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the years 1905 through 1944[167]—one wonders why Justice Harlan could not have done so in 1968.

III. FROM *Schwinn* TO *Sylvania*: RESTRAINTS ON ALIENATION REVISITED

Perhaps no decision in the annals of antitrust has evoked more criticism than the Supreme Court's ruling in *United States v. Arnold, Schwinn & Co.*[168] Only four years after the Court in *White Motor Co. v. United States*[169] expressly declined to hold vertical territorial and customer restrictions unlawful per se without examining their "actual impact . . . on competition,"[170] Justice Fortas, writing for a five-member majority, opted for a per se rule. He flatly stated: "[u]nder the Sherman Act, it is unreasonable *without more* for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it."[171]

The hue and cry engendered by *Schwinn* was readily understandable. In striking down post-sale restrictions as necessarily violative of section 1,[172] the Court did not simply abruptly end its short-lived search for "the economic and business stuff out of which these arrangements emerge;"[173] it also swept aside a venerable body of law sustaining such restraints under the traditional rule of reason as legitimate means for fostering effective interbrand competition.[174] Even more perplexing, the Court predicated its new prohibition on a theoretical doctrine which Justice Stewart tersely characterized in his dissent as "a wooden and irrelevant formula"[175]—the so-called "ancient rule

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167. Universal Oil Products Co. v. Globe Oil Refining Co., 322 U.S. 471, 484 (1944); United States v. Dubilier Condenser Corp., 289 U.S. 178, 186-87 (1933); Becher v. Contoure Laboratories, 279 U.S. 388, 391 (1929); DuPont Powder Co. v. Masland, 244 U.S. 100, 102 (1917); Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373, 402-03 (1911); Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236, 250-51 (1905).

168. 388 U.S. 365 (1967).

169. 372 U.S. 253 (1963).

170. *Id.* at 263.

171. 388 U.S. at 379 (emphasis supplied). Of course, even prior to *Schwinn*, where territorial or customer restraints were part and parcel of an unlawful price-fixing scheme, a finding of per se illegality was compelled. United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 724 (1944).

172. 15 U.S.C. § 1 (1970).

173. White Motor Co. v. United States, 372 U.S. 253, 263 (1963).

174. *See, e.g.*, Sandura Co. v. FTC, 339 F.2d 847 (6th Cir. 1964); Snap-On Tools Corp. v. FTC, 321 F.2d 825 (7th Cir. 1963); Chicago Sugar Co. v. American Sugar Ref. Co., 176 F.2d 1 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950); Fosburgh v. California & Hawaiian Sugar Ref. Co., 291 F. 29 (9th Cir. 1923); P. Lorillard Co. v. Weingarden, 280 F. 238 (W.D.N.Y. 1922); Cole Motor Car Co. v. Hurst, 228 F. 280 (5th Cir. 1915), *writ of error denied sub nom.* Tillar v. Cole Motor Car Co., 246 F. 831 (5th Cir. 1917), *cert. denied*, 247 U.S. 511 (1918); Phillips v. Iola Portland Cement Co., 125 F. 593 (8th Cir. 1903), *cert. denied*, 192 U.S. 606 (1904); United States v. Newbury Mfg. Co., 36 F. Supp. 602 (D. Mass.), *motion to vacate judgment denied*, 123 F.2d 453 (1st Cir. 1941). *See generally* Robinson, *Restraints on Trade and the Orderly Marketing of Goods*, 45 CORNELL L.Q. 254, 261-82 (1960).

175. 388 U.S. at 394.

against restraints on alienation."[176] Curiously enough, this "ancient rule" had not even been mentioned in *White Motor*, except for a passing reference by Justice Brennan in his concurring opinion, and then only to emphasize that the mere existence of restraints on alienation should not conclusively establish illegality.[177] Moreover, since it is doubtful that an undeviating rule against such restraints ever existed, even at common law,[178] the jurisprudential underpinnings of *Schwinn* were anything but sturdy.

The Court's reliance on this "rule" led to an anomalous result in *Schwinn* itself. Whereas territorial and customer restrictions were branded per se unlawful if incidental to an outright sale, the same restraints occurring in an agency or consignment arrangement, where the manufacturer retains title, dominion and risk of loss, warranted application of the more flexible rule of reason.[179] In the case of a sale, Justice Fortas found these restrictions to be "so obviously destructive of competition that their mere existence is enough" to violate section 1;[180] when imposed on an agent or consignee, however, they mysteriously lost their inherently pernicious character and became justifiable as reasonable restraints of trade. The majority offered no explanation why the mere passage of ownership in the goods could convert distribution arrangements which were found to "preserve . . . competition"[181] into restrictions which destroy it.

It is easy to see, therefore, why *Schwinn* has provided such an attractive

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176. *Id.* at 380. Oddly enough, Justice Fortas did not elaborate on the content of the "ancient rule" itself, nor did he cite any cases in support of its application.

177. 372 U.S. at 264-65. The only case cited by Justice Brennan in support of the proposition that a territorial restriction "involves a form of restraint upon alienation" was Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). *Dr. Miles*, however, may be distinguished because it involved vertical price-fixing. Moreover, Chief Justice Hughes' opinion for the Court makes clear that not every restraint on alienation constitutes a per se violation of the antitrust laws:

> The question is, whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable.

Id. at 406. Nor did the dissenters in *White Motor* predicate their conclusion of illegality on any theory of restraints on alienation, but, rather, on the similarity they perceived between horizontal market division and vertical territorial and customer restraints. 372 U.S. at 279-80 (Clark, J., dissenting).

Significantly, in United States v. Sealy, Inc., 388 U.S. 350, 352 (1967), decided the same day that the Court applied the "ancient rule against restraints on alienation" to strike down post-sale restrictions in *Schwinn*, the Court rejected Justice Clark's analogy between vertical and horizontal restraints as a matter of law.

Indeed, in *Schwinn* itself, Justice Fortas took pains to distinguish Schwinn's distribution system—"a truly vertical arrangement . . . embodying the unilateral program of a single manufacturer," 388 U.S. at 378—from horizontal restraints "in which the actors are distributors with or without the manufacturer's participation." *Id.* at 372.

178. 388 U.S. at 391-92 (Stewart, J., dissenting); Handler, *The Twentieth Annual Antitrust Review—1967*, 53 VA. L. REV. 1667, 1684-85 (1967); Handler, *Twenty-Five Years of Antitrust* (*Twenty-Fifth Annual Antitrust Review*), 73 COLUM. L. REV. 415, 458 (1973).

179. Furthermore, as Justice Fortas emphasized, the application of the rule of reason to restraints in agency and consignment arrangements is not to be confined to their impact on intrabrand competition alone, but requires instead an examination of their effects on "the product market as a whole . . . ." 388 U.S. at 382.

180. *Id.* at 379.

181. *Id.* at 382.

target for legal commentators.[182] More surprising, however, is the rough treatment accorded the decision by the lower courts. One would ordinarily expect an authoritative determination by the Supreme Court to be followed obediently irrespective of its logical persuasiveness. *Schwinn*, however, has not received such deference. Evidently recognizing that a total prohibition of restraints on alienation would produce unpalatable results, judges have struggled to distinguish or limit *Schwinn* in ways that are a tribute to judicial ingenuity.

In *Tripoli Co. v. Wella Corp.*,[183] for example, the Third Circuit, sitting en banc, held that it was reasonable for a cosmetic manufacturer to restrict the resale of its products by wholesalers to professional end-users such as beauty parlors. Standing on its head Justice Fortas' statement in *Schwinn* that it is unreasonable "without more" to impose post-sale restrictions,[184]

182. *See, e.g.*, Handler, *Twenty-Five Years of Antitrust (Twenty-Fifth Annual Antitrust Review)*, 73 COLUM. L. REV. 415, 458-59 (1973); Pollock, *Antitrust Problems in Franchising*, 15 N.Y.L. FORUM 106, 110-13 (1969); McLaren, *Marketing Limitations on Independent Distributors and Dealers—Prices, Territories, Customers, and Handling of Competitive Products*, 13 ANTITRUST BULL. 161, 168 (1968); Pollock, *Distribution in the Wake of Schwinn, White Motor, Et Al.*, 23 RECORD OF N.Y.C.B.A. 241, 245 (1968); Keck, *The Schwinn Case*, 23 THE BUSINESS LAWYER 669 (1968); Handler, *The Twentieth Annual Antitrust Review—1967*, 53 VA. L. REV. 1667, 1680-86 (1967); Orrick, *Marketing Restrictions Imposed to Protect the Integrity of 'Franchise' Distribution Systems*, 36 ABA ANTITRUST L.J. 63, 69-72 (1967); Comegys, Moderator, *Restraints in Distribution: General Motors, Sealy and Schwinn*, a *Symposium on Ancillary Restrictions*, 36 ABA ANTITRUST L.J. 84 (1967); Williams, *Distribution and the Sherman Act—The Effects of General Motors, Schwinn and Sealy*, 1967 DUKE L.J. 732, 740 (1967); Note, *Territorial Restrictions and Per Se Rules—A Re-evaluation of the Schwinn and Sealy Doctrines*, 70 MICH. L. REV. 616 (1972); Note, *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 235-39 (1967); Comment, *The Impact of the Schwinn Case on Territorial Restrictions*, 46 TEXAS L. REV. 497, 511 (1968).

183. 425 F.2d 932 (3d Cir.) (en banc), *cert. denied*, 400 U.S. 831 (1970).

184. *Schwinn*'s "without more" language plainly connoted automatic illegality, not as the Third Circuit would have it, an invitation to provide rebuttal evidence. The sentence following Justice Fortas' assertion of illegality "without more" dispels any doubt about the meaning intended by this phrase: "Such restraints are so obviously destructive of competition *that their mere existence is enough*." 388 U.S. at 379 (emphasis supplied). In fact, two state court judges have noted that the Third Circuit's reliance on the "without more" language is highly suspect. Clairol Inc. v. Cosmetics Plus, 1974-2 Trade Cas. ¶ 75,260 (N.J. Super. Ct. 1974); Kugler v. Koscot Interplanetary, Inc., 1972 Trade Cas. ¶ 74,117, at 92,669 (N.J. Super Ct. 1972). Nevertheless, in Good Investment Promotions, Inc. v. Corning Glass Works, 493 F.2d 891 (6th Cir. 1974), *rev'g* 1974-1 Trade Cas. ¶ 75,112 (N.D. Ohio 1973), the Sixth Circuit, following *Tripoli*, expressly relied on Justice Fortas' "without more" phrase in reversing a summary judgment in favor of plaintiff granted by the district court on a strict reading of *Schwinn*.

To be sure, the *Schwinn* majority, citing *White Motor*, did suggest that a manufacturer's status as a "newcomer" or a "failing company" might be "relevant to a showing that the challenged vertical restraint is sheltered by the rule of reason because it is not anticompetitive," 388 U.S. at 374, apparently borrowing a page from the law of tie-ins where the existence of such factors may militate against a finding of per se illegality. *See, e.g.*, United States v. Jerrold Electronics, 365 U.S. 567 (1961), *aff'g per curiam* 187 F. Supp. 545 (E.D. Pa. 1960). One district court has recently suggested the availability of such a justification with respect to a customer restriction. Jack Winter, Inc. v. Koratron Co., 1974-2 Trade Cas. ¶ 75,270, at 97,751 (N.D. Calif. 1974). Contrary to Justice Fortas' suggestion, the "newcomer" and "failing company" defenses were not the only possible justifications for post-sale restrictions mentioned in *White Motor*. Justice Douglas also noted that a full evidentiary hearing might demonstrate that such restrictions are "allowable protections against aggressive competitors," 372 U.S. at 263, apparently recognizing the justification of effective interbrand competition which the *Schwinn* majority rejected out of hand, not as a matter of fact, but as a matter of law.

the court eschewed a per se rule[185] and found that the manufacturer had indeed demonstrated "more," since the restraints, unlike those in *Schwinn*, were designed to protect the consumer against injury and the manufacturer against product liability claims.[186] Moreover, having taken the first plunge, the Third Circuit has recently intimated that the implications of *Tripoli* may extend beyond the realm of health and safety justifications. It has broadly suggested that "where a manufacturer's restriction is related to a legitimate business purpose, *Schwinn* may be inapplicable"[187]—the very antithesis, of course, of a per se rule.[188] Consonant with its antipathy toward *Schwinn*, the same court has held that the termination of a distributorship for failure to restrict resales to a particular channel of distribution is not unlawful when motivated by a desire to preserve an exclusive selling arrangement between the manufacturer and another distributor.[189]

Other courts, including the Second,[190] Sixth[191] and Tenth Circuits,[192] have devised an additional barrier to invoking *Schwinn*—proof that the restraint has been "firmly and resolutely" enforced.[193] Thus, the Second Circuit has declined to find a customer restriction unlawful where there was conflicting evidence on the issue of enforcement, holding that, under *Schwinn*, "the existence of such a contractual clause does not imply a *per se* violation."[194]

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185. 425 F.2d at 936.

186. *Id.* at 938. *But see* United States v. Glaxo Group Ltd., 302 F. Supp. 1 (D.D.C. 1969), *rev'd on other grounds*, 410 U.S. 52 (1973), rejecting as a matter of law, under authority of *Schwinn*, defendant's proffered health and safety justification for a restriction on the resale of a pharmaceutical production in bulk form.

187. Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 847 n. 13 (3d Cir. 1974).

188. A per se rule presumes the absence of lawful justification:

> There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal *without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.*

Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958) (emphasis supplied).

189. Williams v. Independent News Co., Inc., 485 F.2d 1099 (3d Cir. 1973). Even Judge Adams, who dissented in *Williams* on the basis of *Schwinn*, felt constrained "to point out the criticism that has been directed at that case." *Id.* at 1113.

190. Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398, 406 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968).

191. Good Inv. Promotions, Inc. v. Corning Glass Works, 493 F.2d 891, 893 (6th Cir. 1974).

192. Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637, 639 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973).

193. *See also* Knutson v. Daily Review, Inc., 1974-2 Trade Cas. ¶ 75,273 (N.D. Calif. 1974); Fairfield County Beverage Distributors v. Narragansett Brewing Co., 1974-2 Trade Cas. ¶ 75,325 (D. Conn. 1974); Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 1974-1 Trade Cas. ¶ 75,034 (E.D. Pa. 1974); A.P. Hopkins Corp. v. Studebaker Corp., 355 F. Supp. 816 (E.D. Mich. 1972), *aff'd.* 1974-1 Trade Cas. ¶ 75,055 (6th Cir. 1974); United States v. Eaton Yale & Towne, Inc., 1972 Trade Cas. ¶ 73,889 (D. Conn. 1972); Ansul Co. v. Uniroyal, Inc., 306 F. Supp. 541 (S.D.N.Y. 1969), *aff'd in pertinent part*, 448 F.2d 872 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972). *But see* Hensley Equipment Co. v. Esco Corp., 383 F.2d 252 (5th Cir. 1967), where the Fifth Circuit held that a post-sale customer restriction imposed by a patentee was a per se violation under *Schwinn* without proof that the restraint had been enforced. *Id.* at 264.

194. Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398, 406 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968). *But see* Lepore v. New York News, Inc., 346 F. Supp. 755, 761 (S.D.N.Y. 1972). Although the requirement of "firm and resolute" enforce-

While it is true that the Schwinn company enforced its restrictions, and that Justice Fortas' opinion mentions that fact,[195] proof of enforcement has never been regarded as an essential element of a section 1 violation in other contexts. It is hornbook law that the Sherman Act condemns contracts, combinations and conspiracies in restraint of trade, and that no overt act is necessary to bring the statute into play.[196] Moreover, there may be no occasion to enforce a contractual restraint, since the other party may live up to its letter without any urging. Imposition of a "firm and resolute" enforcement qualification on the *Schwinn* rule simply indicates judicial discomfort with Justice Fortas' inflexible doctrine.[197]

Indeed, one court has gone so far as to hold the *Schwinn* rule inapplicable when a purchaser can avoid the post-sale restraint by electing to buy the product at a higher price.[198] And even where *Schwinn* has been applied literally, judicial enthusiasm is sometimes conspicuously absent. Thus, the Tenth Circuit, while applying *Schwinn*, recently invited the Supreme Court to grant "an exception to the *per se* rule when a product is unique and where the manufacturer can justify its territorial restraints under the rule of reason."[199]

In view of the widespread judicial reluctance to apply a doctrine in the area where it is plainly applicable—where there is a direct restraint on alienation[200]—it is small wonder that the courts have refused to extend *Schwinn*

ment was not specifically mentioned in Bowen v. New York News, Inc., 366 F. Supp. 651, 672 (S.D.N.Y. 1973), it was apparently satisfied by defendant's cut-off of those distributors who refused to comply with the alleged territorial and customer restrictions in their agreements.

195. 388 U.S. at 372, *quoting from* United States v. Arnold, Schwinn & Co., 237 F. Supp. 323, 342 (N.D. Ill. 1965).

196. 15 U.S.C. § 1 (1970). As the Supreme Court has held, "the offensive agreement or conspiracy alone, *whether or not followed by efforts to carry it into effect*, is a violation of the Sherman Act." United States v. Trenton Potteries Co., 273 U.S. 392, 402 (1927) (emphasis supplied). Of course, proof of enforcement might be necessary for a private litigant to demonstrate injury to his "business or property" in a treble damage action under section 4 of the Clayton Act. 15 U.S.C. § 15 (1970).

197. *But see* Dobbins v. Kawasaki Motors Corp., U.S.A., 362 F. Supp. 54, 61 (D. Ore. 1973), where the court found a territorial restriction per se unlawful under section 1 despite defendant's denial that it had insisted on compliance with the covenant.

198. Carter-Wallace, Inc. v. United States, 449 F.2d 1374, 1379-80 (Ct. Cl. 1971). To be sure, the court in *Carter-Wallace* noted that, in certain circumstances, a pricing system differentiating restrained and unrestrained resale of a product could constitute a violation of the Sherman Act. Significantly, however, the court rejected the claim that such a system was per se unlawful. *Id.* at 1381.

In still another case, a California state court refused to invalidate post-sale territorial restraints imposed by Chicken Delight and remanded for trial, holding that the "relevant factual distinctions" between the food industry and the bicycle industry in *Schwinn* could "under the rule of reason . . . justify restraints of trade that would be unreasonable in the marketing of a standardized manufactured appliance." LaFortune v. Ebie, 1972 Trade Cas. ¶ 74,090, at 92,486 (Cal. Dist. Ct. App. 1972).

199. Adolph Coors Co. v. FTC, 1974-1 Trade Cas. ¶ 75,090, at 96,854 (10th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3388 (U.S. Jan. 13, 1975) (No. 74-128). Ironically, it was unnecessary for the Tenth Circuit to apply *Schwinn*, since the defendant's territorial restrictions were part of a price fixing scheme and, as such, per se illegal under United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 724 (1944).

200. The cases that have unqualifiedly applied *Schwinn*'s per se rule to strike down post-sale restraints on alienation are relatively few in number. *See* Eastex Aviation, Inc.

to strike down marketing arrangements where the so-called "ancient rule" does not expressly apply, but which may similarly lessen intrabrand competition. Thus, where a distributor is authorized to sell his supplier's product in a specified geographic area, the Tenth Circuit has held that nothing more is involved than a lawful "description of a primary marketing area," and that this does not become illegal simply because the distributor never actually sells outside his allotted territory.[201] The per se approach has also been rejected where territorial or customer restrictions occur in connection with the franchising of services[202] or the licensing of trademarks and copyrights,[203] since there is no initial sale of goods to which a resale restraint can attach. Indeed, even where a manufacturer sells a component of a trademarked product which is then resold in finished form, it has been said that *Schwinn* is factually distinguishable, and that restrictions on the sale of the finished product may be justified under the rule of reason.[204]

Given the growing resistance on the part of the courts to give *Schwinn* a "rigid and procrustean" reading,[205] the opinion of a sharply divided Ninth Circuit panel this year in *GTE Sylvania Inc. v. Continental T-V Inc.*[206]

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v. Sperry & Hutchinson Co., 367 F. Supp. 868 (E.D. Tex. 1973); Cook v. Ralston Purina Co., 366 F. Supp. 999 (M.D. Ga. 1973); Dobbins v. Kawasaki Motors Corp., U.S.A., 362 F. Supp. 54 (D. Ore. 1973); United States v. Glaxo Group Ltd., 302 F. Supp. 1 (D.D.C. 1969), *rev'd on other grounds*, 410 U.S. 52 (1973). In Hensley Equip. Co. v. Esco Corp., 383 F.2d 252 (5th Cir. 1967), the Fifth Circuit, relying on *Schwinn*, found that a post-sale customer restraint constituted an antitrust violation and hence sufficient misuse to bar the enforcement of defendant's patent. Other cases ostensibly following *Schwinn* have involved both territorial restraints and vertical price-fixing, a combination which, as already noted, *see* note 171 *supra*, spelled per se illegality long before *Schwinn* was decided. *See, e.g.*, Adolph Coors Co. v. FTC, 1974-1 Trade Cas. ¶ 75,090 (10th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3388 (U.S. Jan. 13, 1975) (No. 74-128); Bowen v. New York News, Inc., 366 F. Supp. 651 (S.D.N.Y. 1973).

201. Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637, 639-40 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973).

202. Anderson v. American Auto. Ass'n, 454 F.2d 1240 (9th Cir. 1972); American Motor Inns, Inc. v. Holiday Inns, Inc., 365 F. Supp. 1073, 1089 (D.N.J. 1973). *See also* Polytechnic Data Corp. v. Xerox Corp., 362 F. Supp. 1 (N.D. Ill. 1973) (lease).

203. Williams & Co. v. Williams & Co., 377 F. Supp. 418 (C.D. Calif., 1974) (copyright license); Jack Winter, Inc. v. Koratron Co., Inc., 1974-2 Trade Cas. ¶ 75,270 (N.D. Calif. 1974) (trademark license); Mid-America ICEE, Inc. v. John E. Mitchell Co., 1972 Trade Cas. ¶ 73,833 (D. Ore. 1971) (trademark license).

Although the Court in *Schwinn* had "no occasion" to consider whether a patentee who parts with dominion over his product may impose territorial restrictions on its resale, 388 U.S. at 379 n.6, at least one court has answered this question negatively. American Indus. Fastener Corp. v. Flushing Enterprises, Inc., 362 F. Supp. 32 (N.D. Ohio 1973); *see also* Hensley Equip. Co. v. Esco Corp., 383 F.2d 252 (5th Cir. 1967), discussed in note 193 *supra*. Post-sale restraints imposed by a patentee should not be confused with use restrictions in patent manufacturing licenses, which have been uniformly upheld. *See, e.g.*, General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175 (1938), *aff'd on rehearing*, 305 U.S. 124 (1938); Bela Seating Co. v. Poloron Prods., Inc., 438 F.2d 733 (7th Cir.), *cert. denied*, 403 U.S. 922 (1971). Indeed, the Patent Code itself permits a patentee to grant manufacturing licenses limited to specified territories. 35 U.S.C. § 261 (1970).

204. Booth Bottling Co. v. Beverages Int'l, Inc., 361 F. Supp. 340, 343 (E.D. Pa. 1973).

205. Carter-Wallace, Inc. v. United States, 449 F.2d 1374, 1379 (Ct. Cl. 1971).

206. 1974-1 Trade Cas. ¶ 75,072 (9th Cir. 1974). On December 19, 1974, the Ninth Circuit granted the defendant's motion for rehearing en banc and withdrew the panel's opinion. 1975 Trade Cas. ¶ 75,435 (9th Cir. 1974).

appears aberrational. Far from limiting *Schwinn*, *Sylvania* stretched its rationale to embrace "location" clauses in distribution agreements and thereby outlawing for the first time a covenant which had been regarded as reasonable long before, and even after, Justice Forfas had elevated the "ancient rule" against restraints on alienation to the status of an antitrust precept.[207]

Faced with a dwindling share of the television business and contemplating the possibility of withdrawal from the market, Sylvania decided to shift from saturation distribution to franchising dealers selectively by location. Pursuant to this new "elbow room" policy, a dealer authorized by Sylvania to resell its television sets at one location could not resell them from a store at an unauthorized location. In this manner, Sylvania sought to reduce intrabrand competition among its dealers as an incentive for them to carry and promote its products. The company did not, however, prohibit its dealers from selling to customers who lived outside their franchised locations; nor did it seek to discourage dealers from selling competitive brands. The restraint was only on the location from which Sylvania products could be sold. Under its revised distribution system, Sylvania was able in a few years to increase its market share from one or two percent to five percent.[208]

In 1960 Continental T.V., an authorized Sylvania dealer in several California cities, opened a new store in another town and proceeded, without its supplier's consent, to sell Sylvania sets from that outlet. Sylvania terminated Continental's dealership, and Continental brought suit charging that Sylvania's enforcement of the location clause violated section 1 of the Sherman Act.

The case was tried before former Associate Justice Clark, who instructed the jury in substance that although Sylvania could lawfully prevent its franchisees from holding themselves out as authorized dealers at unauthorized locations, once Sylvania had parted with title to its product it could not re-

207. For more than thirty years, dating back at least to the Second Circuit's decision in Boro Hall Corp. v. General Motors Corp., 124 F.2d 822 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943), it had been widely assumed by the antitrust bar that location clauses were reasonable restraints of trade and therefore lawful. Twenty-four years later, the Supreme Court declined to review the legality of a similar clause, despite the Government's assertion that it had been employed to prohibit sales to discount houses. United States v. General Motors Corp., 384 U.S. 127, 139-40 (1966). On remand, the district court's decree expressly permitted General Motors to enforce location clauses, except insofar as they were used to prevent sales to discounters (and then only for a six-month period).

Nor was there any reason to believe, prior to *Sylvania*, that *Schwinn*'s per se proscription of territorial restrictions extended to location clauses. In fact, the final decree in *Schwinn* expressly allowed the company to "designat[e] in its retailer franchise agreements the place or places of business for which the franchise is issued." United States v. Arnold, Schwinn & Co., 1968 Trade Cas. ¶ 72,480, at 85,569 (N.D. Ill. 1968). Moreover, years after *Schwinn*, the Department of Justice refused to label location clauses per se illegal, arguing instead that they should continue to be governed by the rule of reason. One week *after Sylvania* was decided, a spokesman for the Antitrust Division stated that location clauses "are not illegal standing by themselves," since "[t]hey reflect the manufacturer's legitimate interest in having his goods distributed efficiently throughout a particular area." K. Clearwaters, Franchising and the Antitrust Laws, Address before International Franchise Association, May 16, 1974.

208. 1974-1 Trade Cas. at 96,793.

strict the store locations from which its dealers could resell without running afoul of the Sherman Act.[209] The jury returned a verdict for Continental, and a Ninth Circuit panel, using *Schwinn* as a springboard, affirmed in a two-to-one decision.[210]

One of the ironies of the *Sylvania* decision is that it condemned as a matter of law a clause that was expressly permitted by the *Schwinn* decree itself.[211] Another irony is that the Ninth Circuit paid lip service to Sylvania's right to grant exclusive franchises at different locations—to promise its dealers that others would not be authorized to sell at such locations;[212] and yet the court refused to allow Sylvania to make good on its promise of exclusivity against dealers who, like Continental, chose to operate retail outlets at unauthorized locations, at least so long as they did so without misrepresenting themselves at those locations as authorized Sylvania dealers.[213]

The reasoning of the majority was straight out of *Schwinn*. Since Sylvania had parted with dominion, risk and control over its product, and since the purpose and effect of the location clause was to lessen intrabrand competition, enforcement of the limitation violated the Sherman Act. Thus, Sylvania was not entitled to have the reasonableness of its conduct submitted to the jury.[214]

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209. *Id.* Although Justice Clark did not participate in *Schwinn*, his distaste for territorial restrictions was recorded in his *White Motor* dissent. 372 U.S. at 279-80; note 177 *supra*.

210. The majority opinion was written by District Judge Skopil, who had already indicated an inclination to apply *Schwinn* without qualification. *See* Dobbins v. Kawasaki Motors Corp., U.S.A., 362 F. Supp. 54, 61 (D. Ore. 1973).

211. *See* note 207 *supra*.

212. 1974-1 Trade Cas. at 96,794.

213. The law is clear that where there is effective interbrand competition at the seller and buyer levels, the seller may confer an exclusive territory upon each of his dealers; that is, he may agree that he will not appoint another dealer or sell to anyone else in the assigned territory. *See, e.g.*, Elder-Beerman Stores Corp. v. Federated Dept. Stores, Inc., 459 F.2d 138 (6th Cir. 1972); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957); Beckman v. Walter Kidde & Co., 316 F. Supp. 1321 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972); Top-All Varieties, Inc. v. Hallmark Cards, Inc., 301 F. Supp. 703 (S.D.N.Y. 1969); Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957).

Indeed, *Schwinn* itself recognizes the right of a manufacturer to vertically "confine" sales to selected dealers if competitive products are readily available. 388 U.S. at 376. In these circumstances, since the limitation is on the seller, the rule against restraints on alienation does not come into play. Needless to say, the seller's promise of exclusivity is not very meaningful if he cannot use location clauses preventing his other dealers from opening outlets in the same area. The Ninth Circuit majority did not explain what practical value an exclusive can have if it can be subverted by other dealers flooding the area with outlets of their own.

214. 1974-1 Trade Cas. at 96,795. In addition, the majority reasoned that since, under *Schwinn*, Sylvania could not lawfully prevent Continental from selling to an unaffiliated retailer who then resells from an unfranchised location, there was no "apparent reason" why the *Schwinn* rationale "should not also protect the transfer if Continental itself is the retailer." *Id.* But to Judge Ely, who dissented, the distinction "appear[ed] obvious":

> . . . allowing a franchised dealer to sell to non-franchised retailer has a far different effect upon the franchisor than allowing a franchised dealer to open a store at any location he chooses. The unfranchised retailer will ordinarily, in the first instance, pay a higher price for the Sylvania product because the

Nonetheless, there are marked differences between the territorial restrictions proscribed by *Schwinn* and the location clauses employed by Sylvania. Whereas the former absolutely forbade a dealer to sell the manufacturer's goods to customers located outside his territory, the latter permitted a dealer to sell to anyone, regardless of his customer's location, provided he did so from an authorized outlet. These restrictions, in turn, affect competition differently. Territorial restrictions insulate the dealer from all but interbrand competition, while location clauses tolerate a certain degree of intrabrand competition as well. Unquestionably, both may operate to restrain intrabrand competition, since the inability to establish additional stores is likely to foreclose certain sales. The pivotal question, however, is whether location clauses should be branded as illegal per se when by their very terms they are less restrictive than territorial restraints, or whether they should be analyzed under the rule of reason.

One thing is clear: the outcome in *Sylvania* was not preordained by *Schwinn*. To justify the *Sylvania* decision, one must be prepared to extend Justice Fortas' application of the "ancient rule" to reach all marketing restrictions ancillary to a sale of goods which may *indirectly* inhibit alienation—irrespective of the absence of any direct restraint, the extent to which intrabrand competition is in fact lessened, and the enhancement of interbrand competition. Apart from the absence of any suggestion in *Schwinn* that the Court intended to reach all such ancillary restrictions, *Sylvania*'s extension of the "ancient rule" casts a cloud over several other methods of distribution that have been heretofore viewed as perfectly lawful.

What fate, for example, does *Sylvania* forebode for the primary responsibility clause? Such a clause, which obligates a distributor or dealer to concentrate his marketing efforts in the particular geographic area for which he is principally responsible, has been routinely sanctioned as striking a reasonable balance between intrabrand and interbrand competition.[215] Indeed, in *White Motor* Justice Brennan suggested that these clauses presented a "less

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unfranchised dealer is buying through a middleman, the franchised dealer, rather than directly from Sylvania. The franchised dealer, on the other hand, has the benefit of company-arranged credit, guaranteed company shipments, and a recognized name as a Sylvania franchisee, as well as the advantage of buying directly from the manufacturer. Any inherent advantages of being a Sylvania franchisee go with the dealer to the new location, regardless of whether he holds himself out at the new location as a franchised Sylvania dealer. *The franchised dealer who violates the company's elbow room policy still will retain all the benefits of his franchise, while eliminating the benefits to the company of having a reliable market, and spaced distribution.*

Id. at 96,800-801 (emphasis supplied).

215. *See, e.g.*, Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973); Plastic Pkg'g Materials, Inc. v. Dow Chem. Co., 327 F. Supp. 213 (E.D. Pa. 1971). The result is different, of course, where a primary responsibility clause is in fact nothing more than a subterfuge employed by the manufacturer to camouflage the continuance of a prior practice of imposing territorial restrictions. *See* Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973).

restrictive alternative" to territorial restrictions,[216] and the final decree in *Schwinn* explicitly sanctioned them.[217] But primary responsibility clauses may indirectly affect alienation, since the buyer, although not forbidden to resell in another marketing area, may refrain from doing so because he runs the risk of termination if he spreads himself too thin. Would these clauses also be condemned as per se unlawful under the *Sylvania* rationale? Similarly, what would be the fate of profit pass-over clauses? Such provisions require a dealer to turn over part of his profits from sales made in the territory of another dealer to compensate the latter for his efforts in promoting or servicing the product in his marketing area.[218]

My own view is that the per se rule announced in *Schwinn* was ill-conceived. Its dubious reasoning should not be extended indiscriminately to strike down less onerous restraints embodied in location, primary responsibility, profit pass-over clauses, or other marketing limitations which, far from being perniciously anticompetitive, may serve to promote interbrand competition. Whatever indirect effect such provisions may have in dampening competition among sellers of the same brand is far outweighed by the more vigorous interbrand competition that these restrictions will foster. At the very least, the issue warrants a balancing of factors to determine reasonableness and should be submitted to a jury.

But I go further. *Schwinn itself* should be reexamined. The restrictions it outlawed likewise strengthen interbrand at the expense of intrabrand competition. If I am correct that sound antitrust policy militates in favor of loca-

216. 372 U.S. at 271 (Brennan, J., concurring). Justice Brennan pointed out that numerous consent decrees have "recognized the lawfulness of area-of-primary-responsibility covenants as substitutes for the more restrictive exclusive arrangements." *Id.* at 271-72 n.12. *See, e.g.*, United States v. Necchi Sewing Mach. Sales Corp., 1958 Trade Cas. ¶ 68,957, at 73,841 (S.D.N.Y. 1958); United States v. Bostitch, Inc., 1958 Trade Cas. ¶ 69,207, at 74,741-42 (D.R.I. 1958); United States v. American Type Founders Co., 1958 Trade Cas. ¶ 69,065, at 74,026 (D.N.J. 1958); United States v. Rudolph Wurlitzer Co., 1958 Trade Cas. ¶ 69,011, at 74,008 (W.D.N.Y. 1958); United States v. J.P. Seeburg Corp., 1957 Trade Cas. ¶ 68,613, at 72,479 (N.D. Ill. 1957); United States v. Philco Corp., 1956 Trade Cas. ¶ 68,409, at 71,753 (E.D. Pa. 1956).

217. Not only does the *Schwinn* decree permit the company to maintain, create, or eliminate areas or territories of primary responsibility for its distributors; but it also allows Schwinn to terminate those distributors "who do not adequately represent Schwinn and promote the sale of Schwinn products in areas so designated as their primary responsibility." 1968 Trade Cas. ¶ 72,480, at 85,569 (N.D. Ill. 1968). To be sure, the final decree entered on remand in United States v. Topco Associates, Inc., 405 U.S. 596 (1972), undercut this by stipulating that primary responsibility clauses may not be "used to achieve or maintain territorial exclusivity." 1973-1 Trade Cas. ¶ 74,391, at [illegible] (N.D. Ill. 1973). Nevertheless, to determine whether a primary responsibility clause was so used would require the very type of factual inquiry which was foreclosed by the Ninth Circuit's per se rationale in *Sylvania*.

218. In Superior Bedding Co. v. Serta Associates, Inc., 353 F. Supp. 1143 (N.D. Ill. 1972), the court, after noting that it was "unaware of any case which has held pass-over fees illegal *per se* in concept or operation," upheld the validity of a 7% profit pass-over arrangement under a rule-of-reason analysis. The court sustained defendant's position that the pass-over fee "fairly compensates the licensee into whose territory the merchandise is shipped for his loss of advertising expenditures, sales efforts, and good will, nevertheless allowing the licensee who must pay the fee room for a profit." *Id.* at 1150. *See also* White Motor Co. v. United States, 372 U.S. 253, 270-71 (1963) (Brennan, J., concurring).

tion and primary responsibility clauses as necessary and reasonable tools for promoting interbrand competition, the same policy considerations would support direct post-sale territorial and customer restraints shown to have demonstrable procompetitive effects.

The *Schwinn* decision is hardly a satisfactory resolution of the issue in light of the numerous aspects of Justice Fortas' opinion which have prompted the commentators to criticize it and the lower courts to construe it narrowly: its disregard for prior rule-of-reason precedent, its almost total reliance on what well may be a mythical "ancient rule" against restraining alienation, its tortured distinction between agency and consignment arrangements, on the one hand, and sale transactions on the other, and its myopic view that intrabrand rather than interbrand competition is a paramount antitrust objective. In light of these striking conceptual and practical shortcomings, plus the painful experience of the lower courts in trying to cope with *Schwinn*, the time is ripe for the Supreme Court to reexamine its soundness.[219]

Dramatic changes in the Court's membership in the seven years since *Schwinn* may accelerate the needed reappraisal. Three Justices who participated in the five-man majority opinion, including its author, are no longer on the bench,[220] while Justice Stewart, one of two dissenters, remains an influential voice in antitrust decisionmaking.[221] This is not to suggest that a mere change in the Court's composition should cause prior precedent to be repudiated.[222] On the other hand, the Court has never shirked its responsibility to reevaluate precedent once time an experience offer insights into its application.[223] The rule against restraints on alienation, hastily embraced as a per se tenet in *Schwinn*, has proven ill-adapted to the complex marketing problems of modern business,[224] and should give way to the more flexible, time-tested doctrine of ancillary restraints. As Justice Frankfurter once cogently observed:

> [*S*]*tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and ques-

219. *See* Handler, *Twenty-Five Years of Antitrust* (*Twenty-Fifth Annual Antitrust Review*), 73 COLUM. L. REV. 415, 458-59 (1973).

220. The vote in *Schwinn* was 5-to-2 with Justices Clark and White taking no part. Justice Fortas was joined in the majority by Chief Justice Warren and Justices Black, Douglas and Brennan. Justice Stewart, who dissented in part (having concurred in the majority's application of the rule of reason to consignment and agency arrangements), was joined by Justice Harlan.

221. *See, e.g.*, United States v. General Dynamics Corp., 415 U.S. 486 (1974).

222. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 635 (1974) (Stewart, J., dissenting).

223. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963), *overruling* Betts v. Brady, 316 U.S. 455 (1942); Mapp v. Ohio, 367 U.S. 643 (1961), *overruling* Wolf v. Colorado, 338 U.S. 25 (1949); Brown v. Board of Education, 347 U.S. 483 (1954), *overruling* Plessy v. Ferguson, 163 U.S. 537 (1896).

224. In this connection, Schwinn's post-litigation experience is quite revealing. Far from assuring the independence of the company's distributors, the decision prompted Schwinn to eliminate those very distributors through vertical integration, *see* Keck, *The Schwinn Case*, 23 BUS. LAWYER 669, 686-87 (1968), thus fulfilling Justice Stewart's prophesy that the Court might "inadvertently compel concentration by misguided zealousness." 388 U.S. at 387 (Stewart, J., dissenting).

> tionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.[225]

Perhaps *Sylvania* will serve as a vehicle for the Court to give consideration once again to those wise words.

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225. Helvering v. Hallock, 309 U.S. 106, 119 (1940).

76-86 + 76-242

... to taking case to reconsider some of Schwinn's language

Resp., a mfg. of TV sets, used franchised dealers but limited the locations of the stores where sets could be sold. Purpose was to select & keep good dealers who would be assured that no other dealer would be allowed to locate nearby. Resp. was a minor factor (1 to 2%) in TV market & wished to improve its position by this plan.

Petr., a franchised dealer was denied right to sell Resp's TVs at a new location reserved to another dealer.

DC held Schwinn was controlling. CA9, en banc, reversed - applying a "rule of reason" rather than per se Schwinn rule.

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PRELIMINARY MEMORANDUM

Summer List 18, Sheet 1 — Cert to CA 9 (en banc)*

No. 76-15 CFX

CONTINENTAL T.V., INC. — Federal/Civil

v.

GTE SYLVANIA INC. — Timely

1. SUMMARY. The resp, a manufacturer of television sets, made and enforced agreements with its retail dealers limiting the locations at which the sets could be sold. The petn raises the question of whether the legality of the agreements

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* The majority opinion was written by Ely, joined by five others. Chambers concurred in the judgment, but dissented "from the number of words used to arrive at the point of reversal." Kilkenny dissented, in an opinion in which Browning, Duniway and Wright "concur in whole or in part." Browning and Duniway also filed separate dissenting opinions. Koelsch, Trask and Kennedy did not participate.

should be adjudged under a per se doctrine derived from United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), or under a rule of reason.

2. FACTS. In 1962 resp's share of the national market for television sets had declined to one or two percent. The resp thereupon discarded a "saturation" distribution system and adopted a new distribution policy that was intended to lead to the development of a network of dealers with an interest in marketing resp's product aggressively. Under the policy resp sold only to selected retailers, and those retailers were authorized to sell the product to consumers only at designated locations. The policy was intended to reduce intrabrand competition -- by limiting that competition each dealer could be assured of predictable and profitable sales and could be encouraged to promote the brand, since only a limited percentage of sales thereby generated would be lost to others. But resp did not allow intrabrand competition to be completely eliminated: no dealer could veto the location of another dealer and resp typically franchised two or more dealers in an area of substantial population. And no effort was made to restrict the customers to whom a dealer could sell, although, of course, the practical effect of the location clause was to limit the geographical area in which a dealer could compete effectively for customers. By 1965 the resp's market share increased to five percent, an increase that resp attributes to its new distribution policy.

Petr, a group of affiliated corporations with common ownership, was a franchised dealer in several locations in Northern California. In 1965 petr opened a new store in Sacramento and requested approval to sell resp's products there. Resp denied the approval, but petr proceeded nevertheless to sell resp's merchandise in its new store. In the meantime various credit difficulties arose with regard to petr's purchase of the merchandise. Ultimately resp revoked petr's franchises.

Petr sought damages, alleging that the resp's distribution policy was a policy in restraint of trade, constituting a per se violation of § 1 of the Sherman Act. Justice Clark, sitting as the trial judge, instructed the jury in accordance with a per se rule and the jury returned a verdict in favor of petr. Judgment entered against resp in the amount of $1.774,515 plus attorney's fees. Resp appealed, and a divided panel affirmed, finding a per se violation in accord with Schwinn. Rehearing en banc was granted, the panel decision was withdrawn, and the district court was reversed by a 7 to 4 vote.

The majority argued that the trial judge applied too literally certain "sweeping language" from Schwinn that suggests that once a manufacturer has parted with title to its product, any effort thereafter to restrict the territory or the persons to whom the product may be transferred is a per se violation of the Sherman Act. In the majority's view Schwinn was to be read in the factual context in which it

arose. Schwinn involved a system of vertical restraints affecting wholesale and retail distribution: each wholesaler was the sole outlet for an assigned area and was prohibited from reselling to retailers outside the area, thereby completely eliminating intrabrand competition at the wholesale level; and both wholesalers and retailers were prohibited from selling to unfranchised retailers, thus limiting intrabrand competition at the retail level. In contrast to the Schwinn restraints, resp allowed every dealer to sell to any buyer, thus allowing every purchaser a choice among competing dealers. And, unlike Schwinn, which had a dominant market share, resp had a small market share and faced the threat of expulsion from the market.

The majority drew some support from other courts that had concluded that location clauses were not condemned by Schwinn. See, e.g., Salco Corp. v. General Motors Corp., 517 F.2d 567 (10th Cir. 1975). And they emphasized the "clearly established" legality of exclusive dealerships, arguing that it it is legal for a manufacturer to promise a dealer that he will have the exclusive right to sell within a designated territory, then it must be legal for the manufacturer to keep that promise by excluding unauthorized dealers. Finally, the majority noted that because location agreements may in some instances promote competition -- by sacrificing some intrabrand competition, competition between brands may be enhanced -- a per se rule of condemnation was inappropriate.

A dissent by Kilkenny emphasized that Schwinn was controlling. It characterized the district court instructions as the application of Schwinn to a set of facts that it logically encompasses; the location agreement was to be seen as accompliching the same effect as the restriction of sales to customers in the dealer's territory. Any justification for the restriction of intrabrand competition because of the supposed benefits to interbrand competition was viewed as speculative. And a search for such a justification was seen as having been rejected in United States v. Topco Associates, 405 U.S. 596 (1972) (horizontal restraints on intrabrand competition are per se illegal despite the claims of an overall benefit to competition).

Another dissent by Browning focused on the majority's claim that interbrand competition might be nurtured by allowing some restraints on intrabrand competition. Browning argued that because the measurement of such benefits, if any, is highly difficult and speculative, judicial decisions under a rule of reason would be unpredictable. And he argued that any decision to sacrifice intrabrand competition is more appropriately left to Congress than to the courts.

3. CONTENTIONS. Petr argues that Schwinn should be seen as controlling. The per se rule adopted therein preserves intra-brand competition, serves to protect the commercial freedom of the retailer, and serves to conserve judicial resources. And, petr argues, the decision to allow restraints of intrabrand

competition should be made only by Congress. Petr also asserts that the opinion of CA 9 is in conflict with decisions from other CAs.

4. DISCUSSION. There does not seem to be a conflict on the legality of location clauses in the CAs. See Kaiser v. General Motors Corp., 530 F.2d 964 (3d Cir. 1976), aff'g without opinion 396 F.Supp. 33 (E.D. Pa. 1975); Salco Corp. v. General Motors Corp., 517 F.2d 567 (10th Cir. 1975). Petr focuses on two cases which he claims conflict with the decision below. Reed. Bros., Inc. v. Monsanto Co., 525 F.2d 567 (10th Cir. 1975), cert. denied, 96 S. Ct. 787 (1976); Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir. 1973) But both involve territorial restraints on customers like those presented in Schwinn. Thus if the majority's distinction of Schwinn is seen as convincing, there would seem to be no conflict.

Although the restraints on intrabrand competition examined below do seem somewhat less burdensome than those considered in Schwinn, the language of Schwinn is very broad and it could easily be read to require a different result below. It is unnecessary to add, however, that Schwinn has been subject to extensive criticism and that lower courts have largely threaded their way around it. See materials cited in petn app at 18 n.13 and 33 n.24. Perhaps a grant is warranted only if the Court wishes to reassert or to reconsider Schwinn.

There is a response.

9/15/76 Meserve op in petn

Court .... Voted on ...., 19...

Argued ...., 19... Assigned ...., 19... No. 76-15

Submitted ...., 19... Announced ...., 19...

CONTINENTAL T.V., INC., ET AL., Petitioners

vs.

GTE SYLVANIA INCORPORATED

7/8/76 - Cert.

Relisted for Byron (also I will dissent from denial of Cert unless this vote can be changed)

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Stevens, J.		✓											
Rehnquist, J.			✓										
Powell, J.		✓											
Blackmun, J.			✓										
Marshall, J.			✓										
White, J.			✓										
Stewart, J.			✓										
Brennan, J.		✓											
Burger, Ch. J.			✓										

September 29, 1976

No. 76-15
Continental TV, Inc. v. GTE Sylvania, Inc.

Dear Potter:

This is the case that John Stevens and I think give us an appropriate opportunity to reexamine Schwinn.

The Court's decision in that case has been the subject of considerable criticism and confusion. I think you and John Harlan were right in thinking that the Court adopted a "wooden and irrelevant formula" rather than a "reasoned response" to the problem.

There are now three votes to grant (Bill Brennan, John and me), and the case was relisted for Byron to "take another look".

Although you voted to deny, I write to express the hope that you also will take another look.

Sincerely,

Mr. Justice Stewart

lfp/ss

I have talked to Potter & he will reconsider. This is best chance I've seen to deal with Schwinn problem - either to clarify or overrule it.

Court	Voted on ...., 19...	OCT 1 5 1976
Argued ...., 19...	Assigned ...., 19...	No. 76-15
Submitted ...., 19...	Announced ...., 19...	

CONTINENTAL T.V., INC.

vs.

GTE SYLVANIA, INC.

RELIST for J. White

Schwinn issue

Granted

(Cheers!)

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Stevens, J.		✓											
Rehnquist, J.			✓										
Powell, J.		✓											
Blackmun, J.			✓										
Marshall, J.			✓										
White, J.			✓										
Stewart, J.		✓											
Brennan, J.		✓											
Burger, Ch. J.			✓										

[2/28/77]

76-15 Continental TV v. GTE Sylvania Argued 1/28/77

Miller (Petr)

Tom Clark (as DC) found conspiracy.
Jury asked to decide only two issues.
Clark gave a Schwinn instruction.

Argues that Schwinn is applicable & controlling - ~~merely~~
Any effort to restrict territory or vendees is per se violation.
(J Stewart noted that Schwinn relies on "ancient rule against restraints on alienation" - & this draws no distinction bet. "prohibitory" & "inhibitory" restraints - as argued by Miller)

Auto dealer cases are different.
Relies on Topco.

Popofsky (Resp.)

Location clauses are pro-competitive as to inter-brand competition.

(YP)

BOBTAIL BENCH MEMO

To: Justice Powell   Date: 2/10/1977

From: Tyler Baker

Re: Continental T.V., Inc. v. GTE Sylvania Inc., No. 76-15

Dick Meserve's cert pool memo sets out the basic contours of the case quite clearly. Since I know that you will have read the briefs, I will not bother setting out the facts. The per se instruction given by the DC is on pp. 20-21 of Petr's Br. The rule of reason instruction requested by respondents but rejected by the DC is on p. 21 n.7 of Petr's Br. Both briefs spend quite a bit of time bickering about allegedly abusive acts by the other side. Those issues are subsidiary at best to the basic issue in this case.

Reasonable minds can and have differed as to the appropriateness of using a per se approach to questions of vertical territorial restrictions. It is far more difficult to find supporters for the particular approach taken by the Court in Schwinn, making the per se rule turn on whether the product went from the manufacturer by sale or consignment. The only academic support is in Sullivan's recent Antitrust Hornbook (Sullivan is counsel for Petr), which follows:

Schwinn's per se rule turns on whether there was a sale or consignment

> The ancient concept of restraints on alienation *is* a convenient one with which to demarcate between the *per se* area and the area in which the rule of reason governs. It is workably precise, surely no small advantage in a realm of the law where much is shrouded in sweepingly vague characterizations. Furthermore, as it discriminates on an economically significant ground—whether the restriction is associated with a partial forward integration or is a naked one—it will tend to screen out for *per se* treatment the instances where there is little or no social advantage in allowing manufacturer interposition at the next level, while assigning for rule of reason treatment cases where hampering manufacturers by discouraging their investment at the next level would entail social costs. It is also consistent with and responsive to the visceral reactions of people in the marketplace about the difference between mine and thine. Indeed it has a Hegelian quality which may reflect deep psychic attitudes about property.[11]

Id., at 405.

When one has to rely on Hegel for an antitrust doctrine, things are really on shaky ground! The Court's division between per se and rule of reason approaches has the obvious tendency of encouraging manufacturers to integrate vertically forward, so that they can still exert the kind of control over the product that they feel is necessary. The Court decided against extending the per se rule to the consignment situation because it perceived that vertical restrictions might be necessary for the little guys to combat the big guys. As one commentator noted, however, one of the advantages of the franchise system is that it avoids the necessity of accumulating large amounts of capital, because the franchisees provide their own capital. Many of the little guys that the Court thought it was protecting will not be able to carry the additional financial burden of the consignment appraoch. The ancient rule against restrictions on alienation is basically irrelevant to good antitrust policy.

The normal standard for extending per se analysis to an antitrust issue is whether the challenged practices have such a "pernicious effect on competition and lack of any redeeming virtue" as to make unnecessary any "inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958). Prof. Bork, as he then was, has expressed the same point somewhat differently: A per se rule should be used where the challenged practice has no efficiency-creating potential. This statement reflects a bias which I share, namely, that the purpose of the antitrust laws is generally to further efficient markets. Petr's argument sometimes loses track of this goal, especially when discussing the importance of distributor autonomy.

incompatible - with public's interest in competitive distribution of the product?

It seems to me (and to Bork, Posner, and Baxter, among others) that a basic question is whether the manufacturer is often going to have an interest that is at odds with the consuming public's interest in competitive, efficient distribution of his product. With only one possible exception, the answer is "no." If a manufacturer has market power with respect to his product, the real antitrust problem is a horizontal one in the industry that produces the product. Generally, the manufacturer is not going to be able to increase his market power by any kind of vertical arrangement. (I think that one could argue that an agreement that dealers would not carry other manufacturers' products--not at issue here--could be seen as a potential barrier to entry by new manufacturers.) Whether the manufacturer is in a monopolistic, an oligopolistic, or a competitive industry, he is going to prefer as efficient a distribution system as possible. The costs of distribution are effectively costs to the manufacturer, and if those costs are lower, more products will be sold, and the manufacturer's profits will be greater. If two monopolists stand in a vertical relation to one another, price will be higher, output less, and the joint profit less than if only one monopolist existed. Thus, the manufacturer has every incentive to keep the distribution system competitive

The manufacturer may, however, have good competitive reasons for wanting to impose some territorial restrictions. Before going into those reasons, it is worth discussing the effect of the territorial restrictions. Whether the system is an insulated exclusive area as in Schwinn or the more permeable geographic areas defined by the dealer's location at issue here, the effect, although it may vary in degree, is to give the benefitted distributors additional market power. The distributors are mini-monopolists in

effect of territorial restrictions is to give dealer more market power

their geographic areas. Of course, the monopoly only exists with respect to the product of the particular manufacturer which must compete with similar products of other manufacturers. As a result of inter-brand competition, there is a very real limit to the extent that the dealer can exploit his protected position, but it is clear that he can exploit it to some extent. Indeed, it is the basic premise of the arguments in favor of territorial restrictions that the dealer can get some super-competitive profits. The point is that it may be desirable that he do so.

There are a variety of reasons that a manufacturer might prefer to give territorial restrictions despite his general preference for efficiency and competition among his dealers. The best case is where the manufacturer is trying to break into new markets or to introduce a new product. There are obvious risks to the dealers in such a situation. Before they will take the risks, they will require a return greater than that appropriate for a less risky investment. By assuring the dealers that they will have the market in an area, the manufacturer induces them to take the risk. If the manufacturer could not prevent others from entering that market in the event that the new product is successful, the dealers who took the greater risk would be compensated only at the lower level of return appropriate for those who did not take the risk.

Another reason that a manufacturer might use restrictions is to assure that the product is efficiently promoted by the dealers. The protection of the restriction gives dealers a chance to recover the additional costs of the promotions. This is the area in which the "free rider" discussion is appropriate. If another dealer could freely compete for the same market without

promoting the product, the first dealer would no longer spend the money to do the promotions, because he would not recover that money. Peters essentially ignore the problem of the free rider, arguing that if the market will not bear the costs of promotion they should not be incurred and that if the market will bear the costs they will be incurred. Donald Baker recognizes two related interests of the manufacturer that might justify restrictions: 1) the protection of "good will in the product (e.g. where frequent maintenance is necessary) autos and 2) the avoidance of risk to the consumers' health and safety.) This general analysis does assume that the manufacturer knows what is the best distribution strategy. But, he has every incentive to make the right decisions, and there is always the corrective influence of inter-brand competition. The only reasoned argument against letting the manufacturer impose restrictions in these situations is from an economist named Comanor. He is against the whole process of product differentiation which is admittedly furthered by the inducement of dealers to engage in promotion of products. There are some problems with product differentiation, but it does not seem to me that they justify a per se rule in this context.

There are several commonly mentioned competitive risks with vertical restrictions. The most troubling is that the restriction might be the result of a dealer cartel forcing (or bribing) the manufacturer to run the cartel for them by dividing markets). If the dealers' interests predominate, one cannot be confident that there will not be competitive losses. Unlike the manufacturer, they have every incentive to act like monopolists at the the retail level. Bork thinks that this situation would be easy to detect. Posner is not so confident.

The only competitive concern with respect to the manufacturer is that the restrictions might be used as a way of enforcing the general price structure in a manufacturer's oligopoly situation. I think that this is a more realistic problem with vertical price-fixing arrangements, which remain illegal per se. The opinion might mention that the rule of reason analysis should take into account the fact that the manufacturer is in a tight oligopoly situation as an additional concern.

From the preceding discussion, it should be clear that vertical territorial restrictions do not satisfy the per se rule requirements. There are a variety of pro-competitive reasons who the restrictions should be imposed. Donald Baker argues that the appropriate rule should be presumptive illegality with exceptions if the manufacturer proves that he falls within one of the valid justifications for the restrictions. This would be a really innovative change, creating a whole new category. Probably, a rule of reason approach with explicit recognition of the likely problems would be the best approach to take.

The arguments in favor of a per se approach are not very telling. Protection of franchisee autonomy is not an independent goal, unless it also furthers efficiency. As noted above the per se rule may well work to the long term disadvantage of the group of small businessmen who are franchisees. The per se rule is certainly more certain, but absent the economic justification, certainty is not enough. Petr argues that the Court should look to whether less restrictive alternatives were available. Under the economic analysis above, there is no reason to think that a manufacturer will give a dealer any more power than necessary to induce the dealer to provide the desired

amount of promotion, etc. A system which involves the courts in XXXXX second-guessing business decisions seems unattractive to me.

If necessary, this case can be distinguished from Schwinn on XX its facts. There is language in Schwinn that would extend this far, but it was unnecesaary to the decision. Here there was no restriction of a particular territory in which a dealer could compete (just a restriction regarding theXX location from which he could XXX sell.) There was no XXXXXX restriction regarding the customers to WXX whom the dealer could sell. This is only a difference of degree, but it is a difference--intra-brand XXXXXXX XXXXXXX competition is more possible here than in Schwinn. The restriction was also free of other objectionable elements. There was no right of dealer veto of XX new dealers. (This could be used to enforce XXXX dealer cartel arrangement.) XXXX There was no requirement that dealer's not carry competing products. (This could be used to XXXXXX create a barrier to new XXX entry at the manufacturer level.)

I would recommend scrapping Schwinn and setting out a rational rule of reason structure.

P.S.

I have attached a copy of the relevant part of a recent article describing the struggles of the lower courts with Schwinn.

TAB

76-15 Continental TV v Sylvania (vertical territorial restrictions)

3/7/77 Pre-Conference Notes

Posner
Baxter
Bork

Few decisions criticized so widely by legal scholars (only favorable article by Sullivan - on brief), or proved so unpalatable to lower cts, or so confounding to bar + business ~~clients~~ clients.

White Motors, four yrs., earlier had declined to invalidate per se vertical territorial restrictions..

Petrs Position: The restriction on its location as a franchised dealer is void under Schwinn. ~~It~~ Petr. asserts right to operate from as many locations as it wishes - perhaps choosing those where other dealers have built up good will for Sylvania.

Economic theory of Anti-Trust:

Per se Rule

Per se ~~r~~ rules (rather than rule of reason) - since No. Pacific Ry - have been reserved for "practices that have a pernicious effect on competition and lack any redeeming virtue".

The Q

In most cases, the quest. is whether the manufacturer - under the challenged practice - will normally have an interest at odds with the public interest in competitive, efficient marketing of the product.

Effect of territorial restrictions

Gives distributor more market power. The dealer has a mini-monopoly in its product brand. Thus diminishes intra-product competition but furthers inter-brand competition (e.g. Sylvania increased its share).

Assures more efficient promotion by dealer - advertising & service (e.g. auto dealers)

Thus, no "pernicious effect on competition"; & there are pro-competitive economic effects. Totally different from per se situations.

No. 76-15, Continental TV v. GTE Sylvania Conf. 3/2/77

Affirmed 5
Reverse 1

The Chief Justice ~~Affirm~~ Pass - 1

When Posner argued Schwinn, he abandoned the per se position.
Per se rule is error.

Stevens, J. Pass

Can't distinguish Schwinn. But case is different.
Topco is relevant.
If we substitute a rule of reason - would open door.
Can't differentiate bet. vertical + horizontal agreements.

Brennan, J. Pass
Joined Schwinn.
Can distinguish Schwinn -
May repudiate Schwinn

Stewart, J. ~~Pass~~ Affirm
Unless Schwinn is overruled, this case must be Reversed
Can't distinguish this case.
Topco is horizontal - not relevant.
(Would prefer to join 4 to over-rule - but will join affirmance on basis that Schwinn can be distinguished.)

Affirm
Distinguish
Schwarin - would not
over-rule it.

Reverse
On Topco (?!)

Blackmun, J. Affirm
Not sure Schwarin can
be distinguished.
Can't buy per se rule.
Willing to over-rule.

Powell, J. Affirm
Can't distinguish
Schwarin.
I'd over-rule.

Rehnquist, J.

Not present

LFP/lab 5/16/77

To: Tyler Baker   Date: May 16, 1977

From: L.F.P., Jr.

No. 76-15 Sylvania

This is a brief memorandum of my general reaction to your first draft of 5/13/77. In a sentence, I think we are off to a fine start but a good deal of revision lies ahead.

The first 29 and 1/2 pages read very well, and I presently perceive no need for rewriting or revision. I have done some editing, and I am sure that you will continue this process.

My concern - as I am sure it is with you - relates to what I view as Part IV, commencing on page 30. Here, having concluded that Schwinn cannot be distinguished, we address the question whether it should be reaffirmed or its *per se* rule rejected. I have read this part of the draft only once, but it leaves me with the distinct impression that it tends to be more like an essay on economics than a legal opinion or argument. It is essential, of course, to address the basic economic considerations, and I think you do this very well - although perhaps at too great a length.

It also is important to demonstrate the economic illiteracy of Schwinn and I assume that you have read and relied upon the critical commentary that does this. I do have the impression that you have perhaps "leaned over backwards" a bit in an effort to be "fair" to the Schwinn analysis. You do identify

the illogic of the Schwinn distinction between sale and consignment, and this is a major argument against reaffirming Schwinn. Yet, I rather think the draft overemphasizes this weakness in the Schwinn opinion. If I were writing a dissent, I think I would accept the illogic of the sale/consignment distinction, and say that the proper resolution is to *extend* the *per se* rule to both.

I have assumed that, after showing - as summarily as we reasonably can - the economic unsoundness of Schwinn, ~~that~~ we would make a strong affirmative argument in favor of the application of the rule of reason to this type of vertical restriction. I also have assumed (without really reading any of the cases), that Schwinn represented a major departure from prior antitrust precedents. The rule of reason is the norm for reviewing Section 1 of the Sherman Act claims. The *per se* rule (applicable primarily to horizontal restraints) is, I have thought, largely an exception engrafted upon the rule of reason. Schwinn (again, I have thought, without any recent study) represents a major, and unprecedented, extension of *per se* antitrust analysis. If we can show this by reference to the antitrust decisions of this Court, the opinion would be vastly strengthened.

My recollection is that the brief filed by Wilmer, Cutler is the single most helpful brief in this case. No doubt you have drawn on it heavily. If not, I commend it to you.

I understand that you plan to document the economic

argument by reference to scholarly law reviews and textbooks. In this connection, many of your present notes are good. Indeed, several of them - discussing prior decisions of this Court - might well be worked into the text. On the other hand, several of the notes "talking economics", sound a bit like an elementary lecture in a first year economics class. I think some of this can be eliminated or condensed, although you may want to try it out on Gene Comey.

My own view of the fundamental economic issue is that the benefits from enhanced interbrand competition vastly exceed whatever curtailment may result as to intrabrand competition. I would have thought some of the scholarly commentary would have made this point strongly. The present draft seems a bit too deferential to the possible adverse effect on intrabrand competition.

One further thought as to possible helpful authority: if you can find one or two strong Court of Appeals decisions that advance arguments supportive of any of our main points, I would certainly use them. In this connection, I am sure you plan at least to cite the lower court cases that have been critical of Schwinn.

This memorandum may seem more critical of the draft than I feel. My reaction is quite affirmative up to page 30. From that point on, I think you have excellent material. As is usually the case with a first draft, it needs to be reworked carefully and refocused along the lines indicated above.

L.F.P.

LFP/lab 5/16/7_

Fils

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L.F.P.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 1, 1977

Re: No. 76-15 - Continental T. V., Inc. v.
GTE Sylvania, Inc.

Dear Lewis:

It is likely that I shall concur in the result in this case.

Sincerely,

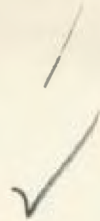
Byron

Mr. Justice Powell

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART



June 1, 1977

76-15, Continental TV v. GTE Sylvania

Dear Lewis,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P. S.

Mr. Justice Powell

Copies to the Conference

wr [illegible] Tyler - add this - advise Printer

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 1, 1977

Re: No. 76-15 - Continental TV, Inc. v. GTE Sylvania, Inc.

Dear Lewis:

Please show me as not participating in the consideration or decision of this case.

Sincerely,

wr

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 9, 1977

Re: 76-15 - Continental T.V., Inc. v. GTE Sylvania Inc.

Dear Lewis:

Please join me.

Respectfully,

JPS

Mr. Justice Powell

Copies to the Conference

June 9, 1977

No. 76-15 Continental T.V., Inc. v.
GTE Sylvania Inc.

MEMORANDUM TO THE CONFERENCE

I am circulating today the first printed draft of the opinion that circulated on May 31, in typewritten form.

John has made several suggestions, indicating his willingness to join the opinion if these changes are made. All are quite acceptable to me, and neither John nor I thinks they change in any way the basic analysis of the opinion. Rather than delay circulating the printed draft until these suggestioned changes can be incorporated, I enclose a copy of John's letter of June 9. The page references therein are to my typewfitten circulation of May 31.

Sincerely,

Enclosure

LFP/lab

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

FILE COPY
PLEASE RETURN
TO FILE

June 9, 1977

Re: 76-15 - Continental T.V., Inc. v. GTE Sylvania

Dear Lewis:

With a few changes, which I do not expect to cause you any difficulty, I am prepared to join your opinion. Would you be willing to do the following?

On page 14 of your typewritten draft, substitute the following for the two sentences in the middle of the page beginning with "Under this rule . . . ."

> "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.15/ *Per se* rules of illegality are appropriate only when they relate to conduct which is manifestly anti-competitive. As the Court explained . . . ."

On page 17, line 11, I believe the word "power" should be omitted.

On page 18, rewrite the second sentence to read:

> "For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers . . . ."

On page 19, rewrite the last full sentence on the page to read:

> "We conclude that the distinction drawn in *Schwinn* between sale and nonsale transactions is sufficient to justify the application of a *per se* rule in one situation and a rule of reason in the other. The question remains . . . ."

On page 20, rewrite the third sentence from the bottom to read:

> "As indicated above, there is substantial scholarly and judicial authority supporting their economic utility. There is relatively little . . . ."

If my reason for any of these suggestions is unclear, I will be glad to chat with you about them.

Respectfully,

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 13, 1977

Re: No. 76-15 - Continental T.V. v. G.T.E. Sylvania

Dear Lewis:

Please join me.

Sincerely,

H.A.B.

Cheers!

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

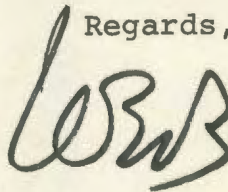
June 13, 1977

Re: 76-15 - Continental T.V. v. GTE Sylvania

Dear Lewis:

I join.

Regards,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 16, 1977

FILE COPY
PLEASE RETURN
TO FILE

No. 76-15 Continental TV v. GTE Sylvania

MEMORANDUM TO THE CONFERENCE:

In order to facilitate our moving ahead, I enclose pages 10, 14 and 16, of my opinion reflecting changes in footnotes.

I do not expect to have any further changes.

L.F.P.

L.F.P., Jr.

ss

appeal by the Government, the Schwinn franchise plan included a location restriction similar to the one challenged here. These restrictions allowed Schwinn and Sylvania to regulate the amount of competition among their retailers by preventing a franchisee from selling franchised products from outlets other than the one covered by the franchise agreement. To exactly the same end, the Schwinn franchise plan included a companion restriction, apparently not found in the Sylvania plan, that prohibited franchised retailers from selling Schwinn products to nonfranchised retailers. In *Schwinn* the Court expressly held that this restriction was impermissible under the broad principle stated there. In intent and competitive impact, the retail customer restriction in *Schwinn* is indistinguishable from the location restriction in the present case. In both cases the restrictions limited the freedom of the retailer to dispose of the purchased products as he desired. The fact that one restriction was addressed to territory and the other to customers seems irrelevant to functional antitrust analysis and, indeed, to the language and broad thrust of the opinion in *Schwinn*.[12]

III

Sylvania argues that if *Schwinn* cannot be distinguished, it should be reconsidered. Although *Schwinn* is supported by

[12] Sylvania's suggested distinction focuses on a comparison of the likely diminution of intrabrand competition under the location clause and under the exclusive distributor territories in *Schwinn* and ignores the customer restrictions in *Schwinn* on the theory that Sylvania's francise agreement embodied no similar provisions. Continental's response is that a location restriction also is capable theoretically of producing complete insulation from intrabrand competition. Despite this possibility, it seems more likely that only a manufacturer oblivious to its own interest in effective market development would use the policy to achieve that result. In any event, we consider the comparison drawn in the text to be the relevant one. As Chief Justice Hughes stated in *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 363, 377, "Realities must dominate the judgment. . . . The Anti-Trust Act aims at substance."

Substitute Fn 12, p. 10

The distinctions drawn by the Court of Appeals and endorsed in Mr. Justice White's concurring opinion have no basis in Schwinn. The intrabrand competitive impact of the restrictions at issue in Schwinn ranged from complete elimination to mere reduction; yet, the Court did not even hint at any distinction on this ground. Similarly, there is no suggestion that the per se rule was applied because of Schwinn's prominent position in its industry. That position was the same whether the bicycles were sold or consigned, but the Court's analysis was quite different. In light of Mr. Justice White's emphasis on the "superior consumer acceptance" enjoyed by the Schwinn brand name, we note that the Court rejected precisely that premise in Schwinn. Applying the rule of reason to the restrictions imposed in nonsale transactions, the Court stressed that there was "no showing that [competitive bicycles were] not in all respects reasonably interchangeable as articles of competitive commerce with the Schwinn product" and that it did "not regard Schwinn's claim of product excellence as establishing the contrary." 388 U.S., at 381 & n. 7. Although Schwinn did hint at preferential treatment for new entrants and failing firms, the District Court below did not even submit Sylvania's claim that it was failing to the jury. Accordingly, Mr. Justice White's position appears to reflect

an extension of Schwinn in this regard. Having crossed the "failing firm" line, Mr. Justice White neither attempts to draw a new one nor to explain why one should be drawn at all.

rule can be justified under the demanding standards of *Northern Pac. R. Co.* The Court's refusal to endorse a *per se* rule in *White Motor Co.* was based on its uncertainty as to whether vertical restrictions satisfied those standards. Addressing this question for the first time, the Court stated:

> "We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' . . . ." 372 U. S., at 263, quoting *Northern Pac. R. Co.* v. *United States, supra,* at 5.

Only four years later the Court in *Schwinn* announced its sweeping *per se* rule without even a reference to *Northern Pac. R. Co.* and with no explanation of its sudden change in position.[17] We turn now to consider *Schwinn* in light of *Northern Pac. R. Co.*

The market impact of vertical restrictions[18] is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition.[19] Significantly, the Court in *Schwinn* did not dis-

---

[17] After *White Motor Co.*, the courts of appeals continued to evaluate territorial restrictions according to the rule of reason. *Sandura Co.* v. *FTC*, 339 F. 2d 847 (CA6 1964); *Snap-On Tools Corp.* v. *FTC*, 321 F. 2d 825 (CA7 1963). For an exposition of the history of the antitrust analysis of vertical restrictions before *Schwinn*, see ABA Monograph No. 2, *supra*, n. 14, at 6–7.

[18] As in *Schwinn*, we are concerned here only with nonprice vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy.

[19] Interbrand competition is the competition between the manufacturers of the same generic product—television sets in this case—and is the primary concern of antitrust law. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between

Substitute Fn 18 p. 14

As in Schwinn, we are concerned here only with nonprice vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. As Mr. Justice White notes, *post*, at ___, some commentators have argued that the manufacturer's motivation for imposing vertical price restrictions may be the same as for nonprice restrictions. There are, however, significant differences that could easily justify different treatment. In his concurring opinion in White Motor Co., Mr. Justice Brennan noted that, unlike nonprice restrictions, "[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands." 372 U.S., at 268. Professor Posner also recognized that "industry-wide resale price maintenance might facilitate cartelizing." Posner, *supra* n. 13, at 294 (footnote omitted); see Posner, Antitrust: Cases, Economic Notes and Other Materials 134 (1974); Gellhorn, Antitrust: Law and Economics 252 (1976); Note, 10 Colum. J.L. & Soc. Prob. *supra* n. 13, at 498. Furthermore, Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the

Federal Trade Commission Act allowing fair trade pricing at the option of the individual states. Consumer Goods Pricing Act of 1975, Pub. Law 94-145 (1975), amending 15 U.S.C. § 45(a). No similar expression of congressional intent exists for nonprice restrictions.

rule of reason for nonsale transactions reflected the view that the restrictions have too great a potential for the promotion of interbrand competition to justify complete prohibition.[22] The Court's opinion provides no analytical support for these contrasting positions. Nor is there even an assertion in the

whom have regarded the Court's apparent reliance on the "ancient rule" as both a misreading of legal history and a perversion of antitrust analysis. See, *e. g.*, Handler, *supra*, n. 13, at 1684–1686; Posner, *supra*, n. 13, at 295–296; Robinson, *supra*, n. 13, at 271; but see Louis, *supra*, n. 13, at 276 n. 6. We quite agree with MR. JUSTICE STEWART's dissenting comment in *Schwinn* that "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today." 388 U. S., at 392.

We are similarly unable to accept Judge Browning's argument in his dissent below that the Sherman Act was intended to prohibit restrictions on the autonomy of independent businessmen even though the restrictions have no impact on "price, quality, and quantity of goods and services." 537 F. 2d, at 1019. Competitive economies have social and political as well as economic advantages, see, *e. g.*, *Northern Pac. R. Co.* v. *United States*, 356 U. S., at 4, but an antitrust policy divorced from market considerations would lack any objective benchmarks. As Justice Brandeis reminded us, "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain is of their very essence." *Chicago Board of Trade* v. *United States*, 246 U. S., at 238.

[22] In that regard, the Court specifically stated that a more complete prohibition "might severely hamper smaller enterprises resorting to reasonable methods of meeting the competition of giants and merchandising through independent dealers." 388 U. S., at 380. The Court also broadly hinted that it would recognize additional exceptions to the *per se* rule for new entrants in an industry and for failing firms, both of which were mentioned in *White Motor* as candidates for such exceptions. *Id.*, at 374. The Court might have limited the exceptions to the *per se* rule to these situations, which present the strongest arguments for the sacrifice of intrabrand competition for interbrand competition. Significantly, it chose instead to create the more extensive exception for nonsale transactions which is available to all businesses, regardless of their size, financial health, or market share. This broader exception demonstrates even more clearly the Court's awareness of "redeeming virtues" of vertical restrictions.

Substitute last paragraph of Fn 21, p. 16.

We are similarly unable to accept Judge Browning's interpretation of Schwinn. In his dissent below he argued that the decision reflects the view that the Sherman Act was intended to prohibit restrictions on the autonomy of independent businessmen even though they have no impact on "price, quality and quantity of goods and services" 537 F.2d, at 1019. The view is certainly not explicit in Schwinn, which purports to be based on an examination of the "impact [of the restrictions] upon the market place." 388 U S., at 374. Competitive economies have social and political as well as economic advantages, see e.g., Northern Pac. R. Co. v. United States, 356 U.S., at 4, but an antitrust policy divorced from market considerations would lack any objective benchmarks. As Justice Brandeis reminded us, "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain is of their very essence." Chicago Board of Trade v. United States, 246 U.S., at 238. Although Mr. Justice White's concurring opinion endorses Judge Browning's interpretation, post, at ___, the opinion then proceeds to distinguish Schwinn on grounds inconsistent with that interpretation, post, at ___.

As delivered from Bench

Respondent GTE Sylvania, Inc. manufactures and sells television sets. In an effort to increase its declining sales, Sylvania adopted a franchise plan to sell directly to a smaller and more select group of franchised retailers. It limited the number of franchises granted for any given area, and required each franchisee to sell his Sylvania products only from the location at which he was franchised.

A dispute arose between Sylvania and one of its franchisees, Continental T.V. In the litigation that followed, Continental contended that Sylvania had violated § 1 of the Sherman Act by prohibiting the sale of Sylvania TV's from other than specified locations.

In U.S. v. Schwinn - a case decided in 1967 - this Court enunciated a per se rule of liability where manufacturers impose certain vertical restrictions on wholesalers and retailers of their products.

The DC in this case thought the Schwinn per se rule applied, and instructed the jury accordingly. A large verdict was rendered against Sylvania.

On appeal,

On appeal, the Court of Appeals for the Ninth Circuit reversed, finding a basis for distinguishing the Schwinn rule.

Although we think no adequate basis for ~~the~~ a distinction exists, we have reexamined the decision in Schwinn and conclude that it should be overruled.

The per se rule of illegality, adopted for first time in that case, was a departure from antitrust principles generally applicable. Restrictions similar to those used by Sylvania are widely ~~used~~ employed in our free market economy. The weight of scholarly and judicial authority supports their economic usefulness.

Accordingly, we affirm the judgment of the Court of Appeals ~~is affirmed.~~ – though we do so on different grounds.

Mr. Justice White filed an opinion concurring in the result. Mr. Justice Brennan filed a dissenting opinion, in which Mr. Justice Marshall joined.

Rehnquist took no part in consideration or decision of this case.

Techical changes

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: ______________

Recirculated: 6-22-77

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-15

Continental T. V., Inc., et al., Petitioners, *v.* GTE Sylvania Incorporated. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 23, 1977]

First printed draft. Same as typewritten draft to which I've responded already by adding notes. LFP

MR. JUSTICE WHITE, concurring in the judgment.

Although I agree with the majority that the location clause at issue in this case is not a *per se* violation of the Sherman Act and should be judged under the rule of reason, I cannot agree that this result requires the overruling of *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967). In my view this case is distinguishable from *Schwinn* because there is less potential for restraint of intrabrand competition and more potential for stimulating interbrand competition. As to intrabrand competition, Sylvania, unlike Schwinn, did not restrict the customers to whom or the territories where its purchasers could sell. As to interbrand competition, Sylvania, unlike Schwinn, had an insignificant market share at the time it adopted its challenged distribution practice and enjoyed no consumer preference that would allow its retailers to charge a premium over other brands. In two short paragraphs, the majority disposes of the view, adopted after careful analysis by the Ninth Circuit en banc below, that these differences provide a "principled basis for distinguishing *Schwinn*," *ante*, at 9, despite holdings by three Courts of Appeals and the District Court on remand in *Schwinn* that the *per se* rule established in that case does not apply to location clauses such as Sylvania's. To reach out to overrule one of this Court's recent interpretations of the Sherman Act, after such a cursory examination of the necessity for doing

so, is surely an affront to the principle that considerations of *stare decisis* are to be given particularly strong weight in the area of statutory construction. *Illinois Brick Co.* v. *Illinois,* — U. S. —, — (1977); *Runyon* v. *McCrary,* 427 U. S. 160, 175 (1976); *Edelman* v. *Jordan,* 415 U. S. 651, 671 (1974).

One element of the system of interrelated vertical restraints invalidated in *Schwinn* was a retail customer restriction prohibiting franchised retailers from selling Schwinn products to nonfranchised retailers. The Court rests its inability to distinguish *Schwinn* entirely on this retail customer restriction, finding it "[i]n intent and competitive impact . . . indistinguishable from the location restriction in the present case," because "[i]n both cases the restrictions limited the freedom of the retailer to dispose of the purchased products as he desired." *Ante,* at 10. The customer restriction may well, have, however, a very different "intent and competitive impact" than the location restriction: it prevents discount stores from getting the manufacturer's product and thus prevents intraband price competition. Suppose, for example, that interband competition is sufficiently weak that the franchised retailers are able to charge a price substantially above wholesale. Under a location restriction, these franchisers are free to sell to discount stores seeking to exploit the potential ~~for sales to discount stores seeking to exploit the potential~~ for sales at prices below the prevailing retail level. One of the franchised retailers may be tempted to lower its price and act in effect as a wholesaler for the discount house in order to share in the profits to be had from lowering prices and expanding volume.[1]

Under a retail customer restriction, on the other hand, the franchised dealers cannot sell to discounters, who are cut off

[1] The franchised retailers would be prevented from engaging in discounting themselves if, under the *Colgate* doctrine, see *infra,* at 9, the manufacturer could lawfully terminate dealers who did not adhere to its suggested retail price.

altogether from the manufacturer's product and the opportunity for intrabrand price competition. This was precisely the theory on which the Government successfully challenged Schwinn's customer restrictions in this Court. The District Court in that case found that "[e]ach one of [Schwinn's franchised retailers] knows also that he is not a wholesaler and that he cannot sell as a wholesaler or act as an agent for some other unfranchised dealer, such as a discount house retailer who has not been franchised as a dealer by Schwinn." 237 F. Supp. 323, 333 (ND Ill. 1965). The Government argued on appeal, with extensive citations to the record, that the effect of this restriction was "to keep Schwinn products out of the hands of discount houses and other price cutters so as to discourage price competition in retailing. . . ." Brief for United States 26. *See* id., at 29–37.[2]

It is true that, as the majority states, Sylvania's location restriction inhibited to some degree "the freedom of the retailer to dispose of the purchased products" by requiring the retailer to sell from one particular place of business. But the retailer is still free to sell to any type of customer—including discounters and other unfranchised dealers—from any area. I think this freedom implies a significant difference for the effect of a location clause on intrabrand competition. The District Court on remand in *Schwinn* evidently thought so as well, for after enjoining Schwinn's customer restriction as directed by this Court it expressly sanctioned location clauses, permitting Schwinn to "designat[e] in its retailer franchise agreements the location of the place or places of business for

[2] Given the Government's emphasis on the inhibiting effect of the Schwinn restrictions on discounting activities, the Court may well have been referring to this effect when it condemned the restrictions as "obviously destructive of competition." 388 U. S., at 379. But the Court was also heavily influenced by its concern for the freedom of dealers to control the disposition of products they purchased from Schwinn. See *infra*, at 8–11. In any event, the record in *Schwinn* illustrates the potentially greater threat to intraband competition posed by customer as opposed to location restrictions.

which the franchise is issued." 291 F. Supp. 564, 565–566 (ND Ill. 1968).

An additional basis for finding less restraint of intrabrand competition in this case, emphasized by the Ninth Circuit en banc, is that *Schwinn* involved restrictions on competition among distributors at the wholesale level. As Judge Ely wrote for the seven-member majority below:

> "[Schwinn] had created exclusive geographical sales territories for each of its 22 wholesale bicycle distributors and had made each distributor the sole Schwinn outlet for the distributor's designated area. Each distributor was prohibited from selling to any retailers located outside its territory.
>
> . . . . .
>
> "Schwinn's territorial restrictions requiring dealers to confine their sales to exclusive territories prescribed by Schwinn prevented a dealer from competing for customers outside his territory. . . . Schwinn's restrictions guaranteed each wholesaler distributor that it would be absolutely isolated from all competition from other Schwinn wholesalers." 537 F. 2d 980, 989–990 (1976).

Moreover, like its franchised retailers, Schwinn's distributors were absolutely barred from selling to nonfranchised retailers, further limiting the possibilities of intrabrand price competition.

The majority apparently gives no weight to the Court of Appeals' reliance on the difference between the competitive effects of Sylvania's location clause and Schwinn's interlocking "system of vertical restraints affecting both wholesale and retail distribution." *Id.*, at 989. It also ignores post-*Schwinn* decisions of the Third and Tenth Circuits upholding the validity of location clauses similar to Sylvania's here. *Salco Corp.* v. *General Motors Corp., Buick Motor Division,* 517 F. 2d 567 (CA10 1975); *Kaiser* v. *General Motors Corp.,* 530

F. 2d 964 (CA3 1976), aff'g 396 F. Supp. 33 (ED Pa. 1975). Finally, many of the scholarly authorities the majority cites in support of its overruling of *Schwinn* have not had to strain to distinguish location clauses from the restrictions invalidated there. *E. g.,* Robinson, Recent Antitrust Developments: 1974, 75 Colum. L. Rev. 243, 278 (1975) (outcome in *Sylvania* not preordained by *Schwinn* because of marked differences in the vertical restraints in the two cases); McLaren, Territorial and Customer Restrictions, Consignments, Suggested Retail Prices and Refusals to Deal, 37 Antitrust L. J. 137, 144–145 (1968) (by implication *Schwinn* exempts location clauses from its *per se* rule); Pollack, Alternative Distribution Methods After *Schwinn,* 63 N. W. U. L. Rev. 595, 603 (1968) ("Nor does the *Schwinn* doctrine outlaw the use of a so-called 'location clause' . . .").

Just as there are significant differences between *Schwinn* and this case with respect to intrabrand competition, there are also significant differences with respect to interbrand competition. Unlike Schwinn, Sylvania clearly had no economic power in the generic product market. At the time they instituted their respective distribution policies, Schwinn was "the leading bicycle producer in the Nation," with a national market share of 22.5%, 388 U. S., at 368, 374, whereas Sylvania was a "faltering, if not failing" producer of television sets, with "a relatively insignificant 1 to 2%" share of the national market in which the dominant manufacturer had a 60 to 70% share. *Ante,* at 1, 21 n. 29. Moreover, the Schwinn brand name enjoyed superior consumer acceptance and commanded a premium price as, in the District Court's words, "the Cadillac of the bicycle industry." 237 F. Supp., at 335. This premium gave Schwinn dealers a margin of protection from interbrand competition and created the possibilities for price cutting by discounters that the Government

argued were forestalled by Schwinn's customer restrictions.[3] Thus, judged by the criteria economists use to measure market power—product differentiation and market share[4]—Schwinn enjoyed a substantially stronger position in the bicycle market than did Sylvania in the television market. This Court relied on Schwinn's market position as one reason not to apply the rule of reason to the vertical restraints challenged there. "Schwinn was not a newcomer, seeking to break into or stay in the bicycle business. It was not a 'failing company.' On the contrary, at the initiation of these practices, it was the leading bicycle producer in the Nation." 388 U. S., at 374. And the Court of Appeals below found "another significant distinction between our case and *Schwinn*" in Sylvania's "precarious market share," which "was so small when it adopted its locations practice that it was threatened with expulsion from the television market." 537 F. 2d, at 991.[5]

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[3] Relying on the finding of the District Court, the Government argued in its brief, at 36:

"[T]he declared purpose of the Schwinn franchising system [was] to establish and exploit a distinctive identity and superior consumer acceptance for the Schwinn brand name as the Cadillac of bicycles, thereby enabling the charging of a premium price. . . . This scheme could not possibly succeed, and doubtless would long ago have been abandoned, if in the consumer's mind other bicycles were just as good as Schwinn's."

[4] See, *e. g.*, Scherer, Industrial Market Structure and Economic Performance 10–11 (1970); Samuelson, Economics 485–491 (10th ed. 1976).

[5] Schwinn's national market share declined to 12.8% in the 10 years following the institution of its distribution program, at which time it ranked second behind a firm with a 22.8% share. 388 U. S., at 368–369. In the three years following the adoption of its locations practice, Sylvania's national market share increased to 5%, placing it eighth among manufacturers of color television sets. *Ante*, at 1–2. At this time Sylvania's shares of the San Francisco, Sacramento, and Northern California markets were respectively 2.5%, 15%, and 5%. *Id.*, at 2 n. 4, 3 n. 6. The District Court made no findings as to Schwinn's shares of local bicycle markets.

In my view there are at least two considerations, both relied upon by the majority to justify overruling *Schwinn,* that would provide a "principled basis" for instead refusing to extend *Schwinn* to a vertical restraint that is imposed by a "faltering" manufacturer with a "precarious" position in a generic product market dominated by another firm. The first is that, as the majority puts it, "when interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." *Ante,* at 15 n. 19. See also *id.,* at 17.[6] Second is the view, argued forcefully in the economic literature cited by the majority, that the potential benefits of vertical restraints in promoting interbrand competition are particularly strong where the manufacturer imposing the restraints is seeking to enter a new market or to expand a small market share. *Ibid.*[7] The majority even recognizes that *Schwinn* "hinted" at an exception for new entrants and failing firms from its *per se* rule. *Id.,* at 16 n. 22.

In other areas of the antitrust law, this Court has not hesitated to base its rules of *per se* illegality in part on the defendant's market power. Indeed, in the very case from which the majority draws its standard for *per se* rules, *Northern Pac. R. Co.* v. *United States,* 356 U. S. 1, 5 (1958), the Court stated the reach of the *per se* rule against tie-ins under § 1 of the Sherman Act as extending to all defendants with "sufficient economic power with respect to the tying product

[6] For an extensive discussion of this effect of interbrand competition, see ABA Antitrust Section, Monograph No. 2, Vertical Restraints Limiting Intrabrand Competition 116–128 (1977).

[7] Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards, 30 Law & Contemp. Prob. 506, 511 (1965); Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger, and Potential Competition Decisions, 75 Colum. L. Rev. 282, 293 (1975); Scherer, *supra,* at 510.

to appreciably restrain free competition in the market for the tied product. . . ." *Id.*, at 6. And the Court subsequently approved an exception to this *per se* rule for "infant industries" marketing a new product. *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (ED Pa. 1960), aff'd *per curiam*, 365 U. S. 567 (1961). See also *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 363 (1963), where the Court held presumptively illegal a merger "which produces a firm controlling an undue percentage share of the relevant market. . . . ." I see no doctrinal obstacle to excluding firms with such minimal market power as Sylvania's from the reach of the *Schwinn* rule.[8]

I have, moreover, substantial misgivings about the approach the majority takes to overruling *Schwinn*. The reason for the distinction in *Schwinn* between sale and nonsale transactions was not, as the majority would have it, "the Court's effort to accommodate the perceived intrabrand harm and interbrand benefit of vertical restrictions," *ante*, at 15; the reason was rather, as Judge Browning argued in dissent below, the notion in many of our cases involving vertical restraints that independent businessmen should have the freedom to dispose of the goods they own as they see fit. Thus the first case cited

[8] Cf. *Sandura Co.* v. *FTC*, 339 F. 2d 847, 850 (CA6 1964) (territorial restrictions on distributors imposed by small manufacturer "competing with and losing ground to the 'giants' of the floorcovering industry" is not *per se* illegal); Baker, Vertical Restraints in Times of Change: From *White* to *Schwinn* to Where?, 44 Antitrust L. J. 537, 545–547 (1975) (presumptive illegality of territorial restrictions imposed by manufacturer with "any degree of market power"). The majority's failure to use the market share of Schwinn and Sylvania as a basis for distinguishing these cases is the more anomalous for its reliance, see *infra*, at 10–12, on the economic analysis of those who distinguish the anticompetitive effects of distribution restraints on the basis of the market shares of the distributors. See Posner, *supra*, at 299; Bork, The Rule of Reason and the *Per Se* Concept: Price Fixing and Market Division II, 75 Yale L. J. 373, 391–429 (1966).

by the Court in *Schwinn* for the proposition that "restraints upon alienation . . . are beyond the power of the manufacturer to impose upon its vendees and . . . are violations of § 1 of the Sherman Act," 388 U. S., at 377, was this Court's seminal decision holding a series of resale price-maintenance agreements *per se* illegal, *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911). In *Dr. Miles the* Court stated that "a general restraint on alienation is ordinarily invalid," citing Coke on Littleton, and emphasized that the case involved "agreements restricting the freedom of trade on the part of dealers who own what they sell." *Id.*, at 404, 407–408. Mr. Justice Holmes stated in dissent, "If [the manufacturer] should make the retail dealers agent in law as well as in name and retain the title until the goods left their hands I cannot conceive that even the present enthusiasm for regulating the prices to be charged by other people would deny that the owner was acting within his rights." *Id.*, at 411.

This concern for the freedom of the businessman to dispose of his own goods as he sees fit is most probably the explanation for two subsequent cases in which the Court allowed manufacturers to achieve economic results similar to that in *Dr. Miles* where they did not impose restrictions on dealers who had purchased their products. In *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919), the Court found no antitrust violation in a manufacturer's policy of refusing to sell to dealers who failed to charge the manufacturer's suggested retail price and of terminating dealers who did not adhere to that price. It stated that the Sherman Act did not "restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Id.*, at 307. In *United States* v. *General Electric Co.*, 272 U. S. 476 (1926), the Court upheld resale price maintenance agreements made by a patentee with its dealers who obtained its goods on a consignment basis. The Court distinguished

Dr. Miles on the ground that the agreements there were "contracts of sale rather than of agency" and involved "an attempt by the Miles Medical Company . . . to hold its purchasers, after the purchase at full price, to an obligation to maintain prices on a resale by them." *Id.*, at 487. By contrast, a manufacturer was free to contract with his *agents* to "[fix] the price by which his agents transfer the title from him directly to [the] consumer, . . . however comprehensive as a mass or whole in [the] effect [of these contracts]." *Id.*, at 488. Although these two cases have been called into question by subsequent decisions, see *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960), and *Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1964), their rationale runs through our case law in the area of distributional restraints. In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U. S. 211, 213 (1951), the Court held that an agreement to fix resale prices was *per se* illegal under § 1 because "such agreements, 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." Accord, *Albrecht* v. *Herald Co.*, 390 U. S. 145, 152 (1968). See generally Judge Browning's dissent below, 537 F. 2d, at 1018–1022; ABA Antitrust Section, Monograph No. 2, Vertical Restraints Limiting Intraband Competition 50–53, 158–159, 169–175, 186–187 (1977); Policy, 65 Colum. L. Rev. 422, 527–436 (1965).

After summarily rejecting this concern, reflected in our interpretations of the Sherman Act, for "the autonomy of independent businessmen," *ante*, at 16 n. 21, the majority not surprisingly finds "no justification" for Schwinn's distinction between sale and nonsale transactions because the distinction is "essentially unrelated to any relevant economic impact." *Id.*, at 19. But while according some weight to the businessman's interest in controlling the terms on which he trades in his own goods may be anathema to those who view the

Sherman Act as directed solely to economic efficiency,[9] this principle is without question more deeply embedded in our cases than the notions of "free rider" effects and distributional efficiencies borrowed by the majority from the "new economics of vertical relationships." *Ante,* at 17–19. Perhaps the Court is right in partially abandoning this principle and in judging the instant nonprice vertical restraints solely by their "relevant economic impact"; but the precedents which reflect this principle should not be so lightly rejected by the Court. The rationale of *Schwinn* is no doubt difficult to discern from the opinion, and it may be wrong; it is not, however, the aberration the majority makes it out to be here.

I have a further reservation about the majority's reliance on "relevant economic impact" as the test for retaining *per se* rules regarding vertical restraints. It is common ground among the leading advocates of a purely economic approach to the question of distribution restraints that the economic arguments in favor of allowing vertical nonprice restraints generally apply to vertical price restraints as well.[10] Although the majority asserts that "the *per se* illegality of price restric-

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[9] *E. g.,* Bork, Legislative Intent and the Policy of the Sherman Act, 9 J. Law & Econ. 7 (1966); Bork, The Rule of Reason and the *Per Se* Concept: Price Fixing and Market Division I, 74 Yale L. J. 775 (1965).

[10] Professor Posner writes, for example,

"There is no basis for choosing between [price fixing and market division] on social grounds. If resale price maintenance is like dealer price fixing, and therefore bad, a manufacturer's assignment of exclusive territories is like market division, and therefore bad too. . . .

. . . . .

"[If helping new entrants break into a market] is a good justification for exclusive territories, it is an equally good justification for resale price maintenance, which as we have seen is simply another method of dealing with the free rider problem. . . . In fact, *any* argument that can be made on behalf of exclusive territories can be made on behalf of resale price maintenance." Posner, *supra,* at 292–293. (Footnote omitted.)

See Bork, *supra,* n. 8, at 391–464.

tions . . . involves significantly different questions of analysis and policy," *ante,* at 14 n. 18, I suspect this purported distinction may be as difficult to justify as that of *Schwinn* under the terms of the majority's analysis. Thus Professor Posner, in an article cited five times by the majority, concludes, "I believe the law should treat price and nonprice restrictions the same and that it should make no distinction between the imposition of restrictions in a sale contract and their imposition in an agency contract." Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum. L. Rev. 282, 298 (1975). Indeed, the Court has already recognized that resale price maintenance may increase output by inducing "demand-creating activity" by dealers (such as additional retail outlets, advertising and promotion, and product servicing) that outweighs the additional sales that would result from lower prices brought about by dealer price competition. *Albrecht* v. *Herald Co.,* 390 U. S. 145, 151 n. 7 (1968). These same output-enhancing possibilities of nonprice vertical restraints are relied upon by the majority as evidence of their "social utility and economic soundness," *ante,* at 20, and as a justification for judging them under the rule of reason. The effect, if not the intention, of the Court's opinion is necessarily to call into question the firmly established *per se* rule against price restraints.

Although the case law in the area of distributional restraints has perhaps been less than satisfactory, the Court would do well to proceed more deliberately in attempting to improve it. In view of the ample reasons for distinguishing *Schwinn* from this case and in the absence of contrary congressional action, I would adhere to the principle that

> ". . . each case under the Sherman Act must be determined upon the particular facts disclosed by the record, and . . . the opinions in those cases must be read in the light of their facts and of a clear recognition of the

essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied." *Maple Flooring Manufacturers Association* v. *United States,* 268 U. S. 563, 579 (1925).

In order to decide this case, the Court need only hold that a location clause imposed by a manufacturer with negligible economic power in the product market has a competitive impact sufficiently less restrictive than the *Schwinn* restraints to justify a rule of reason standard, even if the same weight is given here as in *Schwinn* to dealer autonomy. I therefore concur in the judgment.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 22, 1977

Cases heretofore held for Continental TV v. GTE Sylvania, Inc., No. 76-15.

MEMORANDUM TO THE CONFERENCE:

No. 76-86 McClatchy Newspapers v. Noble
No. 76-242 Noble v. McClatchy Newspapers

Noble was a distributor for the Sacramento Bee, a newspaper published by McClatchy Newspapers (the newspaper). Before his contract was cancelled, Noble had the right to distribute the paper in a particular area of Sacramento. The contract included a right to transfer the distributorship, but after the contract was cancelled, Noble was told that he "had nothing to sell." Noble asserted three antitrust claims against the newspaper: (1) an alleged § 1 violation in terminating the contract, (2) an alleged § 1 violation in preventing the sale of the distributorship, and (3) an alleged § 2 violation in monopolizing the publication of daily newspapers of general circulation in the relevant market. The jury reurned a verdict for the newspaper on claims (1) and (3) and for Noble on claim (2). Both sides appealed to CA9.

With respect to the termination claim, CA9 held that it was necessary to remand for a new trial since the DC failed to instruct the jury that an agreement to restrict the territory in which newspapers purchased by Noble from the newspaper could be sold would have been a per se violation of § 1. With respect to the sale-of-business claim, CA9 held that it was error for the DC to deny the newspaper's motion for judgment n.o.v. According to CA9, after the cancellation of the contract, Noble owned nothing but a contractual right to distribute the paper for 30 days (the notice period), and testimony at trial indicated that that right was worthless.

In No. 76-86, the newspaper argues, _inter alia_ that it was error for CA9 to require a _per se_ instruction under _Schwinn_. Our decision in _Continental T.V._ supports that view, and I will vote to grant, vacate, and remand in light of _Continental T.V_

In No. 76-242, Noble argues that CA9 erred in its ruling on the sale-of-business claim. The argument focuses on whether CA9 looked at the value of the business before or after the allegedly illegal restraint. Noble's argument really is that the contract allowing termination at the newspaper's will is unfair. I do not think that this issue is certworthy and will vote to deny.

No. 76-871 Prestige Lincoln-Mercury, Inc. v. Quality Mercury, Inc.

Petitioner Lincoln-Mercury is an auto dealership near Minneapolis. Resp Quality Mercury, Inc., is an authorized Mercury dealership, also near Minneapolis. Ford Motor Co. is also a resp, although in the action below it is a co-defendant with petr Prestige. Quality alleges that Ford agreed with Prestige not to create another Lincoln dealership in the Minneapolis area without Prestige's consent. Quality, desirous of obtaining a dealership, asserts that this agreement is a violation of § 1, of the Sherman Act.

The DC granted Prestige's and Ford's motions to dismiss. CA8 reversed. The DC held that Quality had alleged nothing more than an exclusive dealership and concluded that the cases support such agreements. CA8 found the cases to support the view that it is legal for a franchiser to exercise his independent judgment as to the persons with whom he deals. Reading the complaint liberally, the court found an allegation of anti-competitive motive or effect. The court also relied on the allegation that the alleged veto power was to last in perpetuity.

It is difficult to square the court's view with the large number of case sustaining exclusive dealerships, but no _per se_ rule was applied here. Applying the rule of reason, the court found anti-competitive elements in the agreement. Ford argues that the decision was wrong but that the case is not certworthy at this early stage. I agree and will vote to deny.

No. 76-910 Edwin K. Williams & Co.--East v. Edwin K. Williams & Co., Inc

Resp developed a system of bookkeeping for service stations. The system included the sale of copyrighted books and forms, as well as bookkeeping services. After an earlier dispute between resp and petr, who was resp's regional representative in the eastern U.S., resp gave petr an exclusive license to sell the system in the states east of the Mississippi. In 1970 resp sued petr in Calif. state court for breach of the revised agreement. Petr removed to the DC for the CD Calif. and claimed that the revised agreement violated the Sherman Act and that resp's copyrights were invalid. The DC granted damages and declaratory and injunctive relief to resp. CA9 affirmed in relevant part.

One of petr's claims is that the relationship between itself and resp was essentially horizontal because they were potential competitors. Thus, the licensing agreement was really a cover for an illegal horizontal market division under United States v. Topco. Associates, 405 U.S. 596. CA9 rejected this argument finding that the contract was a valid (vertical) licensing agreement. It seems to me that this case involves both vertical and horizontal elements. Resp, as the producer of the materials and the owner of the rights, was in a vertical relationship with petr. But, as the distributor of the system in the western states, resp was in a horizontal, competitive relationship with petr. The analysis here is difficult, but I am not inclined to think that the case is certworthy. American Motor Inns, Inc. v. Holiday Inns, Inc, 521 F.2d 1230 (CA3 1975), on which petr relies, is distinguishable. That case involves an agreement whereby existing Holiday Inn franchises could block the extention of any new franchises in their areas. The DC there found a horizontal agreement among the franchisees of the type contemplated in Continental T.V., at 21, n. 28. In light of the unusual nature of this relationship and the absence of any square conflict, I will vote to deny.

Petr also claimed that, even if the relationship was vertical, the territorial allocation agreement violated the Schwinn per se rule. CA9 distinguished Schwinn on the ground that this case primarily involved services rather than goods. Since Schwinn has been overruled, there is no reason to address the validity of this distinction.

Finally, petr relied on the old case of Baker v. Selden, 101 U.S. 99, for the argument that resp's forms and books are not property subject to copyright. CA9 distinguished Baker on the ground that the books in the instant case contain instructional information. I do not consider this issue certworthy.

L.F.P.

L.F.P., Jr.

ss

2 copies -1c Mr Putzel 6/13/77

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
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join LFP 6/13/77	dissent typed draft 6/10/77	join LFP 6/1/77	might concur in the result 6/1/77	join WJB 6/16/77	join LFP 6/13/77	typed draft 5/31/77	out 6/1/77	join LFP 6/9/77
	1st draft 6/13/77		Typed draft 6/15/77			1st draft 6/9/77		
			1st draft 6/21/77			2nd draft 6/21/77		
			2nd draft 6/22/77					

76-15 Continental TV v. GTE Sylvania