the years 1905 through 1944— 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.166 Only four years after the Court in White Motor Co. v. United States167 expressly declined to hold vertical territorial and customer restrictions unlawful per se without examining their “actual impact . . . on competition,”168 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.”169

The hue and cry engendered by Schwinn was readily understandable. In striking down post-sale restrictions as necessarily violative of section 1,170 the Court did not simply abruptly end its short-lived search for “the economic and business stuff out of which these arrangements emerge”;171 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.172 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”173—the so-called “ancient rule

166. Universal Oil Products Co. v. Globe Refining Co., 322 U.S. 477, 484 (1944); United States v. Duhler Condenser Corp., 289 U.S. 178, 186-87 (1933); Becher v. Contoure Laboratories, 279 U.S. 388, 391 (1929); DaPont 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, 230-31 (1905).
169. Id. at 263.
170. Id. 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).
against restraints on alienation." 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. Moreover, since it is doubtful that an undeviating rule against such restraints ever existed, even at common law, 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, dominance and risk of loss, warranted application of the more flexible rule of reason. 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 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" into restrictions which destroy it.

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

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 486. 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 distri- bution 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.


179. Furthermore, as Justice Fortas emphasized, the application of the rule of reason to restrictions 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. 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 unacceptable results, judges have struggled to distinguish or limit Schwinn in ways that are a tribute to judicial ingenuity.

In *Tripoli Co. v. Wells Corp.*, 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,

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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), infra, 1974-1 Trade Cas. ¶ 75,312 (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), all's a 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. Koraytron Co., 1974-2 Trade Cas. ¶ 73,270, 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 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. 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"—the very antithesis, of course, of a per se rule. Consonant with its antipathy toward Schwinn, the same court has held that the termination of a distributorship for failure to restrict resale 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.

Other courts, including the Second, Sixth and Tenth Circuits, have devised an additional barrier to invoking Schwinn—proof that the restraint has been "firmly and resolutely" enforced. 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." [184]

185. 423 F.2d at 936.
188. A per se rule presumes the absence of lawful justification:
There are certain agreements or practices which become per se 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., 483 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.
While it is true that the Schwinn company enforced its restrictions, and that Justice Fortas' opinion mentions that fact, 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. 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.

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. 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,"

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—it is small wonder that the courts have refused to extend Schwinn enforcement 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.

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.
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. The per se approach has also been rejected where territorial or customer restrictions occur in connection with the franchising of services or the licensing of trademarks and copyrights, since there is no initial sale of goods to which a resale restraint can attach. Indeed, 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.

Given the growing resistance on the part of the courts to give Schwinn a “rigid and procrustean” reading, the opinion of a sharply divided Ninth Circuit this year in GTE Sylvania Inc. v. Continental T-V Inc.

restrictions, and that the remittance has never been applied literally. Thus, the Tenth Supreme Court to rule applicable to buy the products of the state’s particular brand. A valid rule 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. The per se approach has also been rejected where territorial or customer restrictions occur in connection with the franchising of services or the licensing of trademarks and copyrights, 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.

Given the growing resistance on the part of the courts to give Schwinn a “rigid and procrustean” reading, the opinion of a sharply divided Ninth Circuit this year in GTE Sylvania Inc. v. Continental T-V Inc.
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 Fortas had elevated the "ancient rule" against restraints on alienation to the status of an antitrust precept.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{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 prescription 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 10, 1974.

\textsuperscript{208} 1974-1 Trade Cas. at 98,793.
strict the store locations from which its dealers could resell without running afoul of the Sherman Act.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,"\textsuperscript{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 to those locations as authorized Sylvania dealers.\textsuperscript{212}

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.\textsuperscript{214}

\textsuperscript{209} Id. Although Justice Clark did not participate in Schwinn, his dicta on territorial restrictions was recorded in his White Motor dissent. 372 U.S. at 279-80; note 177 supra.

\textsuperscript{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).

\textsuperscript{211} See note 207 supra.

\textsuperscript{212} 1974-1 Trade Cas. at 96,794.

\textsuperscript{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., 42 F.2d 418 (D.C. Cir.), cert. denid, 355 U.S. 822 (1937); Beckman v. Walter Kidde & Co., 316 F. Supp. 1321 (E.D.N.Y. 1970), aff'd per curiam, 451 F.2d 599 (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); Schwinn Motor Co. v. Hudson Sales Corp., 316 F. Supp. 899 (D. Me.), aff'd per curiam, 451 F.2d 736 (1st Cir. 1971), cert. denied, 388 U.S. 922 (1972).

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.

\textsuperscript{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 appears "[d]istinguished" obviously:

... allowing a franchised dealer to sell to non-franchised retailer has a far different effect upon the franchisee 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. Indeed, in *White Motor* Justice Brennan suggested that these clauses presented a "less

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 retains 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).

preordained by the recognition of interbrand competition among sellers of the same brand is far outweighed by the more 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 outlawed likewise strengthen interbrand at the expense of intrabrand competition. If I am correct that sound antitrust policy militates in favor of local


217. Not only does the Schwinn decree permit the company to maintain, create, or allocate 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. 566 (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 81,758 (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 the pass-over fee illegal per se in concept or operation,” upheld the validity of a 7% 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, notwithstanding 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).
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 intra-brand 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 offers 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-
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tionable, when such adherence involves collision with a prior doctrine
more embracing in its scope, intrinsically sounder, and verified by

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

Resps., a mfr. of TV sets, used Schwinns' langs. franchised dealers but limited the locations at which the 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. Resps. were a minor factor (1 to 2%) in TV market & wished to improve its functions by this plan.

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

* 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 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 accomplishing the same effect as the restriction of sales to customer's in 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 intrabrand 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
CONTINENTAL T.V., INC., ET AL., Petitioners

VS.

GTE SYLVANIA INCORPORATED

7/8/76 - Cert.

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Relisted for Breyer (also I will dissent from denial of cert. unless this vote can be changed).
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

I have talked to Potter and he will reconsider. Please let me know what you have with Schwinn problem - either to clarify or reverse.
CONTINENTAL T.V., INC.

vs.

GTE SYLVANIA, INC.

RELIST for J. White

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