In the Supreme Court of the United States

October Term, 1996

State Oil Company, petitioner

v.

Barkat U. Khan and Khan & Associates, Inc.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AND THE FEDERAL TRADE COMMISSION'S
AMICI CURIAE SUPPORTING REVERSAL

Walter Dellinger
Acting Solicitor General

JOEL I. KLEIN
Acting Assistant Attorney General

Lawrence G. Wallace
Deputy Solicitor General

A. DOUGLAS MELAMED
Deputy Assistant Attorney General

EDWARD C. DUMONT
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN

DAVID SEIDMAN

Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

STEPHEN CALKINS
General Counsel
Federal Trade Commission
Washington, D.C. 20580

QUESTION PRESENTED

The United States and the Federal Trade Commission will address the following question:

Whether petitioner's contractual imposition of maximum resale prices for the gasoline it sold to respondents, who operated a retail gasoline dealership, was a per se violation of Section 1 of the Sherman Act.

In the Supreme Court of the United States

October Term, 1996

No. 96-871

State Oil Company, petitioner

v.

Barkat U. Khan and Khan & Associates, Inc.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES
AND THE FEDERAL TRADE COMMISSION

The United States and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws. This case presents the question whether an agreement between a supplier and its dealer that effectively sets the dealer's maximum resale price constitutes a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, or is instead properly analyzed under the rule of reason. The Court's resolution of that question may affect both federal antitrust enforcement and the extent to which private [2]enforcement of the antitrust laws achieves its intended purpose.

STATEMENT

1. Respondent Khan entered into a lease and supply agreement (the Agreement) to operate a gas station and convenience store owned by petitioner State Oil Company. Pet. App. 1a. The Agreement provided that respondent would ordinarily obtain his entire supply of gasoline from petitioner, at a price equal to a "suggested" retail price set by petitioner, less retail sales tax and a margin of 3.25 cents per gallon. Pet. App. 2a-3a, 25a.

The Agreement did not specify the price respondent could charge for gasoline. If, however, he charged more than petitioner's "suggested" retail price, the Agreement required that he rebate to petitioner the entire amount by which his price exceeded the suggested price, multiplied by the total number of gallons sold. Pet. App. 2a, 25a. Consequently, increasing the retail price of gasoline would not increase respondent's margin at all, and would increase his net revenue only in the unlikely event that it increased the amount of gasoline he sold. The Agreement did not specify any consequences if respondent were to sell below the suggested retail price, but provided that petitioner would not lower its price to preserve respondent's per-gallon margin. Ibid. Thus, reducing retail prices would decrease respondent's revenue per gallon, but would increase his total revenue if it led to a sufficient increase in sales.

About a year after respondent began operating the station, petitioner notified him that it intended to terminate the Agreement on the ground that he had not [3] paid the agreed rent. Pet. App. 2a, 26a. An Illinois court later appointed a receiver, who operated the station for nine months. Id. at 26a-27a.

2. Respondent sued petitioner, alleging, among other things, resale price fixing in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Respondent contended that the Agreement fixed prices by preventing him from raising or lowering his retail prices and that, but for the Agreement's pricing provisions, he would have charged different prices and increased his income. Pet. App. 34a. Petitioner argued that the Agreement left Khan free to charge whatever price he wished. Ibid.

The district court first ruled that respondent's price fixing claim did not allege a per se violation of Section 1, but should instead be analyzed under the "rule of reason." Pet. App. 35a. In the court's view, the alleged facts did not establish the sort of "manifestly anticompetitive implications" or "pernicious effect on competition" that would justify application of the per se rule. J.A. 43 (Order of Sept. 12, 1995). Later, evaluating respondent's claim on petitioner's motion for summary judgment, the court concluded that he had "failed to demonstrate antitrust injury, harm to competition, a relevant market for analysis and market power." Pet. App. 37a. Indeed, in the court's view, respondent had "not even attempted to demonstrate * * * the effect of the pricing provisions on competition in a relevant market." Id. at 40a. The court held that an expert's report offered by respondent to show that, but for the pricing provisions of the Agreement, he would have made more money would not be admissible at trial, and in any event was insufficient to establish the intended proposition. Id. at 39a.

[4] 3. The court of appeals reversed. In an opinion by Chief Judge Posner, the court first noted that the Agreement did not fix minimum prices, because it merely stated petitioner's intention not to lower its wholesale price in the event that respondent wished to charge a lower retail price--something that petitioner had, in any event, no obligation to do. Pet. App. 2a-3a. The court held that the Agreement did fix maximum prices, however, because the pricing terms made it "worthless" for respondent to exceed the price set by petitioner and amounted to "an alternative sanction to termination, and probably an equally effective one." Id. at 3a-4a.

After reviewing briefly the legal and economic aspects of various sorts of price fixing (Pet. App. 4a-6a), the court concluded that maximum price fixing of the sort involved in this case remains per se illegal under this Court's decision in Albrecht v. Herald Co., 390 U.S. 145 (1968). The court expressed "considerable sympathy" with petitioner's argument that Albrecht had been superseded by later cases establishing that a private party does not have standing to maintain an antitrust action unless it can show "antitrust injury," which would not normally be possible in a maximum price fixing case "[i]f typically and here a resale price ceiling imposed by a seller merely prevents his dealers from reaping monopoly profits." Pet. App. 8a. The court also noted (ibid.) that this Court's decision in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), had changed the law on vertical non-price restraints (such as exclusive dealer territories) in a way that might affect the reasoning of Albrecht. Despite, however, its view that "Albrecht was unsound when decided, * * * is inconsistent with later decisions by the [5] Supreme Court[,] * * * [and] should be overruled," the court concluded that the Albrecht rule remained controlling. Pet. App. 9a.

In light of Albrecht and of Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 336-337 (1990), the court rejected petitioner's argument that respondent had alleged no cognizable antitrust injury: "The implication [of those cases] is that the injury to a dealer like Khan from not being able to raise his price because of a restriction imposed by his supplier is antitrust injury." Pet. App. 11a. Finally, although it noted that respondent was nonetheless required to demonstrate "injury in fact" (ibid.), the court held that the expert report submitted by respondent was admissible and "sufficiently plausible to defeat summary judgment on the question of injury" (id. at 13a). The court therefore remanded the case for further proceedings.(1)

SUMMARY OF ARGUMENT

Although the Sherman Act by its terms prohibits every agreement "in restraint of trade," this Court has long recognized that Congress intended to outlaw only "unreasonable" restraints. While most antitrust claims are therefore analyzed under a "rule of reason," analysis and experience indicate that some [6] types of restraint have such pernicious anti-competitive effects, and so little potential for pro-competitive benefits, that they are condemned as unlawful "per se." The paradigmatic example is "horizontal" price fixing among competitors, and per se condemnation was early applied as well to "vertical" agreements through which suppliers set the minimum resale prices to be charged by their distributors. In its 1967 decision in United States v. Arnold, Schwinn & Co., 388 U.S. 365, the Court initially extended the same sort of per se prohibition to vertical non-price restraints, including the enforcement of exclusive distribution territories.

It was in this context that the Court undertook its only previous plenary consideration of the issue of vertical maximum price fixing. In Albrecht v. Herald Co., 390 U.S. 145 (1968), the Court invoked the per se rule that is applied against horizontal price fixing. It was argued in that case that vertical maximum price restraints could have important pro-competitive effects when used to counteract the intrabrand monopoly conferred by exclusive distribution territories. The Court rejected that argument, however, in large part because the decision in Schwinn had recently held that in most cases the establishment of such territories was also per se illegal.

Although it is possible to interpret Albrecht narrowly, we agree with the court of appeals that, fairly read, the Court's opinion announced a per se rule against vertical maximum price fixing, and that that rule would normally cover this case. Since Albrecht, however, the Court has overruled the decision in Schwinn, which provided the primary basis for Albrecht's rejection of the pro-competitive justification offered for the use of maximum retail price [7] agreements. In light of the subsequent rejection of the Schwinn rule, this Court itself has recognized that the pro-competitive potential of such agreements is "more evident now than it was when Albrecht was decided." Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 343 n.13 (1990). It is therefore appropriate for the Court to reconsider Albrecht's approach to this type of restraint.

Per se illegality is appropriate only for practices that "always or almost always tend to restrict competition and decrease output." Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19-20 (1979). Maximum vertical price fixing, however, may serve the important and pro-competitive purpose of limiting a dealer's ability to exploit market power. On the other hand, the possible anti-competitive effects of such arrangements articulated in Albrecht do not appear to be so frequent, so serious, or so unlikely to escape detection and remedy as to justify a per se rule, which may itself create perverse incentives leading to inefficiency, higher consumer prices, and the elimination of small business opportunities.

In the 30 years since Albrecht was decided, it has generated extensive legal and economic discussion. The consensus of commentators is that Albrecht's per se rule should be replaced. The Albrecht rule has played little or no role in government enforcement efforts, and we are confident that anti-competitive uses of such restrictions may be adequately policed under the rule of reason. While the importance of stare decisis is unquestioned, in this case the development of antitrust law, and in particular the overruling of Schwinn, have significantly changed the legal landscape in which Albrecht was decided. Tak-[8] ing account of all these factors, we believe that Albrecht's per se prohibition should be overruled.

ARGUMENT

PURELY VERTICAL AGREEMENTS FIXING MAXIMUM RESALE PRICES SHOULD BE EVALUATED UNDER THE RULE OF REASON

A. The Origins Of Albrecht

Section 1 of the Sherman Act prohibits "[e]very contract, combination * * *, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. 1. This Court long ago recognized, however, that "Congress could not have intended a literal interpretation of the word 'every,'" and most arrangements challenged as restraints of trade are therefore analyzed to determine "whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 343 (1982) (emphasis added); see also Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911).

In some cases, however, the Court has determined that "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." Maricopa, 457 U.S. at 344. When the Court has been satisfied that restraints of a certain type will, in the great majority of cases, have a "pernicious effect on competition" unjustified by "any redeeming virtue," it has condemned them categorically. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); see also, e.g., Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 723-724 (1988). Appropriate "per se" rules of this [9]type "tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 n.16 (1977). See also, e.g., Atlantic Richfield Co. v. USA Petroleum Co. (ARCO), 495 U.S. 328, 342 (1990); Pitofsky, In Defense of Discounters: The No-Frills Case for a Per Se Rule against Vertical Price Fixing, 71 Geo. L.J. 1487, 1489 (1983).

The paradigmatic per se antitrust violation has always been "horizontal" price fixing--the coordinated setting of prices by or among competitors. See, e.g., Maricopa, 457 U.S. at 344-346; United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927). Early in this century, the Court applied the same per se treatment to "vertical" agreements between a supplier and a distributor that set minimum resale prices the distributor may charge its customers for the supplier's products. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911); see also, e.g., Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984). In 1951, the Court made clear that the per se rule applies to any price agreement among competitors, whether the agreement fixes minimum or maximum prices. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213.(2)

[10]The 1960's brought important developments in the Court's analysis of vertical arrangements, related to but distinct from those at issue here, through which suppliers may seek to impose restrictions on their dealers with respect to matters other than resale prices. In White Motor Co. v. United States, 372 U.S. 253 (1963), the Court for the first time considered the validity of vertical restrictions conferring exclusive dealer territories. See id. at 261. The Court reversed a summary judgment in favor of the government, holding that too little was known about "the economic and business stuff out of which these arrangements emerge" and their "actual impact * * * on competition" to justify per se condemnation. Id. at 263. Four years later, however, in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), the Court held that, once title to goods had been transferred to a distributor, territorial or customer restrictions imposed by a supplier on their resale were "so obviously destructive of competition" as to be illegal per se. Id. at 379, 382.

It was in this context that the Court first gave plenary consideration to the issue of vertical maximum price fixing.(3)

In Albrecht v. Herald Co., 390 U.S. 145 [11] (1968), the Court considered the legality of actions taken by a newspaper publisher to induce one of its distributors to comply with maximum resale prices set by the publisher. The Court first concluded (id. at 149-150) that the publisher's conduct, which involved hiring other parties to sell papers at the desired price to customers on the distributor's assigned route, was not "wholly unilateral," and therefore satisfied the "combination" requirement of the Sherman Act.

The Court went on to reject (390 U.S. at 151-154) the argument (stated id. at 149) that there was "no restraint of trade * * * [in] a situation in which a seller establishes maximum prices to be charged by a retailer enjoying an exclusive [resale] territory." Citing cases dealing with horizontal price fixing, the Court reaffirmed Kiefer-Stewart's denunciation of maximum (as well as minimum) price agreements, and applied it to the case of a supplier that imposed maximum prices on its distributor. The Court concluded that "the combination formed by the [publisher] in this case to force [the distributor] to maintain a specified price for the resale of the newspapers which he had purchased from respondent constituted, without more, an illegal restraint of trade under § 1 of the Sherman Act." 390 U.S. at 153.

Finally, the Court rejected the suggestion that the publisher's fixing of maximum prices should be permitted because the publisher granted distributors exclusive routes and then set maximum prices to prevent "price gouging by dealers who had monopoly power in their own territories." 390 U.S. at 153. The Court pointed out that the factual predicates for such [12]a justification had not been established below: "[N]either the existence of exclusive territories nor the economic power they might place in the hands of the dealers was at issue before the jury." Ibid. Similarly, no evidence had been presented below about the nature of the exclusive territories, and the Court expressed skepticism that any price restraint could be justified on the ground that it was part of a larger scheme involving exclusive dealer territories, which the Court had so recently held were themselves per se illegal under normal circumstances. Id. at 153-154, citing United States v. Arnold, Schwinn & Co., supra.

B. Interpretation Of Albrecht

It is possible to articulate a very narrow interpretation of Albrecht. The Court rejected a proffered economic justification for setting maximum prices--the existence of exclusive dealer territories--on the grounds that it had not been argued or factually developed in the district court and that it probably would not have been persuasive in any event, given the law at the time concerning vertical non-price restraints. 390 U.S. at 153-154. It is not, therefore, clear that the Court intended its holding with respect to the case as it was tried to establish a true per se rule, under which any justification, no matter how well developed, would have been simply irrelevant. See also id. at 154-156 (Douglas, J., concurring); compare, e.g., Socony-Vacuum, 310 U.S. at 221-222. On this view, the Court's comment that the facts presented showed liability "without more," 390 U.S. at 153, means only that vertical maximum price fixing raises sufficient antitrust concerns that a plaintiff who alleges it makes out a prima facie case for [13] liability, which will be successful if the defendant offers no pro-competitive justification for its actions--not that such a plaintiff is automatically entitled to prevail, without regard to any justification that may be offered.

Although in some ways appealing, this and other possible narrow interpretations of Albrecht are ultimately unsatisfying as fair readings of the Court's opinion. The Albrecht Court clearly thought that its decision would apply to a direct agreement between a supplier and one or more dealers (390 U.S. at 150 n.6), and it clearly believed that the case could be resolved, without extended analysis, on the basis of precedent dealing with the per se rule against horizontal price fixing. Both this Court and lower courts have subsequently read the decision as establishing a rule that purely vertical maximum price restraints are illegal per se.(4)

Albrecht may have been incorrectly decided, or the surrounding legal landscape may, as we argue below, have changed so significantly in later years that the decision should now be reconsidered. Without a fundamental reinterpretation provided by this Court, however, we agree with the court of appeals (Pet. App. 10a) that Albrecht established a per se rule, [14]and that the decision "cannot fairly be distinguished from this case."(5)

[15]C. Delopment Of The Law Since Albrecht

As discussed above, Albrecht rejected the suggestion that maximum price fixing was justifiable as an adjunct to the granting of exclusive dealer territories in part because the Court had recently held, in Schwinn, that the creation of such territories was illegal per se. Albrecht, 390 U.S. at 153-154.(6)

Nine years later, however, the Court reconsidered Schwinn in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). Reverting to White Motor's more cautious approach of developing experience and understanding "the actual impact of these arrangements on competition" before condemning them per se (GTE, 433 U.S. at 50-51, quoting White Motor, 372 U.S. at 263), the Court canvassed the "substantial scholarly and judicial authority supporting th[e] economic utility" of vertical non-price restraints. GTE, 433 U.S. at 57-58. That authority showed that although such restrictions (and, in particular, territorial restraints) reduced intrabrand competition, they had significant "redeeming virtues" in promoting interbrand competition by allowing a manufacturer to achieve more efficient distribution of its products. Id. at 54 (quoting Northern Pac. Ry., 356 U.S. at 5); see also 433 U.S. at 54-57. Faced with "relatively little authority to the contrary" (id. at 58), the Court concluded that Schwinn should be overruled and that vertical non-price restraints should be judged under the rule of reason.

[16]As we have noted, the GTE Court recognized (433 U.S. at 54) that non-price restraints such as exclusive dealer territories raise legitimate antitrust concerns because they tend to reduce intrabrand competition. The Court explained, however, that "the ability of retailers to exploit the resulting [exclusive] market may be limited" by other factors, such as the interbrand competition that such restrictions could help facilitate. Ibid. Yet it was just this sort of moderating effect--"blunt[ing] the pernicious consequences" of exclusive dealership territories--that the Albrecht Court had rejected (390 U.S. at 154) as a potential justification for the fixing of maximum resale prices. Although the rationale for that rejection may have had greater force in 1968, when exclusive territories were themselves per se illegal, it was rendered anachronistic by GTE's opening of the validity of such territories to rule-of-reason analysis and adjudication.

GTE distinguished its treatment of non-price vertical restrictions from the continued per se treatment of vertical price restraints. 433 U.S. at 51 n.18. The Court's discussion of the latter makes clear, however, that it was focusing on the fixing of minimum, not maximum, prices.(7)

This case involves no minimum [17]price fixing, see Pet. App. 2a-3a, and its result need [18] have no implication for the law in that area. Similarly, this case involves no issue of maximum price fixing among horizontal competitors. Compare, e.g., Maricopa, supra.

As both the Court and commentators have recognized, the issue of vertical, maximum price restraints is analytically quite distinct from other "price fixing" issues.(8)

Indeed, in recent years the Court, without retreating from the per se approach to other agreements involving price, has explicitly recognized that, in the wake of GTE, "[t]he procompetitive potential of a vertical maximum price restraint is more evident now than it was when Albrecht was decided." ARCO, 495 U.S. at 343 n.13 (emphasis added). From 1968 until the present case, however, Albrecht remained "the only case in which the Court [19] ha[d] confronted an unadulterated vertical, maximum-price-fixing arrangement." ARCO, 495 U.S. at 336 n.6. It is therefore appropriate for the Court in this case to reconsider its approach to this particular category of restraints.

D. Vertical Maximum Price Fixing Should Be Analyzed Under The Rule Of Reason

Since GTE, this Court has reaffirmed that it will hesitate to adopt per se rules applicable to "restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458-459 (1986); see also National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 103-104 (1984). Per se condemnation is appropriate only if a particular type of restraint "appears to be one that would always or almost always tend to restrict competition and decrease output." Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19-20 (1979). Vertical maximum price-fixing agreements do not satisfy that standard.

1. The primary pro-competitive justification adduced in support of maximum vertical price fixing is the one the Court refused to countenance in Albrecht, but which it has since elaborated with apparent approval:

When a manufacturer provides a dealer an exclusive area within which to distribute a product, the manufacturer's decision to fix a maximum resale price may actually protect consumers against exploitation by the dealer acting as a local monopolist. The manufacturer acts not out of altruism, of course, but out of a desire to increase its own sales--whereas the dealer's [20] incentive, like that of any monopolist, is to reduce output and increase price.

ARCO, 495 U.S. at 343 n.13. Professor Areeda makes the same point:

A dealer, although small in absolute terms, may enjoy a considerable degree of monopoly power in its local market. Like any other monopolist, it is likely to restrict output and raise price, to the detriment of both the manufacturer and consumer. The detriment to the consumer is obvious: higher prices. The detriment to the manufacturer is equally clear: fewer sales. The manufacturer thus serves both his own interests and those of consumers by restraining the dealers' exercise of monopoly power and preventing dealers from profiting more than is necessary for effective performance of the distribution function. This protects the public from price gouging.

8 P. Areeda, Antitrust Law ¶ 1636a, at 395 (1989); see also, e.g., Caribe BMW, 19 F.3d at 753 (maximum resale price agreement can be used to "protect[] consumers from the exercise of a retailer's monopoly power."); Albrecht, 390 U.S. at 158-159 (Harlan, J., dissenting).(9)

The Herald Company asserted that very purpose for its attempt to impose maximum [21]prices on its distributors. See Albrecht v. Herald Co., 367 F.2d 517, 519 (8th Cir. 1966) (quoting publisher's letter to Albrecht), rev'd, 390 U.S. 145 (1968).

2. On the other side of the balance, Albrecht identified several concerns that might be raised by vertical maximum price fixing. First, the Court pointed out (390 U.S. at 152-153) that "[m]aximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay," thus "severely intrud[ing] upon the ability of [wholesale] buyers to compete and survive in th[e] market." 390 U.S. at 152. It is not clear, however, why ordinary market mechanisms would not tend to correct such problems automatically. See Areeda, supra, ¶ 1637e. Manufacturers generally have every incentive not to hamstring their distributors, and distributors are not likely to be shy about communicating the necessary market information back to their suppliers. It therefore seems unlikely that pricing errors of this sort (which a dealer might also mitigate by offering separate service contracts) would be so frequent, so serious, or so persistent as to require per se antitrust condemnation in order to ensure effective competition.

Albrecht also adverted to the possibility that "[m]aximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition." 390 U.S. at 153. Again, however, a supplier normally has the economic incentive to attempt to ensure the efficiency of its distribution system, and the possibility that it may make mistakes is not enough to justify a rule that any distributor [22] must always be free to substitute its own, perhaps equally imperfect, judgment for that of the supplier. Indeed, after GTE, a vertical distribution scheme expressly designed to channel distribution through a few specific dealers, including large ones able to realize considerable economies of scale, would be evaluated under the rule of reason. Thus, the possibility that maximum prices might achieve the same effect indirectly no longer provides persuasive support for holding them per se unlawful.

Albrecht suggested (390 U.S. at 153) that "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, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices." As that language itself suggests, however, it is the dealers' costs, not any restriction on maximum price, that deters price reductions in such circumstances. If, on the other hand, a particular vertical maximum price-fixing agreement were suspected to be, in fact, a scheme for fixing minimum prices, for concealing or implementing a horizontal price agreement, or for setting illegally predatory prices, then it could be challenged under the rules applicable to such arrangements. The possibility of such disguises does not pose so substantial a danger as to justify complete preclusion of legitimate, pro-competitive maximum price fixing.

Finally, Albrecht echoed (390 U.S. at 152) the point made in Kiefer-Stewart (340 U.S. at 213) that all sorts of price-fixing agreements, whatever their other characteristics, "cripple the freedom of traders" by "restrain[ing] their ability to sell in accordance with their own judgment." That concern has [23] considerable historical resonance. See GTE, 433 U.S. at 66-69 (White, J., concurring in the judgment). As the Court has observed, however, every agreement concerning trade imposes some restraint on traders' freedom. Id. at 53 n.21, citing Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). In determining which restraints are unreasonable, and therefore impermissible under the antitrust laws, "an antitrust policy divorced from market considerations would lack any objective benchmarks." GTE, 433 U.S. at 53 n.21. Moreover, the Court has recognized that per se rules against economically efficient vertical restraints may induce producers to take over their own distribution functions entirely, thus "work[ing] to the ultimate detriment of the small businessmen" who would otherwise operate as relatively independent distributors. Id. at 57 n.26; see also Business Elec., 485 U.S. at 725.(10)

Thus, concern for the competitive autonomy of particular market actors pro-[24]vides neither a practical nor an analytically sound justification for holding vertical maximum price fixing to be illegal per se.

3. These arguments are typical of those advanced, over the 30 years since Albrecht was decided, in an extensive legal and economic literature with which this Court is doubtless familiar. See, e.g., ARCO, 495 U.S. at 343 n.13; Areeda, supra, ¶¶ 1634-1638. It is fair to say that a broad consensus has developed among informed lawyers and economists that the per se rule adopted in Albrecht should be replaced by rule-of-reason analysis. See, e.g., Areeda, supra, ¶ 1638b.(11)

This view is shared even by a commentator who points out that rule-of-reason litigation may impose significant burdens. Pitofsky, supra, at 1489-1490 & n.17.(12)

Moreover, the experience of those at the [25]Department of Justice and the Federal Trade Commission who are primarily charged with enforcement of the antitrust laws is instructive: Since Albrecht, we are aware of no case in which either the Commission or the United States has committed enforcement resources to proceeding against a party on the ground of purely vertical maximum price fixing.

We do not discount the possibility that there are cases in which vertical maximum price fixing may be, on balance, anti-competitive and therefore violate the Sherman Act. Repudiation of a per se rule will presumably give rise to new experience with a variety of such restraints; market participants can be creative not only in embracing competition, but in seeking to avoid it; and economists continue to explore the ways in which particular mechanisms may tend to enhance or to defeat the free operation of the market.(13)

Certainly we do not advocate any rule declaring that vertical maximum pricing arrangements are per se legal. There is no reason to believe, however, that such anti-competitive situations will be frequent or [26]that those that may arise may not be adequately policed under the rule of reason. We are therefore confident that the loss of Albrecht's per se rule will not materially hamper the federal government's ability to enforce the antitrust laws vigorously in any appropriate case. Compare Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777 & n.25 (1984). In the meantime, we see no reason to deny consumers such benefits as may result from allowing suppliers to impose maximum resale prices on their distributors in situations in which such restraints are, on balance, pro-competitive.

4. "The importance of stare decisis is, of course, unquestioned." GTE, 433 U.S. at 58 n.30. In cases under the Sherman Act, however, this Court has recognized that it has a special responsibility through common-law adjudication to give more definite content to the broad mandate of the Act and, indeed, that the Act adopted the "dynamic potential * * * [of] the common law itself." Business Elec., 485 U.S. at 732. The essence of that potential is the ability to adapt to changed circumstances or to the accumulation of experience. Thus, the Court has not been unwilling to reconsider previous antitrust decisions whose rationales have been called into question. See, e.g.,

Copperweld Corp. v. Independence Tube Corp., supra; GTE, 433 U.S. at 47-49; Simpson v. Union Oil Co., 377 U.S. 13, 22-25 (1964) (effectively overruling United States v. General Electric Co., 272 U.S. 476 (1926)).

In this case, although Albrecht effectively adopted a per se rule against vertical maximum price restraints, this Court "has never explored or analyzed in detail the justifications for such a rule," and the doctrine has played "only a relatively minor role in the Court's Sherman Act holdings" and essentially no [27]role in the government's enforcement efforts. Copperweld, 467 U.S. at 766, 777. As the GTE Court observed about Schwinn, "[s]ince its announcement, [Albrecht] has been the subject of continuing controversy and confusion," and "[t]he great weight of scholarly opinion has been critical of the decision." GTE, 433 U.S. at 47-48. Moreover, and perhaps most important, "the growth of judicial doctrine" in the area of vertical non-price restraints has largely "removed or weakened the conceptual underpinnings" of Albrecht. Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989). For all these reasons, we believe that "the experience of the past [30] years should be brought to bear on this subject of considerable commercial importance." GTE, 433 U.S. at 48-49.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

APRIL, 1997

1. Ripple concurred, writing separately "to note that I share my colleagues' substantive criticism of the per se rule as it has been applied to vertical maximum price-fixing" and to suggest that this case could be distinguished from Albrecht on the ground that it "involves a single contract between a Judge single wholesaler and a single retailer" which does not "implicate any other entities," so that "the threat of horizontal cartelization is absent or, at the very least, greatly diminished." Pet. App. 16a-17a.

2. Kiefer-Stewart involved an agreement among suppliers to fix the maximum resale prices charged by the wholesalers next in the distribution chain, and therefore had overtones of vertical price fixing. It seems clear from the Court's opinion, however, that the decision was based principally on the horizontal agreement between competing suppliers. 340 U.S. at 213-214; see also ARCO, 495 U.S. at 336 n.6; Maricopa, 457 U.S. at 348 & n.18; Albrecht, 390 U.S. at 164-165 (Harlan, J., dissenting); White Motor Co. v. United States, 372 U.S. 253, 260 (1963); but see Albrecht, 390 U.S. at 152 & n.8. A different aspect of the decision in Kiefer-Stewart was overruled in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

3. In White Motor Co. v. United States, 372 U.S. at 264, the Court arguably "intimate[d]" its approval of a judgment that certain vertical maximum price restrictions were illegal per se. See also id. at 257, 260. The opinion in White Motor repeatedly noted, however, that the validity of the price-fixing provisions was not before the Court. Id. at 256-257 nn.2-3, 260.

4. See, e.g., ARCO, 495 U.S. at 335-336 & nn. 5-6; Business Elec., 485 U.S. at 735; Acquaire v. Canada Dry Bottling Co. of N.Y., 24 F.3d 401, 409 (2d Cir. 1994); Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745, 752-753 (1st Cir. 1994) (Breyer, C.J.); Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 213 (3d Cir. 1992), cert. denied, 507 U.S. 921 (1993); Blanton v. Mobil Oil Corp., 721 F.2d 1207, 1211 (9th Cir. 1983), cert. denied, 471 U.S. 1007 (1985); Carlson Mach. Tools, Inc. v. American Tool, Inc., 678 F.2d 1253, 1261 (5th Cir. 1982).

5. The petition for certiorari in the present case states separately the question whether the damages claimed by respondents constitute "antitrust injury." Pet. i (Question 1), 4-7; see, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). In our view, the proper resolution of that question is intertwined with the question whether purely vertical maximum resale price maintenance is still to be considered per se illegal for the reasons articulated in Albrecht. The court of appeals did not err in holding (Pet. App. 10a-11a) that respondents alleged the sort of injury

recognized by the Albrecht Court. See also Atlantic Richfield Co. v. USA Petroleum Co. (ARCO), 495 U.S. 328, 345-346 (1990); Caribe BMW, 19 F.3d at 752-754; cf. Lear, Inc. v. Adkins, 395 U.S. 653, 670-671 (1969) (patent licensees "may often be the only individuals with enough economic incentive" to vindicate the public interest by challenging the validity of a patent).

If, however, the Court in this case abandons or reformulates the rule of Albrecht, then what is necessary to show antitrust injury in this context will depend on what legitimate antitrust concerns, if any, remain regarding the agreement at issue. That is a question that, in our view, could appropriately be addressed in the first instance by the court of appeals, if that court determines on remand that it would be appropriate to afford respondent a further opportunity to make his case under the rule of reason. We therefore address ourselves principally to the Albrecht question. The Court should, however, make clear that, contrary to the court of appeals' implication (Pet. App. 10a), principles of antitrust injury that affect the ability of private plaintiffs to bring damage actions under Section 4 of the Clayton Act, 15 U.S.C. 15, do not limit the authority of the United States or the Federal Trade Commission to enforce the antitrust laws, including whatever limits they place on vertical maximum price-fixing, in appropriate cases. See Sherman Act § 4, 15 U.S.C. 4; Federal Trade Commission Act § 5, 15 U.S.C. 45.

6. Schwinn applied a per se rule only to cases in which the supplier sold goods outright to its distributors, as opposed to treating distributors as agents and delivering goods to them only on consignment. Schwinn, 388 U.S. at 379-380. The former appeared to be the case in Albrecht. 390 U.S. at 147.

7. The risks of cartelization and lessened interbrand competition mentioned by the Court in GTE, and the sources cited, relate to the fixing of minimum prices. Similarly, the congressional approval of per se analysis inferred by the Court (433 U.S. at 51 n.18) from repeal of the federal antitrust exemptions for state "fair trade" laws would not extend to maximum price restraints, because the sort of "fair-trade pricing" (ibid.) covered by those lawsÑand certainly the sort that concerned Congress when, at a time of rapid inflation, it repealed the federal exemptionsÑtypically involved only the setting of minimum prices. See generally Miller-Tydings Fair Trade Act, ch. 690, § 1, 50 Stat. 693 (1937) (authorizing States to permit "contracts or agreements prescribing minimum prices for * * * resale") (emphasis added); McGuire Act, Pub. L. No. 542, § 1, 66 Stat. 632 (1952) ("minimum or stipulated prices"); H.R. Rep. No. 341, 94th Cong., 1st Sess. (1975) (emphasizing, for example (id. at 3), that "From the consumers' point of view, 'fair trade' laws have one effect--higher prices."); S. Rep. No. 466, 94th Cong., 1st Sess. (1975); 121 Cong. Rec. 23,658-23,662 (1975) (House debate); id. at 23,660 (statement of Rep. McClory) (contending that "maximum price maintenance" would not be affected by the proposed repeal); 121 Cong. Rec. 38,049-38,051 (1975) (Senate debate); see also, e.g., Broussard v. Socony Mobil Oil Co., 350 F.2d 346, 349 n.8 (5th Cir. 1965).

While it was considering repeal of the "fair trade" exemption, the Senate Judiciary Committee held hearings on a proposed provision explicitly permitting newspaper publishers to set maximum resale prices. Fair Trade Laws: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Pt. 2 (1975). The amendment "was not brought to a vote because of lack of support for it." S. Rep. No. 466, supra, at 3; see also 121 Cong. Rec. 38,051 (1975) (remarks of Sen. Hruska). Failure to enact or vote on a legislative proposal is not, of course, comparable in significance to a congressional enactment, such as the repeal of the "fair trade" exemption. See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 186-187 (1994). And, in any event, the fact that Congress in 1975 had no interest in trading one specific antitrust exemption for another does not suggest that it intended that vertical maximum price setting be per se illegal. As noted above, the entire tenor of the congressional debate reflects hostility to the setting of minimum, not maximum, prices. But see H.R. Rep. No. 341, supra, at 2 (citing Albrecht); Bowen v. New York News, Inc., 522 F.2d 1242, 1249-1250 (2d Cir. 1975) (applying McGuire Act to maximum price maintenance), cert. denied, 425 U.S. 936 (1976).

8. See, e.g., 8 P. Areeda, Antitrust Law ¶ 1637b (1989); 3A P. Areeda & H. Hovenkamp, Antitrust Law ¶ 76063 (1996); Pitofsky, supra, 71 Geo. L.J. at 1490 n.17. In particular, any discussion or agreement concerning price among competitors has always been viewed as a matter at the very center of antitrust concern. See, e.g., Areeda, supra, ¶ 1637c n.11 ("[C]ompetitors have so strong an incentive to escape price competition that it is exceedingly dangerous to allow them to discuss and come to any kind of consensus about price."). The prohibition of vertical minimum price

maintenance rests in part on concerns about facilitating or concealing exactly such horizontal collusion. See, e.g., Dr. Miles, 220 U.S. at 407-408; Pitofsky, supra, 71 Geo. L.J. at 1490-1491. Purely vertical, maximum price agreements, on the other hand, present little or no similar danger. Moreover, in the case of vertical minimum price fixing, suppliers' stated concerns (such as inducing dealers to provide adequate point-of-sale services) could often be addressed directly in a distribution agreement without reference to price (by, for example, requiring the distributor to provide a certain level of facilities or services to its customers).

9. For a more formal exposition of the economic principles involved, see, e.g., Spengler, Vertical Integration and Antitrust Policy, 58 J. Pol. Econ. 347 (1950); Machlup & Taber, Bilateral Monopoly, Successive Monopoly, and Vertical Integration, 27 Economica 101 (1960); J. Tirole, The Theory of Industrial Organization 173-177 (1988); Blair & Esquibel, Maximum Resale Price Restraints in Franchising, 65 Antitrust L.J. 157, 161-167 (1996).

10. This is not merely speculation. See, e.g., Paschall v. Kansas City Star Co., 727 F.2d 692, 695 (8th Cir.) (en banc) (newspaper announced termination of all contract carriers in favor of delivery agents so publisher could set uniform price and provide better service), cert. denied, 469 U.S. 872 (1984); Northwest Pubs., Inc. v. Crumb, 752 F.2d 473, 475 (9th Cir. 1985) (termination of distributors in favor of employee distribution in order to control subscriber prices). In other cases, a supplier barred from setting maximum resale prices may compete directly with its dealers in order to provide a constraint on their pricing. E.g., Belfiore v. New York Times Co., 826 F.2d 177, 181 (2d Cir. 1987), cert. denied, 484 U.S. 1067 (1988). Vertical integration or direct competition undertaken solely to avoid per se antitrust rules is unlikely to serve any purpose of the antitrust laws. ARCO, 495 U.S. at 343 n.13; see generally, e.g., Blair & Fesmire, Maximum Price Fixing and the Goals of Antitrust, 37 Syracuse L. Rev. 43, 73 (1986).

11. See also, e.g., Blair & Fesmire, Maximum Price Fixing and the Goals of Antitrust, supra; id. at 44 ("[T]he Albrecht rule * * * is unambiguously negative in its effects, and judicial policy in this area should be reexamined."); Easterbrook, Maximum Price Fixing, 48 U. Chi. L. Rev. 886 (1981); R. Givens, Antitrust: An Economic Approach ¤Ê8.02[10] (1996) ("To permit antitrust laws to be used to discourage efforts to keep consumer prices down is to turn antitrust on its head and run counter to the basic purposes of the Sherman Act."); H. Hovenkamp, Federal Antitrust Policy ¤ 11.5(c), at 422 (1994) ("Few Supreme Court decisions have proved more anticompetitive than Albrecht."); Areeda, supra, |Ê1635; Calkins, The October 1989 Supreme Court Term and Antitrust: Power, Access, and Legitimacy, 59 Antitrust L.J. 339, 364 (1991) (Albrecht is "now generally discredited"); F. Scherer & D. Ross, Industrial Market Structure and Economic Performance 558 (3d ed. 1990); see also Page, The Scope of Liability for Antitrust Violations, 37 Stan. L. Rev. 1445, 1469-1470 (1985).

12. Adjudication under the rule of reason does not always require elaborate and burdensome analysis. In an appropriate case, the requisite inquiry may be accomplished quickly. See FTC v. Indiana Fed'n of Dentists, 476 U.S. at 459; National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. at 110. See also Klein, A Stepwise Approach to Antitrust Review of Horizontal Agreements, 7 Trade Reg. Rep. (CCH) | 50,157 (Nov. 7, 1996).

13. Some recent economic literature suggests that, under certain restrictive conditions, the setting of maximum resale prices could have the effect of increasing consumer prices. See O'Brien & Shaffer, Vertical Control with Bilateral Contracts, 23 Rand J. Econ. 299 (1992); Perry & Besanko, Resale Price Maintenance and Manufacturer Competition for Exclusive Dealerships, 39 J. Indus. Econ. 517 (1991).