

Economic Theory Trader Freedom and Consumer Welfare: *State Oil Co. v. Khan* and the Continuing Incoherence of Antitrust Doctrine

Alan J. Messe

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ESSAY

ECONOMIC THEORY, TRADER FREEDOM, AND CONSUMER WELFARE: *STATE OIL CO. V.* *KHAN* AND THE CONTINUING INCOHERENCE OF ANTITRUST DOCTRINE .

Alan J. Meese†

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INTRODUCTION

Economic theory can be a useful tool for courts applying the anti-trust laws. Theory can tell courts what purposes contracts might serve

† Associate Professor of Law, William and Mary School of Law. A.B. 1986, College of William and Mary; J.D. 1989, The University of Chicago. A research grant from the William and Mary School of Law supported this project. Thomas Arthur, Neal Devins, Jack Goldsmith, James Hamilton, Charles Koch, Lawrence Lessig, Taylor Reveley, and Cynthia Ward provided helpful comments. Jeanne Gordon and Della Harris assisted in preparation of the manuscript.

and what effects they will have on consumers and others. Does a contract increase prices? Create wealth? Both? Economic theory can help judges answer these and other questions. It is little wonder, then, that implicitly or explicitly, economics has played an important role in the development of antitrust doctrine since Congress passed the Sherman Act over a century ago.¹

Economics, however, is not a static science. Contracts that once seemed to harm consumers, for instance, may now appear innocuous or even beneficial. Yet the mere fact that the economist's evaluation of a practice has changed radically does not necessarily require a concomitant change in antitrust doctrine. While economic theory can perform a descriptive function, explaining what purposes or effects various contracts might have, economics cannot tell judges what purposes or effects matter under the antitrust laws.² That question, instead, is a purely normative one that courts must answer by invoking their best reading of these statutes. Moreover, economic theory does not limit the range of answers to this normative question. Contracts that economists view with indifference or approval can have social or political consequences that Congress may have meant to remedy through antitrust regulation—even, perhaps, at the expense of consumers or efficiency. To be sure, economics can help courts illuminate the nature and extent of the trade off between, for example, the deconcentration of economic power and lower prices. Economics cannot, however, determine whether this much deconcentration is worth that much consumer welfare or whether such a trade off is appropriate in the first place.

While the boundaries between the descriptive and the normative are theoretically clear, courts do not always respect them in practice. One such instance of failure to respect those boundaries prompts this essay: the Supreme Court's recent opinion in *State Oil Co. v. Khan*.³ In *Khan*, the Court reconsidered its decision in *Albrecht v. Herald Co.*,⁴ which had declared maximum resale price maintenance ("maximum rpm") *per se* unlawful under the Sherman Act.⁵ Relying upon advances in economic theory which suggested that maximum rpm likely

¹ See HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937*, at 268 (1991) ("Antitrust policy has been forged by economic ideology since its inception."); Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 226 (1995) ("In almost every era of antitrust history, policymakers have employed economic models to explain or modify the state of the law and the rationale for its enforcement.").

² See MILTON FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3, 3-7 (1953). See generally Herbert Hovenkamp, *Positivism in Law & Economics*, 78 CAL. L. REV. 815 (1990) (contending that welfare economics cannot dictate legal results without additional normative arguments).

³ 118 S. Ct. 275 (1997).

⁴ 390 U.S. 145 (1968).

⁵ See *id.* at 151-54.

may enhance the welfare of consumers, the *Khan* Court asserted that *Albrecht* rested upon economic premises that have been discredited.⁶

As shown below, *Khan's* repudiation of *Albrecht* cannot be justified as a ministerial application of economic theory. *Albrecht* did not depend upon any particular account of the purely economic effects of maximum rpm. Instead, the decision was based upon a conclusion that the practice interfered with the discretion of dealers to price as they saw fit and thus offended "trader freedom," a value the Court long had held worthy of protection under the antitrust laws. *Khan's* determination that maximum rpm is more beneficial than *Albrecht* might have supposed further highlights the trade off between the protection of dealers and the welfare of consumers; however, it does not *ipso facto* establish that *Albrecht* was wrongly decided. Rather, *Khan* implicitly rests upon the repudiation of *Albrecht's* normative vision of antitrust and the substitution of an alternative vision that sees no independent role for "trader freedom" in the development of antitrust doctrine.

Khan's failure to address squarely the normative basis for its consumer-friendly decision is nothing new. For over two decades, the Supreme Court fastidiously has declined to articulate a vision of what the antitrust laws were designed to accomplish, all the while developing a jurisprudence that is increasingly solicitous of consumers and indifferent to trader freedom. In so doing, the Court has narrowed or overruled precedents that, like *Albrecht*, have rested upon noneconomic values such as trader freedom. It has not, however, explicitly questioned the normative basis for these prior decisions, but instead has employed revised economic theory to discredit them. Indeed in some instances, the Court actually has left intact certain decisions that rest on trader freedom, albeit in narrowed form.

Supporters and opponents alike may see *Khan* as one more step in an inexorable and silent march toward an antitrust jurisprudence that rests solely upon the welfare of consumers. More cynical observers may even see a disingenuous use of economic theory to shield a less-than-candid abandonment of trader freedom, a value deeply entrenched in several decades of case law. Closer analysis, however, reveals a different account of the Court's behavior and the role of economic theory in its decision making. One can characterize *Khan*, as well as the Court's approach to trader freedom generally, as an attempt to minimize the institutional costs associated with the appearance of politicized decision making in an environment in which the normative foundations of antitrust are in serious dispute. Advances in economic theory have made it clear that the protection of traders

⁶ See *Khan*, 118 S. Ct. at 284-85.

often occurs at the expense of consumers. As a result, adherence to decisions such as *Albrecht* would have required the Court to balance the welfare of consumers against the social, moral, and political benefits of trader freedom. Because there is no consensus that Congress meant for courts to trade off consumer welfare against other values, the pursuit of such balancing would appear incompatible with the judicial function. Thus, by repudiating *Albrecht* the Court avoided the appearance of politicized decision making and safeguarded its own legitimacy. Further, by characterizing its repudiation as an application of changed economic theory, the Court avoided a direct challenge to *Albrecht's* normative vision and the accompanying costs of questioning an approach to antitrust policy with significant precedential support.

This account of the *Khan* Court's behavior explains its reticence to excise explicitly trader freedom from antitrust jurisprudence and suggests that—at least in the short run—this value will continue to play some role in antitrust doctrine. After all, not all trader freedom precedents involve clear sacrifices in consumer welfare, even when one takes advances in economic theory into account. Adherence to such decisions, therefore, does not always entail the appearance of political decision making of the sort that would have attended adherence to *Albrecht*; some doctrines can protect traders without (apparently) harming consumers. Repudiation of such decisions, then, could not rest upon changes in economic theory but instead would entail the high cost of questioning directly the normative premises of the trader freedom era. Ironically, the Court's fastidious attention to the appearance of principled decision making has produced an incoherent antitrust doctrine. Still, absent a new consensus regarding the normative foundations of antitrust, the Court's equivocal approach to trader freedom likely will continue.

I

TRADER FREEDOM'S UNCERTAIN STATUS IN THE SUPREME COURT

For decades the Supreme Court looked outside economic theory for the normative content of antitrust. In particular, the Court consistently held that "trader freedom"—the autonomy of individuals and small businesses—deserved independent significance under the antitrust laws. Group boycotts were deemed *per se* unlawful, even absent any showing of anticompetitive effect, because they interfered with the freedom of firms to compete in the marketplace.⁷ Horizontal ter-

⁷ See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-14 (1959); *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 467-68 (1941).

ritorial restraints ancillary to otherwise lawful joint ventures were unlawful because they limited the discretion of traders to determine where they would operate.⁸ Tying contracts, which bound purchasers to take one product in order to obtain another, were condemned because they deprived purchasers of the freedom to do business with the vendor of their choice and denied vendors the correlative opportunity to sell.⁹ Horizontal *maximum* price fixing—agreements that reduced prices—were banned because they deprived parties to them of the freedom to price as they saw fit.¹⁰ Mergers—even those that might lead to lower prices—were viewed with hostility because they eliminated independent competitors and threatened to drive smaller, less efficient firms out of business.¹¹ Congress, the Justices claimed, expressly had mandated the protection of trader freedom, even when that protection came at the expense of consumers.¹² Scholars during this era generally agreed with this assessment of the law's scope.¹³

⁸ See *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972). In *Topco* the Court noted:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. *And the freedom guaranteed each and every business, no matter how small, is the freedom to compete . . .*

Id. at 610 (emphasis added).

⁹ See *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 497-98, 503-04 (1969); HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 10.1, at 352 (1994) (concluding that the "main focus" of tying doctrine has been "on interference with the freedom of dealers or other purchasers to make individual business judgments"); Alan J. Meese, *Tying Meets the New Institutional Economics: Farewell to the Chimera of Forcing*, 146 U. PA. L. REV. 1, 12-21 (1997); see also *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966) (voiding exclusive dealing contract because it "take[s] away freedom of purchasers to buy in an open market" and thus offends "the central policy" of the antitrust laws).

¹⁰ See, e.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951).

¹¹ See *United States v. Von's Grocery Co.*, 384 U.S. 270, 277-78 (1966) (declaring a merger in an unconcentrated market unlawful); *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (opining that efficiencies that may lead to lower prices also could militate against a merger).

¹² See *Brown Shoe*, 370 U.S. at 344; *Klor's*, 359 U.S. at 212; *Fashion Originators' Guild*, 312 U.S. at 467. Judge Learned Hand's articulation of the Sherman Act's purported concern for trader freedom is typical:

We have been speaking only of the economic reasons which forbid monopoly; but . . . there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In the debates in Congress Senator Sherman himself . . . showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.

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

¹³ See, e.g., EARL W. KINTNER, *AN ANTITRUST PRIMER* at xiii-xiv (1964); LAWRENCE ANTHONY SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 10-13 (1977); Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 383-84 (1965). There were,

The Court did not ignore economic theory in developing its anti-trust jurisprudence during this trader freedom era. To the contrary, the Court's opinions almost always contained assertions about the economic effects of the practices in question.¹⁴ These assertions, nevertheless, usually appeared side-by-side with language regarding the practices' impact on trader freedom, language that often appeared dispositive.¹⁵ Economics served a makeweight function, allowing the Court to assert that its decisions, while enhancing the freedom of traders, also promoted the welfare of consumers.¹⁶ Indeed, to the extent that the Court was able to portray its decisions as favorable to consumers, it minimized the appearance of preferring traders to consumers, thus implying that little turned on the conclusion that trader freedom was of independent significance.¹⁷

Perhaps no decision better exemplifies the Court's solicitude for trader freedom than *Albrecht v. Herald Co.*¹⁸ In *Albrecht*, the Court determined that agreements setting maximum resale prices were unlawful *per se* because, among other things, they interfered with the discretion of dealers to price their products as they saw fit.¹⁹ The exercise of this discretion, of course, could readily *raise* prices, to the detriment of consumers. Thus, while the Court also invoked certain economic evils that such contracts "might" produce, the categorical ban on maximum rpm reflected a normative conception of antitrust willing to subordinate the interests of consumers to those of dealers.

it should be noted, significant dissents from this view within the academy. See, e.g., Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 369-70 (1965). However, even the dissenters conceded that "most commentators on the topic" agreed that antitrust had a social purpose that could override the welfare of consumers. *Id.* at 369.

¹⁴ See HOVENKAMP, *supra* note 9, § 2.2a, at 61 ("Even the relative aggressiveness of the Warren Court era was grounded in economic theory, although antitrusters often pushed the theory too far.")

¹⁵ See, e.g., *Von's Grocery*, 384 U.S. at 274-78 (voiding a merger that eliminated small competitors and purportedly threatened a "trend toward concentration"); *Klor's*, 359 U.S. at 213 (condemning group boycotts because they interfered with trader freedom and led to "monopoly").

¹⁶ See Thomas E. Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325, 330 (1968) (suggesting that the Court "used economic doctrine to support decisions arrived at upon other grounds"); *id.* at 332 (arguing that the Court was primarily concerned with "equality of opportunity, free access to markets by competing sellers, and complete freedom of choice by buyers"); Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1524-27 (1984) (arguing that during the 1960s the Court employed economic theory to justify decisions motivated by political and social concerns).

¹⁷ See Donald I. Baker & William Blumenthal, *Ideological Cycles and Unstable Antitrust Rules*, 31 ANTITRUST BULL. 323, 330 (1986) (contending that during the trader freedom era "[t]he precise objective of antitrust policy was unimportant, for populist and economic approaches yielded consistent results").

¹⁸ 390 U.S. 145 (1968).

¹⁹ See *id.* at 152-53.

Things changed, some thought, in *Continental T.V., Inc. v. GTE Sylvania Inc.*²⁰ In *Sylvania*, the Court reconsidered the *per se* ban on agreements granting exclusive territories that it had announced just a decade earlier in *United States v. Arnold, Schwinn & Co.*²¹ Relying upon "new economics" regarding the virtues of such agreements, the Court determined that *Schwinn's per se* rule lacked justification and that such agreements should be analyzed on a case-by-case basis under the "Rule of Reason."²² To the chagrin of some, however, the Court provided "virtually no guidance" on how to conduct the Rule of Reason analysis.²³

In a footnote, the *Sylvania* Court explicitly rejected the assertion that concerns for dealer autonomy justified adherence to *Schwinn's per se* rule.²⁴ *Schwinn*, it claimed, did not purport to rest upon trader freedom, but instead upon the economic consequences of exclusive territories.²⁵ Although the Court could have stopped there, it went on to repudiate several decades of its stated antitrust policy, opining that trader freedom should play no role in the development of antitrust doctrine.²⁶ The Court neither mentioned nor explicitly questioned assertions in prior case law that one purpose of antitrust law was to protect this autonomy. Nor did the Court claim that economic theory itself justified the abandonment of trader freedom. Instead, it observed that an antitrust policy concerned with this value, and not "market considerations," would "lack any objective benchmarks."²⁷

Scholars naturally have disagreed over the exact meaning of *Sylvania's* dictum for the normative content of antitrust. Some have argued that the decision signalled a wholesale abandonment of trader freedom as a valid antitrust consideration and a substitution of an antitrust policy that rests solely upon solicitude for consumers.²⁸ Others

²⁰ 433 U.S. 36 (1977).

²¹ 388 U.S. 365, 381-82 (1967), *overruled by* *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

²² *See Sylvania*, 433 U.S. at 57-59.

²³ Robert Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 11 (1978).

²⁴ *See Sylvania*, 433 U.S. at 53 n.21; *see also id.* at 67-70 (White, J., concurring in the judgment) (noting that the majority "summarily reject[ed] th[e] concern . . . for the autonomy of independent businessmen" (internal quotation marks omitted)).

²⁵ *See id.* at 53 n.21.

²⁶ *See id.*

²⁷ *Id.*

²⁸ *See, e.g.,* Frank H. Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 888 (1981) ("The Supreme Court has overruled *Schwinn* and explicitly rejected any analysis that makes antitrust cases turn on the 'autonomy of independent businessmen.' Arguments about the effect of a practice on quantity and price, not arguments about freedom and autonomy, control antitrust analysis." (quoting *Sylvania*, 433 U.S. at 53 n.21)); Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 13 (1977) ("One must not read a Supreme Court opinion like a bond indenture, but it does appear that the Court is implying that antitrust prohibitions must

have suggested that the Court meant this language to apply only to the narrow question before it: whether exclusive territories should be unlawful *per se*.²⁹ According to these commentators, trader freedom did not justify *per se* treatment in light of the newly discovered benefits of such agreements; still, they said, it should play a role in analyzing these restraints under the Rule of Reason.³⁰

These contending positions reflected emerging disagreements between two opposing schools of antitrust thought regarding the normative premises that should inform antitrust doctrine.³¹ The "Populist" or "trader freedom" school embraces the traditional idea that an important, perhaps central goal of antitrust doctrine is the enhancement of trader freedom, even if such enhancement occasionally occurs at the expense of consumers.³² The "consumer welfare" school, on the other hand, holds that one should judge restraints solely according to their effect on consumers.³³ Although members of this school disagree about how to define "consumer welfare," there is a

have an economic rationale and that the aesthetic delights of smallness . . . will not be permitted to decide antitrust cases."). Similarly, without citing this dictum, Robert Bork asserted that *Sylvania* implicitly rejected dealer freedom. See Robert H. Bork, *Vertical Restraints: Schwinn Overruled*, 1977 SUP. CT. REV. 171, 172 ("A great deal of doctrinal baggage about the social purposes of these laws . . . was silently jettisoned").

²⁹ See, e.g., William B. Bohling, *A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis, and Sylvania*, 64 IOWA L. REV. 461, 495-96 (1979) (arguing that "the Court [did not] intimate that [trader freedom] should be kept from consideration, or that economic efficiencies should become the sole determinant"); John J. Flynn, *The "Is" and "Ought" of Vertical Restraints After Monsanto Co. v. Spray-Rite Service Corp.*, 71 CORNELL L. REV. 1095, 1101 (1986) ("Justice Powell's statement [in footnote 21 of *Sylvania*] hardly represents a resounding rejection of injecting social and economic values and broader economic goals into the interpretation of antitrust concepts . . .").

³⁰ See Bohling, *supra* note 29, at 497-503; Flynn, *supra* note 29, at 1101-02; see also Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1176-85 (1981) (accepting *Sylvania* but contending that trader freedom should still play a role in vertical restraints doctrine).

³¹ See STEPHEN F. ROSS, *PRINCIPLES OF ANTITRUST LAW* 3-11 (1993) (comparing and contrasting normative approaches of the "Chicago" and "Populist" schools); Jacobs, *supra* note 1, at 226-40 (same).

³² See, e.g., John J. Flynn, *Legal Reasoning, Antitrust Policy and the Social "Science" of Economics*, 33 ANTITRUST BULL. 713, 719-20 (1988); Fox, *supra* note 30, at 1152-55; Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1060-65 (1979) (arguing that concerns regarding concentration of power motivated Congress when it amended § 7 of the Clayton Act); see also *supra* notes 7-13 and accompanying text (collecting sources enunciating trader freedom approach).

³³ See, e.g., I PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶¶ 100-13 (rev. ed. 1997); ROBERT H. BORK, *THE ANTITRUST PARADOX* 107-15 (1978); Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 TEX. L. REV. 705, 715 (1982); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

clear consensus that "trader freedom" should play no role in the development of antitrust doctrine.³⁴

In the two decades since *Sylvania*, the Court has avoided further articulation of its normative vision for antitrust law and thus has refused to explain whether trader freedom continues to be a worthy consideration in the evolution of antitrust doctrine. To be sure, the Court has de-emphasized trader freedom in several settings, often narrowing the scope of decisions grounded upon this value.³⁵ Unlike the *Sylvania* Court, however, the Court has declined to explain its own normative premises or to criticize those of its predecessors. Instead the Court has rested its decisions upon advances in economic theory that purportedly call its prior decisions into question.³⁶

Although the Court has narrowed doctrines that were premised on concern for trader freedom, it has refused to discard them altogether.³⁷ Tying law provides a ready example. Influenced by advances in economic thinking, the Court has made it more difficult for plaintiffs to establish that a seller has "forced" a tie on a purchaser. Specifically, the Court has required a plaintiff to prove that the seller actually possesses market power before it can establish that forcing has occurred.³⁸ Still, the Court continues to adhere to the view that without more, this forcing gives rise to *per se* liability, despite the general

³⁴ Compare Lande, *supra* note 33 (equating consumer welfare with competitive pricing), with BORK, *supra* note 33, at 107-15 (defining "consumer welfare" as the aggregate wealth of society).

³⁵ See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221-27 (1993) (narrowing the definition of "competitive injury" under the Robinson-Patman Act); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726-31, 735-36 (1988) (narrowing the definition of minimum rpm); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-98 (1986) (heightening standards governing proof of predatory pricing); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296-98 (1985) (confining *per se* rule against group boycotts to cases in which either (1) the defendant possesses market power or (2) the boycott is not ancillary to an otherwise legitimate joint venture).

³⁶ See, e.g., *Brooke Group*, 509 U.S. at 223-30 (relying upon revised thinking regarding the feasibility of predation to narrow definition of "competitive injury" under Robinson-Patman Act); *Sharp*, 485 U.S. at 725-28 (relying upon new understandings of the benefits of vertical restraints to contract definition of minimum rpm); *Matsushita*, 475 U.S. at 588-93 (relying upon literature concluding that predation is rare to heighten summary judgment standards in cases alleging a predatory pricing conspiracy); see also William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1, 47-69 (1995) (arguing that the Supreme Court has adjusted Warren-era doctrine in light of revised economic models).

³⁷ See William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221, 1237-38, 1253-57 (1989) (arguing that the Court has refused fully to embrace consumer welfare as the exclusive goal of antitrust); Page, *supra* note 36, at 47-53.

³⁸ See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12-18 (1984); cf., e.g., *United States v. Loew's Inc.*, 371 U.S. 38, 45 & n.4 (1962) (holding that, without more, possession of a copyright confers "economic power" of the sort necessary to establish *per se* liability). For a discussion of the evolution of the market power requirement in the tying context, see Meese, *supra* note 9, at 18-21; Page, *supra* note 36, at 63-65.

consensus that tying contracts are often innocuous or beneficial.³⁹ While this position has led some scholars to criticize current doctrine as incoherent, it flows naturally from a solicitude for the "freedom" of traders and other purchasers.⁴⁰

Other examples illustrate the Court's reluctance to wholly discard considerations of trader freedom. For instance, the Court has narrowed the class of conduct deemed minimum rpm and has made it more difficult for dealers alleging such conduct to survive summary judgment.⁴¹ At the same time, however, the Court has retained the *per se* rule against minimum rpm agreements, a position that many attribute to a regard for trader freedom.⁴² Moreover, the Court has continued to adhere to the *per se* rule against horizontal maximum price fixing, even though such contracts can reduce consumer prices.⁴³ It is little wonder that long after *Sylvania*, lower courts and

³⁹ See *Jefferson Parish*, 466 U.S. at 12-15; cf. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 462-69 (1992) (reaffirming the *per se* rule); *Jefferson Parish*, 466 U.S. at 41-42 (O'Connor, J., concurring) (arguing that tying contracts should be lawful absent proof of anticompetitive effect); BORK, *supra* note 33, at 372-81 (concluding that tying contracts are rarely harmful).

⁴⁰ See Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 263, 311 (1986) (referring to *Jefferson Parish* as "a Jekyll and Hyde" opinion, in which "two . . . antitrust personalities struggle for dominance"); Diane Wood Hutchinson, *Antitrust 1984: Five Decisions in Search of a Theory*, 1984 SUP. CT. REV. 69, 134-35 (arguing that the majority opinion in *Jefferson Parish* was internally inconsistent and wanted to "have things both ways").

⁴¹ See *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726-31, 735-36 (1988); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 760-64 (1984); see also Barbara Ann White, *Black and White Thinking in the Gray Areas of Antitrust: The Dismantling of Vertical Restraints Regulation*, 60 GEO. WASH. L. REV. 1, *passim* (1991) (reviewing the Court's recent vertical restraints jurisprudence and arguing that it has created a regime of *per se* legality with respect to certain vertical price restraints).

⁴² See *Sharp*, 485 U.S. at 735-36; *Monsanto*, 465 U.S. at 761 n.7 (refusing to reconsider *per se* rule against minimum rpm, ostensibly because the lower courts had not addressed the question); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977) (stating that its holding did not undermine the *per se* rule against minimum rpm); see also *id.* at 67 (White, J., concurring in judgment) (arguing that the ban on minimum rpm rests upon concern for the freedom of traders); *Khan v. State Oil Co.*, 93 F.3d 1358, 1364 (7th Cir. 1996) (Posner, C.J.) (opining that the Court's continuing hostility toward minimum rpm must rest upon something other than a concern for consumer welfare); Flynn, *supra* note 29, at 1144 ("[Resale price maintenance] impairs a central goal of antitrust policy—the independence of traders to set their own price . . ."); Fox, *supra* note 30, at 1184 ("The *per se* rule against vertical price-fixing reflects the value that sellers of goods should have the freedom to charge the price they see fit . . .").

⁴³ See *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 354 (1982); Peter M. Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of The Chicago School*, 1982 SUP. CT. REV. 319, 344-48 (contending that the *Maricopa County* decision rests upon a rejection of consumer welfare as the sole normative value in antitrust); Louis Kaplow, *Antitrust, Law & Economics, and the Courts*, LAW & CONTEMP. PROBS., Autumn 1987, at 181, 205 (same).

scholars disagree in their assessment of the Court's attitude toward trader freedom.⁴⁴

In *Khan*, the Court had a unique opportunity to clarify the role, if any, that trader freedom should play in antitrust policy. The *Khan* Court reconsidered its holding in *Albrecht*, which had declared maximum rpm—a practice that *reduces* consumer prices—unlawful *per se*. Because the *Albrecht* Court explicitly rested its decision upon solicitude for trader freedom, economic theory alone, it seemed, could not justify repudiating the decision, even if the theory demonstrated that *Albrecht's* rule harmed consumers. Rejection of *Albrecht* seemingly would require an explicit renunciation of "trader freedom," while adherence would require its reaffirmation.

As many had hoped,⁴⁵ the Court overruled *Albrecht* in *Khan*.⁴⁶ It did so, however, without indicating whether trader freedom does and should continue to play a role in antitrust law. Instead, without questioning *Albrecht's* commitment to this value, the Court claimed that advances in economic theory required it to overturn *Albrecht*.⁴⁷ As shown below, however, the Court's reasoning proved unconvincing, leading one to suspect that *Khan* involved more than simply the ministerial application of economic theory and to wonder just what role trader freedom will play in future decisions.

II

ECONOMIC THEORY AND TRADER FREEDOM: A ROCKY RELATIONSHIP

A. Economic Theory as Figleaf: Price Theory and *Albrecht's* Protection of Traders

On its face, *Albrecht* presented an almost paradigmatic conflict between trader freedom and consumers. The facts were straightfor-

⁴⁴ Compare *Fishman v. Estate of Wirtz*, 807 F.2d 520, 566-70 (7th Cir. 1986) (Easterbrook, J., concurring and dissenting) (arguing that Supreme Court precedent reflects singular concern for consumer welfare), and Ross, *supra* note 31, at 3 ("The now ascendant view is that antitrust laws should promote allocative efficiency."), with *Rothery Storage v. Atlas Van Lines*, 792 F.2d 210, 231-32 (D.C. Cir. 1986) (Wald, J., concurring) (arguing that precedent reflects concern for noneconomic values), HOVENKAMP, *supra* note 9, § 2.2e, at 69 (arguing that current law does not uniformly reflect concern for economic efficiency), and Page, *supra* note 36, at 47-69 (same).

⁴⁵ See, e.g., Roger D. Blair & Gordon L. Lang, *Albrecht After ARCO: Maximum Resale Price Fixing Moves Toward the Rule of Reason*, 44 VAND. L. REV. 1007, 1032 (1991); see also *Khan*, 93 F.3d at 1363 (Posner, C.J.) ("*Albrecht* was unsound when decided, and is inconsistent with later decisions by the Supreme Court. It should be overruled. Someday, we expect, it will be.")

⁴⁶ See *Khan*, 118 S. Ct. at 284-85.

⁴⁷ See *id.* at 283 ("After reconsidering *Albrecht's* rationale . . . we conclude that there is insufficient economic justification for *per se* invalidation of vertical maximum price fixing.")

ward.⁴⁸ The Herald Company published a morning paper in St. Louis, the *Globe-Democrat*. Herald appointed Albrecht as a *Globe* distributor, subject to Herald's written policy setting a ceiling on resale prices.⁴⁹ Albrecht, however, insisted on charging a price higher than that which Herald had set and had advertised to the public. Herald engaged in self-help, delivering papers to Albrecht's customers at the advertised prices. Albrecht then relented, lowering his prices before eventually selling the route to another entrepreneur.

The Court found that Herald's maintenance of maximum resale prices was a *per se* violation of the Sherman Act.⁵⁰ To the casual reader, the Court's decision may have appeared to rest upon concern for consumers and efficiency, as the Court offered three ways in which maximum rpm agreements could have negative economic consequences. Such agreements, the Court said, could set prices so low as to prevent small dealers from providing essential services to consumers.⁵¹ Moreover, by setting prices below the costs that some dealers faced, maximum rpm agreements could "channel distribution through a few large or specifically advantaged dealers."⁵² Finally, the Court suggested that a purportedly maximum resale price in fact tends to become a minimum.⁵³

The Court's eagerness to ascribe deleterious consequences to such agreements flowed naturally from the state of economic science at the time. Price theory, the then-dominant economic paradigm, treated the boundaries of the firm as a given, determined by technology.⁵⁴ The only transactions contemplated by this paradigm involved the sale of an item from one firm to another with no accompanying contractual restrictions.⁵⁵ Moreover, this paradigm recognized only those efficiencies that could be achieved within a firm, such as economies of scale or superior management.⁵⁶ The price-theory paradigm

⁴⁸ Unless otherwise noted, the facts are taken from the Supreme Court's opinion. See *Albrecht v. Herald Co.*, 390 U.S. 144, 147-49 (1968).

⁴⁹ See *Albrecht v. Herald Co.*, 367 F.2d 517, 519 (8th Cir. 1966).

⁵⁰ See *Albrecht*, 390 U.S. at 152-53.

⁵¹ See *id.*

⁵² *Id.* at 153.

⁵³ See *id.*

⁵⁴ See R.H. COASE, *Industrial Organization: A Proposal for Research*, in *THE FIRM, THE MARKET, AND THE LAW* 57, 60-67 (1988); OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 7 (1985); George J. Stigler, *The Division of Labor Is Limited by the Extent of the Market*, 59 J. POL. ECON. 185, 185 (1951) (stating that economists "have generally treated as a (technological?) datum the problem of what the firm does—what governs its range of activities or functions").

⁵⁵ See Richard N. Langlois, *Contract, Competition and Efficiency*, 55 BROOKLYN L. REV. 831, 835 (1989).

⁵⁶ See Oliver E. Williamson, *Delimiting Antitrust*, 76 GEO. L.J. 271, 272 (1987). For examples of this outlook, see DONALD DEWEY, *MONOPOLY IN ECONOMICS AND LAW* 201-02 (1959); Friedrich Kessler & Richard H. Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 2-3 (1959).

gave rise, in turn, to the “inhospitality tradition” of antitrust.⁵⁷ Within this milieu, it was difficult to characterize maximum rpm agreements as reflecting any cooperative effort between manufacturer and dealer to improve customer service. Instead, scholars characterized vertical restraints, and other nonstandard contracts that influenced dealers’ decisions after passage of title, as unnatural, “coercive” efforts to extend the “power” of a manufacturer beyond its normal boundaries to the detriment of dealers and consumers.⁵⁸ The *Albrecht* Court’s assertion that, for instance, manufacturers might employ maximum rpm to drive prices below dealer costs—even if this strategy harmed consumers—fits comfortably within this tradition.

Even on its own terms, however, the *Albrecht* Court’s analysis of the economic consequences of maximum rpm did not warrant *per se* treatment. To begin with, the fear that maximum rpm would channel distribution through larger, more efficient dealers did not derive from regard for consumer welfare, but instead a desire to protect smaller, less efficient producers. Moreover, even if the Court’s concerns could be deemed “economic,” they still did not justify *per se* treatment of maximum rpm agreements. Previously, the Court had reserved such treatment for only those agreements that, by their nature, had a “pernicious effect on competition.”⁵⁹ The *Albrecht* Court, however, did not assert that maximum rpm “always” or “almost always” had the “pernicious” economic effects it identified.⁶⁰ Instead, the Court simply

⁵⁷ See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 4-7 (1984) (describing the inhospitality tradition); Williamson, *supra* note 56, at 272-73 & n.6. The phrase “inhospitality tradition” apparently was coined by Professor Donald Turner, who said: “I approach territorial and customer restrictions not hospitably in the common law tradition, but inhospitably in the tradition of antitrust law.” Donald F. Turner, *Some Reflections on Antitrust*, 1966 N.Y. ST. B.A. ANTITRUST L. SYMP. 1, 1-2.

⁵⁸ See WILLIAMSON, *supra* note 54, at 371 (“[S]ince there is nothing to be gained by introducing nonstandard terms into market-mediated exchange, the use of contract restraints was presumed to have anticompetitive purpose and affect [sic].”); Alan J. Meese, *Price Theory and Vertical Restraints: A Misunderstood Relation*, 45 UCLA L. REV. 143, 176-83 (1997); Rudolph J. Peritz, *A Genealogy of Vertical Restraints Doctrine*, 40 HASTINGS L.J. 511, 538-41 (1989) (concluding that *Albrecht* was based upon a desire to “redistribute bargaining power between large producers and small distributors”). The remarks of one commentator, who approved of *Albrecht*, capture nicely the attitude of the time. See Jerrold G. Van Cise, *Franchising—From Power to Partnership*, 15 ANTITRUST BULL. 443, 443 (1970) (analogizing a franchisor to a “medieval feudal lord holding the power of economic life and death over enfranchised serfs”). Some commentators continue to characterize vertical restraints in this manner. See, e.g., 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 & n.91 (1987) (arguing that the agreement in *Albrecht* resulted from unequal bargaining power).

⁵⁹ *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

⁶⁰ *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979) (holding that the *per se* rule should be applied only to a practice that “facially appears to be one that would always or almost always tend to restrict competition and decrease output” (citing *Northern Pacific*, 356 U.S. at 4)).

stated that each of these effects "may" occur.⁶¹ However, it did invoke one effect that these agreements *always* had: a limitation on the "freedom" of dealers to price as they saw fit.⁶² Indeed, as a logical matter, the absence of any assertion that maximum rpm "certainly" or even "probably" produced negative economic effects indicates that this limitation on trader freedom—not any purported anticompetitive effects—led the *Albrecht* Court to declare these restraints unlawful.⁶³ In fact, in his concurrence in *Sylvania*, Justice White, the author of *Albrecht*, admitted as much, citing *Albrecht* as one of several decisions premised upon "concern for the freedom of the businessman to dispose of his own goods as he sees fit."⁶⁴ By invoking the specter of more concrete anticompetitive consequences, the *Albrecht* Court managed to mask any appearance that it was protecting dealers at the expense of consumers. Economic theory, such as it was, served as a convenient fig leaf, donned by a Court unwilling to admit it was giving "trader freedom" dispositive effect.⁶⁵

⁶¹ *Albrecht*, 390 U.S. at 152-53.

⁶² "[A]greements to fix maximum prices 'no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.'" *Id.* at 152 (quoting *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951)).

⁶³ One leading commentator reached this conclusion at the time. See Milton Handler, *Through the Antitrust Looking Glass—Twenty-First Annual Antitrust Review*, 57 CAL. L. REV. 182, 194 (1969) (arguing that "the test of legality [in *Albrecht*] is not so much whether there was technically an unreasonable restraint of trade as whether the complainant, by entering into a contract . . . , has surrendered his economic freedom"); see also Kauper, *supra* note 16, at 334 (arguing that 1960s vertical restraints doctrine had "become the vehicle for redressing the imbalance of bargaining power which threatens the exercise of [a dealer's] independent judgment").

⁶⁴ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 67 (1977) (White, J., concurring in the judgment).

⁶⁵ See generally Kauper, *supra* note 16, at 330-31 (questioning, among other things, "whether the Court has simply used economic doctrine to support decisions arrived at upon other grounds"). On this score, there is a constructive comparison between *Albrecht* and *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966). Writing for the majority in *Von's Grocery*, Justice Black was content to declare the merger in question unlawful because it was part of a trend toward concentration that threatened to eliminate the role of "small dealers and worthy men" in the Los Angeles grocery market. *Id.* at 274-78 (quoting *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897)). Justice White, who would author *Albrecht* two years later, concurred, attempting to explain that the merger in question would, in fact, lead to oligopolistic interdependence and higher prices. See *id.* at 280-81 (White, J., concurring). By assigning the *Albrecht* opinion to Justice White, then, the Chief Justice assured the Court of two opinions for the price of one: Justice Black's concern for trader freedom and Justice White's "fig leaf" economics. See generally Rowe, *supra* note 16, at 1524-25 (showing that, in the 1960s, the Court "fused Populist ideals with oligopoly learning into strict anti-merger norms").

B. The Collapse of Price Theory: *Albrecht* Meets the New Institutional Economics

Albrecht rested upon a normative vision that is willing to elevate the welfare of traders over that of consumers; otherwise the Court would have had difficulty sustaining the decision. In reconsidering *Albrecht*, the *Khan* Court could have affirmed the dictum in *Sylvania* that trader freedom should play no role in antitrust doctrine.⁶⁶ Thus, the Court could have disposed of *Albrecht* and definitively asserted its position on the role of trader freedom in antitrust law.

The Court chose another course, however, attempting to repudiate *Albrecht* without questioning its normative vision at all. Just as the *Albrecht* Court had purported to rely upon economic theory in justifying its decision to declare maximum rpm unlawful *per se*, the *Khan* Court invoked economics to rebut it. In so doing, the Court cited a large body of scholarship maintaining that maximum rpm likely benefitted consumers.⁶⁷ Much of this work reflected a reversal of the inhospitality tradition, a reversal that resulted from the new institutional economics (“NIE”)—the self-described antithesis to the price theoretic models that tacitly had informed the Court in *Albrecht*.⁶⁸

Unlike price theory and the inhospitality tradition that it bred, which assumed that nonstandard contracts were coercive and monopolistic, the NIE established a presumption that such restraints were designed to attenuate the costs that might accompany a manufacturer’s decision to rely upon a network of dealers to distribute its goods.⁶⁹ One such cost is the possibility that dealers will charge exorbitant prices, perhaps higher than those the manufacturer has advertised. This price gouging, of course, can dilute the manufacturer’s goodwill, as well as that of its other dealers, thereby reducing the overall demand for the product involved.⁷⁰ By adopting a maximum price limitation a manufacturer can prevent this behavior and protect itself,

⁶⁶ See *Sylvania*, 433 U.S. at 53 n.21.

⁶⁷ For instance, the Court relied very heavily upon (then) Professor Easterbrook’s article, *Maximum Price Fixing*, *supra* note 28. See *Khan*, 118 S. Ct. at 281-83 (citing this article four times). Like much of Judge Easterbrook’s work, this article abandoned the “inhospitality tradition” in favor of the benevolent attitude of the NIE. See, e.g., Easterbrook, *supra* note 57, at 4-7 (condemning the inhospitality tradition); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 150 (1984) (applying NIE approach to vertical restraints).

⁶⁸ See WILLIAMSON, *supra* note 54, at 1-2, 12-18; Meese, *supra* note 58, at 166-68 (describing rivalry between the NIE and price theory); see also *supra* notes 54-58 and accompanying text (describing how *Albrecht* reflected price-theoretic economics).

⁶⁹ See WILLIAMSON, *supra* note 54, at 28 (characterizing the NIE as “maintain[ing] the rebuttable presumption that nonstandard forms of contracting have efficiency purposes”).

⁷⁰ See Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 706 (7th Cir. 1984); Brief *Amicus Curiae* of the National Beer Wholesalers Association, Inc. in Support of Petitioners at 7-8, *Khan* (No. 96-871) [hereinafter National Beer Brief in Support of Petitioners]; Easterbrook, *supra* note 28, at 892-95; Meese, *supra* note 58, at 165-66, 188.

as well as those dealers who refrain from opportunistic gouging.⁷¹ *Albrecht*, of course, involved just such an arrangement.

By positing such benevolent explanations for maximum rpm, the NIE rebuts *Albrecht's* presumption that nonstandard contracts are coercive or unnatural. Rather, it suggests that such arrangements may be part of a cooperative effort to serve consumers.⁷² The *Khan* Court did not, by any means, articulate fully a new institutional framework for analyzing these agreements. Indeed, some scholars on whom the Court relied offered critiques of *Albrecht* internal to price theory.⁷³ Still, following in the spirit of *Sylvania*,⁷⁴ the *Khan* Court's critique of *Albrecht's* economic analysis reflected a reversal of the inhospitable attitude toward nonstandard agreements. For instance, the Court suggested that manufacturers would not deliberately set prices so low as to prevent dealers from offering essential services.⁷⁵ Also, the Court asserted that manufacturers have little incentive to exclude potential dealers from the market by attempting to channel distribution through only a few advantaged firms.⁷⁶ Finally, the Justices opined that an arrangement that set prices so low as to disfavor inefficient dealers would not "necessarily" harm consumers.⁷⁷ In short, the *Khan* Court concluded that "the potential injuries cited in *Albrecht* [were] less serious than the Court imagined."⁷⁸

Though basically correct, the *Khan* Court's exegesis was insufficient to repudiate *Albrecht*. Even on its face, *Albrecht* did not rest solely upon maximum rpm's (purported) economic consequences. In fact, Khan and his supporters did not rely solely upon the negative economic consequences identified in *Albrecht*, but instead invoked the discretion of dealers to price according to their own best judgment.⁷⁹ As

⁷¹ See *Jack Walters & Sons*, 737 F.2d at 706; Easterbrook, *supra* note 28, at 893-95; Meese, *supra* note 58, at 165-66.

⁷² See Meese, *supra* note 58, at 188-89.

⁷³ See, e.g., Blair & Lang, *supra* note 45, at 1011-17 (arguing that manufacturers with market power can use maximum rpm to prevent dealers from adding to the monopoly markup already imposed by the manufacturer), cited with approval in *Khan*, 118 S. Ct. at 282-83.

⁷⁴ See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-59 (1977) (relying upon revised economic learning regarding vertical restraints to overrule *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)); WILLIAMSON, *supra* note 54, at 371-72 (attributing *Sylvania's* reversal of *Schwinn* to a rejection of the price-theoretic paradigm and accompanying inhospitality tradition).

⁷⁵ See *Khan*, 118 S. Ct. at 282-83.

⁷⁶ See *id.* at 283.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See Brief for Respondents at 3-9, *Khan* (No. 96-871); Joint Amicus Curiae Brief in Support of Respondent of National Coalition of Petroleum Retailers and Auto Service Dealers of America Automotive Trades Organization of California at 16-18, *Khan* (No. 96-871) [hereinafter *Petroleum Retailers and Auto Service Dealers Brief in Support of Respondent*]; Brief of Amici Curiae Minnesota Service Station and Convenience Store Associ-

it had done in *Sylvania*, however, the Court refused to give dispositive weight to trader freedom. But unlike the *Sylvania* Court, which had offered a normative vision different from *Albrecht's*, the *Khan* Court turned again to economics. The Court declared that *Albrecht's* claim that maximum rpm limited the freedom of traders, like its other assertions, was merely "theoretical."⁸⁰ As a matter of fact, the *Khan* Court said, the *Albrecht* rule actually conflicted with trader freedom in some instances. Echoing the contentions of several scholars, the Court claimed that the *per se* ban on maximum rpm had impelled some firms to integrate forward into distribution, thus eliminating the very independent businesses that *Albrecht* tried to protect.⁸¹ Accordingly, maximum rpm did not "always" or "almost always" infringe on trader freedom; rather, in some cases it actually enhanced it by averting the forward integration that would follow a ban on the practice.

According to *Khan*, *Albrecht's* error lay not in its normative account of the effects that matter for antitrust purposes, but instead in its descriptive account of the effects that maximum rpm produces. Any disagreement between the two decisions, it seems, is purely technical. Indeed, in justifying its decision to overrule *Albrecht* despite the force of *stare decisis*, the Court declared that "the theoretical underpinnings of [*Albrecht*] are called into serious question."⁸² The repudiation of *Albrecht*, the *Khan* Court wanted us to believe, was mandated by a change in scientific understandings that require a different application of *Albrecht's* unchanged principles.⁸³ This development appeared to be entirely external to the Court or its normative premises, occurring instead within the autonomous discipline of economics.⁸⁴

ation at 3, 11-12, *Khan* (No. 96-871) [hereinafter *Minnesota Service Station et al. Brief in Support of Respondent*].

⁸⁰ *Khan*, 118 S. Ct. at 282.

⁸¹ *See id.* ("[T]he ban on maximum resale price limitations declared in *Albrecht* in the name of 'dealer freedom' has actually prompted many suppliers to integrate forward into distribution, thus eliminating the very independent trader for whom *Albrecht* professed solicitude." (quoting 7 [sic] PHILLIP E. AREEDA, *ANTITRUST LAW* ¶ 1635, at 395 (1989)); *see also* Ross, *supra* note 31, at 254 (noting that "[a]s a result of *Albrecht*, virtually every newspaper in the country has begun to use agents or employees rather than independent entities to distribute its issues"); Roger D. Blair & James M. Fesmire, *Maximum Price Fixing and the Goals of Antitrust*, 37 SYRACUSE L. REV. 43, 59-67, 72-73 (1986) (arguing that firms prohibited from imposing maximum rpm will consider forward integration as an alternative).

⁸² *Khan*, 118 S. Ct. at 284; *see also id.* at 285 (arguing that the Court could appropriately overrule *Albrecht* even though it should "not 'lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error'" (quoting *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988))).

⁸³ *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1247-1250 (1993) (describing such an interpretive approach in the antitrust context).

⁸⁴ I do not mean to argue that this change in economic theory was in fact unrelated to the Court or antitrust doctrine, only that it *appeared* exogenous. After all, many advances in the theory seem to have occurred in at least partial response to decisions protecting the freedom of traders. *See, e.g.*, Oliver E. Williamson, *Assessing Vertical Market Restrictions: Anti-*

In discarding *Albrecht*, then, the Court joined those scholars—particularly members of the consumer welfare school—who have asserted that revised understandings of economic theory *ipso facto* require repudiation of the antitrust jurisprudence associated with the trader freedom era.⁸⁵

The *Khan* Court purportedly based its decision on positive economics. As a result, it neither criticized *Albrecht's* normative vision nor affirmed the contrary vision as expressed in *Sylvania's* dictum. *Khan's* failure to affirm *Sylvania's* dictum may have been an oversight and thus not reflective of any conscious decision to avoid speaking in a normative voice. This explanation seems unlikely, however, for the material before the Court quite squarely presented it with the choice between competing normative visions. For instance, the brief of the United States, upon which the Court relied, quoted *Sylvania's* dictum arguing explicitly that trader freedom should play no role in the development of antitrust doctrine.⁸⁶ A second brief, supporting continued adherence to *Albrecht's* *per se* rule, urged the Court to resist the "myth" that *Sylvania* had abandoned trader freedom.⁸⁷ Other briefs reiterated the contention of the United States and maintained that *Sylvania* had repudiated *Albrecht's* solicitude for trader freedom.⁸⁸ Finally, a law review article on which the Court relied quoted *Sylvania's* dictum and claimed that the decision signalled the Court's repudia-

trust Ramifications of the Transaction Cost Approach, 127 U. PA. L. REV. 953 (1979) (employing *Schwinn* as an instance in which the Court misunderstood the economics of vertical relationships and advocating departure from the inhospitality tradition).

⁸⁵ See Bork, *supra* note 28, at 186-92; Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925-33 (1979); cf. Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L.J. 305, 308-09 (1987) ("The empirical foundation on which much antitrust policy was built has been washed away.").

⁸⁶ See Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Reversal at 22-23, *Khan* (No. 96-871) [hereinafter United States Brief Supporting Reversal]; see also *Khan*, 118 S. Ct. at 283 (asserting that "*amici curiae* have [not] called our attention to any cases in which enforcement efforts have been directed solely against the conduct encompassed by *Albrecht's* *per se* rule"); United States Brief Supporting Reversal, *supra*, at 24-25 (asserting that the government has not pursued a case of maximum rpm after *Albrecht*).

⁸⁷ See Petroleum Retailers and Auto Service Dealers Brief in Support of Respondent, *supra* note 79, at 17-18 (arguing that *Sylvania's* footnote 21 did not "put[] to bed any antitrust concern over the right and ability of small businesses to compete"); see also Minnesota Service Station et al. Brief in Support of Respondent, *supra* note 79, at 12 n.13 (arguing that footnote 21 did not reject trader freedom as a relevant consideration when price restraints are concerned).

⁸⁸ See, e.g., National Beer Brief in Support of Petitioners, *supra* note 70, at 3 ("The *per se* rule set forth in *Albrecht* . . . is plainly inconsistent with the 'consumer welfare' and 'competition based on efficiency' premises of modern antitrust law . . ."); Brief of the American Petroleum Institute as *Amicus Curiae* Supporting Petitioner at 10, 16-17, *Khan* (No. 96-871) (arguing that *Sylvania* "decisively rejected" any role for trader freedom).

tion of trader freedom as a goal accorded weight under the antitrust laws.⁸⁹

C. A Poor Translation: *Khan's* Implicit Rejection of Trader Freedom

The practice of adjusting antitrust doctrine to reflect advances in economic theory has a solid pedigree, including antecedents predating the Sherman Act itself.⁹⁰ This approach, which some commentators refer to as "translation," ensures that the law continues to promote the values Congress meant to implement as the world or our understanding of it changes.⁹¹ On the surface, *Khan's* treatment of *Albrecht* seems to fall squarely within this tradition. Closer analysis, however, demonstrates that *Khan's* purely descriptive critique of *Albrecht* ultimately comes up short; economic theory simply cannot do all of the work the Court assigned to it.

Albrecht did not really depend upon any assertion that the incidence of negative economic consequences of maximum rpm are "serious" or even, for that matter, "likely." To the contrary, the Court simply asserted that such consequences "may" occur.⁹² Convincing as it was, *Khan's* demonstration that these consequences are not likely does not undermine *Albrecht*, at least not when taken on its own terms.

Similarly, *Khan's* assertion that maximum rpm agreements that drive inefficient dealers out of business would not "necessarily" harm consumers may be entirely correct as a matter of economic theory. Yet it simply begs the question: whether harm to consumers or the welfare of dealers is the appropriate concern for antitrust purposes. For the *Albrecht* Court, trader freedom trumped the welfare of consumers, and the Court plainly favored inefficient dealers harmed by

⁸⁹ See Easterbrook, *supra* note 28, at 888 ("The Supreme Court has overruled *Schwinn* and explicitly rejected any analysis that makes antitrust cases turn on the 'autonomy of independent businessmen.' Arguments about the effect of a practice on quantity and price, not arguments about freedom and autonomy, control antitrust analysis." (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977))). The *Khan* Court approvingly cited pages 887-890 of this article. See *Khan*, 118 S. Ct. at 281 (footnote omitted).

⁹⁰ See *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731-34 (1988); *Sylvania*, 433 U.S. at 47-59; *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360-61 (1933); *Standard Oil Co. v. United States*, 221 U.S. 1, 56-60 (1911); *Gibbs v. Consolidated Gas Co.*, 130 U.S. 396, 409 (1889); *Diamond Match Co. v. Roeber*, 13 N.E. 419, 421-22 (N.Y. 1887); *Kellogg v. Larkin*, 3 Pin. 123, 139-141 (Wis. 1851); see also HOVENKAMP, *supra* note 9, § 2.2a, at 59-61 (tracing influence of changes in economic theory on antitrust doctrine).

⁹¹ See Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 48 (1966) (arguing that Congress intended the courts to adjust antitrust doctrine in response to changes in economic theory); Lessig, *supra* note 83, at 1247-50 (applying theory of interpretive translation in the antitrust context).

⁹² *Albrecht*, 390 U.S. at 152-53.

maximum rpm over the consumers who enjoyed its benefits. *Khan's* contrary determination, that inefficient dealers deserve no protection, rests upon an unexpressed normative choice and not any advances in economic theory.

But what of the Court's assertion that *Albrecht* led to forward integration to the detriment of dealers? Certainly this argument did not depend upon a rejection of *Albrecht's* normative vision, or did it? The empirical basis for the Court's finding is at best inadequate. Vertical integration may have costs of its own, costs that may prevent the adoption of such a strategy.⁹³ *Khan*, after all, had received his dealership well after *Albrecht*, which therefore did not interfere with his freedom.⁹⁴ In support of its assertion that *Albrecht* impelled significant forward integration, the Court cited but one scholar, who in turn provided only one example in which such integration had occurred: the newspaper industry.⁹⁵ Thus, the Court's hypothesis about the effects of *Albrecht* upon "dealer freedom" is sheer guesswork, with no stronger basis in empirical fact than, for instance, *Albrecht's* own assertion that maximum rpm would prevent dealers from providing essential services.⁹⁶ One suspects that like the *Albrecht* Court's "concern" for the negative effects of maximum rpm, *Khan's* concern for forward integration is a convenient pretext designed to support a predetermined decision to disregard trader freedom.⁹⁷

⁹³ See Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691, 716 (1986) ("[Complete] integration shifts the incentives for opportunistic and distortionary behavior, but it does not remove these incentives.").

⁹⁴ In fact, there is evidence that dealer-run gasoline stations generally face lower costs than those owned by manufacturers. See S. REP. NO. 102-450, at 6 (1992) (concluding that independent gasoline stations face lower costs than company-owned outlets).

⁹⁵ See *Khan*, 118 S. Ct. at 282 (quoting 7 [sic] AREEDA, *supra* note 81, ¶ 1635, at 395); *id.* (citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 729.7, at 599-614 (1996 Supp.)).

⁹⁶ I do not mean to suggest that it would be impossible to build an empirical case in support of the Court's assumption. After all, the burden of creating such a case would be far lighter than the burden of establishing *per se* illegality. To invoke *per se* treatment, the Court must conclude that a practice "always" or "almost always" has a prohibited effect. See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 432-34 (1990). Thus, proof that a practice does not engender a "prohibited effect" in a significant proportion of cases would be sufficient to defeat application of the *per se* rule. The *Khan* Court, however, did not define "significant"; nor did it point to any such proof. Thus, even if such evidence should come to light, one cannot conclude that the Court based its decision on any *bona fide* concern for "trader freedom."

⁹⁷ Ironically, there is one sense in which advances in economic theory *do* suggest that maximum rpm enhances dealer freedom. To the extent that a manufacturer demands maximum rpm agreements to protect its distribution system—including dealers—from opportunistic price gouging, such agreements are best characterized as voluntary integration that, like many contracts, *enhance* the freedom of dealers. See Meese, *supra* note 58, at 188-89. The *Khan* Court, however, did not recognize this implication of the NIE.

Finally, the (purported) fact that a *per se* rule against maximum rpm has produced some forward integration does not, by itself, undermine *Albrecht*, absent rejection of its normative vision. The feasibility of vertical integration is a function of antitrust doctrine, which condemns certain forms of forward integration as monopolistic.⁹⁸ Indeed, in expressing concern over *Albrecht*-induced forward integration, the Court relied on a scholar who cited only instances in which such integration induced newspaper carriers to bring monopolization suits.⁹⁹

Whether the Court would deem monopolistic the sort of forward integration that *Albrecht* envisioned depends, in part, upon the scope of the relevant market.¹⁰⁰ Most manufacturers will not have monopolies and thus would be able to integrate forward with impunity. Enter the Court's fairly recent decision in *Eastman Kodak, Co. v. Image Technical Services, Inc.*¹⁰¹ In *Kodak*, a decision that some traced to concern for small businesses, the Court held that the presence of sunk investments and information costs could create a market—there a market for Kodak spare parts sold to uninformed purchasers—for antitrust purposes.¹⁰² Like the customers in *Kodak*, dealers also incur sunk costs and may not be fully informed of the possibility that their suppliers will act opportunistically.¹⁰³ Thus, it is conceptually possible to define the dealership opportunity itself as a relevant market over which the manufacturer maintains a monopoly.¹⁰⁴ This similarity be-

⁹⁸ See *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 368-69, 375 (1927).

⁹⁹ See 8 AREEDA, *supra* note 81, ¶ 1635, at 395; 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 729 (rev. ed. 1996). Similarly, in claiming that *Albrecht* had led to forward integration, the United States could cite only cases in which such integration had spawned lengthy antitrust litigation. See United States Brief Supporting Reversal, *supra* note 86, at 23 n.10 (citing *Northwest Publications, Inc. v. Crumb*, 752 F.2d 473, 475 (9th Cir. 1985); *Paschall v. Kansas City Star Co.*, 727 F.2d 692, 695 (8th Cir. 1984) (en banc)).

¹⁰⁰ See *Belfiore v. New York Times Co.*, 826 F.2d 177, 180-81 (2d Cir. 1987) (finding forward integration by the New York Times Company lawful because, inter alia, it faced competition from other papers).

¹⁰¹ 504 U.S. 451 (1992).

¹⁰² See *id.* at 462-63, 477-79; see also Eleanor M. Fox, *Eastman Kodak Company v. Image Technical Services, Inc.—Information Failure as Soul or Hook?*, 62 *ANTITRUST L.J.* 759, 766 (1994) (arguing that *Kodak* rested upon a desire to protect opportunities for independent providers of repair and maintenance services for Kodak copiers).

¹⁰³ See George A. Hay, *Is the Glass Half-Empty or Half-Full?: Reflections on the Kodak Case*, 62 *ANTITRUST L.J.* 177, 185-88 (1993) (describing possible extensions of *Kodak* to the franchise context); see also Fox, *supra* note 102, at 766 (contending that, if *Kodak* were taken to its logical conclusion, “[f]loodgates would open for franchisees to sue franchisors”).

¹⁰⁴ See Warren S. Grimes, *When Do Franchisors Have Market Power? Antitrust Remedies for Franchisor Opportunism*, 65 *ANTITRUST L.J.* 105, 136-41 (1996); Hay, *supra* note 103, at 185-86. Courts have yet to reach a consensus on whether a dealership opportunity can be a relevant market. Compare *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 438-

tween dealers and the *Kodak* consumers bolsters the argument that "unfair" conduct, such as forward integration by manufacturers, is an abuse of monopoly power.¹⁰⁵

In *Khan*, the Court was not in a position to address *Kodak's* relevance in the dealership context. Thus, it is difficult to infer from the Court's indifference toward forward integration a conclusion that manufacturers generally will lack monopoly power. After all, the only examples of such integration, of which the Court was made aware, involved firms that courts had deemed monopolists before the *Kodak* decision.¹⁰⁶

Forward integration by a monopolist is lawful only if a legitimate justification supports it.¹⁰⁷ Yet this simply begs the question as to what is "legitimate." Is it legitimate for a manufacturer to integrate because its costs of distribution, and thus prices, are lower than those of its dealers? Or would this integration constitute predatory conduct, subjecting the manufacturer to treble damages?¹⁰⁸ The answer depends upon whether the Court construes the Sherman Act to ensure the survival of small dealers against the onslaught of more efficient manufacturers—a question the Court has not addressed explicitly.¹⁰⁹

41 (3d Cir. 1997) (rejecting claim that franchise opportunity constituted relevant market because obligations creating relationship were contractual in nature), *with Collins v. International Dairy Queen, Inc.*, 939 F. Supp. 875, 877-80 (M.D. Ga. 1996) (relying on *Kodak* for proposition that franchisor possessed "monopoly" over franchise opportunity). For a powerful argument that the sort of market imperfections identified in *Kodak* should not give rise to market power, see Thomas C. Arthur, *The Costly Quest for Perfect Competition: Kodak and Nonstructural Market Power*, 69 N.Y.U. L. Rev. 1 (1994).

¹⁰⁵ See *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 714-21 (7th Cir. 1979); Grimes, *supra* note 104, at 136-41.

¹⁰⁶ See United States Brief Supporting Reversal, *supra* note 86, at 23 n.10 (citing *Paschall v. Kansas City Star Co.*, 727 F.2d 692, 696 (8th Cir. 1984) (en banc), a case decided prior to *Kodak*, as support for the claim that *Albrecht* led to forward integration).

¹⁰⁷ See *Kodak*, 504 U.S. at 483-86; *Aspen Skiing Corp. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-11 (1985); Grimes, *supra* note 104, at 141.

¹⁰⁸ Cf. *Paschall*, 727 F.2d at 695 (rejecting the panel's conclusion that the newspaper's forward integration was monopolistic because the integration allowed the firm to "set an area-wide uniform price for its newspapers and provide readers with better, more responsive service").

¹⁰⁹ See *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 n.11 (1986) (reserving the question whether efficiency driven, above-cost pricing that drives a firm out of business can produce "antitrust injury" in light of social and political values). To be sure, in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), the Court held that a dealer did not suffer "antitrust injury" when it incurred lost profits due to a competing dealer's adherence to a maximum rpm agreement, so long as the prices fixed by the agreement were not predatory. See *id.* at 339-46. *ARCO's* application of the "antitrust injury" requirement, particularly its focus on whether the prices set by the scheme were predatory, could have been read to suggest that the Court no longer considered the limitation on trader freedom caused by maximum rpm of independent consequence under the antitrust laws. Still, the plaintiff in *ARCO* was not a party to the agreement in question, and other language in the opinion suggested that a dealer constrained by such an agreement could suffer antitrust injury, even if the agreement did not fix predatory prices. See *id.* at 345 ("If [maximum rpm] causes the anticompetitive consequences detailed in *Albrecht*, consumers and the man-

Adherence to *Albrecht's* normative vision would seem to require condemnation of this variety of forward integration as monopolistic.¹¹⁰ *Khan*, on the other hand, suggests the opposite, opining that a maximum rpm scheme that reduces prices so much as to harm inefficient dealers is still "not necessarily harmful to competition and consumers."¹¹¹ Thus, in asserting that the *Albrecht* rule encourages forward integration, *Khan* apparently rejected *sub silentio* *Albrecht's* normative preference for dealers over consumers.

III

AVOIDING THE QUESTION: THE COURT'S CONTINUING AMBIVALENCE TOWARD TRADER FREEDOM

Despite its implicit rejection of *Albrecht's* normative vision, *Khan* does not rule out a subsequent embrace of trader freedom in other doctrinal contexts. After all, the Court purported to assume that trader freedom was a relevant consideration and thus, unlike *Sylvania*, cannot be cited as rejecting it outright. Moreover, *Khan* arguably rejects *Sylvania's* dictum. At the least, the Court retains maximum flexibility in determining the significance of trader freedom, maintaining for instance, the option to reaffirm those decisions that depend upon concerns over the autonomy of traders and others. By saying one thing while doing another, the Court has ensured that the role of trader freedom in antitrust policy will remain in a state of flux.

This state of affairs should not continue indefinitely. To be precise, the resolution of numerous pending doctrinal questions should require the Court to confront directly the normative question it avoided in *Khan*. For instance, several scholars, including some on whom the *Khan* Court relied, have advocated a rule of *per se* legality for various vertical restraints, such as maximum rpm.¹¹² Such treatment, of course, is only appropriate if the practice in question never—

ufacturers' own dealers may bring suit." (second emphasis added)); Roger D. Blair & John E. Lopatka, *The Albrecht Rule After Khan: Death Becomes Her*, 74 NOTRE DAME L. REV. 123, 136-37 (1998).

¹¹⁰ See, e.g., *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1342-43 (9th Cir. 1970) (finding a manufacturer's efficiency-based forward integration an abuse of monopoly power).

¹¹¹ *Khan*, 118 S. Ct. at 283 (emphasis added).

¹¹² See, e.g., 8 AREEDA, *supra* note 81, ¶ 1638b, at 419-20 (arguing that maximum rpm should be lawful unless (1) the "maximum" is really a minimum or (2) the manufacturer is engaged in predatory pricing—both independent violations of the Sherman Act); Bork, *supra* note 28, at 181-82 (concluding that "antitrust should have no concern with vertical restraints; all should be lawful"); Easterbrook, *supra* note 28, at 887 (arguing that "maximum price fixing is almost always beneficial"); Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981) (arguing that resale price maintenance agreements should be *per se* lawful).

or almost never—has any negative consequences.¹¹³ Yet if trader freedom is of significant value to antitrust doctrine, *any* vertical restraint will have “negative consequences.” Thus, Rule of Reason scrutiny, not *per se* legality, is the most appropriate treatment. If, on the other hand, the Court jettisons trader freedom, *per se* legality is more likely appropriate. This is not to say that a determination whether a practice is *per se* lawful necessarily will require a choice between competing normative visions. While the *adoption* of a rule of *per se* legality logically would require the rejection of trader freedom, the Court could embrace a Rule of Reason standard without choosing between traders and consumers. More precisely, the Court could determine that a particular class of restraint poses a threat to consumers sufficient to avoid *per se* legality, regardless of whether trader freedom is a cognizable value under the Sherman Act.

Even if the Court rejects rules of *per se* legality without embracing trader freedom, the content of any Rule of Reason analysis for vertical restraints will depend upon the normative role that the Court assigns to this value. If the Court embraces trader freedom, any contractual restraint would be deemed to produce an anticompetitive effect, to be weighed—in one way or another—against the restraint’s benefits. If, on the other hand, the Court repudiates trader freedom, it would ensure a purely economic analysis. Take as an example the law governing exclusive territories. According to scholars who see consumers as the sole beneficiaries of antitrust, proof that such a restraint will lead to higher prices should be a necessary condition for liability under the Rule of Reason.¹¹⁴ Adopting trader freedom as an operative goal of antitrust, however, would require a different mode of analysis. Courts could hold, for instance, that the existence of the restraint *ipso facto* establishes a *prima facie* case, thus shifting the burden of justification to the proponent of the restraint.¹¹⁵

Although it appears that the Court will have to determine explicitly whether trader freedom merits normative significance under the antitrust laws, history suggests that it will not do so any time soon. Despite its declining docket, the Court, in the two decades since *Sylvania*, has avoided any case that would require it to elaborate on the

¹¹³ See Frank H. Easterbrook, *Comparative Advantage and Antitrust Law*, 75 CAL. L. REV. 983, 987 (1987) (deeming *per se* legality appropriate if 80% of the conduct in question is “beneficial”); Herbert Hovenkamp, *Chicago and Its Alternatives*, 1986 DUKE L.J. 1014, 1020-21 (“*Per se* legality is appropriate only if we can be relatively sure that every instance of [the restraint in question] is competitively harmless.”).

¹¹⁴ See William F. Baxter, *The Viability of Vertical Restraints Doctrine*, 75 CAL. L. REV. 933, 948-49 (1987); Easterbrook, *supra* note 67, at 135.

¹¹⁵ This position, it should be noted, is taken by many of those in the so-called Populist school of antitrust. See, e.g., Ross, *supra* note 31, at 242-46 & n.51; Bohling, *supra* note 29, at 513-15; Flynn, *supra* note 29, at 1143-46.

content of Rule of Reason analysis. As a result, lower courts have assumed the responsibility of dealing with this normative question. Indeed, the *Khan* Court continued this practice, remanding the case for a Rule of Reason analysis without indicating whether the lower court should include in its calculus the restraint's effect on trader freedom.¹¹⁶ The lower courts, in turn, have refused to accord any normative significance to trader freedom.¹¹⁷ This tendency to refrain from articulating antitrust policy extends beyond vertical restraints and is, in fact, part of a larger pattern. For instance, the Court has heard only two merger cases since 1974, neither of which dealt directly with the substantive law of mergers.¹¹⁸ In each case, the Court narrowed the class of private parties who may challenge mergers, with the result that the Government now brings nearly all such actions.¹¹⁹ As it has done with vertical restraints, the Court has left the difficult questions to other actors who have refused to accord trader freedom any significance.¹²⁰

IV

BALANCING LEGITIMACY AGAINST COHERENCE IN A WORLD OF CHANGING THEORY

A. Maintaining Appearances: The Court's Refusal to Choose Between Traders and Consumers in *Khan*

More cynical observers may perceive *Khan* as part of a less-than-candid campaign slowly and silently to excise trader freedom as a relevant concern of antitrust regulation. By resting its decision solely upon economic theory, the Court arguably has avoided accountability for its choice to repudiate *Albrecht's* normative vision. Moreover, if its

¹¹⁶ See *Khan*, 118 S. Ct. at 285.

¹¹⁷ Instead, these courts have uniformly held that to state a prima facie case under the Rule of Reason, plaintiffs challenging vertical restraints must show that the agreement will lead to higher prices for consumers. See Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 71-73 (1991) (concluding that plaintiffs only have prevailed in cases in which they were able to establish the existence of anticompetitive effects, namely, a reduction in intrabrand competition that led to higher prices).

¹¹⁸ See *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

¹¹⁹ See Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentive and Public Enforcement Goals*, 94 MICH. L. REV. 1, 9-10, 45 (1995) (observing that recent changes in standing doctrine have shifted merger enforcement responsibility to government actors).

¹²⁰ See 1992 Horizontal Merger Guidelines for Department of Justice and Federal Trade Commission, 57 Fed. Reg. 41,552 (1992) (promulgating standards governing enforcement agencies' decisions to challenge mergers). In defining its overall objectives, the Guidelines note that "the Agency seeks to avoid unnecessary interference with the larger universe of mergers that are either *competitively* beneficial or neutral." *Id.* at 41,553 (emphasis added).

treatment of merger law and nonprice restraints is any indication, the Court will leave the content of Rule of Reason analysis to the lower courts, ensuring that trader freedom plays no role in the regulation of maximum rpm. If this cynical view is accurate, it may be only a matter of time before the Court altogether abandons trader freedom as a value in antitrust analysis. Just as prior Courts employed economic theory to justify decisions that enhanced trader freedom, the *Khan* Court has used new theory to mask its repudiation of this value.

A different diagnosis of the problem, however, assigns an alternative role to economic theory and suggests a different fate for trader freedom, at least in the short run. This diagnosis begins with a commonplace observation: judges are acutely sensitive to the appearance that they are making law rather than expounding it. Without the purse, sword, or democratically derived legitimacy, the Court must depend upon public esteem for the implementation of its decisions.¹²¹ This esteem, in turn, depends upon the public's belief that the Justices are engaged in a legal enterprise and not a political one.¹²² When judges step outside their assigned role and appear to act politically, they incur costs—what one scholar has called “illegitimacy costs.”¹²³ All else being equal, judges will make decisions in a manner that avoids the appearance of formulating policy and thereby minimizes illegitimacy costs.¹²⁴

¹²¹ See *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.”); *United States v. Lee*, 106 U.S. 196, 223 (1882); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 139 (1980) (“The fortress of judicial review stands or falls with public opinion and the Court’s symbolic image . . .”).

¹²² See Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 *STAN. L. REV.* 169, 236-40 (1968); see also *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting) (“[Respect for the Court’s judgments] must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.”); THURMON W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 49 (1935) (“An official admission by a judicial institution that it was moving in all directions at once in order to satisfy the conflicting emotional values of the people which it served would be unthinkable.”).

¹²³ Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365, 1387 (1997); see also Deutsch, *supra* note 122, at 237-39 (arguing that the Court has a “symbolic function” that requires it to act and speak like a purely legal institution); Kauper, *supra* note 16, at 335-36 (arguing that the Court’s failure to articulate the true basis for antitrust decisions produced “an increasing cynicism about its methods and results which threatens . . . ultimately to jeopardize acceptance of its commands”).

¹²⁴ See Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig’s Theory of Translation*, 65 *FORDHAM L. REV.* 1435, 1454-55 (1997) (“Supreme Court Justices and other federal judges always try to justify their decisions by writing opinions that appeal to the constitutional text, to history, and to prior caselaw. Such appeals are what the Justices’ employers—the American people—expect from their Court.”); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *STAN. L. REV.* 395, 426-42 (1995).

Against this backdrop, one easily can understand why the *Khan* Court declined to pursue “trader freedom” seriously. The Justices undoubtedly realized that protection of such freedom would come with a price—literally—to be paid by consumers. Recognition of trader freedom as a relevant factor, then, would have begged the question of whether the freedom that *Albrecht* protected is worth the accompanying cost that consumers must bear. By refusing to accord trader freedom any independent weight, the Court avoided the prospect of balancing trader freedom against consumer welfare, an enterprise that inevitably would have cast the Justices in a policy-making role.

Of course, these same considerations operated on the Court in *Albrecht* and other decisions in the trader freedom era, and yet the Court, as we have seen, did engage in such trade offs. However, judicial ideology to one side, at least two interrelated factors must account for the current Court’s stance toward trader freedom. First, for reasons wholly external to antitrust law, economic theory, and trader freedom, the notion of “balancing” one value against another now stands in far less repute.¹²⁵ In 1968, a mainstream antitrust scholar could ask the Court to weigh openly trader freedom against consumer welfare, without even hinting that such balancing might be inconsistent with the judicial function.¹²⁶ The Court’s candor was all that mattered.¹²⁷ Today, should the Court balance one value against another—particularly values as incommensurable as trader freedom and consumer welfare—it almost certainly will subject itself to charges that it improperly has assumed a legislative function.¹²⁸ Indeed, the Court expressly has recognized as much, sometimes rejecting invitations to engage in balancing for this very reason.¹²⁹ While the current Court may be no more or less concerned about the appearance of

¹²⁵ See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (tracing the rise and spread of balancing and offering a critique).

¹²⁶ See Kauper, *supra* note 16, at 330-34.

¹²⁷ See *id.* at 335-36 (arguing that the Court’s lack of candor had resulted in “increasing cynicism about its methods” thus “impairing the credibility of the judicial process”).

¹²⁸ See, e.g., Aleinikoff, *supra* note 125, at 972-76, 984-86; Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 56-59 (1987); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); see also *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment) (chiding the Court for balancing incommensurate values because such an approach “is more like judging whether a particular line is longer than a particular rock is heavy”).

¹²⁹ See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 527-28 (1996) (Thomas, J., concurring) (criticizing the balancing test governing regulation of commercial speech as an “inherently nondeterminate” standard that required courts to “weigh incommensurables” such that “individual judicial preferences will govern application of the test”); *Employment Div. v. Smith*, 494 U.S. 872, 889 n.5 (1990) (“[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.”).

acting in a political manner, balancing, which once seemed judicial, now appears political.

Second, advances in economic thinking have made the existence of such balancing more apparent. While the advances in economic theory that undermined the inhospitality tradition did not ipso facto undermine *Albrecht*, they nonetheless did emphasize and elaborate on the nature and extent of the trade off between dealers and consumers that *Albrecht* entailed. As a result, the *Khan* Court could no longer legitimately assert that it could protect dealers without really harming consumers.¹³⁰ Indeed, one even could say that these advances raised the possibility that *Albrecht* struck the balance incorrectly. Adherence to trader freedom, then, necessarily would have required the Court to balance dealers against consumers anew, and to do so in a much more explicit manner. Such an overt rebalancing would have required the Court to incur higher illegitimacy costs than those that had accompanied *Albrecht*.

One finds an analogy in, of all places, administrative law. For nearly two centuries, the Court was generally willing to second guess agency interpretations of statutes, purporting to "find" or "locate" the law by discerning congressional intent. Eventually, however, legal culture came to see the enterprise of interpretation as an exercise in judicial policy making, at least when the underlying statute was ambiguous.¹³¹ This realization led the Court to abandon its willingness to review agency interpretations de novo on the grounds that such second-guessing would require the Court to resolve "competing political interests."¹³²

¹³⁰ Cf. Baker & Blumenthal, *supra* note 17, at 331-32 (asserting that during the 1970s and 1980s, new economic learning demonstrated that "ideologies of various stripes could not all be satisfied simultaneously [and that] populist objectives could be attained only at the sacrifice of economic objectives").

¹³¹ See Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 305 (1988) ("When a court 'interprets' imprecise, ambiguous, or conflicting statutory language in a particular manner, the court is resolving a policy issue."); Antonin Scalia, *Rulemaking as Politics*, 34 ADMIN. L. REV. v, v-vi (Summer 1982) (admonishing agencies to make decisions that are "manifestations of the popular will through the political process" and not based on "goals no more specific than 'the public interest, convenience and necessity'"); see also Lessig, *supra* note 124, at 436-38 (discussing *Chevron* and how, after this decision, "a federal court must defer to an agency interpretation of [an] ambiguous [statutory] provision").

¹³² *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 865-66 (1984); see also Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 978-79 (1992) ("[T]he most apparent objective [of *Chevron*] was to maximize the role of democratically accountable institutions in the process of legal interpretation and to restrict the discretion of unelected courts."). A portion of the *Chevron* Court's language is worth quoting here:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated poli-

Similar considerations were apparently at work in the evolution from *Albrecht* to *Khan*. Just as changes in legal culture led the Justices to view the interpretation of ambiguous statutes as a political enterprise, advances in economic theory led the Court to believe that protection of trader freedom would require it to make inherently political trade offs.¹³³ By overruling *Albrecht* and returning the question to the lower courts, the Court avoided the institutional cost associated with balancing incommensurable values.

This is not to suggest that the Court has embraced, *sub silentio*, *Sylvania's* dictum asserting that an antitrust policy giving credence to trader freedom would "lack any objective benchmarks" and thus should be disfavored.¹³⁴ Perhaps some Justices, maybe even a majority, ultimately would agree with this dictum and the "consumer welfare" standard it implies. On the other hand, it seems possible that some Justices who joined the unanimous *Khan* opinion would reject *Sylvania's* dictum out of support for trader freedom, a commitment to balancing, or both.¹³⁵ Still, even a Justice who is personally enthusiastic about the enterprise of balancing traders against consumers presumably understands that such a course is costly—within today's legal culture anyway—and should be avoided if possible. Thus, while *Sylvania's* dictum may not reflect the substantive position of all the Justices, it may be suggestive of the sort of incentives that influence their behavior.

Of course, courts regularly engage in the enterprise of balancing. For instance, they weigh the value of potential life against a mother's right to choose an abortion.¹³⁶ They also regularly balance the community's right to safety against the individual's expectation of privacy.¹³⁷ Yet the analysis offered here did not begin with the premise

cymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself . . . did not resolve . . .

Chevron, 467 U.S. at 865.

¹³³ Cf. AREEDA & HOVENKAMP, *supra* note 33, ¶¶ 111-13 (arguing that the Court should not, absent clear evidence to the contrary, impute to Congress a desire to empower judges to balance consumer welfare against other values); BORK, *supra* note 33, at 79-89 (arguing that consideration of values other than consumer welfare in the development of antitrust doctrine would require the Court to engage in trade offs involving social and political questions, a process that would be inconsistent with the judicial function).

¹³⁴ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977).

¹³⁵ See, e.g., John Paul Stevens, *The Third Branch of Liberty*, 41 U. MIAMI L. REV. 277, 280 (1986) (arguing that the Sherman Act should be interpreted "as a charter of freedom because it is designed to enlarge the opportunity for independent decision making" (internal quotation marks and footnote omitted)).

¹³⁶ See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

¹³⁷ See *Maryland v. Wilson*, 519 U.S. 408 (1997).

that illegitimacy costs are prohibitive—only that they are present—and will be dispositive *other things being equal*. However, other things are not always equal. It is one thing occasionally to leave antitrust policy to the lower courts or the Department of Justice. On the other hand, when constitutional questions are involved, the Court's self-image as expositor of particular constitutional values no doubt comes into play, steeling it against illegitimacy costs that may flow from balancing.¹³⁸ By avoiding the appearance of political decision making in *Khan*, the Court preserved its political capital for those instances in which it cares to act.¹³⁹

If this account makes sense, one may justifiably ask why the Court simply did not explicitly abandon trader freedom altogether. Two interrelated considerations may explain the Court's failure to do so. First, an open acknowledgment by the Court that it is aware of political costs may itself entail some costs—imagine the Justices writing “we hereby overrule *Albrecht* because adherence to that decision would entail a high reputational cost.” Thus, the only practical means of excising trader freedom from the law would be to question directly *Albrecht's* normative premises, that is, to overrule *Albrecht* by asserting that consumer welfare is the sole standard by which the Court will measure trade restraints. Such a direct repudiation of the Court's prior normative vision, not based on any intervening events other than changes in the Court's membership, would appear political and thus entail illegitimacy costs of its own.¹⁴⁰

¹³⁸ See, e.g., *Planned Parenthood*, 505 U.S. at 864-69 (describing the Court's rather expansive vision of its role in the articulation of constitutional values); John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice*, LAW & CONTEMP. PROB., Autumn 1993, at 293, 306-307 & nn.66-67 (asserting that the Court has staked out individual rights as its special preserve while ceding authority over other constitutional questions to the political branches).

¹³⁹ See CHOPER, *supra* note 121, at 164-70 (arguing that the Court should preserve its political capital by deferring to other branches of government in all but individual rights cases).

¹⁴⁰ See Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995) (describing the illegitimacy costs that courts incur when they overrule precedents for apparently political reasons); Lessig, *supra* note 123, at 1391-92. Various Justices have recognized these costs, albeit often in dissent. For example, according to Justice Stewart:

A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.

Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting); see also *Planned Parenthood*, 505 U.S. at 864 (“To overrule prior law for no other reason than mere disagreement with it would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.”); *Mapp v. Ohio*, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting) (“It certainly has never been a postulate of judicial power that mere altered disposition, or

Second, suggesting that prior Justices fundamentally had misread the antitrust laws would call the Court's own competence into question.¹⁴¹ Even Justices who would reject a role for trader freedom in antitrust doctrine as an original matter may find it costly to discard explicitly this value and the precedents it supports. Not surprisingly, therefore, the *Khan* Court chose to clothe its decision in the garb of positive economics. It costs far less for the Court to say "our predecessors did their best, given the economics of the time" than to say "our predecessors did not understand what the antitrust laws are all about."

The *Khan* Court, then, was between the proverbial rock and a hard place. Any endorsement of trader freedom could not be confined to the context of maximum rpm. As a result, reaffirmation of *Albrecht* would have left the Court continually balancing trader freedom against consumer welfare in a variety of doctrinal settings—an apparently political task with the accompanying reputational costs. Explicit repudiation of *Albrecht's* normative premises, on the other hand, itself would have entailed a significant cost.

By seeking refuge in the objectivity of economic theory and by focusing only on the effect maximum rpm might have on consumers, the Court avoided these two unsavory alternatives while appearing simply to implement the conclusions of neutral experts. To be sure, this course is not without cost. More perceptive observers will recognize that changes in economic theory did not by themselves justify the repudiation of *Albrecht*. When forced to choose between candor and the appearance of legitimacy, the Court understandably chose the latter.

The course taken in *Khan* was not entirely inevitable. To be sure, the Court could only avoid the appearance of political behavior by refusing to stake out a clear, consistent position regarding the role of trader freedom. The apparently political nature of a decision to speak vaguely, however, was not a given. Instead, this choice was a function of the current state of (highly contested) discourse within the academy and elsewhere regarding the normative vision Congress meant to incorporate within the antitrust laws.¹⁴² At one time, perhaps, a sufficiently strong consensus existed that Congress designed the antitrust laws to protect trader freedom at the expense of consumers.¹⁴³ Even absent such a consensus, the *Albrecht* Court credibly could claim,

subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law.”).

¹⁴¹ See *Planned Parenthood*, 505 U.S. at 866 (“There is a limit to the amount of error that can plausibly be imputed to prior Courts.”).

¹⁴² Cf. Lessig, *supra* note 123, at 412 (observing that discourses are not permanently or naturally “contested” or “uncontested”).

¹⁴³ See *supra* notes 12-13 (collecting authorities from trader freedom era concluding that antitrust laws were designed to protect traders at the expense of consumers).

based on the dominant economic paradigm of the time, that traders could be protected without harming consumers.¹⁴⁴ However, the relatively recent realization associated with advances in economic theory—that the protection of traders often occurs at the expense of consumers—has led many scholars to question whether Congress in fact contemplated such a trade off. As a result, any possible consensus suggesting that the antitrust laws empower the Court to engage in such trade offs has long since evaporated.¹⁴⁵ Absent the emergence of a new scholarly consensus regarding antitrust's normative foundations, the Court's reticence to speak in a clear normative voice likely will continue.¹⁴⁶

B. A Poor Prognosis: Legitimacy and the Continuing Incoherence of Antitrust Doctrine

This Essay's analysis, it is submitted, explains the course taken in *Khan*. Further, unlike claims that the Court quietly has chosen to embrace consumer welfare, the present analysis explains the Court's reluctance to speak plainly about its normative premises in other doctrinal contexts, as well as its continued adherence to certain precedents premised upon trader freedom.¹⁴⁷ Some such precedents, after all, involve little or no obvious cost to consumers, at least as economic theory now stands. Even if economic theory demonstrates that these decisions bar only innocuous conduct, adherence to them entails few if any trade offs and correspondingly minor illegitimacy costs, while repudiation of them would require the Court to question directly its prior normative vision.

The Court's stubborn adherence to the *per se* rule against tying agreements provides an example of this phenomenon.¹⁴⁸ Although premised upon a concern for trader freedom, the prohibition of contracts "forcing" a buyer to purchase (unwanted) tied products inflicts no obvious harm on consumers, at least when analyzed with the economic models applied by the Court.¹⁴⁹ These models simply demonstrate that such contracts are not always harmful; they do not

¹⁴⁴ See *supra* notes 14-17 and accompanying text.

¹⁴⁵ See *supra* notes 31-34 and accompanying text (describing debate between "trader freedom" and "consumer welfare" schools).

¹⁴⁶ See Easterbrook, *supra* note 33, at 714 (suggesting that such a consensus cannot be reached).

¹⁴⁷ See *supra* notes 35-42 (describing the Court's refusal to abandon various precedents premised upon a concern for trader freedom).

¹⁴⁸ See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461-79 (1992) (applying *per se* rule to tying arrangements); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12-15 (1984) (rejecting challenge to *per se* rule).

¹⁴⁹ See *Jefferson Parish*, 466 U.S. at 12-15 (holding that proof that seller imposing tie possesses market power establishes that tie has been "forced" on consumers and is *per se* illegal).

demonstrate that tying contracts usually or sometimes benefit consumers.¹⁵⁰ Adherence to this precedent, then, involves no apparent balancing of traders against consumers and thus no illegitimacy costs. Rejection of it, on the other hand, would seem political.

This Essay's analysis suggests that this pattern is likely to continue. That is, the Court's adherence to precedents premised on trader freedom will vary inversely with the illegitimacy costs that such adherence will entail. The Court will continue to narrow or overrule those precedents that would require the Court to sacrifice obvious benefits to consumers. It seems unlikely, however, that the Court, in the course of overruling these decisions, will speak directly to their normative premises. More plausibly, one would expect the Court to follow the course taken in *Khan* and assert that the economic premises underlying prior decisions have proven false.¹⁵¹ For instance, one might expect the Court to abandon the *per se* rule against horizontal maximum price fixing¹⁵² without questioning the law's commitment to trader freedom. Similarly, the Court could relax precedents hostile to consumer-friendly mergers by relying upon the greater appreciation in the economics profession and elsewhere of the beneficial effects of such transactions.¹⁵³

The Court will not, however, entirely expunge trader freedom from the case law. As noted above, some precedents that rest on this value present no obvious harm to consumers. Take, for example, the law regarding group boycotts. Those who see no place for trader freedom in antitrust law would require a showing of economic harm before condemning such arrangements.¹⁵⁴ Current law, however, forbids such boycotts when they are imposed by firms with market power and unaccompanied by any integration.¹⁵⁵ Unlike a *per se* rule against maximum rpm, the *per se* rule against certain group boycotts does no

¹⁵⁰ See Meese, *supra* note 9, at 44-49 (contending that the dominant critique of tying doctrine depends upon the assertion that such contracts are rarely harmful, without any corresponding showing that they produce consumer benefits); see also *id.* at 48-49 (showing that briefs before the Court in *Jefferson Parish* barely mentioned the possible benefits of tying contracts).

¹⁵¹ Cf. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 219-30 (1993) (narrowing *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), in light of revised understandings of the feasibility of predatory pricing).

¹⁵² See *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 354 (1982).

¹⁵³ For instance, the Court could agree with those lower courts that have suggested that efficiencies will justify an otherwise anticompetitive merger. See, e.g., *FTC v. University Health, Inc.*, 938 F.2d 1206, 1222-23 (11th Cir. 1991); see also *Williamson*, *supra* note 56, at 272-73 (describing increased appreciation in the economics profession for the benefits of mergers).

¹⁵⁴ See, e.g., RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 207-11 (1976).

¹⁵⁵ See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 298 (1985).

apparent harm to consumers. As a result, adherence to a *per se* rule would involve no balancing of consumers against traders and thus entail no illegitimacy costs. Therefore, the analysis offered here would predict that the Court would adhere to the current rule, even though it forbids conduct that is unlikely to result in economic harm.¹⁵⁶

Friends and foes of trader freedom will surely find the prognosis this Essay has offered disheartening. It should be emphasized, however, that the state of affairs it has described is not permanent. For instance, to the extent that advocates can highlight for the Court just how precedents that protect traders harm consumers, they effectively can raise the illegitimacy costs of adhering to such decisions.¹⁵⁷

Also, as noted earlier, the Court's current reluctance to espouse a clear, consistent position regarding the role of trader freedom reflects its unwillingness to engage in conduct that may appear political.¹⁵⁸ If all or nearly all of the scholars and lawyers concerned with antitrust shared a particular account of the original meaning of the Sherman Act, the Court explicitly could embrace or repudiate trader freedom.¹⁵⁹ However, no such uniformity of vision exists, and this lack of consensus ensures that the Court will face the charge of acting in a political manner regardless of the normative vision it ultimately embraces.

There is, it should be noted, a significant irony in the position in which the Court has placed itself. In attempting to minimize the appearance of politicized decision making, the Justices have abjured any unifying standard, such as consumer welfare, to inform antitrust doctrine. The result has been and apparently will be a jurisprudence that treats similar cases very differently. Consider, for instance, the plight of a franchisor that possesses market power. Under *Khan*, a franchisor can prohibit opportunistic price gouging by its dealers through a price ceiling agreement, subject only to Rule of Reason scrutiny.¹⁶⁰ However, the same franchisor cannot employ tying contracts to pre-

¹⁵⁶ Of course, the fact that an agreement does not have anticompetitive effects suggests that it produces efficiencies that benefit consumers and others. See *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 191 (7th Cir. 1985) (Easterbrook, J.); 1 AREEDA & HOVENKAMP, *supra* note 33, ¶ 111, at 113 (“[E]fficiency gains are a probable explanation for conduct that promises no gain from reduced competition.”). The mere fact that a contract produces such benefits, however, does guarantee that the benefits will be apparent, or that the courts will recognize them as such. Absent such recognition, courts that adhere to rules voiding such agreements will suffer no illegitimacy costs.

¹⁵⁷ Thus, convincing the Court that, for example, tying contracts can yield significant consumer benefits may induce it to abandon the *per se* rule against such agreements. See Meese, *supra* note 9, at 59-66 (describing benefits of tying contracts).

¹⁵⁸ See *supra* Part IV.A.

¹⁵⁹ See Bork, *supra* note 28, at 173 (suggesting that, in deciding antitrust cases, the Court “must pay attention to its constituencies”).

¹⁶⁰ See *supra* notes 69-71 and accompanying text (describing how maximum rpm can deter dealer opportunism).

vent opportunistic reductions in quality.¹⁶¹ Similarly, manufacturers can freely combat dealer free riding by granting and enforcing airtight exclusive territories.¹⁶² Yet, should a manufacturer allow several dealers to exploit the same territory and set minimum prices to prevent free riding, it may find itself paying treble damages or facing indictment.¹⁶³ By avoiding the appearance of politicized decision making on a case-by-case basis, the Justices have developed a jurisprudence that, taken as a whole, simply does not treat like cases alike. Faced with the choice between doctrinal consistency and the enhancement of its own stature, the Court has chosen the latter course.

CONCLUSION

Economics can and should play an important role in the development of antitrust doctrine. Whether it should play an exclusive role poses a much more difficult question, on which there is no consensus in sight. So long as the protection of traders appears to injure consumers, the Justices will neglect the value of trader freedom in favor of consumer-friendly decisions. However, when the Justices can preserve trader freedom without apparent consumer harm, decisions premised upon the protection of this value likely will survive. Legitimacy in judicial decision making, it seems, will come at the price of doctrinal incoherence.

¹⁶¹ See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12-15 (1984) (holding tying contracts obtained by firms with market power *per se* unlawful); Alan J. Meese, *Anti-trust Balancing in a (Near) Coasean World: The Case of Franchise Tying Contracts*, 95 MICH. L. REV. 111, 117-121 (1996) (describing how tying contracts can prevent franchisee opportunism). See generally Arthur, *supra* note 104, at 64-68 (describing similarities between tying and other intrabrand vertical restraints).

¹⁶² See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57-59 (1977) (stating that exclusive territories should be analyzed under the Rule of Reason); *supra* notes 116-17 and accompanying text (describing Rule of Reason case law sympathetic to exclusive territories).

¹⁶³ See *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724-27 (1988) (reiterating the *per se* rule against minimum rpm); *Sylvania*, 433 U.S. at 51 n.18 (rejecting assertion that rationale for overruling *Schwinn* also required repudiation of *per se* rule against minimum rpm).