The Facial Unreasonableness Theory: Filling the Void Between Per Se and Rule of Reason

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NOTE

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INTRODUCTION

To curb the unchecked restraints which trusts and monopolies imposed upon the free enterprise system, Congress enacted the Sherman Antitrust Act in 1890.1 Section 1 of the Act provides that "[e]very contract, combination, . . . or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal."2 Although this section’s general intent to promote free enterprise is clear,3 the legislative history surrounding its enactment does not define explicitly the bounds of the statute’s proscriptions.4 Thus, to confine the all-encompassing language of section 1,

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2 15 U.S.C. § 1 (1976). Section 1 of the Act provides that violations shall carry criminal sanctions and be punishable by fine. Id. Equitable relief also may be granted in appropriate circumstances. Id. § 4; see R. POSNER, ANTITRUST LAW AN ECONOMIC PERSPECTIVE 31-32 (1976). See generally 1 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 2.02 [2] (1980) [hereinafter cited as VON KALINOWSKI].

3 See American Column & Lumber Co. v. United States, 257 U.S. 377, 400 (1921) (purpose of the Sherman Act is to maintain free competition); Eastern States Retail Lumber Dealers’ Ass’n v. United States, 234 U.S. 600, 609 (1914) (Act condemns combinations and conspiracies obstructing “the free and natural flow of trade”); United States v. Union Pac. Ry., 226 U.S. 61, 87 (1912) (statute intended to preserve “free action of competition in interstate commerce’’); Northern Sec. Co. v. United States, 193 U.S. 197, 337 (1904) (Act designed to forbid destruction or restriction of free competition). In enacting the statute, “Congress’ purpose was to restore, so far as possible, an economic climate in which natural market forces could freely operate unrestricted by artificial or monopolistic restraints imposed by the large and powerful business organizations of the period.” 1 E. KINTNER, supra note 1, § 4.18, at 239; see 21 CONG. REC. 2558 (1890)(remarks of Sen. Pugh).

4 See Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 & n.10 (1940); Letwin, Congress and the Sherman Antitrust Law: 1887-1890, 23 U. CHI. L. REV. 221, 253 (1956). Despite the existence of extensive congressional debate, see 1 E. KINTNER, supra note 1, §§ 4.1-4.18, at
the courts began to approve reasonable restraints of trade. When examined under this "rule of reason," however, certain practices consistently were found to be unlawful. In time, the judiciary condemned these restraints without engaging in the complicated and burdensome rule of reason analysis, reasoning that such practices were inherently anticompetitive. This "per se" characterization eventually became unpopular, however, when the courts recognized that certain restrictions on trade, which appeared to be familiar prohibited conduct, actually enhanced competition.

Neither the burdensome rule of reason nor the sweeping per se rule, therefore, has been a totally satisfactory means of dealing with restraints of trade under section 1 of the Sherman Act. This is particularly true regarding the intricate nuances of novel commercial practices. This Note initially will examine the development of the rule of reason and the per se approach by focusing upon the Supreme Court cases which have molded these analytical theories. This will be followed by an analysis of the middle tier standard suggested by the Fifth Circuit as a means to bridge the

125-242, section 1's legislative history does not provide clear insight into the intended scope of the Act. Id.

See, e.g., United States v. American Tobacco Co., 221 U.S. 106, 178-79 (1911); Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911); notes 51-63 and accompanying text infra.

See Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940); notes 70-77 and accompanying text infra.


See United States v. Realty Mutli-List, Inc., 629 F.2d 1351, 1374-75 (5th Cir. 1980);
gap between these two traditional approaches. The Note will conclude that this intermediate "facial unreasonableness" theory presents a logical and practical response to the problems created by traditional section 1 Sherman Act analyses.

THE DEVELOPMENT OF THE RULE OF REASON

Characterized by laissez-faire economics, the latter part of the nineteenth century was an era in which the federal government's reluctance to interfere with business enabled industries to expand at a rapid pace. The absence of governmental regulation, however, permitted strong commercial forces to engage in trade practices which weakened the competitive position of smaller enterprises. Small entrepreneurs, wishing to avoid what they perceived to be impending financial ruin, began to combine or consolidate their businesses with those of their competitors. Because this
trend toward conglomeration threatened to vest a relatively small segment of society with most of the nation's wealth, Congress enacted the Sherman Antitrust Act.\textsuperscript{17}

Although the Act's legislative history bespeaks no specific social policy,\textsuperscript{18} it is clear that the objective of the statute is to benefit the consumer by promoting competition.\textsuperscript{19} Indeed, Senator Sherman, the sponsor of the original bill,\textsuperscript{20} stated that “[t]he law of selfishness uncontrolled by competition” permitted monopolists to

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\textsuperscript{17}See United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 536 (1944); United States v. Aluminum Co. of America, 148 F.2d 416, 428 (2d Cir. 1946); 1 H. Toulmin, Jr., \textit{Toulin's Antitrust Laws} §§ 4.7-4.8, at 107-12 (1949); C. Beard & M. Beard, supra note 13, at 291-93. See generally \textit{Standard Oil Co.} v. United States, 221 U.S. 1, 32-48 (1911).

\textsuperscript{18}See note 1 and accompanying text supra. Notwithstanding the popularity of trusts as a means of consolidating and managing large enterprises, a fear of plutocracy pervaded this period of economic expansion. \textit{Von Kalinowski}, supra note 2, § 2.02[2]. By eliminating small competitors and defrauding consumers, trust proponents exposed themselves to widespread public criticism. Indeed, citizens felt that trusts had used their power “to oppress individuals and injure the public generally.” \textit{Standard Oil Co.} v. United States, 221 U.S. 1, 50 (1911). Additionally, a series of economic depressions heightened the discontent of the American public. \textit{Von Kalinowski}, supra note 2, § 2.02[3][a]. Consequently, public sentiment was ripe for the passage of the Sherman Act. See Letwin, supra note 4, at 225.

\textsuperscript{19}See note 3 supra. The Supreme Court stated that “[t]he purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, [and] to afford protection from the subversive or coercive influences of monopolistic endeavor.” \textit{Appalachian Coals}, Inc. v. United States, 288 U.S. 344, 359 (1933). Indeed, an earlier Court injected its philosophy of competition into the Sherman Act. Justice Peckham emphasized that “[c]ompetition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life.” \textit{United States v. Trans-Missouri Freight Ass'n}, 166 U.S. 290, 337 (1897); \textit{see}, e.g., \textit{United States v. Colgate & Co.}, 250 U.S. 300, 307 (1919); \textit{United States v. Joint Traffic Ass'n}, 171 U.S. 505, 577 (1898).

\textsuperscript{20}Senator John Sherman, a prominent Republican from Ohio, led the movement for antitrust legislation in Congress. \textit{Von Kalinowski}, supra note 2, § 2.02[4][a]. \textit{But see} \textit{Yankwich, Competition, Real or Soft?}, 14 F.R.D. 199, 202 (1954).
oppress the public through the unbridled pursuit of profits. The application of this theme to antitrust law, however, was left to judicial construction.

The first significant judicial attempt to define the broad scope of the Sherman Act was made by Justice Peckham in *United States v. Trans-Missouri Freight Association,* a case involving an organization of eighteen railroad companies (the Association), which agreed to adhere to certain rates, rules, and regulations for the carriage of freight. Responding to the government's contention that this arrangement constituted an unlawful restraint of trade, the defendants argued that the uniform rate structure was necessary to avoid severe price wars which would be ruinous to those in the industry. The defendants asserted that despite the

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21 A. WALKER, HISTORY OF THE SHERMAN LAW 13 (1910). Senator Sherman vigorously condemned the trusts and their effects on the lives of consumers:

> These trusts and combinations are great wrongs to the people. . . . They operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business, and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy, and increase the price of what they sell. They aggregate to themselves great enormous wealth by extortion, which makes the people poor. Then making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States, they pursue unmolested, unrestrained by law, their ceaseless round of peculation under the law, till they are fast producing that condition of our people in which the great mass of them are servitors of those which have this aggregated wealth at their command.

*Id.* at 14-15 (quoting 21 *CONG. REC.* 2456 (1890)). See generally W. BALDWIN, supra note 12, at 25-32.

22 See L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 14 (1977). The broad language of the Act was intended to appease various factions within Congress, see von KALINOWSKI, supra note 2, § 2.02[4][b], and "has a generality and adaptability comparable to that found to be desirable in constitutional provisions." Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933). Additionally, judicial interpretation of the Act has been derived not only from the words of the statute, but occasionally "by a resort to the history of the times when it was passed." *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 318-19 (1897).

As a result of judicial construction, several standards by which to judge the lawfulness of a restraint evolved. These gauges of legality included a "literalist" interpretation, *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 342 (1897), a direct and immediate effect test, *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 588 (1898), an ancillary restraints standard, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899), and the rule of reason, *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911). See generally 1 E. KINTNER, supra note 1, § 8.1, at 340-50 (1980);

Bork, supra note 18, at 796-805.

23 166 U.S. 290 (1897).

24 *Id.* at 310.

25 *Id.*

26 *Id.* at 310-11.
Act's broad language, the reasonableness standard which had prevailed at common law should be deemed carried forward into the Sherman Act.\textsuperscript{27} Thus, since the agreement did not constitute an unreasonable restraint, it was contended that the Association did not contravene the Act.\textsuperscript{28} Rejecting this argument, the Court held that the statute should be applied literally so as to encompass all contracts which restrained trade.\textsuperscript{29} To engraft upon the Sherman Act a reasonableness standard, the Court stated, would improperly impose an onerous burden upon the courts,\textsuperscript{30} and ultimately harm the public because private plaintiffs would be discouraged by the burden of establishing that a restraint lacks reasonableness.\textsuperscript{31} Justice White, joined by three other justices, vigorously dis-

\textsuperscript{27} Id. at 327-28. In the late nineteenth century, English courts embraced a common-law rule of reason analysis for determining the legality of a restraint of trade. Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., [1894] A.C. 535, 565. The general rule was that “restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void.” Id. Nevertheless, courts did not condemn automatically all restraints: It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests . . . of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.

Id.; accord, Horner v. Graves, 131 Eng. Rep. 284, 287 (P.C. 1831). This common-law standard of reasonableness was adopted by pre-Sherman Act American courts. See, e.g., Gibbs v. Consolidated Gas Co., 130 U.S. 396, 409 (1889); Diamond Match Co. v. Roeber, 106 N.Y. 473, 482, 13 N.E. 419, 421 (1887). As applied, the rule commanded that a contract be enforced if “under the particular circumstances of the case and the nature of the particular contract involved in it, the contract . . . is not . . . unreasonable.” 130 U.S. at 409. The question of reasonableness often arose in connection with the purchase of a business or industry. The courts indicated that a restraint would be considered reasonable if the restraint “imposed is no greater than is essential to the protection of the obligee in the enjoyment of the business or industry or practice purchased.” 2 A. Eddy, supra note 13, § 787, at 856; see, e.g., Fowle v. Park, 131 U.S. 88, 97 (1889); Long v. Towl, 42 Mo. 545, 549 (1868); Ellerman v. Chicago Junction Rys. & Union Stockyards Co., 49 N.J. Eq. 217, 256-57, 23 A. 287, 300-01 (1891). See generally United States v. Addyston Pipe & Steel Co., 85 F. 271, 280-93 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).

\textsuperscript{28} United States v. Trans-Missouri Freight Ass'n, 166 U.S. at 290, 327 (1897).

\textsuperscript{29} Id. at 328. The Trans-Missouri Court acknowledged that some contracts having a pernicious effect on trade were recognized as valid at common law. Id. Nevertheless, the Court believed, “[w]hen . . . the body of an act pronounces as illegal every contract or combination in restraint of trade . . . the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade . . . .” Id.

\textsuperscript{30} Id.

\textsuperscript{31} Id. at 331-32. The Court recognized that it would be “exceedingly difficult” to develop guidelines in determining reasonable restraints. Id. at 332.

\textsuperscript{32} Id. at 332-33.
sent, urging that the court's failure to apply the common-law standard of reasonableness would result in the destruction of "both the freedom of contract and trade itself." Indeed, the dissent reasoned, since the plain intention of the law was to foster the development of free trade, contracts not unreasonably restraining commerce must fall outside the proscriptions of the Sherman Act.

Two years later, in *United States v. Joint Traffic Association*, the Court considered whether the construction of the Act enunciated in the factually similar *Trans-Missouri Freight* case was constitutionally infirm because it rendered illegal all trade restraints regardless of their reasonableness. The *Joint Traffic Association* defendants asserted that such an interpretation of the Sherman Act would abridge the right to engage in contract, implicit in the fifth amendment. A closely divided Court, speaking again through Justice Peckham, stated that *Trans-Missouri Freight* did not outlaw all contractual trade restraints. The Court held that restraints having a legitimate purpose and only an indirect restraining effect on interstate commerce are not within the proscription of the Act. The Court noted, however, that the *Joint Traffic Association* agreement, substantially identical to the agreement struck down in *Trans-Missouri Freight*, had a direct anticompetitive effect on interstate commerce, and thus, contravened the Sherman Act.

Although *Joint Traffic Association* apparently evinced the Court's willingness to restrict the broad, literal interpretation of

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33 The dissenting members of the *Trans-Missouri* Court included Justices White, Field, Gray, and Shiras. *Id.* at 343.
34 *Id.* at 351.
35 *Id.*
36 171 U.S. 505 (1898).
37 *Id.* at 559. Attempting to distinguish *Trans-Missouri*, the members of the Association asserted that the board of directors of any of the Joint Traffic companies could adopt a resolution providing for a change of rates for that particular company. *Id.* at 562-63. Conversely, in *Trans-Missouri*, no such procedure was established. The Court, however, rejected this distinction noting that the Board of Managers of the Association undoubtedly had the power to enforce uniform rates or else the defecting company would face a "relentless war of competition." *Id.* at 563.
38 *Id.* at 566-67.
39 *Id.*
40 *Id.* at 568.
41 *Id.*
section 1, the adoption of a reasonableness standard would not occur until 13 years later. Indeed, it was not until 1911, in Standard Oil Co. v. United States that the common-law standard of reasonableness was held to be implicitly preserved in the Sherman Act. In this case, the Supreme Court was faced with a challenge to the legality of the giant trust headed by Standard Oil. The government alleged that the defendants had conspired to restrain trade and to monopolize the oil industry by obtaining interests in many business entities "engaged in purchasing, transporting, refining, shipping, and selling" petroleum products. The defendants, however, argued that they had attained their dominant status in the industry through "lawful competitive methods, guided by economic genius of the highest order, sustained by courage, [and] by a keen insight into commercial situations." Notwithstanding that the defense did not succeed in earlier cases, the defendants raised the reasonableness of the challenged restraint, urging that by virtue of their positions in the industry they were able to benefit the public through increased production and lower prices.

Unlike the Trans-Missouri Freight and Joint Traffic Association cases, Standard Oil embraced the reasonableness standard as...
a means of assessing the legality of the challenged practice. Writing for the majority, Justice White, author of the dissenting opinion in *Trans-Missouri Freight* and now Chief Justice, stated that only those restraints which unduly inhibited interstate commerce were intended to be prohibited by the Act. The Court reasoned that the antitrust statute, drafted at a time when many new types of commercial combinations were evolving, purposely was written in broad language to ensure that novel restraints would not escape sanction. Because the statute was not intended to apply to reasonable trade restraints, however, the Court found it necessary to enunciate a standard by which the validity of a given restraint could be judged. The test contemplated by the Act, according to the Court, was the standard of reason, the same standard which had been applied at common law.

Chief Justice White explained that neither *Trans-Missouri Freight* nor *Joint Traffic Association* precluded adoption of this "rule of reason" standard. Conceding that those cases did not expressly mandate that challenged practices had to be judged by the rule of reason, he emphasized that reasonableness was an implicit factor in those decisions. Indeed, the Court stated that although *Joint Traffic Association* used a "direct or indirect effects" test, the same result would have been reached if the rule of reason were employed. Moreover, Chief Justice White noted that the rule of reason had been applied in every previous case to determine whether the particular practice was within the ambit of the Act.

Although the Court agreed that only unreasonable trade restraints offended the Act, it concluded that the practices involved in *Standard Oil* exceeded the bounds of reasonableness. Chief Justice White noted that these practices gave the Standard Oil corporation "an enlarged and more perfect sway and control over the trade and commerce in petroleum and its products" which re-

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51 Id. at 60.
52 Id.
53 Id. at 59-60.
54 Id. at 60.
55 Id.; see note 27 and accompanying text supra.
56 221 U.S. at 64-65.
57 Id. at 65-66.
58 Id.
59 Id. at 65.
60 See id. at 73-74.
resulted in the destruction of potential competition.\textsuperscript{61} In addition, the Court found that the defendants' centralization and domination of the petroleum industry through novel methods of combination\textsuperscript{62} revealed an illegal purpose and intent "so certain as practically to cause the subject not to be within the domain of reasonable contention."\textsuperscript{63}

Notwithstanding that the rule of reason proved to be a viable standard by which the legality of a challenged practice could be measured,\textsuperscript{64} it greatly expanded the inquiry required to be undertaken by the judiciary in antitrust cases. Analyzing a potential violation under the rule of reason approach required courts to inquire, \textit{inter alia}, into the nature and history of the restraint, and, most importantly, into its effect on competition.\textsuperscript{65} The individualized in-
quiry required under this standard resulted in judicial acceptance of competitively beneficial practices which would not have survived under the literalist approach of Trans-Missouri Freight. Conversely, certain categories of restraints consistently were found to lack redeeming competitive benefits when subjected to analysis under the rule of reason. Thus, rather than continuing to engage in the judicially burdensome rule of reason inquiry, courts began to categorize such restraints as per se or presumptively unreasonable, obviating the necessity of an in-depth analysis.

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68 See Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 19 n.33 (1979); Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); In re Japanese Electronic Prods., 631 F.2d 1069 (3d Cir. 1980). The Japanese Electronic case illustrates the burdens faced by courts in antitrust litigation. In this case the National Union Electronic Corporation charged that Japanese companies were driving American television manufacturers out of the market by selling products at “artifically depressed prices.” Id. at 1071-72. This conspiracy allegedly involved 100 firms across the globe and was over 30 years old. Id. at 1074. After 9 years of pretrial discovery, millions of documents were produced and the transcripts of depositions amounted to more than 100,000 pages. Id. at 1073. In 1980 alone, over 100 briefs were filed, containing in excess of 7500 pages. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1118 n.2 (E.D. Pa. 1981).

The complexities of antitrust cases have been well documented. See generally Report to the President of the National Commission for the Review of Antitrust Laws and Procedures (January 22, 1979) [hereinafter cited as Report of the National Commission]. The Supreme Court has suggested that courts are “ill-equipped and ill-situated” for the decisionmaking processes involved in these cases. United States v. Topco Assocs., 405 U.S. 596, 611 (1972). Indeed, the Court has recognized that it is beyond the capabilities of the judiciary “[t]o analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy.” Id. at 611-12; see Ponzer, Information and Antitrust: Reflections on the Gypsum and Engineers Decisions, 67 Geo. L.J. 1187, 1191 (1979).

69 See Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). The per se analysis allows businessmen to predict which practices are categorically illegal. Thus, such activity will be deterred before its inception. Bauer, Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination, 79 Colum. L. Rev. 685, 694-95 (1979). The per se rule also offers administrative time savings because the questioned conduct is not subject to an in-depth economic and circumstantial investigation by the court. Id.; Redlich, The Burger Court and the Per Se Rule, 44 Ala. L. Rev. 1, 4-5 (1979); see United States v. Topco Assocs., Inc., 405 U.S. 596, 609-10 n.10 (1972); Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). Conversely, the major disadvantage of the per se approach is that any procompetitive aspects of the unlawful agreement are not considered. Bauer, supra, at 695; Redlich, supra, at 5.
The first practice to be found unreasonable per se was horizontal price fixing.\(^{70}\) In *United States v. Socony-Vacuum Oil Co.*,\(^{71}\) major oil companies operating in the midwest bought large quantities of gasoline which small refiners sold at low prices on the spot market because of a lack of storage capacity.\(^{72}\) Past experience indicated that the presence of such "distress" gasoline had a depressing effect on gasoline prices.\(^{73}\) The defendants attempted to stabilize the market by purchasing the distress supplies at higher prevailing market prices.\(^{74}\) Because this effectively placed an artificial floor on gasoline prices, the United States brought suit.\(^{75}\) In response to the government's charge that the purchasing scheme constituted a violation of section 1, the defendants argued that because the practice contributed to the elimination of competitive abuses, it was not an unreasonable restraint of trade.\(^{76}\) Rejecting this attempt to find shelter under the rule of reason, the Court stated that regardless of attempted justifications, "[u]nder the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."\(^{77}\)

The scope of the per se rule was defined more precisely in *Northern Pacific Railway v. United States*.\(^{78}\) The Northern Pacific Railroad had been granted land by the federal government to lay tracks and develop the peripheral property.\(^{79}\) When the railroad subsequently conveyed the land, it inserted "preferential routing"
clauses into the sales contracts and leases. These provisions required the lessee or grantee to use the Northern Pacific when shipping any goods produced on the land if the rates charged were the same as those of competing railroads. Characterizing this practice as a classic tying arrangement, the Court noted that since the railroad had "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product," analysis under the rule of reason was inappropriate. Under the per se rule, the Court explained, those trade practices having a "pernicious effect on competition and lack[ing] 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."

Another type of restraint found to be per se unreasonable was the horizontal division of markets. In United States v. Topco Associates, Inc., a cooperative association comprised of regional independent grocery chains functioned as a purchasing agent for its members, allowing them to acquire and sell high quality private label products at prices which were competitive with those of the

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80 Id. at 3.
81 Id.
82 A tying arrangement may take one of two forms. First, such an arrangement is said to exist where the sale of one product is conditioned upon the purchase of another—the tied product. Second, a tying arrangement will be found where a buyer agrees not to purchase the tied product from any other supplier. Id. at 5-6; 2 E. Kintner, supra note 1, § 10.52, at 223; von Kalinowski, supra note 2, § 6.02[3][c]. Since access to the tied product is obstructed and freedom to choose comparable products is unduly inhibited, tying arrangements are not favored. Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958). Under the rule of reason, however, tying arrangements have been found to be acceptable when they serve to protect the goodwill of a business, help to nurture a developing industry, or allay consumer discontent over separate sales of certain products. von Kalinowski, supra note 2, § 6.02[3][c].
84 Id. at 8.
85 Id. at 5.
86 Horizontal market restrictions are characterized by an "agreement among competitors which has the effect of eliminating competition in markets where, absent the agreement, '[they] might otherwise compete.'" 2 E. Kintner, supra note 1, § 10.42, at 189 (quoting United States v. Topco Assoc., 319 F. Supp. 1031, 1041 (N.D. Ill. 1970), rev'd on other grounds, 405 U.S. 596 (1972)). An unlawful division of markets is established where the parties collaborate, operate on the same level of manufacturing or distribution, deal in the same type of product, and eliminate competition among themselves. Id. Covenants not to compete, however, generally are excepted from this category. von Kalinowski, supra note 2, § 6.02[2][d] n.37.
87 405 U.S. 596 (1972).
88 Id. at 598.
larger national chains. As a condition to admission, however, members were required to agree to sell Topco products only within those territories in which the Association granted them a license. Although three types of licenses, exclusive, nonexclusive and co-extensive, were granted, the majority of licenses issued were exclusive or "de facto exclusive," thus "insulat[ing] members from competition in Topco-brand goods."

The government charged that the division of territories eliminated intrabrand competition in Topco goods at the retail level. Topco responded, however, that the territorial restrictions increased interbrand competition by allowing members to compete successfully with national retailers. Moreover, the Association urged that "without exclusivity, a private label would not be private." The Supreme Court, however, held that the Topco agreement was a naked restraint of trade and thus per se illegal. The Court noted that good intentions and alleged motives to increase competition are irrelevant under the per se analysis.

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89 Id. The Association purchased food and nonfood items and resold them to its members under its own brand names. Id. Although Topco did not manufacture or process the items it procured, it shipped the goods directly to the members. Id. The sales of high quality merchandise under private labels provided the members of the Association with many competitive advantages. Id. at 599 & n.3.

90 Id. at 601.

91 The exclusive territorial license allowed a member "to sell all products bearing specified trademarks of the Association, to the exclusion of all other persons." Id.

92 The nonexclusive territorial license permitted a member to sell the Association's products along with those also licensed to sell Topco brands in the same geographical area. Id.

93 Coextensive territorial licenses enabled two or more members of the Association "to sell all products bearing specified trademarks of the Association to the exclusion of all other persons." Id. at 601-02.

94 Id. at 602. Topco's licensing system proved to operate as "de facto" exclusive regardless of the actual license distributed. Id. This resulted from a clause in the agreement which provided that a membership could be terminated if the member sold its goods in an area outside of its license. Id.

95 Id.

96 Id. at 603.

97 Id. at 605. Intrabrand competition exists between wholesale or retail distributors of a particular manufacturer's product. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52 n.19 (1977). Conversely, interbrand competition exists "among the manufacturers of the same generic product . . . and is the primary concern of antitrust law." Id. Interbrand competition "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." Id.


99 Id. at 608.

100 Id. at 610.
A fourth category of restraint that traditionally has been deemed per se unreasonable is the group boycott or concerted refusal to deal.\textsuperscript{101} Although the Supreme Court had suggested in early cases that such restraints are presumptively unreasonable,\textsuperscript{102} it was not until relatively recently that the Court unequivocally brought the group boycott within the per se umbrella. In \textit{Klor's, Inc. v. Broadway-Hale Stores, Inc.},\textsuperscript{103} the plaintiff operated a small retail appliance store next to a Broadway-Hale department store.\textsuperscript{104} It was uncontroverted that Broadway-Hale conspired with appliance manufacturers and distributors to prevent sales to the plaintiff.\textsuperscript{105} The defendant conspirators maintained, however, that this conduct was outside the scope of the Sherman Act.\textsuperscript{106} They argued that the existence of numerous other appliance retailers in the area, all of whom were unaffected by the conspiracy, compelled the conclusion that the practice lacked the requisite anticompetitive effect and concomitant public harm.\textsuperscript{107} Rejecting this attempt to demonstrate that the practice was reasonable, the Court stated that group boycotts have long been included in that category of restraints to which the rule of reason has been inapplicable.\textsuperscript{108} The Court concluded that “[the group boycott] is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.”\textsuperscript{109}

In \textit{United States v. Arnold, Schwinn & Co.},\textsuperscript{110} the Supreme Court applied the per se analysis to certain vertical territorial re-

\textsuperscript{101} Group boycotts consist of “group action to coerce outside parties, whatever its purpose.” \textit{Section of Antitrust Law of the American Bar Association, Antitrust Law Developments} 17 (1975) [hereinafter cited as \textit{Antitrust Developments}]. A refusal to deal by one person does not amount to an illegal restraint because of the absence of concerted action. \textit{Von Kalinowski}, supra note 2, § 6.02[2][c] & n.34; see \textit{Antitrust Developments}, supra, at 16. Hostility towards the group boycott exists because “their only perceptible function is to coerce parties who are not members of the group to follow a prescribed course of action.” \textit{Von Kalinowski}, supra note 2, § 6.02[3][d].


\textsuperscript{103} 359 U.S. 207 (1959).

\textsuperscript{104} \textit{Id.} at 208.

\textsuperscript{105} \textit{Id.} at 209.

\textsuperscript{106} \textit{See id.}

\textsuperscript{107} \textit{Id.} at 209-10.

\textsuperscript{108} \textit{Id.} at 212.

\textsuperscript{109} \textit{Id.} at 213.

restrictions. In Schwinn, the defendant manufacturer sought to limit the geographical areas within which its distributors were permitted to conduct business. The Court held that when a distributor has purchased merchandise, obtaining dominion and control over the goods, any attempt by the manufacturer to limit the territory within which sales may be made or to restrict sales to certain retailers is a per se violation of section 1. The Court, however, was not willing to extend the per se approach to the situation where the distributor or wholesaler merely acts as a consignee or agent of the manufacturer in soliciting sales from retailers. Instead, the Court maintained that when the manufacturer retains title to the goods, the imposition of territorial limitations on resale must be examined under the rule of reason.

THE PER SE INQUIRY: Sylvania AND BMI

Although certain types of vertical territorial restrictions had been excluded from per se treatment in Schwinn, this limited approach was not well received by the lower courts. Indeed, the

111 Id. at 379. Vertical territorial restraints exist when a manufacturer prohibits his distributors from selling goods outside an allotted territory. Antitrust Developments, supra note 101, at 24; Von Kalinowski, supra note 2, § 6.02[3][e]. The validity of vertical market restraints was first raised in White Motor Co. v. United States, 372 U.S. 253 (1963). In White Motor Co., the Court acknowledged that its lack of experience with this type of competitive restraint prohibited it from deciding whether the restraint's impact on competition was pernicious and thus per se illegal. Id. at 261-63.

113 Schwinn manufactured and sold bicycles to franchised retailers through intermediate wholesalers and distributors. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 369 (1967). These distributors had the exclusive right to sell to franchised retailers within a specified area. Id. at 371. Neither the distributors nor the wholesalers were permitted to sell bicycles to nonfranchised retailers. Id.

The sale of Schwinn bicycles was carried out in two ways. Under the "Schwinn Plan," distributors were mere conduits, forwarding orders to retailers without obtaining title to or possession of the goods. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58 (1977); see 388 U.S. at 370. Under the second type of transaction, the distributors functioned as wholesalers, acquiring title to the bicycles and filling retail orders on demand. 433 U.S. at 43; see 388 U.S. at 370.

114 388 U.S. at 379.

115 Id. at 379-80.

116 Id. at 380.

outright condemnation of vertical territorial restrictions when title had passed to the buyer was criticized as harsh and inequitable. Attempting to circumvent the inherent injustices fostered by Schwinn, therefore, the courts began to rely heavily upon factual distinctions.\textsuperscript{119} In Tripoli Co. v. Wella Corp.\textsuperscript{120} for example, the Third Circuit, faced with an attempt to impose vertical territorial restrictions upon wholesalers, refused to apply the per se rule, reasoning that Schwinn should be restricted to "its factual context."\textsuperscript{121} The Schwinn case involved restrictions on sales to non-franchised retailers which were motivated solely by marketing and competitive considerations.\textsuperscript{122} The Tripoli case, however, dealt with a manufacturer's attempt to bar sales of professional products to consumers based upon product safety concerns.\textsuperscript{123} The court concluded, therefore, that the Tripoli restraints were "of a different order," and thus should have been judged under the rule of reason.\textsuperscript{124}

While some courts devised means to circumvent the constraints of the per se rule,\textsuperscript{125} other courts applied the analysis de-

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\textsuperscript{119} See notes 108-114 and accompanying text supra.
\textsuperscript{120} 425 F.2d 932 (2d Cir.)(en banc), cert. denied, 400 U.S. 831 (1970).
\textsuperscript{121} 425 F.2d at 932. In Tripoli, the court noted that Schwinn was not intended to establish "as a per se violation every attempt by a manufacturer to restrict the persons to whom a wholesaler may resell any product whatsoever [where title has been left to] the manufacturers." Id.
\textsuperscript{122} See notes 110-117 and accompanying text supra.
\textsuperscript{123} 425 F.2d at 937. Wella, a manufacturer of cosmetic products, sold these goods to Tripoli, a wholesale distributor of professional beauty care supplies. Id. at 934. Wella terminated its sales to Tripoli upon learning that it was selling goods to consumers which were intended for use by professionals. Id. Wella claimed that its action was justified because injuries to consumers could result from the sale of inadequately labeled professional products. Id. at 937.
\textsuperscript{124} Id. at 936. Applying the rule of reason, the court determined that the nature of the product was such that the restriction upon sale was reasonable. Misuse of Wella's products by nonprofessionals could cause serious harm, including blindness. Id. at 937. The court concluded that whether Wella's motive was to further the public interest or to protect itself from potential product liability, it "furnished a sufficient lawful main purpose, to which the restriction on resale of potentially dangerous products is reasonably ancillary." Id. at 938.


\textsuperscript{125} In Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637 (10th Cir.), cert. denied, 411 U.S. 987 (1973), the court artfully dodged the application of the Schwinn rule. In
spite a reluctance to do so.\textsuperscript{126} This hesitation to follow the \textit{Schwinn} decision stemmed from the realization that the mere existence of a vertical territorial restriction, coupled with the buyer's dominion over the goods, would require a finding of illegality even if the restraint clearly had been reasonable.\textsuperscript{127} Judicial dissatisfaction with the per se characterization of vertical territorial restrictions continued to mount,\textsuperscript{128} therefore, until the Supreme Court finally over-

this case, Febco, a manufacturer, entered into an agreement naming Thompson the exclusive distributor of its products in the Colorado area. 472 F.2d at 639. Consequently, Colorado Pump, another distributor, was barred from purchasing goods directly from Febco and was compelled to purchase these products from Thompson at a higher price. \textit{Id.} Colorado Pump brought suit, contending that the contract provisions were per se illegal under \textit{Schwinn} because the vertical territorial restraint restricted the sale of products after title had passed to the distributor. \textit{Id.} The court, however, distinguished \textit{Schwinn} on the ground that it involved a manufacturer who had been "firm and resolute" in its insistence that there be compliance with the imposed limitations. The contract between Febco and Thompson was different in character because it merely described "a primary marketing territory" and did not forbid sales by Thompson outside the territory. \textit{Id.} The court found that no violation of the Sherman Act existed. \textit{Id.} at 640-41.

\textsuperscript{126} See, e.g., Adolph Coors Co. v. FTC, 497 F.2d 1178 (10th Cir. 1974), \textit{cert. denied}, 419 U.S. 1109 (1975). In \textit{Coors}, a beer brewery sold and shipped beer to distributors upon whom specific resale territorial restrictions were imposed. 497 F.2d at 1182. Upon receipt of the beer, these distributors were obliged to ensure that retailers properly rotated and refrigerated the beer in accordance with the Coors requirements. \textit{Id.} Coors contended that the territorial restrictions were necessary to maintain the quality of the product. \textit{Id.} at 1182-83.

The Tenth Circuit followed the \textit{Schwinn} approach, finding Coors' territorial restrictions on resale per se illegal. \textit{Id.} at 1187. Although the court found that the brewery's relinquishment of dominion over the product compelled application of the per se rule, the court expressed dissatisfaction with the breadth of the \textit{Schwinn} approach. \textit{Id.} Indeed, the court noted that if the rule of reason had been applied, the manufacturer's territorial restrictions could have been justified. See \textit{id.} at 1187.

\textsuperscript{127} See \textit{id.}; notes 115-124 and accompanying text supra.

\textsuperscript{128} Dissatisfaction with the per se approach also was visible in cases dealing with group boycotts. In E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm. (CATM), 467 F.2d 178 (5th Cir. 1972), \textit{cert. denied}, 409 U.S. 1109 (1973), for example, the court refused to apply the per se rule. 467 F.2d at 186-87. McQuade was a wholesaler of vacation tour packages sold through retail travel agents and airlines. \textit{Id.} at 180. CATM was an organization composed of representatives of air carriers which published a listing of available tour programs. \textit{Id.} McQuade brought suit alleging, \textit{inter alia}, that CATM's refusal to list him on two separate occasions was a per se violation of the Sherman Act. \textit{Id.} at 182-83.

The Fifth Circuit stated that an analysis of the purpose and effect of the restraint is a prerequisite to a finding of per se illegality in the context of concerted refusals to deal. \textit{Id.} at 187. Such trade practices can be characterized as naked restraints of trade only when coercive or exclusionary conduct is present. \textit{Id.} Because McQuade neither alleged nor proved that CATM's actions were motivated by an intent to exclude him from the wholesale tour market, that he was treated in discriminatory fashion, or that CATM combined with other tour operators to deprive him of a place on the listing, the court did not feel that a naked restraint existed. \textit{Id.} at 187-88.
ruled *Schwinn* in *Continental T.V., Inc. v. GTE Sylvania, Inc.*<sup>129</sup>

The *Sylvania* case represents the first clear attempt by the Supreme Court to limit application of the per se rule. In *Sylvania*, the defendant television manufacturer used restrictive franchise agreements to limit the locations in which its products could be sold by retailers.<sup>130</sup> Although these agreements clearly were illegal under *Schwinn* because the manufacturer tried to exercise control over its products after title and risk of loss had passed to the buyer, the Supreme Court refused to hold such conduct presumptively violative of section 1 of the Act.<sup>131</sup> Rejecting the Ninth Circuit's attempt to distinguish *Schwinn,*<sup>132</sup> the Court reconsidered the applicability of the per se standard to vertical restraints.<sup>133</sup> Noting at the outset that the per se rule should apply only to "manifestly anticompetitive" conduct, the Court assessed the competitive effects of nonprice vertical restrictions.<sup>134</sup> Notwithstanding that such restrictions reduce intrabrand competition, the Court noted that they tend to increase interbrand competition.<sup>135</sup> Thus, because these practices do not have a "pernicious effect on competition,"<sup>136</sup> the Court declined to apply the per se label<sup>137</sup> and held


<sup>130</sup> *Id.* at 38. Sylvania's franchise agreements did not purport to grant exclusive sales territories. They did provide, however, that each franchise owner could sell Sylvania products only from his specific franchise location. *Id.* When Continental attempted to move its Sylvania merchandise to a new, nonfranchised location with the intention of conducting a retail business there, Sylvania terminated the franchise and filed suit. *Id.* at 39-40.

<sup>131</sup> *Id.* at 58-59.

<sup>132</sup> *Id.* at 45-47. Rejecting the trial court's imposition of per se liability, the Ninth Circuit distinguished *Schwinn* by focusing upon the "potential for competitive harm" created in each case. *Id.* at 41.

<sup>133</sup> *Id.* at 47-59. The Supreme Court rejected the Ninth Circuit's efforts to distinguish *Schwinn,* see note 132 *supra*, reasoning that there appeared to be no "principled basis" for differentiating the two cases. 433 U.S. at 46. The Court then noted that the "need for clarification of the law in this area" persuaded it to reevaluate *Schwinn.* *Id.* at 47.

<sup>134</sup> 433 U.S. at 50.

<sup>135</sup> *Id.* at 58.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 58-59. The Court noted that *Schwinn* 's "per se rule for sale transactions reflected the view that vertical restrictions are 'so obviously destructive' of intrabrand competition that their use would 'open the door to exclusivity of outlets.' " *Id.* at 52. Conversely, the continued application of the rule of reason to nonsale transactions "reflected the view that [vertical restrictions] have too great a potential for the promotion of interbrand competition to justify complete prohibition." *Id.* at 53. Reviewing the rationale underlying the *Schwinn* decision, the *Sylvania* Court was unable to find support for the sale-nonsale distinction. *Id.* at 54, 56. The Court concluded that the distinction drawn in *Schwinn* between sale and nonsale transactions is not sufficient to justify the application of the per se rule in one situation and the rule of reason in another. *Id.* at 57.
that the rule of reason is the proper standard by which the legality of vertical restraints is to be determined.\textsuperscript{138}

The Court again reevaluated its approach to allegations of per se illegality in Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,\textsuperscript{139} (BMI), a case involving a challenge to the blanket licensing of musical compositions.\textsuperscript{140} Alleging that such licenses constituted illegal price fixing, a prohibited tying arrangement, and a concerted refusal to deal, CBS instituted an action against the licensing entities.\textsuperscript{141} Reversing the Second Circuit's condemnation of the licensing agreement, the Supreme Court held that the alleged violation did not constitute a per se unreasonable restraint of trade.\textsuperscript{142} At the outset, the Court noted that not every practice literally falling within a traditional per se label such as "price fixing" merits automatic condemnation.\textsuperscript{143} The Court reasoned that it would be an overly broad and simplistic approach to condemn these practices without considering whether they are "'plainly anticompetitive' and very likely without 'redeeming virtue.'"\textsuperscript{144} Thus, the Court stated that the inquiry is whether the alleged restraint "facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead [whether it is] designed 'to increase economic efficiency and render markets more, rather than less, competitive.'"\textsuperscript{145} The Court determined that the blanket license involved in BMI met several vital needs of the industry because it facilitated the licensing of a large number of compositions quickly and with a minimum of administrative expense, provided a reliable method for collection and distribution of royalties, and furnished a monitoring system for the

\textsuperscript{138} Id. at 59.
\textsuperscript{139} 441 U.S. 1 (1979).
\textsuperscript{140} Under a "blanket licensing" system, certain organizations operate as clearinghouses for the licensing of copyrighted musical compositions. Id. at 5. Copyright owners grant to these clearinghouses, on a nonexclusive basis, the right to license their compositions for public performance. Id. In return, the organizations perform various functions for the composers, including the collection and distribution of royalties. Id. Authorizations from clearinghouses such as BMI almost always take the form of blanket licenses. These arrangements permit the licensees to use any and all compositions in the library of the organization for a fixed term. Id. Almost all television and radio broadcasters hold blanket licenses from clearinghouse organizations which charge them a fixed rate or a percentage of total dollar revenues. Id.
\textsuperscript{141} Id. at 6.
\textsuperscript{142} Id. at 7.
\textsuperscript{143} Id. at 9.
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 19-20.
FACIAL UNREASONABLENESS THEORY

4 Recognizing that the blanket licensing arrangement offered the important advantage of cost efficiency over individually negotiated agreements, the Court did not view it as a mere aggregation of separate licenses. Rather, the Court posited that the blanket license was a product unto itself. Thus, the Court reasoned that "a simple horizontal arrangement among competitors" did not exist notwithstanding that the price for the product was not determined by the competitive activity of the individual copyright owners. The Court concluded that it was apparent that the blanket license was not being used by persons in a competitive relationship to conceal price fixing. Having found that the blanket license was not a "naked restraint of trade" without redeeming competitive benefits, the Court declined to apply the per se rule, remanding instead for analysis under the rule of reason.

The thrust of the per se rule is to allow the courts "to make broad generalizations about the social utility of particular commercial practices." The BMI and Sylvania decisions indicate that while such judgments may sweep broadly, they must not be applied blindly. Indeed, these cases prohibit courts from routinely affixing the per se label to a practice merely because it can be characterized as a territorial restriction, horizontal price-fixing.

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146 Id. at 20.
147 Id. at 21-22.
148 Id.
149 Id. at 23.
150 Id. at 23-24.
151 Id. at 20, 24-25. The Supreme Court did not consider the blanket license a naked restraint of trade because it felt that the practice was an "acceptable mechanism" for the dissemination of copyrighted musical compositions. Id. at 24. Justice Stevens dissented, agreeing that the case should be decided under the rule of reason, but asserting that the blanket licenses should have been found unlawful under that standard. Id. at 25-26 (Stevens, J., dissenting). He reasoned that the licensing system was "patently discriminatory" because prices were based upon a percentage of the advertising revenues of the buyer rather than on the quantity or quality of the music used. Id. at 30-31 (Stevens, J., dissenting). One commentator has noted that Justice Stevens was applying a truncated rule of reason analysis which compares the pricing policies of the questioned practice to a perfectly competitive market and demands a satisfactory explanation from the defendant if he wishes to escape liability. See Sullivan & Wiley, supra note 8, at 324.
153 See Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc., 572 F.2d 883, 885 (1st Cir.), cert. denied, 439 U.S. 833 (1978). In Eastern Scientific, the plaintiff contended that its supplier refused to permit sales of its products outside of Rhode Island at less than the retail price. 572 F.2d at 884. The district court found that this was a per se violation of the Sherman Act, id.; see United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967),
agreement,\textsuperscript{144} group boycott,\textsuperscript{145} or tying arrangement.\textsuperscript{146} Rather, to

but a few days after this decision, the Supreme Court issued its \textit{Sylvania} opinion. 572 F.2d at 884. On appeal, therefore, the First Circuit felt bound by the Supreme Court's mandate that "departure[s] from the rule of reason standard must be based upon demonstrable economic effect rather than . . . formalistic line drawing." \textit{Id.} at 885 (quoting Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 57 (1977)). Eastern contended that although the rule could no longer be applied to mere territorial restrictions, resale price restrictions were still per se illegal. 572 F.2d at 885. The First Circuit reasoned, however, that under \textit{Sylvania}, the pro and anticompetitive effects of a given restraint had to be balanced. \textit{Id.} The court noted that resale price restrictions could not "have a greater anti-competitive effect than a pure policy of territorial restrictions." \textit{Id.} Thus, the court concluded, since pure territorial restrictions are analyzed under the rule of reason, there was "no reason . . . why a similar but less anti-competitive scheme should be treated differently." \textit{Id.} at 886.

\textsuperscript{144} See Arizona v. Maricopa County Medical Soc'y, 643 F.2d 553, 557 & n.4 (9th Cir. 1980), cert. granted, 49 U.S.L.W. 3663 (U.S. Mar. 9, 1981); notes 184-187 and accompanying text infra.

\textsuperscript{145} See, e.g., Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir.) (en banc), cert. denied, 459 U.S. 946 (1978); Ackerman-Chillingworth v. Pacific Elec. Contractors Ass'n, 579 F.2d 484, 490 n.7 (9th Cir. 1978), cert. denied, 439 U.S. 1089 (1979); Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 652-53 (6th Cir. 1977); Hunt v. Mobil Oil Corp., 465 F. Supp. 195, 214 (S.D.N.Y. 1978), aff'd, 610 F.2d 806 (2d Cir. 1979). See generally Bauer, \textit{Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination}, 79 Colum. L. Rev. 685, 694-95 (1979). See also Deesen v. Professional Golfers' Ass'n of America, 358 F.2d 165, 170 (9th Cir.), cert. denied, 385 U.S. 846 (1966). Group boycotts have been condemned by the Supreme Court. See, e.g., Silver v. New York Stock Exchange, 373 U.S. 341, 347 (1963); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959). Recognizing the impracticality of that rule and the procompetitive effects of certain concerted refusals to deal, the lower courts have applied the per se rule only to those boycotts which are "clearly exclusionary or coercive in nature." Gould v. Control Laser Corp., 462 F. Supp. 685, 691 (M.D. Fla. 1978); see Neeld v. National Hockey League, 594 F.2d 1297, 1298-99 (9th Cir. 1979); Smith v. Pro Football, Inc., 593 F.2d 1173, 1179-80, 1179 n.22 (D.C. Cir. 1978); Worthen Bank & Trust Co. v. National Bank Americard, Inc., 485 F.2d 119, 124-25 (8th Cir. 1973), cert. denied, 415 U.S. 918 (1974); E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 187 (5th Cir. 1972), cert. denied, 409 U.S. 1109 (1973). These courts have circumscribed the rigidity of the per se rule by reasoning that the need for its application "depends not upon a finding that [a restraint] constitutes a 'boycott' but upon an analysis of its purpose and competitive impact." Gould v. Control Laser Corp., 462 F. Supp. at 691. In \textit{Gould}, a patentholder alleged that members of the laser industry conspired to violate the Sherman Act by agreeing to deal with him only under the licensing terms set by the group. \textit{Id.} at 688. The court believed that such an agreement did not warrant per se treatment. \textit{Id.} at 691. Although such concerted activity "was unquestionably coercive," the coercion, according to the court, "was not directed at a competitor, and the participants in the boycott were not seeking to increase their market shares at the expense of competing firms." \textit{Id.} Thus, the restraint was found not to be so "manifestly harmful to competition" as to forego a rule of reason inquiry into the defendants' justifications for the restraint. \textit{Id.}

\textsuperscript{146} See, e.g., Krehl v. Baskin-Robbins Ice Cream Co., [1979] 2 Trade Reg. Rep. (CCH) ¶ 62,806 (C.D. Cal.). The Supreme Court has enunciated a rule of per se illegality concerning tying arrangements. See Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958); notes 78-85 and accompanying text supra. Such agreements will be found to violate the Sherman Act if four elements are found to exist. There must be: (1) two separate, distinct products, with the sale of one, the tied product, conditioned upon the sale of the other, the tying
avoid "an unintended and undesirable rigidity in the law," the Supreme Court has mandated that application of the per se rule be justified by "demonstrable economic effect." The lower courts, therefore, must balance the probability and severity of anticompetitive consequences with the procompetitive effects of a practice, regardless of the label traditionally attached to the restraint. The per se rule will be applied only when this balancing test mandates the conclusion that the challenged product almost always will restrict competition.

It appears, therefore, that under present law, the per se rule can be applied only after scrutiny of the competitive effects of a particular restraint in a given industry. This limited scrutiny can be distinguished from the rule of reason analysis in several major respects. The rule of reason approach entails an examination of the precise facts in the case involved. Indeed, while the competitive consequences of a restraint are scrutinized under both inquiries, it is the rule of reason which looks, inter alia, to the relevant product and geographic markets as they existed before and after the challenged practice evolved. Conversely, the per se inquiry seeks only to make broad generalizations, and therefore, does not concern itself with particularities. Moreover, under the per se inquiry, the purposes of a restraint generally are not scrutinized, except when they tend to show competitive effects. A court engaged in the rule of reason analysis, however, will focus upon the particular defen-
dant's purposes for developing a commercial practice and will examine the justifications for and scope of that restraint in detail. Finally, the market power of an antitrust defendant may be considered irrelevant under the per se approach, depending upon the type of restraint involved. Under the rule of reason analysis, this factor is highly significant.

**Facial Unreasonableness: An Intermediate Level of Analysis**

Recently, in *United States v. Realty Mutli-List, Inc.*, the Fifth Circuit devised a level of analysis which contains the less burdensome elements of the rule of reason inquiry, seems less harsh than the per se rule, and represents an intermediate approach to alleged Sherman Act violations. In *RML*, real estate brokers formed an organization (RML) through which they would pool their listings of property. Members were required to ensure that nonmembers would not gain access to the listings and other services provided by RML. Moreover, members were not permitted to answer nonmembers' inquiries concerning listed property. A broker could become a member of RML only if he maintained an active office within the county open during "customary business hours," and had a "favorable credit report and business reputation." The government brought suit, alleging that these requirements for admission to the organization authorized RML "to establish a group boycott of those real estate brokers who fail[ed] to qualify under them." After the district court granted RML's motion for summary judgment, the government appealed.

The Fifth Circuit began its analysis of the case by discussing the nature of the per se rule and the guidelines for its application. Although the RML membership criteria created a group boycott, the court noted that the mere labeling of a restraint is insufficient to invoke the per se rule. Because the per se rule is limited to

161 629 F.2d 1351 (5th Cir. 1980).
162 Id. at 1355.
163 Id. at 1357.
164 Id. All inquiries concerning listed property had to be referred to the listing broker. Id.
165 Id. at 1358. Prospective members also were required to receive the votes of a majority of RML's active members, and to purchase one share of stock in the organization at the current value of $1000 per share. Id.
166 Id. at 1354.
167 Id. at 1359.
168 Id. at 1365. The court noted that per se treatment is not to be extended "to a type
those cases which fall within its rationale, the court noted that it would not be applicable if the practice "is at least potentially reasonably ancillary to joint, efficiency-creating economic activities." The court reasoned that under Sylvania and BMI the per se ban should apply only if there is no uncertainty as to the anticompetitive effects of a restraint of trade. Since the group boycott in RML created the potential for economic efficiency, the court concluded that per se treatment was inappropriate.

After making this determination, however, the court departed from the path etched out by prior judicial decisions. Instead of proceeding directly to the comprehensive economic rule of reason analysis, the court scrutinized the membership criteria under a "facial unreasonableness" theory, and found them illegal because they were not "narrowly tailored" to meet RML's legitimate competitive needs. Premising its use of this truncated analysis upon the "flexibility" that the rule of reason provides to the Sherman Act, the court set forth standards by which the facial legal-

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629 F.2d at 1363. The RML court drew upon the previous group boycott analysis it had espoused in E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178 (5th Cir. 1972), cert. denied, 409 U.S. 1109 (1973); see note 128 supra. Under McQuade, the court noted, the per se rule applies only when a group boycott is exclusionary or coercive in nature. 629 F.2d at 1366.

629 F.2d at 1367. The court acknowledged that "'[t]here is good in the multiple listing system,'" id. (quoting Grillo v. Board of Realtors, 91 N.J. Super. 202, 218, 219 A.2d 635, 644 (Ch. Div. 1966)), and thus declined to apply the per se rule. 629 F.2d at 1367. In reaching this conclusion, the court evaluated "the justifications for the particular restraints imposed and their competitive significance" rather than merely relying upon the inflexible approach offered by the traditional per se analysis. Id. at 1369.

629 F.2d at 1369. Ordinarily, after the limited inquiry reveals no per se violation of section 1, a court analyzes the restraint fully under the rule of reason. See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 24 (1979). The RML court, however, departed from this traditional approach and scrutinized the membership criteria under the facial unreasonableness theory. See 629 F.2d at 1369-87.

629 F.2d at 1381. The flexibility afforded courts in adjudicating section 1 antitrust violations appears largely due to the fluid guidelines which govern the rule of reason inquiry. In applying the rule of reason, courts are required "to void any restraint whose anticompetitive effects outweigh its contributions to competition." Id. Although case law has revealed a number of factors to be considered, see, e.g., Board of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918); note 65 supra, a mandate of this nature seems to allow the judiciary to select and apply criteria which will enable it to execute their balancing task effectively.
ity of a practice could be judged. As an initial matter, the court noted that any "significantly restrictive" restraint created by a "significant market power" is subject to facial invalidation.\textsuperscript{176} To determine whether such a practice is indeed illegal, the court stated that the inquiry must focus upon the competitive justifications advanced by the proponents of the restraint. Thus, a court must decide whether the restriction is justified by "legitimate competitive needs,"\textsuperscript{177} and if so, whether it is "reasonably necessary" and "narrowly tailored" to meet those ends.\textsuperscript{178} If these criteria are not met, the court reasoned, no justification exists for the restraint, and the potential for competitive harm permits a finding of facial unreasonableness.\textsuperscript{179} Significantly, the court emphasized that under this truncated analysis, the proof of a restraint's past effects is irrelevant because the power to create anticompetitive harm is sufficient to condemn the trade practice.\textsuperscript{180} The court noted, however, that if a restraint survived the facial inquiry, a court then would be required to examine "actual effects in the marketplace" under the rule of reason.\textsuperscript{181}

It is submitted that the RML court's facial unreasonableness test is a necessary accommodation between the per se approach and the rule of reason. Because a finding of facial unreasonableness will occur only after a consideration of the precise facts involved in a case, it is submitted that this analysis is more equitable than the sweeping per se rule. In addition, the facial scrutiny of a restraint focuses upon the justifications for a trade practice while the per se inquiry looks only to competitive effects. As the RML court noted, the facial unreasonableness test is a version of the rule of reason in

\textsuperscript{176} 629 F.2d at 1372. The court found that RML possessed sufficient market power since it was the sole multiple listing service within the county and its members "constitute[d] a vast majority" of the active real estate brokers within the county. Id. at 1374.

\textsuperscript{177} Id.

\textsuperscript{178} Id. at 1375.

\textsuperscript{179} Id.

\textsuperscript{180} Id. The RML court stated that if the justifications advanced in support of a challenged practice do not withstand scrutiny under the facial unreasonableness test, and the defendant has the power to produce anticompetitive harm, the restraint "may be condemned on its face without proof of past effect." Id. Indeed, the court reasoned, "it is the power to bring about the unjustified anticompetitive effect which the Sherman Act condemns." Id. at 1376. Thus, the facial unreasonableness test differs from the limited per se inquiry in that the past effects of a general trade practice are immaterial. Id. See also Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 14-16 (1979); notes 152-160 and accompanying text supra.

\textsuperscript{181} 629 F.2d at 1376 n.51.
that it requires consideration of the market power of a defendant and the specific scope of and purposes for a restraint. This analysis is not as burdensome as the full-scale rule of reason, however, since it does not mandate scrutiny of the specific competitive impacts caused by the trade practice in issue.

It is suggested that the RML court’s facial analysis will be particularly useful in the context of novel restraints. Indeed, while the per se inquiry avoids the harsh strictures of categorization, the courts have been reluctant to find novel restraints illegal under this approach and generally require scrutiny under the rule of reason. Courts can make a decision with respect to the per se ban only after they have looked to the evidence of harm and procompetitive effects presented by a restraint.\(^{182}\) It only will be after considerable experience with a trade practice that a court will feel competent to make the “broad generalization” that the restraint has no “redeeming virtue.”\(^{183}\) It is submitted that without an intermediate level of analysis, this experience can be gained only by looking to the precise facts in given cases and evaluating them under the rule of reason.

The Ninth Circuit’s decision in *Arizona v. Maricopa County Medical Society*\(^ {184}\) illustrates the courts’ inclination to subject novel restraints to a rule of reason analysis rather than the per se inquiry set forth in *Sylvania* and *BMI*. In *Maricopa*, the court refused to apply the per se ban against two medical care foundations which set maximum fees that physicians could charge holders of foundation-approved insurance policies.\(^ {185}\) Before rejecting the per se rule, however, the court did not engage in the inquiry characterized by the balancing test set forth in *BMI*. Rather, the court rea-

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\(^{182}\) See notes 158-160 and accompanying text supra.

\(^{183}\) Many courts have been reluctant to brand a restraint as per se illegal in the absence of evidence that it consistently produced anticompetitive effects. See, e.g., White Motor Co. v. United States, 372 U.S. 253, 263 (1963); cf. Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 19 n.33 (1979) (“per se rule is not employed until after considerable experience with the type of challenged restraint”).

\(^{184}\) 643 F.2d 553 (9th Cir. 1980), cert. granted, 49 U.S.L.W. 3663 (U.S. Mar. 9, 1981).

\(^{185}\) 643 F.2d at 554-55. In *Maricopa*, the State of Arizona brought suit against two foundations for medical care which it had licensed as insurance administrators. *Id.* at 554. The foundations periodically polled member physicians to set maximum fees which doctors could charge patients under insurance policies approved by the organization. *Id.* at 554-55. The state alleged that this “price fixing” raised the fees of members above the average amounts charged by doctors in Arizona. *Id.* at 555. The state contended that this practice was “without redeeming virtue” and should be condemned as “unreasonable per se.” *Id.* at 556.
soned that because it was unfamiliar with the impact of this restraint and "uncertain about the competitive order that should exist within the health care industry," an in-depth rule of reason analysis was required.\textsuperscript{186} Indeed, the court stated that it was "impossible" to weigh "the pro- and anticompetitive aspects" of the restraint in this case to determine whether the per se rule should apply.\textsuperscript{187}

It is suggested, therefore, that when novel restraints are challenged, the difficulty of balancing unknown competitive impacts will cause courts to eschew the per se rule and lead them to turn to the rule of reason analysis. Despite the equitable results achieved through application of the rule of reason, however, it seems that courts will not be able to delve into this "incredibly complicated and prolonged economic investigation" every time a novel or unclassified restraint is challenged.\textsuperscript{188} Indeed, this is true not only because of crowded court calendars and prohibitive litigation expenses,\textsuperscript{189} but also because inherent difficulties arise when a court assumes the role of economic adjudicator. The judiciary often is ill-equipped to deal with the complex economic determinations which the rule of reason demands.\textsuperscript{190}

\textsuperscript{186} Id. The Maricopa court noted that the flaw in Arizona's argument was that it demonstrated "nothing about the actual competitive effects of the challenged arrangement." \textit{Id.} Moreover, the court stated, no authorities, "primary or secondary, afford assurance concerning its competitive impact." \textit{Id.} The court, therefore, was unwilling to conclude that the practice constituted a per se violation of the Sherman Act, by looking to a mere "unsupported belief" that competitive harms would result. \textit{Id.} at 557.

\textsuperscript{187} \textit{Id.} at 558.

\textsuperscript{188} See \textit{Northern Pac. Ry. v. United States}, 356 U.S. 1, 5 (1958); note 168 and accompanying text \textit{supra}.

\textsuperscript{189} Due to the length and complexity of some antitrust cases, courts frequently face significant time and caseload problems. See note 68 \textit{supra}. Moreover, it has been noted that the broad scope of the antitrust laws, liberal discovery rules, and the opportunity to obtain large judgments may encourage parties to "view litigation as all-out economic war." \textit{Report of National Commission, supra} note 68, at 12.

\textsuperscript{190} The complexity of rule of reason analysis is fostered by the intricate workings of various industries. \textit{Report of the National Commission, supra} note 68, at 11. Many inquiries involved in determining the reasonableness of a restraint are particularly difficult and time consuming. Judges, for example, must identify the relevant market and the percentage of that market affected by the restraint—considerations of paramount importance which often are difficult to measure. See Comment, \textit{Perceptible Competitive Impact—It's the Next Best Thing to Selling There: Jim Walter Corp. v. FTC}, 55 St. John's L. Rev. 312, 321 & n.49 (1981). See generally \textit{von Kalinowski}, \textit{supra} note 2, at § 6.02[4][a]. Moreover, most judges would rather not assume the task of regulating the economy because this involves the evaluation of complex, often inconclusive criteria. \textit{Sullivan}, \textit{supra} note 22, at 7; \textit{see United States v. Topco Assocs., Inc.}, 405 U.S. 596, 609-10 n.10 (1972). Indeed, judges and lawyers are more comfortable with conspiracy analysis than price theory. R. \textit{Posner}, \textit{supra} note 2,
It is submitted that the RML court's facial unreasonableness test is particularly appropriate in the context of novel restraints, where increased economic sophistication in the marketplace and the judiciary's lack of familiarity with competitive conditions demonstrate the need for an intermediate level of analysis. Indeed, under the per se inquiry, not only is the proponent of a novel restraint barred from asserting justifications for the challenged practice, but the heavy emphasis on past competitive effects makes this approach totally impracticable. Without an intermediate level of scrutiny, the courts will be obliged to examine new restraints under the burdensome rule of reason until they feel confident enough to make a "broad generalization" about the practice. It is suggested that the RML test provides a rational solution to this dilemma because it permits courts to consider significant and more measurable factors such as motivation and market power, gives defendants an opportunity to advance justifications for their trade practices, and provides all concerned with an expeditious means to avoid protracted litigation.

**CONCLUSION**

Although a full-scale analysis will be avoided when a restraint is condemned as facially unreasonable, a court must proceed further to the rule of reason examination if the questioned practice is upheld under the intermediate approach. Thus, if a defendant survives the per se inquiry, he must demonstrate that the restraint is facially reasonable and, if he succeeds, must further assert that the practice is reasonable in all respects. At first glance, therefore, it

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*Sullivan, supra* note 22, at 10.

191 *E.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 & n.16 (1977). The RML court noted that "[t]he per se rule is the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he needs only tally his score." 629 F.2d at 1362-63.


193 See notes 186-187 and accompanying text *supra*.

194 See notes 189-190 and accompanying text *supra*.

seems that facial evaluation will serve merely as an obstacle to final adjudication. It is submitted, however, that although a restraint could be subjected to three levels of analysis, both the per se and facial unreasonableness inquiries entail the examination of those factors which otherwise would be examined under the rule of reason. Thus, it is suggested that RML's new analysis is a screening process which permits only truly ambiguous restraints to be scrutinized in detail under the rule of reason. Indeed, a court should not be required to engage in complex economic analysis unless the commercial practice is proven facially reasonable and, therefore, worthy of continued investigation under the full-scale rule of reason analysis.

Additionally, since proof of past competitive effects is irrelevant under the facial unreasonable analysis, it might be argued that a court will never gain sufficient experience with novel restraints to make future "broad generalizations" that plainly anticompetitive effects always result from such practices. Notably, however, the RML court stated that when a practice has no competitive justification or is too broad to serve legitimate needs, the restraint has "anticompetitive effect[s] which [have] no countervailing procompetitive benefit." It appears, therefore, that when a novel practice repeatedly fails to survive facial scrutiny under the RML test, courts will be able to make the broad generalization that it is per se illegal.

Daniel F. De Vita

629 F.2d at 1375.