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,

Mr. Justice Powell

Copies to Conference
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,

Mr. Justice Powell

Copies to the Conference
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,

Mr. Justice Powell

Copies to the Conference
June 9, 1977

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

Dear Lewis:

Please join me,

Respectfully,

[Signature]

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 typewritten circulation of May 31.

Sincerely,

Enclosure

LFP/1ab
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,

[Signature]

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

Dear Lewis:

Please join me.

Sincerely,

[Signature]

Mr. Justice Powell

cc: The Conference
June 13, 1977

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

Dear Lewis:

I join.

Regards,

Mr. Justice Powell

Copies to the Conference
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.
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.*

III

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

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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 franchise 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."
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-

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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
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
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; Pomer, 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 com-
ment in Schuinn 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
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. Signifi-
cantly, 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 consideration 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 \( \text{post} \) endorses Judge Browning's interpretation, \( \text{at} \), the opinion then proceeds to distinguish Schwinn on grounds inconsistent with that interpretation, \( \text{post} \), at \( \text{at} \).
Respondent 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 Sylvania products only from the location at which it 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 Schwinn, 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 distinction exists, we have reexamined the decision in Schwinn and conclude it should be overruled.

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

Accordingly, 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.

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