

REFUSALS TO SELL AND PUBLIC CONTROL OF COMPETITION

REFUSAL to sell is a business tactic in the struggle for power and profit. It is part and parcel of the problems with which the anti-trust laws are concerned. But while existing statutes are sufficient to regulate refusal to sell, courts have often failed to bring the device within statutory prohibitions.¹ Appropriate application of the anti-trust laws requires an examination of the purpose and effect of refusals to sell. Then present legal approaches can be better examined and evaluated.

REFUSAL TO SELL: A MARK OF MONOPOLY POWER

A producer in a purely competitive market will ordinarily sell to all comers. He will refuse only if his entire output is already spoken for, or if the sale would be unprofitable, or if the would-be buyer is a poor credit risk. Since his own output is but an insignificant fraction of the supply, he cannot alter the market price by thus limiting his sales.²

But the situation is different when the producer has a substantial degree of monopoly power stemming from a patent, a trade-mark, a secret process, a locational advantage, or comparative size.³ Within the limits of his monopoly position the producer can use refusal to sell as a device to influence prices. Moreover, he has a weapon with which to extend his power over the market.

1. *E.g.*, *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 224 Fed. 566 (S.D.N.Y. 1915), *aff'd*, 227 Fed. 46 (2d Cir. 1915) (suggestion of a constitutional privilege); *R. G. Brown, The Right To Refuse To Sell*, 25 YALE L. J. 194 (1916).

The present reluctance of the federal courts to compel sales is illustrated in their adjustment of anti-trust decrees. *See, e.g.*, *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 728-9 (1944); *United States v. Klearflax Linen Looms, Inc.*, 63 F.Supp. 32, 42 (D.Minn. 1945); *cf. Seegert, Compulsory Licensing By Judicial Action: A Remedy for Misuse of Patents*, 47 MICH. L. REV. 613, 635-6 (1949); *Comment*, 56 YALE L. J. 77 (1946). And in *Associated Press v. United States*, 326 U.S. 1, 45-6 (1945), Justice Roberts, dissenting, feared that the decision turned a private business into a public utility. What the Justice feared was in effect advocated years ago: that a corporation achieving substantial monopoly should be held to the standards of a public utility. *See Adler, Business Jurisprudence*, 28 HARV. L. REV. 135 (1914); *Wyman, The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 217 (1904).

Considerable uncertainty remains as to the scope of the privilege to refuse to sell. The American Law Institute recognizes the privilege; but in general it takes no position as to liability where a refusal to deal is (a) a breach of duty from the nature of the business or from legislative enactment, (b) a means of accomplishing an illegal effect on competition, or (c) part of a concerted refusal by a combination of persons of which the defendant is a member. 4 RESTATEMENT, TORTS § 762 (1939). *See also TOULMIN, TRADE AGREEMENTS AND THE ANTI-TRUST LAWS* §§ 127, 156 (1937).

2. For a general description of the characteristics of a competitive market, *see BOULDING, ECONOMIC ANALYSIS*, c. 22 (rev. ed. 1948); *CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION* 16-20 (5th ed. 1946).

3. *See, e.g.*, *BAIN, PRICING, DISTRIBUTION AND EMPLOYMENT* 140 (1948).

Preventing Competition in Distribution

A producer runs the risk of reduced profits when he makes unrestricted sales at a set price to all distributors. Competition among these distributors may become acute, and the consequent decrease in their profit margins creates downward pressure against the producer's own price.⁴ The pressure is made more severe by the presence of chain stores, mail order houses, and other mass retail distributors, who can demand the producer's "wholesale" price or less. This saving, plus operational economies, often enables these large distributors to offer consumers a lower price than do wholesale-retail channels.⁵ The retailers and wholesalers in turn demand that the producer remove the mass distributors' price advantage. And a second danger arises where the producer short-circuits his regular distribution channels by selling directly to a few large-scale consumers at more than the wholesale price. If he exerts no control over his distributors, they may compete with the producer himself for these sales.⁶ Thus bedeviled, the producer may seek to reduce distributive competition.

Several devices are available.⁷ A direct method is "vertical integration forward," in which the producer sets up his own distribution system and refuses to sell to independent distributors.⁸ Heavy investment in retail outlets, however, will be practical only if the product is costly enough and popular enough to justify stores selling that product only, or if the producer is willing to enter a general retail business.

Another device which may be employed is a resale price maintenance agreement on each sale.⁹ Or, with less formality, the producer may "suggest" the proper resale price, cutting off any distributors who disregard his suggestion.¹⁰

A less obvious method of protecting price is to limit the outlets in any area from the beginning, thus forestalling the competition which leads to price cutting. This is achieved by the exclusive sales arrangement, in which the pro-

4. See PURDY, LINDAHL & CARTER, *CORPORATE CONCENTRATION AND PUBLIC POLICY* 395 (1942).

5. *Ibid.* For a discussion of the efficiencies achieved by chain stores in the grocery field, see HOFFMAN, *LARGE SCALE ORGANIZATION IN THE FOOD INDUSTRIES* 62-75 (TNEC Monograph 35, 1940).

6. *E.g.*, *United States v. Klearflax Linen Looms, Inc.*, 63 F.Supp. 32 (D.Minn. 1945).

7. See MILLER, *UNFAIR COMPETITION* 210, 234-5 (1941), and sources cited therein. For an example of the similarity and interrelationship of the several devices, see *Baran v. Goodyear Tire & Rubber Co.*, 256 Fed. 571 (S.D.N.Y. 1919).

8. *E.g.*, *Eastman Kodak Co. of New York v. Southern Photo Materials Co.*, 273 U.S. 359 (1927). An alternate method is the use of agency agreements. See note 42 *infra*.

9. For an extensive economic analysis of resale price maintenance, see MILLER, *UNFAIR COMPETITION* 245-66 (1941). See also PURDY, LINDAHL & CARTER, *CORPORATE CONCENTRATION AND PUBLIC POLICY* 394-5 (1942).

10. *E.g.*, *United States v. Colgate & Co.*, 250 U.S. 300 (1919), discussed *infra* p. 1126.

ducer selects one or more distributors for each area, sells to them only, and directs them to stay in their own territory.¹¹

Finally, the producer may cut competition in distribution channels by classifying chains and other mass distributors as "retailers," and then either charging them more than the price charged "wholesalers," or selling to "wholesalers" only.¹² The producer can thus curb the opportunity of the chains to undercut the rest of the market.

Refusal to sell is involved to some degree in all of these methods of securing control over a price structure. It comes as a matter of course with vertical integration. It is a policing device for a producer engaged in outright resale price maintenance. It is the crux of the matter in exclusive sales arrangements. And refusal to sell to large distributors classified as "retailers" is one way to keep them from cutting prices.

Aggressive use of refusal to sell

Refusal to sell is used not only to control a price structure, but also as a lever to extend the producer's existing monopoly power. When a producer of a distinctive article also turns out products which are sold in a competitive market, he may make his control of the unique item do double duty. The result is a "tie-in" sale:¹³ the holder of a patent on a salt-tablet dispenser, for example, may refuse to sell unless the buyers use his salt tablets, which are no different from other brands.¹⁴ A producer may also hinder the marketing of

11. *E.g.*, *Boro Hall Corp. v. General Motors Corp.*, 37 F.Supp. 999 (S.D.N.Y. 1941), *aff'd*, 124 F.2d 822 (2d Cir. 1942), *reh'g denied*, 130 F.2d 196 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943).

12. *E.g.*, *Mennen Co. v. FTC*, 288 Fed. 774 (2d Cir. 1923), *cert. denied*, 262 U.S. 759 (1923) (price higher than to wholesalers); *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (2d Cir. 1915) (selling to wholesalers only); see Slichter, *The Cream of Wheat Case*, 31 *POL. SCI. Q.* 392 (1916); Shneiderman, "The Tyranny of Labels"—*A Study of Functional Discounts Under the Robinson-Patman Act*, 60 *HARV. L. REV.* 571 (1947).

Both devices may be termed "defensive price discrimination," in contrast to the ordinary type of price discrimination involved in extracting the best price from each of a series of separate markets or in lowering prices in a particular area to drive a competitor out of business. Refusals to sell attacked as price discrimination, however, have not always involved either this purpose of ordinary price discrimination, or "defensive price discrimination" of the kind outlined in the text. See pp. 1132-4 *infra*.

13. "A tying arrangement is a successful business practice only in the circumstance that the seller has a strong monopoly position in one or more products." MILLER, *UNFAIR COMPETITION* 199 (1941). For the varying economic effects of a tie-in arrangement, see *id.* at 200-3.

14. *Cf.* *International Salt Co. v. United States*, 332 U.S. 392 (1947) (tie-in clause in patent lease illegal); *International Business Machines Corp. v. United States*, 293 U.S. 131 (1936) (condition that lease shall terminate in case any cards not manufactured by the lessor are used in the leased machine: illegal); see *Notes*, 57 *YALE L. J.* 1293 (1948); 48 *COL. L. REV.* 733 (1948). It is not certain that the decisions would have been the same if, instead of an express tie-in clause, there had been merely a refusal to

products which are close substitutes for his own. He may require the dealer to push his product. Or he may refuse to sell unless the dealer drops substitute items altogether.¹⁵

Group refusal to sell

Where an individual lacks sufficient power to make his refusal to sell a significant factor in the market, then group activity by several sellers may make the device effective.¹⁶ As in the case of individual producers, the success of group refusal rests on the extent of monopoly power over the product in question. There is no economic reason for differentiating individual refusal, where the power is a product of uniqueness or of individual size, from group refusal, where power is achieved through combination. The impact on competition depends on power, not numbers.

Summary

Effective refusal to sell operates as a restraint on trade, mild or severe. Distribution channels are narrowed, prices are raised, existing and potential competitors are injured, or monopoly influences are extended to other lines of business. Refusal to sell, therefore, is a practice which should be examined in the light of anti-trust law.

REFUSAL TO SELL AND THE COURTS

Despite the inherently restrictive nature of refusal to sell, the courts have tended to concentrate on the form in which the device is used rather than on the seriousness of its effects.¹⁷

sell one item without a simultaneous sale of the other. *Cf.* *FTC v. Gratz*, 253 U.S. 421 (1920) (tie-in of unpatented goods allowed). And see cases cited note 45 *infra*.

15. See cases cited note 45 *infra*.

16. ". . . [W]here there is a high degree of substitution between branded products, successful price maintenance will be achieved only where rivals follow similar policies." MILLER, *UNFAIR COMPETITION* 260 (1941).

17. When found as an integral part of an over-all monopolistic plan, refusal to sell is condemned along with the rest of the plan. *E.g.*, *American Tobacco Co. v. United States*, 328 U.S. 781, 808 (1946); *Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936). But reluctance to outlaw the "pure" refusal leads to results of greatly varying merit. In addition to the cases discussed elsewhere in this Comment, consider the following miscellaneous situations in which refusals have been upheld: *FTC v. Gratz*, 253 U.S. 421 (1921) (refusal to sell steel ties without a purchase of bagging to be used with them); *Green v. Electric Vacuum Co.*, 132 F.2d 312 (6th Cir. 1942), *cert. dismissed*, 319 U.S. 777 (1943) (to prevent rebuilding and resale of traded-in vacuum cleaners); *Green v. Victor Talking Mach. Co.*, 24 F.2d 378 (2d Cir. 1928) (to coerce the sale of stock); *Mennen Co. v. FTC*, 288 Fed. 774 (2d Cir. 1923), *cert. denied*, 262 U.S. 759 (1923) (refusal to sell at wholesale price to retailers' cooperative); *Boro Hall Corp. v. General Motors Corp.*, 37 F.Supp. 999 (S.D.N.Y. 1941), *aff'd*, 124 F.2d 822 (2d Cir. 1942), *reh'g denied*, 130 F.2d 196 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943) (to uphold quality of distributors); *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F.Supp. 824 (D.Md. 1938) (to coerce a dealer into buying up or selling out to another); In the Matter of

This formalistic approach is not dictated by the anti-trust laws. Present legislation is sufficiently flexible to enable the courts to strike down any trade practice which they view as an unreasonable restraint of competition.¹⁸

Elimination of price cutters

Refusal to sell, like outright agreement, can be used to effect resale price maintenance. Yet judicial treatment of the two devices has been far from parallel. Resale price maintenance by contract was early held illegal.¹⁹ And al-

Bird & Son, 25 F.T.C. 548 (1937) (to reduce distribution costs); *Koss v. Continental Oil Co.*, 222 Ind. 224, 52 N.E.2d 614 (1944) (refusal to sell to a filling station owner who was violating union rules as to operating hours); *Foster v. Shubert Holding Co.*, 316 Mass. 470, 55 N.E.2d 772 (1944) (to distribute theater tickets without the use of a ticket agency); *Hompes v. B. F. Goodrich Co.*, 137 Neb. 84, 288 N.W. 367 (1939) (allegedly to force distributor to sell out cheaply); *Nissen v. Andres*, 178 Okla. 469, 63 P.2d 47 (1936) (refusal to sell to competitor); *McMaster v. Ford Motor Co.*, 122 S.C. 244; 115 S.E. 244 (1921) (to prevent installation of device on cars made by defendant); *cf. FTC v. Raymond Bros.-Clark Co.*, 263 U.S. 565 (1924) (refusal to buy in order to force exclusive selling). *But see United States v. Keystone Watch Case Co.*, 218 Fed. 502 (E.D.Pa. 1915), *appeal dismissed*, 257 U.S. 664 (1921) (selling only to jobbers who maintained resale prices and who dealt exclusively in defendant's goods constituted a violation of the Sherman Act).

18. Section 5 of the Federal Trade Commission Act is particularly appropriate: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." 38 STAT. 719 (1914), as amended, 15 U.S.C. §45 (1946). Originally a strict limitation was placed on the meaning of the statute. But more recently, it has been given wider scope. *Compare FTC v. Gratz*, 253 U.S. 421, 427 (1920), *with FTC v. Cement Institute*, 333 U.S. 683, 690-3, 703-9 (1948).

A sharp distinction has at times been drawn between this regulation of unfair competition in the interest of business morality, and the preservation of competition by the Sherman Act provisions against restraint of trade. See Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 214 (1936). "The law of boycott [i.e., refusal to deal] is rooted in the soil of restraint of trade rather than unfair competition." *Id.* at 202. But even writers who urge this questionable distinction may concede that in practice there is great overlap. See Schwartz, Book Review, 58 YALE L. J. 198 (1948).

The Federal Trade Commission (FTC) includes in its list of unfair methods and practices:

"Trade boycotts or combinations of traders to prevent certain wholesale or retail dealers or certain classes of such dealers from procuring goods at the same terms accorded to the boycotters or conspirators, or through coercion to influence the trade policy of their competitors or of manufacturers from whom they buy." REP. FTC 53 (1947).

It might appear that the word "or" between "Trade boycotts" and "combinations of traders" in the above quotation is conjunctive, and only *group* boycotts are condemned by the Commission. Most cases brought by the FTC on individual refusals to deal have involved refusals to sell to price cutters. Nonetheless the FTC has on occasion considered other individual refusals to sell to be unfair methods of competition. *See In the Matter of R. B. Semler, Inc.*, 42 F.T.C. 372 (1946) (to force exclusive dealing); *In the Matter of Letellier-Phillips Paper Company*, 27 F.T.C. 741 (1938) (same).

19. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373 (1911); Note, 7 A.L.R. 449 (1920). This is now part of the broader rule that agreements to fix or maintain

though in many instances the Miller-Tydings Act²⁰ and state Fair Trade acts²¹ now permit such contracts, the old rule still applies outside of that protected area.²²

Refusals to sell, on the other hand, have often been accorded a special immunity not granted to restraints of trade achieved by direct agreement. The chief source of confusion has been *United States v. Colgate & Co.*,²³ where the Supreme Court broadly affirmed the privilege to refuse to sell, despite the fact that it resulted in resale price maintenance. The indictment in that case alleged not only that supplies were cut off from price cutters, but also that resale prices were named by the company, that dealers were urged to observe the prices on pain of losing their supply, that dealers were urged to report any sales by others at different prices, that lists of price cutters were kept, and that assurance of future compliance was secured from reported dealers and from prospective dealers.²⁴ Dismissing the indictment, the Court broadly affirmed the privilege to refuse to sell. Moreover, Justice McReynolds affixed to the privilege a further canon: "And of course [one] may announce in advance the circumstances under which he will sell."²⁵

prices in interstate commerce are illegal *per se*. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

20. The Miller-Tydings Act, 50 STAT. 693 (1937), 15 U.S.C. § 1 (1946), adds to Section 1 of the Sherman Act the provisions that

" . . . [N]othing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition. . . . [T]he preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. . . ."

21. McLaughlin, *Fair Trade Acts*, 86 U. OF PA. L. REV. 803 (1938); Shulman, *The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels*, 49 YALE L. J. 607 (1940).

22. *E.g.*, *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 296-7 (1945); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 723-4 (1944).

23. 250 U.S. 300 (1919); *accord, e.g.*, *Harriet Hubbard Ayer, Inc. v. FTC*, 15 F.2d 274 (2d Cir. 1926), *cert. denied*, 273 U.S. 759 (1927); *United States v. Hudnut*, 8 F.2d 1010 (S.D.N.Y. 1925).

24. The indictment is restated in Dunn, *Resale Price Maintenance*, 32 YALE L. J. 676, 685-6 (1923).

25. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

The *Colgate* case virtually invited resale price maintenance. Indeed, one lower court, in *United States v. A. Schrader's Son, Inc.*,²⁶ took the *Colgate* decision to reinstate resale price maintenance agreements. Any variance between express agreements and a tacit understanding seemed to the court a distinction without a difference.²⁷ But the Supreme Court reversed,²⁸ thus preserving the anomaly. Regardless of the merits of resale price maintenance,²⁹ the lower court's view seems correct. The prompt elimination of a price cutter by refusing to sell to him is probably more effective than a damage suit after breach of a formal contract.

Further confinement of the *Colgate* rule was not long in coming. The decision in *FTC v. Beech-Nut Packing Co.*,³⁰ purportedly an attempt to harmonize conflicting interpretations of the *Colgate* case, was in effect its antithesis. The *Beech-Nut* decision attempted a distinction between a simple refusal to sell and schemes designed to make that refusal effective. Yet the condemned plan seemingly contained the same attempts to discover price cutting as did the *Colgate* plan, with the single additional feature that the cases of defendant's products were marked and traced.³¹

26. 264 Fed. 175 (N.D. Ohio 1919), *rev'd*, 252 U.S. 85 (1920).

27. 264 Fed. 175, 183 (N.D. Ohio 1919). See Dunn, *Resale Price Maintenance*, 32 YALE L. J. 676, 691-3 (1923) ("the reality of the situation is that the *Colgate* case essentially legalizes what the *Miles* case outlaws").

28. *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920). The opinionless dissents of Justices Holmes and Brandeis may signify agreement with the trial court that the situations are indistinguishable. Neither Justice took exception to the *Colgate* decision; they simply did not oppose resale price maintenance. See *FTC v. Beech-Nut Packing Company*, 257 U.S. 441, 456 (1922) (dissenting opinion).

Justice McReynolds, speaking for the majority in the *Schrader* case, referred to ". . . the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to observe fixed resale prices." 252 U.S. 85, 99 (1920). But *cf.* Justice McReynolds dissenting in *FTC v. Beech-Nut Packing Company*, *supra*, at 458.

A similar distinction had been drawn in the leading case against resale price maintenance, *Dr. Miles Medical Company v. John D. Park & Sons Company*, 220 U.S. 373, 404 (1911): "But because a manufacturer is not bound to make or sell, it does not follow that in case of sales actually made he may impose upon purchasers every sort of restriction."

29. See OPPENHEIM, *CASES ON FEDERAL ANTI-TRUST LAWS* 383-7 (1948), and sources cited therein; also see note 21 *supra*.

30. 257 U.S. 441 (1922). See Note, *The Attitude of the Federal Courts Toward Resale Price Maintenance Since the Beechnut Decision*, 27 COL. L. REV. 183 (1927).

31. 257 U.S. 441, 446-51 (1922). The court also attempted to distinguish the *Colgate* case on the ground that the *Colgate* case was heard on a demurrer to an indictment brought under the Sherman Act, whereas the *Beech-Nut* case was brought under the Federal Trade Commission Act. For a criticism of the procedural aspects of the *Colgate* case see McLaughlin, *Fair Trade Acts*, 86 U. OF PA. L. REV. 803, 803-10 (1938). How-

Naturally enough, the tenuous distinction between the *Colgate* and *Beech-Nut* plans led to considerable confusion in the lower courts. A price maintenance plan was illegal only if a court detected some element of "agreement."³² A court of appeals in one circuit soon supplied a ready-made *reductio ad absurdum* which was nevertheless the correct interpretation of the Supreme Court decisions.³³ Walking a tight-rope between "cooperation" and "individual action," the court held these practices invalid:

"(1) Requiring from dealers assurance that they will be governed by the suggested resale discounts in the disposal of stocks previously purchased, as a condition precedent to subsequent sales to them by respondent.

"(2) Requiring from dealers placing orders assurances that the commodities so ordered will be resold at the suggested resale discounts as a condition precedent to the acceptance of such orders.

"(3) Requiring from dealers generally assurances that they will be governed by the suggested resale discounts in all resales of respondent's products, under threat of discontinuance of relations."³⁴

In the same case these practices were upheld:

". . . manifesting to dealers an intention to act upon all reports sent in by them of variations from the resale discounts by the elimination of the price cutter; . . . informing dealers that price cutters reported, who would not give assurance of adherence to the suggested resale discounts, had been or would be refused further sales; . . . employing its salesmen to investigate charges of price cutting reported by dealers and advising dealers of that fact. . . ."³⁵

This self-defeating result was soon prevented by further encroachments on the *Colgate* doctrine. Price maintenance plans are now restrained not only when an element of agreement or cooperation is present, but, alternatively, when courts find any other acts collateral to the refusal to sell. Such plans have been found illegal when they included one or more of the following: procuring agents and retailers to report price cutters,³⁶ informing dealers that reported price cutters will be³⁷ or have been³⁸ refused sales, keeping a "do not sell" list,³⁹ getting assurance that one will cease price cutting before selling to him

ever, the *Colgate* case has controlled cases brought by the Federal Trade Commission. See, e.g. *Toledo Pipe-Threading Mach. Co. v. FTC*, 11 F.2d 337, 340-1 (6th Cir. 1926).

32. Compare *Baran v. Goodyear Tire & Rubber Co.*, 256 Fed. 571 (S.D.N.Y. 1919) (legal), with *Oppenheim, Oberndorf & Co. v. FTC*, 5 F.2d 574 (4th Cir. 1925) (illegal).

33. *Toledo Pipe-Threading Mach. Co. v. FTC*, 11 F.2d 337 (6th Cir. 1926); accord, *Cream of Wheat Co. v. FTC*, 14 F.2d 40, 49-50 (8th Cir. 1926).

34. *Toledo Pipe-Threading Mach. Co. v. FTC*, 11 F.2d 337, 340 (6th Cir. 1926).

35. *Ibid.*

36. E.g., *Q.R.S. Music Co. v. FTC*, 12 F.2d 730 (7th Cir. 1926).

37. E.g., *Moir v. FTC*, 12 F.2d 22 (1st Cir. 1926).

38. E.g., *J. W. Kobi Co. v. FTC*, 23 F.2d 41 (2d Cir. 1927).

39. E.g., *Hills Bros. v. FTC*, 9 F.2d 481 (9th Cir. 1926), cert. denied, 270 U.S. 662 (1926).

further,⁴⁰ numbering packages in order to facilitate the detection of price cutters,⁴¹ and using refusal to sell in an over-all price fixing scheme.⁴² By attacking these collateral practices, the courts have virtually condemned the underlying purpose—resale price maintenance.⁴³

When a leading case is beset by qualifications and then atrophied by lack of use, its final demise is difficult to detect. Perhaps the *Colgate* case is dead, despite frequent citation. But doubt remains.⁴⁴ The *Colgate* case, still a symbol of special immunity for all refusals to sell, should be expressly overruled at the earliest opportunity.

Exclusive sales arrangements: avoiding potential price cutters

Exclusive sales arrangements—under which a producer refuses to sell to all or some of the would-be competitors of his buyer⁴⁵—may be as effective in

40. *E.g.*, *Shakespeare Co. v. FTC*, 50 F.2d 758 (6th Cir. 1931), 30 MICH. L. REV. 634 (1932).

41. *E.g.*, *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922).

42. *E.g.*, *American Tobacco Co. v. United States*, 328 U.S. 781, 803 (1946).

Control of the final price of sale, however, may be achieved by vertical integration and possibly by setting up agency relationships. See *Standard Oil Co. of California v. United States*, 17 U.S.L. WEEK 4510, 4515 (U.S. June 13, 1949); *id.* at 4518 (dissenting opinion). Compare *United States v. General Electric Co.*, 272 U.S. 476 (1926) and *FTC v. Curtis Publishing Co.*, 260 U.S. 568 (1923) (agency devices successful), with *United States v. Masonite Corp.*, 316 U.S. 265 (1942) and *United States v. General Electric Co.*, 80 F.Supp. 989 (S.D.N.Y. 1948) (control of prices set by "agents" on patented matter illegal); see Comment, 51 YALE L. J. 299 (1941); Note, 61 HARV. L. REV. 1427 (1943). Also see note 48 *infra*.

43. The Court used the same approach in *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944), where the refusal to sell was not just to eliminate price cutters but was to assure that resale would be only to listed dealers, who dealt only in defendant's goods and who were "ethical."

44. See *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 729 (1944). In *Standard Oil Co. v. FTC*, 173 F.2d 210 (7th Cir. 1949), the court suggested that a producer refuse to sell at a discount to jobbers who resold to retailers at less than the producer's own price to retailers.

A court may still go to some lengths in freeing defendants from the charge of a price maintenance plan. In *Johnson v. J. H. Yost Lumber Co.*, 117 F.2d 53 (8th Cir. 1941), defendant lumber suppliers were held not to be members of an existing conspiracy to force plaintiffs out of operation of a "cut rate" lumber yard. But under pressure from their other customers, who were the conspirators, the suppliers refused to sell to plaintiffs. In releasing the suppliers, the court was careful to avoid charging them with any knowledge of the price maintenance plan. Ignorance of the purpose of the combination may have been a necessary finding in excusing the suppliers from the charge of conspiracy. But the decision scrupulously avoids any consideration of price maintenance, citing the *Colgate* case in support of an unlimited privilege to refuse to sell.

Where the refusal to sell to price cutters is not a customary course of dealing, difficulty in proving the real purpose of the refusal may prevent application of the *Beech-Nut* limitation of the *Colgate* rule. See *Harriet Hubbard Ayer, Inc. v. FTC*, 15 F.2d 274 (2d Cir. 1926), *cert. denied*, 273 U.S. 759 (1927).

45. The legality of exclusive arrangements depends largely on whether the limita-

preventing competition in a distribution system as is the refusal to sell to proven price cutters. One might expect, therefore, that exclusive sales arrangements would be given equally strict treatment.

Instead, exclusive sales arrangements are widely upheld.⁴⁶ Only in one state, and there by reason of specific statute,⁴⁷ are exclusive sales arrangements generally condemned.⁴⁸ Elsewhere even the extreme situation of a total

tion is on the right to buy or on the right to sell. Whereas exclusive sales arrangements (also called exclusive representation arrangements) are leniently treated under the "rule of reason" of the Sherman Act, Section 3 of the Clayton Act makes an exclusive dealer arrangement—defined as a condition, agreement, or understanding by a purchaser that he is not to handle the goods of a competitor of the seller—illegal if it may substantially lessen competition or tend to create a monopoly in interstate commerce. 38 STAT. 731 (1914), 15 U.S.C. § 14 (1946). See, e.g., *Standard Oil Co. of California v. United States*, 17 U.S.L. WEEK 4510 (U.S. June 13, 1949); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922). A tie-in sale constitutes a partial exclusive dealership: to the extent that a purchaser is forced to take his requirements from one seller, he is prevented from buying from other sellers. It too is within the condemnation of the statute. See note 14 *supra*.

The contrast between treatment of exclusive sales arrangements and of exclusive dealer arrangements may be due to the supposedly greater need for protection of retailers than of distributors, and of distributors than of manufacturers. The theory is that the unit closest to the retail level will be the smallest. 51 CONG. REC. 9407 (1914). A similar contrast, perhaps on the same theory, may be found where the buyer agrees not to sell without permission of the original seller. See note 54 *infra*. On the other hand, the legality of group boycott does not depend on whether the limitation is on the right to buy or on the right to sell. See pp. 1136-40 *infra*.

Although Section 3 of the Clayton Act outlaws exclusive dealer agreements, a similar arrangement without benefit of specific contract perhaps could be legally achieved by refusing to sell to those who carry a competitor's product. *Brosious v. Pepsi-Cola Co.*, 155 F.2d 99 (3d Cir. 1946); *Camfield Mfg. Co. v. McGraw Electric Co.*, 70 F.Supp. 477, 481 (D.Del. 1947); *Andrew Jergens Co. v. Woodbury, Inc.*, 271 Fed. 43 (D.Del. 1920). *Contra*: *United States v. Keystone Watch Case Co.*, 218 Fed. 502 (E.D.Pa. 1915), *appeal dismissed*, 257 U.S. 664 (1921); *R. B. Semler, Inc.* 42 F.T.C. 372 (1946); 35 COL. L. REV. 127 (1935); *cf.* *B. S. Pearsall Butter Co. v. FTC*, 292 Fed. 720 (7th Cir. 1923). The Supreme Court has recognized that exclusive dealer agreements, and refusals to sell to those who decline to enter exclusive dealer agreements, may be equivalent. See *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 464 (1941).

46. See cases collected in OPPENHEIM, *CASES ON FEDERAL ANTI-TRUST LAWS* 598-601 (1948); 36 AM. JUR. 514-6 (1941); Note, 27 COL. L. REV. 838 (1927). *Contra*: *Morey v. Paladini*, 187 Cal. 727, 203 Pac. 760 (1922) (exclusive right to sell lobsters on West Coast north of parallel 36°); *F. W. Cook Co. v. Page*, 294 S.W. 934 (Tex. Civ. App. 1927).

The exclusive sales arrangement is generally upheld whether achieved by specific agreement or simply by refusals to sell to dealers not selected. Compare the situation with regard to exclusive dealer arrangements, note 45 *supra*.

47. TEX. REV. CIV. STAT., art. 7428 (Vernon, Supp. 1948). See Note, *Exclusive Territory Agreements as Affected by the Texas Anti-Trust Law*, 6 TEX. L. REV. 210 (1928).

48. See note 46 *supra*. Even in Texas, where exclusive sales contracts are outlawed, exclusive sales arrangements achieved without formal agreement or by agency are ap-

output contract is rarely held illegal.⁴⁹

But just as the special immunity of other refusals to sell is lost when refusal becomes part of a larger scheme,⁵⁰ so is an exclusive sales arrangement subject to judicial censure when it is merged with an over-all price maintenance plan,⁵¹ a group boycott,⁵² or an exclusive dealership.⁵³ The agreement may also be stricken as an unreasonable restraint on trade in the special case—not by definition an exclusive sales arrangement—where the buyer agrees to sell only to dealers approved by the original seller.⁵⁴

The exclusive sales arrangement by itself is apparently considered less harmful. The benefits which accrue to the original seller are in some measure derived from greater efficiency in the distribution system.⁵⁵ Greater efficiency may lead to the lowering of prices in order to achieve higher sales, especially if there is considerable competition from similar products. A portion of the original seller's benefits thus passes to the public. At least the exclusive sales arrangement will injure consumers less often than its converse, the exclusive

parently allowed. See *Jax Beer Co. v. Palmer*, 150 S.W.2d 452 (Tex. Civ. App. 1941) (no agreement); *Double Seal Ring Co. v. Keith*, 107 S.W.2d 423 (Tex. Civ. App. 1937) (agency).

49. See, e.g., *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933), note 83 *infra*.

50. See note 17 *supra*.

51. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); cf. *United States v. Paramount Pictures, Inc.* 334 U.S. 131 (1948).

52. *Hawarden v. Youghioghenny & Lehigh Coal Co.*, 111 Wis. 545, 87 N.W. 472 (1901).

53. *Pittsburgh Plate Glass Co. v. Jarrett*, 42 F.Supp. 723 (M.D.Ga. 1942), *modified on other grounds*, 131 F.2d 674 (5th Cir. 1942).

The co-existence of an exclusive dealership with an exclusive sales arrangement may be hard to prove. Business experience might indicate that one reason why dealers, though not bound by contract, carry only one make of goods is that they feel they would forfeit their exclusive sales territory if they were to attempt to carry a competing model. See *Camfield Mfg. Co. v. McGraw Electric Co.*, 70 F.Supp. 477, 481 (D.Del. 1947); and see note 45 *supra*.

The force of the prohibition against exclusive dealer agreements and any future prohibition against exclusive sales arrangements might be attenuated by contracts of agency. In such a case the seller becomes the principal, and is able to dictate the terms of redistribution of the goods consigned. *Accord*, MASS. GEN. LAWS, c. 93, § 1 (Ter. Ed. 1932); and see note 42 *supra*. Federal legislators recognized this possibility. 51 CONG. REC. 9160, 9256, 9407, 9410-1 (1914).

54. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940). *But cf.* *Hood Rubber Co. v. United States Rubber Co.*, 229 Fed. 583 (D.Mass. 1916) (sellers' agreement to sell only to persons approved by the buyer does not give rise to cause of action against sellers). An agreement is condemned, however, where terms and conditions of resale are fixed in order to give the original seller such control of his distribution system that he can control later prices and prevent competition. See, e.g., *United States v. Masonite Corp.*, 316 U.S. 265 (1942).

55. NEW YORK UNIVERSITY BUREAU OF BUSINESS RESEARCH, THE EXCLUSIVE AGENCY 11-6 (1923); see LEARNED, PROBLEMS IN MARKETING 161-79 (1936) *passim*.

dealer agreement, which prevents a dealer from handling competing products.⁵⁶ The latter arrangement, if made with all the important distributors in an area, may force competing products off the market altogether.

But where a seller has a stronger degree of monopoly power, the total effect of an exclusive sales arrangement may also be undesirable. The benefits of efficiency are less likely to reach the consumer. And the elimination of distributive competition may take the form of automatic resale price maintenance.⁵⁷ Wholesalers and retailers with exclusive rights in a unique commodity have no price competition to meet. Hence the producer is relieved of pressure against his own price.

The exclusive sales arrangement, as a definite restraint on trade, must remain suspect. Since resale price maintenance by refusal to sell to price cutters is in many instances outlawed,⁵⁸ more subtle price maintenance by exclusive sales arrangements should not go unfettered.

Refusal to sell as a form of price discrimination

Refusals to sell have been attacked on occasion as a form of price discrimination. While such attacks have generally failed, the approach provides a suitable method of curbing improper refusals to sell.

Section 2 of the Clayton Act forbids unwarranted discrimination in price between different purchasers of commodities in interstate commerce where the effect ". . . may be substantially to lessen competition or tend to create a monopoly. . . ."⁵⁹ At present, literal interpretation insulates refusals to sell against this section of the anti-trust laws: when there is a refusal to sell there can be neither "purchaser" nor "price" as required by the act.⁶⁰ Moreover,

56. See note 45 *supra*.

57. NEW YORK UNIVERSITY BUREAU OF BUSINESS RESEARCH, *THE EXCLUSIVE AGENCY* 15 (1923).

58. See pp. 1125-9 *supra*.

59. "It shall be unlawful for any person engaged in [interstate] commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ." 38 STAT. 730 (1914), as amended, 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1946).

See Crowley, *Equal Price Treatment Under the Robinson-Patman Act*, 95 U. OF PA. L. REV. 306 (1947); Haslett, *Price Discriminations and their Justifications Under the Robinson-Patman Act of 1936*, 46 MICH. L. REV. 450 (1948).

60. *Shaw's, Inc. v. Wilson-Jones Co.*, 105 F.2d 331 (3d Cir. 1939), *affirming* 26 F.Supp. 713 (E.D.Pa. 1939); *Sorrentino v. Glen-Gery Shale Brick Corp.*, 46 F.Supp. 709 (E.D.Pa. 1942); *Abouaf v. J. D. & A. B. Spreckels Co.*, 26 F.Supp. 830 (N.D. Cal. 1939); see Bayly, *Four Years Under the Robinson-Patman Act*, 25 MINN. L. REV. 131, 133-4, 167-8 (1941); *cf.* *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755 (1947). *Contra*: *Sidney Morris & Co. v. National Ass'n of Stationers*, 40 F.2d 620 (7th Cir. 1930); *see* *Shaw's, Inc. v. Wilson-Jones Co.*, 26 F.Supp. 713 (E.D.Pa. 1939),

the Clayton and Robinson-Patman Acts specifically provide that they do not ". . . prevent persons engaged in selling goods, wares, or merchandise in [interstate] commerce from selecting their own customers in bona fide transactions and not in restraint of trade. . . ." ⁶¹ Despite some contrary interpretations of the legislative history, ⁶² the usual view in the light of this proviso is that Section 2 does not prevent *A* from refusing to make *B* his customer and thus with impunity refusing to sell *B* his products at any price, regardless of his price policy toward other customers. ⁶³

Yet logically complete refusal to sell is only a refusal to sell at any but a prohibitive price. In practice, moreover, a complete refusal to sell can often be used with the purpose and effect of price discrimination. ⁶⁴ Usually the de-

aff'd on other grounds, supra; *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F.Supp. 824, 825 (D.Md. 1937).

61. 38 STAT. 730-1 (1914), as amended, 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1946).

62. See 40 COL. L. REV. 157 (1940); 11 GEO. WASH. L. REV. 122 (1942). The intent of Congress on this point is by no means clear. See 80 CONG. REC. 5723, 6231, 6333, 9418 (1936).

63. See *Pittsburgh Plate Glass Co. v. Jarrett*, 42 F.Supp. 723, 734 (M.D.Ga. 1942), *modified on other grounds*, 131 F.2d 674 (5th Cir. 1942); Note, *Compulsory Sales Under the Clayton Act*, 29 HARV. L. REV. 77 (1915); cf. TOULMIN, *TRADE AGREEMENTS AND THE ANTI-TRUST LAWS* 292 (1937). One of the sponsors of the Robinson-Patman Act took a different view, and adopted the negative implication of the proviso: "A seller shall not refuse to sell, or to select customers, where the effect restrains trade." PATMAN, *THE ROBINSON-PATMAN ACT* 151 (1938).

The United States Supreme Court has recognized in an allied context that price discrimination can occur outside of an actual purchase contract. *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 743-4 (1945) involved Section 2(e) of the Clayton Act, which reads: "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." 38 STAT. 730 (1914), as amended, 49 STAT. 1527 (1936), 15 U.S.C. § 13(e) (1946). The Supreme Court held that the above section applies when the discrimination is not within the purchase contract but is in favor of one who has been a purchaser in general. Cf. *Shaw's, Inc. v. Wilson-Jones Co.*, 105 F.2d 331 (3d Cir. 1939), 40 COL. L. REV. 157 (1940); *Sorrentino v. Glen-Gery Shale Brick Corp.*, 46 F.Supp. 709 (E.D.Pa. 1942), 11 GEO. WASH. L. REV. 122 (1942). In both these latter cases the plaintiffs had been purchasers in the past.

64. In *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (3d Cir. 1915), the court upheld a refusal to sell which served the purpose of "defensive price discrimination" (defined note 12 *supra*). And in *Standard Oil Co. v. FTC*, 173 F.2d 210, 217 (7th Cir. 1949), a court order presented the defendant with the alternatives of (a) refusing to sell to price cutting jobbers, or (b) selling to them at the same price offered retailers. The latter course appears to be "defensive price discrimination," and the first alternative is its equivalent. Refusals to sell attacked as price discrimination have been used for purposes much like those of refusals to sell treated elsewhere in this Comment. *E.g.*, *Sidney Morris & Co. v. National Ass'n of Stationers*, 40 F.2d 620 (7th Cir. 1930) (refusal to sell to one who refused to maintain resale prices); *Whitwell v.*

sired commodity is available to the would-be buyer via the seller's normal channels at the retail price.⁶⁵ And, unless forewarned of the niceties of Section 2, a producer refusing to sell at the wholesale price would himself rarely object to selling at retail price.

Before the Clayton Act was passed, one court held that if complete refusal to sell be justified, then discrimination in quoted price is *a fortiori* justified.⁶⁶ Except for the specific words of the act, the reverse must be equally true: when discrimination in price is bad, then complete refusal to sell must on like grounds be bad.

The present insistence of the courts that only an executed transaction comes within Section 2⁶⁷ seems an empty requirement. Since refusals to sell are practically and logically extensions of discrimination in price, discriminatory refusals, like discriminatory sales, should be subjected to the criteria of that section. But even if the terms of Section 2 are not considered applicable, they, like other specific anti-trust prohibitions, determine in part the scope of unfair methods of competition within the prohibition of Section 5 of the Federal Trade Commission Act.⁶⁸ The close analogy between many refusals to sell and price discrimination is sufficient reason to classify such refusals as unfair methods of competition. If one method of achieving an illegal result is to be outlawed, so should the other.

Refusal to sell as an attempt to monopolize

While courts have rejected Section 2 of the Clayton Act as a means of controlling refusal to sell, Section 2 of the Sherman Act,⁶⁹ condemning attempts

Continental Tobacco Co., 125 Fed. 454 (8th Cir. 1903) (discrimination in quoted price in order to coerce purchasers not to deal in the goods of competitors of the seller); Sorrentino v. Glen-Gery Shale Brick Corp., 46 F.Supp. 709 (E.D.Pa. 1942) (would sell to plaintiff only through a dealer at retail rates in order to establish an exclusive sales arrangement); Arthur v. Kraft-Phenix Cheese Corp., 26 F.Supp. 824 (D.Md. 1938) (refusal to sell at dealer's discount in order to coerce plaintiff to buy up or sell out to a competitor of the seller).

65. See, e.g., *Abouaf v. J. D. & A. B. Spreckels Co.*, 26 F.Supp. 830, 831-2 (N.D.Cal. 1939).

66. *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454 (8th Cir. 1903). The *Whitwell* case, holding discrimination in quoted price legal, has been relied on in upholding complete refusal to sell long after the passage of the Clayton Act in 1914. See *Brosious v. Pepsi-Cola Co.*, 59 F.Supp. 429, 432-3 (M.D.Pa. 1945), *aff'd*, 155 F.2d 99 (3d Cir. 1946).

67. See note 60 *supra*. Also see *A. J. Goodman & Son, Inc. v. United Lacquer Mfg. Corp.*, 81 F.Supp. 890 (D.Mass. 1949), 97 U. OF PA. L. REV. 915 (contracting to sell at a discriminatory price does not violate Section 2(a) of the Clayton Act).

68. E.g., *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 453 (1922); *Keasbey & Mattison Co. v. FTC*, 159 F.2d 940, 946 (6th Cir. 1947); See Montague, *The Commission's Jurisdiction Over Practices in Restraint of Trade: A Large-Scale Method of Mass Enforcement of the Anti-Trust Laws*, 8 GEO. WASH. L. REV. 365 (1940).

69. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or com-

to monopolize, may have greater potentialities. Its relevance is clear, since effective refusal to sell not only presupposes some monopoly power⁷⁰ but also is frequently used to extend that power.⁷¹ It can be readily applied, for collateral practices illegal under Section 1 of the Sherman Act need not be shown; courts have only to consider the intent and effect of the refusal.

This approach has already been used in two cases. In the first of these, *Eastman Kodak Co. of New York v. Southern Photo Materials Co.*,⁷² the defendant's parent company had a monopoly in the manufacture of photographic materials. When the parent company gained control of a supply-house competing with plaintiff, the defendant discontinued sales to plaintiff. The Supreme Court held that this discontinuance was an illegal attempt to monopolize. Basing the decision on this ground represents a direct limitation on refusal to sell, since vertical integration is not illegal in itself.⁷³

A federal district court has made a comparable decision without even alluding to the *Southern Photo* case. In *United States v. Klearflax Linen Looms, Inc.*⁷⁴ the country's only manufacturer of linen rugs held up its deliveries to a distributor which had underbid the company on a government contract for the sale of such rugs. Here too the practice was condemned by the court as an illegal attempt to monopolize.

Since both cases related to national monopolies, they may go no further than early dicta⁷⁵ indicating that a producer with monopoly power could not

merce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ." 26 STAT. 209 (1890), 15 U.S.C. § 2 (1946).

70. See p. 1121 *supra*.

71. For example, when a producer resorts to "tie-in" sales, or prevents distributors from dealing in the goods of his nearest competitors, he is clearly attempting to extend his monopoly power. Insofar as these activities are done by contract or agreement, Section 3 of the Clayton Act provides specific prohibitions. 38 STAT. 731 (1914), 15 U.S.C. § 14 (1946). When the same things are done by refusing to sell one item without another or by refusing to sell to those who deal in competitors' goods, the policy of Section 3 is just as much violated. The practice should then be outlawed under Section 2 of the Sherman Act or Section 5 of the Federal Trade Commission Act, just as price discrimination by refusal to sell should be outlawed under Section 5 of the Federal Trade Commission Act. See note 68 *supra*; cf. *United States v. Columbia Steel Co.*, 334 U.S. 495, 507 n.7 (1948), 58 YALE L. J. 764 (1949) (Sherman Act violations are determined in part by policy of Section 7 of Clayton Act); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 464 (1941) (Section 5 of Federal Trade Commission Act governs method of business which runs afoul of Section 3 of Clayton Act).

72. 273 U.S. 359 (1927).

73. *United States v. Columbia Steel Co.*, 334 U.S. 495, 524-7 (1948), 58 YALE L. J. 764 (1949).

74. 63 F.Supp. 32 (D.Minn. 1945), 14 GEO. WASH. L. REV. 531 (1946), 41 ILL. L. REV. 132 (1946).

75. In dicta the privilege to refuse to sell apparently did not extend to instances where there was a purpose to monopolize. See, e.g., *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); 4 RESTATEMENT, TORTS § 764 (1939). Nor did the privilege extend to monopolies. See *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 49 (2d Cir. 1915); *United States v. Parker-Rust-Proof Co.*, 61 F.Supp. 805, 812 (E.D.Mich.

seek to extend that power by refusal to sell. But both may gain added significance from the recently expanded scope of Section 2 of the Sherman Act. The label of "monopoly"—seemingly the essential ingredient of the *Southern Photo* and *Klearflax* cases—is now applied by the courts to control over even a small fraction of the national market.⁷⁶ Hence courts may more often find situations in which the rule of the two cases can be employed.

Group boycott

Much of the courts' difficulty in bringing individual refusal to sell within statutory prohibitions disappears when the refusal stems from group action. Partly due to an assumption that group action is more effective,⁷⁷ and partly due to explicit terms of the anti-trust laws,⁷⁸ the emphasis in these cases is shifted from the refusal itself to the agreement or combination.⁷⁹ Thus placed

1945). *But see* *Locker v. American Tobacco Co.*, 195 N.Y. 565, 88 N.E. 289 (1909).

In *Greenleaf v. Brunswick-Balke-Collender Co.*, 79 F.Supp. 362 (E.D.Pa. 1947), defendant's motion for summary judgment was dismissed where plaintiff, a champion billiard player, accused the defendant, a manufacturer of billiard equipment, of refusing to invite plaintiff to compete in its annual tournament because plaintiff went on an exhibition tour arranged by a rival wholesaler. Citing the *Southern Photo* case, the court stated that ". . . an illegal monopoly cannot . . . refuse to deal with a person without sufficient cause." *Id.* at 365.

76. *See, e.g.*, *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235-6 (1948); Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. OF CHI. L. REV. 567 (1947).

77. Criticism of this basis is well taken:

"No attempt is made in the cases to ascertain the combine's economic strength. A boycott by a powerful corporation, under the *ratio decidendi* of the courts, would presumably be upheld while the combined boycott of several pigmies would be denounced. Although the presence of a combination invites the application of the conspiracy concept, nevertheless the element of numbers seems, at best, but an adventitious factor." *Handler, Unfair Competition*, 21 IOWA L. REV. 175, 207-8 (1936).

The distinction between individual and group is often hazy. "The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act." *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947); *see United States v. General Motors Corp.*, 121 F.2d 376, 404 (7th Cir. 1941), *cert. denied*, 314 U.S. 618 (1941); Hardy, *Loose and Consolidated Combinations Under the Antitrust Laws*, 21 GEO. L. J. 123 (1933); Note, *Are Two or More Persons Necessary to Have a Conspiracy Under Section 1 of the Sherman Act?*, 43 ILL. L. REV. 551 (1948).

78. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ." 26 STAT. 209 (Sherman Act, 1890), 15 U.S.C. § 1 (1946).

79. *E.g.*, *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291, 312 (1923). A combination or conspiracy can be formed without any specific agreement on the part of the conspirators. *E.g.*, *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225, 227 (1939); *William Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F.2d 738, 743-5 (3d Cir. 1945); *see* 97 U. OF PA. L. REV. 133 (1948). Hence proof of conspiracy is the crucial point in perhaps the majority of group boycott cases. *Compare* *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914) (conspiracy), *with* *United States v.*

on more familiar ground, the courts have handed down a logical pattern of decisions in which refusals to sell are tested directly in terms of their restraint on competition.⁸⁰

Competitors who combine in a refusal to sell do so at their peril, for group boycott has been so consistently condemned as to suggest *per se* illegality.⁸¹ Since 1914⁸² the Supreme Court has only once upheld an agreement by which competitors mutually limited their right to sell⁸³—and that in a case which in-

Southern California Wholesale Grocers' Ass'n, 7 F.2d 944 (S.D.Cal. 1925) (no conspiracy); *cf.* Southern Hardware Jobbers' Ass'n v. FTC, 290 Fed. 773 (5th Cir. 1923).

80. There is a sharp divergence in outcome as the composition of an alliance changes from vertical units, as in exclusive sales arrangements, to horizontal units, as in group boycott. Term requirement contracts, binding a buyer to buy and/or a seller to sell all the buyer's requirements of a commodity for a given time are often upheld even though they are a form of exclusive dealing arrangement. *E.g.*, Match Corp. of America v. Acme Match Corp., 285 Ill. App. 197, 1 N.E.2d 867 (1st Dist. 1936). *Contra*: Standard Oil Co. of California v. United States, 17 U.S.L. WEEK 4510 (U.S. June 13, 1949). See Stockhausen, *The Commercial and Anti-Trust Aspects of Term Requirements Contracts*, 23 N.Y.U.L.Q. REV. 412 (1948). Courts have often demonstrated their disfavor of requirement contracts by holding them unenforceable for lack of consideration. See Havighurst & Berman, *Requirement and Output Contracts*, 27 ILL. L. REV. 1 (1932); Notes, 23 COL. L. REV. 223 (1928), 24 A.L.R. 1352 (1923); 74 A.L.R. 476 (1931). Agreements between those who were never competitors not to compete in the future may be found reasonable if part of a transfer of a business, or part of an employment contract. *E.g.*, Buanno v. Weinraub, 81 N.E.2d 600 (Ind. 1948) (employment contract); Heuer v. Rubin, 62 A.2d 812 (N.J. 1949) (transfer of a business). But if the area from which the party is excluded is too large, the agreement may be outlawed. *E.g.*, Kex Mfg. Co. v. Plu-Gum Co., 28 Ohio App. 514, 162 N.E. 816 (Cuyahoga County 1928) (entire United States), 4 NOTRE DAME LAW. 265 (1929); see Pfarrar, *Contracts in Restraint of Trade*, 4 NOTRE DAME LAW. 244 (1929).

An agreement between erstwhile competitors to split territory, geographically or otherwise, with each party not to sell in the area of the other is normally illegal. *E.g.*, Addyston Pipe and Steel Co. v. United States, 175 U.S. 211 (1899); Johnson v. Joseph Schlitz Brewing Co., 33 F.Supp. 176 (E.D.Tenn. 1940).

81. See United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948); Kirklpatrick, *Commercial Boycotts as Per Se Violations of the Sherman Act*, 10 GEO. WASH. L. REV. 302, 387 (1942); Note, 58 YALE L.J. 764, 767 n. 17 (1949); 41 COL. L. REV. 941 (1941); *cf.* Handler, *The Sugar Institute Case and the Present Status of the Anti-Trust Laws*, 36 COL. L. REV. 1, 14-8 (1936). But see 4 RESTATEMENT, TORTS §765 (1939).

82. The leading case against group boycott has long been Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914), in which reports of wholesalers selling directly to consumers were circulated among the retailers, without any express agreement to boycott. While this was a refusal to buy, the case was sufficient precedent for refusals to sell, since the joining together is the distinguishing factor of group boycott. Bobbs-Merrill Co. v. Straus, 139 Fed. 155, 191 (C.C.S.D.N.Y. 1905). *But cf.* Sidney Morris & Co. v. National Ass'n of Stationers, 40 F.2d 620 (7th Cir. 1930).

Combinations refusing to deal had been condemned by the Supreme Court even before the *Eastern States Lumber* case. *E.g.*, Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912). But such combinations had on occasion been upheld. *Anderson v. United States*, 171 U.S. 604 (1898).

83. In *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933), the court, in view

involved persuasive extenuating circumstances, and which has now been all but overruled.⁸⁴ Moreover, a recent dictum in the *Columbia Steel* case stated flatly that group boycott is illegal *per se*.⁸⁵

Nevertheless, lower court dicta have continued to reflect a more lenient view.⁸⁶ And the Supreme Court, even in the cases cited in the *Columbia Steel* dictum,⁸⁷ has indulged in such a thorough canvassing of facts that the possibility of a justifiable group boycott may be implied.⁸⁸

Even *Fashion Originators' Guild of America v. FTC*,⁸⁹ which is often thought to stand for illegality *per se*,⁹⁰ does not preclude this interpretation. In that case, a powerful combination in the women's garment industry refused to sell to manufacturers and retailers who dealt in designs "pirated" from their members. Outlawing the combination, the Supreme Court stated that such a purposeful restraint on interstate commerce would not be justified even if style copying were an acknowledged tort under the law of the state,⁹¹ and the Federal Trade Commission was upheld in refusing to hear much of the

of the serious economic problems in the Appalachian coal area, allowed cooperation among competing producers, even including the creation of a joint selling agency which was to sell substantially all the output of the producers.

On the other hand group boycotts, both with and without other factors, have been condemned by the Supreme Court. *E.g.*, *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930); *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923).

84. *See* *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 214-6 (1940).

85. *See* *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 (1948).

86. *See, e.g.*, *United States v. Waltham Watch Co.*, 47 F.Supp. 524, 531 (S.D.N.Y. 1942) (*prima facie* unlawful). In *Butterick Pub. Co. v. FTC*, 85 F.2d 522, 526-7 (2d Cir. 1936), a group boycott was held partially allowable, where the purpose was to prevent sales of coverless magazines by dealers who had obtained refunds on their purchase price by ripping off the covers of these unsold magazines and returning the covers to the publishers.

Generally the lower federal courts have followed the lead of the Supreme Court in disfavoring all group boycotts. *See, e.g.*, *Belfi v. United States*, 259 Fed. 822 (3d Cir. 1919); *Majestic Theater Co. v. United Artists Corp.*, 43 F.2d 991 (D.Conn. 1930). But earlier boycotts were occasionally upheld. *E.g.*, *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.*, 66 Fed. 637 (2d Cir. 1895). Because of past leniency on the part of state courts, *e.g.*, *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N.W. 1119 (1893); *Wolfenstein v. Fashion Originators Guild of America*, 244 App.Div. 656, 280 N.Y.Supp. 361 (1st Dep't 1935), 36 Col. L. Rev. 484 (1936), treatises consider group boycott capable of justification. *See* PROSSER, TORTS 1021-2 (1941); 4 RESTATEMENT, TORTS § 765 (1939).

87. The dictum cites *Associated Press v. United States*, 326 U.S. 1 (1945); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914); *Montague & Co. v. Lowry*, 193 U.S. 38 (1904).

88. On at least one occasion after 1914 a Supreme Court dictum has indicated that group boycott could be justified. *See* *United States v. American Livestock Commission Co.*, 279 U.S. 435, 437-8 (1929).

89. 312 U.S. 457 (1941).

90. *See* note 81 *supra*.

91. 312 U.S. 457, 468 (1941).

evidence offered as to the reasonableness of the restraint. But the facts already before the Court were enough to classify the restraint as inexcusably serious. Some of the facets of the case were particularly disfavored restraints on competition. For example, the Court laid emphasis on the use of various policing measures ("blacklists," snoopers, fines), on the ". . . intentional destruction of one type of manufacture and sale which competed with Guild members,"⁹² and on the general strength of the Guild. Moreover, the Court indicated that the Guild's plan ran afoul of Section 3 of the Clayton Act,⁹³ in that goods were sold only to manufacturers and retailers who refrained from dealing in "pirated" designs. Finally, the Second Circuit decision, which the Supreme Court affirmed without adverse comment, had specifically said that a group boycott, though prima facie unlawful, may be justified.⁹⁴ In condemning a group boycott having a fairly plausible purpose, the *Fashion Originators'* decision certainly tightened the rules against group refusal to sell, but it did not necessarily outlaw the practice beyond redemption.

Nor does *Associated Press v. United States*⁹⁵ clearly establish that group refusal to sell is illegal *per se*. Admission to the defendant news agency, which dominated the American news-gathering trade, was comparatively simple for an applicant not serving the same area as a member. But should the applicant be in competition with a newspaper already a member, admission was contingent on the payment of a considerable sum and on a majority vote of the members, both requirements subject in effect to the waiver of the competing member. Nonmembers could not get AP news; and members were prohibited by one of the by-laws from selling or furnishing spontaneous news to any agency or publisher other than AP.

Two elements in the case must be distinguished: the group refusal to sell to outsiders, and the discriminatory by-laws themselves. Judge Learned Hand, speaking for a three-judge district court, had viewed the problem first as one of group boycott.⁹⁶ Finding authority indefinite,⁹⁷ but certain that such a combination might be legally justifiable, he then appraised the dominant position of AP and concluded that the by-laws were contracts unreasonably restraining trade. The Supreme Court in affirming made no specific examination of the law of group boycott. The majority laid emphasis on the by-laws themselves and on the dominant position of AP. While pointing out that ex-

92. *Id.* at 467.

93. 312 U.S. 457, 464 (1941).

94. *Fashion Originators' Guild of America v. FTC*, 114 F.2d 80, 84 (2d Cir. 1940). The lower court decision went on to say that this particular combination was unlawful *per se*. *Id.* at 85.

The Second Circuit had previously been more tolerant of group boycott than most other courts. See *Butterick Pub. Co. v. FTC*, 85 F.2d 522 (2d Cir. 1936), note 85 *supra*.

95. 326 U.S. 1 (1945). See Lewin, *The Associated Press Decision—An Extension of the Sherman Act?*, 13 U. OF CHI. L. REV. 247 (1946).

96. *United States v. Associated Press*, 52 F.Supp. 362 (S.D.N.Y. 1943).

97. *Id.* at 369-70.

clusive agreements between two papers in different cities might well be reasonable,⁹⁸ the majority found that the by-laws, viewed in the light of their designed purpose of hampering competition, had the net effect of seriously limiting the opportunity of competitors. This effect was largely attributable to AP's size in the trade, which the Court so stressed as to suggest that illegality resulted less from the boycott aspects of the by-laws than from the effect given the boycott by AP's power.⁹⁹

The Court's multiple emphasis makes the case somewhat inconclusive on the status of group boycott. Nevertheless, it is now difficult to imagine any group boycott being sustained by the Supreme Court. Lower courts have already begun to echo the *Columbia Steel* dictum.¹⁰⁰ Unless further clarification is forthcoming, it may be supposed that only the necessarily ineffective boycott—devoid of intent to injure, of coercive practices, and of dominant market position—could possibly survive in the federal courts as an exercise of the privilege to refuse to sell. And such a boycott would in most cases be so inconsequential that litigation would not arise.

Yet the reservation which may be implied in the *Associated Press* and *Fashion Originators'* opinions seems a desirable alternative to illegality *per se*. The restraint of trade effected by group refusal to sell may be of negligible importance. Moreover, group action may actually improve competitive conditions where, for example, several small producers adopt a common selling agency in order to survive the onslaught of giant concerns. The varying effects of refusal to sell require application of the "rule of reason," considered in the light of the dominant economic and social functions which Congress expects the anti-trust laws to fulfill.

CONCLUSION

The facility with which courts strike down group boycott is in marked contrast with their reluctance to fit a single concern's refusal to sell into the terms of legislative prohibitions. Yet even the single concern is far from exempt. Refusal to sell to price cutters has been condemned, both by detecting collateral facts subject to Section 1 of the Sherman Act, and by finding such schemes to be unfair methods of competition. On a few occasions, other refusals to sell have been outlawed as illegal price discrimination and as attempts to monopolize. Since effective refusal to sell is a restraint on trade, these prohibitions should be more often applied. The vestiges of special immunity should be stripped away.

98. 326 U.S. 1, 14 (1945). Justice Douglas in his concurring opinion pointed out that exclusive sales arrangements are widely upheld. *Id.* at 23.

99. The dissent of Justice Roberts, that AP was thus improperly rendered a public utility subject to a duty to serve all, reemphasizes the refusal to sell. And in effect it urges that a group boycott is legal. 326 U.S. 1, 29 (1945). Nor does the majority rule at any point say that group boycott is illegal *per se*.

100. See *United States v. New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79, 87 (7th Cir. 1949).

The present law applying to group action may indicate suitable limits for individual refusal to sell. As an enterprise grows in power, the effect on competition of its refusal to sell is as great as the effect of a group boycott. On the other hand, the prohibitions should not be carried too far. The problems presented by individual or group refusal to sell are eminently suited to the "rule of reason." The determinants of legality should be not the method, but rather the purpose, the result, and the underlying monopoly power.