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PROPERTY RIGHTS AND INTRABRAND RESTRAINTS

Alan J. Meese†

Intrabrand restraints limit the discretion of one or more sellers—usually dealers—with respect to the disposition of a product sold under a single brand. While most scholars believe that such contracts can help assure optimal promotion of a manufacturer’s products, there is disagreement about the exact manner in which such restraints accomplish this objective. Many scholars believe that such restraints themselves induce dealers to engage in promotional activities desired by the manufacturer. Others believe that such restraints merely serve as “performance bonds,” which dealers will forfeit if they fail to follow the manufacturer’s precise promotional instructions. Some scholars reject both approaches, arguing that manufacturers are in no position to “plan” dealers’ promotional agendas and that manufacturers could in any event rely upon less restrictive means to achieve the same objectives. These scholars argue that these restraints are generally anticompetitive.

This Article argues that reliance upon the theory of property rights provides the most plausible account of these agreements. For one thing, a focus on property rights helps explain why manufacturers choose to rely upon the market to distribute their products in the first place, a decision that other scholars have taken for granted. A manufacturer or joint venture that relied upon its own employees to distribute its product would incur significant costs gathering and processing the information required to direct employee activities. By relying upon the market, that is, independent dealers, firms avoid these costs and delegate promotional decisionmaking to those actors with access to localized knowledge and the incentives to acquire it.

Reliance on the market entails problems of its own, however. In particular, dealers may not be able to capture the benefits of local promotional expenditures that induce consumers to purchase the manufacturer’s product. Instead, cut rate dealers may decline to expend resources on promotion, free riding on the efforts of their fellow dealers. Thus, reliance upon independent dealers to distribute a manufacturer’s product may result in a market failure, attenuating the benefits that decentralized distribution might otherwise produce. Intrabrand restraints help overcome this market failure and thus facil-

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iate a strategy of decentralized distribution by granting dealers an effective property right over the promotional information they produce, thus perfecting dealers’ incentives to identify and pursue optimal promotional strategies. Far from ensuring that dealers pursue a particular promotional agenda “desired by the manufacturer,” as some have argued, such restraints actually further the strategy of decentralization by perfecting dealers’ ability to pursue whichever agenda they should choose. Moreover, because manufacturers and joint ventures adopt such restraints to avoid planing dealers’ promotional activities, such restraints are superior to so-called less restrictive alternatives that inevitably require manufacturers to announce and enforce detailed promotional strategies. This property rights interpretation of these restraints bolsters the scholarly presumption in their favor and should compel courts to analyze all such agreements under a lenient Rule of Reason.

INTRODUCTION

Manufacturers must decide how to distribute their products to consumers. Some firms perform this function themselves by owning their own retail outlets and employing the salespeople who work there. Others choose to rely upon “the market,” selling their products to independent firms who then sell the items to consumers.

Companies that choose the latter option often attempt to exercise some control over those who distribute their products, employing what economists and antitrust scholars call “intrabrand restraints.” These contracts limit the discretion of one or more sellers—usually dealers—with respect to the disposition of a product sold under a sin-

1 See, e.g., Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice § 11.1, at 441 (1999) (“These restraints are described as ‘intrabrand,’ because they regulate a dealer’s sales of a single brand without creating limitations on its sales of brands made by other suppliers.”).
gle brand.\textsuperscript{2} Such restraints may be "vertical," as when a single manufacturer grants its dealers exclusive territories or sets minimum resale prices.\textsuperscript{3} They may also be "horizontal," as when a joint venture between competitors imposes exclusive territories or resale prices on members that distribute the venture's product.\textsuperscript{4} Such partial integration allows a manufacturer or joint venture to assert control over firms that sell its product without owning these entities outright.

For many decades, economists, antitrust scholars, and courts were hostile to intrabrand restraints. According to neoclassical price theory, the dominant approach to industrial organization during the 20th century, economic activity is conducted in one of two ways: the firm or the market. Within this intellectual framework, practices that are "between" the firm and the market, that is, that share characteristics of both institutions, are inherently suspect. Price theory's hostility to such nonstandard agreements produced the "inhospitality tradition" of antitrust, whereby courts declared partial integration unlawful per se or presumptively unlawful.\textsuperscript{5} According to these courts, intrabrand restraints—which controlled the disposition of products after their sale "on the market"—offered a prime example of such anticompetitive practices.\textsuperscript{6}

In recent decades, antitrust law and scholarship have experienced a revolution of sorts. Economists and other scholars have sought new explanations for nonstandard agreements, including intrabrand restraints. Today, most economists and antitrust scholars believe that intrabrand restraints usually produce significant economic

\textsuperscript{2} \textit{Id.}
\textsuperscript{4} See, \textit{e.g.}, United States v. Topco Assocs., Inc., 405 U.S. 596 (1972) (evaluating joint venture's imposition of exclusive territories on members that distributed its product); \textit{see also} Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593, 602–03 (7th Cir. 1996) (examining agreement among venture members limiting output of venture product); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 212 (D.C. Cir. 1986) (evaluating joint venture's imposition of minimum prices on members).
\textsuperscript{6} \textit{See infra} notes 33–37 and accompanying text (describing price theory's model of industrial organization and its influence on antitrust policy). \textit{See generally Topco}, 405 U.S. at 608 (declaring horizontal exclusive territories ancillary to legitimate joint venture unlawful per se); Albrecht v. Herald Co., 390 U.S. 145, 152–54 (1968) (holding maximum resale price restraints unlawful per se), \textit{overruled by} State Oil Co. v. Khan, 522 U.S. 3 (1997); \textit{Arnold}, Schwinn & Co., 388 U.S. at 382 (ruling location clauses and other vertical intrabrand restraints unlawful per se).
benefits by facilitating the distribution of products to consumers.\footnote{See, e.g., ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 290–91, 435–39, 449–50 (asserting that vertical distribution restraints produce significant benefits and should be lawful per se); HOVENKAMP, supra note 1, § 11.7a, at 485 ("Most price and nonprice [vertical] restraints are efficient and benefit consumers."); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 171–84 (2001); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 185–89 (1985); id. at 28 (articulating a "rebuttable presumption that nonstandard forms of contracting have efficiency purposes"); Victor P. Goldberg, The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services, 79 NW. U. L. REV. 736, 738 (1984) [hereinafter Goldberg, Retailing Services] (suggesting there is an "embarrassment of riches" when it comes to beneficial explanations of vertical restraints).}

However, this agreement is not universal. Some scholars still resist the claim that intrabrand restraints are presumptively efficient.\footnote{See, e.g., RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW 258 (2001) (contending that vertical intrabrand restraints generally harm consumers because they result in "monopolistic competition—the product differentiation, the market fragmentation through advertising and promotion, and the pursuit of brand loyalty leading to higher costs and higher prices"); LAWRENCE A. SULLIVAN & WARREN GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 304–16 (2000) (emphasizing the harms produced by vertical intrabrand restraints); Peter C. Carstensen, The Competitive Dynamics of Distribution Restraints: The Efficiency Hypothesis Versus The Rent-Seeking, Strategic Alternatives, 69 ANTITRUST L.J. 569 (2001) (asserting a number of nonefficiency-oriented explanations as to why manufacturers and retailers create restraints on distribution); id. at 927–35 (suggesting a "structured rule of reason" whereby proof of product differentiation suffices to establish a presumption that such restraints are unlawful); id. at 664–67 (stating that courts should presume horizontal intrabrand restraints unlawful); John J. Flynn, The "Is" and "Ought" of Vertical Restraints After Monsanto Co. v. Spray-Rite Service Corp., 71 CORNELL L. REV. 1095, 1142–47 (1986) (arguing that courts should presume vertical intrabrand restraints unlawful); Robert Pitofsky, A Framework for Antitrust Analysis of Joint Ventures, 74 GEO. L.J., 1605, 1620–21 (1986) [hereinafter Pitofsky, Joint Ventures] (treating horizontal intrabrand restraints as presumptively unlawful or unlawful per se); see also Robert Pitofsky, Why Dr. Miles Was Right, 8 REG. 27 (1984) [hereinafter Pitofsky, Dr. Miles] (arguing that minimum resale price maintenance should be unlawful per se).}

Echoing the inhospitality tradition, these scholars continue to emphasize the purported harms that such restraints can cause, while concurrently doubting their supposed benefits.\footnote{See Carstensen, supra note 8, at 574–605; Robert Pitofsky, In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing, 71 GEO. L.J. 1487, 1490–93 (1983) [hereinafter Pitofsky, No-Frills Case].}

Nevertheless, the trend among academics is unmistakable: most advocate a strong presumption that intrabrand restraints are procompetitive.\footnote{One scholar recently claimed that the presumption in favor of intrabrand restraints is "generally associated with the Chicago School" of antitrust analysis. See Carstensen, supra note 8, at 571. While it is certainly true that members of the Chicago School pioneered the theoretical claim that such restraints are generally efficient, several leading scholars outside the Chicago School explicitly embrace the presumption that vertical restraints are usually procompetitive. See, e.g., HOVENKAMP, supra note 1, § 11.3, at 450–58, 485–89; WILLIAMSON, supra note 7, at 185–89.} Over the past three decades, this scholarship has influ-
enced judges, and courts have adjusted antitrust doctrine to reflect this academic trend. However, courts still remain hostile to certain intrabrand restraints, particularly those that explicitly invoke price or output.

Despite these developments in theory and doctrine, disagreement persists among proponents of intrabrand restraints about the exact mechanism through which such agreements may reduce the cost of distribution. The dominant approach, first articulated by Professor Lester Telser, focuses on vertical intrabrand restraints but has implications for horizontal arrangements as well. According to Telser, such restraints can overcome a form of market failure that might result when manufacturers rely upon independent dealers—the market—to distribute their goods. Left to their own devices, it is said, individual dealers will refuse to produce certain promotional services—information—that enhance consumer demand for the manufacturer's product, choosing instead to free ride on the promotional efforts of fellow dealers. Because all dealers will find it rational to free ride in this manner, no dealer will provide promotional services, and demand for the manufacturer's product will fall. Telser and other scholars assert that vertical intrabrand restraints can prevent such free riding by eliminating price competition among dealers, thereby channeling competitive efforts into other forms of rivalry, such as the provision of presale promotion desired by the manufacturer. Other scholars have extended Telser's analysis to explain various intrabrand restraints that are horizontal in nature.
Two scholars sympathetic to intrabrand restraints—Professors Benjamin Klein and Kevin Murphy—reject Telser’s account, arguing that such restraints cannot overcome free riding.\textsuperscript{19} Although Klein and Murphy agree that dealers tend to free ride on each others’ promotional efforts, they correctly note that Telser fails to explain how such restraints in fact induce dealers to engage in the promotional activities desired by the manufacturer.\textsuperscript{20} For their part, Klein and Murphy argue that vertical intrabrand restraints are private mechanisms for enforcing implicit contractual obligations that dealers assume as a condition of distributing the manufacturer’s product.\textsuperscript{21} More precisely, by conferring market power on dealers, intrabrand restraints create a stream of income that dealers will forfeit if terminated and thus serve as a sort of performance bond that dealers post by agreeing to such restraints.\textsuperscript{22} Such bonds do not themselves prompt dealers to engage in any promotional activity. They do, however, facilitate a manufacturer’s efforts to ensure dealers’ compliance with obligations to engage in promotional efforts, as well as other unrelated obligations.\textsuperscript{23}

The Telser account of intrabrand restraints is in obvious tension with that offered by Klein and Murphy. Still, both also share some common characteristics. First, neither questions the manufacturer’s decision not to integrate forward into distribution—that is, to rely upon “the market” to distribute its goods.\textsuperscript{24} This approach is consistent with neoclassical price theory, which took the boundaries of a firm as determined by technology and thus given.\textsuperscript{25} Second, both accounts assume that reliance on the market can involve a cost in the form of dealer free riding.\textsuperscript{26} Moreover, while both accounts focus on vertical intrabrand restraints, both can readily apply to certain intrabrand restraints that are horizontal, explaining, for instance, why a joint venture might assign exclusive territories to members selling its product.\textsuperscript{27} Finally, and most importantly, both rest upon the price-theoretic assumption that manufacturers know what types of services


\textsuperscript{20} See Klein & Murphy, supra note 19, at 266 (“No matter how large a margin is created by resale price maintenance, there appears to be no incentive for competitive free-riding retailers to supply the desired demonstration services.”).

\textsuperscript{21} Id. at 270–76.

\textsuperscript{22} Id. at 274–76.

\textsuperscript{23} See id.

\textsuperscript{24} See infra note 40 and accompanying text; infra note 70 and accompanying text.

\textsuperscript{25} See infra notes 33–35 and accompanying text.

\textsuperscript{26} See infra notes 42–47, 72 and accompanying text.

\textsuperscript{27} See infra notes 59–60 and accompanying text; see also United States v. Topco Assocs., Inc., 405 U.S. 596 (1972) (declaring such territories unlawful per se).
they wish dealers to provide and that manufacturers employ intrabrand restraints to induce dealers to provide that desired mix and level of services. Put another way, both approaches seem to conclude that manufacturers employ intrabrand restraints to plan the promotional activities of their dealers, much as a firm "plans" the activities of its employees. This planning assumption renders each approach vulnerable to certain criticisms leveled by opponents of such restraints.28

This Article examines an alternative framework for evaluating and explaining intrabrand restraints, a framework derived from the concept of property. Unlike neoclassical price theory, a property rights approach can explain why firms rely upon the market to distribute their goods and also helps illuminate the rationale for intrabrand restraints. This Article argues that many vertical intrabrand restraints may be characterized as contracts for property rights—i.e., rights that facilitate and perfect a manufacturer's decision to rely upon the market to distribute its goods. More precisely, such agreements may be characterized as a means of vesting dealers with exclusive rights over a valuable resource, namely, customers who decide to purchase a manufacturer's product. By perfecting dealer property rights, manufacturers can transform promotional information from a collective good into a private good, thus facilitating its production.29

Similarly, a joint venture among competitors can use horizontal intrabrand restraints to perfect the property rights of members who distribute the venture's product.30

Significantly, the existence and enforcement of intrabrand restraints does not depend upon any implicit or explicit assumption that manufacturers possess the knowledge necessary to plan or anticipate the promotional activities of their dealers. Whereas a planning-based account imputes extraordinary prescience to the manufacturer, in reality knowledge of optimal promotional strategies is difficult to obtain; no single firm can readily gather and possess all such information. Because they take for granted the availability of knowledge about optimal promotional strategies, both planning accounts ignore one rationale for relying upon a dealer-based system of distribution in the first place: the desire to decentralize authority over promotional decision-making. By relying upon the market and vesting dealers with property rights, it is argued, manufacturers empower dealers to determine what sorts of promotional efforts make sense—i.e., what sorts of information to produce. At the same time, these restraints ensure that dealers

28 See infra Part I.B.
30 See infra note 262 and accompanying text.
who produce such information can recover the cost of doing so, thus
perfecting dealers' market-based incentives to identify and execute
optimal promotional strategies. A planning account errs by assuming
that manufacturers possess the very knowledge that reliance on the
market and intrabrand restraints help create.

To be sure, a manufacturer could maintain a form of property
rights in information by integrating forward into the distribution of its
product, relying upon salaried employees with access to knowledge
about local conditions to make its promotional decisions. In this way
the manufacturer would ensure that only a single entity internalizes
the benefits of producing information useful to consumers. However,
reliance on employees with little or no stake in promotional outcomes
deprives the manufacturer of a key aspect of a market-based system of
distribution: independent dealers who internalize the profit from
their promotional efforts. By contrast, intrabrand restraints allow
manufacturers to have the best of both worlds: dealers who possess
localized knowledge and appropriate incentives to promote the manu-
facturer's product. A manufacturer will thus avoid the shortcomings
of complete vertical integration while simultaneously realizing the full
benefits of a market-based system of distribution. Other benign ac-
counts simply do not address the role that intrabrand restraints play in
facilitating a strategy of decentralized, market-based distribution.

By rejecting the planning assumption inherent in current benign
accounts, a property rights theory offers a more plausible explanation
of how intrabrand restraints ensure that dealers engage in appropri-
ate promotional activities. As a result, the property approach ultimately bolstered Telser's standard account against both friendly and
hostile critiques. A property-based account counters claims that in-
trabrand restraints cannot induce the exact promotion that the manu-
facturer desires. Such claims ignore the fact that these restraints can
facilitate a strategy of decentralized generation of knowledge about
local promotional strategies. Such a strategy of decentralization rests on a manufacturer's rejection of any desire to obtain a particular mix of
promotional services. Moreover, a property account provides a more
robust response to the assertion that less restrictive alternatives—includ-
ing complete vertical integration—will advance the legitimate
objectives of intrabrand restraints without producing offsetting harms.
A property rights account applies with equal force to horizontal in-
trabrand restraints, explaining, for instance, a joint venture's imposi-
tion of intrabrand restraints on members that distribute its product.
In short, a property rights conception of intrabrand restraints solidi-
fies Telser's approach by supporting the presumption that such re-
straints are procompetitive. Finally, a property rights approach
suggests that courts should continue to adjust antitrust doctrine gov-
erning intrabrand restraints, subjecting all such restraints to lenient Rule of Reason treatment.

The property rights account of intrabrand restraints offered here does not purport to explain all such contracts. Not all products require the sort of presale promotional services that Telser and others have identified. Thus, intrabrand restraints employed in some industries require a different explanation. Nonetheless, where products do require presale promotion incident to their sale, a property rights account provides the most plausible description of the rationale for such restraints.

Part I of this Article canvasses the competing benign accounts of intrabrand restraints. Both benign accounts assume that manufacturers possess the knowledge necessary to plan or anticipate the promotional activities of those who distribute their products, and this assumption gives rise to various critiques by scholars hostile to intrabrand restraints. Part II examines a competing “property rights” conception of such restraints that rejects the planning assumption inherent in the benign accounts. Part III explains how the property rights approach ultimately bolsters Telser’s analysis against various critiques and outlines the doctrinal implications of this approach.

I

COMPETING ACCOUNTS OF INTRABRAND RESTRAINTS

A. Two Benign Accounts of Intrabrand Restraints

Price theory dominated industrial organization from 1940 through the 1970s. The dominant economic paradigm of this period—neoclassical price theory—rested on several assumptions that produced an intellectual milieu quite hostile to such restraints. The firm of price theory was a “black box,” a production function with a unitary interest that purchased inputs and transformed them into outputs. Moreover, the boundary between the “firm” and “the market,”

31 See infra notes 95–99 and accompanying text (explaining use of restraints by beer manufacturer without relying upon claim that such restraints induced presale promotion).


that is, the distinction between what a firm produces itself and what it leaves to others, was determined by technological considerations common to all firms in a given industry.\textsuperscript{34} In this price-theoretic world, it cost little or nothing to acquire or transfer information, and firms and consumers rarely behaved in an opportunistic manner.\textsuperscript{35} Given these assumptions, there was no rationale for a manufacturer to control the disposition of its product after title passed to another firm or consumer.\textsuperscript{36} Price theory, in turn, gave rise to the "inhospitality tradition of antitrust," which presumed that all nonstandard contracts, including intrabrand restraints, were efforts to create or to exercise market power.\textsuperscript{37} Antitrust law generally recently—was a black box, a production function that took in inputs and transformed them into outputs."); Oliver E. Williamson, Delimiting Antitrust, 76 Geo. L.J. 271, 272 (1987) (describing the "prevailing practice [under price theory] of describing the firm as a production function whose natural boundaries were defined by technology," and noting that "[e]conomic inputs were thus transformed by the production technology into economic outputs . . . [and] organizational considerations [that might explain the boundaries of firms] were effectively suppressed").

\textsuperscript{34} See Friedrich A. Hayek, Individualism and Economic Order 97–98 (1948) [hereinafter Hayek, The Meaning of Competition, in Economic Order] (explaining link between the assumption that all firms possessed the same production technology and the assumption that information was costless to obtain); Williamson, supra note 7, at 7 ("The prevailing orientation toward economic organization [under price theory] . . . was that technological features of firm and market organization were determinative."); Richard N. Langlois, Transaction Costs, Production Costs, and the Passage of Time, in Coasean Economics: Law and Economics and the New Institutional Economics 2–3 (Steven G. Medema ed., 1998) [hereinafter Langlois, Transaction Costs] ("[T]he ‘theory of the firm’ . . . start[s] with firms as production functions, each one identical, and each one transforming homogeneous inputs into homogeneous outputs according to given technical ‘blueprints’ known to all."); George J. Stigler, The Division of Labor Is Limited by the Extent of the Market, 59 J. Pol. Econ. 185, 185 (1951) (stating that economic theory has "generally treated as a [technological?] datum the problem of what the firm does—what governs its range of activities or functions"); Oliver E. Williamson, Technology and Transaction Cost Economics, 10 J. Econ. Behav. & Org. 355, 356 (1988) (asserting that under the price-theoretic paradigm, "[t]he ‘natural’ boundaries of the firm were thought to be defined by engineering considerations").

\textsuperscript{35} See Langlois, Transaction Costs, supra note 34, at 2 ("In this kingdom [of the price-theoretic paradigm], knowledge remains explicit and freely transmittable, and cognitive limits seldom if ever constrain."); see also Meese, Price Theory, supra note 5, at 116–17 (examining price theory’s tendency to assume away opportunism).

\textsuperscript{36} See Meese, Price Theory, supra note 5, at 118.

\textsuperscript{37} See id. at 124; see also Williamson, supra note 7, at 370–73 (describing influence of inhospitality tradition on antitrust treatment of nonstandard contracts). One commentator states:

[The] "inhospitality tradition" of antitrust . . . called for courts to strike down business practices that were not clearly procompetitive. In this tradition an inference of monopolization followed from the courts' inability to grasp how a practice might be consistent with substantial competition. The tradition took hold when many practices were genuine mysteries to economists, and monopolistic explanations of mysteries were congenial. The same tradition emphasized competition in the spot market. Long-term contracts, even those arrived at by competitive processes, were deemed anticompetitive because they shut off day-to-day rivalry.
tracked these insights and declared most such restraints unlawful per se.\textsuperscript{38}

In 1960, Professor Lester Telser offered a radically different account of intrabrand restraints, an account that implicitly rejected certain price-theoretic assumptions that drove the inhospitality tradition.\textsuperscript{39} Like price theorists, Telser began with the assumption that a manufacturer relies upon the market to distribute its products.\textsuperscript{40} At the same time, Telser argued that effective distribution may in some instances require dealers to provide consumers with "special services," particularly information about the product's attributes, prior to sale.\textsuperscript{41} Unlike the underlying product, however, such information is a "collective good"; the dealer who produces that information cannot exclude nonpaying consumers from it.\textsuperscript{42}

Contrary to the assumptions of price theory, information is not free.\textsuperscript{43} Like the production of most collective goods, the production of special services is potentially beset by a form of opportunism known


\textsuperscript{39} See Telser, \textit{Fair Trade I, supra} note 13, at 86-88, 100.

\textsuperscript{40} \textit{See supra} notes 33-34 and accompanying text (explaining that price theory took the boundaries of the firm as a given, determined by technology).

\textsuperscript{41} See Telser, \textit{Fair Trade I, supra} note 13, at 89-91.

\textsuperscript{42} \textit{Id.} at 91-92; \textit{see also} Mancur Olson, Jr., \textit{The Logic of Collective Action} 13-15 (1965) (defining collective good). To be sure, there are some instances in which dealers could recoup the cost of presale promotion directly from customers. For instance, a dealer could charge consumers for product demonstrations. However, few consumers would be willing to pay for such demonstrations because they would not know the value of the demonstration until after they received it. See Kenneth J. Arrow, \textit{Essays in the Theory of Risk-Bearing} 152 (1971) ("[Information's] value for the purchaser is not known until he has the information, but then he has in effect acquired it without cost.").

\textsuperscript{43} \textit{See supra} notes 34-35 and accompanying text (outlining price theory's assumption that production and dissemination of information is costless).}
as "free riding." A dealer who produces information cannot charge a price to consumers who use that information. At best, the dealer can hope that the consumer will purchase the underlying good from it, at a price that reflects the cost of the information. But if consumers are rational, they will try to avoid paying for this information, even if they choose to purchase the product in question. At the same time, rational dealers will behave in an opportunistic manner, seeking to attract these consumers by forgoing the production of information and offering them the product at a price lower than that charged by dealers who produce the information. If dealers and consumers act rationally, no dealer will produce such special services, and demand for the manufacturer's product will fall.

Given the tendency of dealers to free ride, reliance on the sort of unrestricted market that price theory imagined to distribute goods will result in market failure and suboptimal demand for the manufacturer's product. Minimum resale price maintenance ("minimum rpm"), it is said, can cure this failure by undermining dealer and customer efforts to free ride. For instance, a contract setting a price floor—minimum rpm—for dealers may prevent free riding dealers from undercutting a full-service retailer. Indeed, Telser argued that such an agreement will do more than prevent free riding; it will also cause dealers to engage in various forms of nonprice competition. Just as a cartel agreement will lead participants to "cheat" by, for instance, offering ancillary services "under the table," so too will minimum rpm induce dealers to "cheat" by engaging in nonprice competition. Promotional expenditures, of course, are one form of such competition. By setting a floor on the price dealers can

44 See Olson, supra note 42, at 9-12, 26-31; see also Williamson, supra note 7, at 47 (defining opportunism as "self-interest seeking at the expense of trading partners with guile").
45 See Arrow, supra note 42, at 152; Williamson, supra note 7, at 9 n.8.
46 See Telser, Fair Trade I, supra note 13, at 91 ("[S]ome retailers have good reason not to provide these special services and offer to sell the product at lower prices. They reduce their prices because they avoid the additional cost of the special services."); cf supra note 35 (explaining how price theory assumed away opportunism by dealers and others).
47 See Telser, Fair Trade I, supra note 13, at 91 ("As a result [of distributor free riding,] few or none of the retailers offer the special services the manufacturer thinks necessary to sell his product."); see also Olson, supra note 42, at 27 ("Normally, the provision of the collective good will be strikingly suboptimal."); Lester G. Telser, Why Should Manufacturers Want Fair Trade III, 33 J.L. & Econ. 409, 409-10 (1990) [hereinafter Telser, Fair Trade II] (stating that absent some vertical control, free riding among retailers will lead to an inefficient equilibrium in which no retailer provides special services).
48 See Meese, Price Theory, supra note 5, at 183-89.
49 Telser, Fair Trade I, supra note 13, at 91-96.
50 Id. at 90-91.
51 It should be noted that Telser did not himself invoke this analogy to a cartel; subsequent scholars did so. See, e.g., Posner, supra note 7, at 14-15, 172-73.
52 Telser, Fair Trade I, supra note 13, at 91-92.
charge, according to Telser, a manufacturer can ensure that any retailer rivalry takes the form of promotional services desired by the manufacturer.\textsuperscript{53}

While Telser's analysis focused on the possibility that minimum rpm—a vertical restraint—can induce presale promotion like advertising and product demonstrations, other scholars have extended his analysis to include additional promotional services that minimum rpm can generate.\textsuperscript{54} For instance, some scholars have argued that a manufacturer can employ minimum rpm to compensate fashionable retailers for carrying the manufacturer's product, thus certifying to consumers that the item is of high quality.\textsuperscript{55} According to these scholars, minimum rpm or other intrabrand restraints can allow dealers to recoup the expense of investigating a product's attributes before certifying the product's quality to consumers by preventing cut-rate dealers from free riding on such certifications.\textsuperscript{56} Other scholars have applied Telser's analysis to different vertical restraints,\textsuperscript{57} contending that an exclusive territory, for instance, can eliminate or attenuate the prospect of dealer free riding and thus prevent the dealers who do provide special services from suffering at the expense of those who do not.\textsuperscript{58} Similarly, many scholars have applied Telser's analysis to horizontal intrabrand restraints. These scholars argue that horizontal divisions of territory or horizontal price fixing ancillary to legitimate joint ven-

\textsuperscript{53} See id. at 90–91.


\textsuperscript{55} See Goldberg, Retailing Services, supra note 7, at 744–46 (arguing that manufacturers can employ minimum rpm to purchase a dealer's "endorsement" of its product); Marvel & McCafferty, supra note 54, at 348.

\textsuperscript{56} See Marvel & McCafferty, supra note 54, at 347–49. It should be noted that this "endorsement" account of intrabrand restraints does not depend upon the manufacturer's ability to determine how dealers assess the quality of products before choosing to carry them.

\textsuperscript{57} See Robert H. Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 75 YALE L.J. 373, 430–38 (1966) [hereinafter Bork, Rule of Reason] (applying Telser's analysis to exclusive territories); Richard A. Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 COLUM. L. REV. 282, 285 (1975) (same). Indeed, even before Bork and Posner extended Telser's analysis, litigants advanced similar arguments before the courts and the enforcement agencies. See, e.g., Brief for Appellant at 15, White Motor Co. v. United States, 372 U.S. 253 (1963) (No. 54) (arguing that reservation of customers and exclusive territories were necessary to ensure that "dealers who have spent valuable time 'pre-selling' a customer—i.e., softening him up for a White sale instead of a G.M. or Ford sale—will not lose the legitimate reward of their labor to another White dealer who jumps territorial boundaries . . . and snatches away the pre-sold customer").

\textsuperscript{58} See Bork, Rule of Reason, supra note 57, at 430–38; Posner, supra note 57, at 283–85.
tures can ensure appropriate promotion of the venture’s product and should be presumed lawful. Numerous antitrust scholars and economists employ Telser’s analysis, to support assertions that intrabrand restraints are generally procompetitive. Moreover, the Supreme Court, relying upon Telser’s analysis, has directed lower courts to examine vertical intrabrand restraints that do not invoke price or output under a “Rule of Reason” analysis. On the other hand, the inhostility tradition continues to influence antitrust doctrine. In particular, intrabrand restraints that do invoke price or output are either unlawful per se or presumptively unlawful pursuant to a truncated Rule of Reason test. Under this test, proof of a restraint’s existence itself gives rise to a prima facie case, requiring justification by the defendants.

59 See Bork, supra note 7, at 270–79; Hovenkamp, supra note 1, § 5.2b, at 205–09 (arguing that horizontal restraints truly ancillary to legitimate joint ventures should be analyzed under the Rule of Reason); Frank H. Easterbrook, Maximum Price Fixing, 48 U. Chi. L. REV. 886, 887 (1981) [hereinafter Easterbrook, Maximum Price Fixing] (arguing for elimination of the per se rule against maximum price fixing because the practice benefits consumers); Alan J. Meese, Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason, 68 ANTITRUST L.J. 461, 491–93 (2000) [hereinafter Meese, Quick Look] (applying Telser’s analysis to explain horizontal exclusive territories ancillary to a legitimate joint venture); Posner, supra note 57, at 298–99 (arguing that horizontal ancillary restraints should be lawful absent a showing of market power); see also Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 214 (D.C. Cir. 1986) (Bork, J.) (finding horizontal price fixing ancillary to joint venture a reasonable restraint because it deterred free riding); Polk Bros. v. Forest City Enters., 776 F.2d 185, 190–91 (7th Cir. 1985) (Easterbrook, J.) (holding that horizontal ancillary restraint might plausibly combat free riding and thus should be analyzed under the Rule of Reason). But see United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972) (declaring division of territories ancillary to legitimate joint venture unlawful per se).


61 See Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723–28 (1988) (relying upon assertion that vertical intrabrand restraints can produce significant benefits to narrow scope of per se rule against minimum rpm); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55–57 (1977) (invoking similar reasoning to reject per se rule against exclusive territories); see also Hovenkamp, supra note 1, § 11.6b, at 480 (concluding that Rule of Reason applied to nonprice restraints “has come close to creating complete nonliability”).

62 See Cal. Dental Ass’n v. FTC, 526 U.S. 756, 769–70 (1999) (stating that explicit horizontal restraint on price or output establishes prima facie case that restraint is unlawful under an abbreviated Rule of Reason analysis); Nat'l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100 (1984) (stating that horizontal restraints on price or output are generally unlawful per se, without regard to their market context); id. at 100–01 (declining to apply per se rule where some horizontal cooperation was necessary to create product in the first place); id. at 110 (stating that, even under the Rule of Reason, existence of naked restraint on price or output itself establishes a prima facie case); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 n.7 (1984) (declining to reconsider the per se rule against minimum rpm); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 342–57 (1982) (declaring horizontal maximum price fixing ancillary to a legitimate joint venture unlawful per se); Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 674–76 (7th Cir. 1992) (reading NCAA as allowing plaintiff to establish a prima facie case by proving explicit horizontal intrabrand price restraint).
Telser's special services argument suggests that minimum rpm and other intrabrand restraints result in higher prices than those an unrestrained market would produce. However, such prices do not reflect an exercise of market power or other consumer harm. They simply indicate an economic truism: the production of special services (information) costs money, and firms that produce this information must recoup their costs to remain in business. A cost-based price increase, whether promulgated by dealers or a fully integrated firm, does not reflect an exercise of market power.

Telser's account of minimum rpm did not purport to explain all intrabrand restraints. Instead, he expressly limited his account to differentiated products that require presale promotion to attract consumers. At the same time, he explained that such restraints sometimes facilitated cartelization among manufacturers by preventing dealers from passing along discounts that manufacturers offered to undercut the cartel price. However, Telser ultimately concluded.

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63 See Telser, Fair Trade I, supra note 13, at 91 (noting that absent such restraints dealers “reduce their prices because they avoid the additional cost of the special services”). There is, of course, one exception: intrabrand restraints that involve maximum price fixing. See also Maricopa, 457 U.S. at 348-49 (declaring horizontal maximum rpm unlawful per se); Easterbrook, Maximum Price Fixing, supra note 59, at 891-900 (explaining how maximum price fixing can overcome various market failures).

64 See Telser, Fair Trade I, supra note 13, at 91 (“If some retailers do provide these services and ask for a correspondingly higher price whereas others do not provide the services and offer to sell the product to consumers at a lower price then an unstable situation emerges.”); see also William F. Baxter, The Viability of Vertical Restraints Doctrine, 75 CAL. L. REV. 933, 945-46 (1987) (Higher retail prices are entirely consistent with the benign explanation of resale price maintenance. Imposition of [resale price maintenance] reflects a judgment on the part of the brand owner that her products will compete more successfully, both against other branded products and against generic rivals, if the retailer competes along parameters other than price. And the retailer’s expenses of engaging in those other forms of rivalry are financed by setting a retail margin higher than would prevail if retail price competition were allowed or encouraged.);

65 See Meese, Price Theory, supra note 5, at 81 (explaining that a cost-based price increase induced by restraint does not reflect an exercise of market power); Alan J. Meese, Tying Meets the New Institutional Economics, 146 U. PA. L. REV. 1, 70 (1997) (hereinafter Meese, New Institutional Economics) (contending that a cost-based price differential that induces acceptance of a tying contract does not reflect an exercise of market power and thus does not raise antitrust concerns).

66 See Telser, Fair Trade I, supra note 13, at 95-96.

67 See id. at 96-99.
that such restraints were presumptive efforts at inducing dealers to produce optimal presale promotional services.68

Despite broad acceptance, Telser’s theory is not the only benign account of intrabrand restraints. Professors Benjamin Klein and Kevin Murphy have offered an amendment to Telser’s approach.69 Like Telser, they begin with the assumption that manufacturers rely upon the market to distribute their goods.70 Additionally, they question neither the prevailing wisdom that intrabrand restraints are generally procompetitive71 nor Telser’s claim that opportunistic free riding will prevent dealers from providing special services.72 Finally, while Klein and Murphy focus on vertical intrabrand restraints, their analysis applies equally to horizontal intrabrand restraints.73

Nonetheless, these scholars dispute Telser’s claim that intrabrand restraints can themselves cure dealer free riding. For one thing, such restraints are not airtight; a dealer can circumvent a minimum rpm agreement by offering secret rebates or generous warranties and by bundling discounted items with the main product.74 Thus, while such restraints may induce nonprice competition, there is no guarantee that they will induce the particular form of competition that the manufacturer desires.75 Moreover, even if a manufacturer

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68 See Telser, Fair Trade II, supra note 47, at 410.
69 See Klein, Distribution Restrictions, supra note 19, at 35–36; Klein & Murphy, supra note 19, at 265–66.
70 Klein and Murphy do mention that complete vertical integration is one method of distribution. See Klein & Murphy, supra note 19, at 265–67. At the same time, they apparently assume that such integration is indistinguishable from reliance on the market. They thus make no effort to explain why a manufacturer might choose to rely on the market to distribute its goods.
72 See Klein, Distribution Restrictions, supra note 19, at 5–8 (providing an excellent summary of “classic free riding”).
73 See supra text accompanying notes 3–4 (explaining the distinction between horizontal and vertical intrabrand restraints).
74 Klein & Murphy, supra note 19, at 266; see id. at 277 (“Clearly, if resale price maintenance is to be effective, the manufacturer must monitor the most obvious forms of non-price competition that are the closest substitutes for price reductions.”); see also, e.g., Ill. Corporate Travel, Inc. v. Am. Airlines, Inc., 806 F.2d 722, 728–29 (7th Cir. 1986) (explaining how travel agents circumvented price regulation by bundling low-priced services with tickets).
75 Klein, Distribution Restrictions, supra note 19, at 7 n.11. Klein explains how a different form of competition may occur:

Minimum resale price maintenance, by itself, will not assure that dealers will supply the quantity and types of service desired by the manufacturer. Telser . . . begs this question by artificially assuming that the promotional services desired by the manufacturer are the only type of non-price competition dealers can engage in. Once there are alternative forms of non-price dealer competition, dealers have the ability and incentive to engage in “classic dealer free riding” on other dealers’ promotional activities by sup-
can police and enforce such a restraint, i.e., prevent dealers from engaging in undesirable forms of nonprice competition, there is no guarantee that higher resale prices will result in the promotional activities the manufacturer hopes to induce.\textsuperscript{76} According to Klein and Murphy, a dealer could choose to pocket any premium that the restraint creates, providing no promotional services whatsoever.\textsuperscript{77} Without some other method of inducing dealers to produce such services, intrabrand restraints may confer a windfall on dealers while raising the manufacturer's cost of distribution.\textsuperscript{78} In this case, one would not expect manufacturers to adopt and police such restraints unless they were designed to obtain or protect market power.\textsuperscript{79}

Ultimately, the exact scope of Klein and Murphy's critique of Telser's account remains unclear. On one hand, these authors purport to critique the "standard economic analysis" of vertical restraints, which they describe as "fundamentally flawed."\textsuperscript{80} On the other hand, as previously explained, Klein and Murphy also seem to admit that the standard account is sound when it comes to exclusive territories.\textsuperscript{81}

This critique of Telser's analysis could undermine the generally favorable attitude toward intrabrand restraints.\textsuperscript{82} Indeed, even before
Klein and Murphy published their thesis, other scholars raised some of the same objections to Telser's theory. Nonetheless, Klein and Murphy did more than critique the standard argument; they offered their own benign account of intrabrand restraints in an effort to account for a far wider range of such restraints than Telser's special services argument can explain. According to Klein and Murphy, intrabrand restraints serve as private enforcement mechanisms that supplement the imperfect remedies that the state provides through public contract law. By guaranteeing dealers a higher return, intrabrand restraints can create a future stream of income that dealers would forfeit if terminated. This stream of income serves as a sort of "performance bond" or "hostage" that manufacturers may take from a dealer who fails to meet its contractual obligations, including obligations to produce promotional services. Moreover, to induce the retailer's performance (footnote omitted)); it should be noted that Professors Sullivan and Grimes do not discuss Klein and Murphy's account of the procompetitive benefits of such restraints.

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83 See, e.g., Pitofsky, Dr. Miles, supra note 8, at 29 (characterizing as "nonsense" the claim that minimum rpm will induce dealers to provide "the right service in the right amount at the right time").

84 See supra note 66 and accompanying text (explaining that Telser's approach only purports to explain a subset of intrabrand restraints); see also Klein & Murphy, supra note 19, at 267 ("[O]ur theory of vertical restraints is shown to be applicable to any situation where it is not economical for the manufacturer to write an explicit contract with its dealers regarding some aspect of desired dealer performance." (emphasis added)).

85 See Klein & Murphy, supra note 19, at 267-28 ("[W]e assume that it is not economically feasible for a manufacturer to write an explicit, enforceable contract with a dealer for the supply of desired dealer services," and "[w]e assume that . . . an explicit contract regarding [dealer] performance cannot be made because dealer performance may be prohibitively costly to measure and to specify in a way that contractual breach and the extent of damages can be proven to the satisfaction of the court.").

86 See id. at 269-76; see also Goldberg, Retailing Services, supra note 7, at 749 (arguing that vertical restraints can be methods of providing dealers with deferred compensation that they will forfeit if terminated); Patrick J. Kaufmann & Francine Lafontaine, Costs of Control: The Source of Economic Rents for McDonald's Franchises, 37 J.L. & ECON. 417, 437-39 (1994) (relying in part on Klein and Murphy's model to interpret various aspects of the McDonald's franchise system); Andrew N. Kleit, Efficiencies Without Economists: The Early Years of Resale Price Maintenance, 59 S. ECON. J. 597, 599-600 (1993) (outlining Klein and Murphy's approaches as one possible explanation for intrabrand restraints). Notably, while Judge Posner invokes the Klein and Murphy account of distribution restraints, he does not reject the Telser account. See POSNER, supra note 7, at 172-75. Nor does he offer a defense of Telser against the Klein and Murphy critique. This Article supplies such a defense and also explains why the Telser and Klein and Murphy accounts are not mutually exclusive. See infra Part II-III.

87 See Goldberg, Retailing Services, supra note 7, at 749 ("If the privilege of continued future dealing with a particular manufacturer is a valuable asset, . . . the greater the value of that asset (the higher the rewards of dealing with this manufacturer), the more the retailer risks by acting against the manufacturer's interests or orders."); Klein, Contractual Arrangements, supra note 71, at 357; Klein & Murphy, supra note 19, at 268, 274-76 ("The potential loss of this future quasi-rent stream takes the place of a potential court-imposed sanction in assuring dealer performance."); Oliver E. Williamson, Credible Commitments: Using Hostages to Support Exchange, 73 AM. ECON. REV. 519, 519-20 (1983) [hereinafter Wil-
dealer to remain loyal, the manufacturer must tailor the restraint so as to allow the dealer to exercise a portion of the market power that the manufacturer possesses due to product differentiation.  Like Telser, then, Klein and Murphy assume that such restraints result in higher prices. But the source of the increase is not simply the cost of producing information; it also includes dealers' exercise of market power.

Of course, the mere existence of a performance bond does not encourage dealers to produce special services or, for that matter, anything else. A performance bond can only encourage a dealer to carry out those obligations that it undertakes. Under this analysis, intrabrand restraints can encourage special services only if the parties understand that the dealer must provide the particular services that the manufacturer desires. This obligation need not be enforceable in court. It may instead take the form of an implicit contract. Moreover, it is not enough that the parties subjectively understand the existence of the obligation; the manufacturer also must police and enforce a dealer's compliance. Only then will intrabrand restraints "cause" dealers to provide promotional services, just as the threat of an action for breach of contract would induce the production of such services if the legal system functioned smoothly.

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88 See Hovenkamp, supra note 1, § 1.4, at 36–37 (sketching economics of product differentiation); Klein & Murphy, supra note 19, at 274–76 (arguing that exclusive territories will not suffice to induce dealer promotion unless the territory confers market power that the dealer would forfeit after termination by the manufacturer). It should be noted that Professor Telser assumed that the special services argument would apply only to cases in which a manufacturer was selling a differentiated product and thus possessed market power. See Telser, Fair Trade I, supra note 13, at 95–96. He did not, however, argue that minimum rpm that induced special services caused dealers to price above their costs. See supra text accompanying notes 63–65 (explaining that Telser's approach does not imply that minimum rpm induces dealers to price above cost).

89 It should be noted that, under the Rule of Reason, proof that a restraint results in an exercise of market power suffices to establish a prima facie case. See Meese, Price Theory, supra note 5, at 79–80.

90 See Klein & Murphy, supra note 19, at 282.

91 See id. at 282–85.

92 See id. at 267–68; Klein, Contractual Arrangements, supra note 71, at 360.

93 See Klein & Murphy, supra note 19, at 269 (stating that use of vertical restraints as a performance bond requires the manufacturer to make a credible commitment to terminate shirking dealers).

94 Id. at 285 ("In any event, the manufacturer must always monitor dealer performance and terminate dealers who violate the implicit contractual understanding regarding the supply of promotional services."); Kleit, supra note 86, at 599 ("[U]nder the Klein and Murphy model, [i]f the retailer 'misbehaves' the manufacturer cuts off its supply of goods, thus denying the retailer the stream of RPM-induced quasi-rents."). Klein and Murphy also claim that intrabrand restraints provide dealers with a "payment" to compensate them for the provision of such services. See Klein & Murphy, supra note 19, at 285. It is not clear why such a payment is necessary. If manufacturers enforce such obligations by threatening to terminate, then all dealers will incur the cost of such obligations and include that
As noted above, Klein and Murphy purport to explain more restraints than are explained by Telser's special services argument. In particular, Klein and Murphy argue that manufacturers can employ intrabrand restraints to enforce any obligation that dealers incur, including but not limited to the obligation to provide promotional services. Indeed, the case study these scholars employ to illustrate their analysis involves a beer manufacturer's attempt to protect its goodwill by maintaining the quality of a product requiring certain forms of rotation and storage at the wholesale and retail levels. Left to their own devices, dealers may shirk these responsibilities so that other dealers and the manufacturer internalize most of the resulting harm. By conferring exclusive territories or setting a minimum price, Klein and Murphy argue, a manufacturer may create a mechanism for enforcing guidelines that govern a dealer's treatment of the product. Although such guidelines prevent a form of dealer shirking, they do not induce production of presale promotion as Telser's special services theory envisions. According to Klein and Murphy,
intrabrand restraints can be procompetitive even if the product in question does not require the provision of presale promotional services. In this sense, the "performance bond" account of intrabrand restraints actually bolsters the presumption in favor of such agreements.

While the special services and performance bond accounts of intrabrand restraints obviously conflict, they share some features as well. Both accounts take as given the boundaries of the firms employing intrabrand restraints: like price theory, both accept as an unexplained datum the manufacturer's decision to rely upon the market to distribute its goods. Neither account asks why a manufacturer might choose to rely upon the market for this purpose. Moreover, both the special services and the performance bond accounts assume that reliance upon independent dealers will result in a market failure in the form of inadequate promotional expenditures. Both accounts may also explain certain horizontal intrabrand restraints, such as a joint venture's imposition of exclusive territories on distributors. Thus, both accounts support a presumption that such restraints are procompetitive.

Finally, both accounts rest on a "planning" view of intrabrand restraints. Namely, they assume—consistent with price theory—that the manufacturer possesses the knowledge required to determine the spe-

("It is clear that these refrigeration and product rotation services do not fit the standard 'consumer free-riding' paradigm."); Telser, Fair Trade II, supra note 47, at 410 (agreeing with Klein and Murphy that the Coors example "is not a valid instance of the special service argument"); see also Kleit, supra note 86, at 598-600 (describing such shirking as involving a "vertical externality" and distinguishing this externality from the "horizontal externality" posited by Telser).

See Klein & Murphy, supra note 19, at 281 (explaining how intrabrand restraints can be part of a scheme to induce dealers to maintain product quality even where investments in quality do not constitute special services of the sort emphasized by Telser).

See Williamson, supra note 7, at 7 (discussing how neoclassical price theory often took the boundaries of the firm as a technologically determined given); Stigler, supra note 34, at 185; supra note 34 and accompanying text (explaining that the price-theoretic approach to industrial organization took as a given the boundaries of firms, determined by technological considerations); see also Telser, Fair Trade I, supra note 13, at 87 (assuming without explanation that reliance on dealers may be less costly than self-distribution).

See Meese, Quick Look, supra note 59, at 479-81 (relying upon Telser's analysis to explain horizontal intrabrand restraints).

To be sure, both the Telser and the Klein and Murphy accounts are merely "exemplifying theories"; that is, they simply establish that such restraints can or may be procompetitive in some circumstances. See generally Franklin M. Fisher, Games Economists Play: A Noncooperative View, 20 RAND J. ECON. 113, 118 (1989) ("Exemplifying theory does not tell us what must happen. Rather it tells us what can happen."). Still, subsequent empirical work suggests that a presumption in favor of vertical restraints is well justified. See Pauline M. Ippolito, Resale Price Maintenance: Economic Evidence from Litigation 76 (1988); Thomas R. Overstreet, Jr., Resale Price Maintenance: Economic Theories and Empirical Evidence 160-63 (1983); see also Telser, Fair Trade II, supra note 47, at 410 (citing Ippolito, supra).
cial services that dealers should perform. Again, Klein and Murphy's view depends upon a claim that manufacturers and dealers agree, explicitly or implicitly, that dealers must provide the promotional services that the manufacturer designates. Under this analysis, intrabrand restraints are simply one method of "supporting" an independent contractual obligation—a method indistinguishable from a performance bond or a liquidated damages provision. If contract law provided perfect and costless remedies for a dealer's breach of such obligations, no bond would be necessary.

Similarly, Telser asserts that minimum rpm helps ensure that dealers provide the services that the manufacturer envisions. In his seminal article, Telser claims that there are special services "that the manufacturer thinks necessary to sell his product." Telser also states that dealers will not provide such services unless the manufacturer sets and enforces prices sufficient to cover the services' cost. At the same time, however, Telser does not explain how manufacturers

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104 See supra note 35 and accompanying text (explaining that price theory assumed that firms and individuals could costlessly gather and transmit knowledge).

105 See Klein & Murphy, supra note 19, at 285. Klein and Murphy state: In the absence of vertical integration, the manufacturer must adopt a marketing arrangement that assures the supply by dealers of a greater level of promotional services than those dealers would voluntarily supply. The manufacturer accomplishes this by creating an implicit contractual understanding with the dealer whereby the dealer agrees to provide the desired level of promotional services in exchange for payment from the manufacturer. . . . [T]he manufacturer must always monitor dealer performance and terminate dealers who violate the implicit contractual understanding regarding the supply of promotional services.

106 It should be noted in this regard that Klein and Murphy state that "measurement problems" prevent the manufacturer and dealer from agreeing on an enforceable promotional obligation. See id. While these scholars do not elaborate on the nature of these problems, they apparently assume that the manufacturer would know what to measure, i.e., the manufacturer would know what sort of service it would want a dealer to provide. See id. Otherwise, the manufacturer would have no basis for terminating a dealer and thus depriving it of the performance bond.

107 See id. at 267; see also Williamson, supra note 7, at 168–69 (basing an analysis of "hostages" and self-enforcing agreements on the assumption that judicial enforcement of agreements is nonexistent); Klein, Contractual Arrangements, supra note 71, at 356–58 (same).

108 Telser, Fair Trade I, supra note 13, at 91 (emphasis added); see Telser, Fair Trade II, supra note 47, at 409 ("A manufacturer wants a distributor to furnish a potential customer with special services associated with the product. Typically, these are point-of-purchase sales promotions or information about the particular product."). Professor Williamson characterized Telser's approach as presuming that dealers agree to provide "specified minimum services," including advertising, in return for an intrabrand restraint. See Oliver E. Williamson, Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach, 127 U. PA. L. REV. 953, 976 (1979) [hereinafter Williamson, Vertical Market Restrictions].

109 See Telser, Fair Trade I, supra note 13, at 91–92; see also Williamson, Vertical Market Restrictions, supra note 108, at 976–78 (suggesting that intrabrand restraints accompany specified dealer obligations, including obligations to advertise).
would acquire the knowledge necessary to determine which services they desire. Nor does he explain how minimum rpm would induce dealers to produce these particular services.\footnote{110} Professor Howard Marvel, who defends Telser against Klein and Murphy, characterizes the special services approach as follows: "[O]nce attractive margins are offered through RPM, dealers will compete for those margins in ways that work to the manufacturer's interest."\footnote{111} Under this view, Marvel claims, minimum rpm is "self-monitoring."\footnote{112} However, like Telser, Marvel does not respond to the claim that minimum rpm will lead to forms of nonprice competition that the manufacturer does not desire or that dealers will simply pocket the premium that such restraints create.

Telser's discussion of possible alternatives to minimum rpm confirms his assumption that such a restraint is a method of ensuring the production of services that the manufacturer envisions. According to Telser, the chief alternative to maintained prices is a scheme whereby a manufacturer offers its product to dealers at two different prices: a low price for dealers who agree to provide the special service that the manufacturer seeks and a high price to those who decline to make such an agreement.\footnote{113} This scheme, of course, would require the manufacturer to determine in advance the precise service it wished the dealer receiving the lower price to provide and to communicate this knowledge to dealers.\footnote{114} Or, the manufacturer could "accomplish

\footnote{110} Indeed, when Klein and Murphy challenged him on this score, Telser simply repeated an assertion that minimum rpm would induce dealers to engage in the special services desired by the manufacturer:

The manufacturer may eliminate free-riding by imposing on all distributors a minimum resale price set at a level high enough to remunerate for the cost of the special services. The customer has no incentive to seek the product from another distributor at a lower price because, by hypothesis, no distributor can offer it at a price below the minimum set by the manufacturer. One distributor cannot free load on another, and each obtains an incentive to supply the special services jointly with the physical product because only in this way can they sell the product. Moreover, distributors must compete for customers by providing the special services. The conclusion is this: the minimum resale price is a means of attaining an efficient equilibrium when the circumstances for special services apply.\cite{See Telser, Fair Trade II, supra note 47, at 410 (emphasis added). Thus, Telser assumes that manufacturers will set prices at a level "high enough" to provide "the" services that the manufacturer desires. Presumably, then, the manufacturer will know the cost of the services it wishes the dealer to provide. Lastly, Telser apparently assumes that, to obtain customers, dealers will engage in nonprice competition, and that that competition will just happen to be the special services that the manufacturer desires.\cite{111}}

\footnote{111} Marvel, supra note 54, at 64–65.

\footnote{112} See id.

\footnote{113} See Telser, \textit{Fair Trade I}, supra note 13, at 93 ("Let those who agree to provide special services jointly with the product pay a lower price at the factory gate than those who do not provide the special services.").

\footnote{114} Such a scheme would be indistinguishable from a manufacturer's decision to offer two different distributorship agreements—one low-priced agreement that contains provi-
the same thing" by "paying retailers directly an amount equal to the cost of the special services they provide." However, this assumes that the manufacturer knows what services dealers should provide, as well as the costs of these services, and can therefore price them accordingly. Each alternative would require a manufacturer to monitor the behavior of its dealers to determine whether they actually provided "these requisite services."

According to Telser, each option would produce the same quantity and type of promotion as minimum rpm. Consequently, Telser argues that minimum rpm is only superior to these alternatives insofar as it may be cheaper to enforce than direct payments to dealers in return for services. Telser does not consider the costs that manufacturers would have to incur to determine what services dealers should provide. He apparently assumed that manufacturers who choose to employ minimum rpm could readily determine the exact form of promotion they desired and, if they wished, could communicate these expectations to dealers. Minimum rpm was superior only because it did not require manufacturers to monitor compliance with such expectations.

sions deterring opportunism and another high-priced agreement that allows distributors to behave as they please. See Williamson, supra note 7, at 23–29, 32–34 (contending that a potential victim of opportunism will charge its trading partner a relatively low price if the partner agrees to contractual provisions that will attenuate opportunism); Alan J. Meese, Price Theory and Vertical Restraints: A Misunderstood Relation, 45 UCLA L. Rev. 143, 187–88 (1997) [hereinafter Meese, Vertical Restraints] (noting that a manufacturer can induce a dealer to agree to intrabrand restraints by charging higher prices to dealers that decline to enter such agreements); Meese, New Institutional Economics, supra note 65, at 69–70 (suggesting that a seller can employ discounts to induce a buyer to enter a tying contract that can obviate buyer opportunism).

Telser, Fair Trade I, supra note 13, at 94.

To be sure, a manufacturer could simply promise ex post payment for all promotional expenses that a dealer could document. However, such an approach would create a moral hazard: dealers would not internalize these promotional costs and would overspend. Therefore, the manufacturer would want to limit such reimbursement to those activities that it deemed cost-beneficial.

See Telser, Fair Trade I, supra note 13, at 94 ("[The manufacturer] would need to check the performance of the retailers to be sure that they actually provide these requisite services" and would have "to survey retailers to see that they do indeed provide the special services and do not simply fritter away the direct payments."). Presumably, "requisite services" would only include those deemed necessary by the manufacturer.

See id. at 93 (concluding that a differential pricing scheme can "obtain the same result as by imposing resale price maintenance on the retailers"); id. at 94 (noting that a manufacturer can accomplish the same thing as a differential pricing scheme "by paying distributors directly" to provide services). Telser drew one possible distinction between minimum rpm and these alternatives. Minimum rpm, he said, would compensate distributors only to the extent that the special services they provided resulted in actual sales. See id. (characterizing this phenomenon as an "advantage of price maintenance").

See id.

See id. at 92–94.
Thus, Telser assumed that minimum rpm would induce the same mix of promotional services as an explicit contract governing a dealer's service obligations without explaining how minimum rpm would have this effect. Nor did he consider Klein and Murphy's subsequent suggestion that dealers might choose to engage in forms of nonprice competition that the manufacturer would not desire. Indeed, in a response to the Klein and Murphy critique, Telser simply repeated his assertion that minimum rpm would lead dealers to produce the promotional services that manufacturers desire.  

B. Dissents from the Benign Accounts

Some scholars still cling to the inhospitality tradition, disputing the claim that intrabrand restraints are generally efficient. Although these scholars center their criticisms on Telser's account, some of their criticisms apply equally to Klein and Murphy's performance bond approach. Some criticisms react to the planning assumption inherent in each approach and focus on vertical intrabrand restraints, but the critiques are equally relevant to horizontal intrabrand restraints.

To some, the Telser account imputes an unrealistic omniscience to the manufacturer by assuming that the manufacturer knows not only what type of special services a dealer should provide in local markets but also the cost of such services. As a result, some scholars argue that minimum rpm and other intrabrand restraints are tantamount to coercive central planning, albeit under the guise of private contracts. A better policy, these scholars say, would allow "the market"—unfettered choice by dealers, and not a distant administrator—to determine the level and type of promotional services as well as re-

121 See supra note 110.
122 See supra notes 37-38 and accompanying text (discussing inhospitality tradition).
123 See supra notes 28, 104 and accompanying text.
124 See, e.g., infra notes 145-46 and accompanying text (explaining that a critique based on less restrictive alternatives applies equally to horizontal restraints).
125 See, e.g., Brief for Petitioner at 54-60, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (No. 76-15); Lawrence Anthony Sullivan, Antitrust 381-82 (1977) (arguing that even if retail price maintenance results in the optimal deployment of resources to a given sector, "it could not be as sensitive to changed conditions" as unbridled rivalry); Eleanor M. Fox, The Modernization of Antitrust: A New Equilibrium, 66 Cornell L. Rev. 1140, 1184 (1981) ("The per se rule against vertical price-fixing reflects the value that sellers of goods should have the freedom to charge the price they see fit."); Pitofsky, No-Frills Case, supra note 9, at 1493 ("[A]uthorizing the manufacturer to decide what mix of products and services is desirable, instead of allowing the market to decide that question, is inconsistent with the nation's commitment to a competitive process."). This critique rests in part on a normative conception of antitrust law that values "freedom" from contractual restraint for its own sake. However, as I have demonstrated elsewhere, this "normative" approach to intrabrand restraints also relies upon purely economic (descriptive) assumptions about retail markets. See Meese, Vertical Restraints, supra note 114, at 172-84.
sale prices.\textsuperscript{126} Such an approach would ensure that those closest to the situation make promotional decisions, honoring antitrust's commitment to a "competitive process."\textsuperscript{127}

Scholars also question the Telser special services account along the lines emphasized by Klein and Murphy, arguing that there is no guarantee that minimum rpm will induce dealers to provide any promotional services; dealers may simply pocket the premium that restraints create.\textsuperscript{128} Critics further question whether dealers subject to minimum rpm will engage in nonprice competition that the manufacturer desires.\textsuperscript{129} Indeed, the former Chairman of the Federal Trade Commission, Robert Pitofsky, labeled as "nonsense" the claim that minimum rpm would induce dealers to produce the presale services "desired by the manufacturer."\textsuperscript{130} For these scholars, the failure to explain how intrabrand restraints induce dealers to produce appropriate types and quantities of promotion undermines any presumption that the restraints are procompetitive.\textsuperscript{131}

For some scholars, the absence of a contract or other provision delineating what the manufacturer expects suggests that the restraint will not induce the desired promotional services.\textsuperscript{132} After all, if manufacturers expect that intrabrand restraints will lead dealers to provide "special services," and if an intrabrand restraint cannot itself induce such services, then one might expect the parties to memorialize these

\textsuperscript{126} See Sullivan, supra note 125, at 382 (“[T]here is an extravagant arrogance on behalf of manufacturers [for them to claim] that, despite their lack of involvement and experience at the resale level, they can better identify the optimum price, scale and level of promotion ... than could dealers, involved and experienced ... and possessed of that market information.”); id. at 386 (“Manufacturer justifications have one common characteristic—they presuppose that an administered decision, a centralized decision made by the manufacturer and which governs all dealers, will in some sense be better than decisions made by dealers in the competitive marketplace.”); Flynn, supra note 8, at 1139-40, n.223; Pitofsky, Dr. Miles, supra note 8, at 29 (“If we ... permit suppliers to fix resale prices[... ] ... we would in effect be turning over to the suppliers the decision on the amounts and kinds of service that are needed. It is far better ... to leave that decision to the free market.”).

\textsuperscript{127} See Sullivan & Grimes, supra note 8, at 15-16; Flynn, supra note 8, at 1139-40; Fox, supra note 125, at 1154; Pitofsky, No-Frills Case, supra note 9, at 1493.

\textsuperscript{128} See, e.g., Sullivan & Grimes, supra note 8, at 305-06; Carstensen, supra note 8, at 606 (contending that intrabrand restraints are susceptible to cheating and therefore produce few net benefits).

\textsuperscript{129} See Pitofsky, No-Frills Case, supra note 9, at 1493.

\textsuperscript{130} See Pitofsky, Dr. Miles, supra note 8, at 29.

\textsuperscript{131} See supra notes 122-24 and accompanying text.

\textsuperscript{132} See Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 739-48 (1988) (Stevens, J., dissenting) (arguing that agreement between manufacturer and dealer to terminate another price-cutting dealer should be unlawful per se absent another legitimate purpose, such as an accompanying agreement on promotional services that the distributor should provide); Sullivan & Grimes, supra note 8, at 506 (“If a retailer chooses not to provide these amenities [desired by the manufacturer], use of a distribution restraint, unless tied to contractual commitments, will not assure any change in the retailer's performance.”).
Failure to do so could place a dealer at risk of arbitrary termination—a risk the manufacturer would find incorporated in the reduced price it could charge for its product. Thus, the absence of express provisions regarding the promotional efforts desired by the manufacturer arguably challenges a manufacturer’s claim that an intrabrand restraint is designed to overcome market failure by inducing the production of such services. Absent benefits, the logical implication is that such restraints represent an exercise of market power to the detriment of consumers.

Some scholars attack minimum rpm or exclusive territory agreements as anticompetitive, arguing that manufacturers could obtain the same level of promotion by employing methods less restrictive of rivalry between dealers. These scholars concede that reliance on dealers’ unfettered discretion will not result in an efficient level of promotional services because of the opportunistic free riding Telser has identified. This critique flows from the “planning” assumption inherent in Telser’s analysis, an assumption that Klein and Murphy embrace as well. After all, if a manufacturer knows what services it

133 Such memorialization would not necessarily create a contract plausibly enforceable in the courts. It would, however, give distributors notice of the promotional services manufacturers expect them to provide. The performance bond theory implies that a manufacturer that does not provide such guidance would suffer in the marketplace because dealers would come to fear that they may become victims of arbitrary termination.


135 See Bus. Elecs., 485 U.S. at 739 (Stevens, J., dissenting) (claiming, without citation of evidence, that vertical nonprice restraints “typically” involve dealer agreement to “certain standards in its advertising, promotion, product display, and provision of repair and maintenance services in order to protect the goodwill of the manufacturer’s product.”); id. at 740–742 (Stevens, J., dissenting) (arguing that agreement to terminate price-cutting dealer was “naked” and thus should be unlawful per se absent accompanying agreement on promotional services that the dealer should provide); see also Carstensen, supra note 8, at 591 (“The free-rider explanation for overt restraints on resale competition implies the existence of a prior commitment . . . by the reseller to provide some costly service or effort . . . . Where only [intrabrand restraints] exist, . . . the producer [presumably] has some market power, and the investments required are not substantially vulnerable to . . . opportunism.”); Rudolph J. Peritz, A Genealogy of Vertical Restraints Doctrine, 40 Hastings L.J. 511, 549–50 (1989) (endorsing Justice Stevens’ reasoning on this point). By its terms, this critique cannot apply to the Klein and Murphy account, which assumes that manufacturers inform dealers of their respective obligations.

136 See, e.g., Carstensen, supra note 8, at 591.

137 See id. at 608–09; Pitofsky, No-Frills Case, supra note 9, at 1493.

138 Id.

139 See supra notes 104–05 and accompanying text.
desires and sets a retail price accordingly, then presumably it can communicate these expectations to dealers.140

In some cases such alternatives consist simply of less onerous contractual restrictions. For example, some scholars argue that a manufacturer could assign dealers so-called “areas of primary responsibility” instead of exclusive territories, requiring dealers to make their “best efforts” in particular territories while still allowing them to sell wherever they please.141 Second, manufacturers could enter into explicit contracts requiring dealers to engage in the exact promotional services desired.142 Finally, manufacturers could produce the same or greater benefits by integrating forward into the distribution function, engaging in such promotional activities themselves.143 Scholars also suggest similar alternatives for horizontal intrabrand restraints.144 For

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140 Cf. supra notes 104–21 and accompanying text (explaining that Telser apparently assumed that a manufacturer can costlessly determine dealers’ optimal promotional strategy).

141 See, e.g., White Motor Co. v. United States, 372 U.S. 253, 272 n.12 (1963) (Brennan, J., concurring) (noting that primary responsibility clauses have been upheld in prior cases); Sullivan, supra note 125, at 408 (suggesting that a primary responsibility clause or a “mandate for specified levels of promotion” adequately protects manufacturers’ interests); Pitofsky, Joint Ventures, supra note 8, at 1621 (arguing that “primary responsibility or profit pass-over clauses” are less restrictive means of achieving the legitimate objectives of exclusive territories); Donald F. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals To Deal, 75 Harv. L. Rev. 655, 699 (1962) (arguing that legitimate objectives of exclusive territories could be achieved through “such less restrictive alternatives as a clause assigning each dealer a territory of primary responsibility which he agrees to use his best efforts to develop”).

142 See Turner, supra note 141, at 699.

143 See, e.g., Sullivan, supra note 125, at 416 (“The manufacturer can expressly require every dealer to provide whatever display, service or other facility, or whatever commitment to local promotional activity the manufacturer regards as needed.”); Sullivan & Grimes, supra note 8, at 304–05 (identifying promotional allowances, where manufacturer pays dealer to engage in services “that the producer deems most critical” as a less restrictive alternative); Pitofsky, No-Frills Case, supra note 9, at 1493 (“If a manufacturer really wants additional advertising, the common commercial practice is to contract separately for it. If a manufacturer wants a warranty program, the same solution applies.”); Pitofsky, Dr. Miles, supra note 8, at 29 (“[I]f suppliers want more advertising or more generous warranties, they and their dealers draw up a contract specifying the terms of a cooperative arrangement...”).

144 See Sullivan & Grimes, supra note 8, at 505 (identifying an example in which vertical integration operates as a less restrictive alternative); Carstensen, supra note 8, at 608 (“[T]he most plausible response [to dealer free riding] will remain that of internalizing the activity within the organization in such a way that free riding is made unfeasible by the very nature of the business organization.”); Pitofsky, Dr. Miles, supra note 8, at 29 (arguing that one alternative to minimum rpm is for “the suppliers [to] provide the services themselves”).

145 See Sullivan & Grimes, supra note 8, at 223 (endorsing less restrictive alternative test as applied to horizontal intrabrand restraints); Pitofsky, Joint Ventures, supra note 8, at 1621 (suggesting that venture partners may achieve legitimate objectives of exclusive territories via primary responsibility clauses). The enforcement agencies take a similar approach. See, e.g., Fed. Trade Comm’n & U.S. Dep’t of Justice, Antitrust Guidelines for Collaborations Among Competitors § 3.36(b) (2000) [hereinafter Antitrust Guide-
these scholars, the presence of readily available alternatives that produce the same or greater benefits suggests that intrabrand restraints—whether vertical or horizontal—are generally anticompetitive.146

Proponents of the Telser approach have responded to several of these critiques.147 Take, for example, the argument that intrabrand restraints involve undue interference in a dealer's decisionmaking and are thus analogous to impermissible central planning.148 Although intrabrand restraints do involve a manufacturer's "administration" of portions of the dealer's promotional agenda,149 such "administration" occurs daily in a capitalist economy;150 indeed, economists treat the presence of (private) "administration" as the defining characteristic of the private, capitalistic business firm.151 Formation of a firm entails the delegation of an individual's control of his labor or property to an employer, who in turn agrees to administer these resources.152 Unlike central planning, such delegation is entirely voluntary, and thus presumptively efficient.153 A fortiori, a dealer's delegation of authority over its promotional or pricing decisions to the manufacturer is no more problematic than an employee's delegation of such authority to an employer.154

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146 See Sullivan & Grimes, supra note 8, at 223, 664–67; Carstensen, supra note 8, at 606–08; Pitofsky, Dr. Miles, supra note 8, at 29.
147 Klein and Murphy have not responded to criticisms of their analysis. This is not surprising, as scholars hostile to intrabrand restraints focus their critique on Telser's special services theory. See supra notes 125–27 and accompanying text. Indeed, as noted earlier, while some scholars use portions of Klein and Murphy's analysis against Telser's approach, they do not address Klein and Murphy's assertion that intrabrand restraints are generally efficient. See generally Klein & Murphy, supra note 19, at 266–67, 295–96 (contending that intrabrand restraints are usually procompetitive).
148 See supra notes 123–25 and accompanying text.
149 See Sullivan, supra note 125, at 384–85.
152 See Cheung, supra note 151, at 5 (noting that a firm involves "a form of contract that binds the input owner to follow directions instead of determining his own course by continual reference to the market prices of a variety of activities he may perform"); R.H. Coase, The Nature of the Firm: Meaning, 4 J.L. & Econ. & Org. 19, 28–29 (1988) [hereinafter Coase, Meaning of Firm] (stating that the firm is a "special kind of contract").
153 See Coase, Nature of the Firm, supra note 151, at 390; Goldberg, Relational Perspective, supra note 150, at 107; Meese, Vertical Restraints, supra note 114, at 187.
154 Invocation of the "competitive process" begs the question of the appropriate definition of "competition." As I show elsewhere, many scholars hostile to intrabrand restraints adopt an atomistic, "technological" conception of competition that does not recognize intrabrand restraints as competitive. See Meese, Vertical Restraints, supra note 114, at 183–95 (explaining that the so-called "Populist" approach to such restraints rests upon a price-theoretic model of "competition"). By contrast, reliance upon a more modern model of
In response to the less restrictive alternatives argument, some
scholars counter that such alternatives are usually less effective than
straightforward minimum rpm or exclusive territories and cost more
to negotiate and enforce. For instance, areas of primary responsi-
bility require retailers to serve their own areas well but do not prevent
retailers from serving other areas and thus free riding on the efforts of
other dealers. Similarly, the claim that manufacturers could readily
negotiate and enforce requirements that dealers engage in particular
promotional services seems exaggerated. Such negotiations cost time
and money, and rules governing the nonenforcement of form con-
tracts make it difficult for parties to memorialize the manufacturer’s
promotional expectations. Even if parties manage to negotiate de-
tailed promotional obligations, the manufacturer would incur prohib-
itive costs in monitoring and enforcing them. Thus, these scholars
conclude, intrabrand restraints such as minimum rpm and exclusive
territories, while more restrictive of rivalry, are also more effective and

competition that recognizes the presence of market failures produces a far more hospita-
able approach to intrabrand restraints and other nonstandard contracts. See Meese, Price
Theory, supra note 5, at 170 n.328; see also Goldberg, Relational Perspective, supra note 150, at
111 (noting that a manufacturer’s experimentation with various vertical restraints involves
“the competitive process in producing competitive results”).

155 See Bork, supra note 7, at 290–91; Goldberg, Relational Perspective, supra note 150, at
110–11; Meese, Vertical Restraints, supra note 114, at 189–95.

156 See Meese, Quick Look, supra note 59, at 487 n.109.

157 At common law, dealers were bound to whatever agreement they signed, regardless
of whether they were subjectively aware of the terms. See Sanger v. Dun, 3 N.W. 388, 389
(Wis. 1879) (“It will not do for a man to enter into a contract, and, when called upon to
abide by its conditions, say that he did not read it when he signed it, or did not know what
it contained.”); RESTATEMENT (FIRST) OF CONTRACTS § 70 (1932) (articulating the “duty to
read” approach to contract interpretation). Under such a background rule, a manufac-
turer could simply create individualized service and promotional obligations by requiring
each dealer to sign a slightly different contract. More recently, however, courts have held
that, absent subjective assent, parties are bound only by those provisions of form contracts
that are within the reasonable expectations of the parties. See Weaver v. Am. Oil Co., 276
N.E. 2d 144, 148 (Ind. 1971); RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981). Even
reasonable provisions of form contracts are unenforceable unless equally applicable to par-
ties similarly situated. See RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981). As a result,
any manufacturer who wished to impose individualized promotional obligations on dealers
would have to ensure that there is evidence of each dealers’ subjective assent to the terms
of the contract. See Meese, Vertical Restraints, supra note 114, at 193–94.

158 See Bork, supra note 7, at 290-91. Bork states:

This technique [using minimum rpm or exclusive territories] is preferable
to direct payment for such effort. Direct payment may be accepted and
competed away in lower prices, again destroying the incentive of other out-
lets to provide the desired efforts. The manufacturer would have to engage
in extensive policing activities to catch such actions, and would have to ar-
gue the question of whether the efforts being made were the correct
amount.

Id.; see also Goldberg, Relational Perspective, supra note 150, at 107 (noting that “the quality
of [retailer] service is difficult to monitor”); Telser, Fair Trade I, supra note 13, at 93–95
(describing some of these enforcement costs).
less costly methods of solving market failure.\(^{159}\) As a result, the existence of such alternatives in no way supports a presumption that intrabrandon restraints are anticompetitive.\(^{160}\)

These responses are not entirely satisfactory. First and foremost, there is no obvious response to the observation that Telser's account lacks a mechanism to ensure that dealers engage in the particular forms of promotion desired by the manufacturer.\(^{161}\) Absent an explanation of exactly how intrabrandon restraints overcome free riding, one could not definitively state that such restraints "presumptively" or "usually" produce the benefits Telser claimed.\(^{162}\) Moreover, recognition that planning in a market economy often occurs within firms does not explain why planning should occur when the manufacturer has decided not to take on the distribution function itself but relied upon the market through independent dealers. Nor does it establish that most intrabrandon restraints are examples of voluntary manufacturer planning of dealer activities. The mere identification of a market failure does not ipso facto establish that the state should regulate, i.e., plan, to correct the failure. In some cases, the cure is worse than the disease.\(^{163}\) Similarly, proof that dealers will underinvest in promotion does not establish the need for manufacturer planning.\(^{164}\)

\(^{159}\) See Bork, supra note 7, at 291-97 (arguing that manufacturers can easily police intrabrandon restraints because rival dealers can readily detect cheating by fellow dealers and report it to the manufacturer); Williamson, supra note 7, at 187 (arguing that intrabrandon restraints minimize policing costs associated with a franchise system of distribution); Goldberg, Relational Perspective, supra note 150, at 111 ("[T]he franchisor who adopts more restrictive terms probably does so because he believes those terms are more efficacious."); Meese, Vertical Restraints, supra note 114, at 192-93 ("[I]t is cheaper to determine whether a dealer has sold outside its territory or below a certain price than it is to ascertain if it has failed to adhere to a complex set of guidelines governing various attributes of dealer service.").

\(^{160}\) Cf supra note 146 and accompanying text (describing assertions by some scholars that existence of less restrictive alternatives gives rise to a presumption that such restraints are anticompetitive).

\(^{161}\) See supra notes 108–12 and accompanying text (outlining this shortcoming of Telser's approach).


\(^{163}\) See Ronald H. Coase, The Regulated Industries: Discussion, 54 AM. ECON. REV. 194, 195 (1964) [hereinafter Coase, Regulated Industries] (pointing out that economists often emphasize the category of "market failure" but have no category of "government failure"); Harold Demsetz, Information and Efficiency: Another Viewpoint, 12 J.L. & ECON. 1, 2–4 (1969) (explaining the so-called nirvana fallacy, whereby advocates of regulation emphasize the failure of private markets and ignore shortcomings of government intervention).

\(^{164}\) Economists have often recognized, for instance, that identification of a market failure does not itself establish that complete integration, and pervasive planning within a single entity is justified. See Oliver E. Williamson, Why Law, Economics, and Organization? (Dec. 2000) (unpublished manuscript, on file with the Cornell Law Review) [hereinafter Williamson, Unpublished Manuscript].
Indeed, the economists who argue that intrabrand restraints are generally efficient also argue that dealers' possession of local knowledge counsels against vertical integration, that is, complete planning of the distribution function.165

Furthermore, the response to the less restrictive alternative challenge is not as strong as perceived. Initially, it is not clear that less restrictive alternatives are always less effective than intrabrand restraints. While it is true that the negotiation and policing of detailed provisions governing individual dealers' promotional duties can be more expensive than negotiation over a resale price or the extent of an exclusive territory, this need not always be the case. Manufacturers who wish to impose minimum rpm or exclusive territories presumably must generate knowledge regarding the types of promotion they wish dealers to provide and then calculate a corresponding price or territory that they will enforce. A requirement that manufacturers instead "bargain" with dealers over specific service obligations would add negligible cost because a manufacturer could document promotional expectations in a form contract. Contrary to the suggestion of Telser and others, manufacturers who impose intrabrand restraints must do more than monitor dealers' compliance with a particular price or territorial boundary; they also must prevent dealers from circumventing these restrictions.166 Creation, communication, and enforcement of specific obligations may cost no more than the communication and enforcement of a minimum price or exclusive territory.

In sum, recognition that less restrictive alternatives may be less effective fails to establish that intrabrand restraints are superior from the perspective of consumers or society. Less effective alternatives also are less restrictive of rivalry between dealers: they may produce fewer benefits than intrabrand restraints but may also produce fewer harms.167 On balance, a less restrictive alternative may well advance social welfare more than an intrabrand restraint, even if the latter is slightly more effective. Such reasoning both underpins the assertion that less restrictive alternatives are "protection enough" for the legitimate interests of a manufacturer or joint venture and supports the presumption that such restraints are anticompetitive.168

165 See Williamson, supra note 7, at 109–10.
166 See Goldberg, Relational Perspective, supra note 150, at 109–10 (explaining various steps that a manufacturer can take to prevent cheating on intrabrand restraints); Klein & Murphy, supra note 19, at 266 (explaining that dealers can circumvent minimum rpm by providing consumers with secret discounts); cf. Bork, supra note 7, at 291 (contending that such restraints are easy to monitor because other dealers will readily report instances of cheating); Telser, Fair Trade I, supra note 13, at 94 (assuming that manufacturers who employ minimum rpm need only "to police violations of minimum prices").
167 See supra notes 67–68 (outlining one possible harm of intrabrand restraints).
168 See Turner, supra note 141, at 699.
At any rate, a conclusion that intrabrand restraints advance social welfare more than less restrictive alternatives has modest consequences for antitrust doctrine. This conclusion surely rebuts any argument that intrabrand restraints are always unnecessarily restrictive and should therefore be unlawful per se.\(^{169}\) Even absent per se treatment, however, courts must analyze intrabrand restraints under the Rule of Reason, balancing the benefits and harms of the challenged restraint on a case-by-case basis.\(^{170}\) Courts and most scholars agree that once a plaintiff establishes a prima facie case, even a reasonable restraint would fail scrutiny if a less restrictive alternative would produce the same benefits.\(^{171}\) Proof that a restraint results in an exercise of market power establishes a prima facie case for purposes of Rule of Reason analysis.\(^{172}\) Neither Telser nor his defenders have offered any arguments precluding the consideration of less restrictive alternatives to intrabrand restraints in this manner.\(^{173}\)

\(^{169}\) See, e.g., Williamson, supra note 7, at 185–89 (rejecting the argument that the presence of less restrictive alternatives justifies automatic condemnation of exclusive territories); Meese, Vertical Restraints, supra note 114, at 189–95 (explaining that the purported existence of less restrictive alternatives does not justify a per se rule against such restraints). But see supra notes 34–38 and accompanying text (explaining that the inospitality tradition once led courts to declare such restraints unlawful per se); Sullivan, supra note 125, at 385–86 (relying in part on the existence of less restrictive alternatives as a rationale for per se treatment of minimum rpm).

\(^{170}\) See Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57–59 (1977) (suggesting that courts should analyze vertical restraints by balancing harms against benefits); see also, e.g., Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1019 (10th Cir. 1998) (concluding that under the Rule of Reason "the harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable") (citing 7 Phillip E. Areeda, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1502, at 372 (1986)); Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993) (under the Rule of Reason "it remains for the factfinder to weigh the harms and benefits of the challenged behavior"); Areeda, supra, ¶ 1500, at 361–64 (declaring that Rule of Reason analysis calls for balancing); Hovenkamp, supra note 1, ¶ 5.6c, at 257–58 (same).

\(^{171}\) See Law, 134 F.3d at 1019; Capital Imaging, 996 F.2d at 543; Antitrust Guidelines, supra note 145 (stating that any attempt to justify apparently anticompetitive restraint is subject to a less restrictive alternative test); Hovenkamp, supra note 1, ¶ 12.1c, at 498 (endorsing application of less restrictive alternative test as part of Rule of Reason analysis of vertical restraints).

\(^{172}\) See Law, 134 F.3d at 1020 (noting that proof that restraint produces prices different from those that previously existed established prima facie case).

\(^{173}\) At any rate, the argument that less restrictive alternatives are often less effective does not buttress Klein and Murphy's account. They assert that manufacturers communicate their expectations regarding the types of special service they wish dealers to provide. See supra notes 90–94 and accompanying text. In one sense, the performance bond account of intrabrand restraints lends itself to the claim that less restrictive alternatives may achieve the same objectives as exclusive territories or minimum rpm. If a manufacturer knows which special services it desires, then presumably it can communicate that knowledge to dealers. Of course, communication of an implicit obligation does not ensure the effective enforcement of such an undertaking. Klein and Murphy are correct that private enforcement of a dealer's obligations is often superior to reliance upon the judicial system. However, they have made no effort to explain why intrabrand restraints are superior to
More importantly, responses favoring less restrictive alternatives
do not aid scholars or jurists in choosing between the alternate benign
accounts of intrabrand restraints. Is it true that the mere existence of
minimum rpm will induce dealers to engage in the promotional activi-
ties anticipated and “desired” by the manufacturer? Or are such re-
straints indistinguishable from other types of performance bonds,
such as an initial franchise fee? Moreover, does minimum rpm truly
confer market power on dealers or do these restraints simply ensure
that dealers incur the costs necessary to promote the manufacturer's
product? While a more charitable approach to intrabrand restraints
has carried the day, no universal agreement exists regarding how such
restraints induce dealers prone to free ride to produce the promo-
tional services that the manufacturer desires.

II
A Property-Based Approach to Intrabrand Restraints

Scholars who presume that intrabrand restraints are procompeti-
tive do not agree as to how such restraints overcome a failure in the
market for distributional services. Indeed, Klein and Murphy con-
tend that intrabrand restraints do not induce dealers to produce pro-
motional services any more than would an ordinary performance
bond. Telser and his followers claim that such restraints induce deal-
ers to provide promotional services but do not explain how. At the
same time, some scholars assert that intrabrand restraints are pre-
sumptively anticompetitive even when conditions require the produc-
tion of such services. This controversy suggests the need for a fresh
analysis.

This Article explores a distinct approach that avoids the pitfalls of
either benign account of intrabrand restraints. The conclusion that
intrabrand restraints are best characterized as contracts for property
rights, unrelated to any expectation that dealers will perform particu-
lar promotional services ultimately bolsters Telser's special services ac-
count against its critics.

As explained below, manufacturers can avoid the excessive costs
of planning by relying upon independent dealers to distribute their

other private enforcement mechanisms. For instance, manufacturers could require deal-
ers to post actual performance bonds or to make investments in training or equipment
specific to the relationship. Although such mechanisms have costs, they may be less costly
than the creation and enforcement of intrabrand restraints such as a minimum rpm agree-
ment. At the same time, however, such mechanisms would involve no reduction in price
rivalry between dealers.

174 See supra Part I.A.
175 See supra notes 122–46 and accompanying text.
176 See Yoram Barzel, Economic Analysis of Property Rights 91 (2d ed. 1997) (not-
ing that vast majority of property rights are created by contract).
products. Manufacturers then delegate the authority over promotional decisionmaking to individuals with the requisite incentives and knowledge to make optimal promotional investments. Background rules of property law facilitate this process by assigning independent dealers the presumptive right to reap the fruits of their investment in promotional activity.

Still, considering the prospect of dealer free riding, these background rules do not ensure that dealers will internalize the benefits of their promotional activity. By adopting vertical intrabrand restraints, manufacturers who choose to rely upon the market—indeed dealers—to distribute their goods can better define dealer property rights. Under a property rights paradigm, parties contract solely for the intrabrand restraint. The resulting property right consists of the ability to exclude other dealers from potential customers, which a dealer locates and secures through promotional efforts. The delineation of a property right in customers provides an indirect means of creating and protecting rights in information, a valuable but fleeting resource. Privatizing information allows manufacturers to alter the institutional framework to achieve two desirable goals: a decentralized system for creating knowledge regarding optimal promotional strategies, and an atmosphere where dealers possess the incentives to pursue such strategies without fear of free-riding. Joint ventures likewise can rely upon members to distribute their goods and employ horizontal intrabrand restraints to ensure that members internalize the benefits of their promotional efforts.

A. The Vices of Planning

As noted earlier, both benign accounts take as a given the manufacturer's decision to rely upon the market to distribute its products but fails to ask why. It is therefore useful to assume for the sake of analysis that the manufacturer has taken on the task of distribution and to ask whether such self-distribution would be an optimal strategy. This analysis sheds light on the manufacturer's decision to rely on the market to distribute goods in the first place and helps explain the use of intrabrand restraints.

A firm that chooses to distribute its own goods necessarily takes on the task of planning or directing its own promotional activities.\footnote{See Cheung, supra note 151, at 10 (stating that a firm directs economic activity with a "visible hand"); Coase, Nature of the Firm, supra note 151, at 387-89 (describing how reliance on the firm to conduct economic activity involves owner's direction or planning of employee activity).}

\footnote{See id. at 3 (defining a property right over an asset as "the individual's ability, in expected terms, to consume the good (or the services of the asset) directly or to consume it indirectly through exchange" (emphasis omitted)).}

\footnote{See supra note 70 and accompanying text.}
An omniscient manufacturer would thus determine the forms of promotion each employee should provide and then communicate these expectations to its workers. The manufacturer would also monitor employee efforts, terminating those who did not comply with the manufacturer’s requirements.

Such intrafirm planning is analogous to that of a communist state, in which an omniscient central planner determines and oversees the optimal activities of each manufacturer and each dealer. In such a world, each independent dealer would function as an employee of the state and receive orders from central authorities. Indeed, many economists once believed that central planning was the best way to ensure an efficient allocation of resources. This enthusiasm for planning, while perplexing to modern economists, fit within the confines of the perfect competition model. This model, of course, was the foundation for the neoclassical price theory that dominated economic thinking and gave rise to the inhospitality approach. By adopting various unrealistic assumptions—that knowledge flows freely and costlessly between economic actors and that firms in a given industry share the same production characteristics—the model made planning appear to be a more realistic method of allocating society’s resources.

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180 See Sullivan, supra note 125, at 386, 416; Klein & Murphy, supra note 19, at 283–85 (describing how manufacturers communicate such expectations to dealers); Pitofsky, No-Frills Case, supra note 9, at 1493 (arguing that manufacturers who desire particular promotional services can contract with dealers to provide those services).

181 See Coase, Nature of the Firm, supra note 151, at 389 & n.3 (contending that planning that occurs within the firm is in principle no different from that undertaken in a communist state).


183 Cf. R.H. Coase, The Institutional Structure of Production, 82 AM. ECON. REV. 713, 715 (1992) [hereinafter Coase, Institutional Structure] (reporting Lenin’s assertion that, in a communist state, the state would run the economic system as one large factory); Coase, Nature of the Firm, supra note 151, at 394 (noting that a useful theory of the firm must explain why a single firm does not conduct all economic activity).


185 See id. (explaining the link between the perfect competition model and the enthusiasm for planning among economists in the first half of the twentieth century); R.H. Coase, The Nature of the Firm: Origin, 4 J.L. ECON. & ORG. 3, 8 (1988) (chronicling the perfect competition model and some economists’ enthusiasm for central planning); see also Hayek, The Meaning of Competition, in Economic Order, supra note 34, at 94–96 (explaining that then-contemporary economists often adopted unrealistic assumptions associated with the perfect competition model when analyzing economic problems); supra note 37 and accompanying text (describing role of price theory in creating inhospitality tradition).

186 See Machovec, supra note 184, at 52–95; Langlois, Transaction Costs, supra note 34, at 2 (“In this kingdom of [the world imagined by price theory], knowledge remains explicit and freely transmittable, and cognitive limits seldom if ever constrain.”).
The real world departs in several respects from that imagined by price theory and past devotees of central planning. Knowledge is costly to acquire. An effective planner would have to gather a vast amount of information about consumer preferences in each relevant region to determine their receptivity to various possible promotional strategies. Further, information about existing customers would not suffice; the planner also must acquire knowledge about potential or "marginal" customers, who would be the most sensitive to promotional activities.\textsuperscript{187} Even if the planner could gather this information at no cost, he could not adequately determine the appropriate forms of promotion. Such a determination would require the planner to understand the capabilities and costs of each dealer and tailor promotion plans accordingly. While price theorists once assumed that firms share the same production technologies and the same cost structure, in reality no two retailers are alike: each has unique production, human, and reputational capacities.\textsuperscript{188}

Of course, the central planner could avoid many of these costs by gathering and relying upon aggregate data regarding consumers and dealers. Specifically, a planner could adopt promotional guidelines reflecting preferences of the average consumer and dealer. However, this one-size-fits-all approach makes sense only if all consumers and dealers share the same characteristics.\textsuperscript{189} In actuality, however, the "average" or aggregate characteristics of retailers and consumers mask wide underlying variations.\textsuperscript{190} Thus, a one-size-fits-all approach would ensure an improper mix of promotional efforts by every nonaverage

\textsuperscript{187} See Gary S. Becker & Kevin M. Murphy, \textit{A Simple Theory of Advertising as a Good or Bad}, 108 Q. J. Econ. 941, 955 (1993) (noting that advertising raises demand by attracting marginal consumers who did not previously purchase the brand); Klein & Murphy, \textit{supra} note 19, at 284–85 (contending that manufacturers sometimes direct promotional efforts toward marginal customers who are sensitive to such promotion).

\textsuperscript{188} See \textit{HAYEK}, \textit{The Meaning of Competition, in Economic Order}, \textit{supra} note 34, at 101–02 (stating "[t]hat in conditions of real life the position even of any two producers is hardly ever the same" because "[a]t any given moment the equipment of a particular firm is always largely determined by historical accident, and the problem is that it should make the best use of the given equipment (including the acquired capacities of the members of its staff)" rather than "what it should do if it were given unlimited time to adjust itself to constant conditions"); F.A. Hayek, \textit{The Use of Knowledge in Society}, 35 Am. Econ. Rev. 519, 523 (1945) ("How easy it is for an inefficient manager to dissipate the differentials on which profitability rests... and that it is possible... to produce with a great variety of costs are among commonplaces of business experience which do not seem to be equally familiar in the study of the economist."); see also Langlois, \textit{Transaction Costs, supra} note 34, at 2–4 (explaining how neoclassical price theory rested on the assumption that the market contained "identical idealized" firms possessing identical production technologies); \textit{cf.} CARL KAYSEN & DONALD F. TURNER, \textit{Antitrust Policy: An Economic and Legal Analysis} 9 (1959) (assuming that "large permanent differences in economic efficiency among firms... are either nonexistent or rare").

\textsuperscript{189} See \textit{supra} note 188 and accompanying text (explaining that price theory incorrectly assumed that all firms in a particular industry share the same production function).

\textsuperscript{190} See Hayek, \textit{supra} note 188, at 524.
dealer or every average dealer serving nonaverage consumers. It may even defeat the purpose of relying upon dealers who possess knowledge about local conditions. A planner who hoped to achieve optimal results would want to determine the nature of these differences and account for them when selecting the promotion each dealer should undertake.

This account of the shortcomings of central planning illuminates similar problems with a manufacturer’s efforts to plan employees’ promotional activities. Because the manufacturer-owners hold a residual claim, a property right, to the fruits of the firm’s efforts, they have more incentive than state planners to “get things right,” particularly in a competitive market. Nonetheless, manufacturer-owners would not engage in promotion themselves but would depend on their employees to do so. Although the employees have access to localized knowledge, they lack incentive to properly gather and exploit such knowledge. Because of the absence of employee property rights, a manufacturer who desired optimal results would have to direct employees’ promotional activities. Of course, a vertically integrated manufacturer could employ incentive-based compensation mechanisms instead of simple wage contracts. As a result, employees would pursue the owners’ interests more vigorously.

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191 See Williamson, supra note 7, at 110 (suggesting that automobile manufacturers rely upon independent dealers to distribute their products because dealers possess information about local conditions not readily available to manufacturers).

192 See Hayek, supra note 188, at 524 (stating that the kind of knowledge which is necessary for central planning is “the kind which by its nature cannot enter into statistics and therefore cannot be conveyed to any central authority in statistical form.”). According to Hayek, “[t]he statistics which such a central authority would have to use would have to be arrived at precisely by abstracting from minor differences between the things, by lumping together, as resources of one kind, items which differ as regards location, quality, and other particulars . . . .” Id. Thus, “from this . . . central planning based on statistical information by its nature cannot take direct account of these circumstances of time and place,” and therefore the “central planner will have to find some way or other in which the decisions depending on them can be left to ‘the man on the spot.’”


194 See Williamson, supra note 7, at 161 (arguing that transferring activity from the market to a firm dampens incentives to innovate because employees do not realize the full benefits of their efforts).

195 Cf. Armen A. Alchian & Harold Demsetz, Production, Information Costs, and Economic Organization, 62 Am. Econ. Rev. 777, 782–83 (1972) [hereinafter Alchian & Demsetz, Economic Organization] (stating that private firms empower residual claimants to direct economic activity so as to ensure that the decisionmaker possesses appropriate incentives).

196 See Williamson, supra note 7, at 146–47.
tional decisions would result only if the employees received the entire residual product attributable to their efforts, thereby rendering them "owners" of the products in question. The best way to achieve this result is to sell the products in question to dealers, who would thereby internalize the complete benefits of their own efforts. These owners still would have to inform themselves about the preferences of actual and potential consumers as well as employees' capacities. The owner then would have to process the information and determine the promotional duties of each employee-dealer, just as a state central planner would.

At the same time, the manufacturer must respond to constant changes in the variables described above. Entry or other initiatives by competing manufacturers or dealers may alter or reveal consumer tastes. Marginal consumers may switch products, exposing a new set of consumers who have different preferences and who may be susceptible to different promotional strategies. In addition, entry by competing manufacturers may reveal new and more effective promotional strategies. Employees, individually and collectively, may acquire new capabilities. Finally, individual regions could experience an influx or outflux of consumers, and exogenous factors, such as changes in the media market, may alter the costs of various forms of promotion.

While a firm's owners could depend upon the employee-dealers to acquire and report relevant information about promotional options, so could a central planner. Indeed, like the planner, who could impose legal obligations on its citizen-employees to gather and report such knowledge, a firm could impose similar contractual obligations on its employees. Nonetheless, the imposition of these obligations would simply create another problem: the need to monitor compliance with them. Such monitoring would not be possible without some method of gathering information about employee perform-

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197 See Hayek, The Meaning of Competition, in Economic Order, supra note 34, at 101 ("[A]ll economic problems are created by unforeseen changes which require adaptation."); Hayek, supra note 188, at 524 ("[T]he economic problem of society is mainly one of rapid adaptation to changes in the particular circumstances of time and place.").

198 See Machovec, supra note 184, at 123-38 (examining the role of entry in changing or revealing consumer preferences).

199 See id. at 107-22 (discussing how free entry and competition induce firms constantly to improve their production processes).

200 See Coase, Institutional Structure, supra note 183, at 715 (recounting dictum by Lenin that the whole Russian economy "would be run as one big factory").

201 See Scott E. Masten, A Legal Basis for the Firm, 4 J.L. Econ. & Org. 181, 186 (1988) (explaining that employees are legally obligated to convey material information to employers).
ance. A firm could rely on other employees to assist in the monitoring. But, then, who would monitor the monitors? 202

Similar shortcomings would likely beset a manufacturer's attempt to engage in vertical planning of the promotional decisions of its independent dealers as envisioned by the two benign approaches described earlier. 203 Vertical planning would replace one form contract—the firm—with a dealership arrangement. 204 As the residual claimant of the firm's activities, the owner would have an incentive to "get things right." 205 On the other hand, this owner would lack the knowledge that local dealers possess. Vertical planning would require the owner to gather, process, and disseminate the same knowledge as a central planner. While theoretically possible when the cost of generating such knowledge is negligible, attempts to plan dealers' promotional activities in this manner usually involve significant costs. The same difficulties would beset a joint venture's effort to plan the promotional efforts of members who distribute its products.

B. The Property Alternative

Given the high costs of planning, be it by government or by a private manufacturer, how else might society allocate resources so as to maximize welfare? More precisely, how might society generate and utilize knowledge in a manner that maximizes society's return from existing resources? 206 The conventional answer is to establish a price mechanism. 207 This system allows for the decentralized production and utilization of information by the person "on the spot," that is, the individual most likely to possess the knowledge that society wishes to consider when making allocational decisions. 208 Indeed, for some,

202 See JUVENAL, SATIRES VI, at 347-48 ("SED QUIS CUSTODIET IPSOS CUSTODES?" or "But who would guard the guardians themselves?"); Alchian & Demsetz, Economic Organization, supra note 195, at 782.
203 See supra Part I.A.
204 See Cheung, supra note 151, at 5 (stating that the firm is one type of contract); Masten, supra note 201, at 183-94 (explaining that the firm is simply a standard set of default obligations enforced by the state).
205 See Alchian & Demsetz, Economic Organization, supra note 195, at 782-83.
206 See F.A. HAYEK, Competition as Discovery Procedure, in NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS (1978) [hereinafter HAYEK, NEW STUDIES]; HAYEK, The Meaning of Competition, in ECONOMIC ORDER, supra note 34, at 95 (stating that a society that hopes to maximize its welfare must determine "what institutional arrangements are necessary in order that the unknown persons who have knowledge specially suited to a particular task are most likely to be attracted to that task").
207 See Hayek, supra note 188, at 525-26.
208 See id. at 524-25 (declaring that the price system ensures that society utilizes information held by "the man on the spot").
Still, an injunction to rely upon the price system is a bit vague. A price system depends upon a variety of institutions, most notably private property and contract. By creating and enforcing rights and allowing individuals to trade or alter them, the state creates an institutional framework that makes the price system—the market—possible. In so doing, the state avoids the need to allocate society's divisible property and labor on a daily basis.

In a system in which property rights are well specified, individual owners who decide how to direct their labor and resources do so cognizant of the costs and benefits of their actions. Individual direction often entails cooperation with others, who consent to the use of

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209 See Cheung, supra note 151, at 10 (remarking that the use of the firm entails reliance upon the “visible hand” of planning in contrast with the “invisible hand” of the market); Coase, Nature of the Firm, supra note 151, at 389–92 (contrasting the firm and the market, and equating the former with planning and the latter with “reliance on the price mechanism”).

210 See BARZEL, supra note 176, at 11–13 (explaining that the price-theoretic perfect competition model depends upon perfect specification of property rights and costless transactions); FRIEDRICH A. HAYEK, Free Enterprise and Competitive Order, in ECONOMIC INDIVIDUALISM AND ECONOMIC ORDER 110–11 (1948) (“That a functioning market presupposes not only prevention of violence and fraud but the protection of certain rights, such as property, and the enforcement of contracts, is always taken for granted.”); Coase, Institutional Structure, supra note 183, at 717–18 (“[T]he rights which individuals possess, with their duties and privileges, will be, to a large extent, what the law determines. As a result, the legal system will have a profound effect on the working of the economic system and may in certain respects be said to control it.”); Harold Demsetz, The Exchange and Enforcement of Property Rights, 7 J.L. & ECON. 11, 18 (1964) [hereinafter Demsetz, Exchange and Enforcement] (“The institution of private property . . . is probably due in part to its great practicality in revealing the social values upon which to base solutions to scarcity problems.”); Nutter, supra note 195, at 220–24.

211 See Coase, Institutional Structure, supra note 183, at 718 (“[Legal] rights should be assigned to those who can use them most productively and with incentives . . . to discover (and maintain) such a distribution of rights . . . . [T]he costs of their transference should be low, through clarity in the law and by making the legal requirements for such transfers less onerous.”); see also Armen Alchian & Harold Demsetz, Property Right Paradigm, 33 J. ECON. HIST. 16, 20–22 (1973) [hereinafter Alchian & Demsetz, Property Right Paradigm] (arguing that the utility of property rights depends upon the deregulation of prices and elimination of other restraints on alienation).

212 See Alchian & Demsetz, Property Right Paradigm, supra note 211, at 18–20 (contrasting incentive effects of private and communal rights).

213 See id. at 19–20 (explaining that absence of property rights causes individuals to ignore the full costs and benefits of their actions); De Alessi, supra note 193, at 66 (“If transaction costs are zero, then these rights will be fully defined, fully allocated, and fully enforced. Moreover, they will be reallocated to their highest-valued use regardless of their initial assignment.” (citing R.H. Coase, The Problem of Social Cost, 3 J.L. ECON. 1 (1960)) (footnote omitted)); Harold Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. 347, 350 (1967) [hereinafter Demsetz, Property Rights] (explaining how well-defined property rights can cause property holders to internalize social costs and benefits of their actions).
their own property and labor.\textsuperscript{214} This cooperation often requires contractual modification of state-created rights or the creation of new rights.\textsuperscript{215} For instance, a trademark owner has the right to exclude rivals from using the trademark, even if these rivals can show that their products are virtually identical to those of the owner.\textsuperscript{216} However, the owner may relinquish certain rights by contract, at once licensing the mark to innumerable business partners and placing strict controls on each licensee's activities.\textsuperscript{217} In this way, the owner redefines the right to expand access to its product while retaining control over the mark and its associated image.

Property owners do not have perfect knowledge about the various possible uses of their property. Nonetheless, in a system that recognizes private property and allows parties to part with such property for a price, there is no need for any individual to possess more than a fraction of the knowledge necessary to order economic activity.\textsuperscript{218} Consider the example of a landowner attempting to decide how to dispose of some farmland. Under a system of central planning, the state would decide how to use that property and how consumers would value each potential use. The state's planner would determine the nature of the soil, local weather conditions, and what crops or livestock the land could support. The planner would also ascertain what inputs (e.g., fertilizer, pesticides, machinery, labor, and water) are necessary for each possible use as well as the capabilities of potential tenants. With this knowledge, the planner could assign value to various crops or livestock, net the cost of each input, and determine the most valuable use of the land.\textsuperscript{219} If, by contrast, land is private

\textsuperscript{214} See Barzel, supra note 176, at 33–54 (analyzing different contractual forms that parties employ to redefine property rights and facilitate cooperation).

\textsuperscript{215} See id. at 14 ("[C]ontracts that use the state's assistance to delineate and reassign ownership are central to the property rights approach."); id. at 33 ("At the heart of the study of property rights lies the study of contracts. Contracts, whether formal or informal, reallocate rights among contracting parties."); Coase, Institutional Structure, supra note 183, at 718 (discussing how background rules can maximize value of production if they allow parties to transfer and redefine property and other rights); see also Gary D. Libecap, Contracting for Property Rights 29–30 (1989) (explaining how California miners created and enforced property rights in gold-rich land nominally owned by the national government).

\textsuperscript{216} See Restatement (Third) of Unfair Competition § 20(1)(b) (1995).

\textsuperscript{217} This is the definition of business format franchising. See Kabir C. Sen, The Use of Initial Fees and Royalties in Business-format Franchising, 14 Managerial & Decision Econ. 175 (1993) (explaining this form of franchising); see also Rubin, supra note 96, at 224–25 (same).

\textsuperscript{218} See Hayek, supra note 188, at 525–26 (explaining that in a market system, "[t]he whole [of the system] acts as one market, not because any of its members survey the whole field, but because their limited individual fields of vision sufficiently overlap so that through many intermediaries the relevant information is communicated to all").

\textsuperscript{219} Similarly, a government that "owned" the airwaves could decide who gets to broadcast on which frequency, based on a prediction regarding what the person would broadcast, how much it would cost, and whether the broadcast would maximize the welfare of
property and subject to alienation, the property owner—who has every incentive to maximize the land’s sale price—would have to make one simple and straightforward determination: who is willing to pay the most for the property.\textsuperscript{220}

The fact that the landowner in our example does not obtain or use certain information does not imply that no one does. Someone has to decide how much to offer the owner for his land, and the owner presumably will choose from many competing offers. Thus, a farmer desiring to grow beans on the land has to determine the cost of cultivation and the value of the beans produced. A rancher who proposes to raise cattle needs to make a similar determination. In composing their bids, each potential owner has the incentives necessary to make a bid reflecting the best assessment of the land’s value for a particular use. Each individual relies upon localized and idiosyncratic knowledge of personal capabilities as well as the costs and (net) benefits of utilizing the property. This knowledge exceeds the practical reach of a central planner.\textsuperscript{221}

In short, even the free market and the system of private property that supports it require the generation and dissemination of a vast amount of knowledge. Still, a property system essentially delegates this task to myriad individual actors, each with the incentive to maximize property value and each reacting upon signals that other property owners produce.\textsuperscript{222} The result is a decentralized market system for producing, disseminating, and using knowledge, a system that outperforms central planning.\textsuperscript{223}

C. Property Rights and Intrabrand Restraints

Again, both benign accounts of intrabrand restraints begin with the assumption that a manufacturer has decided to rely upon the market—i.e., dealers—to distribute its goods.\textsuperscript{224} The comparison of central planning and a price system supported by property rights...
illuminates both a manufacturer's decision to rely upon dealers and the rationale for intrabrand restraints. If property rights and reliance on the price mechanism offer an antidote to the shortcomings of central planning, then perhaps property rights are superior to a regime in which manufacturers plan the activities of employees through explicit expectations regarding promotional activities.\footnote{See supra Part II.A (describing this option and its various potential shortcomings).} By creating property rights and allocating them among independent dealers, a society delegates the task of deciding how to exploit the property. At the same time, society ensures that the individuals with access to the knowledge necessary to make sound promotional decisions will have the incentives to gather and employ that knowledge.

Positive law creates such a system of property rights. Absent a collateral agreement, dealers and others who purchase products from a manufacturer possess title and control over those products.\footnote{See U.C.C. § 2-106(1) (2002) (defining "sale" of a good as involving "passing of title from the seller to the buyer for a price"); \textit{id.} § 2-403 (explaining that a "purchaser of goods acquires all title which his transferor had").} With control, dealers are free to exclude potential customers from their products unless consumers pay an agreed price. Under positive law, manufacturers who do not wish to plan the promotional activities of employee-dealers may opt for a regime of property rights under which dealers decide how, where, to whom, and at what price to promote the product.\footnote{See United States v. Arnold, Schwinn & Co., 388 U.S. 365, 377-78 (1967) (discussing common law's hostility to restraints on alienation of personal property).} As true owners of the product—that is, as claimants to the item's residual value—dealers have incentive to maximize the net benefits from product sales, thus acting as perfect agents of the manufacturer.\footnote{See Michael C. Jensen & William H. Meckling, \textit{Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure}, 3 J. Fin. Econ. 305, 308 (1976) (stating that an agent will faithfully pursue a principal's interests if the agent internalizes the full costs and benefits of his actions).} Dealers who choose the right mix of promotional activities will "capture" the most customers and realize the highest prices.\footnote{See \textit{Sullivan}, supra note 125, at 414-15 (arguing that market rivalry between dealers will produce correct investments in promotion).} Put another way, dealers will "keep what they kill."\footnote{Cf. \textit{Pierson v. Post}, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805) (establishing the rule of capture).} In contrast, employees of a vertically integrated manufacturer without such property rights possess imperfect incentives to acquire the knowledge necessary to engage in appropriate forms of promotion.\footnote{See Williamson, Unpublished Manuscript, supra note 164, at 14-15 (describing various shortcomings of complete integration, including low powered incentives, administrative controls, and relative inability to adapt to change); see also \textit{Barzel}, supra note 176, at 8-9, 52-53 (suggesting that efficiency requires parties to allocate property rights to individuals whose efforts will have the largest impact on the property's value).}
Similar considerations are said to explain a firm's decision to rely upon a franchising system. For example, an entrepreneur with an idea for a new restaurant chain could open hundreds of restaurants, owning each restaurant himself and employing everyone who works there. Employee-managers would make the day-to-day operating decisions at each restaurant. Those employees with access to information about the tastes and preferences of local consumers would not internalize the revenue (or costs) of the operation they supervise. Entrepreneurs adopting a franchise system, on the other hand, ensure that the operator of each independent franchise restaurant internalizes a large share of the costs and benefits of activities.\textsuperscript{232} By relying upon independent dealers, a manufacturer can harness the same high-powered incentives produced by the market and thus avoid the shortcomings inherent in a system of complete integration or other methods of planning dealer promotional activities.\textsuperscript{233} A joint venture can realize similar benefits by declining to distribute its output and instead relying upon its members.\textsuperscript{234} Each approach reflects economists' prediction that parties will allocate property rights to those most able to affect the property's value.\textsuperscript{235}

Decentralization is not an end in itself; it is useful only to the extent that it leaves market participants with appropriate incentives to produce valuable social goods.\textsuperscript{236} Economists once assumed that the market automatically produced an optimal allocation of resources, ignoring the prospect of opportunism and the cost of producing and transferring information.\textsuperscript{237} However, reliance on the market often comes at a cost—what economists now refer to as a "transaction cost."\textsuperscript{238} A market based upon a rule of capture may leave dealers with imperfect property rights, attenuating the benefits of a decentralized system for identifying promotional strategies. Take, for instance,

\begin{footnotes}
\item[232] See Brickley, supra note 96, at 748 (contending that franchising serves this purpose).
\item[233] See Cheung, supra note 151, at 10–13 (explaining how piece rate and market systems "clearly reveal ] productivity differentials among workers" and thus eliminate the need for extensive monitoring); Williamson, Unpublished Manuscript, supra note 164, at 14–15 (describing various shortcomings of complete integration, including low-powered incentives, administrative controls, and relative inability to adapt to change).
\item[234] See, e.g., United States v. Topco Assocs., Inc., 405 U.S. 596 (1972) (evaluating restraint ancillary to venture where members distributed the venture's product).
\item[235] See Barzel, supra note 176, at 8–9, 52–53, 78.
\item[236] See Coase, Institutional Structure, supra note 183, at 718 (opining that a well-functioning economic system requires that "rights should be assigned to those who can use them most productively and with incentives that lead them to do so" (emphasis added)). See generally Demsetz, Property Rights, supra note 213, at 356–58 (stating that decentralized land holdings may result in externalities that parties can sometimes control by contract).
\item[237] See supra note 135 and accompanying text (explaining the tendency of price theorists to assume away opportunism and information costs).
\item[238] See Williamson, supra note 7, at 20–22; Coase, Nature of the Firm, supra note 151, at 390–91
\end{footnotes}
the case of an automobile manufacturer who sells cars to all approved dealers without any contractual restraints on dealer prices or territories. A rule of capture would ensure that each dealer keeps whichever customer the dealer convinces to purchase a car. The problems with such a rule should be clear, in light of the prospect of dealer opportunism that Professor Tesler identified. That is, the efforts of one dealer may lead to the “capture” of a customer by a different dealer. A consumer could take advantage of a dealer who advertises a particular automobile, spends significant time explaining the car’s attributes, and allows the consumer to test drive it, by purchasing the vehicle from a “cut-rate” dealer across the street who provides few, if any, promotional services.

Of course, the rule of capture does not prevent a full-service dealer from selling automobiles. Having provided the consumer with the requisite product information, the dealer can match or undercut the price charged by the cut-rate dealer. Indeed, this is a rational strategy in the short run, insofar as the cost of advertising and demonstrating the car is sunk and does not enter into the dealer’s calculus when determining the car’s sale price. However, such a strategy ultimately would leave the dealer with a loss. More importantly, when deciding whether to promote a different car in the future, the putative full-service dealer must account for the possibility that it will not be able to realize a price sufficient to cover the costs of the automobile and its promotion. As a result, information regarding the attributes of the product remains a collective good: once produced, recipients may consume the good without paying for it. The result will be less promotion and fewer customers. Similar problems beset the rule of capture in other contexts in which property rights are poorly delineated.

239 See supra notes 39–47 and accompanying text.
240 See Telser, Fair Trade I, supra note 13, at 91–92.
242 See OLSON, supra note 42, at 14–15 (defining collective good).
243 See Telser, Fair Trade I, supra note 13, at 91; see also, e.g., Isaksen v. Vt. Castings, Inc., 825 F.2d 1158, 1161–62 (7th Cir. 1987) (reporting one dealer’s letter to manufacturer stating that “[t]he worst disappointment is spending a great deal of time with a customer only to lose him . . . because of price. This letter was precipitated by the loss of [three] sales of V.C. stoves today [to] people who[m] we educated [and] spent long hours with.” (second and third alterations in original)).
244 See Pierson v Post, 3 Cai. R. 175, 178–81 (N.Y. Sup. Ct. 1805) (Livingston, J., dissenting). Judge Livingston chided the majority for granting a property right to a hunter who captured a fox that a different hunter had identified:

Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for
Therefore, given the fact that promotional information is a collective good, it seems that reliance upon the price system buttressed by property rights entails significant transaction costs. Knowing that promotional investments are vulnerable to opportunistic free riding, dealers have no incentive to discover optimal promotional strategies. Consequently, reliance on a market-based system of distribution would not generate the sort of localized knowledge that could facilitate distribution of the manufacturer's product. Similar problems would beset a joint venture's reliance on individual members to distribute its product.\textsuperscript{245}

Nonetheless, goods are not collective or private in the abstract. Their status is a function of property rights.\textsuperscript{246} By altering the background structure of property rights, the state can render private what might otherwise be a public or collective good.\textsuperscript{247} Moreover, not all property rights derive from positive law; some derive from private contract, which actors use to rearrange rights the law has granted.\textsuperscript{248} No system of law precisely defines and enforces every property right that society might usefully employ. Thus, society allows individuals to create or redefine property rights by contract.\textsuperscript{249} By rearranging these

\begin{footnotesize}
        \textsuperscript{245} See, e.g., United States v. Topco Assocs., Inc., 319 F. Supp. 1031, 1040 (N.D. Ill. 1970) (finding that joint venture's reliance on unrestrained members to distribute its product would result in suboptimal promotion), rev'd on other grounds, 405 U.S. 596 (1972). \\
        \textsuperscript{246} See Coase, The Lighthouse, supra note 29, at 357, 359–60 (contending that a good's status as public or private depends upon the background definition and assignment of property rights); see also Alchian & Demsetz, Property Right Paradigm, supra note 211, at 22–25 (describing a system of property rights that can transform a communal good characterized by underproduction into a private good). \\
        \textsuperscript{247} See Coase, The Lighthouse, supra note 29, at 372–76. \\
        \textsuperscript{248} See Barzel, supra note 176, at 14. \\
        \textsuperscript{249} See Coase, Institutional Structure, supra note 183, at 717–18 (arguing that the institutional framework should minimize the cost of redefining and transferring rights to employ social resources); cf. FRIEDRICH A. HAYEK, Socialist Calculation I: The Nature and History of the Problem, in INDIVIDUALISM AND ECONOMIC ORDER 135 (1948) ("The recognition of the principle of private property does not by any means necessarily imply that the particular delimitation of the contents of this right as determined by the existing laws are the most appropriate.").
\end{footnotesize}
rights, private actors can alter the institutional structure of production and affect the ultimate allocation of resources.\textsuperscript{250}

A classic example of a contractually created property right is the covenant ancillary to the sale of a business. According to positive law, the seller has every right to compete with the purchaser immediately after the transaction of a sale. In other words, purchasers—no more than sellers—have no state-created right to particular customers for the goods or services they provide.\textsuperscript{251}

The absence of state-created rights does not reflect a social determination that such rights are useless or counterproductive. Instead, by declining to create such rights, the state avoids the cost of determining the proper scope of covenants, forcing the affected parties to set the relevant boundaries.\textsuperscript{252} Predictably, parties often create such rights by contract. For instance, sellers of a business often agree not to compete with the purchaser in a defined area for a fixed period of time after the sale.\textsuperscript{253} Courts regularly enforce such agreements, recognizing that these undertakings are necessary to create and protect the value of the business and the associated goodwill that the seller created.\textsuperscript{254} Although the restrictions reduce competitive rivalry, they

\begin{itemize}
  \item \textsuperscript{250} See Coase, \textit{Institutional Structure}, \textit{supra} note 183, at 716 (explaining that the presence or absence of transaction costs will affect the ultimate allocation of resources and that market actors can alter these costs by adopting contractual provisions and other practices); Williamson, Unpublished Manuscript, \textit{supra} note 164, at 26 (distinguishing institutional environment, or "rules of the game," created by the state, from the institutions of governance, or "play of the game," which parties can alter by contract).
  \item \textsuperscript{251} For instance, there is no common law tort of competition. See \textit{generally} \textit{Restatement (Third) of Unfair Competition} § 1 cmt. a (1995) ("The freedom to compete necessarily contemplates the probability of harm to the commercial relations of other participants in the market. . . . The freedom to compete implies a right to induce prospective customers to do business with the actor rather than with the actor's competitors."). \textit{But see} Michael J. Trebilcock, \textit{The Common Law of Restraint of Trade: A Legal and Economic Analysis} 234-35 (1986) (discussing precedents from the British Commonwealth holding that sellers may not specifically solicit former customers but may nonetheless serve them in the ordinary course of business).
  \item \textsuperscript{252} See Ian Ayres & Robert Gertner, \textit{Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules}, 99 \textit{Yale L.J.} 87, 119-27 (1989) (addressing default rules that penalize both parties for not memorializing their understanding, thus forcing the parties to bargain explicitly for what they "would have wanted").
  \item \textsuperscript{253} See, e.g., Diamond Match Co. v. Roeber, 13 N.E. 419, 423 (N.Y. 1887) (enforcing covenant by seller not to compete with purchaser in most of the United States for ninety-nine years); see also United States v. Addyston Pipe & Steel Co., 85 F. 271, 280-82 (6th Cir. 1898) (examining the common law governing such restraints).
  \item \textsuperscript{254} See, e.g., Addyston Pipe, 85 F. at 280 ("It was of importance, as an incentive to industry and honest dealing in trade, that, after a man had built up a business with an extensive good will, he should be able to sell his business and good will to the best advantage," but "he could not do so unless he could bind himself by an enforceable contract not to engage in the same business in such a way as to prevent injury to that which he was about to sell."); Diamond Match Co., 13 N.E. at 421-22 ("It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good-will of the business and the fruits of his industry upon the best terms he can obtain.").
\end{itemize}
also protect incentives to create and sell businesses in the first place. See Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 689 (1978) ("The long-run benefit of enhancing the marketability of the business itself—and thereby providing incentives to develop such an enterprise—outweighed the temporary and limited loss of competition."); see also TREBILCOCK, supra note 251, at 252 ("A restrictive covenant enables the owner of a business in effect to capitalize the benefits of expected returns from investments in goodwill ... by creating limited property rights in these assets in the purchaser that protects him from reappropriation of those assets by the vendor."); id. at 258-67 (arguing that enforcement of such restrictions generally serves the public interest).

On similar grounds, courts occasionally hold that the covenant of good faith implied in all contracts protects dealers’ expectations to serve particular areas unaffected by rivalry from the manufacturer or newly appointed dealers. See Vylene Enters. v. Naugles, Inc., 90 F.3d 1472, 1477 (9th Cir. 1996) (holding that implied covenant of good faith prevented franchisor from awarding new franchise in close proximity to franchisee); Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 727-28 (7th Cir. 1979) (finding that implied covenant of good faith prevented franchisor from opening several company-owned stores near franchisee’s location); Scheck v. Burger King Corp., 798 F. Supp. 692, 699-700 (S.D. Fla. 1992) (recognizing that the covenant of good faith and fair dealing prevents the franchisor from destroying the franchisee’s right to enjoy the benefits of the contract).

Similarly, a manufacturer who chooses to rely upon “the market” to distribute its goods need not content itself with the atomistic process implied by the rule of capture. “The market” is not an exogenous or natural entity entirely distinct from the firms or individuals employing it. To the contrary, the market can entail any number of institutional arrangements. Although positive law grants dealers a presumptive right to full dominion and control over products they purchase, the parties can alter these rights by contract, creating what appear to be new rights. For instance, a manufacturer might decide to condition the sale of its product on dealers’ agreements not to do business with certain customers. It could do so expressly by reserving certain customers for itself or for other dealers. Or it could do so indirectly by limiting the dealers’ locations or obtaining an agreement from dealers not to sell purchased products outside a certain defined area. Finally, the manufacturer could set a price below which dealers could not charge and enforce the price floor against price cut-
Similar logic also explains horizontal intrabrand restraints, as when a joint venture imposes such restraints on members who distribute its products.  

Vertical intrabrand restraints create and define new property rights, especially the property right to exploit customers that a dealer or other distributor has “found.” By redefining property rights, manufacturers can reduce the cost of relying upon the market and, ironically, more closely replicate the results produced by the “perfect” market that economists once took for granted.  

One method—the reservation of customers—does so expressly. Exclusive territories and location clauses, for example, rely upon the realities of time and space to increase the probability that dealers will receive the patronage of the customers they convince to purchase the manufacturer’s product. A price floor ensures that dealers who produce information useful to consumers do not lose the customers to dealers who refuse to incur the cost of promotion. Just as a mandatory price ceiling would prevent dealers from recouping their investments in ancillary goods and services, unbridled rivalry would drive prices so low that dealers could not recoup their investments in information.  

A price floor protects these investments by attenuating such rivalry, perfecting dealers’ incentives to identify and pursue optimal promotional strategies. Similarly, horizontal restraints can grant property rights to members of a joint venture who distribute the venture’s product. A few scholars have suggested such a characterization of these restraints, without developing its implications.

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263 See Coase, supra note 33, at 67–68 (arguing that nonstandard contracts and other practices are often “a necessary element in bringing about a competitive situation”); Williamson, supra note 7, at 27 (suggesting that nonstandard contracts can be used to redefine property rights to ensure that the “residual rights to control [are] placed in the hands of those who can use [the] rights most productively”); see also Barzel, supra note 176, at 11–13 (explaining that price theory’s model of perfect competition, which assumed away information and bargaining costs, rested on assumption that property rights are perfectly specified).

264 See Barzel, supra note 176, at 28–29 (explaining that price ceilings on gasoline prevented dealers from charging gasoline prices that covered the cost of related services such as service attendants).

265 See, e.g., Topco, 405 U.S. at 600–06.

266 Professor Williamson previously suggested that “nonstandard” contracts are means of “[r]edefining property rights” to place control over assets “in the hands of those who can use those rights most productively.” Williamson, supra note 7, at 27. He does not, however, mention the property rights approach in connection with intrabrand restraints. Indeed, in prior work, he indicated that intrabrand restraints can accompany obligations to provide particular collateral services, including advertising. See, e.g., Williamson, Vertical Market Restrictions, supra note 108, at 976. Moreover, Judge Bork suggested that minimum
None of these mechanisms results in perfect specification of property rights in consumers or, more importantly, information. A dealer restricted to a single location can nonetheless sell to any customer who shows up there.\footnote{See, e.g., Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc., 889 F.2d 524, 525 (4th Cir. 1989) (evaluating manufacturer policy preventing dealers from advertising outside the state and selling to customers not physically present in the store).} Moreover, a price floor cannot prevent consumers from purchasing from free-riding dealers; it can only make them indifferent about doing so. Finally, dealers can circumvent a price floor by, for instance, bundling discounted items with the main product.\footnote{See supra note 74 and accompanying text.}

Still, imperfection is no argument against a property rights interpretation of intrabrand restraints. In the real world, no property right is perfectly specified; that is, each definition leaves some room for opportunistic exploitation by others.\footnote{See Barzel, supra note 176, at 11 ("Because of the costliness of delineating and policing rights, opportunities arise for some people to capture what appears to be others' wealth."); id. at 92–93 (employing "free" salt provided by restaurants as an example of an imperfectly specified property right which could result in overconsumption by customers); Demsetz, Exchange and Enforcement, supra note 210, at 14–15 (using parking spaces as an example of such imperfectly specified rights).} Moreover, as explained below, manufacturers can take various steps to minimize exploitative behavior.\footnote{See infra notes 340–43 and accompanying text (outlining various means that manufacturers may employ to minimize dealer attempts to cheat on such restraints).} An imperfect property right is often better than no property right, and manufacturers presumably choose among various imperfect rpm may be seen as the equivalent of a contractual property right. Responding to a claim that promotional information does not constitute "output" for the purpose of social welfare calculus, Bork noted that "[c]ontract law delegates to private persons the power to create property rights because of their superior knowledge of the efficiencies to be gained in particular situations. R[pm] is best viewed as an instance of this general principle." Robert H. Bork, Resale Price Maintenance and Consumer Welfare, 77 Yale L.J. 950, 956 (1968). Bork did not elaborate on this suggestion but instead returned to his argument that promotion is a form of socially useful output, See id. at 956–58. Bork's subsequent writings on the subject do not repeat the property rights characterization or otherwise shed light on the debate between Telser et al., on the one hand, and Klein and Murphy, on the other. See, e.g., Bork, supra note 7, at 280–98, 449–50, 453–54; Robert H. Bork, Schwinn Overruled, 1977 Sup. Ct. Rev. 171, 180–82 (analyzing the economics of vertical intrabrand restraints without referring to property rights); see also Rothery Storage & Van Co. v. Atlas Van Lines Co., 792 F.2d 210, 217–23 (D.C. Cir. 1986) (Bork, J.) (examining economic impact of horizontal intrabrand restraints without invoking concept of property rights). Finally, in an introduction to an article on exclusive dealing, Professor Marvel suggests that minimum rpm may be viewed as a property right held by dealers. See Howard P. Marvel, Exclusive Dealing, 25 J.L. & Econ. 1, 2 (1982). Marvel does not, however, examine the basis for the creation and enforcement of such a right, choosing instead to examine the rationale of exclusive dealing, which he characterizes as a means of granting a property right to a manufacturer. See id. Indeed, Marvel suggests that manufacturers grant exclusive territories to "selected full service dealers," a conclusion that seems somewhat inconsistent with the argument made in this Article. See id. at 10.

See infra notes 340–43 and accompanying text.
By defining and enforcing property rights, manufacturers transform the information produced by those who distribute their products from a collective good into a good that is largely private in nature, ensuring that someone internalizes the benefits of its production. Because they internalize these benefits and the costs of promotion, dealers can act as faithful agents of the manufacturer, identifying and producing the type and amount of promotion the manufacturer would desire.

Once in possession of a property right, a dealer would determine how best to exploit the right in question, given the dealer’s unique knowledge, capabilities, and assessment of local consumers’ preferences. One automobile dealer might rely heavily on print advertising. Another might emphasize the recruitment and retention of highly trained sales people. A third might invest in a courteous and efficient service department, hoping that consumers’ experience with the department would encourage them to return to the dealer when they purchase a new vehicle. A fourth might seek an equal balance of all three methods. In an economy and society as varied as ours, each dealer would likely choose to produce a slightly different mix of promotional information, confident of reaping the rewards of such investments. A dealer’s choice would not be set in stone, as the localized knowledge driving the decisions would be in constant

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271 See Barzel, supra note 176, at 92–96 (explaining that parties often maximize their welfare by creating imperfectly defined rights, given the high cost of enforcing rights that are perfectly defined).

272 See Coase, The Lighthouse, supra note 29, at 359–60 (explaining that a good’s status as public or private depends upon the background definition and assignment of property rights); I. Trotter Hardy, Not So Different: Tangible, Intangible, Digital, and Analog Works and Their Comparison for Copyright Purposes, 26 U. Dayt on L. Rev. 211, 220–22 (2001) (contending that a good’s status as private or public depends upon existence or not of property rights in it). See also Easterbrook, Vertical Arrangements, supra note 60, at 150 n.30 (“Restricted dealing may be a beneficial response to the high cost of conveying (and establishing property rights in) information.”).

273 See Jensen & Meckling, supra note 228, at 308 (stating that agent who internalizes the costs and benefits of actions will faithfully pursue owner’s interests); see also Bork, Rule of Reason, supra note 57, at 436 (contending, without elaboration, that exclusive territories can create “an identity of interest” between the manufacturer and its dealers).

274 See Meese, Vertical Restraints, supra note 114, at 193 (pointing out that exclusive territories allow dealers to customize promotion for different customer bases).

275 See Kevin J. Arquit, Resale Price Maintenance: Consumers’ Friend or Foe?, 60 Antitrust L.J. 447, 453 (1992) (explaining that minimum rpm can induce dealers to supply postsale services).

276 One scholar sympathetic to Telser’s analysis has noted that manufacturers might prefer different promotional strategies in, for example, rural areas than in cities. See Goldberg, Relational Perspective, supra note 150, at 110–11 n.84. Like Klein and Murphy, however, Goldberg assumes that manufacturers would “combine vertical restrictions with enforcement to elicit various forms of intensive retailing effort from their dealers.” Id. at 110.
Reliance on a market system of distribution allows for more rapid and nuanced responses to these changes and lowers distribution costs.\(^\text{278}\)

Intrabrand restraints, then, may alter the institutional framework within which dealers conduct business.\(^\text{279}\) The restraints redefine dealer property rights in a manner that minimizes the transaction costs associated with relying upon a market system of distribution.\(^\text{280}\) However, these restraints need not be part of a manufacturer's efforts to plan the promotional activities of its dealers, as the two benign approaches apparently assume.\(^\text{281}\) As explained earlier, such planning would be extremely expensive because a manufacturer could not gather the knowledge required to announce and enforce promotional obligations unique to each particular dealer.\(^\text{282}\) Thus, such restraints facilitate the manufacturer's decision to reject such planning in favor of a market-based system of distribution, with its high-powered incentives and reliance on local knowledge. In the same way, horizontal intrabrand restraints can facilitate a joint venture's decision to rely upon its members to sell the venture's output. Within such a property rights regime, each dealer or venture member could decide individually how much to invest in promotion, what sort of promotion to employ, and how to respond to any changes in relevant variables.

To be sure, a single manufacturer or joint venture that is vertically integrated into distribution also possesses a property right in any information produced about its products. As a nominal matter, such a firm would be the "single owner" of the information it produced.\(^\text{283}\)

Those who embrace a price-theoretic approach to industrial organiz-

\(^\text{277}\) See supra notes 197–99 and accompanying text (explaining that data relevant to promotional decisions are constantly changing).

\(^\text{278}\) See Hayek, supra note 188, at 524–25 (showing that reliance upon decentralized price mechanism to allocate resources empowers individuals with localized knowledge to adapt rapidly to changed circumstances); see also Cheung, supra note 151, at 13–15 (illustrating how reliance on the market to allocate resources entails less direction by those negotiating the sale of goods or services).

\(^\text{279}\) See Coase, Institutional Structure, supra note 183, at 716 (explaining that many business practices are designed to lower the cost of relying upon the market to conduct economic activity).

\(^\text{280}\) See Barzel, supra note 176, at 11 ("Exchange partners may impose restrictions on one another in order to reduce the level of undesired behavior. Consequently, property rights—particularly the right to consume what appears to be one's own property—are often made subject to [contractual] constraint."); id. at 14 (explaining that many property rights are defined by contract).

\(^\text{281}\) See supra notes 104–21 and accompanying text (explaining how approaches offered by Professors Telser, Klein, and Murphy all rest on assumption that manufacturers plan or expect particular promotional services from their dealers).

\(^\text{282}\) See supra notes 187–205 and accompanying text.

tion assume that this sole owner would adopt optimal promotional strategies. Yet, contrary to the assumptions of price theory, the "firm" is not a "black box," whose employees automatically pursue the owners' interests. In the modern manufacturing corporation or joint venture, residual claimants who internalize benefits will be far removed from the local context in which promotional decisions are best made. Individuals "on the spot," however, will be employees, and thus lack the high-powered incentives that independent entrepreneurs possess. By adopting intrabrand restraints and relying upon the market to distribute goods, the manufacturer or joint venture has the best of both worlds: decentralized decisionmaking by individuals with access to local knowledge and appropriate incentives to provide effective promotion.

Such restraints naturally reduce competition, but so do other property rights, whether created by the state or contract. The law of trademark, for instance, assigns a seller an exclusive right to sell products under its brand, thus eliminating competition with others who might try to sell under the same mark without the owner's consent. Contracts ancillary to the sale of a business eliminate competition between the seller and purchaser. Nonetheless, courts enforce such

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284 See Carstensen, supra note 8, at 608–09 (contending that complete vertical integration would insure that the manufacturer internalized benefits of promotion and thus overcome free rider problem); see also supra note 33 and accompanying text (noting price-theoretic assumption that firms always pursued unitary interests).

285 See Machovec, supra note 184, at 16 (describing the firm of price theory as a roboticized calculating machine); Langlois, Contract, supra note 33, at 837 ("Since the [price-theoretic] firm is a single, indivisible unit, the traditional theory describing the 'classical' firm ignores the firm's internal contractual makeup."). One scholar argues that manufacturers or joint ventures could solve market failures by "internalizing the activity within the organization." See Carstensen, supra note 8, at 608. Such "internalization"—that is, complete vertical integration—is supposedly superior to reliance upon intrabrand restraints, which require "discretionary adherence to a contract in the face of obvious economic temptation." Id. Like price theorists, Carstensen assumes that the various participants in individual firms pursue complete unitary interests—i.e., that the interests of employees and owners never diverge. Absent this unrealistic assumption, the claim that complete vertical integration will always be superior to intrabrand restraints does not survive scrutiny.

286 See Cheung, supra note 151, at 10, 13–15 (discussing how unlike wage contracts, piece work arrangements, which closely approximate market contracting, directly reward productivity differences between laborers); Williamson, Unpublished Manuscript, supra note 164, at 14–15 (explaining that employees lack the high-intensity incentives possessed by entrepreneurs and equating "the firm" with the existence of an employment relationship).

287 See Bork, Rule of Reason, supra note 57, at 468 (arguing that areas of primary responsibility are less effective than exclusive territories because the former would require the manufacturer to centrally gather and process information regarding the optimal promotional activities of each dealer); Meese, Vertical Restraints, supra note 114, at 193 (sugesting that vertical restraints can facilitate decentralization of promotional decisions).

288 See supra note 216 and accompanying text.

289 See supra notes 253–55 and accompanying text.
restraints, so long as they are "reasonable," because they facilitate the creation of property in the first place.  

III

IMPLICATIONS

Most scholars believe that intrabrand restraints are presumptively beneficial and generally embrace Telser's theory that intrabrand restraints may prevent dealers or others who distribute products from free riding on each others' promotional efforts. Nonetheless, some scholars still cling to the inhospitality tradition, rejecting Telser's claim that intrabrand restraints usually reduce distribution costs and promote social welfare. At the same time, Klein and Murphy question Telser's account of intrabrand restraints and offer their own "performance bond" theory of such arrangements. Finally, while courts presume that some intrabrand restraints are beneficial, others are automatically or presumptively unlawful. The property rights approach of intrabrand restraints explored here ultimately bolster's Telser's account against both sets of critiques. A property account also compels rejection of antitrust doctrines, left over from the inhospitality tradition, that are hostile to such restraints.

A. Response to Critics of the Special Services Argument

The property rights approach to intrabrand restraints offers a more robust response to several critiques of Telser's account and undermines any lingering manifestations of the inhospitality tradition. For instance, consider the claim that intrabrand restraints constitute inappropriate manufacturer administration of dealers' promotional decisions. Telser's articulation of the special services rationale for intrabrand restraints would seem to rest upon a claim that manufacturers know what types of promotional services dealers should produce, the prices they should charge, or the locations where they

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290 See Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 18–19 (1979) (stating that courts should be reluctant to condemn restraints that are reasonably necessary to further intellectual property rights); see also Fred S. McChesney, Antitrust and Property (Including Intellectual): First Principles, 2000 U. Chi. Legal F. 23, 25–27 (same).

291 See supra notes 8–9; see also supra note 7 and accompanying text.

292 See supra notes 32–38 and accompanying text (describing origins of inhospitality tradition).

293 See Klein & Murphy, supra note 19, at 274–76.

294 See, e.g., Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54 (1977) ("Vertical restrictions promote intrabrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of products. These 'redeeming virtues' are implicit in every decision sustaining vertical restrictions under the rule of reason."); supra note 62 (collecting authorities holding that intrabrand restraint on price as output are unlawful per se or presumptively so).

295 See supra notes 125–27 and accompanying text.
should sell their products.\footnote{See supra notes 108–21 and accompanying text.} Similarly, Klein and Murphy’s performance bond argument depends on the contention that manufacturers determine what sorts of services dealers should provide and then terminate those dealers who do not provide them.\footnote{See Klein & Murphy, supra note 19, at 267-68.} By contrast, a property rights approach to intrabrand restraints rejects any assumption that manufacturers plan or administer dealer activities. Indeed, the whole point of a property rights approach is that manufacturers understand that they are incapable of administering dealers’ promotional decisions.

It may well be true that dealers are in a better position than manufacturers to determine what sorts of promotion to produce given their access to localized knowledge about the costs and benefits of various forms of promotion. Yet, by creating and defining property rights, intrabrand restraints avoid the pitfalls of centralized decision-making while harnessing the benefits of decentralization. A contrary approach relying on the rule of capture would undermine the enterprise of decentralization by distorting the incentives faced by dealers who seek to determine (independently) how to promote the product they have purchased.\footnote{See supra notes 225–41 and accompanying text.}

Viewed as a property right, intrabrand restraints are the antithesis of manufacturer planning. Property rights eliminate certain forms of rivalry between dealers. For instance, an exclusive territory prevents a dealer outside the territory from securing customers from another dealer’s territory. Such a restraint affects a dealer’s decisions about where to compete with other dealers of the same brand. However, this attribute does not distinguish intrabrand restraints from other forms of property, whether created by the state or by contract. All property prevents some individuals from enjoying the fruits of others’ efforts. That is the purpose of property.\footnote{See Barzel, supra note 176, at 10–11 (remarking that where property rights are imperfectly specified, some individuals will be able to capture the fruits of others’ efforts); Demsetz, Property Rights, supra note 213, at 348–53 (contending that society recognizes property rights when such rights are necessary to ensure that individuals reap the rewards of their own efforts, as against the depredations of interlopers).} The alternative—a war of all against all for whatever resources individuals can capture—would replicate the tragedy of the commons throughout society.\footnote{See Alchian & Demsetz, Property Right Paradigm, supra note 211, at 19–20 (explaining shortcomings of communal ownership system); see also N. Sec. Co. v. United States, 193 U.S. 197, 411 (1904) (Holmes, J., dissenting): I am happy to know that only a minority of my brethren adopt an interpretation of the law which in my opinion would make eternal the bellum omnium contra omnes and disintegrate society so far as it could into individual atoms. If that were [Congress’] intent I should regard calling such a law
parties create by contract.\textsuperscript{301} Courts have long recognized that contracts are not suspect merely because they eliminate rivalry that would otherwise have occurred.\textsuperscript{302} Recognition of property, including property created by contract, does not constitute improper administration in any economically meaningful sense.

A property rights interpretation of intrabrand restraints also accounts for the absence of explicit or implicit obligations that intrabrand restraints merely support. As explained earlier, some scholars and jurists consider the absence of explicit or implicit obligations damning to a manufacturer’s claim that intrabrand restraints enhance the efficiency of its distribution system.\textsuperscript{303} This critique emphasizes the failure of Telser and others to articulate how intrabrand restraints induce dealers to engage in the promotional activities that the manufacturer desires.\textsuperscript{304} The absence of an explanation may suggest that intrabrand restraints do not produce the benefits that Telser attributes to them.\textsuperscript{305} Far from suggesting anything nefarious, however, the lack of explicit obligations is entirely consistent with

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\textsuperscript{301} See \textit{Coase}, supra note 33, at 8–9 (explaining that commodity exchanges, often invoked as exemplars of perfect competition, are in fact the result of complex contracts that restrain the discretion of numerous actors); Frank H. Easterbrook, \textit{The Limits of Antitrust}, 63 Tex. L. Rev. 1, 1 (1984) (same); see also Hayek, \textit{Free Enterprise and Competitive Order, in \textit{Economic Order}}, supra note 34, at 110–11 (noting that the competitive market presupposes background rules of property, contract, and tort); Hayek, \textit{New Studies}, \textit{supra} note 206, at 190 (stating that protection of private property and “the whole aggregate of libertarian institutions of law” are necessary to support a price system).

\textsuperscript{302} See, e.g., Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 687–88 (1978) (enforcement of commercial contracts, including covenants not to compete, “enables competitive markets—indeed, a competitive economy—to function effectively”); Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918) (Brandeis, J.) ([T]he legality of an agreement or regulation cannot be determined by . . . whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

\textit{Vertial Arrangements, supra} note 60, at 156 (“Every restricted dealing arrangement is designed to influence price. It must be . . . Every argument about restricted dealing implies that the restrictions influence price. There is no such thing as a free lunch; the manufacturer can’t get the dealer to do more without increasing the dealer’s margin.”).

\textsuperscript{303} See \textit{supra} notes 132–36 and accompanying text; see also Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 739–42 (1988) (Stevens, J., dissenting) (contending that intrabrand restraint must be “ancillary” to some express obligation to provide promotional services to avoid per se condemnation); Carstensen, \textit{supra} note 8, at 591 (contending that “the freerider explanation for overt restraints on resale competition implies the existence of some prior commitment, overt or tacit, by the reseller to provide some costly service or effort in connection with the sale”).

\textsuperscript{304} See \textit{supra} note 110 and accompanying text.

\textsuperscript{305} See \textit{supra} notes 128–31 and accompanying text.
\end{footnotesize}
a property rights conception of these restraints. After all, a property right aims to facilitate delegation of economic authority to the firm or the individual with the best access to the knowledge necessary to make the decision.\footnote{306}{See discussion supra Part II.B.} Delegation avoids the need for detailed prescription of dealers’ promotional duties, thereby ensuring that dealers pursue promotional strategies that further the manufacturer’s interest. Indeed, the imposition of such precise obligations, by contract or otherwise, is the antithesis of the sort of property right posited here.\footnote{307}{The Supreme Court seems to have been moving in this direction in \emph{Business Electronics Corp.} There, the dissent argued that the lack of promotional obligations undertaken by dealers required a conclusion that an agreement to terminate a price cutter was not collateral to a legitimate purpose and thus was a “naked” restraint of trade in per se violation of the Sherman Act. \textit{See Bus. Elecs. Corp.}, 485 U.S. at 739–42 (Stevens, J., dissenting). The majority responded by noting that a restraint could be “ancillary” to a transaction of sale despite the absence of any other contractual obligations. \textit{See id.} at 729–30 n.3. The majority also argued that a requirement that manufacturers adopt explicit obligations to avoid per se treatment was perverse and that such restraints may be “inefficient” when compared with “efficient nonprice vertical restraints.” \textit{See id.} Unfortunately, the Court did not explain how such a restraint could be “efficient” without some mechanism ensuring that the remaining dealer performs the promotional services the manufacturer desires. This Article supplies the argumentation missing from the Court’s opinion and recognizes that an agreement such as that challenged in \emph{Business Electronics Corp.} could effectively assign property rights to the remaining dealer.} Omission of explicit or implicit obligations collateral to an intrabrand restraint says nothing about the social value of such restraints.

A property rights conception of intrabrand restraints also undermines the claim that less restrictive alternatives are valid substitutes for such arrangements. If, for instance, manufacturers could simply bargain with dealers and negotiate precise promotional obligations,\footnote{308}{See supra note 143 and accompanying text; Pitofsky, \emph{Dr. Miles, supra} note 8, at 29.} the bargaining, policing, and enforcement of such obligations would be costly—perhaps more costly than implementing a resale price or exclusive territory.\footnote{309}{See supra notes 157–58 and accompanying text.} Even if bargaining and enforcement cost nothing, this alternative would be inferior to the contractual specification of a property right. After all, the whole point of a property right is that the manufacturer does not know what sorts of information or how much information dealers should produce. Without this knowledge, a manufacturer cannot bargain with dealers over their promotional obligations. As a result, a requirement that manufacturers further their interests by imposing discrete promotional obligations on dealers would rest upon a mischaracterization of the (legitimate) interests that the restraints serve.\footnote{310}{See Meese, \emph{Vertical Restraints, supra} note 114, at 193 (concluding that exclusive territory is superior to manufacturer imposition of a particular service obligation because the former approach allows for “dealer-by-dealer decision making about the appropriate mix of various presale and postsale services”).} In other words, explicit bargaining over
dealers' precise promotional obligations cannot further the interest advanced by contractual property rights: creation of a decentralized process for producing and acting upon knowledge regarding optimal promotional investments. Those who rely on such bargaining incorrectly assume the existence of the very knowledge that intrabrand restraints are designed to produce.  

Similar considerations also apply to other purported contractual alternatives.  

Moreover, complete integration is a poor substitute for contractually created property rights, as it eliminates many advantages of relying upon the market to distribute products. By owning dealerships and planning the activities of individuals who work there, a manufacturer forfeits the benefits of relying upon independent dealers with strong incentives to develop promotional strategies that serve the interests of both parties.  

By defining and conferring property rights

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311 See Hayek, The Meaning of Competition, in Economic Order, supra note 34, at 92-99 (contending that price-theoretic economists assumed the widespread existence of knowledge and other conditions without asking how these conditions came about).

312 For instance, so-called "areas of primary responsibility" allow dealers to operate wherever they wish so long as they make "best efforts" within the territory assigned to them. See Turner, supra note 141, at 699. Even if bargaining over such a provision were costless, the agreement cannot advance the same interest as the exclusive territory, for two independent reasons. First, because such an approach leaves other dealers free to sell wherever they wish, a dealer will have no assurance of recapturing the benefits of promotional investments made in its area of primary responsibility. See Meese, Quick Look, supra note 59, at 487 n.109. Second, a contractual requirement that dealers make their "best efforts" within their areas of responsibility does not serve the same interest—decentralization—as a contractual property right. Someone still has to determine whether a dealer has made best efforts. No manufacturer or court can make such a determination without performing the same function that contractual property rights delegate to dealers.

Nearly four decades ago, then-Professor Bork discussed a similar response to the claim that areas of primary responsibility will produce the same efficiencies as an exclusive territory. As Bork noted, this alternative would require the manufacturer to constantly supervise and evaluate the promotional activities of each dealer—a task he considered prohibitively expensive in light of dealers' superior access to information. See Bork, Rule of Reason, supra note 57, at 468. Although Bork's argument implicitly rested upon the sort of "property rights" logic that this Article applies, he did not employ the term or seek to generalize the concept as a rationale for reliance upon the market or use of intrabrand restraints. Indeed, Bork treated the promotion produced by completely integrated firms as a perfect baseline for evaluating the promotional efforts of firms that rely upon the market. See, e.g., id. at 434-35. This assumption precludes the possibility that reliance on the market is a superior method of distribution. Moreover, Bork did not use this reasoning to respond to the planning assumptions inherent in Telser's work or Klein and Murphy's subsequent work. Bork did suggest in passing that vertical restraints could be characterized as contracts for property rights in a subsequent article. See supra note 265. However, he did not elaborate on this suggestion, see id., and the author is unaware of any subsequent work that expands on Bork's suggestion.

313 But see Coase, Nature of the Firm, supra note 151, at 394 (explaining that reliance on the firm to conduct economic activity comes with independent costs that may impel firms to rely upon markets instead).

314 See Williamson, Unpublished Manuscript, supra note 164, at 14-15 (explaining that, by transforming independent contractors into employees, complete integration dampens employee incentives and creates opportunities for shirking not present in the market-
on independent dealers, however, intrabrand restraints help manufacturers realize the best of both worlds: independent dealers willing and able to behave in an entrepreneurial fashion and appropriate incentives to ensure that these dealers internalize the full benefits of their activities. At any rate, a firm is itself a nexus of (voluntary) contracts, and complete integration does not magically transform independent dealers into automatons who singlemindedly pursue the owner's will. Thus, complete integration will not insure the optimal production of promotion.

In sum, a property rights account of intrabrand restraints explains how such contracts induce dealers or other firms to identify and execute promotional strategies that further the interest of a single manufacturer or joint venture in generating demand for its product. At the same time, a property rights approach rebuts any claim that less restrictive alternatives can serve the same objectives. These conclusions have significant implications for antitrust policy. For example, they rebut the theoretical claim that such restraints are presumptively anticompetitive. As a result, the property rights account compels the rejection of all existing per se rules against vertical or horizontal intrabrand restraints, and thus requires the Supreme Court to repudiate various precedents associated with the inhospitality tradition. That is to say, a property rights approach requires that courts analyze all intrabrand restraints under the Rule of Reason currently reserved only for some restraints.

A property rights account has other important implications for such a Rule of Reason analysis. This account weakens any claim that certain intrabrand restraints are so often anticompetitive that their

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315 One scholar suggests that intrabrand restraints are less effective than complete integration because they are susceptible of cheating and difficult to enforce. See Carstensen, supra note 8, at 606-08. As a result, he concludes that intrabrand restraints are most likely anticompetitive attempts to exercise or create market power. See id. at 608-09. If such restraints are difficult to enforce, however, it is not clear how they can be anticompetitive in any significant way.

316 See supra notes 193-202 and accompanying text.

317 See supra text accompanying note 146.

318 In particular, application of a property rights account would require the Court to overrule Monsanto Co. v. Spray-Rite Servs., 465 U.S. 752, 761 n.7 (1984) (adhering to per se rule against minimum rpm); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 342-57 (1982) (declaring maximum horizontal price fixing ancillary to a legitimate joint venture unlawful per se); United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972) (holding horizontal allocation of territories ancillary to legitimate joint venture per se unlawful); and United States v. Sealy, Inc., 388 U.S. 350, 356-57 (1967) (finding horizontal minimum price fixing ancillary to legitimate joint venture unlawful per se).

319 See supra text accompanying notes 61-62 (explaining that courts analyze some intrabrand restraints under the Rule of Reason and treat others as unlawful per se).
mere existence should suffice to establish a prima facie case.\textsuperscript{320} Although an intrabrand restraint may in some instances be anticompetitive, proof that parties entered into such an agreement is equally consistent with a procompetitive interpretation and thus cannot give rise to a presumption against it.\textsuperscript{321}

A property rights account also undermines the need to analyze such alternatives on a case-by-case basis whenever a plaintiff makes out a prima facie case and offers a less restrictive alternative.\textsuperscript{322} After all, case-by-case analysis rests on the assumption that these alternatives sometimes produce the same or similar benefits as the intrabrand restraint under challenge.\textsuperscript{323} However, such alternatives can never produce one benefit of such restraints: the delegation of decisionmaking power to the person "on the spot."\textsuperscript{324} Therefore, if a manufacturer can show that an intrabrand restraint functions as a contractually created property right, Rule of Reason analysis should end regardless of whether the plaintiff can formulate a less restrictive alternative.

B. Bolstering the Telser Approach Against the Klein and Murphy Account

A property rights account of intrabrand restraints bolsters Telser's original argument against objections that Klein and Murphy advance. Telser did not explain how an intrabrand restraint can en-
sure that dealers produce the exact promotional services the manufacturer desires.\textsuperscript{325} Klein and Murphy emphasized this omission and questioned whether intrabrand restraints can induce dealers to engage in such promotion.\textsuperscript{326} Absent an explanation from Telser, Klein and Murphy surmised a different role for intrabrand restraints: performance bonds.\textsuperscript{327} The property rights account of intrabrand restraints responds to the Klein and Murphy challenge.

A property rights perspective illuminates a manufacturer's decision to rely upon the market to distribute its products. Like price theorists, however, Telser, Klein, and Murphy ignore this question and begin with the unexplained assumption that the manufacturer exogenously chooses to rely upon the market.\textsuperscript{328} By failing to consider the rationale for this decision, these scholars have obscured the justification for intrabrand restraints.\textsuperscript{329} I do not mean to suggest that Professors Telser, Klein and Murphy embrace all of the postulates of price theory. On the contrary, these scholars have offered creative approaches that depart in numerous ways from the price-theoretic framework. Both accounts, for instance, depend upon the assumption that dealers are prone to opportunism and that manufacturers cannot control this behavior with explicit contracting.\textsuperscript{330} Nonetheless, these scholars have retained at least one habit of price theory: the assumption that the boundaries of the firm, here the manufacturer, are a given, determined by considerations exogenous to the rationale for intrabrand restraints. As a result, this Article suggests that these scholars have overlooked a powerful rationale for reliance on the market and intrabrand restraints: decentralization.

A property rights perspective explains why manufacturers choose to rely upon the market in the first place. This explanation also rebuts the claim that intrabrand restraints cannot induce the exact promotional services the manufacturer desires.\textsuperscript{331} By relying upon the market, manufacturers consciously leave the decision regarding promotional investments to independent dealers, who have a comparative advantage in acquiring the knowledge necessary to make

\begin{itemize}
\item \textsuperscript{325} See supra notes 108–12 and accompanying text.
\item \textsuperscript{326} See supra notes 74–79 and accompanying text.
\item \textsuperscript{327} See supra notes 85–92 and accompanying text.
\item \textsuperscript{328} See supra notes 70, 101 and accompanying text.
\item \textsuperscript{329} Cf. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 114–17 (1962) (explaining how relaxation of background assumptions can lead to new explanations for previously observed phenomena).
\item \textsuperscript{330} See supra notes 236–37 and accompanying text.
\item \textsuperscript{331} See Klein, Distribution Restrictions, supra note 19, at 7 n.11 (challenging the standard economic analysis of how vertical restraints operate to induce desired retailer behavior by the manufacturer); Klein & Murphy, supra note 19, at 265–67 (same).
\end{itemize}
educated promotional decisions.\textsuperscript{332} More precisely, a property rights approach suggests that reliance on the market presents two main advantages: one informational and one incentive based. By relying upon local dealers, manufacturers can decentralize decisionmaking authority to the individuals most likely to possess the knowledge necessary to make optimal decisions regarding promotion and distribution of the manufacturer’s product.\textsuperscript{333} By relying upon independent dealers, manufacturers simultaneously ensure that those who are "on the spot" have high-powered incentives to seek and to use the proper promotional strategy.\textsuperscript{334} In turn, intrabrand restraints can help manufacturers perfect dealer incentives and thus enhance the benefits of a market-based, decentralized system of distribution. The lack of any mechanisms to assure that dealers produce particular services actually enhances the value of such property rights by ensuring that dealers can rely upon their own local knowledge to pursue strategies that serve the manufacturer’s interest.\textsuperscript{335} Similar logic explains why a joint venture would depend on members bound by horizontal intrabrand restraints to distribute its product.\textsuperscript{336}

Given this account of the rationale for reliance on the market, a property rights approach rejects the basic assumption that manufacturers desire or anticipate particular types or levels of promotion. The account also rejects Klein and Murphy’s claim that an implicit contract exists between manufacturers and dealers implementing manufacturers’ expectations. Indeed, a property rights approach posits that manufacturers deliberately choose not to determine what sorts of promotion dealers should produce. This determination would be too costly because it would require manufacturers to gather unique, localized information about each dealer and its base of actual and potential consumers. Although price theorists advocate such an approach, it would be prohibitively expensive in reality.\textsuperscript{337} Like scholars who argue that bargaining over promotional obligations is a “less restrictive means” of furthering a manufacturer’s objective, Klein and

\textsuperscript{332} See David A. Butz & Andrew N. Kleit, Are Vertical Restraints Pro- or Anticompetitive? Lessons from Interstate Circuit, 44 J.L. & ECON. 131, 145–46, 155 (2001) (arguing that intrabrand restraints could enhance promotional expenditures by selected retailers without inducing promotion by others).

\textsuperscript{333} See discussion supra Part II.B.

\textsuperscript{334} See Hayek, supra note 188, at 524.

\textsuperscript{335} A property rights account explains how intrabrand restraints are “self-monitoring.” Marvel, supra note 54, at 64 (suggesting, without elaboration, that vertical intrabrand restraints are “self enforcing”). It also explains why manufacturers would want intrabrand restraints to be “self-monitoring.” See supra notes 193–202 and accompanying text.

\textsuperscript{336} See supra note 4 and accompanying text (collecting decisions evaluating restraints ancillary to such ventures).

\textsuperscript{337} See supra notes 178–92 and accompanying text (discussing shortcomings of central planning and the perfect competition model on which such planning was based).
Murphy presume the very knowledge that intrabrand restraints are designed to create.\textsuperscript{338}

To be sure, dealers can "cheat" on intrabrand restraints, as Klein and Murphy claim. A dealer who avoids detection can sell outside an assigned territory. Similarly, a dealer can circumvent minimum rpm by engaging in nonpromotional competition by, for instance, providing disguised discounts to consumers.\textsuperscript{339} Customers aware of cheating can consume the promotion produced by full-service dealers and obtain the product at what is effectively a discounted price.

The fact that a property right is susceptible to some cheating does not condemn the interpretation offered here. All property rights are imperfect in this manner. The seller of a business can evade the plain meaning of a covenant not to compete by locating just outside the radius set by the arrangement and serving customers from within that radius. A neighbor can avoid a fee simple by walking her dog very early in the morning, thereby evading detection when the animal trespasses. Finally, a driver can park in a lot marked "for customers only" without patronizing the store that owns the lot. While imperfect, each of these rights serves the interests of the parties asserting them.

Property owners can also take steps to minimize cheating. The purchaser of a business can secure a promise from the seller not to solicit certain customers or even all customers in a certain area. The property owner can put a fence around her yard or wake up early to monitor potential trespassers. The merchant can charge for parking and provide free parking to those who validate their tickets.

Manufacturers, too, can attenuate the imperfections that might beset intrabrand restraints.\textsuperscript{340} A firm that adopts an exclusive territory can also prevent dealers from soliciting orders from outside the territory.\textsuperscript{341} The firm can even require dealers to decline to serve customers who live outside their assigned territories.\textsuperscript{342} A manufacturer concerned that dealers might cheat on minimum rpm by discounting

\textsuperscript{338} See Hayek, The Meaning of Competition, in Economic Order, supra note 34, at 92–99 (explaining how price theorists assumed existence of knowledge and other conditions without inquiring into what type of economic system brought them about).

\textsuperscript{339} See Klein & Murphy, supra note 19, at 266; see also supra notes 74–75 and accompanying text (explaining how bundling and other forms of nonprice competition may undermine minimum rpm).

\textsuperscript{340} See Marvel, supra note 54, at 64 ("[W]ith a manufacturer supervising its conduct, a dealer will find it difficult to evade [rpm]."). Even Klein and Murphy argue that nonprice competition between dealers will not always eliminate the premium that intrabrand restraints create. If it did, then intrabrand restraints could not serve as performance bonds. See Klein & Murphy, supra note 19, at 278–79.

\textsuperscript{341} See Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc., 889 F.2d 524, 525 (4th Cir. 1989).

\textsuperscript{342} Cf. id. at 525–29 (upholding a provision barring dealers from selling to consumers not physically present in the store).
related products can prohibit the dealer from selling or advertising such products or maintain the prices of these products instead. In addition, a manufacturer concerned that dealers might offer overly generous warranties can assume the warranty function itself and prohibit its dealers from offering more generous warranties. By adopting these mechanisms, a manufacturer can reduce the number of alternative forms of nonprice competition available to dealers and further perfect the property right that it grants. Moreover, manufacturers need not always monitor compliance with such restraints, but may instead rely upon dealers to complain when competing dealers cheat. Joint ventures can take similar steps to perfect the property rights conferred on members that distribute their products.

Nonetheless, the mere fact that contractual property rights allow dealers to realize the benefits of optimal promotional strategies by recouping their investments in information does not mean that dealers will make such investments. Something must spur them to do so. According to Klein and Murphy, dealers who are parties to intrabrand restraints may simply choose to pocket the premium that such restraints create, without embarking on any promotional efforts. As a result, manufacturers must adopt some method of contractual control to make sure that dealers invest in the production of information.

The prospect of pocketing is more hypothetical than real. Dealers may pocket a premium created by intrabrand restraints only if they attract a significant number of customers who are willing to purchase the product at the price necessary to support the premium. While intrabrand restraints may temper intrabrand competition, they have no effect on the rivalry between the restrained dealers and dealers selling other brands. Interbrand competition—including actual or potential competition from completely integrated firms—could deprive shirking dealers of the customers necessary to support a strategy of passively pocketing the premium. Absent cooperation between different manufacturers and their dealers, such competition will likely motivate dealers to exercise their contractually protected rights to

343 See Overstreet, supra note 103, at 84–101 (providing examples of such restrictions); Goldberg, Relational Perspective, supra note 150, at 109–10 (arguing that manufacturers can limit cheating by prohibiting bundled sales); Marvel, supra note 54, at 65 n.11 (contending that manufacturers can impose advertising restrictions that deter cheating); see also Ill. Corp. Travel, Inc. v. Am. Airlines, Inc., 806 F.2d 722, 724 (7th Cir. 1986) (evaluating airline’s ban on travel agent’s advertisement of discounts from airline’s ticket prices).

344 See Klein & Murphy, supra note 19, at 266.

345 See supra text accompanying notes 85–94 (explaining Klein and Murphy’s views on this question).


347 See id. (noting that interbrand competition can discipline a dealer’s exercise of intrabrand market power).
produce information. Dealers who do not produce such information will likely find themselves losing customers to dealers who do.

Put differently, any claim that manufacturers can grant dealers a premium over the price that would otherwise prevail in the market assumes a significant number of consumers willing to pay the premium-creating price. How can dealers be sure that consumers will pay such prices, particularly given competition from other brands? Klein and Murphy's invocation of product differentiation is less an answer than an unexplained assumption.

Product differentiation—actual or perceived differences between functionally similar products—is not a preexisting, exogenous phenomenon but instead the result of a process in which intrabrand restraints play an important role. Someone must communicate product differences to potential consumers. Without this promotion, consumers will have no reason to prefer the manufacturer's product to the various products sold by the firm's competitors. Thus, Klein and Murphy's claim that dealers might pocket a premium produced by an intrabrand restraint is circular because it assumes the existence of the very promotional activities that intrabrand restraints induce dealers to perform. Dealers who hope to create a premium in the face of interbrand competition must engage in presale promotion.

It should be noted that the property rights approach does not exclude all other explanations for intrabrand restraints. As noted earlier, economists and other scholars sometimes observe intrabrand restraints imposed by manufacturers whose products do not require presale promotional services. Such restraints could reflect attempts by manufacturers or dealers to exercise market power, to the detri-

348 See Meese, Price Theory, supra note 5, at 166 n.487 (explaining that manufacturers cannot create differentiated products absent some method for communicating such differences to consumers).

349 See John Maurice Clark, Competition as a Dynamic Process 251 (1961) ("Product differentiation requires substantial selling effort in some form . . . ."); Williamson, Vertical Market Restrictions, supra note 108, at 976–77 (arguing that when potential customers lack perfect information about attributes of differentiated products, manufacturers must communicate the product's attributes to consumers).


351 Cf. Hayek, The Meaning of Competition, in Economic Order, supra note 34, at 92–99 (criticizing economists for embracing economic models that assume competitive results without asking what sort of process is necessary to produce those results in the first place); id. at 96 (explaining that mainstream economic models assume away the very activities, including activities differentiating products, that constitute useful competition in the real world).

352 See supra notes 84–100 and accompanying text; see also Marvel, supra note 54, at 80 ("Even with new theories and reinterpretation of existing efficiency explanations, not all uses of [rpm] are likely to be explicable.").
ment of consumers and society.\textsuperscript{353} Such restraints may also function as performance bonds to facilitate the enforcement of obligations unrelated to presale promotion.\textsuperscript{354} For example, a manufacturer might employ such restraints as part of an effort to ensure that dealers properly refrigerate a product or take other steps to ensure the product's quality.\textsuperscript{355} In this way, a manufacturer could prevent dealers from injuring the manufacturer's reputation by providing suboptimal quality to consumers.\textsuperscript{356}

The use of intrabrand restraints to protect a product's goodwill may be part of an effort to plan certain aspects of dealers' activities. Nevertheless, such planning differs from efforts to plan dealers' promotional activities in two ways. First, almost by definition, manufacturers are in a better position to manage the quality of their product than are individual dealers with no role in developing or manufacturing it. Second, there is no obvious property rights alternative to centralized management of product quality. While many consumers are repeat players who will purchase the manufacturer's product multiple times, nothing requires them to purchase the product from the same dealer more than a fraction of the time.\textsuperscript{357} A consumer may purchase a particular brand of beer from two or three local grocery stores, some convenience stores, liquor stores, and restaurants. Assigning dealers a property right by intrabrand restraint or otherwise will not induce dealers to take the necessary steps to protect a product's quality, since dealers with such a right still may not internalize more than a fraction of the benefits of maintaining product quality.\textsuperscript{358} These circumstances may warrant some form of planning by the manufacturer of a dealer's activities that maintain product quality.

In the end, Klein and Murphy's account of how intrabrand restraints induce presale promotion desired by a manufacturer or joint venture does not withstand careful analysis. As a result, scholars and courts attempting to discern the rationale of various intrabrand restraints may have to distinguish the different transaction costs that reliance upon the market produces. When reliance on an unrestrained market will lead to an underinvestment in presale promotion, it seems best to interpret these restraints as contractually created property

\textsuperscript{353} See supra note 79 and accompanying text.
\textsuperscript{354} See Klein & Murphy, supra note 19, at 277-82 (arguing that manufacturers might employ restraints in this manner).
\textsuperscript{355} See id. at 280-82 (arguing that Coors employed intrabrand restraints in an effort to accomplish this objective).
\textsuperscript{356} Id. at 277-82; see also Brickley, supra note 96, at 748-49 (explaining that individual franchisees may lack appropriate incentives to protect the quality of the franchise product).
\textsuperscript{357} See Brickley, supra note 96, at 748-49.
\textsuperscript{358} See supra note 173 and accompanying text.
rights, without any accompanying controls on dealers’ promotional activities. As Professor Telser claimed, intrabrand restraints induce the optimal production of promotional services, without the sort of planning he apparently implied. Where, on the other hand, reliance on the market leads to dealer shirking that affects product quality, it may make sense to interpret such restraints as performance bonds.

**Conclusion**

Manufacturers or joint ventures can avoid the costs of planning promotional activities by relying upon the market to distribute their goods. However, reliance on the market brings other costs as dealers or other distributors find themselves unable to recoup their investments in promotional activities. Intrabrand restraints may help cure this market failure by granting effective property rights over information that dealers and others produce. Far from planning the activities of dealers and others, intrabrand restraints facilitate the delegation of decisionmaking to independent firms with the knowledge and incentives necessary to develop and execute optimal promotional strategies.