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INTRODUCTION

In 2016, Connecticut Fine Wine & Spirits, LLC ("Total Wine") filed a complaint in federal district court against both the Commissioner for the Connecticut Department of Consumer Protection and the Director of Connecticut's Division for Liquor Control. The complaint alleged that Section 1 of the Sherman Antitrust Act ("Sherman Act") preempted Connecticut's post-and-hold alcohol regulatory scheme.[1] The district court dismissed the compliant for failure to state a claim and Total Wine appealed.[2] The United States Court of Appeals for the Second Circuit denied the appeal, holding that Connecticut's scheme is legal under binding Second Circuit precedent.[3] Total Wine subsequently appealed to the United States Supreme Court.[4] This antitrust appeal presented a circuit split because the Second Circuit has

* J.D., 2021, University of Pittsburgh School of Law. The author would like to thank his parents for their encouragement; his girlfriend, Kelly Capone, for her support; and Alana Staniszewski for her input and ideas.

[1] *See* Complaint at 7–8, Conn. Fine Wine & Spirits, LLC v. Harris, 255 F. Supp. 3d 355 (D. Conn. 2017) (No. 3:16-cv-01434).

[2] Conn. Fine Wine & Spirits, LLC v. Harris, 255 F. Supp. 3d 355, 360 (D. Conn. 2017).

[3] Conn. Fine Wine & Spirits, LLC v. Seagull, 916 F.3d 160, 177 (2d Cir. 2019) (declining to overrule Battipaglia v. N.Y. State Liquor Auth., 745 F.2d 166 (2d Cir. 1984)).

[4] Petition for Writ of Certiorari, Conn. Fine Wine & Spirits, LLC v. Seagull, 916 F.3d 160 (2d Cir. 2019) (No. 19-710).

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authorized this type of regulation,[5] whereas the Fourth and Ninth Circuits have invalidated similar regulatory schemes under the Sherman Act.[6]

This Note analyzes how the Supreme Court would resolve the current circuit split. Part I provides a brief introduction to antitrust legislation and the basis behind Total Wine's appeal. Part II provides an overview of the Sherman Act, the evolution of the illegality of horizontal price-fixing agreements, the state action antitrust immunity doctrine, and the current circuit split. Part III focuses on the evolution of Twenty-first Amendment jurisprudence and whether Section 2 of the Amendment would provide protections to state post-and-hold laws, even if they are not entitled to antitrust immunity. Part IV examines how the Supreme Court would have analyzed the issue and how it might have ruled if it had granted certiorari.

I. A BRIEF INTRODUCTION TO ANTITRUST LAW

The American dream is premised on the idea of free market competition.[7] In a free market system, the interactions between independent buyers and sellers set the prices for goods and services.[8] Because free markets are premised on the sellers' freedom to compete on price, free markets generally disfavor cartel behavior—agreements or arrangements by competitors to fix the selling price of goods or services in the marketplace.[9] When competitors collude on price, such a situation is referred to as "market failure" because the prices are no longer determined by the interactions of independent buyers and sellers.[10] In a free market system, price

[5] *See* Costco Wholesale Corp. v. Maleng, 522 F.3d 874 (9th Cir. 2008); TFWS, Inc. v. Schaefer, 242 F.3d 198 (4th Cir. 2001); Miller v. Hedlund, 813 F.2d 1344 (9th Cir. 1987).

[6] *Id.*

[7] *See American Political Culture*, US HISTORY.ORG, https://www.ushistory.org/gov/4a.asp [https://perma.cc/VN87-JX2C] ("At the heart of the American Dream are beliefs in the rights . . . to compete freely in open markets with as little government involvement as possible.").

[8] E. THOMAS SULLIVAN & JEFFERY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 9 (7th ed. 2019). In a free market system, individual firms decide what to produce, how much to produce, and what price to charge. *Id.* In turn, individual consumers decide how much to buy and what price to pay. *Id.* Price is then set at a market equilibrium point where supply equals demand. *Id.* at 13–15.

[9] *See Glossary of Statistical Terms: "Cartel,"* ORG. ECON. COOP. & DEV., https://stats.oecd.org/glossary/detail.asp?ID=3157 [https://perma.cc/F95M-HRBY].

[10] *See Market Failure: The Inefficient Distribution of Goods and Services in the Free Market*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/economics/market-failure/ [https://perma.cc/84XG-SZFC].

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collusion is disfavored because it results in "monopoly-like outcomes" and, in turn, harms the consumer in the form of higher prices.[11]

Resolving market failures generally requires government intervention.[12] In the United States, antitrust legislation is one tool the government uses to correct market failures.[13] The laws intervene to prevent market failures when the producers of goods and services do not conform to the standard expectations of the free market system.[14] This means that the law focuses on protecting competitors, not competition.[15] Consequently, courts rely on economic theory when determining whether conduct that causes an alleged market failure constitutes an antitrust violation.[16] In economic terms, courts ask whether or not the conduct impacts consumer welfare.[17] Under a consumer welfare standard, courts evaluate conduct by looking at the difference between what the consumer actually pays and what they would be willing to pay for a good or service.[18] "If consumers are harmed by reduced output, decreased product quality, or higher prices" resulting from the anticompetitive behavior, "then this result trumps any amount of offsetting gains to producers or others,"[19] and the conduct is declared illegal.

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[11] *See* Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals and Rules*, 2000 WIS. L. REV. 941, 941 (2000), https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1367&context=all_fac [https://perma.cc/3WZW-UW8Q].

[12] *See Types of Market Failures*, ECON. ONLINE, https://www.economicsonline.co.uk/Market_failures/Types_of_market_failure.html [https://perma.cc/HKL7-QTBJ].

[13] *See, e.g.*, 15 U.S.C. § 1 (2018). "A monopoly power in the market can be controlled by the government by passing restrictive trade practice legislation and anti-monopoly laws. These regulations are targeted to remove unfair competition in the market, prevent iniquitous price discrimination and fixing prices that equal to competitive prices." Jesal Shethna, *Market Failure and the Role of Government*, EDUCBA, https://www.educba.com/market-failure-and-the-role-of-government/ [https://perma.cc/2F29-EM2R].

[14] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488–89 (1977); *see also* SULLIVAN & HARRISON, *supra* note 8, at 3.

[15] *See Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 488.

[16] *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55–57 (1977); SULLIVAN & HARRISON, *supra* note 8, at 9.

[17] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get, Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? (Feb. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf [https://perma.cc/V29X-6UPB].

[18] *Id.* at 4.

[19] *Id.* at 5.

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A key piece of antitrust legislation in America is the Sherman Act.[20] Under Section 1 of the Sherman Act, "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . is declared illegal"[21] when such an agreement amounts to unreasonable restraints on trade.[22] Examples of unreasonable restraints on trade are: group boycotts, price-fixing agreements, market division schemes, and tying arrangements.[23] There are two types of price-fixing agreements: horizontal price-fixing and vertical price-fixing.[24] Horizontal price-fixing occurs when competitors in the same market reach an agreement to fix their prices, while vertical price-fixing occurs when participants in a supply chain, usually between a manufacturer and a retailer, agree to fix price.[25] Horizontal price-fixing agreements fall within the purview of Section 1 of the Sherman Act, and vertical price-fixing falls within Section 2 of the Sherman Act.[26]

A state cannot give "immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."[27] Therefore, the Sherman Act can preempt state regulations that mandate private parties to collude, so long as there is an irreconcilable difference between the challenged statute and the Sherman Act.[28] When analyzing whether there is an irreconcilable difference between the Sherman Act and the challenged statute, the Supreme Court applies principles that are similar to a preemption analysis under the Supremacy

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[20] *Antitrust Enforcement and the Consumer*, U.S. DEP'T OF JUST., https://www.justice.gov/atr/file/800691/download (last updated Dec. 18, 2015) ("There are three major Federal antitrust laws: . . . [t]he Sherman Antitrust Act[,] [t]he Clayton Act[,] [and the] Federal Trade Commission Act.").

[21] 15 U.S.C. § 1 (2018).

[22] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 98 (1984) ("[E]very contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.").

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

[24] Eric Reed, *What is Price Fixing?*, THESTREET (June 12, 2019), https://www.thestreet.com/markets/what-is-price-fixing-14988936 [https://perma.cc/BT2Z-VE2Z].

[25] *Id.*

[26] *See* Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 907 (2007).

[27] *See* Parker v. Brown, 317 U.S. 341, 351 (1943). The Sherman Act's "purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations." *Id.* But, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.*

[28] *See* Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982).

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Clause of the United States Constitution.[29] Such a standard suggests that the Sherman Act will preempt state laws only when they mandate per se violations,[30] with horizontal price-fixing being an example of such conduct.[31]

Critically, the United States Courts of Appeals disagree on what state conduct is preempted by Section 1 of the Sherman Act.[32] Currently, the Second Circuit has sanctioned liquor cartel arrangements, allowing states to create regulatory schemes in which wholesalers must share their prices, stick to the agreed-upon prices, and match prices to whoever shares the lowest price.[33] In contrast, the Fourth and Ninth Circuits have held that price posting arrangements constitute illegal price-fixing arrangements.[34]

A. Post-and-Hold Laws

The anticompetitive regulatory scheme that the Second Circuit has authorized is referred to as post-and-hold laws—price posting laws that regulate the distribution of alcohol within a state.[35] Post-and-hold laws generally have three components: they (1) require alcohol distributors to share future prices with the state by "posting" them in advance with a designated state agency or board; (2) require the distributors to "hold" these prices for a specified period of time; and (3) permit the state to share the posted prices with competitors, allowing competitors, within a given number of

[29] *Id.*

[30] *Id.* The law is 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." *Id.* at 661. This has been interpreted by the circuit courts to require a per se violation of the Sherman Act. *See* TFWS, Inc. v. Schaefer, 242 F.3d 198, 206–07 (4th Cir. 2001) ("When a state regulatory scheme is challenged for being irreconcilable on its face with § 1 of the Sherman Act, the antitrust violation must be of the per se variety."); Miller v. Hedlund, 813 F.2d 1344, 1348–49 (9th Cir. 1987) (noting that Supreme Court precedent suggested a per se violation is required for preemption); Battipaglia v. N.Y. State Liquor Auth., 745 F.2d 166, 173 (2d Cir. 1984) (interpreting Rice to require a per se violation).

[31] Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) ("Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are *per se* unlawful.").

[32] *See Schaefer*, 242 F.3d at 206–07; *Miller*, 813 F.2d at 1348–89; *Battipaglia*, 745 F.2d at 173.

[33] *See Battipaglia*, 745 F.2d at 179–80; CONN. GEN. STAT. ANN. § 30-63(c) (West 2019); N.Y. ALCO. BEV. CONT. LAW § 101-b (McKinney 2006).

[34] *See Schaefer*, 242 F.3d at 201; *Miller*, 813 F.2d at 1350–51.

[35] Henry Saffer & Markus Gehrsitz, *The Effect of Post-and-Hold Laws on Alcohol Consumption* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 21367, 2015), https://www.nber.org/papers/w21367.pdf [https://perma.cc/KMA9-ENLS].

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days after posting the price schedule, to match or adjust their price to the lowest posted price.[36] These laws can be problematic because they provide competitors with a record of past and future prices, which in turn may facilitate collusion and price-fixing among competitors, and as a result, harm consumer welfare.[37] For example, due to Connecticut's post-and-hold law, consumers in the state face prices that are "24 percent higher than in neighboring states or up to $8 more a bottle."[38] Subsequently, a court may view these laws as horizontal price-fixing agreements, an antitrust violation under Section 1 of the Sherman Act.

B. Total Wine's Challenge to Connecticut's Post-and-Hold Law

In 2016, Total Wine filed a complaint in the United States District Court for the District of Connecticut, alleging that the Sherman Act preempted Connecticut's alcohol regulatory scheme.[39] Like many other states, the Connecticut post-and-hold scheme at issue contains three relevant provisions.[40] First, alcohol wholesalers and manufacturers must share their prices with the state's Department of Consumer Protection.[41] Second, the department will share the wholesalers' and manufacturers' prices with other wholesalers and manufacturers, allowing them to match the lowest

[36] James C. Cooper & Joshua D. Wright, *Alcohol, Antitrust, and the 21st Amendment: An Empirical Examination of Post and Hold Laws*, 32 INT'L REV. L. & ECON. 379, 380 (2012).

[37] *See* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980) (noting that "an agreement to adhere to previously announced prices and terms of sale" was per se unlawful); Sugar Inst. v. United States, 297 U.S. 553, 601–02 (1936) (finding a Sherman Act violation where competitors publicly announce price and adhere to those prices); *see also* Cooper & Wright, *supra* note 36, at 380–82, 387–88 (discussing research that post-and-hold laws harm consumer welfare by increasing prices and causing consumers to consume 2-8% less alcohol). *But see* Maple Flooring Mfg. Ass'n v. United States, 268 U.S. 563, 586 (1925) (finding that competitors sharing aggregate pricing information was not a violation of the Sherman Act).

[38] Allie Howell, *Connecticut's Liquor Pricing Scheme is a Bad Law That Just Won't Die*, REASON (June 27, 2017), https://reason.com/2017/06/27/connecticuts-outdated-liquor-pricing-law/ [https://perma.cc/VA5F-36F5]; *Time to do Away with Minimum Pricing Law*, HARTFORD BUS. J. (Mar. 16, 2015), https://www.hartfordbusiness.com/article/time-to-do-away-with-minimum-pricing-law [https://perma.cc/SJK4-MUVF] ("[T]he state's minimum-pricing law tacks on up to $8 more on 1.75-liter bottles of alcohol.").

[39] *See* Complaint at 3, Conn. Fine Wine & Spirits, LLC v. Harris, 255 F. Supp. 3d 355 (D. Conn. 2017) (No. 3:16-cv-01434) ("Total Wine has been prevented from offering the best prices by an anticompetitive regime of statutes and regulations that intentionally promotes horizontal and vertical price-fixing by Connecticut wholesalers of alcoholic beverage.").

[40] CONN. GEN. STAT. ANN. § 30-63(c) (West 2019).

[41] *Id.*

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posted price within four days of sharing this information.[42] Third, the manufacturer or wholesaler must follow that posted price for the following month.[43] As a result, Total Wine argued that the scheme constituted an illegal horizontal price-fixing agreement under Section 1 of the Sherman Act.[44]

Nevertheless, in *Connecticut Fine Wine & Spirits, LLC*, the district court dismissed the action for failure to state a claim, holding that the Sherman Act did not preempt Connecticut's scheme.[45] The judge came to this decision because the court was bound to follow binding Second Circuit precedent.[46] Under this precedent, such post-and-hold laws are not per se illegal price-fixing agreements because they "do not compel any agreement," and are thus not preempted by the Sherman Act.[47] However, of the circuit courts that have decided this issue, only the Second Circuit has ruled that the Sherman Act does not preempt such laws.[48]

Total Wine appealed the district court's dismissal to the Court of Appeals for the Second Circuit in February 2019.[49] The Second Circuit affirmed the district court's findings, noting that the court in "*Battipaglia* held that . . . post-and-hold provisions . . . 'do not compel any agreement'" because competitors unilaterally determined what prices to charge.[50] Upon affirmance, Total Wine then requested the Second Circuit hear the case en banc, which was denied.[51] As a last resort, Total

[42] *Id.*

[43] *Id.*

[44] *Conn. Fine Wine & Spirits, LLC*, 255 F. Supp. 3d at 359.

[45] *Id.* at 371 ("Connecticut's post and hold provisions are in all material respects identical to those upheld by the Second Circuit in *Battipaglia*. They are therefore not preempted by the Sherman Act.").

[46] *Id.*

[47] Battipaglia v. N.Y. State Liquor Auth., 745 F.2d 166, 170, 175 (2d Cir. 1984) (finding that post-and-hold laws do not constitute a per se agreement to fix price because they do not mandate or authorize conduct that will almost always be an antitrust violation, and wholesalers can follow the law without conspiring to fix price). *Id. But see* TFWS, Inc. v. Schaefer, 242 F.3d 198, 206–07 (4th Cir. 2001); Miller v. Hedlund, 813 F.2d 1344, 1348 (9th Cir. 1987).

[48] *Id. But see* TFWS, Inc. v. Schaefer, 242 F.3d 198, 206–07 (4th Cir. 2001); Miller v. Hedlund, 813 F.2d 1344, 1348 (9th Cir. 1987).

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

[50] *Id.* at 34 (quoting *Battipaglia*, 745 F.2d at 170).

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

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Wine appealed its case to the United States Supreme Court in December 2019.[52] The question presented was "[w]hether Section 1 of the Sherman Act preempts state laws facilitating such unsupervised private price-fixing."[53] The Supreme Court subsequently denied certiorari in April 2020, offering no explanation for its decision.[54]

II. STATE REGULATION AND ANTITRUST LAW

A. An Overview of Price-Fixing as Anticompetitive Behavior

Post-and-hold laws fall within the purview of Section 1 because the Sherman Act prohibits horizontal restraints—agreements among competitors to fix price, restrict output, or otherwise exclude competition.[55] Section 1 of the Sherman Act is triggered when the concerted actions of competitors restrict "consumer choice by impeding the 'ordinary give and take of the market place.'"[56] Nevertheless, while the Sherman Act only prohibits unreasonable restraints on trade,[57] the Supreme Court has announced three tests it will apply when analyzing whether conduct amounts to unreasonable restraints on trade.[58]

First, the Supreme Court has applied what it refers to as the per se illegality standard:[59]

> there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be

[52] Petition for Writ of Certiorari, Conn. Fine Wine & Spirits, LLC v. Seagull, 932 F.3d 22 (2d Cir. 2019) (No. 19-710).

[53] *Id.* at i.

[54] Conn. Fine Wine & Spirits, LLC v. Seagull, 140 S. Ct. 2641 (2020).

[55] SULLIVAN & HARRISON, *supra* note 8, at 111.

[56] FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986) (quoting Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

[57] Standard Oil Co. v. United States, 221 U.S. 1, 87 (1911) ("[I]n declaring illegal every combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . [the Sherman Act] only means to declare illegal any such contract which is in *unreasonable* restraint of trade.").

[58] *Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, BONA LAW PC, https://www.businessjustice.com/antitrust-standards-of-review-the-per-se-rule-of-reason-and-quic.html [https://perma.cc/JW5V-YJ72]. This Note will focus its analysis on the per se and rule of reason approaches.

[59] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

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> unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.[60]

The Court calls this standard per se illegality because by proving the mere existence of this conduct, the conduct is declared illegal without further inquiry.[61] This means that when a court sees certain types of conduct, the nature of that conduct alone will trigger a per se analysis.

Horizontal price-fixing agreements are one category of per se illegal conduct.[62] "[P]rice fixing is an agreement (written, verbal, or inferred from conduct) among competitors that raises, lowers, or stabilizes prices or competitive terms."[63] Horizontal price-fixing is, per se illegal because it eliminates competition on price,[64] upending the regular competitive forces of a free market.[65] As a result, the Supreme Court has held that conduct that directly affects price, by its nature, has no social utility and should be condemned without further inquiry.[66] Since there is no inquiry into the reasonableness of the price under the per se standard, both agreements to set minimum and maximum prices are illegal.[67] Once a price-fixing agreement is

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

[61] *Id.*

[62] *Socony-Vacuum Oil Co.*, 310 U.S. at 218 ("[The Supreme] Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act . . . ."); United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927) ("[I]t has since often been decided and always assumed that uniform pricefixing . . . is prohibited by the Sherman Law despite the reasonableness of the particular prices agreed upon.").

[63] FED. TRADE COMM'N, GUIDE TO ANTITRUST LAWS: PRICE FIXING, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing [https://perma.cc/SGG3-QQJ5].

[64] *Trenton Potteries Co.*, 273 U.S. at 397.

[65] FED. TRADE COMM'N, *supra* note 63.

[66] *Socony-Vacuum Oil Co.*, 310 U.S. at 221, 224; *see also* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648 (1980) (noting that price-fixing includes agreements that have an effect on an inseparable component of the price).

[67] Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332 (1982) (holding that an agreement by physicians to fix the maximum amount of fees they would charge was illegal per se because the "rule is violated . . . by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases"); *Catalano, Inc.*, 446 U.S. at 647 ("It is no excuse that the prices fixed are themselves reasonable.").

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established, it is condemned without further inquiry because the illegal purpose is inferred from the nature of the agreement.[68]

However, a court will not analyze all agreements that affect price under the per se standard.[69] The Supreme Court has moved away from analyzing price-fixing agreements under the per se standard in recent years. Instead it has moved towards a second test called the rule of reason, noting that there is a category of agreements "whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history, and the reasons why it was imposed."[70] Under the rule of reason, a court will determine if an action is an unreasonable restraint on trade by looking to see if the procompetitive effects of the agreement outweigh the anticompetitive effects of the conduct.[71] The goal is to distinguish "between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."[72]

For example, in *National Society of Professional Engineers v. United States*, the Supreme Court applied the rule of reason to analyze an engineering professional society's code of ethics that prohibited members from submitting competitive bids for engineering services.[73] The society claimed, as its competitive justification, that this was done to minimize the risk that "competition would produce inferior engineering work endangering the public safety."[74] While the Court recognized that the agreement affected price by eliminating competitors from disclosing price and resulted in the maintenance of price levels, the Court found that the agreement was

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[68] *Maricopa Cnty. Med. Soc'y*, 457 U.S. 332 (holding maximum fee agreement per se unlawful without further inquiry); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 461–62 (1986) (reasoning courts may condemn price-setting agreement without proof that agreement increased prices); *Socony-Vacuum Oil Co.*, 310 U.S. at 213–14 (holding power to raise prices constitutes unreasonable restraint "without the necessity of minute inquiry" into reasonableness); *Trenton Potteries Co.*, 273 U.S. at 397–98 (1927) (conclusively presuming price-fixing agreement unlawful without regard to reasonableness).

[69] Broad. Music Inc. v. Columbia Broad. Sys. Inc., 441 U.S. 1, 23 (1979) ("Not all arrangements among . . . competitors that have an impact on price are *per se* violation of the Sherman Act or even unreasonable restraints."); *see also* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679 (1978).

[70] *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 692.

[71] Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps promotes competition or whether it is such as may suppress or even destroy competition.").

[72] Leegin Creative Leather Prod. Inc. v. PSKS Inc., 551 U.S. 877, 886 (2007).

[73] *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 681.

[74] *Id.*

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"not price fixing as such."[75] Thus, the Court applied a rule of reason analysis.[76] When looking at the anticompetitive effect of price nondisclosure, the Court found that the ban on competitive bidding prevented customers from making price comparisons, which in turn decreased output and increased prices, suggesting that the conduct was an unreasonable restraint.[77] The Court then rejected policy arguments to save the conduct from being declared illegal because it found that the analysis under the rule of reason should be limited to factors that affect the nature of competition.[78] Because the society only offered a policy justification and failed to offer any acceptable procompetitive justifications for the restraint, the agreement was illegal under the rule of reason.[79] In the end, *National Society of Professional Engineers* shows that when applying the rule of reason, the Court will only look to whether the conduct promotes or restrains competition; it will not look to non-economic factors.

The Supreme Court continued to expand its application of the rule of reason in price-fixing cases in *Broadcast Music Inc. v. Columbia Broadcasting System*.[80] At issue in *Broadcast Music Inc.* were blanket music license agreements, which allowed all the members of Broadcast Music Inc. to use the recordings and works of other member artists for a flat fee.[81] While the Court acknowledged that price-fixing was "literally" at stake, it refused to apply the per se standard to analyze such agreements.[82] Instead, it applied the rule of reason, finding that because the agreements facilitated an orderly market operation by reducing transaction costs, the licenses amounted to reasonable restraints on trade.[83] It is important to note that there were no supply or output restrictions since musicians could still sell their music outside of the agreements.[84] In the end, *Broadcast Music Inc.* shows that when a

[75] *Id.* at 692.

[76] *Id.* at 687.

[77] *Id.* at 692–93.

[78] *Id.* at 691–94.

[79] *See id.* at 694–96.

[80] 441 U.S. 1 (1979).

[81] *Id.* at 5–7.

[82] *Id.* at 9.

[83] *Id.* at 20–21.

[84] *Id.* at 29 (Stevens, J., dissenting); *see also* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 100 (1984) ("Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal per se' approach . . . when 'the practice facially appears to be one that would always

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restraint does not restrict output, a court will accept decreasing transaction costs as a procompetitive benefit that may outweigh the harms of price-fixing.

Nevertheless, where an agreement restricts both price and output, a court may still apply the rule of reason over a per se analysis.[85] In *NCAA v. Board of Regents*, the Supreme Court refused to apply a per se analysis to the NCAA's plan for televising college football games.[86] The plan limited the total amount of intercollegiate football games that could be broadcast, limited the number of games that any one college could televise, and prohibited NCAA members from making any sale of television rights, except in accordance with the plan.[87] Although the "case involve[d] an industry in which horizontal restraints on competition are essential if the product is to be available at all,"[88] because the NCAA failed to offer any acceptable procompetitive justifications for these restrictions, the Court deemed the restraint a naked and illegal restraint on trade.[89] Consequently, *NCAA v. Board of Regents* demonstrates that so long as a defendant cannot offer a procompetitive justification when output and price restrictions are at stake, the conduct will be declared illegal.

Moreover, not all agreements that involve price are illegal. The mere exchange of price information among competitors is not unlawful.[90] Competitors may exchange statistical data of past prices and summary, average, or aggregate data that does not identify individual companies.[91] Still, there is a "plain distinction between the lawful right to publish prices . . . on the one hand, and an agreement among competitors limiting action with respect to the published prices, on the other."[92] Thus, the Supreme Court draws the line between the ability to publish prices or share

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or almost always tend to restrict competition and decrease output.'" (quoting *Broad. Music, Inc.*, 441 U.S. at 19–20)).

[85] *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 100–01.

[86] *Id.* at 85.

[87] *Id.*

[88] *Id.* at 100–01.

[89] *Id.* at 110.

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

[91] *Id.* (finding that where a trade association shared past prices, quantities of goods sold, prices paid for freight, and the number of consumers in the aggregate with competitors, this did not run afoul of the Sherman Act).

[92] Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 649–50 (1980).

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prices and an agreement limiting action with respect to the publishing of prices.[93] As a result, "steps taken to secure adherence, without deviation, to prices and terms thus announced" are illegal,[94] and so is coordinated market behavior in fungible product markets where the Court can infer an agreement to fix or stabilize the price.[95] When taken together, these cases suggest a court will apply a per se analysis when the price sharing includes a "requirement of adherence to announced prices" because they have "been uniformly held illegal without regard to its reasonableness."[96]

In the end, these cases show that the Supreme Court would likely analyze post-and-hold laws in one of two ways—either under a per se illegality approach or the rule of reason analysis. First, under the per se standard, the Court would focus on whether post-and-hold laws by their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."[97] If the Supreme Court chose this route, once the Court determined that Connecticut's law established a horizontal price-fixing agreement, the law would have been preempted by the Sherman Act. Second, the Court could have examined the law under the rule of reason. Under this approach, the post-and-hold law would only be illegal if it fixed prices and restricted output without any procompetitive, economic justification. If the Court chose this latter approach, it is unlikely that the law would have been preempted, as preemption requires per se illegality.

B. The Rise of Parker *Immunity*

The Supreme Court's antitrust analysis will not end after its preemption analysis because even if the Sherman Act preempts state regulation, *Parker* immunity can still save the regulation.[98] *Parker* immunity arises from the notion that "the Sherman Act . . . gives no hint that it was intended to restrain state action or

[93] Sugar Inst. v. United States, 297 U.S. 553, 601–02 (1936).

[94] *Id.* at 601.

[95] United States v. Container Corp. of Am., 393 U.S. 333, 334–37 (1969) (finding that in markets dominated by a few sellers with a homogeneous and fungible product, price exchanges may stabilize prices, interfering with the normal market forces when setting price). Consequently, coordinated behavior and their anticompetitive consequences can be inferred from the market structure to show an illegal price fixing or price stabilizing agreement. *Id.*

[96] Battipaglia v. N.Y. State Liquor Auth., 745 F.2d 166, 179 (2d Cir. 1984) (Winter, J., dissenting) (citing *Sugar Inst.*, 297 U.S. at 601).

[97] Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978).

[98] *See* Parker v. Brown, 317 U.S. 341 (1943).

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official action directed by a state."[99] Consequently, the Sherman Act "must be taken to be a prohibition of individual and not state action."[100] Thus, under *Parker* immunity, a state may commit an antitrust violation when regulating a market.[101] For example, in *Parker v. Brown*, California passed a law limiting the number of raisins sold on the open market in an attempt to stabilize prices.[102] While this was a horizontal price-fixing scheme that was illegal under the Sherman Act, the Supreme Court held that it did not violate the Sherman Act because it was a state regulation enforcing the conditions it set forth.[103] Unfortunately, all that *Parker* establishes is that a state cannot authorize a private individual to violate antitrust law or legalize illegal antitrust behavior.[104] The Supreme Court failed to establish what types of state regulations, or if all state regulations, would be entitled to *Parker* immunity.[105]

C. Midcal*'s Two-Part Test*

1. Clearly Articulated and Actively Supervised

After *Parker*, it took the Supreme Court almost forty years to clarify what state action would receive *Parker* immunity. The first important step in resolving this issue came in 1980, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*[106] In *Midcal*, the Supreme Court specified a two-part test for the state action immunity doctrine.[107] Under its analysis, a state regulation that violates the Sherman Act may be immune when: (1) the challenged restraint is "one clearly articulated and affirmatively expressed as state policy" and (2) the policy is "actively supervised by the state itself."[108]

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[99] *Id.* at 351.

[100] *Id.* at 352.

[101] *Id.*

[102] *Id.* at 346.

[103] *Id.* at 352 ("[I]t is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. . . . The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application.").

[104] *Id.* at 351 ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . .").

[105] *Id.*

[106] 445 U.S. 97 (1980).

[107] *Id.* at 105.

[108] *Id.* (quoting City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 410 (1978)).

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The regulation at issue in *Midcal* was a California liquor law that required all wine producers, wholesalers, and sellers to file fair-trade contracts or price schedules with the state.[109] If the producer did not set prices through a fair-trade contract, the wholesaler had to post a resale price schedule for that producer's brand.[110] Under the law, no wine merchant could sell wine to a retailer at a price that was not set either by a fair-trade contract or a price schedule.[111] Because the law fixed price, the Court found it to be an unlawful restraint on trade.[112] The Court then used its new two-part test to determine if the law was entitled to *Parker* immunity.[113] First, the Supreme Court found that the legislature articulated a state policy—regulating wine prices.[114] Second, the Court found that the state did not actively supervise the policy because California failed to review the reasonableness of the agreed-upon prices, meaning that private parties enforced the prices.[115] Therefore, the Supreme Court found *Parker* immunity inapplicable.[116] In the end, *Midcal* stands for the proposition that if private parties have the power to enforce state policy, or the state does not actively supervise the pricing mechanism, a state regulation that the Sherman Act preempts will not be saved by *Parker* immunity.

2. Is the Restraint a Per Se Violation?

Nevertheless, only two years after *Midcal*, the Supreme Court added another wrinkle to *Parker* immunity—not all potential antitrust violations will give rise to federal preemption.[117] Under *Rice v. Norman Williams Co.*, "[a] state statute is not preempted by the federal antitrust laws simply because the state scheme might have

[109] *Id.* at 99.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 101–02 (finding that the ban on resale price maintenance applied to fair trade contracts).

[113] *Id.* at 105–06.

[114] *Id.* at 105.

[115] *Id.* at 105–06.

[116] *Id.*; *see also* 324 Liquor Corp. v. Duffy, 479 U.S. 335, 344–45 (1987) (noting that where a state "simply authorizes price setting and enforces the prices established by private parties," fails to "establish[] prices [or] review[] the reasonableness of the price schedules," and "does not monitor market conditions or engage in any 'pointed reexamination' of the program," a state does not actively supervise the market (quoting *Midcal*, 445 U.S. at 105–06)).

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

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an anticompetitive effect."[118] Rather, there must be an irreconcilable difference between the state regulation and federal antitrust laws.[119] Under this new approach, a state statute will only be condemned under antitrust law if it mandates or "authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases," or if it forces "a private party to violate antitrust laws in order to comply with the statute."[120]

At issue in *Rice* was a California liquor law that prohibited an importer from importing any brand of distilled spirits for which it is not a designated importer.[121] Since this was a vertical, nonprice restraint, the Court analyzed the restraint under the rule of reason.[122] Under the rule of reason, the Court found that the law merely permitted a distiller to limit which importers can sell its product while not limiting the number of importers or where in the state they may be.[123] Because the law did not mandate vertical restraints, it was not per se illegal, and thus, the Court found that the Sherman Act did not preempt it.[124] Therefore, *Rice* stands for the proposition that a state regulation must be a per se violation before triggering preemption under the Sherman Act.

3. Is the Restraint Hybrid or Unilateral?

After *Rice*, the Supreme Court continued to add wrinkles to the state immunity doctrine. Four years later, in *Fisher v. City of Berkeley*, the Court determined that "[n]ot all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of § 1 [of the Sherman Act]."[125] In other words, "[a] restraint imposed unilaterally by government does not become concerted-action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law."[126] Rather, "[c]ertain restraints may be characterized as 'hybrid,' in that nonmarket mechanisms merely enforce private

[118] *Id.* at 659.

[119] *Id.*

[120] *Id.* at 661.

[121] *Id.* at 656–57.

[122] *Id.* at 661–62.

[123] *Id.* at 662.

[124] *Id.*

[125] Fisher v. City of Berkeley, 475 U.S. 260, 267 (1986).

[126] *Id.*

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marketing decisions."[127] Consequently, where private actors are granted "a degree of private regulatory power," the restraint is a hybrid restraint and not protected under *Parker* and *Midcal*.[128] As a result, *Fisher* introduced a distinction between the types of state regulation—unilateral and hybrid restraints—with only unilateral restraints giving rise to *Parker* immunity.[129]

The restraint at issue in *Fisher* was a city rent control ordinance that placed a price ceiling on all rental property, regardless of the status of the lease.[130] Berkeley's rent control board established the rent ceiling and applied it unilaterally to all private actors.[131] If a landlord failed to adhere to the rent ceiling, the control board could fine him.[132] Since "the rent ceilings [were] imposed by the Ordinance and maintained by the Rent Stabilization Board," the Court found that the ordinance was "unilaterally imposed by government upon landlords to the exclusion of private control," thus triggering *Parker* immunity.[133]

When pulling these concepts together, a general state preemption analysis will proceed as follows: (1) is the conduct effectively an antitrust violation every time; (2) if no, the Sherman Act does not preempt the state regulation, and the analysis is over; (3) if yes, this triggers a *Parker* immunity analysis; (4) is the regulation a unilateral or hybrid restraint; and (5) if the regulation is unilateral, it will be protected under *Parker*; (6) if the regulation is hybrid, it will fail *Midcal*'s two-part test because the state cannot actively supervise it.

In the end, these cases suggest that post-and-hold laws must be analyzed under the per se standard to trigger preemption. If analyzed under the rule of reason, they will not. Moreover, the cases suggest that where states merely let private actors set their prices without review, post-and-hold laws will be found to be a hybrid restraint, will fail *Midcal*'s two-part test, and as a result, *Parker* immunity will not save the laws. However, this is only so long as they are held to be per se illegal restraints.

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[127] *Id.* at 267–68.

[128] *Id.* at 268.

[129] *Id.* ("[T]his Court has twice found such hybrid restraints to violate the Sherman Act.").

[130] *Id.* at 262–63.

[131] *Id.* at 262.

[132] *Id.* at 262–63.

[133] *Id.* at 266.

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D. *The Circuit Courts' Application of* Parker *Immunity to Post-and-Hold Laws*

1. The Second Circuit's Approach

The United States Court of Appeals for the Second Circuit was the first circuit court to analyze *Parker* immunity as applied to post-and-hold laws.[134] Shortly after the Supreme Court decided *Midcal* and *Rice*, the Second Circuit faced applying the *Parker* immunity test to a New York post-and-hold law in *Battipaglia v. New York State Liquor Authority*.[135] The primary provisions challenged in *Battipaglia* prohibited any brand of liquor or wine from being sold to or purchased by a retailer unless a price schedule filed with the liquor authority was in effect.[136] The provision required the liquor authority to publish the filed price schedules "for inspection by licensees" and allowed wholesalers to amend their filed schedule to meet lower competing prices and discounts within three days.[137] The amended prices and discounts were to then become effective on the first day of the following month and were required to remain in effect for the entire month.[138] The New York Legislature stated that the purpose was to protect competitive markets and prevent price discrimination.[139]

After looking at existing antitrust precedent, the Second Circuit found that *Rice* governed the law at issue, not *Midcal*. In his majority opinion, Judge Friendly found that *Rice* was the correct precedent because the New York law was not preempted by the Sherman Act.[140] Judge Friendly held that the law as not preempted because all the law did was share prices; there was no private agreement or concerted effort to fix prices.[141] Thus, there was no per se illegal price-fixing agreement.[142] This was

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

[135] *Id.* It is important to note that the Second Circuit was not required to determine if the law was a hybrid or unilateral restraint because *Battipaglia* was decided before the United States Supreme Court decided *Fisher*. *Id.*; *see also Fisher*, 475 U.S. at 262.

[136] *Battipaglia*, 745 F.2d at 168.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 178.

[140] *Id.* at 173–75.

[141] *Id.* at 174–75.

[142] *Id.* at 175.

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distinguishable from the California law in *Midcal* that mandated price-fixing.[143] As a result, since the regulation only raised a possibility of anticompetitive behavior, it was not preempted by the Sherman Act under the standard set forth in *Rice*, and there was no reason to apply *Midcal*'s two-part test for *Parker* immunity.[144] The majority opinion did, however, reason that it at least passed the first part of *Midcal*'s two-part test because the regulation's goal was to produce orderly market conditions.[145] Judge Friendly was less confident as to whether the second test was satisfied and decided to "neither approve nor disapprove the alternate holding" applying *Midcal*'s test since its reliance "is unnecessary in this case."[146]

In his dissent, Judge Winter disagreed with Judge Friendly's analysis, concluding that the law was a per se violation.[147] First, Judge Winter explained that he believed the law was a per se violation because it called for price sharing and maintenance of previously announced prices.[148] Based on existing case law, he argued that such a requirement was generally held to be illegal without regard to its reasonableness.[149] Judge Winter placed additional weight on the fact that, had this arrangement been devised by private parties instead of state regulation, it would have amounted to a per se violation.[150] Hence, he believed that *Midcal* governed the analysis, not *Rice*.[151] Second, Judge Winter argued that the statute failed the two-part *Midcal* test because the state did not actively supervise whether the posted prices were reasonable, much like the California statute in *Midcal*.[152]

This disagreement between Judge Friendly's majority opinion and Judge Winter's dissent articulated the basis for the circuit split that would emerge

[143] *Id.*

[144] *Id.* at 177.

[145] *Id.* at 176.

[146] *Id.* at 177.

[147] *Id.* at 179 (Winter, J., dissenting).

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.* at 180.

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concerning similar post-and-hold laws—with the Ninth and Fourth Circuits endorsing Judge Winter's view.[153]

2. The Ninth Circuit's Approach

The next circuit court to rule on the legality of post-and-hold laws under the Sherman Act was the United States Court of Appeals for the Ninth Circuit in *Miller v. Hedlund*.[154] Following Supreme Court precedent, the Ninth Circuit's analysis focused on (1) whether the alleged restraint is a per se violation, and (2) if so, does *Parker* immunity apply?[155] When analyzing whether *Parker* immunity applied, the Ninth Circuit found that the answer will generally turn on whether the restraint is unilateral or hybrid.[156] In cases of unilateral restraint, *Parker* immunity "applies without further inquiry."[157] However, in hybrid restraints, *Parker* immunity will only apply if the challenged restraint can pass *Midcal*'s two-part test.[158] If the restraint involves "a 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."[159] In the end, the "determination of whether a restraint is hybrid will largely answer the question of whether the state actively supervises the restraint."[160]

At issue in *Miller* was an Oregon post-and-hold regulation.[161] The relevant provisions required wine and malt beverage wholesalers to share the prices they planned to charge with the state regulator.[162] After the state received all price schedules, each wholesaler had 10 days to adjust to a lower price.[163] If a wholesaler lowered their prices, they had to maintain that price for 180 days for malt beverages

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[153] *See* Costco Wholesale Corp. v. Maleng, 522 F.3d 874 (9th Cir. 2008); TFWS, Inc. v. Schaefer, 242 F.3d 198 (4th Cir. 2001); Miller v. Hedlund, 813 F.2d 1344 (9th Cir. 1987).

[154] *Miller*, 813 F.2d at 1346.

[155] *Id.* at 1348–52.

[156] *Costco Wholesale Corp.*, 522 F.3d at 888.

[157] *Id.* at 887.

[158] *Id.*

[159] *Id.*

[160] *Id.* at 888.

[161] Miller v. Hedlund, 813 F.2d 1344, 1347 (9th Cir. 1987).

[162] *Id.*

[163] *Id.*

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and 30 days for wines.[164] Alcohol retailers challenged the regulation under Section 1 of the Sherman Act for being a horizontal price-fixing agreement.[165] The Ninth Circuit agreed, finding that the regulation was per se illegal, preempted by the Sherman Act, and not entitled to *Parker* immunity.[166]

Following the steps set forth by the Supreme Court, the Ninth Circuit first looked to see whether the alleged restraint was per se illegal.[167] Because "[a]n agreement to adhere to previously announced prices and terms of sale is unlawful per se under the Sherman Act," and the regulation required wholesalers to do just that, the Ninth Circuit found that the agreement was a per se violation, preempted by the Sherman Act.[168] Thus, the court rejected the Second Circuit's stance, noting that "[s]imply ending the analysis because of the lack of concerted activity among the wholesalers fails to take into account the presence and effect of the state's involvement in the matter."[169] Rather, the focus was on whether the state compelled private actors to violate the Sherman Act.[170] Second, the court looked to whether the restraint was unilateral or hybrid.[171] Because Oregon did not review the reasonableness of prices, the court found that the regulation was a hybrid restraint.[172] Third, because the state did not review the reasonableness of the prices, the regulation was not actively supervised and was thus not entitled to *Parker* immunity.[173]

The Ninth Circuit affirmed its position with respect to post-and-hold laws in *Costco Wholesale Corp. v. Maleng*.[174] At issue in *Costco* was an Oregon law with the following relevant provisions: (1) beer and wine distributors were required to sell their products to each retailer at the price they posted; (2) to sell beer and wine within

[164] *Id.*

[165] *Id.* at 1346–47.

[166] *Id.* at 1348–52.

[167] *Id.* at 1348–51.

[168] *Id.* at 1349.

[169] *Id.*

[170] *Id.* at 1350–51.

[171] *Id.* at 1349–50.

[172] *Id.* at 1351.

[173] *Id.* at 1351–52.

[174] 522 F.3d 874 (9th Cir. 2008).

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the state, the distributors needed to post their prices with the state, who would then make the prices publicly available after the rates began; (3) the distributors had to hold their posed prices for at least 30 days; and (4) distributors had to price their products at least 10% above their cost of acquisition.[175] In response to the law, Costco filed an antitrust suit against the Oregon Liquor Control Board, alleging violations of Section 1 of the Sherman Act.[176]

In making its determination, the Ninth Circuit reviewed the Supreme Court precedent. They noted that "the rule to be taken from these cases is that state statutes or local ordinances creating unsupervised private power in derogation of competition are subject to preemption."[177] As such, the Ninth Circuit first held that the post-and-hold provision was a hybrid restraint and subject to preemption because prices were set "solely according to private marketing decisions of non-state actors."[178] The court found that the law did not offer distributors a "sneak peek" at their competitors' prices, unlike the regulations at issue in *Miller*, did "very little" to affect its determination.[179] Second, the Ninth Circuit "conclude[d] that the 'post-and-hold' restraint [was] a per se violation of the Sherman Act" because "[t]he Supreme Court has held that an agreement to adhere to posted prices is a per se violation without regard to its reasonableness."[180]

Accordingly, the Ninth Circuit takes the position that post-and-hold laws are per se violations and are preempted by the Sherman Act because they undermine its objectives:

> [s]uch agreements to adhere to posted prices are anticompetitive because they are highly likely to facilitate horizontal collusion among market participants. When firms in a market are able to coordinate their pricing and production activities,

[175] *Id.* at 883.

[176] *Id.* at 882–83.

[177] *Id.* at 889.

[178] *Id.* at 895.

[179] *Id.*

[180] *Id.*

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> they can increase their collective profits and reduce consumer welfare by raising price and reducing output.[181]

Put another way, post-and hold laws, "through non-market mechanisms . . . enforce[] or facilitate[] privately-made pricing decisions,"[182] the result of which is a market "more conducive to collusive and stabilized pricing" and thus less competitive.[183] As such, the primary evil posed by post-and-hold laws is the idea that a "state [is] is licensing . . . arrangements between private parties that suppress competition," instead of limiting or reducing competition by regulating the market.[184]

3. The Fourth Circuit's Approach

The last circuit court to rule on the issue was the United States Court of Appeals for the Fourth Circuit. Interpreting Supreme Court precedent, the Fourth Circuit followed Judge Winter's approach to post-and-hold laws in *TFWS, Inc. v. Schaefer*.[185] In doing so, the Fourth Circuit created its own two-part test for determining if *Parker* immunity applied to a preempted state regulation: (1) is the regulatory system at issue a "unilateral" or "hybrid restraint"; and (2) if the restraint is hybrid, does it involve a per se violation?[186] If yes to both, the state statute is not entitled to *Parker* immunity.[187]

At issue in *TFWS* was a Maryland post-and-hold law.[188] The system required alcohol wholesalers to file price schedules with the state, and in turn, the state would share the prices with their competitors.[189] After the state shared the reported prices, competitors had the opportunity to amend their prices for new brands or new sizes of existing brands.[190] In turn, wholesalers were required to hold these announced

[181] *Id.*

[182] *Id.* at 893.

[183] *Id.* at 894.

[184] *Id.* at 889 (quoting Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n, 197 F.3d 560, 565 (1st Cir. 1999)).

[185] 242 F.3d 198 (4th Cir. 2001).

[186] *Id.* at 207.

[187] *Id.* at 207, 210.

[188] *Id.* at 201–02.

[189] *Id.*

[190] *Id.* at 202.

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prices for the next month.[191] Since the law facilitated horizontal price-fixing, TFWS claimed Maryland's law violated Section 1 of the Sherman Act.[192] However, contrary to the Second Circuit, the Fourth Circuit found this law to amount to a per se violation that was not entitled to *Parker* immunity.[193]

When analyzing Maryland's law, the Fourth Circuit first characterized this as a hybrid restraint.[194] "The post-and-hold system is a classic hybrid restraint: 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."[195] Second, like Judge Winter in *Battipaglia*, the court found that such an action was a horizontal restraint on price and thus a per se violation.[196] The arrangement was a per se violation because it allowed wholesalers to share prices before they went into effect and allowed them to match prices.[197] The court relied on the fact that had this been a private arrangement, it would automatically fall within the purview of Section 1 of the Sherman Act.[198] Therefore, the Fourth Circuit held that the post-and-hold regulations were per se violations that were not entitled to *Parker* immunity.[199]

As such, the Fourth Circuit takes the position that a post-and-hold law is a per se violation where the "scheme mandates the exchange of price information by wholesalers through public posting and dissemination, and it requires adherence to the publicly announced prices."[200] This is because the mandated activity "is essentially a form of horizontal price fixing, which has been called 'the paradigm of an unreasonable restraint of trade.'"[201]

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[191] *Id.*

[192] *Id.*

[193] *Id.* at 213.

[194] *Id.* at 208–09.

[195] *Id.*

[196] *Id.* at 209.

[197] *Id.*

[198] *Id.*

[199] *Id.* at 213.

[200] *Id.* at 209.

[201] *Id.* (quoting *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 100).

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In the end, this shows that the current circuit split focuses on whether post-and-hold laws that require competitors to disclose prices and adhere to those prices are considered a per se violation within the meaning of Section 1 of the Sherman Act. However, because the courts have acknowledged that the focus is on whether the state compels private actors to violate the Sherman Act and not on whether there is an actual agreement, the Supreme Court is unlikely to follow the Second Circuit's analysis.

III. TWENTY-FIRST AMENDMENT JURISPRUDENCE

A. Introduction to Twenty-first Amendment Jurisprudence

Even if a state alcohol regulation fails to receive *Parker* immunity after the Sherman Act preempts it, it has one last attempt at validity under Section 2 of the Twenty-first Amendment.[202] Under Section 2, the Twenty-first Amendment gives states the power to regulate the sale and distribution of intoxicating beverages within their borders.[203] However, depending on its interpretation, there are two different theories on the scope of power that Section 2 grants the States.[204] First is the absolutist approach—the Amendment vests complete control of regulating intoxicating beverages to the states, depriving the federal government of any authority over alcohol regulation.[205] Second is the federalist approach—the Amendment simply restored the status quo that existed between state and federal regulation prior to Prohibition, making state laws subject to federal preemption under the Commerce Clause.[206] Consequently, Section 2 raises an important question about federal antitrust law—is the Twenty-first Amendment a carve-out to the Commerce Clause and laws passed pursuant to its powers, including the Sherman Act?

B. The Rise and Fall of the Unconditional Grant Theory

Early after the amendment's ratification in the 1930s, the Supreme Court took an absolutist view towards the Twenty-first Amendment. Throughout the 1930s, the

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[202] *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980).

[203] U.S. CONST. amend. XXI, § 2 ("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.").

[204] Clayton L. Silvernail, *Smoke, Mirrors and Myopia: How the States Are Able to Pass Unconstitutional Laws Against the Direct Shipping of Wine in Interstate Commerce*, 44 S. TEX. L. REV. 499, 513 (2003).

[205] *Id.*

[206] *Id.*

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Court used the Twenty-first Amendment to uphold state liquor regulations, finding that the Amendment "confer[s] upon the state[s] the power to forbid all importations which do not comply with the conditions which [they] prescribe[]."[207] For example, in *Young's Market Co.*, the Supreme Court held that California could tax beer imported into the state under the Twenty-first Amendment and not tax domestic beer without violating the Commerce Clause.[208] During this time, the Supreme Court went so far as to say that:

> [t]he Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause . . . . [A] state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained . . . .[209]

In other words, the Twenty-first Amendment exempted states from federal constitutional and statutory alcohol regulations.[210] Nevertheless, this was the highwater mark of state powers under the Twenty-first Amendment.

In the 1960s, the Supreme Court walked back its absolutist approach and instead began moving towards more of a federalist approach.[211] Starting with *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, the Supreme Court acknowledged that the Twenty-first Amendment did not "repeal" the Commerce Clause.[212] Rather, "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same

[207] State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936) (noting that laws passed pursuant to the Twenty-first Amendment's reserved powers could not violate the Commerce Clause or the Fourteenth Amendment's Equal Protection clause).

[208] *Id.*

[209] Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939) (upholding a Kentucky law that allowed liquor transported out of state to be seized if the carrier did not have a state permit, even though this affected interstate commerce).

[210] Matthew J. Patterson, *A Brewing Debate: Alcohol Direct Shipment Laws and the Twenty-First Amendment*, 2002 U. ILL. L. REV. 761, 772 (2002).

[211] *See* Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964) (invalidating a New York law that required merchants to be licensed to sell within the state because the State applied to law to prohibit duty-free sales of liquor in which the merchandise was not even purchased in the state).

[212] *Id.*

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Constitution" and must be interpreted together.[213] Consequently, the Court found that states that passed legislation under the Twenty-first Amendment did not simply take alcohol regulation out of interstate commerce and federal jurisdiction.[214] However, the Court did not decide what types of state alcohol laws would receive protection under the Amendment.[215] This gap left the door open to what state alcohol regulations would be shielded from federal oversight and how the Court would balance the interplay between state and federal powers under the Twenty-first Amendment.[216]

C. The Rise of the Accommodation Doctrine

After *Hostetter*, the Supreme Court continued to narrow the scope of the Twenty-first Amendment.[217] In *Midcal*, the Court finally announced the test that it would apply when determining whether or not a state alcohol law would receive protection under the Twenty-first Amendment.[218] Under this analysis, the Court would focus on the "pragmatic effort to harmonize state and federal power,"[219] suggesting that state liquor regulations could still be preempted when the federal interest outweighed the state's interests in passing the regulation.[220]

For example, in *Midcal*, after California's law requiring retailers and wholesalers to enter into fair trade contracts was preempted by the Sherman Act and failed to receive *Parker* immunity, the state argued that Section 2 of the Twenty-first Amendment still saved the law.[221] As a basis for the Amendment's protections,

[213] *Id.*

[214] *Id.* at 331.

[215] *See id.* at 331–34.

[216] *Id.*

[217] *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980). Despite stating "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system," the Supreme Court admitted that there is no "bright line between federal and state powers over liquor." *Id.*

[218] *Id.* at 109.

[219] *Id.*

[220] Generally, state interests will involve promoting temperance and protecting small retailers. *See* Rice v. Alcoholic Beverage Control Appeals Bd., 579 P.2d 476, 490 (Cal. 1978); 324 Liquor Corp. v. Duffy, 479 U.S. 335, 350–51 (1987); TFWS, Inc. v. Schaefer, 242 F.3d 198, 203 (4th Cir. 2001).

[221] *Midcal*, 445 U.S. at 106–07.

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California claimed that the law protected small retailers and promoted temperance.[222] When looking at the record, the Court found no evidence to support the claim that an increase in price would promote temperance.[223] Moreover, the record showed that retail price maintenance schemes did not protect or assist small retailers.[224] Instead, it led to greater failure rates.[225] As a result, the minimal state interests gave way to the strong federal interest in promoting competitive markets.[226] Therefore, *Midcal* stands for the proposition that a state cannot sustain a Twenty-first Amendment defense unless it is able to offer articulable facts in support of its claim.

Following *Midcal*, the Supreme Court continued to flesh out the test for Twenty-first Amendment challenges in two additional cases in 1984. First, in *Capital Cities Cable, Inc. v. Crisp*, the Court recognized that "[n]otwithstanding the Amendment's broad grant of power to the States, . . . the Federal Government plainly retains authority under the Commerce Clause to regulate even interstate commerce in liquor."[227] Put differently from *Midcal*, the test was "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."[228] Thus, in *Capital Cites*, the Supreme Court found that a state could not block out-of-state alcohol advertisements from coming over the airways because only the Federal Communications Commission had the power to regulate signals over cable.[229] As such, *Capital Cites* indicates that where there are extremely strong federal interests, the Twenty-first Amendment is unlikely to provide protections to state alcohol regulations that conflict with the national interest.

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[222] *Id.* at 112.

[223] *Id.* at 113–14.

[224] *Id.* at 113.

[225] *Id.* at 113–14.

[226] *Id.*

[227] Cap. Cities Cable, Inc. v. Crisp, 467 U.S. 691, 713 (1984).

[228] *Id.* at 714 (finding that Oklahoma had no substantial interest in promoting temperance because that ban only applied to wine ads from out-of-state signals while it allowed print ads from out-of-state for all alcohol sold in the state, and that Oklahoma's interest was outweighed by the FCC's interest in ensuring the availability of diverse cable services throughout the United States).

[229] *Id.*

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Second, in *Bacchus Imports, Ltd. v. Dias*, the Supreme Court acknowledged that economic protectionism of the state's local industry did not fall within a core power of the Twenty-first Amendment."[230] At issue in *Bacchus Imports, Ltd. v. Dias* was a Hawaii law that exempted only local producers from an excise tax.[231] Since this amounted to economic protectionism of a state's local industry and a Commerce Clause violation, the Supreme Court held that the federal interest outweighed the state's, and the Twenty-first Amendment did not save the law.[232]

When taken together, these cases provide the clearest picture of core powers that are subject to Twenty-first Amendment protections—state laws that promote temperance or those that regulate the sale, use, and distribution of alcoholic beverages. However, these cases also demonstrate that even if the regulations fall within a core power of Section 2, they must still outweigh the federal interest in question to receive its protections.

With regards to post-and-hold laws, while they regulate the sale of alcohol within a state and would fall within Twenty-first Amendment protections, it appears that the Twenty-first Amendment will not be a bar to antitrust liability.[233] The Court has announced that there is a very strong and substantial interest in protecting free markets under the Sherman Act.[234] Based on this substantial interest, the Supreme Court has found that the Twenty-first Amendment provides no protections to Sherman Act violations.[235]

For example, in *324 Liquor Corp. v. Duffy*, alcohol retailers challenged the legality of a New York alcohol law under the Sherman Act.[236] The law required alcohol retailers to charge 112% of the wholesaler's posted bottle price.[237] In turn,

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[230] Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 276 (1984).

[231] *Id.*

[232] *Id.*

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

[234] *See* United States v. Topco Assocs., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."); Atl. Cleaners & Dyers v. United States, 286 U.S. 427, 435 (1932) (noting that Congress "exercise[d] all the power it possessed" when passing the Sherman Act).

[235] *324 Liquor Corp.*, 479 U.S. at 341.

[236] *Id.*

[237] *Id.* at 337.

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wholesalers were required to post the prices per bottle and per case but were able to lower the price per case.[238] The Supreme Court found that the Sherman Act preempted the law because it was an illegal price maintenance agreement.[239] New York's defense was that the Twenty-first Amendment shielded the law.[240] The state reasoned that the law's purposes were to protect small liquor retailers and promote temperance.[241] The Supreme Court rejected these arguments for two reasons.[242] First, because the Sherman Act protects competition rather than competitors, protecting small retailers over competition was not a valid state interest.[243] Second, the Court rejected the temperance defense because the state failed to prove that increasing prices promoted temperance.[244] In the end, *324 Liquor* suggests that once the Sherman Act preempts a state alcohol regulation, the Court is unlikely to uphold its validity under the Twenty-first Amendment because of the strong federal interests in promoting free market competition under the Sherman Act.

IV. HOW THE SUPREME COURT WOULD HAVE ANALYZED THE CURRENT CIRCUIT SPLIT

A. Antitrust Analysis

Had the Supreme Court granted certiorari in *Connecticut Fine Wine & Spirits, LLC v. Seagull*, the Court's first step would have been to determine if the Sherman Act preempted the alleged conduct.[245] This would have required the Court to determine if the alleged conduct constituted an agreement to restrain trade within the meaning of Section 1 of the Sherman Act.[246] Here, because the restraint involves actions among competitors at the wholesale level, the Court would likely have classified the restraint as a horizontal restraint, especially as the law seeks to compel

[238] *Id.*

[239] *Id.*

[240] *Id.* at 346–47.

[241] *Id.* at 348, 351.

[242] *Id.* at 348, 350–52.

[243] *Id.*

[244] *Id.*

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

[246] 15 U.S.C. § 1 (2018).

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and facilitate anticompetitive behavior.[247] Moreover, since the law dictates that competitors are to share price, the Court would likely have found that the law involves horizontal price-fixing.[248] As a result, the Supreme Court's next step would have been to decide if the existence of an agreement among competitors would be required to trigger Section 1 of the Sherman Act.[249]

While the Second Circuit requires evidence of an actual agreement,[250] the Supreme Court would have likely found precedent undermining this approach.[251] In *324 Liquor*, which was decided after *Battipaglia*, the Court found that a New York law with a retail price maintenance provision violated Section 1 of the Sherman Act without evidence of an agreement.[252] Accordingly, the Court would have likely sided with the Fourth and Ninth Circuits on this issue and not required the existence of an agreement to trigger Section 1.[253] In the end, because the law facilitates horizontal price-fixing, the Supreme Court would have likely held that Connecticut's post-and-hold law falls within the purview of Section 1 of the Sherman Act.[254]

The second step in the Court's analysis would have been to decide which antitrust test to apply—the rule of reason or the per se standard. With the trend towards the use of the rule of reason, the Supreme Court could very well have applied a rule of reason analysis.[255] If the Court had followed a rule of reason analysis, Connecticut's law would not be preempted by the Sherman Act because *Rice* requires a per se violation.[256] In such a case, Total Wine's challenge would have likely failed at the preemption step. Nevertheless, since the Supreme Court has held under *Catalano, Inc.* and *Sugar Institute* that agreements to adhere to previously announced prices are per se illegal, the Court would likely have applied a per se

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[247] *See* CONN. GEN. STAT. ANN. §§ 30-1, 30-63(c) (West 2019).

[248] *See id.*

[249] 15 U.S.C. § 1 (2018).

[250] *See* Battipaglia v. N.Y. State Liquor Auth., 745 F.2d 166, 175 (2d Cir. 1984).

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

[252] *Id.*

[253] *See* Costco Wholesale Corp. v. Maleng, 522 F.3d 874 (9th Cir. 2008); TFWS, Inc. v. Schaefer, 242 F.3d 198 (4th Cir. 2001); Miller v. Hedlund, 813 F.2d 1344 (9th Cir. 1987).

[254] *See* CONN. GEN. STAT. ANN. §§ 30-1, 30-63(c) (West 2019).

[255] *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23 (1979); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679 (1978).

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

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analysis.[257] Because Connecticut's law requires competitors to announce price, share price, and adhere to their posted prices, this should have been enough to establish that the law is a horizontal price-fixing scheme that is per se illegal under Section 1 of the Sherman Act.[258]

B. Parker *Immunity Analysis*

Assuming that the Supreme Court found that the Sherman Act preempted Connecticut's law, the Court's next step would then have been to determine: (1) was the law a hybrid or unilateral restraint, and (2) would it pass *Midcal*'s two-part test.[259]

1. Hybrid or Unilateral Restraint

Here, the Court would have been unlikely to characterize the Connecticut statute as a unilateral restraint outside the purview of Section 1 for two reasons. First, under Connecticut's regulatory scheme, wholesalers must post the per bottle price and per case price with the state.[260] However, the state does not review the reasonableness of the posted prices.[261] Rather, the state merely polices the posting procedure, leaving the price setting mechanisms in the hands of the competitors.[262] Thus, the law is similar to the laws the Supreme Court invalidated in *324 Liquor* and *Midcal*.[263] Second, the regulatory scheme has a minimum resale price provision which prohibits retailers from selling at "cost."[264] The law defines "cost" as the total amount from adding the posted bottle price, shipping and transportation costs, and the applicable state and federal taxes paid.[265] This means that even if wholesalers lower the price per case, the price remains based on the higher price per bottle. Because the law allows wholesalers to set posted prices that effectively set the lower

[257] *See* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980); Sugar Inst. v. United States, 297 U.S. 553 (1936).

[258] *See* CONN. GEN. STAT. ANN. §§ 30-1, 30-63(c) (West 2019).

[259] *See* Fisher v. City of Berkeley, 475 U.S. 260, 267–68 (1986); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

[260] CONN. GEN. STAT. ANN. § 30-63(c) (West 2019).

[261] *Id.*

[262] *Id.*

[263] *See* 324 Liquor Corp. v. Duffy, 479 U.S. 335, 338–40 (1987); *Midcal*, 445 U.S. at 105–06.

[264] CONN. GEN. STAT. ANN. § 30-68l (West 2019).

[265] *Id.*

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limit for what retailers can charge, it is similar to the law in *324 Liquor*.[266] For these reasons, the Court would have likely upheld the district court's decision in finding that the Connecticut law constitutes a hybrid restraint.[267]

2. Clearly Articulated and Actively Supervised by the State

Once classified as a hybrid restraint, Connecticut's law would have likely failed *Midcal*'s two-part test because the regulatory scheme does not meet the actively supervised by the state requirement for the same reason that the laws in *Midcal* and *324 Liquor* failed.[268] Under Connecticut's regulatory scheme, the state does not set the posted price, review the reasonableness of the posted prices, or control the month-to-month variations in posted prices. Moreover, it does not matter that there is a resale price markup because the Court in *324 Liquor* rejected an argument that a minimum resale price provision shows active supervision.[269] The Court rejected this argument because the resale price was based on the posted price which the state does not review.[270] The only evidence that might point towards the opposite conclusion is the fact that the "Connecticut legislature has frequently debated the merits of the pricing system," which may suggest the state legislature has attempted to engage in pointed reexaminations of the state policy, and thus actively supervises the regulatory system.[271] However, in the face of Connecticut's lack of control in the prices set by wholesalers, the Court would have likely found that the price postings are not regularly supervised by the state. For this reason, the law will fail *Midcal*'s two-part test and would likely not receive *Parker* immunity.

C. Twenty-first Amendment Analysis

Even if the Supreme Court had found that Connecticut's law amounted to a per se illegal hybrid restraint that is not entitled to *Parker* immunity, the Court would still have had to analyze the regulation under the Twenty-first Amendment to see if

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[266] *See 324 Liquor Corp.*, 479 U.S. at 338–40.

[267] Conn. Fine Wine & Spirits, LLC v. Harris, 255 F. Supp. 3d 355, 369 (D. Conn. 2017) ("Given the similarity between the statutory scheme at issue in *324 Liquor* and the Connecticut post and hold provisions at issue here, the court concludes that the post and hold provisions are best characterized as a hybrid restraint.").

[268] *See 324 Liquor Corp.*, 479 U.S. at 338–40; *Midcal*, 445 U.S. at 105–06.

[269] *See 324 Liquor Corp.*, 479 U.S. at 338–40; CONN. GEN. STAT. ANN. § 30-68l (West 2019).

[270] *324 Liquor Corp.*, 479 U.S. at 344–45.

[271] Morgan v. Div. of Liquor Control, 664 F.2d 353, 356 (2d Cir. 1981).

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it would have been shielded from the Sherman Act.[272] At this point in the analysis, the Court would have weighed Connecticut's interests against the "substantial" federal interest in promoting competition under the Sherman Act to see if the law is entitled to protection under Section 2 of the Twenty-first Amendment.[273] However, neither party raised a Twenty-first Amendment argument at the district court level.[274] Consequently, the district court never made any factual findings related to the purposes of the law, meaning the Court would have had to make its own findings of fact regarding the purposes of the law.[275] This is different from *Midcal* and *Liquor 324*, in which the Supreme Court had the opportunity to incorporate the factual findings of the lower court in their analysis.[276] This suggests that the parties may have had an opportunity to bolster their arguments on remand, with the addition of facts relating to the purposes for which the legislation was enacted.

Ultimately, the Court's analysis would have turned on the Twenty-first Amendment's "core powers" under which Connecticut claims to have passed the law.[277] Based on prior cases, this would likely have been: promoting temperance, orderly market conditions, or protecting small retailers.[278] If Connecticut claimed the law promotes temperance, the state would have had to show that the law results in higher prices and that consumers drink less because of those higher alcohol prices. However, based on the factual records of *Midcal* and *324 Liquor*, it seems unlikely that the Court will find post-and-hold laws to promote temperance since there was little evidence that increasing prices discouraged drinking.[279] Thus, absent any recent, credible studies that demonstrated that this system promotes temperance, the Court would have likely found minimal state interest in promoting temperance. This means that promoting temperance would have been outweighed by the substantial federal interest under the Sherman Act.

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[272] *Midcal*, 445 U.S. at 109.

[273] *Id.* at 113–14.

[274] Conn. Fine Wine & Spirits, LLC v. Harris, 255 F. Supp. 3d 355, 364 (D. Conn. 2017).

[275] *Id.* at 351.

[276] *See* 324 Liquor Corp. v. Duffy, 479 U.S. 335, 338–40 (1987); *Midcal*, 445 U.S. at 113–14.

[277] *See* Bacchus Imps., Ltd. v. Dias, 468 U.S. 263 (1984).

[278] *Id.*

[279] *See 324 Liquor Corp.*, 479 U.S. at 338–40; *Midcal*, 445 U.S. at 113–14.

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If Connecticut claimed that the law is intended to protect small retailers, this argument would likely have also failed for two reasons. First, the factual findings in *Midcal* demonstrated that price-fixing laws were detrimental to the survival of small retailers.[280] This would suggest that there is a minimal state interest in protecting the Connecticut retailers.[281] Second, since the Sherman Act protects competition, not competitors, it ultimately does not care about the survival of small retailers.[282] Accordingly, the Court would have likely not found this argument persuasive.

And lastly, if Connecticut claimed to have designed the law to promote orderly markets, this argument would likely also have failed because it is circular. If the law has already been declared per se illegal, this would have suggested that the law is harming competition and consumer welfare, which the Sherman Act seeks to protect.[283] It cannot possibly be the case that a law that already harms the mechanisms of competition can be justified to promote orderly markets because it has already been declared illegal for throwing a wrench in the gears of the free market. Consequently, the Court would have been unlikely to accept such a circular argument as a legitimate state interest under the Twenty-first Amendment. For these reasons, it is unlikely that Connecticut's post-and-hold scheme would have found any shelter under Section 2 of the Twenty-first Amendment, and the Court would have likely concluded that the law constituted a violation of Section 1 of the Sherman Act.

CONCLUSION

In the end, the Supreme Court should have granted certiorari to resolve the current circuit split between the Second Circuit and the Fourth and Ninth Circuits. Had the Court heard *Connecticut Fine Wine & Spirits, LLC*, it would have likely held that post-and-hold laws are illegal horizontal price-fixing arrangements, are preempted by the Sherman Act, are not entitled to *Parker immunity*, are not afforded protection by the Twenty-first Amendment, and therefore, are invalid restraints of trade under the Sherman Act. However, because the Court did not grant certiorari, it appears that we will have to wait for another case the Court views as the appropriate vehicle to resolve this issue. In the meantime, consumers in the Second Circuit, especially Connecticut, will continue to pay higher prices at the liquor store due to

[280] *See Midcal*, 445 U.S. at 113–14.

[281] *Id.*

[282] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

[283] *See* Wilson, *supra* note 17, at 3.

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the Court's authorization of state-sponsored, horizontal, and per se illegal price-fixing arrangements.

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