Maximum Vertical Price Fixing from *Albrecht* Through *Brunswick* to *Khan*: An Antitrust Odyssey

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I. INTRODUCTION

The imposition of a maximum resale price by a manufacturer on her distributors has long received harsh judicial treatment.[1] At the same time, for many years, a majority of economists have viewed maximum vertical price fixing as a practice that is not only benign, but, indeed, one that results in an increase in consumer welfare, a primary goal of antitrust.[2] Further, maximum resale price restraints have been seen by some as not only leading to an enhancement of consumer welfare, but also as promoting every other suggested goal of antitrust policy.[3] Consequently, the Supreme Court's declaration of the per se illegality of these restraints in *Albrecht v. Herald Co.* was met by a chorus of criticism from economists and legal scholars alike.[4] But, even as many in the judiciary came to recognize the benefits of maximum vertical price fixing, its per se illegality stubbornly persisted because of the Court's reluctance to violate the precedent of previous decisions.

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1. *See* Albrecht v. Herald Co., 390 U.S. 145 (1968).

2. *See* Roger Blair & James Fesmire, *Maximum Price Fixing and the Goals of Antitrust*, 37 SYRACUSE L. REV. 43, 67-77 (1986).

3. *Id.*

4. *See, e.g.*, 3 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW 734e (1978); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 422 (1994); STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 255 (1993); F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 558 (3d ed. 1990); Roger D. Blair & David L. Kaserman, *The* Albrecht *Rule and Consumer Welfare: An Economic Analysis*, 33 U. FLA. L. REV. 461 (1981); Frank Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981); John E. Lopatka, *Stephen Breyer and Modern Antitrust Law: A Snug Fit*, 40 ANTITRUST BULL. 1 (1995); James N. Rosse, Vertical Price Fixing in Newspaper Distribution: A Per Se Rule That Makes Everyone Worse Off (May 1980) (unpublished manuscript, on file with author).

The conflict between the benefits of maximum vertical price fixing and its harsh legal treatment was aggravated further in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, where the Court introduced a requirement that a plaintiff in a private action show he has suffered an "antitrust injury" in order for his damages to be compensable.[5] "Antitrust injury" is defined as an injury that results from some anticompetitive aspect of the offending conduct.[6] The Court's clear purpose was to bring antitrust law into conformity with the goals of antitrust. The Court admonished the appellate court's holding because it "divorces antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so."[7] As a result, in the post-*Brunswick* world, courts were left to address a practice that most agreed was procompetitive (as we shall see, the anticompetitive effects detected by some were not convincing), but a practice that was nonetheless illegal. Worse, once courts determined the illegality of a defendant's seemingly procompetitive behavior, they then had to somehow find that the plaintiff was injured by some anticompetitive aspect of a procompetitive practice.

Brunswick cast in stark relief the tension between maximum price fixing's per se illegality under *Albrecht* on the one hand, and the goals of antitrust on the other, setting in motion a judicial odyssey that ended when, in *State Oil v. Khan*,[8] the Supreme Court finally corrected its error. The Court ruled that maximum vertical price fixing is no longer per se illegal, but it stopped short of declaring the practice per se legal.[9] Rather, the Court held that maximum price fixing is now subject to a rule of reason analysis.[10]

This result is a great improvement, albeit one not completely satisfying to all. Vertical maximum price fixing is a procompetitive policy that almost always leads to an increase in consumer welfare. The reversal of its per se illegality and the substitution of a rule of reason analysis is a positive result for the competitive process and for consumers.

The road from *Albrecht* to *Khan* was a long and confusing one. This Article attempts to sort out some of this confusion by portraying that long road as a successful example of the antitrust injury doctrine's ability to bring substantive antitrust law into compliance with the goals of antitrust. To this end, this Article first shows how the exist-

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5. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

6. *See id.* at 489.

7. *See id.* at 487.

8. State Oil v. Khan, 522 U.S. 3 (1997).

9. *Id.* at 22.

10. *Id.*

ence of successive monopoly provides an incentive for maximum vertical price fixing and how maximum vertical price fixing leads to an increase in consumer welfare. Second, it examines manufacturer alternatives to vertical price restraints, finding them less attractive in terms of social welfare. Third, this Article analyzes other competitive concerns raised by the *Albrecht* Court, finding them largely baseless. Next, it looks at how the prohibition of maximum vertical price fixing frustrates every one of the suggested goals of antitrust. Finally, this Article analyzes the antitrust injury doctrine and shows how its application to maximum resale price fixing forced substantive antitrust law into conformance with the goals of antitrust.

II. SUCCESSIVE MONOPOLY AND MAXIMUM VERTICAL PRICE FIXING

Let us now turn to an analysis of how vertical integration can be profitable in the presence of successive monopoly.[11] Successive monopoly occurs when a monopoly producer of some product sells it to a distributor who is the only reseller of the product to final consumers.[12] Once it is understood why successive monopolists might want to integrate, it is easy to appreciate why maximum vertical price fixing might be an attractive alternative.[13]

A. *A Single Monopolist*

First, let's examine what happens when both the production and the distribution of a product are controlled by a single monopolist. Assume that a manufacturer has obtained a patent for a product for which he is the sole producer. Because the monopolist owns a patent, the monopoly is perfectly legal, and antitrust concerns can be ignored.[14] Assume also that the manufacturer has chosen to be the only distributor of the product.[15]

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11. A full understanding of successive monopoly dates to at least Joseph J. Spengler, *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347 (1950). *See also* Fritz Machlup & Martha Taber, *Bilateral Monopoly, Successive Monopoly, and Vertical Integration*, 27 ECONOMICA 101 (1960).

12. This section draws on James Fesmire & Richard Romano, *Maximum Versus Minimum Vertical Price Fixing and Promotional Incentives: Economics, Law, and Policy*, 13 GEO. MASON L. REV. 275, 275-81 (1990).

13. *Id.* at 281.

14. Without the protection of the patent, the manufacturer might be subject to attack under section 2 of the Sherman Act.

15. Much of what follows in this section constitutes a graphical demonstration, or proof, of why successive monopoly provides an incentive for vertical integration and why maximum price fixing might be an attractive alternative. Those with an allergy to graphical analysis may read around the graphs and get the gist of the argument.

In Figure 1, *D* is the demand by consumers for the manufacturer's product and *MR* is the associated marginal revenue curve.[16] Let MC_R represent the marginal cost of retailing (distributing) the product, and let MC_P represent the marginal cost of production. For simplicity, assume both MC_P and MC_R are constant and are therefore equal to average costs.[17] Profits are maximized for the monopolist by producing and selling Q_1 units, where marginal revenue (*MR*) equals the marginal cost of production and retailing ($MR = MC_P + MC_R$).[18] Therefore, the monopolist will charge the price P_1, resulting in maximum profits equal to $(P_1 - MC)Q_1$.[19] No other combination of price and quantity can result in greater profits for the firm with these demand and cost curves.

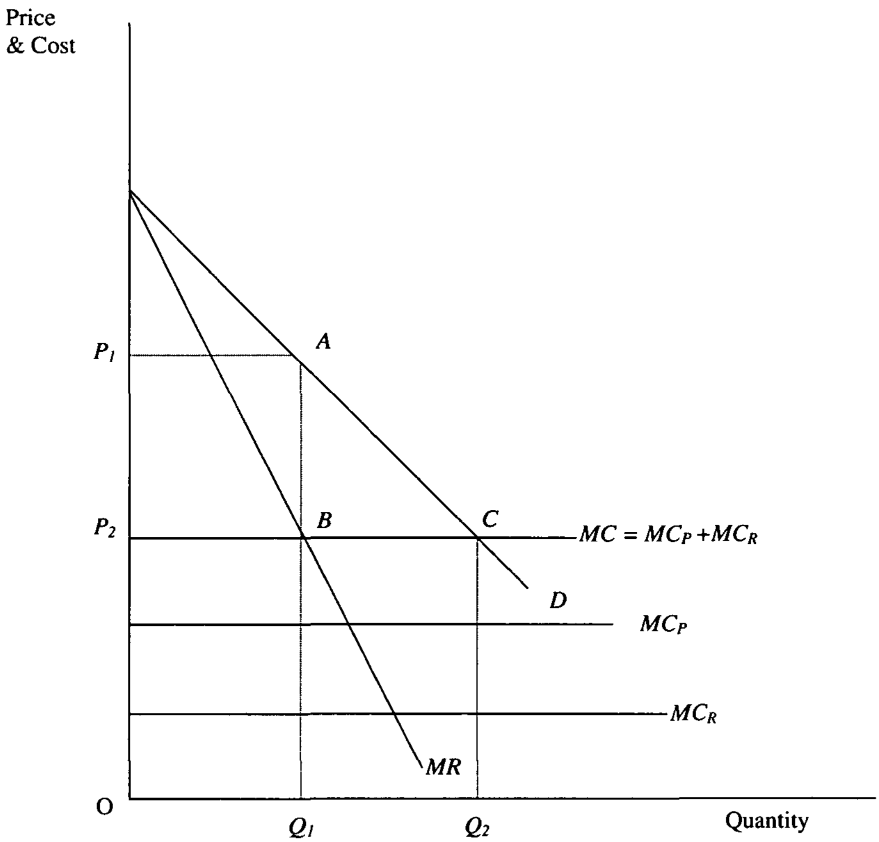
16. *See* MICHAEL PARKIN, ECONOMICS 266-77 (4th ed. 1998). Marginal revenue is the addition to total revenue that results from the sale of an additional unit of a product. *See id.* at 266. To sell more, a monopolist must lower price, implying that marginal revenue is less than that price. *See id.* This is because the additional revenue that is received when one more unit is sold at the new price is offset to some degree by the loss of revenue brought about by selling previous units for a price that is less than what they formerly commanded. In our examples, we use linear demand curves for ease of exposition. For linear demand curves, marginal revenue is also linear and falls twice as fast as the demand curve, bisecting the horizontal distance between the price axis and the demand curve.

17. *See id.* at 220-21. We assume marginal cost is constant for ease of exposition. Marginal cost is the amount added to total cost when an additional unit is produced (or distributed). *See id.* at 220. Average cost is the cost per unit of producing (or distributing) the product. *See id.* If marginal cost is greater than average cost, then average cost will rise. *See id.* at 220-21. If marginal cost is less than average cost, then average cost will fall. *See id.* If marginal cost is equal to average cost, then the average cost remains unchanged. Our results do not depend on the assumption of constant marginal costs. *See id.*

18. Marginal revenue is the amount added to total revenue by the sale of an additional unit. Marginal cost is the addition to cost from the production and distribution of an additional unit. As long as marginal revenue exceeds marginal cost, total revenue increases faster than total cost and the firm's profits rise. As soon as marginal cost exceeds marginal revenue, total cost begins to rise faster than total revenue and the firm's profits begin to fall.

19. The price of a product represents the revenue received from each unit sold. Marginal cost (equal here to average cost) represents the cost per unit sold. The difference between the firm's revenue per unit sold (P_1) and cost per unit produced (*MC*) equals the profit per unit sold. If Q_1 units are sold, then total profit is equal to $(P_1 - MC)Q_1$.

FIGURE 1



Because the monopolist has the ability to choose the price and resulting quantity of his good rather than being forced to accept some price dictated by competitive forces, there is a resulting social welfare loss. We can see this by contrasting our monopoly results with those that would occur in a competitive industry. Suppose that we do have a competitive industry, populated by many small firms, each of which is subject to exactly the same production and distribution costs as our monopolist.[20] Competition among the many small firms in such an environment would drive price to P_2, where price is equal to average and marginal cost *MC*.[21] Because price is equal to average cost, firms in this industry will earn a competitive rate of return.[22] In a competitive industry, then, the result would be a price P_2, and Q_2 units of production and consumption. With a monopolist, who faces no competition from rivals, we have seen the result would be a price P_1, and a restriction of output to Q_1.

In Figure 1, area *ABC* represents the loss in social welfare resulting from the monopolist's ability to restrict output. This loss is equal to the area between the demand curve, which measures what consumers would have been willing to pay, and the marginal cost curve, which measures the cost of the resources for the lost output $(Q_2 - Q_1)$.[23] While our concern here is with social welfare, others would argue that this loss in social welfare understates the degree of antitrust concern.[24]

20. This may not be the case. Often, larger firms experience economies of scale, which are reductions in average costs brought about by efficiencies associated with large-scale production. While economies of scale are an important consideration in other antitrust contexts, they are not relevant here because we consider smaller, competitive firms only to help illustrate what is meant by social welfare.

21. Price is equal to average cost because the existence of many rivals restricts the ability of competitive firms to raise prices. If one firm raises its price, its customers will seek out other firms, and the price-increasing firm will lose profits.

22. A competitive rate of return means that firms are earning zero economic profit. Because economists are interested in resource allocation, they include in total costs all payments required to attract and hold resources. A competitive return, including payment for his time and other resources invested in the firm, is required to keep the entrepreneur, an important resource, in the business.

23. Society becomes better off every time it produces a unit of a good that adds more in terms of benefits, measured by the price a consumer is willing to pay, than it adds in terms of cost, which measures the value of the resources required to produce the good. This is so because everyone involved can then be made better off. Conversely, if the production of goods yielding net benefits is eliminated, society's welfare is reduced by the amount of the net foregone benefits.

24. *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982). Lande argues that the primary purpose of the antitrust laws is to prevent unjust transfers of wealth from consumers to producers. *See id.* at 68-69.

B. Successive Monopolists

Now that we have examined the differences in output and welfare results in the polar cases of monopoly and competitive markets, we next turn to the case where a monopoly producer, rather than performing both the production (upstream) and the distribution (downstream) functions, grants exclusive (monopoly) territories to a system of independent distributors to whom he sells a product. This is a case of successive monopoly. As described above, the objection to monopoly arises from the loss of social welfare that results from the monopolist's restriction of output.[25] In successive monopoly, both the upstream and the downstream monopolists have an incentive to restrict output in order to bring about a higher price and greater profits, thereby compounding the problem. These successive output restrictions, one upon the other, bring about an even higher price and lower output than that which results when a single monopolist controls both the production and the retailing stages.

A monopolist who controls both production and distribution faces a straightforward problem. He chooses that price that leads consumers to buy the profit-maximizing quantity, the quantity at which marginal revenue and marginal cost are equal. In a successive monopoly, however, there are two decision variables. The retailer chooses the final price for consumers and the producer chooses the price that the retailer must pay for each unit of the product, called the "transfer price," T. It is the producer's task to choose the transfer price that will lead the retailer, in turn, to charge a final price that will generate maximum producer profits. Then, faced with the transfer price selected by the producer, the retailer chooses the final price that will maximize his profits.

In Figure 2, assume that D, MR, MC_R, and MC_P, are equivalent to those in Figure 1. Because the producer knows that the retailer will charge a final price to consumers that will maximize retailer profits, the producer's challenge is to choose the unique value of T that will induce the retailer to choose the price and the associated value of Q that will maximize the producer's profits. In order to do this, the producer must determine the retailer's demand for his product. In other words, the producer must determine the relationship between the transfer price that he charges the retailer and the quantity that the retailer will purchase.

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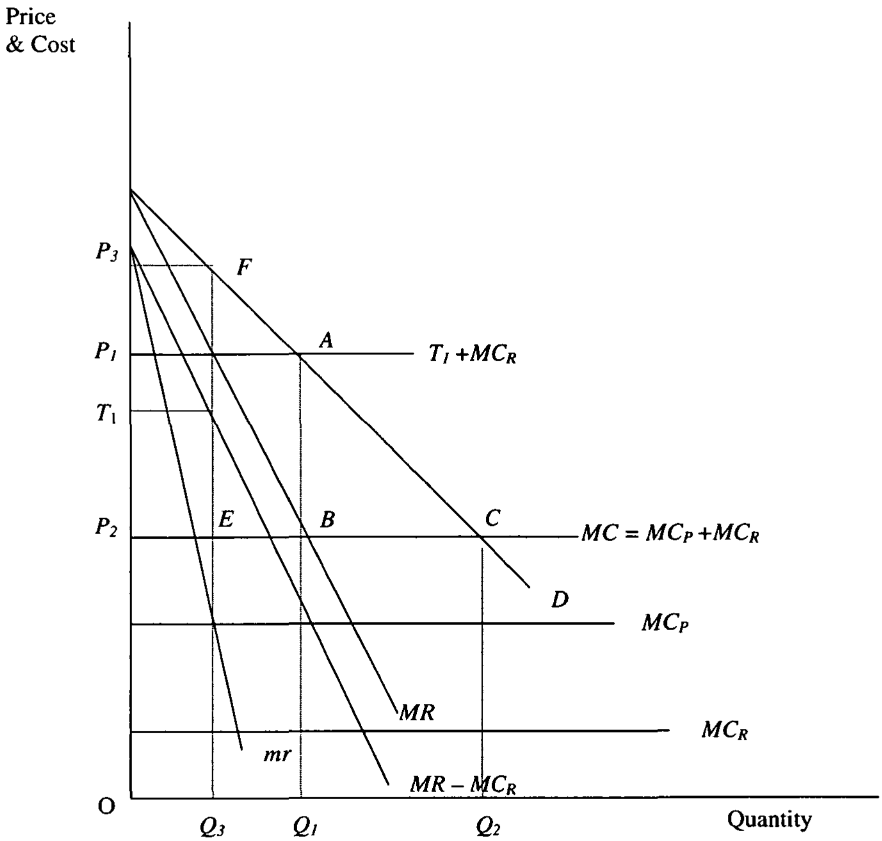
25. *See supra* notes 12-18 and accompanying text.

FIGURE 2


Price
& Cost
P_3
F
P_1
A
$T_1 + MC_R$
T_1
P_2
E
B
C
$MC = MC_P + MC_R$
D
MC_P
MR
MC_R
mr
$MR - MC_R$
O
Q_3
Q_1
Q_2
Quantity

The retailer's marginal cost of supplying an additional unit of the product is equal to $T + MC_R$, the sum of what he must pay the producer and the marginal cost of retailing. The retailer must choose the quantity that equates his marginal revenue and marginal cost in order to maximize his profits.[26] That is, the retailer must elect that quantity where $MR = T + MC_R$. Rearranging the equation, the result is that the retailer will always choose that quantity where $T = MR - MC_R$. Therefore, the producer knows that each time he chooses some transfer price, the resulting quantity sold will be determined where T is equal to $MR - MC_R$. The value of T, on the vertical axis, is related to the quantity purchased by the retailer, on the horizontal axis, by $MR - MC_R$. Thus, the demand curve by the retailer for the product sold by the producer is $MR - MC_R$ in Figure 2.

Because $MR - MC_R$ is the demand curve for the producer's product, it must have an associated marginal revenue curve indicated by *mr* in Figure 2.[27] The producer then maximizes his profits by equating his marginal revenue, *mr*, to his marginal cost, MC_P, selling the quantity Q_3. This requires the producer to charge T_1, the transfer price determined by his demand curve. Because the retailer must pay the transfer price T_1, his marginal cost becomes $T_1 + MC_R$. The retailer equates his marginal revenue and marginal cost, $MR = T_1 + MC_R$, at Q_3 units. The price that the retailer must charge his customers in order to sell Q_3 units is P_3.

We can now compare the economic results when there is a single monopolist in production and distribution with the results in a successive monopoly situation. The single monopolist maximizes his profits by equating his marginal revenue, MR, with his marginal cost, $MC_P + MC_R$, leading him to produce Q_1 units and charge consumers P_1. In the successive monopoly situation, both the upstream and the downstream monopolists have an incentive to restrict output, resulting in a lower quantity for consumers, Q_3, and a higher price, P_3.

Recall now that earlier we found that the welfare loss due to the output restriction of a single monopolist was equal to the area *ABC*. That is, the welfare loss was equal to the difference between the demand curve and the marginal cost curve ($MC_P + MC_R$) for the lost output, $Q_2 - Q_1$. By an analogous argument, we see that the social welfare loss is greater with successive monopoly, equaling *FEC*, the area between the demand curve and the marginal cost curve over the greater lost output, $Q_2 - Q_3$. A reorganization of the chain of distribu-

26. *See supra* note 18 and accompanying text.

27. *See* PARKIN, *supra* note 16 and accompanying text.

tion, replacing a single monopolist with successive monopolists, results in an additional welfare loss equal to the area *FEBA*.

Paradoxically, even though this reduction in welfare is brought about by an intensified quest for monopoly profits by two monopolists instead of just one, the replacement of a single monopolist with successive monopolists results in decreased total profits. Recall that a single monopoly led to profits equal to the area $(P_1 - P_2)Q_1$.[28] Under successive monopoly, when a producer sells Q_3 units to a retailer at a price of T_1 and the cost per unit to the producer is MC_P, he makes profits equal to $(T_1 - MC_P)Q_3$. The retailer then sells Q_3 units at a price of P_3 and his cost per unit is $T_1 + MC_R$. Therefore, the retailer's profits are equal to $(P_3 - T_1 - MC_R)Q_3$. The sum of producer profits and retailer profits equals $(P_3 - MC_R - MC_P)Q_3$, or, simplified, $(P_3 - P_2)Q_3$. An inspection of Figure 2 reveals that the sum of the profits made by the producer and the retailer under successive monopoly is less than the profits made by a single monopolist.

C. *Maximum Price Fixing*

Because the restriction of output by a downstream firm leads to reduced upstream profits, a producer might decide to take steps to curtail that restriction. One way to accomplish this would be through the imposition of a maximum price on the retailer. This would mean that the producer would take charge of both decision variables, *P* and *T*. In Figure 2, the producer could require that the retailer, as a condition of receiving his exclusive territory, charge a price no higher than P_1, the same price that would maximize the producer's profits if he were a single monopolist. At this price, consumers would purchase Q_1 units and the upstream firm would make profits equal to $(T_1 - MC_P)Q_1$, just equal to the profits the producer would make as a single monopolist.[29] Because the highest price the retailer could charge consumers, P_1, is exactly equal to his cost per unit, $T_1 + MC_R$, the retailer would adopt the ceiling price and make zero economic profits.[30]

In this successive monopoly situation, the upstream firm's imposition of a maximum price on the downstream firm results in a price reduction from P_3 to P_1 and an increase in quantity from Q_3 to Q_1. This, in turn, leads to an increase in social welfare equal to the area *FEBA*. Until *Khan*, however, maximum vertical price restraints were per se illegal.[31] If maximum vertical price fixing is illegal, what

28. *See supra* note 19.
29. *Id.*
30. *See supra* note 22 and accompanying text.
31. *See supra* notes 1-8.

options does a manufacturer have to thwart the monopoly pricing of a distributor, a practice that harms both the manufacturer and consumers?

III. ALTERNATIVES TO MAXIMUM PRICE FIXING

If viable alternatives to maximum price fixing exist, we would expect them to be utilized by manufacturers.[32] Indeed, in *Khan*, the Supreme Court observed that such alternatives had been employed, noting that "manufacturers and suppliers appear to have fashioned schemes to get around the per se rule against vertical maximum price fixing."[33] Alternative practices that lead to roughly equivalent economic outcomes without threat of antitrust liability are attractive to suppliers.[34] When suppliers are forced to forego a preferred practice and substitute one that is less attractive, however, society suffers additional costs. The reason for this is that the foregone practice is preferred either because it is more effective or because it is less costly. These additional costs reflect an unnecessary waste of resources for which society could find better uses. An examination of some alternatives to maximum price fixing will demonstrate these additional social costs.

A. *Vertical Integration*

Our analysis of successive monopoly noted that a manufacturer could increase profits and make consumers better off by integrating vertically. If firms are denied the ability to fix maximum prices legally, some will choose the integration option.[35] In fact, maximum vertical price fixing is a contractual alternative to vertical integration. A firm's choice to integrate vertically as an alternative to maximum price fixing does not imply that the result is economically equivalent for society. The manufacturer may not be an efficient distributor. The cost to the manufacturer in lost profits due to successive monopoly may lead him to vertically integrate even if the costs of distribution increase as a result. If the lost profits associated with successive monopoly are greater than the lost profits resulting from the higher costs of distribution associated with vertical integration, the manufacturer will choose vertical integration, even if it is more costly to

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32. This section draws on Roger Blair & John Lopatka, *Albrecht Overruled—At Last*, 66 ANTITRUST L.J. 537, 554-58 (1998).

33. *Khan*, 522 U.S. at 19.

34. Various alternatives are examined in depth in Roger D. Blair & Amanda K. Esquibel, *Maximum Price Restraints in Franchising*, 65 ANTITRUST L.J. 157 (1996).

35. *See* Blair & Fesmire, *supra* note 2, at 59-67.

society. Further, if firms choose to integrate vertically, independent distributors will disappear, frustrating the *Albrecht* Court's concern for the "freedom of traders," traders that will no longer exist.

B. *Dual Distribution*

If a producer is not happy with the price charged by one or more of her distributors, she can engage in *dual distribution*.[36] To do so, the producer simply begins to distribute her product in the offending, formerly exclusive, territory. By directly competing with the distributor and by charging the desired price, the producer prevents the distributor from charging a higher price. This approach to the problem necessarily results in inefficiencies.

Successive monopoly exists because the producer has granted the distributor an exclusive territory. Everything else equal, the producer would prefer that the distribution function be organized competitively. The competing distributors would force the price down to a level that would provide them with a competitive return, thereby maximizing the producer's profits.[37] The producer would not establish exclusive territories and create a successive monopoly situation for herself if distribution could be efficiently organized in a competitive market. In order for the producer to prefer exclusive territories for its distributors, there must be elements of natural monopoly—economies of scale—that render monopoly distributorships more efficient.[38] By engaging in dual distribution, the producer increases the number of distributors in an area and thereby increases the average cost of distribution, causing reduced profits. If the losses due to unexploited economies of scale are less than the profits lost due to successive monopoly pricing, the producer will engage in dual distribution. But, as is the case with vertical integration, if the producer's first choice is maximum price fixing, the resort to inefficient dual distribution comes at a cost to society in the form of wasted resources.

A producer may merely threaten to engage in dual distribution. In *Jack Walters*, for example, the producer stood ready to supply customers directly at its advertised prices.[39] This, of course, made it very difficult for the distributor to raise its price above that level. If a producer never actually has to sell directly, it will incur no added costs due to unexploited economies of scale. To make the threat credible,

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36. *See id.* at 110-11.

37. *See* ROGER D. BLAIR & DAVID L. KASERMAN, ANTITRUST ECONOMICS 344 (1985).

38. A natural monopoly exists when the average cost of production diminishes as the volume of production increases over the relevant range.

39. Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 706 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

however, the producer must actually be capable of dual distribution; establishing this capability may not be costless.

C. *Performance Standards*

There is an inverse relationship between the price a distributor charges for a product and the quantity of that product sold to consumers.[40] This means that if the distributor raises her price above the price desired by the producer, the quantity sold will decrease, lowering producer profits and providing an incentive for maximum vertical price fixing.[41] An alternative to specifying a maximum price, however, is to instead specify a minimum quantity. If the producer selects the quantity that corresponds to the desired price, the only way that the distributor can meet this performance standard is to charge the optimal price. The distribution of gasoline provides a good example of sales quotas. In the typical gasoline franchise contract, a minimum volume of gasoline is specified.[42] This type of performance standard might seem to be a relatively low-cost alternative to price restraints, but this may not be true.

In order for a sales quota to be credible, a manufacturer must be willing to enforce it by terminating relationships with dealers who do not meet the quota's requirements. Such terminations are not without costs, however. Terminating relations with offending dealers can give a manufacturer a bad reputation, making it difficult to find good dealers. If a manufacturer must select from a reduced pool of dealers, the result might well be less efficient dealers and an accompanying increase in costs. Further, in some industries—notably automobile and gasoline distribution—there are statutory protections for distributors. Such legal constraints on a producer's ability to terminate an offending distributor undermine the effectiveness of a sales quota. If terminations lead to litigation, the costs to society of enforcing performance standards may be substantial.

D. *Price Announcements*

A producer may choose to announce suggested retail prices. This information can be included in advertising or printed on a product's package. If customers of dealers charging higher prices become aware of the suggested prices, they may conclude that they can obtain a better price elsewhere. Customers may refuse to pay the higher price

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40. *Supra* notes 11-13.

41. *Supra* notes 19-24.

42. *See* Andrea Shephard, *Contractual Form, Retail Price, and Asset Characteristics in Gasoline Retailing*, 24 RAND J. ECON. 58, 62 (1993).

and threaten to shop around. This, of course, would put great pressure on dealers to conform to the suggested price. One prominent example of this practice is the automobile industry, where manufacturers put price information on all new cars.

Price announcements are not always intended to enforce maximum prices. Their purpose may very well be to serve an informational function apart from maximum resale pricing. In a successive monopoly setting, however, price announcements may make it very difficult for dealers to raise prices above those suggested by the manufacturer. Once again, there are policing and monitoring costs involved with price announcements that can make this alternative more expensive for society.

E. Consignment

If the relationship between a supplier and a dealer is structured as one of consignment, the per se rule against maximum vertical price fixing can be avoided.[43] In a consignment relationship, there is no sales transaction between a dealer and a supplier. Rather, the dealer is, in fact, the agent of the supplier, who is the principle in the relationship. For example, in *Ryoko Manufacturing Co. v. Eden Services*, a supplier was able to limit the prices charged by dealers by establishing an agency relationship with the dealers.[44]

Consignment will not succeed as an instrument of resale price maintenance, however, if the "agent" is in fact economically indistinguishable from a purchaser. In *Union Oil Co.*, the Supreme Court found that a gasoline retailer obtaining gasoline under a consignment agreement was economically indistinguishable from a purchaser and that the retailer's ability to refuse to deal did not immunize the supplier from prosecution for an illegal "minimum" price maintenance agreement.[45] Similarly, in *Greene v. General Foods Corp.*, when a supplier attempted to circumvent *Albrecht's* proscription of "maximum" prices by calling his distributors agents, the court held that the dealers were actually purchasers.[46] But, if, in order to escape per se illegality, a supplier were to actually change the economic function of its dealers, the altered relationship would not be the preferred solution and the costs to society would increase.

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43. United States v. General Electric Co., 272 U.S. 476, 482 (1926).

44. Ryoko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1223-24 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988).

45. *See* Simpson v. Union Oil Co., 377 U.S. 13 (1964).

46. Greene v. General Foods Corp. 517 F.2d 635, 657 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976).

Each of the alternatives we have discussed is less desirable than maximum vertical price fixing for both the supplier and for society. The per se illegality of maximum vertical price restraints, therefore, forces the manufacturer and society into situations that are second best, thereby reducing social welfare.

IV. OTHER ANTICOMPETITIVE CONCERNS

Our analysis has shown not only that maximum resale price maintenance leads to an increase in consumer welfare, but also that if manufacturers prefer maximum price fixing, the alternatives they might be forced to choose from are undesirable because they impose higher costs on society. However, the *Albrecht* Court had a variety of other competitive concerns that might detract from our conclusion that maximum vertical price fixing is good for society.[47] In its decision, the Court condemned maximum price fixing because "by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, [these schemes] may severely intrude upon the ability of buyers to compete and survive in the market."[48] Without specifying what competitive market forces it thought were in operation in Albrecht's exclusive territory, the Court went on to explain:

> Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price charged under a maximum price scheme is nearly always the fixed maximum price . . . the scheme tends to acquire all the attributes of an arrangement fixing minimum prices.[49]

First, what of the validity of the *Albrecht* Court's claim that maximum vertical price fixing impairs a dealer's freedom by limiting her ability to set prices? It is true, of course, that the dealer is not free to raise prices above the imposed cap. It is also true that she is free to choose not to be a dealer. If maximum price fixing is illegal, then neither the dealer nor the manufacturer is free to negotiate a mutually beneficial deal. For example, the dealer freely gives up her right to set the retail price in exchange for the grant of an exclusive territory. But it is not at all obvious that preserving the right of a dealer to set price,

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47. This section follows in part Blair & Lopatka, *supra note* 32.
48. *Albrecht*, 390 U.S. at 152.
49. *Id.* at 152-53.

while at the same time denying the dealer and the manufacturer the right to negotiate a beneficial deal, constitutes a net increase in freedom. Further, if the prohibition of maximum price fixing results in vertical integration and the elimination of independent dealers, it can hardly be argued that dealer freedom has been enhanced.

Second, do suppliers have an incentive to set a price ceiling so low that dealers are unable to provide the services that consumers want? The attack on this argument usually begins by conceding that the price cap might indeed be so low that *some* dealers may be unable to offer services that are desired by consumers. However, the supplier seeks to set the price so that consumers in the aggregate will benefit from the provision of such services. If the supplier makes a mistake in selecting the price ceiling, he will suffer lost profits. This argument implicitly assumes that the interests of the supplier and those of consumers are exactly aligned. Why would a supplier set the dealer's price so low that consumers would not be provided the services they desire?[50]

Third, why would suppliers want to channel distribution through large dealers? Suppliers certainly would have no incentive to do so if large dealers were less efficient than small dealers. If large dealers were more efficient, then channeling sales through them would increase efficiency and consumer welfare.

The final concern of the *Albrecht* Court was that a maximum resale price restraint would disguise an arrangement fixing minimum prices,[51] a concern that sounds more substantial than the others. Like most of the other concerns, however, it does not survive close scrutiny. Suppliers impose maximum resale price restraints on the retailers of a product because they want to charge a price that is above the level that maximizes the profits of the supplier. This forces the retailers to charge a price below the price they desire. Since each retailer wants to charge a higher price than the one specified by the supplier, none will charge a lower price. Thus, all retailers charge the same price. But this uniform price is *below* the prices that would otherwise prevail. Consequently, consumer welfare increases.

Suppose, instead, that there is a *horizontal* conspiracy to set a minimum price.[52] The retailers agree among themselves not to com-

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50. *See* Fesmire & Romano, *supra* note 12 (arguing that under certain conditions maximum vertical price fixing can lead to a decrease in services along with a decrease in welfare). *See also* Roger Blair et al., *Applying the Rule of Reason to Maximum Resale Price Fixing:* Albrecht *Overruled, in* 9 ADVANCES IN APPLIED MICROECONOMICS: INDUSTRIAL ORGANIZATION 215-30 (Michael R. Baye ed., 2000).

51. *Albrecht*, 390 U.S. at 153.

52. No persuasive economic theory supports per se condemnation of minimum vertical

pete on price and, in fact, agree to raise the price above the level that would otherwise prevail. If there is no cheating on the agreement by retailers, prices of all retailers will be uniform. In this instance, however, the uniform price will be *above* the price that would otherwise prevail. As a result, consumer welfare will decline and society will suffer.

Uniform prices by retailers, then, can be the result of either a maximum resale price restraint, which increases consumer welfare, or a horizontal minimum price conspiracy, which reduces consumer welfare. While price uniformity by itself does not distinguish the two cases, other relatively simple tests can be used to identify these restraints. First, if one of the retailers complains because she wants to charge higher prices, it seems obvious that a beneficial maximum resale price restraint is in place. Further, since members of a minimum price conspiracy benefit from such an arrangement, one would not expect them to complain. A member would not want to expose his participation in an illegal arrangement. Moreover, even a competing dealer would not likely challenge a disguised cartel, for she would benefit from the higher price, perhaps even more than the members. Therefore, if a retailer or a retailer's competitor complains, at least if the competitor is not asserting predatory pricing, the assumption should be that the restraint is beneficial to consumers.

While price uniformity alone may not be convincing, there is other evidence that is more compelling. For example, one can compare prices and quantities before and after the restraint is imposed. If a beneficial maximum price restraint is the cause of the uniform pricing, then prices will fall as a result of the restraint. In addition, quantity demanded will increase as consumers respond to the lower price. In contrast, if the uniform prices are a result of a minimum price fixing agreement, then price will increase and quantity demanded will decrease after the agreement is reached. Thus, the intertemporal patterns of both price and quantity sold provide useful evidence to distinguish between good and bad restraints.

The anticompetitive consequences of maximum vertical price fixing posited by the *Albrecht* Court do not support its per se illegality. Most of the consequences are either not anticompetitive or are simply implausible. It is possible for minimum resale price fixing to be disguised as maximum vertical price fixing, but, if that is the case, it can be unveiled for what it is with the tests mentioned above. In sum, it must be concluded here that there is no convincing theory of

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price fixing that is purely vertical.

anticompetitive harm that justifies per se condemnation of maximum vertical price fixing.

V. MAXIMUM PRICE FIXING AND THE GOALS OF ANTITRUST

The antitrust laws serve to promote competition and, at the same time, to discourage monopoly and monopolizing behavior.[53] Economic theory tells us that this will lead to increased welfare for consumers because monopolies tend to restrict output and raise prices for consumers. Due to this direct connection between discouraging monopoly and monopolistic behavior and increasing efficiency—that is, enhancing consumer welfare—the prevailing view today is that the antitrust laws were intended, or should be interpreted, to promote economic efficiency.[54] Some scholars, however, argue that efficiency is just one of a broad range of political and social goals that the laws are intended to promote.[55] Among these other goals are such admirable purposes as the dispersion of economic and political power, the promotion of small business and small business opportunities, the local control over business, the prevention of industrial concentration, and the creation and preservation of entrepreneurial ability.[56] In addition to serving these several goals, the antitrust laws have distributive implications as well. Indeed, Robert Lande has argued that the *primary* purpose of the antitrust laws is distributive: to prevent the unjust transfer of wealth from consumers to producers.[57]

One should not be surprised that these different views exist. Competitive markets are widely thought to promote efficiency and to protect consumers from the greed of monopoly producers.[58] At the same time, the conditions necessary for the existence of competitive markets conduce the other values most often offered as goals of antitrust. That is, competitive markets require many small sellers, each with limited economic power. Entry into or exit from competi-

53. *See generally* 1 AREEDA & TURNER, *supra* note 4, at 103-13; ROBERT H. BORK, THE ANTITRUST PARADOX 50-71 (rev. ed. 1993); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 8-22 (1976). The analysis in this section draws on Roger Blair & James Fesmire, *supra* note 2.

54. *See* 1 AREEDA & TURNER, *supra* note 4, at 103-05; BORK, *supra* note 53, at ix-xii; POSNER, *supra* note 53, at 22.

55. *See* DONALD DEWEY, THE ANTITRUST EXPERIMENT IN AMERICA 1-51 (1990); Harlan Blake & William Jones, *In Defense of Antitrust*, 65 COLUM L. REV. 377, 382-84 (1965); Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1209-13 (1977).

56. These various goals are often stated in other terms, but the ones mentioned capture the meaning of most of those suggested.

57. *See generally* Lande, *supra* note 24.

58. *See generally* BORK, *supra* note 53.

tive industries is easy. These conditions imply the diffusion of economic power and the consequent diffusion of political power that goes with it, the promotion of small business over big business, the prevention of industrial concentration, and the creation and preservation of entrepreneurial ability. In other words, competitive markets imply a world of small firms and independent businesspeople, bountiful opportunities for new small businesses and, because they are small, businesses that are local in character. The diffusion and localization of economic power and interests imply the diffusion and localization of political power and interests. Thus, do we seek competitive efficiency, or do competitive markets connote a Jeffersonian world?

While it is often true that efficiency goals also imply competitive markets, this is not always the case. Sometimes efficiency and consumer welfare can be enhanced by the merger, growth, and concentration of economic power. When this occurs, the goals of economic efficiency and consumer welfare are at odds with other social and political goals associated with competitive markets. When this conflict exists, there must be guideposts to show the way. Robert Bork summarized this need well:

> Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in values arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules.[59]

The intention here is not to advance one goal over any other. Rather, the intention is to assess whether maximum vertical price fixing is consistent with the most popular goals of antitrust that have been advanced by others.

A. *Maximization of Consumer Welfare*

Few would deny that the promotion of economic efficiency (or consumer welfare) is a major goal of antitrust policy. In fact, many would contend that the maximization of consumer welfare through the enhancement of economic efficiency is the primary, if not the exclusive, goal of antitrust law. Robert Bork is the most famous spokesman for this view.[60] He contends that the legislature intended the antitrust

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59. *Id.* at 50.

60. Bork's position is unequivocal: "[T]he only legitimate goal of antitrust is the maximization of consumer welfare." *Id.* at 51. In addition to his provocative book, see Robert H. Bork,

laws to promote consumer welfare through allocative efficiency.[61] His argument is based on a thorough review of the structure of the antitrust laws and their legislative history.[62]

Bork first points to explicit statements by Senator Sherman, the Senate Judiciary Committee, and by members of the House of Representatives.[63] Senator Sherman consistently displayed a concern about anticompetitive behavior, which he believed prevented free competition and resulted in higher prices to consumers.[64] He wished to protect the competitive environment, a goal that is inconsistent with objectives other than the pursuit of consumer welfare. If the primary goal of antitrust law is to permit the competitive process to seek its unfettered result, then the pursuit of other goals is not possible unless they too are the natural result of the competitive process.[65]

The four Democrats on the Senate Judiciary Committee displayed their agreement with Sherman through speeches or through their own antitrust bills. The Republicans either demonstrated no disagreement or showed basic agreement with Senator Sherman. The House of Representatives, through its antitrust bills, also seemed to display a consumer interest, or at least a desire to further values not inconsistent with consumer welfare.[66]

Second, congressional objections to cartels and mergers are consistent with the consumer welfare theme. Since cartels result in higher prices, opposition to cartels promotes consumer welfare. Congress saw mergers as "loose-knit" conspiracies that sought the same result as cartels, i.e., higher prices.[67]

Third, Congress' distinction between legal and illegal mergers demonstrates that it was concerned with consumer welfare. Mergers that resulted in increased efficiencies were viewed as being in the consumer's interest and were not made illegal.[68] Monopoly in itself was not made illegal. Only firms that achieved their monopoly status through practices that did not promote efficiency were considered illegal.[69]

Legislative Intent and the Policy of the Sherman Act, 9 J.L. & ECON. 7 (1966) [hereinafter cited as Bork, *Legislative Intent*].

61. *See* Bork, *Legislative Intent*, *supra* note 60, at 11.
62. *Id.* at 11-30.
63. *Id.* at 13-16.
64. *See id.*
65. *See id.* at 16.
66. *See id.* at 17.
67. *See id.* at 21-26.
68. *See id.* at 29-30.
69. *See id.* at 30.

If Bork is right and the goal of antitrust is to promote efficiency and enhance consumer welfare, then our analysis of the economics of maximum vertical price fixing demonstrates that maximum vertical price fixing serves this purpose well. Such price restraints lead to higher output and lower prices. By overruling *Albrecht*, *Khan* made the use of maximum resale price restraints under conditions of successive monopoly much safer. This is unambiguously beneficial from the perspective of consumer welfare.

B. *Preventing Unjust Transfers of Wealth*

Robert Lande has argued that the primary legislative intent of the antitrust laws is distributive, preventing unjust transfers of wealth from consumers to producers.[70] He contends that Congress did not intend to achieve some superior allocation of wealth in a redistributive sense; Congress merely intended to prevent one type of transfer that it considered inequitable.[71] Trusts and monopolies were prevented because they "unfairly extracted wealth" that would belong to consumers under competitive conditions.[72] Lande points out that Bork's arguments are based on evidence that provides more direct support for the wealth-transfer thesis than for Bork's welfare-maximization theme.[73] For example, the prevention of price increases resulting from monopoly power directly supports the position that unjust transfers should be prevented and only indirectly supports the consumer welfare thesis. Lande also points out that in 1890, it would have been highly unlikely that legislators would have had much appreciation for

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70. *See* Lande, *supra* note 24. In addition, Elzinga notes that conventional wisdom holds there is a tradeoff between equity and efficiency:

> In light of this well-known tradeoff, it is notable that antitrust enforcement generally served to help those at the low end of the income distribution range without decreasing efficiency. Antitrust achieves this double benefit when it promotes efficiency in resource allocation by preventing the cartelization or monopolization of a market shopped in by low-income buyers. The reason is straightforward: prices will be made lower in this market so that for any given income, however low, a larger basket of goods and services can be purchased.
>
> In sum, the pursuit of efficiency goals through antitrust enforcement is consistent with the objective of equitable distribution of income.

Elzinga, *supra* note 55, at 1194-95.

In fact, in most cases economists will take the distribution of income as "given" or will "hold income constant" when dealing with matters of efficiency. This does not deny the fact that some distributions of income are more conducive to economic efficiency than others. Regrettably perhaps, it is often true that the more equal distributions of income are those that provide incentives that to some extent discourage economic efficiency.

71. *See* Lande, *supra* note 24, at 72-74.

72. *See id.* at 83.

73. *See id.*

the concept of allocative efficiency, since economists could scarcely have articulated that concept at that time.[74]

The thrust of Lande's argument is that antitrust was intended to prevent the conversion of consumer surplus into the producer profit that is inherent in a monopolist's successful pursuit of profit. Maximum vertical price fixing is consistent with this goal of antitrust. While recognizing in Figure 1 the social loss we have identified as area *ABC*, Lande points out that because of monopoly, consumers pay P_1 instead of P_2 for the Q_1 units they consume. The difference between these prices represents a transfer of wealth to producers from consumers because of monopoly power. The total transfer is equal to $(P_1 - P_2)Q_2$. Those who advocate consumer welfare and efficiency as the primary goal of antitrust acknowledge that this transfer exists. But, they add that producers are consumers too, so the wealth transfer is from one group of consumers to another, leaving total consumer welfare unchanged. Hence, it is unclear whether this should be assessed as a social loss.[75]

The exercise of maximum vertical price restraints prevents distributors with market power from raising prices. Although the upstream firm has monopoly power, which it exercises, maximum resale price restraints prevent the distributors from making matters worse by raising prices even higher. Therefore, price restraints are perfectly consistent with the goal of preventing unjust transfers of wealth from producers to consumers.

C. *Preventing Excessive Concentrations of Economic Power*

Although it is hard to find anyone who believes that efficiency is not one of the goals of antitrust, the idea that efficiency concerns (or consumer welfare) override all other values grates on many critics. Professor Fox's remarks are instructive:

> As history teaches, "efficiency" is not the reason for antitrust. . . . Distrust of power is the one central and common ground that over time has unified support for antitrust statutes. . . .
>
> One over-arching idea has unified these three concerns (distrust of power, concern for consumers, and commitment to opportunity for entrepreneurs): competition as process. The competition process is the preferred governor of markets. If the

74. *See id.* at 87-88.

75. The welfare criterion that we have adopted here is neutral with regard to wealth transfers. *See supra* note 18.

> impersonal forces of competition, rather than public or private power, determine market behavior and outcomes, power is by definition dispersed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair . . . . In sum, the claim that efficiency has been *the* goal and *the* fulcrum of antitrust is weak at best. . . . The reasons offered do not withstand scrutiny.[76]

Professor Fox is not alone in her view that the purposes of antitrust law include the prevention of excessive concentrations of economic power and the tendency of such concentrations to lead to undesirable government intrusion into the economy. Robert Pitofsky, for example, notes that Congress "exhibited a clear concern that an economic order dominated by a few corporate giants could, during a time of domestic stress or disorder, facilitate the overthrow of democratic institutions and the installation of a totalitarian regime."[77] Judge Learned Hand expressed similar sentiments in *United States v. Aluminum Co. of America* when he wrote that "great industrial consolidations are inherently undesirable, regardless of their economic results . . . . [A]mong the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them."[78]

Assuming that a central goal of antitrust is preventing the concentration of economic power, we must have some idea of what constitutes economic power. Most economists define market power as the ability to raise price profitably by restricting output.[79] To the extent that a firm exercises its market power, the firm reduces consumer welfare. Under conditions of successive monopoly, however, two firms have market power, the producer and the distributor. Assuming that the producer's monopoly is legitimate and not subject to antitrust challenge, the producer's use of maximum resale price restraints limits the exercise of monopoly power by the distributor, resulting in a lower price and a greater quantity for consumers. Further, as we have seen above, if a producer is unable to impose maximum prices on a distributor, one attractive alternative is to integrate forward, taking over the distribution function and giving the producer more control over society's resources. Maximum vertical

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76. Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1152-54 (1981).

77. Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1054 (1979).

78. United States v. Aluminum Co. of America, 148 F.2d 416, 428 (2d Cir. 1945).

79. *See, e.g.*, Benjamin Klein, *Market Power in Antitrust: Economic Analysis After* Kodak, 3 SUP. CT. ECON. REV. 43, 72-73 (1993).

price fixing, then, seems to be consistent with the goal of limiting economic power. Moreover, few would argue today that economic power and political power are unrelated.

D. Protecting Individual Freedom

We have concluded above that the restraint on dealer freedom, noted by the *Albrecht* Court as an adverse consequence of maximum vertical price fixing, does not constitute an anticompetitive effect. Because it has no anticompetitive effect, its practice cannot be deemed inconsistent with the goal of maximizing consumer welfare.

It is possible that dealer freedom is an appropriate, independent goal of antitrust policy. No doubt, Americans value individual freedom. Professors Harlan Blake and William Jones argue that "[i]n the absence of strong countervailing considerations, we favor freedom of action and the wide range of choices that freedom implies."[80] They argue that the freedom of an individual to choose among competing products is obviously reduced when market power, the control of a market by one or a few sellers, replaces both the lack of power associated with competitive markets and a wide range of choices for consumers.[81] Similarly, market power is associated with barriers to entry, and barriers to entry reduce the opportunity for employees to become entrepreneurs. Market power, then, reduces the freedom of both consumers and business entities, whereas the purpose of the antitrust laws [is] to "expand the range of consumer choice and entrepreneurial opportunity by encouraging the formation of markets of numerous buyers and sellers."[82]

In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, the Supreme Court found that agreements between suppliers to impose maximum resale price restraints "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment,"[83] a theme that was echoed in *Albrecht*.[84] This is not the only freedom involved, however. Consider consumer freedom. Lower prices confer more choices on the consumer than do higher prices. Assume that a consumer is spending all of her income on a variety of goods and services. If the price of one of these goods or services falls, the consumer can purchase the same combination of goods and services, but for a smaller expenditure. That is, this week she can buy everything

80. Blake & Jones, *supra* note 55, at 383.
81. *See id.*
82. *Id.* at 384.
83. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951).
84. *See generally Albrecht*, 390 U.S. 145.

that she bought last week and have money left over. The consumer is now free to use this remaining income to buy more of the same good at the new, lower price, or to buy more of other goods. Clearly, her options have been enhanced by the reduction in price. The setting of maximum resale prices increases consumer choice and, therefore, is consistent with promoting the freedom of consumers.

Still, maximum resale price restraints do reduce the retailer's freedom to make business decisions. At the same time, though, the restraints may preserve the very existence of these resellers. We have already seen that conditions of successive monopoly provide an incentive for vertical integration, which eliminates the distributor altogether. In Missouri, for example, the *Kansas City Star* terminated all of its independent distributors and hired salaried distributors.[85] A main motivation for this business strategy was the legal problem associated with vertical pricing restrictions.[86] A similar result occurred in California. In *Northwest Publications, Inc. v. Crumb*, a publisher found it could not control the resale prices of its distributors, and so it terminated them.[87] After roughly ten years of legal wrangling, the strategy was deemed legal.[88] No doubt the cost of getting to this outcome was substantial.

As the theory predicts, a common response to the illegality of maximum price fixing was vertical integration. The producer can restore, through vertical integration, the profits lost as a result of downstream monopolists exercising their market power by raising price. Unfortunately, vertical integration results in the elimination of independent distributors. It is hard to fathom why those interested in promoting freedom for its own sake would prefer this outcome to one where pricing freedom is somewhat restricted, but the independent distributor continues to survive.

We have also noted above that the alternatives to both maximum vertical price fixing and vertical integration are hardly conducive to increasing dealer freedom. Performance standards, dual distribution, price announcements, and consignment arrangements reduce freedom of action by dealers just as surely as do maximum price restraints.

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85. *See* Paschall v. Kansas City Star Co., 695 F.2d 322, 325 (8th Cir. 1982), *reh'g en banc*, 727 F.2d 692, 695 (8th Cir. 1984) (noting that in spite of the Star Co.'s policy of not recognizing a carrier's proprietary right in its assigned route, some routes were sold to third parties for up to $300,000).

86. For an excellent analysis, see Herbert Hovenkamp, *Vertical Integration by the Newspaper Monopolist*, 69 IOWA L. REV. 451 (1983).

87. *See* Northwest Publications, Inc. v. Crumb, 752 F.2d 473 (9th Cir. 1985).

88. *See id.* at 475, 477.

Successive monopoly exists as a result of economic forces. Maximum vertical price fixing is a response to the existence of successive monopoly that increases consumer welfare. In addition to increasing consumer welfare, maximum vertical price fixing is consistent with all of the other suggested goals of antitrust. Further, if a manufacturer chooses vertical price restraints, then that practice constitutes the most efficient alternative for society. And yet, under *Albrecht*, such restraints were per se illegal.

VI. MAXIMUM VERTICAL PRICE FIXING AND THE ANTITRUST INJURY DOCTRINE

The *Albrecht* rule against maximum vertical price fixing was at cross-purposes with all of the suggested goals of antitrust. As previously mentioned, a chorus of criticism from economists and legal scholars greeted the decision. Thus, the *Brunswick* Court and its antitrust injury doctrine were faced with the challenge of bringing antitrust law into conformity with the goals of antitrust.[89]

Section 4 of the Clayton Act provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor [sic] . . . and shall recover threefold the damages by him sustained."[90] Private parties, then, participate in the enforcement of the antitrust laws by bringing suit for the recovery of damages resulting from antitrust violations.[91] While section 4 seems to suggest that a wide array of private parties are eligible to sue for a variety of actual injuries,[92] the courts have, in fact, restricted both those who have standing to sue[93] and the types of injuries[94] that are compensable.

89. This section follows in part Roger Blair & Gordon L. Lang, *Albrecht After ARCO: Maximum Resale Price Fixing Moves Toward the Rule of Reason*, 44 VANDERBILT L. REV. 1007 (1991).

90. 15 U.S.C. § 15 (1994).

91. PRIVATE ANTITRUST LITIGATION (L. White ed. 1988) provides an interesting empirical view of private suits.

92. When a manufacturer fixes her price, the quantity sold is necessarily reduced. This injures the suppliers of all of the firm's inputs: employees who are laid off because of reduced production, firms that provide raw materials to the manufacturers, those that transport the finished product to consumers, etc. The ripple effect is substantial, but these injured parties cannot sue for damages.

93. Antitrust standing identifies parties who may sue. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (3d Cir. 1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (7th Cir. 1977), require that direct injury be suffered by those who sue. *See also* Blue Shield of Virginia v. McCready, 457 U.S. 465 (4th Cir. 1982); Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519 (9th Cir. 1983).

94. Antitrust injury refers to the types of injuries that the antitrust laws were intended to prevent. *See Brunswick*, 429 U.S. 477.

In its *Brunswick* decision, the Supreme Court introduced the antitrust injury doctrine.[95] In the 1950s, Brunswick's sales of bowling lanes and related equipment rose dramatically as a result of an increased interest in bowling.[96] A large portion of Brunswick's sales was financed with credit the company extended to the bowling alley operators.[97] When the popularity of bowling diminished in the 1960s, Brunswick's sales decreased, and some of the bowling centers defaulted on their loans.[98] Brunswick repossessed the equipment but had little success in reselling or leasing it.[99] Brunswick found itself in great financial difficulty and, as a result, began to acquire and operate the bowling centers in an effort to salvage what it could financially.[100]

Pueblo, a rival bowling center, filed suit, claiming that the Brunswick acquisitions violated section 7 of the Clayton Act because they were potentially anticompetitive.[101] Pueblo claimed that Brunswick's size permitted it to reduce competition by driving smaller rivals out of business.[102] The jury agreed, finding that even though there was no evidence that Brunswick had actually driven rivals out of business, it had the ability to do so, therefore, the acquisitions violated section 7.[103] Pueblo claimed damages equal to the additional profits it would have earned had Brunswick allowed the financially troubled bowling centers to fail.[104] That is, if Brunswick had not made the acquisitions, Pueblo would have faced less competition and made higher profits.

The Supreme Court agreed that Pueblo's profits were lower because of Brunswick's illegal acquisitions; there was no dispute over whether there was an injury in fact.[105] But the Court ruled that Pueblo had not suffered an injury that was compensable under the antitrust laws.[106] The antitrust laws were intended to protect competition, not competitors. Therefore, it would have been bizarre to compensate Pueblo for the additional profits it would have earned if competition had been reduced. The Court explained:

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95. *See* Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-O-Mat, 66 ANTITRUST L.J. 273 (1998) for a review and critical analysis of the antitrust injury doctrine.

96. *Brunswick*, 429 U.S. at 489.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.[107]

Thus, in order to apply the antitrust doctrine, one must first determine the anticompetitive effects of a particular violation, and then identify the logical consequences of those anticompetitive effects. If a plaintiff's business or property has been injured and its injury is due to the anticompetitive effects of an antitrust violation, the plaintiff has suffered antitrust injury under the *Brunswick* rule. Injuries that are not consequences of the anticompetitive effects of antitrust violations do not constitute antitrust injury and are not compensable under the remedial provisions of section 4 of the Clayton Act.

A. Albrecht *and Antitrust Injury*

Clearly, the downstream dealer victim of maximum resale price fixing does not suffer antitrust injury. In Figure 2, maximum resale price fixing reduces the price to consumers from P_3 to P_1. Consequently, the downstream firm's profits fall from $(P_3-P_1)Q_3$ to zero. There is no question that the downstream firm has suffered an injury to its business or property. The downstream firm has suffered simple injury in fact, not antitrust injury. The injury flows from the procompetitive consequences of the price constraint.[108] That is, since the harm flows from a price decrease and the consequent increase in the quantity sold to consumers from Q_3 to Q_1, the maximum price fixing has improved efficiency.[109] The effect and, indeed, the purpose of maximum price fixing is to prevent distributors from exploiting their exclusive territories, not to restrain competition.[110] As Phillip Areeda and Donald Turner have noted, "[i]t seems most doubtful that the purposes of the antitrust laws are served by awarding damages for the impairment of the plaintiff's monopoly power over newspaper subscribers."[111]

Consider the damage claim in *Albrecht*, where a newspaper distributor was forced to sell his exclusive newspaper route for less than it

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107. *Id.*

108. Indeed, this is the same price and quantity that competition at the downstream stage would yield.

109. William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467, 492 & n.96 (1979-80).

110. Frank Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 890 n.20 (1981).

111. PHILLIP AREEDA & DONALD TURNER, 2 ANTITRUST LAW 347 (1978).

would have been worth if the publisher had not intervened and caused him to lose customers.[112] Albrecht sued for an amount equal to the reduced value of his business.[113] But, the size of the reduction in his newspaper route's value was equal to the capitalized profits that flowed from the route's exclusivity.[114] The lesson of *Brunswick* is that an award based on lost monopoly profits is improper because lost monopoly profits are not an "injury of the type the antitrust laws were intended to prevent."[115]

In their dissenting opinions, Justices Harlan and Stewart exposed serious flaws in the majority's reasoning.[116] Justice Harlan distinguished between maximum price fixing, which prevents price increases, and minimum resale price maintenance, which limits price decreases.[117] He noted that newspaper publishers want newspapers delivered at the lowest possible cost because that yields the lowest overall price and, thus, the largest circulation.[118] The imposition of a maximum price on distributors contributes to this objective.[119] Harlan explained that price ceilings "do not lessen horizontal competition; they drive prices toward the level that would be set by intense competition, and they cannot go below this level unless the [publisher] who dictates them and the [carrier] who accepts them have both miscalculated."[120] Further, the price cap prevents carriers from reaping monopoly or supracompetitive profits.[121] Justice Stewart concurred, insisting that if the maximum price prevented Albrecht from charging a higher price than would have existed in a competitive market, the Herald Company's "actions were fully compatible with the antitrust laws."[122]

B. *The Response to* Albrecht

The combination of the obvious procompetitive benefits to consumers of maximum price fixing[123] and the much less compelling

112. *Albrecht*, 390 U.S. at 149.
113. *Id.*
114. Page, *supra* note 109, at 491.
115. *Brunswick*, 429 U.S. at 489.
116. *Albrecht*, 390 U.S. at 156-68, 168-70.
117. *Id.*
118. *Id.*
119. *Id.* at 157-58.
120. *Id.* at 159.
121. *Id.*
122. *Id.* at 169. Justice Stewart further noted that "[t]he Court today stands the Sherman Act on its head." *Id.* at 170.
123. *Supra* notes 23-24 and accompanying text.

anticompetitive concerns expressed by the Court,[124] coupled with the powerful dissents just mentioned, helped lead to a confusion of judicial response to *Albrecht's* declaration of maximum price fixing's per se illegality. Much of the confusion revolved around the distinction between injury in fact and antitrust injury. If maximum price fixing is good for consumers, how can there be antitrust injury, even if there is injury in fact? If maximum price fixing is a per se illegal antitrust violation, however, must not there be some harm to competition accompanied by some antitrust injury?

In *Knutson v. Daily Review, Inc.*, terminated newspaper distributors complained about their written contracts, which contained a clause expressly fixing the resale price of a newspaper.[125] The district court, following *Albrecht*, found that the contract violated the Sherman Act, but held that the plaintiffs had failed to establish the fact or amount of damages.[126] The Ninth Circuit Court of Appeals reversed and held that the plaintiffs had proved damages in fact.[127] In response, the district court found that the plaintiffs were entitled to only nominal damages.[128]

The court found that the dealers were aware that the publisher was likely to terminate their contracts and change distribution systems if they raised their prices. Given the dealers' knowledge of the economics of the newspaper business, they would not have raised their prices even if they had been free to do so.[129]

> The result of lifting the price ceiling would therefore be to encourage each dealer's fortification and exploitation of his or her particular monopoly . . . . This analysis suggests that although plaintiff's alleged losses may be of the type that the claimed violation would be likely to cause, they are not of the type that the antitrust laws were intended to prevent.[130]

Similarly, in *Northwest Publications, Inc. v. Crumb*, while noting "maximum vertical price-fixing arguably benefits consumers, the intended beneficiaries of the antitrust laws,"[131] the court held that an express maximum price-fixing clause between the publisher and the distributors was per se illegal. The court nevertheless determined that

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124. *Supra* notes 37-41 and accompanying text.

125. Knutson v. Daily Review, Inc., 383 F. Supp. 1346, 1350 (N.D. Cal. 1974).

126. *Id.* at 1376, 1388.

127. Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976) *cert. denied*, 433 U.S. 910 (1977).

128. Knutson v. Daily Review, Inc., 468 F. Supp. 226, 240 (1979).

129. *Id.* at 239.

130. *Id.* at 232 n.7.

131. Northwest Publications, Inc. v. Crumb, 752 F.2d 473 (9th Cir. 1985).

the plaintiffs were not entitled to damages because they would not have raised their prices, even if permitted, because they had the sophistication to understand that if they had raised prices, they would have been terminated.[132]

The largely futile attempt to reconcile the procompetitive nature of maximum prices with their per se illegality under *Albrecht* continued in *Newberry v. Washington Post Co.*, where the court held that dealers who had not raised their prices, even when there was a price-fixing agreement with the publisher, were entitled to only nominal damages[133] because there was no proof demonstrating when the dealers would have raised prices, to what level they would have raised prices, or what the response of subscribers would have been.[134]

In *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, the Seventh Circuit Court of Appeals began a direct attack on *Albrecht*. Walters, a building materials dealer, complained that the defendant manufacturer of prefabricated houses and his dealers conspired to fix maximum prices to consumers.[135] The district court granted summary judgment in favor of the defendant.[136] The plaintiff appealed, and the Seventh Circuit ruled that Walters did not prove the existence of a vertical price-fixing agreement.[137] The court then struck directly at *Albrecht*, stating that whether maximum vertical price fixing was illegal per se seemed to be "an open question."[138] The court noted that exclusive territories were per se illegal at the time *Albrecht* was decided. Subsequently, however, *Continental T.V. v. GTE Sylvania, Inc.* established that exclusive territories were subject to the rule of reason.[139] Thus, the *Jack Walters* court argued that "a manufacturer-imposed price ceiling intended to limit the power that exclusive territories give dealers to raise prices . . . may also be lawful."[140]

Even if there was a price fixing arrangement, the *Jack Walters* court held that the dealer did not have standing to bring suit because it had suffered no antitrust injury.[141] Judge Posner found that no evidence had been presented that the lower prices would have been below cost and therefore predatory and unlawful. Any harm to Walters resulted from competing dealers lowering their prices while Walters did

132. *Id.* at 476-77.
133. Newberry v. Washington Post Co., 438 F. Supp. 470, 483 (D.D.C. 1977).
134. *Id.*
135. *Jack Walters*, 737 F.2d at 701.
136. 1983-1 Trade Cas. (CCH) 65,284 (E.D. Wis. 1983).
137. *Jack Walters*, 737 F.2d at 708.
138. *Id.* at 707.
139. *See* Continental T.V. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).
140. *Jack Walters*, 737 F.2d at 706.
141. *Id.*

not. Walters could not "complain about having to meet lawful price competition, which antitrust laws seek to encourage, merely because the competition may have been enabled by an antitrust violation."[142]

In *Indiana Grocery v. Super Valu Stores, Inc.*, a different Seventh Circuit panel ruled, just as it had in *Jack Walters*, that a dealer alleging maximum resale price fixing did not suffer antitrust injury and therefore did not have standing to make such a claim.[143] The court explained, "the antitrust laws simply are not in the business of protecting higher-pricing grocers from lower-pricing competition."[144] The *Indiana Grocery* court refused to accept that *Albrecht* required it to recognize the dealers' standing because *Albrecht* had been decided nine years before the Court formulated the antitrust injury requirement in *Brunswick* and did not address the issues of antitrust injury or antitrust standing.[145]

In none of the above cases did any of the courts expressly reverse *Albrecht*. In fact, in several of the cases, the courts purported to follow it.[146] Nonetheless, by using sometimes sophisticated damage analysis and the concept of antitrust injury, these decisions succeeded to a great extent in immunizing manufacturers who utilized maximum price fixing from damage liability, and in some cases from private civil suit.

C. ARCO *and Antitrust Injury*

In *USA Petroleum Co. v. Atlantic Richfield Co.* (hereinafter *ARCO*), USA Petroleum (USA), an independent retail gasoline seller, alleged that Atlantic Richfield Company (ARCO) had conspired with ARCO-brand dealers to sell gasoline at artificially low, uncompetitive prices in violation of section 1 of the Sherman Act.[147] USA further alleged that ARCO had attempted to monopolize the local retail gasoline market in violation of section 2 of the Sherman Act.[148] USA complained that ARCO, by conspiring to fix maximum prices with its

142. *Id.* at 709.

143. Indiana Grocery v. Super Valu Stores, Inc. 864 F.2d 1409 (7th Cir. 1989).

144. *Id.* at 1419-20.

145. *Id.* at 1420.

146. Blair & Lang, *supra* note 89, at 1025.

147. *See* USA Petroleum Co. v. Atlantic Richfield Co., 577 F. Supp. 1296, 1299-1300 (C.D. Cal. 1983).

148. *See id.* at 1300. *See also* 15 U.S.C. § 2 (1994). Section 2 states in part: "Every person who shall monopolize, or attempt to monopolize, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." *Id.*

dealers, had taken sales from USA and other independents, driving independent sellers from the market.[149]

The district court dismissed the section 2 claim and later granted summary judgment on the maximum price-fixing claim, ruling that even if the plaintiff could prove a maximum price-fixing conspiracy, it could not satisfy the antitrust injury requirement without showing those prices to be predatory.[150] The court held that no such showing of predatory pricing was possible because of ARCO's low share (never exceeding seventeen percent) of the retail gasoline market; even if the market were narrowed to include only discount sellers, the existence of several potential entrants prevented ARCO from being able to exercise market power.[151] When USA appealed the grant of summary judgment,[152] the Ninth Circuit panel framed the issue as "whether in the absence of proof of predatory pricing a competitor can recover damages because of a maximum resale price maintenance agreement."[153] A divided court held that USA could recover on such a theory and reversed, believing that the inquiry was "straightforward."[154]

> The "antitrust injury" standard requires us to determine whether the plaintiff's injuries resulted from a disruption of competition in the plaintiff's market caused by the defendant's antitrust violation . . . . In the present case the inquiry seems straightforward: USA's claimed injuries were the direct result, and, indeed, under the allegations we accept as true, the intended objective, of ARCO's price-fixing scheme. According to USA, the purpose of ARCO's price-fixing is to disrupt the market of retail gasoline sales, and that disruption is the source of USA's injuries.[155]

The court found that USA's alleged financial losses and its forced exit from the market because of ARCO's illegal price fixing were the types of injuries that the antitrust laws were intended to prevent.[156]

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149. *See* Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 332 (9th Cir. 1989).

150. USA Petroleum Co. v. Atlantic Richfield Co., 577 F. Supp. at 1307.

151. *Id.* at 1304. The Supreme Court held in *Matsushita Electric Industrial Co., Ltd, v. Zenith Radio Corp.*, 475 U.S. 574 (1986), that a predatory pricing claim will not be sustained when predation is not economically plausible.

152. USA did not appeal the district court's finding that the fixed prices were not predatory.

153. USA Petroleum Co. v. Atlantic Richfield Co., 859 F.2d 687, 689 (9th Cir. 1988).

154. *Id.*

155. *Id.* at 693.

156. *Id.* at 696.

The Supreme Court granted ARCO's petition for certiorari.[157] Since neither ARCO nor the federal enforcement agencies had petitioned the Court to overrule *Albrecht*, the question before the Court was "whether a firm incurs an 'injury' within the meaning of the antitrust laws when it loses sales to a competitor charging nonpredatory prices pursuant to a vertical maximum price-fixing scheme."[158] The Court reversed the Ninth Circuit decision, holding that a firm does not suffer antitrust injury from a vertical maximum price-fixing scheme involving its competitor.[159]

The Court repeated its holding from *Brunswick* that a private plaintiff must prove the existence of "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful."[160] The Court also assumed, arguendo, that *Albrecht* correctly held maximum vertical price fixing to be per se illegal.[161] The Court declared that *Albrecht's* maximum price-fixing scheme was per se illegal "because it threatened to inhibit vigorous competition by the dealers bound by it and because it threatened to become a minimum price-fixing scheme."[162] After restating the four reasons given in *Albrecht* for applying the per se rule to vertical maximum price fixing,[163] the Court distinguished *ARCO* from *Albrecht*.[164]

The maximum price fixing in *Albrecht* was illegal per se "because of its potential effects on dealers and consumers, not because of its effects on *competitors*."[165] In *ARCO*, USA had not suffered any of the injuries mentioned in *Albrecht*. If the prices set by ARCO were indeed too low for dealers to furnish the services desired by consumers, competitors would have been benefited, not harmed. Similarly, if such prices had resulted in the channeling of business to large distributors, this would have helped competing firms. If the maximum prices had acquired the attributes of a minimum price-fixing scheme, USA would have benefited from the higher prices charged by its competitors. In fact, USA's complaint that ARCO's scheme permitted its dealers to increase their sales was evidence that the concerns of the *Albrecht* Court had not been realized. The Court concluded that USA had not suffered an antitrust injury because "its losses [did] not flow

157. Atlantic Richfield Co. v. USA Petroleum Co., 490 U.S. 1097 (1989).
158. Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. at 331.
159. *Id.* at 346.
160. *Id.* at 349 (citing *Brunswick*, 429 U.S. at 489).
161. *Id.* at 357 n.16.
162. *Id.* at 335.
163. *Supra* notes 37-41 and accompanying text.
164. Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. at 335.
165. *Id.*

from the aspects of vertical, maximum price-fixing that render it illegal."[166] The Court further discussed that

> [w]hen a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business loss by rivals can not be viewed as an "anti-competitive" consequence of the claimed violation. A firm complaining about the harm it suffers from non-predatory price competition "is really claiming that it [is] unable to raise prices." (citation omitted) This is not *antitrust* injury; indeed "cutting prices in order to increase business often is the very essence of competition."
>
> . . . .
>
> Although a vertical, maximum price-fixing agreement is unlawful under Section 1 of the Sherman Act, it does not cause a competitor antitrust injury unless it results in predatory pricing. Antitrust injury does not arise . . . until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct . . . . Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they can not give rise to antitrust injury.[167]

The Court dismissed USA's claim that antitrust injury need not be shown when a per se violation is involved.[168] The Court held that there may be "some procompetitive effects"[169] that result from per se violations. "The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior."[170]

Examining the merits of *Albrecht*, the Court agreed with the *Albrecht* dissenters that maximum vertical price fixing can protect consumers from the price-increasing monopoly power that derives from a distributor's exclusive territory:

> If an exclusive dealership is the most efficient means of distribution, the public is not served by forcing the manufacturer to abandon this method and resort to self-distribution or competing distributors. Vertical, maximum price-fixing thus may have

166. *Id.* at 337.

167. *Id.* at 337, 339 (citing Cargill, Inc. v. Monfort & Colorado, Inc., 479 U.S. 104, 116 (1986)).

168. Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. at 341.

169. *Id.* at 342.

170. *Id.*

procompetitive interbrand effects even if it is *per se* illegal because of its potential effects on dealers and consumers.[171]

While critics of *Albrecht* could take heart from this recognition of the procompetitive effects of maximum vertical price fixing, *Albrecht* supporters could find some reason for solace. The *Albrecht* Court stated that providing a cause of action for competing dealers was unnecessary[172] because a manufacturer's own dealers and consumers might sue "if such a scheme causes the anticompetitive consequences detailed in *Albrecht*."[173]

While the Court in *ARCO* did not overrule *Albrecht*, what it did do, much like the Seventh Circuit in *Jack Walters*, was limit *Albrecht's* force by denying standing to one group, competing dealers, and undermine *Albrecht's* rationale by recognizing the procompetitive aspects of maximum vertical price fixing.[174] It effectively barred competing dealers from bringing suit, while permitting other dealers or consumers to bring an action if they could prove, in addition to the violation, that they were injured by the anticompetitive aspects of the illegal agreement.[175]

However, even after *ARCO*, the problem of interpreting "antitrust injury" still remained. The Court variously defined such injury as being "adversely affected by an *anticompetitive* aspect of the defendant's conduct;"[176] as losses that stem from an "*anticompetitive* aspect of the defendant's conduct";[177] and as a "competition-reducing aspect or effect of the defendant's behavior."[178]

The notion that consumers or noncompeting dealers could suffer antitrust injury is troubling. If, as the Court stated, competing dealers do not suffer antitrust injury because "[l]ow prices benefit consumers regardless of how [they] are set,"[179] how could those same low prices cause antitrust injury when the complaining party is now either the dealer through whom the price-fixing agreement was enforced or a

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171. *Id.* at 344 n.13. The majority in *Albrecht* assumed that exclusive territorial agreements were unlawful. Justice Douglas, concurring, and Justice Harlan, dissenting, argued that such agreements were subject to the rule of reason. *See* Albrecht v. Herald Co., 390 U.S. 145, 154, 157 (1968).

172. The government made this argument with respect to price-fixing dealers in its amicus brief. Brief for Amicus Curiae United States at 21 n.15, Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. at 328 (1990) (No. 88-1668).

173. Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. at 346.

174. *Id.* at 342.

175. *Id.* at 346.

176. *Id.* at 339.

177. *Id.*

178. *Id.* at 342.

179. *Id.* at 339.

consumer who benefited from the lower prices and has no injury in fact?[180]

What remained after *ARCO*? Dealers and consumers were free to sue, but what kind of injury could they suffer from the lower prices that resulted from maximum price fixing? The antitrust injury doctrine intended to prevent mistaken antitrust rules from causing harmful effects by limiting the award of damages to those who suffered from a practice that caused an anticompetitive or inefficient effect. After *ARCO*, what remained was a per se rule that required a finding of anticompetitive harm from a practice that was thought by most to be procompetitive.

D. Khan

Barkat Khan leased and operated a Union Oil service station and convenience store from State Oil Company.[181] The terms of the lease required Khan to buy all of his gasoline from State Oil and limited him to a margin of 3.25 cents per gallon.[182] State Oil would suggest a price to Khan that was 3.25 cents above the price he paid State Oil.[183] Kahn could charge a higher price, but he was required to return the difference between the retail margin and 3.25 cents per gallon to State Oil.[184] He was free to charge a lower price, but unless he could convince State Oil to reduce its wholesale price, his margin would shrink below 3.25 cents.[185] Approximately one year after the lease was signed, Khan fell behind in his lease payments and State Oil commenced proceedings to terminate the agreement.[186] At the request of State Oil, the court appointed a receiver who operated the station for about five months.[187] Khan alleged that the receiver was able to obtain a margin in excess of 3.25 cents by raising his price on premium grades above the suggested level.[188]

Khan sued State Oil under section 1 of the Sherman Act, alleging its contract constituted a per se illegal maximum price-fixing agreement.[189] He claimed that without the agreement, he could have

180. *See* Alabama v. Blue Bird Body Co., 573 F.2d 309, 317 n.17 (5th Cir. 1978) (observing in dicta that retail customers would not have standing to challenge a maximum price-fixing agreement because they would not be injured by it).

181. *See Khan*, 522 U.S. at 8.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

charged a higher price and made higher profits, thereby avoiding termination.[190] The district court granted summary judgment to State Oil, holding that the per se rule did not apply.[191]

The Seventh Circuit reversed on appeal in an opinion by Judge Posner.[192] The court found that the agreement did fix maximum prices because, even though Khan was free to set a price above the suggested one, he was forced to remit any amount above the suggested price, rendering such an action unprofitable.[193] The court held that it was bound to follow the Supreme Court's per se prohibition of maximum price fixing, but it struck at the heart of *Albrecht*, noting that despite "all its infirmities, its increasingly wobbly, moth-eaten foundations . . . *Albrecht* has not been expressly overruled."[194] Continuing, the court remarked that "the Supreme Court has told the lower federal courts, in increasingly emphatic, even strident, terms, not to anticipate an overruling of a decision by the court; we are to leave the overruling to the Court itself."[195]

But how could a practice be per se illegal if it caused no antitrust injury? Logic required that the Seventh Circuit's deference to the Supreme Court's *Albrecht* rule be accompanied by a finding of antitrust injury. How could maximum price fixing be anticompetitive if it compeled no anticompetitive harm? State Oil reasoned that *Brunswick* and its progeny, which required the establishment of antitrust injury, implicitly overruled *Albrecht*.[196] The setting of a maximum price "by a seller merely prevents his dealers from reaping monopoly profits, the injury to the dealers from the ceiling—the loss, that is, of monopoly profits—will not support an antitrust suit."[197] While expressing its "considerable sympathy with the argument that *Albrecht* is inconsistent with the cases that establish the requirement of proving antitrust injury,"[198] the court added, "In fact, we think the argument is right."[199] However, the court later reasoned,

> State Oil is not able to identify any cases, real or hypothetical, in which the practice condemned in *Albrecht* could cause an injury to the interests of antitrust. If proof of antitrust injury is required in cases involving the sort of price fixing involved in

190. *Id.*
191. *See Khan*, 907 F. Supp. at 1202.
192. *See* State Oil v. Khan, 93 F.3d 1358 (7th Cir. 1996).
193. *See id.* at 1360-61.
194. *Id.* at 1363.
195. *Id.*
196. *See id.*
197. *Id.*
198. *Id.*
199. *Id.*

> *Albrecht*, no such case could be brought, whether by a private plaintiff or by the Department of Justice or the Federal Trade Commission.
>
> More to the point, The Supreme Court's conception of antitrust injury may be broader than State Oil's.[200]

The Seventh Circuit went on to point out that "the Court has never retreated from its proposition that vertical minimum price fixing (resale price maintenance) is illegal per se."[201] Yet the court remarked, "Resale price maintenance does not impair any interest that antitrust laws interpreted in light of modern economics could be thought intended to protect."[202] Obviously tortured, the court went on:

> The Court must think that preventing intrabrand price competition harms an interest protected by the antitrust laws even if the restriction increases competition viewed as a process for maximizing consumer welfare and even if a restriction that had similar effects but was not an explicit regulation of price would be lawful. If this is what the Court believes—and it does appear to be the Court's current position, though not one that is easy to defend in terms of economic theory—the Court may also think that interfering with the freedom of a dealer to raise prices may cause antitrust injury. . . . In *Atlantic Richfield*, despite the Court's evident skepticism about the continued soundness of *Albrecht*, the Court distinguished it on the ground that the dealers subject to a price ceiling imposed by their supplier, as distinct from their competitors, were the intended beneficiaries of *Albrecht*. See 495 U.S. at 336-37. The implication is that the injury to a dealer like Khan from not being able to raise his price because of a restriction imposed by a dealer is antitrust injury.[203]

In the subsequent appeal, the Supreme Court alluded to the Seventh Circuit's attack on *Albrecht*, noting, "Despite what Chief Judge Posner aptly described as *Albrecht's* infirmities, [and] its increasingly wobbly, moth-eaten foundations, there remains the question whether *Albrecht* deserves continuing respect under the doctrine of *stare decisis*."[204] The Court said that the Seventh Circuit was correct in applying that principle even though it disagreed with *Albrecht* because "it is this Court's prerogative alone to overrule one of its

200. *Id* at 1364.
201. *Id.*
202. *Id.*
203. *Id.*
204. *See Khan*, 52 U.S. at 27, 28.

precedents."[205] Having said all that, the Court, in a unanimous decision written by Justice O'Connor, overruled the Seventh Circuit and held that maximum vertical price fixing "should be evaluated under the rule of reason."[206]

In *Khan*, the Court reviewed its decisions, beginning with *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[207] and leading up to and beyond *Albrecht*,[208] noting the sweeping condemnation of price restraints in *U.S. v. Socony-Vacuum*[209] and[210] the rejection of an agreement by retailers to fix maximum prices in *Kiefer-Stewart*.[211] Moving to nonprice vertical restrictions, the Court cited *White Motor Co v. U.S.*,[212] where "[t]he Court determined that too little was known about the competitive impact of such vertical limitations to warrant treating them as *per se* unlawful."[213] It then noted that four years later in *U.S. v. Arnold, Schwinn & Co.*,[214] the Court had learned enough to declare maximum vertical price limitations a per se violation.[215]

The Court noted that *Albrecht* was decided in the term after *Schwinn*, and that the Court had conceded "maximum and minimum price fixing may have different consequences in many situations."[216] It then observed that *Sylvania*[217] overruled *Schwinn* in 1977.[218] The *Schwinn* Court acknowledged the principle of stare decisis, but explained that the need for clarification of the law justified reconsideration of *Schwinn*.[219]

The *Khan* Court then went on to state that its analysis of "*Albrecht's* continuing validity . . . is also guided by the view that the primary purpose of the antitrust laws is to protect interbrand competition."[220] Further, low prices are good for consumers as long as they are above predatory levels so that a ban on practices that result in lower prices is "especially costly."[221] With these principles in mind,

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205. *Id.*
206. *Id.* at 30.
207. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
208. *See Albrecht*, 390 U.S. 145.
209. *See* United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940).
210. *See* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).
211. *See Khan*, 52 U.S. at 12, 13.
212. *See* White Motor Co. v. United States, 372 U.S. 253 (1963).
213. *See Khan*, 52 U.S. at 13.
214. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).
215. *See Khan*, 52 U.S. at 13.
216. *Id.*
217. *See* Continental T.V. Inc. v. G.T.E Sylvania Inc., 433 U.S. 36 (1977).
218. *See Khan*, 52 U.S. at 13.
219. *See id.*
220. *Id.* at 15 (citing Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988)).
221. *Id.* at 15 (citing Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S.

the Court found it difficult to continue to maintain that maximum vertical price fixing could cause harm to an extent that would justify its per se illegality.[222] The Court went on to address the anticompetitive concerns expressed in *Albrecht*, concluding that per se condemnation was not justified and that the legality of these price schemes could be appropriately dealt with under the rule of reason.[223]

The Court addressed Khan's argument that *Albrecht's* reconsideration "should require 'persuasive expert testimony establishing that the *per se* rule has distorted the market,'" noting "it is the retention of the rule of *Albrecht* and not, as respondents would have it, the rule's elimination, that lacks adequate justification."[224]

Finally, addressing the question of stare decisis, the Court noted that it is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles," but it is not an "inexorable command."[225] "There is a competing interest, well-represented in this Court's decisions, in recognizing and adapting to changing experiences and the lessons of accumulated experience."[226] The Court noted that "*Albrecht* has been widely criticized since its inception" and that the views underlying the decision were so eroded that "there is not much of that decision to salvage."[227]

The Court went on to make clear that it was not holding maximum vertical price fixing per se legal. Instead, according to the Court, the practice should be analyzed under the rule of reason, and, in its view, such analysis effectively identifies those cases involving anticompetitive conduct.[228]

At last, it was done. *Brunswick* had finally worked its will. The long and tortuous road from *Albrecht* to *Khan* was complete. The antitrust injury doctrine served to force a misguided antitrust rule into conformity with the goals of antitrust. While some may argue that the Court should have gone a step further and declared maximum vertical price fixing per se legal, if future litigation can find no plausible antitrust injury, that will soon be the practical result.

574, 594 (1986)).

222. *See Khan*, 52 U.S. at 15.

223. *See id.* at 15-16.

224. *Id.* at 16.

225. *Id.* at 17 (quoting Payne v. Tennessee, 501 U.S. 808, 827-28 (1991)).

226. *Khan*, 52 U.S. at 17.

227. *Id.* at 18.

228. *See id.*

VII. CONCLUSION

The *Albrecht* Court's finding that maximum vertical price fixing was per se illegal was met by a barrage of criticism from those who felt (rightly) that the practice was, in fact, procompetitive and welfare enhancing—a primary goal of antitrust. Further, maximum vertical price restraints advance every one of the other most frequently suggested goals of antitrust. The Supreme Court held in *Brunswick* that it is not enough to show that a violation has occurred and that the violation has resulted in damage in fact; it held that a plaintiff must also show that antitrust injury, an injury of the type the antitrust laws were intended to prevent, has been suffered. The clear purpose of the Court's antitrust injury doctrine was to bring substantive antitrust law into conformity with the goals of antitrust.

Albrecht and *Brunswick,* together, set in motion an odyssey characterized by futile attempts to reconcile the per se illegality of maximum price fixing with its increasingly obvious procompetitive effects. In the end, the tension between *Albrecht's* misguided per se illegality, with the accompanying deference to the doctrine of stare decisis on the one hand, and *Brunswick's* insistence that the law serve the purposes of antitrust on the other, was resolved in favor of *Brunswick* and the goals of antitrust.