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Vertical Maximum Price Fixing: In Defense of *Albrecht*

*Mark E. Roszkowski**

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I. INTRODUCTION

In *Atlantic Richfield Co. v. USA Petroleum Co.* ("*ARCO*")[1], the Supreme Court, reversing the decision of the Ninth Circuit Court of Appeals,[2] held that an antitrust plaintiff suffers no "antitrust injury" "when it loses sales to a competitor charging nonpredatory prices pursuant to a vertical maximum price-fixing scheme."[3] The *ARCO* case involved, directly and indirectly, two of the most controversial issues in modern antitrust law: (1) the extent to which antitrust injury is a prerequisite to recovery under Section 4 of the Clayton Act; and (2) whether vertical maximum price fixing ought

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1. 110 S. Ct. 1884 (1990).

2. USA Petroleum Co. v. Atlantic Richfield Co., 859 F.2d 687 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1884 (1990).

3. *ARCO*, 110 S. Ct. at 1887.

to be illegal per se under Section 1 of the Sherman Act.[4]

The Court in *ARCO* directly addressed the first issue. Section 4 of the Clayton Act states that private actions for treble damages may be maintained by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."[5] Such actions are limited, however, by the "antitrust injury" requirement originally announced by the Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[6] As established by *Brunswick*, plaintiffs proceeding under Section 4 "must prove more than injury causally linked to an illegal presence in the market. 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."[7]

In *ARCO*,[8] USA Petroleum, an independent marketer of gasoline, sued ARCO, an integrated oil company, and its dealers alleging that they had engaged in a maximum price fixing or limit pricing conspiracy, which fixed gasoline prices at levels that, though not "predatory,"[9] were below USA Petroleum's cost "with

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4. Section 1 of the Sherman Act, enacted in 1890, is the foundation of American antitrust law and provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1 (1988).

5. *Id.* § 15. Under § 1(a) of the Clayton Act, 15 U.S.C. § 12(a) (1988), the "antitrust laws" include the Sherman Act, 15 U.S.C. §§ 1-7 (1988); the Clayton Act, 15 U.S.C. §§ 12-27 (1988); and the Wilson Tariff Act, 15 U.S.C. §§ 8-11 (1988).

6. 429 U.S. 477 (1977).

7. *Id.* at 489. The Court extended the antitrust injury requirement to private actions for injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26, in Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 122 (1986).

8. 110 S. Ct. 1884 (1990).

9. Predatory pricing occurs when a firm, in an effort to maintain or acquire a monopoly, undersells its rivals by pricing below cost. After rivals are driven out of business, the predator raises its prices to monopoly levels to offset the losses incurred during the predatory pricing campaign. Since 1975, when the cost-based Areeda-Turner test was introduced, Phillip E. Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975), few plaintiffs have prevailed on predatory pricing theories, HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 172 (1985) [hereinafter HOVENKAMP, ECONOMICS]. As in other areas of antitrust, declined enforcement and limited plaintiff recovery is due to increasing judicial acceptance of neoclassical economic views; here, that predatory pricing is irrational and rarely occurs. *See* HOVENKAMP, ECONOMICS, *supra*; ROBERT H. BORK, THE ANTITRUST PARADOX 144-55 (1978) [hereinafter BORK, PARADOX]; Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981). The Supreme Court has not defined predatory pricing but has hinted that it might involve "(i) pricing below the level necessary to sell [the defendant's] products, or (ii) pricing below some appropriate measure of cost." Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,

the purpose and effect of making it impossible for plaintiff and other independents to compete."[10] In essence, USA Petroleum alleged that ARCO and its co-conspirators sold gasoline at retail for less than independents like USA Petroleum could purchase it at wholesale.[11] USA Petroleum further alleged that the conspiracy resulted in a "steady and continuous reduction in the competitive effectiveness of independent refiners and marketers selling in California and the western United States,"[12] and that, as a result, "more than a dozen large independents have sold out, liquidated or drastically curtailed their operations, and many independent retail stations have closed."[13] Despite these consequences, which were assumed to be true because the case was decided on a motion for summary judgment, the Court denied USA Petroleum standing to maintain its Section 4 action.[14] The Court observed that although Section 1 of the Sherman Act makes a vertical maximum price-fixing agreement unlawful, "it does not cause a competitor antitrust injury unless it results in predatory pricing."[15]

The second issue raised by the *ARCO* case, although not directly addressed by the Court, is the heart of the dispute and the focus of this Article. The second issue was simply whether the substantive rule allegedly involved in *ARCO*—that vertical agreements to fix maximum resale prices are per se illegal under Section 1 of the Sherman Act—is correct. As explained below, the *ARCO* case, though not resolving this issue, embodies the continuing dispute between the Seventh and Ninth Circuits regarding the wisdom of the Supreme Court's vertical maximum price-fixing rule.

The rule that vertical maximum price fixing is per se illegal was first announced by the Court in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*,[16] and reinforced in *Albrecht v. Herald Co.*[17] The *Albrecht* rule has been harshly criticized by members of the "Chicago School" of antitrust ideology,[18] whose views have had a

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475 U.S. 574, 584-85 n.8 (1986). For a discussion of various judicial approaches to predatory pricing, see Wesley J. Liebeler, *Whither Predatory Pricing? From Areeda and Turner to Matsushita*, 61 NOTRE DAME L. REV. 1052 (1986).

10. *ARCO*, 110 S. Ct. at 1896 n.2 (Stevens, J., dissenting) (quoting ¶ 31 of plaintiff's amended complaint).

11. *Id.* (Stevens, J., dissenting).

12. *Id.* at 1896-97 n.5 (Stevens, J., dissenting) (quoting ¶ 18 of plaintiff's amended complaint).

13. *Id.* (Stevens, J., dissenting) (quoting ¶ 18 of plaintiff's amended complaint).

14. *Id.* at 1887.

15. *Id.* at 1887-88.

16. 340 U.S. 211 (1951).

17. 390 U.S. 145 (1968).

18. For the views of the the Chicago School, see BORK, PARADOX, *supra* note 9, and

profound impact on the development of modern antitrust law, particularly vertical restraints of trade.[19] Because prominent members of the Chicago School, namely Judges Posner and Easterbrook, are now members of the Seventh Circuit Court of Appeals, it is not surprising that, unable directly to overrule *Albrecht*, the Seventh Circuit has given its rule of per se illegality for maximum price fixing a very narrow reading. The Seventh Circuit has done this by constricting the antitrust injury requirement.

For example, in 1984, Judge Posner authored the opinion in *Jack Walters & Sons Corp. v. Morton Building, Inc.*[20] In this case, Walters, a dealer in Morton's prefabricated buildings, alleged that Morton had limited the prices that dealers could charge customers, specifically by acting to assure that dealers honored Morton's periodically advertised sale prices.[21] Judge Posner noted that even if illegal maximum price fixing had occurred,[22] the plaintiff suffered no antitrust injury.[23] Judge Posner reasoned that Walters's loss resulted in a gain to consumers because competing dealers, or even Morton, would lower their price to consumers if Walters did not.[24] Judge Posner concluded that the plaintiff "will not be heard to complain about having to meet lawful price competition, which antitrust law seeks to encourage, merely because the competition might have been enabled by an antitrust violation."[25]

In contrast to the Seventh Circuit's formulation, the Ninth Circuit found both standing and antitrust injury in *ARCO* by following the more traditional reasoning that a competitor should have standing to vindicate conduct that the Court has consistently declared to be a per se violation of the Sherman Act.[26] Expressly repudiating Judge Posner's reasoning in *Jack Walters*, the Ninth

Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979). A brief summary of the Chicago School theory appears in Wesley A. Cann, Jr., *Vertical Restraints and the "Efficiency" Influence—Does Any Room Remain for More Traditional Antitrust Values and More Innovative Antitrust Policies?*, 24 AM. BUS. L.J. 483, 486-93 (1987).

19. For an extended criticism of the current law of vertical restraints, see Mark E. Roszkowski, *The Sad Legacy of GTE Sylvania and Its "Rule of Reason": The Dealer Termination Cases and the Demise of Section 1 of the Sherman Act*, 22 CONN. L. REV. 129 (1989).

20. 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

21. *Id.* at 706.

22. *Id.* at 708-09.

23. *Id.* at 709.

24. *Id.*

25. *Id.* For further discussion of this case, see *infra* note 135.

26. USA Petroleum Co. v. Atlantic Richfield Co., 859 F.2d 687, 696 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1884 (1990).

Circuit noted that the antitrust laws were meant to give competitors an "even playing field,"[27] and reasoned that the competitive process works only if market participants are not allowed to combine to fix prices in advance.[28] The court concluded that the antitrust policy is best effectuated by according competitors "standing" to enforce antitrust laws prohibiting price-fixing,[29] and that "the injury done to the market and to competitors by price-fixing conspiracies is antitrust-injury—the type of injury the antitrust laws were meant to prevent."[30]

Commenting on the character of the dispute between the circuits, Professors Blair and Harrison noted that "[t]he division between the Ninth and Seventh Circuits is probably at least as much about the *Albrecht* rule itself as it is about antitrust injury."[31] Blair and Harrison observed that although the Ninth Circuit's approach appears to show "deference to the Supreme Court's position on vertical maximum price-fixing," the court's opinion also "reflects a strong general agreement with the substantive rule."[32] The Seventh Circuit's approach, in contrast, evinces "a conviction that the substantive rule itself is inconsistent with the goals of antitrust law."[33] Based on these observations, Professors Blair and Harrison suggest that the Supreme Court should reconsider *Albrecht*.[34] They conclude, however, that because "the current battle is waged

27. *Id.* at 697.

28. *Id.*

29. *Id.*

30. *Id.*

31. Rodger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 VAND. L. REV. 1539, 1556 (1989) [hereinafter Blair & Harrison, *Rethinking Antitrust*]. Interestingly, even members of the Chicago School criticize Judge Posner's activist stance in *Jack Walters*. For example, Professor Hovenkamp, a self-described Chicago School "fellow traveler," Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 213 n.* (1985), noted:

> Even consumers would not be able to bring actions under the rule established in Judge Posner's opinion in *Jack Walters* . . . .
>
> . . . I cannot escape the conclusion that Judge Posner—growing impatient with Congress's or the Supreme Court's refusal to overrule *Albrecht*—has decided to undertake the task on his own.
>
> Members of the Chicago School have visions, as do most of us, of the kinds of things that should obtain in a perfect world. The per se rule against resale price maintenance is definitely not among them. That fact justifies arguments, both theoretical and political. But it does not justify taking the matter into one's own hands, no matter how certain we may be that we are right.

Herbert Hovenkamp, *Chicago and Its Alternatives*, 1986 DUKE L.J. 1014, 1025-26 (footnote omitted).

32. Blair & Harrison, *supra* note 31, at 1555-56.

33. *Id.* at 1556.

34. *Id.*

in the 'code' of a very elastic concept of an antitrust injury, it remains to be seen whether we have moved toward a substantive reconsideration of *Albrecht*."[35]

Although paying lip service to the *Albrecht* rule,[36] the Supreme Court clearly gutted it in *ARCO* by adopting the Seventh Circuit's restrictive antitrust injury requirement for vertical maximum price-fixing cases.[37] That is, the Court in *ARCO* avoided a substantive reconsideration of *Albrecht* but severely restricted it through the "code" of antitrust injury. The remainder of this Article addresses the question that the Court ducked in *ARCO*: Should *Albrecht* be overruled? In other words, as a matter of substantive antitrust law, should vertical maximum price fixing be per se illegal? Despite reams of caustic criticism of *Albrecht*, the answer, developed below, is clear: the *Albrecht* rule is unequivocally correct.

II. CASES ESTABLISHING THE PER SE RULE AGAINST VERTICAL MAXIMUM PRICE FIXING

Commentators have harshly and relentlessly criticized the Supreme Court's long-standing rule that vertical maximum price fixing is per se illegal.[38] To determine whether such criticism is warranted, this Article first examines in detail the cases announcing the per se standard to ascertain both the specific facts underlying the disputes and the reasoning used by the Court. Second, this Article examines the validity of the voluminous criticism of the rule.

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35. *Id.*

36. Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884, 1889 n.5 (1990).

37. *Id.* at 1890-91.

38. 8 PHILLIP E. AREEDA, ANTITRUST LAW ¶¶ 1634-1640 (1989); BORK, PARADOX, *supra* note 9; HOVENKAMP, ECONOMICS, *supra* note 9, at 265; Rodger D. Blair & James M. Fesmire, *Maximum Pricing Fixing and the Goals of Antitrust*, 37 SYRACUSE L. REV. 43 (1986) [hereinafter Blair & Fesmire, *Maximum Price Fixing*]; Blair & Harrison, *Rethinking Antitrust*, *supra* note 31, at 1553; Rodger D. Blair & David L. Kaserman, *The Albrecht Rule and Consumer Welfare: An Economic Analysis*, 33 U. FLA. L. REV. 461 (1981) [hereinafter Blair & Kaserman, *The Albrecht Rule*]; Rodger D. Blair & Carolyn D. Schafer, *Evolutionary Models of Legal Change and the Albrecht Rule*, 32 ANTITRUST BULL. 989, 994-1000 (1987) [hereinafter Blair & Schafer, *Evolutionary Models*]; Frank H. Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981); Milton Handler, *Reforming the Antitrust Laws*, 82 COLUM. L. REV. 1287, 1299-1307 (1982); Herbert Hovenkamp, *Vertical Integration by the Newspaper Monopolist*, 69 IOWA L. REV. 451, 452-56 (1984) [hereinafter Hovenkamp, *Vertical Integration*]; Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981); *The Supreme Court 1967 Term*, 82 HARV. L. REV. 63, 257-58 (1968).

Despite all the commentary, vertical maximum price fixing cases are extremely rare. The Supreme Court has decided only three such cases, involving widely varied fact situations: *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*;[39] *Albrecht v. Herald Co.*;[40] and *ARCO*.[41] For example, *Kiefer-Stewart* involved an attempt by suppliers to control downstream liquor prices charged by an alleged wholesaler cartel after the Office of Price Administration ("O.P.A.") price controls were lifted.[42] *Albrecht* involved a newspaper publisher's attempt to control price gouging by its distributors after the publisher had established them in exclusive territories.[43] *ARCO* involved an alleged attempt by an oil company to destroy independent retail competition by maintaining its dealers' prices at artificially low levels.[44] In only two of these cases could the defendant assert a pro-competitive motive; breaking up a cartel in *Kiefer-Stewart* and controlling a reseller's local monopoly in *Albrecht*. As developed below, however, these justifications for vertical maximum price fixing wither when examined in light of basic antitrust principles and when restrictive newspaper distribution schemes, such as existed in *Albrecht*, are examined under rule of reason analysis.[45]

A. Kiefer-Stewart

In *Kiefer-Stewart*,[46] an Indiana liquor wholesaler sued Seagram and Calvert Corporations, wholly-owned subsidiaries of a single parent, alleging that Seagram and Calvert had conspired to sell liquor only to wholesalers that observed maximum resale prices set by the defendants.[47] The elimination of O.P.A. regulation of liquor prices in October 1946 precipitated the conspiracy.[48] Under the O.P.A. scheme, liquor markups were limited to 15% over cost, exclusive of state and federal taxes.[49] This formula reduced wholesale profits to approximately 10% of the selling price.[50] After price controls were lifted, the plaintiff, Kiefer-Stewart, and other Indi-

39. 340 U.S. 211 (1951).
40. 390 U.S. 145 (1968).
41. 110 S. Ct. 1884 (1990).
42. *Kiefer-Stewart*, 340 U.S. at 212.
43. *Albrecht*, 390 U.S. at 147.
44. *ARCO*, 110 S. Ct. at 1887-88.
45. *See infra* part III.
46. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).
47. *Id.* at 229-31.
48. *Id.* at 230.
49. *Id.*
50. *Id.*

ana liquor wholesalers met through their trade association and shortly thereafter announced identical liquor price increases reflecting a 15% markup on overall costs, including taxes.[51] Thus, the liquor wholesalers entered into a horizontal price-fixing conspiracy that, although not directly in issue, apparently violated the Sherman Act.[52]

To control this alleged conspiracy, Seagram sent a telegram to all United States wholesalers announcing its intent privately to reimpose O.P.A. pricing restrictions noting: "This decision was reached because of our sincere belief that it is not in our nor the public's interest to raise whiskey prices. By holding the price line we can win the fullest measure of public appreciation and confidence in our industry."[53] The telegram also urged the wholesalers to pressure their retailers to keep prices down.[54] Seagram then suspended shipments to uncooperative Indiana wholesalers, who, with the exception of Kiefer-Stewart, quickly capitulated and restored O.P.A. prices.[55] Calvert, who originally had agreed to supply Kiefer-Stewart despite Seagram's policy, ultimately refused to deal with Kiefer-Stewart.[56]

After a jury returned a verdict in favor of Kiefer-Stewart, Seagram and Calvert appealed.[57] The Court of Appeals for the Seventh Circuit reversed, finding that the evidence was insufficient to establish horizontal conspiracy between Seagram and Calvert,[58] and that even if a conspiracy existed, it was not illegal. The court reasoned that Seagram and Calvert had only set a maximum price, not a fixed price at which their products must be sold,[59] and that the wholesalers were free to charge any price within the maximum limit and could charge different prices for Seagram and Calvert products.[60] The court concluded that this restriction neither restrained trade nor impaired competition,[61] noting that competition depends on the ability to meet prices or beat the price fixed by a

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51. *Id.* at 214.
52. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc. 182 F.2d 228, 229-30 (7th Cir. 1950).
53. *Id.* at 230.
54. *Id.* at 230-31.
55. *Id.* at 231.
56. *Id.*
57. *Id.* at 229.
58. *Id.* at 234.
59. *Id.* at 235.
60. *Id.*
61. *Id.*

competitor, not upon the ability to charge higher prices.[62] The court also noted that the defendants faced a potential "two-horned dilemma":[63] liability for maximum price fixing by refusing to sell; or liability for participation in the retailers' horizontal price-fixing conspiracy by selling to them without restriction and with knowledge of the scheme.[64]

The Supreme Court granted certiorari in *Kiefer-Stewart* and reversed the decision of the Seventh Circuit.[65] Justice Black succinctly disposed of the Seventh Circuit's opinion, reasoning that agreements fixing maximum prices, like those fixing minimum prices, "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."[66] In reaching its conclusion, the Court reaffirmed the holding of its landmark case, *United States v. Socony-Vacuum Oil Co.*,[67] that: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate of foreign commerce is illegal *per se*."[68] Justice Black also rejected the wholesaler-cartel defense by noting that if the plaintiff and other wholesalers were themselves guilty of antitrust violations, they could be held responsible in other governmental or private proceedings.[69] Justice Black stated that Kiefer-Stewart's alleged illegal conduct could not legalize the defendants' unlawful combination "nor immunize them against liability to those they injured."[70] In essence, the Court held that two

62. *Id.*

63. *Id.* at 234.

64. *Id.* at 233-34 (citing United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945)). Judge Bork also noted the alleged benefits in *Kiefer-Stewart* of maximum price fixing in breaking down the wholesaler cartel:

> If a manufacturer knows, or suspects but cannot prove, that resellers have cartelized, the manufacturer can provide a powerful incentive for resellers to defect from the cartel by refusing to sell to those that comply with the cartel's price agreement. Maximum resale price fixing accomplishes that purpose. Because there is no danger of a restriction of output but rather the likelihood of an increase, the law should welcome the vertical restraint.

Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 464 (1966).

65. *Kiefer-Stewart*, 340 U.S. at 211.

66. *Id.* at 213.

67. 310 U.S. 150 (1940).

68. *Kiefer-Stewart*, 340 U.S. at 213 (quoting *Socony-Vacuum*, 310 U.S. at 223).

69. *Id.* at 214.

70. *Id.* (citing Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 242-43 (1948); Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457 (1941)). In *Fashion Originators' Guild*, for example, a group of garment and fabric manufacturers, the Fashion Originators' Guild of America ("F.O.G.A."), refused to sell its garments to retailers who also sold garments copied by other manufacturers from designs

wrongs do not make a right; that is, that Seagram and Calvert could not justify their antitrust violation by asserting that they were using it to combat a separate antitrust violation by Kiefer-Stewart and the other Indiana wholesalers.

The Court treated the *Kiefer-Stewart* case as a horizontal conspiracy to impose maximum resale prices on the wholesalers. Because Seagram and Calvert were wholly-owned subsidiaries of a single parent, courts today, following the Supreme Court's 1984 decision, *Copperweld Corp. v. Independence Tube Corp.*,[71] probably would treat the two distillers as a single economic entity, incapable of conspiring with itself and, thus imposing a purely vertical restraint on the wholesalers. This fact should not affect any substantive outcome, however, because in the *Albrecht* case, the Court directly applied *Kiefer-Stewart*'s reasoning to condemn a wholly vertical maximum price-fixing arrangement.

B. Albrecht

In *Albrecht*,[72] the defendant, Herald Company, published the *Globe-Democrat*, a morning newspaper that it distributed through independent distributors who bought papers at wholesale and sold them at retail.[73] Herald provided each of its 172 distributors with an exclusive territory.[74] To prevent price gouging by the distributors, Herald reserved the right to compete with or ultimately terminate any distributor whose retail prices exceeded a suggested maximum price advertised by Herald in its paper.[75]

Albrecht, one of the distributors, adhered to the advertised price for some time, but ultimately raised his price to customers by ten

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of Guild members. *Fashion Originators' Guild*, 312 U.S. at 461. F.O.G.A. justified its boycott as necessary to control "style piracy," which it believed to be tortious and an unfair trade practice. *Id.* In rejecting this argument, the Court noted:

> [T]he unlawful combination [cannot] be justified upon the argument that systematic copying of dress designs is itself tortious, or should now be declared so by us. In the first place, whether or not given conduct is tortious is a question of state law. . . . In the second place, even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law.

Id. at 468.

71. 467 U.S. 752 (1984). For a thorough debunking of the *Copperweld* reasoning and holding, see Justice Stevens's dissent in that case. *Id.* at 778-96 (Stevens, J., dissenting).

72. Albrecht v. Herald Co., 390 U.S. 145 (1968).

73. *Id.* at 147.

74. *Id.*

75. *Id.*

cents a month.[76] After repeated objections, Herald informed Albrecht and his customers by letter that Herald itself would deliver the paper to any customer who wanted it at the lower price.[77] Herald then hired Milne Circulation Sales, Inc., a national firm engaged in newspaper subscription solicitation, to engage in telephone and house-to-house solicitation of all residents of Albrecht's territory.[78] As a result, 300 of Albrecht's 1200 customers shifted to direct delivery by Herald.[79] To service these customers, Herald advertised that a new route was available without cost.[80] George Kroner, another distributor, took over the route.[81] Kroner knew why he received the route without charge, that overcharging would not be tolerated, and that he might have to return it if Albrecht sold his route or discontinued his pricing practice.[82] Herald continued selling papers to Albrecht until he filed a Section 1 Sherman Act suit, after which Herald terminated Albrecht.[83] Albrecht subsequently sold his route for more than he paid for it but less than he could have received had he been able to turn over 1200 instead of 900 customers.[84]

Albrecht's suit alleged a combination in restraint of trade between the defendant Herald and Albrecht's customers and/or Milne Circulation Sales, Inc. and/or George Kroner.[85] The jury found for the defendant Herald and the Court of Appeals for the Eighth Circuit affirmed.[86] The Supreme Court reversed,[87] relying first on *United States v. Parke, Davis & Co.*[88] to find the existence of a combination,[89] and then upon *Kiefer-Stewart* to find the maximum price-fixing arrangement illegal per se.[90] On the price-fixing issue, the Court stated that schemes to fix maximum prices may severely impair the buyer's ability to compete because such schemes substitute "the perhaps erroneous judgment of the seller

76. *Id.* at 147 & n.2.
77. *Id.* at 147.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 147-48.
82. *Id.* at 148.
83. *Id.*
84. *Id.*
85. *Id.*
86. 367 F.2d 517 (8th Cir. 1966).
87. 390 U.S. 145 (1968).
88. 362 U.S. 29 (1960).
89. *Albrecht*, 390 U.S. at 149-50 (citing *Parke, Davis*, 362 U.S. at 45).
90. *Id.* at 149-52 (citing Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951)).

for the forces of the competitive market."[91] The Court held that the combination formed by Herald to force Albrecht to maintain a specified resale price for the newspapers "constituted, without more, an illegal restraint of trade under Section 1 of the Sherman Act."[92]

In reaching its decision, the *Albrecht* Court catalogued some additional potential anticompetitive consequences of maximum price fixing. First, the price may be set too low to allow the dealer to furnish the services consumers desire.[93] Second, "maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition."[94] Finally, maximum price-fixing schemes tend to acquire the attributes of minimum price-fixing arrangements "if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer."[95]

These remarks by the Court are pure dicta, however, because none of the listed consequences were present in *Albrecht.*[96] Rather, the Court decided *Albrecht* solely on the basis of the fundamental antitrust principles announced in *Dr. Miles Medical Co. v. John D. Parke & Sons, Inc.*[97] and *United States v. Socony-Vacuum Oil Co.*,[98] and applied in *Kiefer-Stewart.*[99] Simply stated, price is to be determined by the free interplay of market forces, not by the private

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91. Id. at 152.
92. *Id.* at 153.
93. *Id.* at 152-53.
94. *Id.* at 153.
95. *Id.*
96. Although none of the potential anticompetitive consequences of maximum price fixing were present in *Albrecht*, one was involved in Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 182 F.2d 228, 230-31 (7th Cir. 1950), *rev'd*, 340 U.S. 211 (1951). As explained by the Court in *Albrecht*: "In *Kiefer-Stewart* after the manufacturer established the maximum price at which its product could be sold, it fair-traded the product so as to fix that price as the legally permissible minimum." *Albrecht*, 390 U.S. at 153 n.9.
97. 220 U.S. 373 (1911). In prohibiting resale price maintenance, the Court in *Dr. Miles* stated:

> [W]here commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstances whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.

Id. at 408-09.
98. 310 U.S. 150 (1940).
99. 340 U.S. 211 (1951).

decision of a group of competitors or by a supplier selling its products through independent distributors.[100] Further, price fixing is illegal per se[101] and is an expansive concept that includes *any* combination that tampers with price setting mechanisms.[102] Thus, it is no defense that the prices set are reasonable,[103] that the price fixing was designed to eliminate some other competitive "abuse" or "evil,"[104] or that the defendants had no power to control the market.[105] Further, price fixing includes not only agreements to pay or charge a rigid, uniform price, but also any agreements to alter prices, whatever machinery is used.[106]

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100. As Professor Sullivan has noted, this principle applies equally to minimum and maximum price fixing:

> The policy which insists on individual decisions about price thus has at its source more than a preference for the independence of the small businessman (though that is surely there) and more than a preference for the lower prices which such a policy will usually yield to consumers (though that too is strongly present). Also at work is the theoretical conviction that the most general function of the competitive process, the allocation and reallocation of resources in a rational yet automatic manner, can be carried out only if independence by each trader is scrupulously required. Created out of the confluence of these parallel strivings, the policy has a breadth which makes it as forbidding to maximum price arrangements as to the more common ones which forestall price decreases.

LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 78, at 212 (1977).

101. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

102. *Id.* at 221.

103. *Id.* As the Court long ago noted, a fixed price is inherently unreasonable:

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.

United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927).

104. *Socony-Vacuum*, 310 U.S. at 218, 220-22.

105. *Id.* at 224 n.59.

106. *Id.* at 222. In Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 348 (1982), the Court reaffirmed the basic principles announced in *Socony-Vacuum*, *Kiefer-Stewart*, and *Albrecht* and applied those principles to find a *horizontal* maximum price-fixing scheme per se illegal. In *Maricopa County Medical Soc'y*, medical care foundations, by agreement of their member-doctors, fixed the maximum fees that doctors could recover for medical services provided to patients insured under plans approved by the foundations. *Id.* at 339-40. After quoting extensively from *Socony-Vacuum*, *Kiefer-Stewart*, and *Albrecht*, the *Maricopa County Medical Soc'y* Court concluded:

> Our decisions foreclose the argument that the agreements at issue escape *per se*

C. *Criticism of* Albrecht

The reasoning outlined above is more than sufficient to dispose of *Kiefer-Stewart*, *Albrecht*, and any other maximum, minimum, horizontal, or vertical price-fixing case. Yet, *Albrecht* has been subjected to harsh criticism, usually based on the assertion that maximum price fixing is necessary to prevent price gouging by the independent distributors who enjoy monopoly power in their respective territories.[107] Indeed, virtually all criticism of the per se rule for maximum price fixing assumes the existence of successive monopoly.[108] Critics further assert that if maximum price fixing is illegal, the only alternative is to vertically integrate into distribution, thus replacing numerous independent dealers with a monopolist.[109] For example, the Court of Appeals for the Eighth Circuit in *Albrecht* found that the *Globe-Democrat*'s maximum price-fixing arrangement benefitted the public by fostering competition.[110] The Eighth Circuit reasoned that if the *Globe-Democrat* was forced to abandon the arrangement, it would have no other choice but to terminate the independent carriers and deliver the papers using its own employees.[111] As a result, the *Globe-Democrat* would "automatically become a monopolist."[112]

Even ignoring the fact that a maximum price is an administered price and therefore should be presumptively unlawful, criticism of

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> condemnation because they are horizontal and fix maximum prices. *Kiefer-Stewart* and *Albrecht* place horizontal agreements to fix maximum prices on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices. The *per se* rule "is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition." In this case the rule is violated by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases. Such a restraint also may discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. It may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character.

Id. at 348 (quoting James A. Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 NW. U. L. REV. 137, 142 (1962)).

In November 1990, the *Socony-Vacuum* holding was emphatically reaffirmed in Palmer v. BRG of Ga., Inc., 111 S. Ct. 401, 402 (1990) (per curiam). In *Palmer*, the Court held that a revenue sharing arrangement between competing bar exam review courses was per se illegal even without direct agreement on actual prices to be charged. *Id.* at 403.

107. *See* sources cited *supra* note 38.

108. *See* sources cited *supra* note 38.

109. *See* sources cited *supra* note 38.

110. Albrecht v. Herald Co., 367 F.2d 517, 522 (8th Cir. 1966), *rev'd*, 390 U.S. 145 (1968).

111. *Id.*

112. *Id.*

the *Albrecht* rule nevertheless suffers from two fatal and fundamental errors. These are the fallacious assumptions that (1) airtight exclusive territories are the only way to distribute newspapers through independent distributors; and (2) vertical integration into distribution either is caused by the *Albrecht* rule, is somehow bad in itself, or is less efficient than distribution through independent carriers.

III. Testing the Validity of Exclusive Territories and Maximum Price Fixing in Newspaper Distribution Under the Rule of Reason

Arguments favoring maximum price fixing are usually couched in strong, pro-consumer rhetoric.[113] In fact, however, a newspaper adopting a maximum price-fixing scheme is motivated not by concern for consumers, but by the desire to keep the retail price of the paper artificially low (in fact, below cost)[114] to increase circulation and thereby maximize advertising revenues. Also lost in the rhetoric is any consideration of *why* the distributors have the ability to charge supracompetitive prices. The answer is simple: because the newspaper set up the distributors in airtight exclusive territories. For example, Professor Hovenkamp repeatedly criticizes the *Albrecht* holding as an impediment to policing the distributors' "natural monopoly" without ever explaining from where the monopoly came or why it is natural.[115] This is typical of anti-*Albrecht* commentary, which invariably assumes that the exclusive territories are legal.

In fact, however, the presumptive *illegality* of exclusive territories is apparent from the fact that price fixing is necessary to police them, a point Justice White clearly enunciated in *Albrecht*. He stated that the exclusive territories could not be presumed valid and that "[t]he assertion that illegal price fixing is justified because it blunts the pernicious consequences of another distribution practice is unpersuasive."[116] Justice White noted that if the economic

113. *See, e.g.*, text accompanying notes 110-12.

114. *See infra* note 156.

115. *See* Hovenkamp, *Vertical Integration*, *supra* note 38, at 452-54, 461. Hovenkamp consistently refers to the carriers' natural monopoly without any supporting authority, *see, e.g.*, *id.*, except for a brief note which is simply a theoretical economic argument with a graph, *id.* at 452-54 & n.17. Interestingly, Professors Blair and Fesmire cite Professor Hovenkamp's argument for the proposition that newspaper distribution is a natural monopoly. Blair & Fesmire, *Maximum Price Fixing*, *supra* note 38, at 76 n.127.

116. Albrecht v. Herald Co., 390 U.S. 145, 153-54 (1968). In this passage, Justice White cited United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967), which held that vertical nonprice restrictions imposed in conjunction with the sale of goods

effect of the exclusive territories established by the newspaper "was such that the public could be protected only by otherwise illegal price fixing itself injurious to the public, the entire distribution scheme must fall under § 1 of the Sherman Act."[117]

Despite this basic observation, the anti-*Albrecht* forces seem willing to ignore the basic mandates of rule of reason analysis in judging the legality of restricted newspaper distribution systems. Under rule of reason analysis, a court must answer three questions: (1) what is the harm or potential harm to competition resulting from the challenged restraint; (2) what is the object of the restraint and is it legitimate and significant; and (3) are less restrictive alternatives, causing fewer harms to competition, available to the collaborators to achieve the legitimate objectives of the restraint.[118] The typical *Albrecht*-style newspaper distribution system of exclusive territories coupled with maximum price fixing fails to withstand antitrust scrutiny under this rule of reason standard.

A. *Harm to Competition and Purpose of the Restraint*

The Court noted in both *Albrecht*[119] and *Kiefer-Stewart*[120] that the harm to competition involved in maximum price fixing is apparent. Suppliers administer pricing decisions to their customers. As a result, independent businesses are unable to determine the prices to charge for their goods based on their own costs and their competitors' actions.[121] Despite this basic consequence, critics of

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were per se illegal. *Schwinn* was overruled in 1977 by Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), which substituted a rule of reason standard. As developed below, the exclusive territories in *Albrecht* fail to meet even this more lenient standard. For an extended critique of *GTE Sylvania* and its consequences, see Roszkowski, *supra* note 19.

117. *Albrecht*, 390 U.S. at 153-54.

118. PHILLIP E. AREEDA, THE RULE OF REASON IN ANTITRUST ANALYSIS: GENERAL ISSUES 2 (1981); *see also* 7 AREEDA, *supra* note 38, ¶ 1502.

119. 390 U.S. 145 (1968).

120. 340 U.S. 211 (1951).

121. The inquiry into the legality of vertical maximum price fixing should be, as Professors Flynn and Ponsoldt note:

> conducted with a presumption of illegality because the impact of the restraint severely curtails the rights of distributors to succeed or fail through a competitive process. In cases where maximum price fixing takes place, be it horizontal or vertical, the markets involved are usually characterized by a virtually complete departure from the ideal of a perfectly competitive market.
>
> Assumption of power by a monopolistic supplier, or by a horizontal agreement among distributors to fix a maximum price, is a direct displacement of the competitive process of price determination. It is an assumption of power by the proponent of the restraint, denying rights of distributors and consumers to make their own judgments about pricing—a denial of rights guaranteed by the

Albrecht nevertheless assume that maximum price fixing is somehow procompetitive. For example, the court of appeals in *Albrecht* reasoned that Herald's maximum price policy actually complied with antitrust law by insuring competition.[122] The Eighth Circuit observed that a home delivery system is monopolistic by nature whether routes are handled by independent merchants, such as the *Albrecht* plaintiff, or by the publisher itself.[123] The court concluded that the "public's protection from the harmful effects therefrom can be guaranteed only by preventing overcharging through insuring competition."[124]

It is difficult to see just what "competition" is promoted by a newspaper's maximum price-fixing policy. The distributors, set up in airtight exclusive territories, do not compete with each other. They, therefore, have no incentive to provide adequate service or to charge their customers less than the advertised maximum price. Indeed, there is no suggestion in *Albrecht* that any distributor charged less than the advertised maximum. The only possible competition occurs between the newspaper and rogue distributors such as Albrecht who fail to toe the maximum price line. Thus, all customers ultimately pay the same administered retail price for the paper, even though there are many supposedly independent "competitors" selling it.[125]

Justice Harlan's dissent in *Albrecht* also is instructive on the

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> goals of anti-trust policy. Congress did not leave to the proponents of such restraints the authority to determine unilaterally the scope of the contract rights of distributors. Similarly, Congress did not intend the proponents of maximum price fixing to determine what the best price should be for the benefit of the public.

John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125, 1149 (1987).

122. *Albrecht*, 367 F.2d at 522.

123. *Id.* at 523.

124. *Id.*

125. Professor Areeda devotes nearly 60 pages of his treatise to criticizing *Albrecht*, 8 AREEDA, *supra* note 38, ¶¶ 1634-41, at 392-451, but musters only one paragraph in response to the "dealer freedom" argument, which as previously discussed, is the sole basis of the *Albrecht* and *Kiefer-Stewart* holdings. *See supra* notes 93-105 and accompanying text. Areeda states:

> As one of its grounds for condemnation, the Supreme Court's *Albrecht* decision objected that vertical agreements limiting maximum prices would "cripple the freedom of traders." A reluctance to allow manufacturers to control a dealer's freedom to dispose as he saw fit of goods he owned was hinted in *Dr. Miles* and apparently made decisive in *Schwinn*'s approach to vertical non-price restraints. The latter case, however, was overruled by *GTE Sylvania*, in which the Supreme Court rejected the dealer freedom rationale as grounds for condemning vertical non-price restraints. The rejection seems equally applicable here,

competition issue. In attempting to justify a more lenient standard for maximum than minimum price-fixing schemes, he stated:

> because dealer autonomy provides no basis for distinguishing desirable from undesirable restraints, for all of them restrain dealer freedom.

8 AREEDA, *supra* note 38, ¶ 1637d, at 406-07 (quoting *Albrecht*, 390 U.S. at 152 (quoting *Kiefer-Stewart*, 340 U.S. at 213)).

The Court's holding in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), is indefensible, however, because *inter alia*, its "rule of reason" standard governing "nonprice" vertical restraints requires an impossible balancing of an admitted restraint on intrabrand competition against only arguable benefits to interbrand competition. *See* Roszkowski, *supra* note 19, at 158. Even if such an intrabrand-interbrand balancing is possible, it is clearly inappropriate for cases like *Albrecht* in which there is no interbrand competition to balance against the restraint on intrabrand competition. *Id.* Further, *GTE Sylvania* expressly limited its holding to nonprice restraints, 433 U.S. at 51 n.18, not price restraints such as those involved in *Albrecht*. Moreover, *GTE Sylvania* announced a rule of reason, not a per se legal standard for nonprice vertical restraints, such as exclusive territories. *Id.* at 57-59. As developed in this Article, such restraints in the newspaper distribution context failed to withstand scrutiny under the rule of reason.

It is also interesting to note that Professor Areeda cites footnote 21 of the *GTE Sylvania* opinion, 433 U.S. at 53 n.21, as authority for the proposition that the Court has rejected the dealer freedom rationale as grounds for condemning vertical non-price restraints. 8 AREEDA, *supra* note 38, ¶ 1637d, at 407 n.18. Similarly, Judge Easterbrook cites footnote 21 as "explicitly reject[ing] any analysis that makes antitrust cases turn on the 'autonomy of independent businessmen.'" Easterbrook, *supra* note 38, at 888.

Footnote 21 is the *GTE Sylvania* Court's response to Judge Browning's dissent in the court of appeals opinion, GTE Sylvania Inc. v. Continental T.V., Inc. 537 F.2d 980, 1018-29 (9th Cir. 1976) (Browning, J., dissenting). In defending the *Schwinn* rule of per se illegality for nonprice vertical restraints, Judge Browning stated:

> The jury's verdict determined that Sylvania restricted the territory in which Continental could resell television sets purchased from Sylvania. Where to sell is a crucial business question. The answer determines the markets in which the seller will compete. Thus, Sylvania interfered with the exercise of Continental's business judgment in a way that significantly impaired Continental's freedom to compete.
>
> Sylvania's conduct toward Continental thwarted an important purpose of the Sherman Act. Legislative history and Supreme Court decisions establish that a principal objective of the Sherman Act was to protect the right of independent business entities to make their own competitive decisions, free of coercion, collusion, or exclusionary practices.
>
> Congress' general purpose in passing the Sherman Act was to limit and restrain accumulated economic power, represented by the trusts, and to restore and preserve a system of free competitive enterprise. The congressional debates reflect a concern not only with the consumer interest in price, quality, and quantity of goods and services *but also* with society's interest in the protection of the independent businessman, for reasons of social and political *as well as* economic policy.

Id. at 1018-19 (emphasis added). In response, the Supreme Court stated:

> We are . . . unable to accept Judge Browning's interpretation of *Schwinn.* In his dissent below he argued that the decision reflects the view that the Sherman Act was intended to prohibit restrictions on the autonomy of independent businessmen even though they have no impact on "price, quality, and quantity of goods and services." This view is certainly not explicit in *Schwinn*, which pur-

> [P]rice floors are invariably harmful on balance. Price ceilings are a different matter: they 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 manufacturer who dictates them and the customer who accepts them have both miscalculated. Since price ceilings reflect the manufacturer's view that there is insufficient competition to drive prices down to a competitive level, they have the arguable justification that they prevent retailers or wholesalers from reaping monopoly or supercompetitive profits.[126]

Each of Justice Harlan's assertions, however, is open to serious question. First, as noted above, price ceilings do not lessen horizontal competition because there is no horizontal competition to lessen. Second, only the market can determine what prices "would be set by intense competition" so that the manufacturer's opinion that insufficient retail competition exists, does not justify administered pricing. Finally, any lack of retail competition enabling the

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> ports to be based on an examination of the "impact [of the restrictions] upon the marketplace." Competitive economies have social and political as well as economic advantages . . . but an antitrust policy divorced from market considerations would lack any objective benchmarks.

GTE Sylvania, 433 U.S. at 53 n.21 (alteration in original) (citations omitted). The Court's interpretation of Judge Browning's argument is clearly wrong. Nowhere does Judge Browning say that the Sherman Act prohibits restraints on the autonomy of independent businesses "divorced from market considerations" such as the impact of the practice on the "price, quality, and quantity of goods and services." Clearly, market impact can be inferred from privately imposed restrictions on a reseller's prices, territories, locations, or customers. For discussion by Professor Sullivan of such an impact in the vertical price context, see *supra* note 100.

Further, *GTE Sylvania*'s lack of concern for dealer autonomy is grossly out of step with both Sherman Act legislative history, *see, e.g.*, GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980, 1018-19 n.1 (9th Cir. 1976) (Browning, J., dissenting) (disputing the majority's opinion that "the sole legislative intent underlying the Sherman Act had as its goal the promotion of consumer welfare"), and a long line of Supreme Court cases including *Kiefer-Stewart* and *Albrecht*. As Justice White noted in *GTE Sylvania*:

> [W]hile according some weight to the businessman's interest in controlling the terms on which he trades in his own goods may be anathema to those who view the Sherman Act as directed solely to economic efficiency, this principle is without question more deeply embedded in our cases than the notions of "free rider" effects and distributional efficiencies borrowed by the majority from the "new economics of vertical relationships."

GTE Sylvania, 433 U.S. at 68-69 (White, J., concurring in judgment only). Thus, in contrast to the sound precedential and policy bases supporting *Kiefer-Stewart* and *Albrecht*, their harsh neoclassical critics, preoccupied with conferring "an absolute right of freedom of contract to the proponent of vertical restraints," utilize "an analytical process based on unrealistic assumptions of fact used to dictate policy designed to maximize an extreme view of private contract and property rights." Flynn & Ponsoldt, *supra* note 121, at 1149-50.

126. Albrecht v. Herald Co., 390 U.S. 145, 159 (1968) (Harlan, J., dissenting).

distributors to reap monopoly profits is caused by the exclusive territories created by the manufacturer. In sum, none of Justice Harlan's purported justifications dictates anything but a rule of per se illegality for vertical maximum price fixing.

Virtually all criticism of the *Albrecht* rule is based upon the "control of successive monopoly" economic paradigm. Under this paradigm, monopoly exists at two stages of a product's distribution—for example, manufacturing and distribution. The effect of such an arrangement is a compound monopoly resulting in higher prices and lower output than if only the manufacturing stage is monopolized. If the monopoly pricing effects of the downstream monopolist can be eliminated (for example, by vertical integration of the upstream monopolist into distribution)[127] or controlled (for example, by maximum price fixing imposed by the upstream on the downstream monopolist), prices, although still at a monopoly level, will be lower and output will be higher.[128] Critics assert that *Albrecht*'s maximum price-fixing rule is wrong because it eliminates an important tool for the control of successive monopoly.

This argument, although perhaps defensible as a matter of economic theory, fails to square with the facts of actual maximum price-fixing cases. For example, Professors Blair and Fesmire assert that "maximum resale pricing occurs in market settings where firms operating in two successive stages of production and distribution possess monopoly power."[129] In other articles, Professor Blair and his co-authors hedge somewhat, requiring only "market power" at successive stages,[130] but nevertheless assert that "a supplier invariably uses maximum resale price fixing to prevent its distributors from exploiting their market power."[131]

In fact, however, the vertical maximum price-fixing cases vary widely from the economic paradigm. For example, in *Kiefer-Stewart*, Calvert and Seagram may have enjoyed some market power, though certainly no monopoly, because of consumer brand loyalty. The wholesalers clearly possessed no market power except that created by their alleged horizontal price-fixing conspiracy. Even

127. *See* 3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 725c (1978) ("Integration of two successive monopolies can lead to a higher output and a lower end-product price.").

128. For an extended economic discussion of this paradigm, see Blair & Kaserman, *The Albrecht Rule*, *supra* note 38, at 466-75.

129. Blair & Fesmire, *Maximum Price Fixing*, *supra* note 38, at 60.

130. Blair & Kaserman, *The Albrecht Rule*, *supra* note 38, at 464-65; Blair & Schafer, *Evolutionary Models*, *supra* note 38, at 999.

131. Blair & Kaserman, *The Albrecht Rule*, *supra* note 38, at 464.

assuming market power was present and that Calvert and Seagram were motivated by a desire to protect consumers from the effects of the wholesaler cartel, maximum price fixing is not the answer. As Justice Black noted in *Kiefer-Stewart* and the Court has noted on other occasions including *Albrecht*, there are better ways to remedy an antitrust violation than with another antitrust violation.[132] In addition, Calvert's and Seagram's purported altruistic motive in *Kiefer-Stewart* certainly is questionable given the fact that after fixing maximum prices, they fair-traded their products, thus fixing the maximum price as the legally permissible minimum.[133]

In *Albrecht*, the *Globe-Democrat* was not the sole newspaper in St. Louis, and Professor Hovenkamp argues that even a sole local newspaper is not a monopolist because it competes in the advertising market, not the market for the sale of newspapers.[134] Further, as developed above, the distributors' "monopoly" was not "natural" but rather was created by the newspaper's grant of territorial exclusivity to the distributors.[135]

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132. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 214 (1951); Albrecht v. Herald Co., 390 U.S. 145, 153-54 (1968); *see supra* notes 69-70 and accompanying text.

133. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 182 F.2d 228, 231 (7th Cir. 1950), *rev'd*, 340 U.S. 211 (1951).

134. Hovenkamp, *Vertical Integration*, *supra* note 38, at 456-60.

135. *See supra* note 115 and accompanying text. The Seventh Circuit's opinion in *Jack Walters* presents considerations similar to those presented in *Albrecht*. Jack Walters & Sons, Corp. v. Morton Bldg., Inc., 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984); *see supra* notes 20-25 and accompanying text. In *Jack Walters*, the plaintiff, Walters, a dealer in Morton's prefabricated buildings, had been established in an exclusive territory by Morton. *Jack Walters*, 737 F.2d at 707. Periodically, Morton would advertise special deals on its buildings. *Id.* at 706. To assure that its dealers honored the sale price, Morton took various steps including: threatening noncomplying dealers with termination, offering to sell directly to the public at the advertised price, and "shopping" the dealers to assure compliance. *Id.* Walters apparently charged higher than the advertised price in part because its wholesale discounts from Morton during sale periods were less than the difference between the regular retail price and the advertised price. *Id.*

As in *Albrecht* and the other maximum price-fixing cases, the successive monopoly paradigm does not fit *Jack Walters*. Morton, though perhaps possessing some monopoly power in the prefabricated farm building market (assuming that is a market), is certainly no monopolist. Further, as in *Albrecht*, the distributors possess market power only because the manufacturer set them up in exclusive territories. Again as in *Albrecht*, the price fixing, which is thought necessary to police distributor price gouging, is itself presumptive evidence of the illegality of the initial creation of exclusive territories.

In addition, as in *Albrecht*, there are less restrictive alternatives available to a manufacturer to achieve its goals other than exclusive territories coupled with maximum price fixing. For example, a manufacturer could advertise that the sale price is available at "participating dealers." If there are enough franchised dealers to provide some intrabrand competition, customers will quickly find a dealer honoring the sale price. Or, the manufacturer could simply provide rebates directly to customers during the sale period. This practice is commonly used to sell hundreds of products from hair dryers to

Finally, the *ARCO* case departs most graphically from the successive monopoly paradigm.[136] Although possessing some market

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automobiles. Or, as in *Jack Walters*, the manufacturer could engage in limited dual distribution.

136. One might argue that *ARCO* provides an independent basis for rejecting the *Albrecht* rule: maximum resale price maintenance provides a firm facing vigorous interbrand competition and desiring to increase volume through lower prices, with a method of ensuring that its downstream retailers, who may not face vigorous intrabrand competition, will implement the strategy. Although plausible, such facts have not been involved in any litigated case, including *ARCO*.

In *ARCO*, the plaintiffs alleged that their *wholesale* price was more than the defendant's *retail* price. Atlantic Richfield Co. v. USA Petroleum Co. 110 S. Ct. 1884, 1896 n.2 (1990) (Stevens, J. dissenting) (quoting ¶ 31 of plaintiff's amended complaint). Because the major oil companies, such as ARCO, supply both the independents and their own dealers, the *ARCO* facts appear to present a classic "price squeeze" rather than any legitimate attempt to compete with the independents. *See, e.g.*, Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802, 811 (3d Cir. 1984) (holding that a monopolization judgment was supported in part by evidence that Kaiser raised its raw material prices to independent fabricators of aluminum drainage pipe to the same level that Kaiser charged for finished pipe).

Also lending support to the plaintiff's theory in *ARCO* are the following recent developments. First, in Rebel Oil Co., v. Atlantic Richfield Co., No. CV-S-90-076 PMP (RJJ) (D. Nev. filed Mar. 27, 1990), a discount gasoline marketer sued ARCO alleging that it has successfully accomplished in Las Vegas what the *ARCO* plaintiffs argued it was attempting to do in Los Angeles. *Protection Order in Predation Case Limits Discovery to Market Share, Entry Barrier*, 59 ANTITRUST & TRADE REG. REP. (BNA) No. 1491, p. 703 (Nov. 15, 1990). The complaint, alleging violations of the Robinson-Patman Act and §§ 1 and 2 of the Sherman Act charged the following:

> ARCO schemed to lower its wholesale price of gasoline in Las Vegas below its cost and below its comparable prices in Los Angeles, despite the higher costs of transporting gasoline 250 miles by pipeline from Los Angeles to Las Vegas. ARCO allegedly coerced its independent dealers to fix the ARCO pump prices at correspondingly below-cost, predatory levels. As a result, ARCO's share of the Las Vegas market allegedly went from zero to at least an estimated 65% to 80% in less than five years. According to REBEL, every significant independent discount gasoline marketer in Las Vegas, except REBEL, was put out of business by ARCO's predation.

Id.

Second, on April 9, 1991, Senator Dennis DeConcini of Arizona introduced the Motor Fuel Consumer Protection Act (S790), which, *inter alia*, prohibits refiners from controlling the operation of retail gas stations. S. 790, 102d Cong., 1st Sess. (1991). Senator DeConcini noted a recent rapid decline in the number of independent dealers and stated, "It would be a grave mistake for us to sit idly by while the major oil refiners gradually squeeze the independent dealer, and competition, from the gasoline market, only to find ourselves held hostage by the next oil crisis." 60 ANTITRUST & TRADE REG. REP. (BNA) No. 1512, p. 554 (Apr. 18, 1991). DeConcini further noted that the oil companies "are waging a systematic campaign to eliminate independently operated service stations from the market by selling gasoline at company operated service stations below the wholesale price charged to independent dealers." *Id.* A similar bill was introduced in the House of Representatives in July 1991 by Representative Michael Synar. H.R. 2966, 102d Cong., 1st Sess. (1991).

Third, in July 1991, Senator Paul Simon of Illinois spoke on the Senate floor of "growing evidence to suggest that major oil companies are selling motor fuel to their own affili-

power, ARCO is far short of a monopolist. Its dealers, either individually or collectively, possess no market power except that created by their participation in ARCO's maximum price-fixing conspiracy. The purpose of ARCO's maximum price-fixing conspiracy was not to control its retailers' monopoly pricing, but instead to drive independent retailers out of business.[137]

In short, the assertion that "the fixing of *maximum* resale prices occurs only in the presence of successive monopoly"[138] is false. Indeed, none of the three Supreme Court cases on the subject involves successive monopoly. Therefore, it is clear that the successive monopoly paradigm, which is the primary basis of *Albrecht* criticism, provides no support for rejecting the rule of per se illegality for maximum price fixing.

Unlike resale price maintenance, whose claim to legality rests upon merely arguable benefits to interbrand competition,[139] maximum resale price fixing has a legitimate goal when used in its most common context—newspaper distribution. That goal is to maximize circulation and thus advertising revenue by keeping the retail

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ated service stations at wholesale or below wholesale prices, undercutting and squeezing the wholesalers who purchase oil from the major oil companies and supply the independent service stations." 137 Cong. Rec. S9963 (daily ed. July 15, 1991) (statement of Senator Simon).

Fourth, on September 11, 1991, in hearings before the Senate Small Business Committee, various independent marketers testified to anticompetitive pricing practices by major oil companies. 61 ANTITRUST & TRADE REG. REP. (BNA) No. 1532, p. 320 (Sept. 12, 1991). For example, Sam Carter, an independent marketer, stated that in the past 18 months, 26 independent retailers that he formerly had supplied, went out of business, noting "major oil companies are driving independent marketers and retailers out of business by temporarily subsidizing the retail price of gasoline." *Id.*

Finally, independent marketers expressed similar sentiments on September 23, 1991, in hearings on HR 2966 before two subcommittees of the House Small Business Committee. 61 ANTITRUST & TRADE REG. REP. (BNA) No. 1534, p. 372 (Sept. 26, 1991). One witness, Mel Sherbert, General Counsel of the Service Station Dealers of America, testified that over 8,000 independent retailers were driven out of business during 1990 by the major refiners' price inversion practices. *Id.*

137. The Seventh Circuit's opinion in Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir. 1989), involves considerations similar to those presented in *ARCO*. In this case, Indiana Grocery, a chain controlling 23% of the Indianapolis grocery market, sued under § 1 of the Sherman Act alleging a maximum price-fixing conspiracy between another chain, Super Valu Stores, Inc., and its local franchisee of a low-cost, no-frills supermarket. *Id.* at 1411-12. Once again, no successive monopoly was involved and control of downstream price gouging was not in issue. Such a conspiracy (as in *ARCO*, allegedly created to drive the plaintiff out of business), if proven, has no procompetitive justification and accordingly should be per se illegal. The fact that Indiana Grocery's evidence, both of conspiracy and competitive harm, was apparently far weaker than USA Petroleum's, is irrelevant in determining the content of the substantive rule applicable to the case.

138. Blair & Fesmire, *Maximum Price Fixing*, *supra* note 38, at 76.

139. *See* Roszkowski, *supra* note 19, at 147-49.

price of the paper very low—in fact, lower than the cost of the paper and ink used to print it. Thus, consistent with the application of general rule of reason analysis, it is necessary to examine whether alternatives that are less restrictive to competition are available in order to achieve this goal.

B. Less Restrictive Alternatives

Albrecht critics fail to consider whether alternatives, less restrictive to competition, are available to achieve the legitimate goals of the restraint. Several alternatives are available, but these are never mentioned in the extensive anti-*Albrecht* commentary. Most alternatives are similar to the devices used to achieve the stated procompetitive goals of resale price maintenance and nonprice vertical restraints. An example illustrates the problem.

A newspaper wants to distribute its product at an extremely low resale price, a price below its cost of manufacture, in order to maximize circulation and therefore advertising revenues. It must, however, distribute its paper through independent distributors because it lacks the economic or administrative means to integrate forward into distribution. Assuming that a system of exclusive territories coupled with maximum price fixing is illegal, the newspaper could, for example, appoint a number of distributors and give them areas of "primary responsibility." In this area, a distributor would be obligated to serve any customer requesting service. The newspaper or an independent subscription service would procure new subscribers and assign them to the distributor responsible for the new subscriber's address. The contract also may require the distributors actively to solicit new customers within their areas of primary responsibility, for which they would be compensated on a commission or other basis. The newspaper might use other financial incentives to induce distributors to solicit new subscriptions in their areas.

Once the areas of primary responsibility are established, the newspaper sells papers to the various distributors at a price it finds satisfactory. To help keep the resale price low, the newspaper might use a variety of devices. First, the newspaper might appoint the distributors for automatically renewable short terms, subject to termination by giving notice within a fixed period prior to the expiration of each term. This would allow the newspaper to expeditiously and unilaterally terminate a price-gouging distributor[140] or

140. Price gouging should not be a problem if competition is ensured as outlined here.

one who otherwise failed adequately to serve its area of primary responsibility. As in *Albrecht*, the terminated distributor should be given a reasonable time to sell its distributorship, including its trucks and other assets, to a suitable buyer. Second, distributors would not be limited to customers within their areas of primary responsibility, but could solicit new or existing customers anywhere the paper is sold. The newspaper would notify all subscribers that they are not obligated to use their assigned distributor, and would provide them with the names and advertising literature of all distributors. The newspaper might give preferential advertising rates to its distributors for advertisements concerning prices and services, and provide allowances for other forms of advertising (for example, yellow page advertisements or flyers distributed door-to-door).[141] Finally, the newspaper would reserve the right to compete with any distributor for any customer.[142]

A system such as this would initially ensure that each subscriber has a distributor obligated to serve her. If at any time the subscriber became dissatisfied with her distributor's service for any reason—high price, late delivery, nondelivery, rude employees, wet papers when it rains—she could simply look in the phone book or the newspaper for the name of a competing distributor. Distributors would be free to compete on any basis they choose, and they would be aware that customers can easily be lost if the price is too high or service poor. Overall prices should drop to a competitive level and the newspaper, if it desires, can expand output by lowering the wholesale price or by providing distributor incentives for new subscriptions. Although such a system is apparently workable,[143] all of the existing commentary nevertheless assumes that ex-

141. In smaller towns, it may not even be necessary to assign areas of primary responsibility because, in such localities, all distributors are physically capable of delivering anywhere the newspaper is sold. Thus, new subscribers would simply be given the names and advertising literature of all distributors and told to take their pick.

142. Professor Hovenkamp argues that this option is foreclosed by *Albrecht*: "*Albrecht* indicates that competitive entry is an illegal form of discipline for carriers charging too high a price." Hovenkamp, *Vertical Integration*, *supra* note 38, at 463. In fact, however, *Albrecht* found the combination providing competition illegal because it was formed with specific intent to enforce an explicit maximum price arrangement on its dealers, a price-fixing arrangement the Court found per se illegal. Albrecht v. Herald Co., 390 U.S. 145, 153 (1968). In contrast, in the distribution system proposed here, price is determined solely by competition among the distributors and between any or all of the distributors and the newspaper. The prospect of competition by the newspaper simply provides an additional check on supracompetitive pricing by any distributor.

143. Any business involving servicing a route in a given locality (dairy, parcel service, garbage hauling) would prefer, as more "efficient," to have all of its pickups or deliveries concentrated in a given neighborhood. Nevertheless, such businesses routinely compete

clusive territories enforced by maximum price fixing are the only alternative to vertical integration. By failing to consider less restrictive alternatives, apologists for maximum price fixing misapply basic antitrust analysis to achieve their preordained result.

IV. The Specter of Vertical Integration

Assume, *arguendo*, that the *Albrecht* critics are correct and that without exclusive territories and maximum price fixing, vertical integration, which eliminates independent distributors, is the only way for a newspaper to achieve its unique below-cost distribution goal. This "specter of vertical integration" argument often is used generically to support arguments to eliminate any scrutiny of vertical restraints, including minimum and maximum price fixing and nonprice restraints.[144] This concern for independent competitors is curious, however, because the Chicago School and the *Albrecht* critics generally applaud vertical integration and vertical merger due to their alleged procompetitive consequences. For example, Professor Hovenkamp stated: "Vertical integration, even when undertaken by a monopolist, is not generally inefficient or harmful to consumers.[145] Vertical integration often reduces transaction costs and consumers generally benefit when firms can operate more efficiently and cheaply."[146] This statement is typical of the voluminous Chicago School commentary on vertical integration, either by

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over wide geographic areas for scattered customers who are able to choose on the traditional bases of price, quality, and service.

In many localities, for example, garbage hauling is done by private firms, rather than by the municipality. For example, in Champaign-Urbana, Illinois, the location of the University of Illinois, with a population of approximately 100,000, garbage hauling is done privately, and the 1991-92 Yellow Pages list 20 independent private haulers. Firms compete for customers throughout the entire locality, which results in each firm having an unwieldy route of widely scattered customers. The individual firms offer a wide variety of pickup options, dumpster and other container rentals, and prices. Customers can shop around and can switch virtually overnight from a hauler charging too much or providing poor service. Contrast this situation (which is analogous to the newspaper distribution system outlined in the text) to a municipal system (which is analogous to the *Albrecht* system) in which consumers are stuck with their designated supplier, who may charge too much and provide poor service.

144. *See* Roszkowski, *supra* note 19, at 149-50.

145. Hovenkamp, *Vertical Integration*, *supra* note 38, at 464 & n.49 (*citing* 3 AREEDA & TURNER, *supra* note 127, ¶¶ 725a-b; BORK, PARADOX, *supra* note 9, at 237-45; RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 196-201 (1976)).

146. Hovenkamp, *Vertical Integration*, *supra* note 38, at 464 & n.50 (*citing* FREDERIC M. SCHERER, INDUSTRIAL MARKET STRUCTURE & ECONOMIC PERFORMANCE 89-91 (2d ed. 1980)); Oliver E. Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV. 953 (1979)). Professor Hovenkamp notes that an example of the kinds of cost savings that a newspaper can achieve by vertically integrating its delivery system appears in BENJAMIN M. COMPAINE,

new entry or merger, which is virtually uniform in its praise of (or at least lack of antitrust concern for) the practice.[147]

The Chicago School particularly supports vertical integration that eliminates an upstream or downstream monopolist, even if, as in newspaper distribution, the integrating firm also is a monopolist. The justification is the same "control of successive monopoly" argument supporting maximum price fixing.[148] In sum, the Chicago School supports vertical integration generally even by a monopolist and particularly when it eliminates another monopolist from the distribution chain.

One would therefore expect the Chicago School enthusiastically to support vertical integration in newspaper distribution when the newspaper, which may or may not be a monopoly, eliminates the monopoly distributors by vertical integration. Yet, curiously in this case, vertical integration becomes a "second-best" alternative dictated by the *Albrecht* decision. For example, Professor Hovenkamp criticized *Albrecht* for holding maximum price fixing illegal per se.[149] He observed:

> The route carriers were monopolists who could maximize their profits by reducing output and charging a higher price for delivering newspapers. The result, of course, was lower circulation

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THE NEWSPAPER INDUSTRY IN THE 1980S: AN ASSESSMENT OF ECONOMICS AND TECHNOLOGY 44-48 (1980).

147. *See, e.g.*, PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 723.1-736.2 (Supp. 1991); HOVENKAMP, ECONOMICS, *supra* note 9, at 192-209; BORK, PARADOX, *supra* note 9, at 226; Hovenkamp, *Vertical Integration*, *supra* note 38; Frank H. Easterbrook, *Vertical Arrangements and the Rule of the Reason*, 53 ANTITRUST L.J. 135 (1984); Posner, *supra* note 38.

148. *See supra* notes 127-38 and accompanying text. As Professor Hovenkamp noted:

> Whenever vertical integration eliminates transactions with a monopolist, however, the result will be higher profits for the integrating firm *and* lower prices for consumers, provided that the integrating firm can produce the product or service as efficiently as the monopolist did. A firm that suspects it is paying monopoly prices for a particular product or service will be highly motivated to provide that product or service for itself.
>
> Vertical integration has been perceived as particularly pernicious when the integrating firm is a monopolist. However, the above rule holds true even for the monopolist: the monopolist that can eliminate another monopolist from its distribution chain will make more profits and will have a lower profit-maximizing price.
>
> . . . .
>
> The economic effects of eliminating a monopolist from a distribution chain are the same whether the vertical integration occurs by new entry or by merger. . . .

HOVENKAMP, ECONOMICS, *supra* note 9, at 195-97; *see* 3 AREEDA & TURNER, *supra* note 127, ¶ 725c.

149. HOVENKAMP, ECONOMICS, *supra* note 9, at 198.

> and lower profits for the newspaper, as well as higher prices to the consumer. A firm forbidden by the antitrust laws to protect itself from monopoly pricing will likely choose the second-best alternative—perhaps outright termination of the independent carriers and their replacement by employees of the newspaper.[150]

Professor Hovenkamp's concern for the independent carriers is indeed surprising given two basic observations. First, the current law of nonprice vertical restraints, which is based upon Chicago School theory, exhibits no concern for the fate of independent dealers. That law, derived from *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[151] is expressly designed to elevate supplier over small dealer interest, and to permit suppliers (often in collusion with powerful dealers) to control the nature of downstream competition by controlling the retail dealer's prices, territories, locations, and customers.[152] Second, like its nonprice vertical restraint theory, the Chicago School vertical integration and merger theory also exhibits no concern for the fate of independent dealers. For example, in criticizing the Supreme Court's vertical merger case law, Professor Hovenkamp advised:

> In spite of their extraordinary potential for creating efficiency and their rather limited threat of economic harm, vertical mergers have not fared well under the antitrust laws. Most of the law of vertical mergers was written at a time when *protection of small businesses rather than encouragement of efficiency was the underlying antitrust policy. Efficiency-creating vertical mergers invariably injure smaller, unintegrated rivals.*[153]

In sum, bedrock Chicago School theory assumes that vertical practices of all types—resale price maintenance, nonprice vertical restraints, and vertical integration either through new entry or merger—are beneficial and should virtually always be legal. Equally fundamental to Chicago School theory is the primacy of manufacturer over independent retailer interests evidenced by an utter lack of concern for preservation of intrabrand competition

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150. *Id.*

151. 433 U.S. 36 (1977).

152. *See* Roszkowski, *supra* note 19, at 153.

153. HOVENKAMP, ECONOMICS, *supra* note 9, at 202-03 (emphasis added) (footnote omitted). Note that vertical integration by a newspaper into distribution often resembles entry by merger rather than internal expansion. In most cases, existing distributors simply become employees of the newspaper. *See* AREEDA & HOVENKAMP, *supra* note 147, ¶ 729.7a, at 742. In any event, Hovenkamp asserts that the competitive consequences of eliminating a monopolist are the same whether vertical integration occurs by merger or new entry. HOVENKAMP, ECONOMICS, *supra* note 9, at 197.

that *GTE Sylvania* and its progeny have grafted onto modern antitrust law.

One then legitimately wonders why, in the minute backwater of newspaper distribution, the Chicago School suddenly turns full circle and evidences concern for the fate of the independent carriers. The answer is that such a position is required to support their relentless assault on the *Albrecht* holding that maximum price fixing is per se illegal. Newspaper distribution is the only context in which even an arguable justification for maximum price fixing can be articulated.[154] Without the argument that maximum price fixing preserves independent dealers against the specter of vertical integration, the anti-*Albrecht* rhetoric loses most of its force.

As previously noted, the bankruptcy of *Albrecht* criticism is further exposed by the fact that the allegedly "independent" carriers who are eliminated do not compete in any meaningful sense, and that their alleged "natural" monopoly was in fact created by the newspaper.[155] The real reason newspapers integrate into distribution is not an *Albrecht* handcuff, as the Chicago School asserts, but because, as these commentators would assert in any other context, it is more efficient to do so. A newspaper, unlike virtually any other supplier, sells its product below cost[156] to maximize circulation and therefore advertising revenue. This characteristic alone ultimately may dictate a company-owned distribution system. Indeed, many newspapers in recent years have vertically integrated

154. As the Court in *Kiefer-Stewart* found, the assertion that maximum price fixing is necessary to control a downstream cartel is not a legitimate argument. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 214 (1951); *see supra* notes 69-70 and accompanying text.

155. *See supra* note 115 and accompanying text.

156. *See* Hovenkamp, *Vertical Integration*, *supra* note 38, at 455 n.19 (citing CHRISTOPHER H. STERLING & TIMOTHY R. HAIGHT, THE MASS MEDIA: ASPEN INSTITUTE GUIDE TO COMMUNICATION INDUSTRY TRENDS 166 (1978) (1976 revenue from circulation for a typical newspaper with circulation of 250,000 was $7,256,686 and expenses for newsprint and ink were $9,391,241); McGuire v. Times Mirror Co., 405 F. Supp. 57, 62 (C.D. Cal. 1975) (*Times Mirror* subscription price was less than it paid for its newsprint) and quoting Brief of American Newspaper Publishers Ass'n as Amicus Curiae at 4, *Albrecht* (No. 43)("[a] typical daily newspaper in the 240,000 circulation range spent, in 1966, $4,411,283.05 on newsprint and ink, while it received only $2,948,318.24 in total circulation income.")). Commenting on these authorities, Professor Hovenkamp noted:

> In short, the marginal revenue that can be obtained from the circulation price of a newspaper is less than the marginal cost of producing it. Furthermore, the above figures understate the marginal cost, for they do not consider other variable costs of production in addition to newsprint and ink, such as labor, mechanical costs, and utilities. Costs for editorial staff, building, and advertising of the newspaper itself should be regarded as fixed and, therefore, should not be calculated into marginal cost.

Hovenkamp, *Vertical Integration*, *supra* note 38, at 455 n.19.

into distribution and have survived antitrust challenges by terminated distributors.[157] In discussing these cases, Professor Areeda concludes that "it appears that publishers have increasingly integrated forward into self-distribution in order to achieve efficiency and to prevent the undermining of circulation goals by independent dealers."[158]

Thus, it is not clear that the *Albrecht* rule is the cause of the trend toward vertical integration in the newspaper industry. Even if it is, it is not clear that such a trend is anticompetitive or results in higher consumer prices. Indeed, all antitrust challenges under Section 2 of the Sherman Act to vertical integration of newspapers have failed,[159] and the independent distributors provided no preintegration competition in any event. Further, true price competition among independent distributors, which is dictated by the *Albrecht* holding, has never seriously been tried. Given these factors, preventing vertical integration certainly provides no basis for exempting maximum price fixing from antitrust law's general ban on vertical and horizontal price fixing. Indeed, perhaps the law's strong policy against price fixing might alone support *Albrecht*. That is, if the newspaper cannot achieve its unique below-cost distribution goals other than by imposing a price-fixing arrangement on its independent distributors, then vertical integration is prima facie preferable.[160]

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157. To explain why the publisher's distribution goals are not fully shared by independent dealers, Professor Areeda provided:

> The [independent wholesaler's] profits are entirely a function of his wholesale-retail margin and his volume, while the publisher's profits are a function both of (1) the wholesale price, publication costs, and volume of newspapers sold, and (2) advertising revenue, which also depends upon circulation volume. In fact, newspapers receive the bulk of their revenues from advertising, not from circulation. In many cases, circulation revenue does not even cover the cost of newsprint. Furthermore, advertising revenues are a function of circulation. This means that a newspaper "monopolist" ordinarily maximizes his profit by increasing his circulation and not by restricting the output of newspapers. This interest conflicts with that of independent dealers who naturally wish to maximize their profits based on circulation alone. Thus, the publisher has a greater incentive than the dealers to assure high quality service to subscribers at lower rather than higher prices. . . .

AREEDA & HOVENKAMP, *supra* note 147, ¶ 729.7a (footnotes omitted).

158. *Id.*

159. *See id.*

160. *Albrecht* also has been criticized for stifling the use of allegedly legitimate business practices that have an indirect or partial effect on the maximum price charged by dealers. Examples include:

> sales quotas, agreements limiting "unfair" practices or requiring "competitive" prices; dual distribution as a de facto limit on dealer prices; suggested, advertised, or pre-ticketed prices; refusals to continue selling to overcharging dealers;

V. CONCLUSION

Few antitrust principles have been criticized as roundly or as often as the rule announced in *Kiefer-Stewart* and *Albrecht* that vertical maximum price fixing is illegal per se. In attempting to establish that "[a]nalysis shows that every vertical restraint should be completely lawful,"[161] Judge Bork and the rest of the Chicago School reserve perhaps their harshest criticism for *Albrecht*, the alleged weakest link in Supreme Court case law proscribing vertical restraints.[162] In *ARCO*, the Court clearly indicated its lack of enthusiasm for *Albrecht*, only "grudgingly"[163] assuming "*arguendo*, that *Albrecht* correctly held that vertical maximum price fixing is subject to the *per se* rule."[164]

In fact, as this Article demonstrates, the criticism is unjustified. True analysis shows that *Albrecht* and *Kiefer-Stewart* were correctly decided and based upon straightforward applications of basic antitrust principles. The arguments against them, based primarily upon the "control of successive monopoly" paradigm or the specter of vertical integration, fail to withstand scrutiny, particularly when those arguments are applied to the only common vertical maximum price-fixing fact pattern—newspaper distribution. In sum, despite the voluminous commentary, no convincing argument has yet been made for departure from a rule of per se illegality for vertical maximum price fixing.

> conditional reimbursements and various formulae relating wholesale to resale prices; temporary promotional prices; and wholesale price discounts to assist particular "low-price" resales.

8 AREEDA, *supra* note 38, ¶ 1639, at 422 (footnote omitted). In fact, *Albrecht* provides little impediment to most such arrangements. As Professor Areeda discusses at length, *id.* ¶¶ 1639a-h, at 422-38, courts have rejected most maximum price-fixing challenges to such practices leaving "considerable leeway for such indirect and informal steps" under *Albrecht*. *Id.* ¶ 1638c.

161. BORK, PARADOX, *supra* note 9, at 288.

162. *Id.* at 281-82.

163. Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884, 1901 n.16 (1990) (Stevens, J., dissenting).

164. *Id.* (Stevens, J., dissenting).