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Trade Regulation—Sherman Act—Combinations to Compete and Replace—Maximum Price Fixing in a Non-Competitive Market—Albrecht v. The Herald Co

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Trade Regulation—Sherman Act—Combinations to Compete and Replace—Maximum Price Fixing in a Non-Competitive Market—*Albrecht v. The Herald Co.*[1]—The Herald Company publishes a morning newspaper, the Globe-Democrat, which is distributed in the metropolitan St. Louis area. Distribution is accomplished through independent carriers, who buy newspapers from the Herald Company at wholesale and sell them at retail. The carriers have agreements with the Herald Company assigning a territory to each carrier and providing that no one will compete with the carrier within his territory. The exclusive territory arrangement is subject to termination if the carrier charges more than a maximum retail price "suggested" by Herald and published in its Globe-Democrat.

Albrecht began in 1961 to charge more than the suggested resale price. Herald objected to this practice many times, and finally in 1964 it informed Albrecht that it would compete with him within his territory because of his practice of overcharging. Thereafter, Herald sent letters to the subscribers in Albrecht's territory offering to deliver the newspapers at the lower, suggested price to any who wished to transfer from Albrecht to direct delivery. In addition, Herald hired Milne Circulation Sales, Inc., to solicit Albrecht's customers. Their combined efforts resulted in a switch of about 300 of Albrecht's 1200 customers.

When the solicitation by Milne and Herald had been completed, the latter turned a new route, consisting of the 300 customers, over to George Kroner, who knew of Herald's policy on overcharging and understood that he might have to return the route if Albrecht stopped charging his customers more than Herald's suggested retail price. Later Herald advised Albrecht that he could recover the lost customers if he charged the "suggested" price.

On August 12, 1964, plaintiff Albrecht filed suit for treble damages under Section 1 of the Sherman Act,[2] charging that a combination or conspiracy in restraint of trade had been formed between Herald and Albrecht's customers[3] and/or Milne and/or Kroner.[4] In response to this suit, the Herald Company terminated Albrecht's status as a carrier. Albrecht sold his route within 60 days for $1200. This was $1000 more than he had paid for the route, but less than he would have realized if he still had 1200 customers.

At the trial court, there was a jury verdict for the defendant Herald Company. Albrecht's request for a judgment notwithstanding the verdict was denied. The court of appeals affirmed the trial court's decision.[5] It

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1 390 U.S. 145 (1968).

2 15 U.S.C. § 1 (1964).

3 The Court suggested that the allegation of a combination between the Herald Company and Albrecht's customers was not frivolous. 390 U.S. at 150 n.6. Although they did not pass upon this claim in the decision, the addition of the footnote suggests the possibility of further expansion of the combination doctrine into other areas.

4 Milne and Kroner were not named by the plaintiff as parties defendant. However, during the trial Albrecht was allowed to amend his petition, which had originally alleged a combination between Herald and persons unknown, to allege one between Herald, Milne and Kroner. See Brief for Respondent at 12, Albrecht v. The Herald Co., 390 U.S. 145 (1968).

5 367 F.2d 517 (8th Cir. 1966).

found there had been no combination or conspiracy formed by the Herald. Furthermore, the court stated that it could find no restraint of trade.[6]

The Supreme Court reversed the decision of the court of appeals and HELD: the Herald Company's activities with Kroner and Milne formed a combination; and furthermore that the setting of a maximum resale price, irrespective of any exclusive territory situation, was a per se violation of the Sherman Act.[7] In the majority opinion, written by Justice White, the Court found that the activities of Herald, Milne and Kroner were in conjunction with one another, and thus that Herald did not act unilaterally. Since there was a combination formed, and the purpose of the combination was involved with some form of price fixing, there was a per se violation. The majority could find no difference between setting a minimum resale price, an activity traditionally considered a per se violation of the Sherman Act,[8] and setting a maximum, in that both substitute the seller's judgment for competitive market forces. They felt that the maximum-price restriction both crippled the freedom of traders and substantially interfered with non-price competition.[9] The Court rejected a contention that setting a maximum price was in the public interest because the exclusive territory arrangement had given Albrecht monopoly control over his customers. The majority decision, however, was careful to refrain from passing upon the legality of the exclusive territory arrangement in the case.[10]

In a concurring opinion,[11] Justice Douglas agreed with the majority that there had been a combination formed by Herald, Milne and Kroner. In addition, applying a "rule of reason" approach to the facts, he found that the price-setting arrangement was unreasonable because of the effect which that price had upon the market.

Justice Stewart, joined by Justice Harlan, dissented from the majority view.[12] The dissenters felt that the basic situation, one of non-competition, made inapplicable the traditional reasons for finding a fixing of prices to be

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6 To a limited extent, every combination tends to have a restraining effect upon trade. Thus a broad application of section 1 would make many innocuous activities illegal. To prevent this absurd result, the courts have employed a "rule of reason," whereby illegality under section 1 is limited to those combinations where the restraint is unreasonable. See Board of Trade v. United States, 246 U.S. 231, 238 (1918). However, the courts have found that combinations formed for certain purposes, such as minimum price fixing, almost always tend to restrain trade and that there is no need to try the issue of restraint. In such instances, as a matter of simplifying administration of the Act, courts have not bothered to examine the facts of individual cases to find those few where the restraint might be reasonable. For this reason, a combination may be deemed to be per se illegal without any actual restraint being shown. See Standard Oil Co. v. United States, 221 U.S. 1, 64-65 (1911); Comment, The Per Se Illegality of Price-Fixing—Sans Power, Purpose, or Effect, 19 U. Chi. L. Rev. 837 (1952).

7 390 U.S. at 150, 154.

8 See authority cited note 6 supra.

9 The *Albrecht* Court referred to one form of non-price competition, that involving essential services provided with a product. 390 U.S. at 152-53.

10 The Court mentioned the exclusive territory arrangement but stated that the problem was not at issue before the jury, so it would not even be considered upon appeal. 390 U.S. at 153.

11 Id. at 154.

12 Id. at 168.

illegal. Earlier cases considering price ceilings did not also involve exclusive territory arrangements.[13] They thought a monopolist should not be allowed to take advantage of the right to exercise independent judgment in pricing. Thus, they concluded, the imposition of price restraints did not adversely affect trade in this particular instance; as a result, the majority decision "[stood] the Sherman Act on its head."[14]

In a separate dissenting opinion,[15] Justice Harlan strongly disagreed with the application of a per se approach to price ceilings. He felt that the majority had disregarded the economic considerations underlying the Act. Although fixing a minimum price is clearly a per se violation because it necessarily lessens competition, fixing a maximum price does not necessarily have that effect. Application of a "rule of reason" to the case should have resulted in a finding that there was no restraint of trade.

Section 1 of the Sherman Act provides: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is . . . illegal. . . ."[16] Thus there are two distinct elements essential to a violation: a form of combination and a restraint of trade. This case note will consider each of these elements in the *Albrecht* decision, and will evaluate the soundness of the changes made by *Albrecht*.

The Combination Issue. The language of Section 1 of the Sherman Act expressly bars any form of contract,[17] conspiracy or combination. Since the inception of the Sherman Act, the meaning of "combination" has been subject to an increasingly broad interpretation. The Court's decision in *Albrecht* continues this trend in the case law to broaden the concept of combination, and thereby makes more activities illegal under the Act.

In *United States v. Colgate & Co.*,[18] a case decided in 1919, the Court greatly limited the application of the term "combination." It held that the Sherman Act does not prevent a manufacturer from announcing in advance the prices at which his goods may be resold and from refusing to deal with those who do not conform to the prices. In so doing, the Court reaffirmed the statutory requirement of combination, and allowed a broad definition of unilateral activity. Since the *Colgate* decision, however, courts have consistently modified this view by declaring less conduct unilateral, thereby allowing the Sherman Act to encompass activities where there would have been no combination under *Colgate*.

In *United States v. Parke, Davis & Co.*,[19] the Court went further than ever before in finding a combination: it held that an announcement of a pricing policy was sufficient to form a combination between a manufacturer, his wholesalers and his retailers, when the manufacturer actively induced un-

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[13] See, e.g., Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

[14] 390 U.S. at 170.

[15] Id. at 156.

[16] 15 U.S.C. § 1 (1964).

[17] This prohibition includes express contracts, as in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), and implied contracts, as in United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920).

[18] 250 U.S. 300 (1919).

[19] 362 U.S. 29 (1960).

willing retailers to comply with the pricing policy. Thus the holding of *Parke, Davis* established that a combination is formed "if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell."[20] This rule considerably narrowed the *Colgate* concept of what was unilateral. The *Albrecht* decision further restricts the conduct of producers.

The Court could have found a combination in *Albrecht* by applying the standards laid down in *Parke, Davis*. The facts amply support the conclusion that the Herald Company's activities went beyond merely declining to deal with Albrecht.[21] In addition to its policy announcement requiring adherence to its maximum prices, Herald began to compete with Albrecht and take his customers after Albrecht had failed to comply. Even more important, it advised Albrecht that the customers would be returned if he reduced his price. In this respect, the Herald Company acted to bring about compliance, action sufficient to create a combination between Herald and Albrecht under *Parke, Davis*.

It is apparent that the Court did not find a *Parke, Davis* type combination because the parties included in the *Albrecht* combination were different from those that would have been in a *Parke, Davis* type.[22] Albrecht was not a party to the combination found by the Court, but he would have been a party under *Parke, Davis*. Likewise, it would have been unnecessary under *Parke, Davis* to include Milne and Kroner, but they were parties to the combination found by the Court in *Albrecht*.

This is the expansion of the concept of combination made in *Albrecht*. Milne and Kroner are made parties. Therefore, their activities take on added significance. Both parties were brought into the controversy with Albrecht only after the latter had already begun charging the higher price. Neither Milne nor Kroner was involved in the actual suggestion of price limits, nor in any attempt to secure Albrecht's compliance in advance. The activities that were relied upon to find a combination in *Albrecht* all occurred after non-compliance, as part of Herald's effort to have Albrecht reduce his price back to the "suggested" maximum. All of Herald's activities in establishing the pricing policy and initially seeking compliance, the areas courts traditionally examine to find a combination,[23] had been handled unilaterally. In *Colgate* and *Parke, Davis*, the courts did not even examine activities subsequent to the imposition of the price regulation; the actions of Milne and Kroner fall entirely into this last category.

In addition to involvement only after the price restricting had occurred, the activities of Milne and Kroner were only tangentially related to the actual restraint. Milne was the Herald Company's regular circulation sales

20 Id. at 43.

21 See p. 208 supra.

22 The Court was prevented from applying *Parke, Davis* because Albrecht abandoned any assertion that he was included in a combination when he amended his complaint during the trial. The Court acknowledged, however, that a *Parke, Davis* combination had been created. 390 U.S. at 150 n.6.

23 E.g., Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213-14 (1951); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 399-400 (1911).

agency. Its activities involving Albrecht consisted solely of competing for Albrecht's customers through offers to sell at a lower price. The Sherman Act prohibition of combinations in restraint of trade has developed in part as a law to protect competition and prohibit those activities adversely affecting it.[24] In contrast, the Herald's hiring of Milne created competition. In *Albrecht* the Court disregarded the fact that the combination itself promoted competition, and instead focused upon the Herald Company's purpose behind the combination, which was to force Albrecht to reduce his price. Thus the decision has the effect of prohibiting activities based upon their ultimate purpose, regardless of their direct effect.

The inclusion of Kroner in the combination illustrates the extent to which the Court disregarded the propriety of the activity and examined only its indirect effect upon the restraint. At no time did Kroner ever compete with Albrecht for customers. Instead, Kroner was a replacement for Albrecht, serving those customers who had already been taken away. Kroner was never directly involved with Albrecht, and was not involved at all until after the solicitation had taken place. Under the *Colgate* doctrine, a party may simply refuse to deal.[25] It was implicit in *Colgate* that after this refusal the rejected party could be replaced by another person who would perform the same function. The *Albrecht* Court's inclusion of Kroner may mean, then, that a non-adhering party may be eliminated by refusal to deal, but may not be replaced, even by a party not previously involved in the price-fixing if the purpose of the replacement is to promote the restraining scheme.

The Court in *Albrecht* has realized that there is very little business activity that may be considered unilateral. Early cases declared activity illegal when a combination was formed to organize or implement a restraint on a third party.[26] *Parke, Davis* extended this prohibition by recognizing that *every* restraint involves at least two parties, one who imposes the restraint and one who is restrained.[27] In *Albrecht*, the Court has included a class of parties previously omitted, those not directly involved in the imposition of the restraint, but whose relationship with the restraining party has an indirect effect of promoting the restraint. Under *Albrecht*, a combination may be found even though the planning, preparation and the imposition of the restraint are handled unilaterally. The Court found a combination by examining activities neither directly promoting the restraint nor directly involved with it. In so doing, the *Albrecht* decision may sound the death knell for all restraints of trade by the virtual elimination of the Sherman Act's combination requirements.

The result in *Albrecht* is not unreasonable when viewed in light of the purpose of the Sherman Act, to prevent unreasonable restraints of trade.[28] No business activity is truly unilateral, so it should be immaterial whether the restraint is the object of the joint activity or only an incidental effect.

[24] See p. 214 infra.

[25] 250 U.S. 300, 307 (1919).

[26] E.g., FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[27] See 390 U.S. at 149.

[28] See pp. 213-14 infra.

The restraint itself, which may be the same in either instance, is the activity that is being proscribed. The original requirement of a form of combination to constitute a violation arose out of the common law origin of the Sherman Act, which had its basis in conspiracy law.[29] In *Parke, Davis*, the Court realized the absurdity of such a requirement, but felt that so long as *Colgate* was not overruled, the requirement must be tolerated.[30] In *Albrecht*, the Supreme Court has once again felt restricted by the *Colgate* decision. Instead of finally overruling it, however, the Court justified its decision on the basis of a combination only remotely connected to the actual restraint.

The Restraint Issue. Once a court has made a determination that a combination exists, to find the conduct illegal under the Sherman Act it must also determine whether the results of that combination are a restraint of trade or commerce. Situations where the combination has been ancillary to fixing minimum prices have been one major area where a restraint of trade is always found.[31] Because this restriction almost always has an adverse effect upon trade, a combination to fix minimum prices has been held illegal per se. The illegality of price restrictions rests upon two divergent reasons.[32] One reason for prohibiting price restraints is the effect which they inevitably place upon the actions of traders. Without any artificial restrictions, a merchant is free to exercise his own judgment, to make his own pricing decisions subject only to the influence of the marketplace. These options are lost when outside restrictions are imposed. It is the very nature of price restrictions, in that they infringe upon freedom to conduct business independently, which serves to make price fixing so reprehensible.

This "free trading" rationale developed early in the common law, long before the drafting of the Sherman Act. The original justification for declaring such restraints illegal was that the producer withheld an interest in the goods even after the title to them had passed. This extension of control was regarded as obnoxious to public policy because it retarded freedom of traffic in essential goods. Free alienability, on the other hand, was a quality desirable both for land, where the concept originated, and for personalty. Early decisions found unreasonable restraints upon alienation to be unenforceable as against public policy. In *Hilton v. Eckersley*,[33] an English court found that pricing restrictions tend "directly to impede and interfere with the free course of trade and manufacture."[34] Thus, even before the enactment of the Sherman Act, courts adopted the concept of free alienation and free decision-making to strike down price-fixing schemes. Later, this concept was

[29] Cf. Allen, Criminal Conspiracies in Restraint of Trade at Common Law, 23 Harv. L. Rev. 531, 532 (1910); H. Thorelli, Federal Antitrust Policy 15 (1955).

[30] 362 U.S. 29, 44 (1960).

[31] See United States v. Trenton Potteries Co., 273 U.S. 392, 396-401 (1927). In *Trenton Potteries*, the Court discounted the reasonableness of the price because "reasonable prices may become unreasonable through market changes." It is this potential for abuse that makes the restraint unlawful, regardless of how it is actually used. See also Comment, supra note 6.

[32] See Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 687 (1962).

[33] 119 Eng. Rep. 781 (Ex. 1855).

[34] Id. at 784. This policy was adopted also in the United States. See People v. Fisher, 14 Wend. 9 (N.Y. 1835).

a major force behind an original draft of the Act, which provided that one of its purposes was "to preserve freedom of trade and production."[35]

The other major reason for a rule of per se illegality for price fixing has been its role in restricting competition.[36] According to elementary economic theory, competition in the marketplace sets the optimum price level for a product.[37] This price is the best for efficiency and proper allocation of resources. Therefore any deviation from this price necessarily results in loss of efficiency and in the improper allocation of resources. For this reason, artificial price fixing, which lessens the influence of the competitive marketplace, is to be avoided. The original draft of the Sherman Act provided that, in addition to the promotion of free trade, a major purpose of the legislation was "to preserve . . . the lowering of prices by . . . competition."[38]

Thus there are two major bases for the illegality of price restrictions. In spite of their differing origins, these two rationales are interrelated. One reason for the protection of freedom of traders is that restricted alienability adversely affects "trade and traffic and bargaining. . . ."[39] Freedom to trade, insofar as it affects the bargaining process, directly affects competition; thus the two categories are not mutually exclusive as there are sound reasons behind promotion of freedom of traders in the modern economy. There are, however, other reasons for protecting the freedom of trade which are unrelated to competition and economics, such as the individual's right to free exercise of choice.[40] Thus the different bases for price fixing illegality tend to overlap, but they are not identical. Both the competition and freedom-of-the-trader rationales were applied by courts in declaring fixing of minimum prices to be illegal per se. In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[41] the Supreme Court distinguished the method of application of the two doctrines. The Court determined that freedom of traders was an issue to be adjudicated by balancing the advantage to the manufacturer in price maintenance against the freedom of trade of dealers who own what they sell. The Court concluded that agreements to destroy price competition were so injurious to the public interest that they must be void, regardless of the advantages which the participants expected to derive.[42] It is important to notice that this rationale was developed where competition was involved.

Since *Dr. Miles*, the courts have been haphazard in expressing their reasons for holding price fixing to be illegal per se and eventually they have extended the *Dr. Miles* result to cases where the rationale no longer applied. This development began in minimum price cases where per se illegality was founded upon the combination of diminished competition and restriction of freedom of traders. Of the two effects, the adverse effect upon com-

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[35] S. 2906, 50th Cong., 1st Sess. (1888).

[36] See United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 407-08 (1911).

[37] See generally, L. Reynolds, Economics, A General Introduction (1963). See also R. Leftwich, The Price System and Resource Allocation 331-37 (1965).

[38] See S. 2906, 50th Cong., 1st Sess. (1888).

[39] Coke's Commentaries § 360.

[40] See United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

[41] 220 U.S. 373 (1911).

[42] Id. at 404-08.

petition was the one most important to the courts.[43] When cases arose which involved *maximum* prices, the courts also applied a per se rule. This was applied apparently because the courts saw no difference between setting maximum and minimum prices.[44] There is, however, an important distinction making the competition rationale applied in minimum price cases inapplicable in maximum price cases. Price competition is still possible under a maximum price restraint since lowering of prices, the most common manifestation of price competition, is still permissible.

In *Albrecht*, the Court continued its past practice of extending its per se rule in price fixing to new situations without fully appraising the differences which the new situation presented. The Court ignored the exclusive territory arrangement, and applied the per se doctrine because of the disruptive effect of the restraint upon individual freedom.[45]

In spite of the Court's analysis it is apparent that in situations like *Albrecht* there can be no competition of any kind, even non-price competition. The exclusive territory arrangement precluded the possibility of *any* form of competition, regardless of whether the price was one reached naturally or one established by the producer. Therefore, in spite of the Court's reference to competition to support its application of a per se rule,[46] *Albrecht* presents a situation lacking in any basis for a competition argument. The Court was required by the peculiar fact situation to base its decision *solely* upon the issue of freedom of traders.[47]

The complete elimination of the competition rationale renders questionable the application of a per se approach in *Albrecht*. With both freedom of traders and some form of competition involved, as in those cases prior to *Albrecht*, the Court could justify the ultimate application of illegality per se upon the overwhelming harm to the public interest caused by the loss of competition. With the most important of the effects of the restriction made irrelevant in cases like *Albrecht*, the "freedom of traders" rationale may still justify declaring a price-fixing arrangement illegal, but the absence

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[43] See authorities cited note 36 supra.

[44] The first mention of the application of the per se doctrine to maximum prices was in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). Although the case did not involve a maximum price, the Court stated, in dictum, "[A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is *illegal per se*." Id. at 223 (emphasis added). Later, in a decision which actually involved setting a maximum resale price, the Court referred to this dictum in its decision. In Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951), defendant Seagram fixed the maximum resale price which its retailers could charge for defendant's liquor products. The court of appeals found this scheme to be legal because the price fixing had the effect of promoting rather than restraining competition. 182 F.2d 228, 235 (7th Cir. 1950). The Supreme Court reversed, citing *Socony-Vacuum*, and held that maximum price agreements are illegal because, like minimum price agreements, they have an adverse effect upon traders' freedom to exercise their independent judgment.

[45] 390 U.S. at 152-54.

[46] In *Albrecht* the Court made reference to an effect of maximum prices upon non-price competition to support application of a per se rule. 390 U.S. at 152-53.

[47] The language of the decision referring to non-price competition is simply not applicable to the fact situation in *Albrecht*, where there is no competing product or dealer to whom a customer may turn.

of competition should require a reevaluation of the reasonableness of the restraint. Since "freedom of traders" is essentially based upon policy considerations, in the absence of a supporting rationale involving competition, other policy considerations should be weighed in the determination of the legality of a particular arrangement fixing maximum prices.

Dr. Miles suggests roughly how such an evaluation should be made—by balancing the advantage to the manufacturer of fixed maximum prices against the freedom of trade of the dealer.[48] In addition, the consumer interest in product price levels should be considered in maximum price situations, which *Dr. Miles* did not anticipate. In *Albrecht*, the publisher had a strong interest in low prices, as they promote higher circulation, a factor used by newspapers in setting advertising rates. The consumer interest is also in favor of maximum price restrictions, since they keep the costs of goods low. On the other side, Albrecht had a strong interest in being able to determine his own price, as the route was his source of income.

It is submitted that in situations such as *Albrecht*, where no competition was involved, such factors should at least be considered in the determination of whether the restraint of trade is unreasonable. Adoption of illegality per se in *Albrecht* is not justified since the situation is one where an adverse effect upon trade is no longer predictable.

Conclusion. The *Albrecht* decision continues the trend of cases expanding the category of activities classified as combinations. In so doing, it redraws the line to encompass activities involving any other party before, during, or after the actual imposition of restraint, and either directly or remotely affecting it. This delineation leaves very little indeed as unilateral. Finally, the absence of competition has placed the Court in the position of rendering illegal per se some activities involving price restrictions that may well be justified when *all* the interests in the restriction are considered.[49]

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48 See p. 214 supra.

49 See also United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), where the Court declared vertical customer and territorial restrictions to be per se illegal. As in *Albrecht*, the Court relied solely on a freedom of the trader rationale.