

Spring 1981

Refusals to Deal: The Sherman Antitrust Act and the Right to Customer Selection, 14 J. Marshall L. Rev. 353 (1981)

Anthony S. Zito Jr.

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Antitrust and Trade Regulation Commons](#)

Recommended Citation

Anthony S. Zito, Jr., Refusals to Deal: The Sherman Antitrust Act and the Right to Customer Selection, 14 J. Marshall L. Rev. 353 (1981)

<https://repository.law.uic.edu/lawreview/vol14/iss2/4>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

REFUSALS TO DEAL: THE SHERMAN ANTITRUST ACT AND THE RIGHT TO CUSTOMER SELECTION

ANTHONY S. ZITO, JR.*

Stimulated by the Industrial Revolution¹ and the burgeoning of urban America,² this country witnessed economic growth so dynamic and powerful that it forever changed the methods and practices of our nation's businesses. This great spurt of economic activity brought huge gains in productivity and profits. Accompanying these welcome monetary rewards, however, was a form of business competition so keen and fierce that the very free enterprise system in which competition is normally encouraged was threatened with collapse. Our current antitrust laws evolved in this environment.³

* Associate Professor of Law, The John Marshall Law School. B.A., J.D., LL.M., Case-Western Reserve University. Member of the Ohio and Illinois Bars. The author wishes to acknowledge with sincere appreciation the invaluable research assistance of Kenneth J. Nemecek, Jr., senior law student at The John Marshall Law School.

1. The term "Industrial Revolution" is usually applied to the social and economic changes that mark the transition from a stable agricultural and commercial society to a modern industrial society relying on complex machinery rather than tools. Historically, the term refers primarily to the period in British history from the middle of the eighteenth century to the middle of the nineteenth century. However, the transformation of the United States into an industrial nation took place largely after the Civil War and lasted until about 1890.

2. Between 1880 and 1910 American cities grew dramatically in physical size and population due to a large rural-urban migration and foreign immigration. As a result, new markets for manufactured goods were created, and the response to these demands carried the mixed commercial, manufacturing, and agrarian economy into the industrial environment we know today, dominated by large mass-production corporations. See Z. MILLER, *THE URBANIZATION OF MODERN AMERICA, A BRIEF HISTORY* 63-96 (1973).

3. The Sherman Antitrust Act of 1890 was the first congressional measure to prohibit trusts. The Act, based on the constitutional power of Congress to regulate interstate commerce, declared illegal every contract, combination (in the form of trust or otherwise), or conspiracy in restraint of interstate and foreign trade. In 1914 the Clayton Antitrust Act was passed to clarify and supplement the Sherman Act. The Clayton Act prohibited exclusive sales contracts, local price cutting to freeze out competitors, rebates, interlocking directorates in corporations capitalized at one million dollars or more in the same field of business, and intercorporate stock holdings. The Act also restricted use of the injunction against labor, and legalized peaceful strikes, picketing, and boycotts. The Federal Trade Commission Act was also passed in 1914. This Act established the Federal Trade Commission (FTC) as an independent agency of the United States

In an open and freely competitive society, the ideal policy of the general law would be to encourage a person or corporation in trade or commerce to exercise individual business judgment in operating the business. It is fundamental to the maintenance of this competitive system that such a trader be able to pursue his business interests in light of his own analysis of the market environment, and that his decision to deal or not to deal with prospective customers reflect this analysis. However, it is equally fundamental to the viability of such an economy that purely arbitrary decisions of the trader must not be allowed to interfere with another's legitimate business endeavors solely because of the trader's superior economic strength and market position. When a business failure is not directly attributable to the operation of normal competitive activity, but rather to predatory objectives or conduct of another, the injury constitutes a threat not only to the individual who is adversely affected, but also to the system itself.⁴ It is through the legislation and interpretation of federal antitrust laws that this system of free and open competition is safeguarded.⁵

Of primary importance to a businessman⁶ who is a member of a trade or business group, either formal or constructive, is an analysis of the antitrust laws' effect on his business and on implementation of his business decisions. By analyzing federal judicial treatment of the scope of the businessman's right to customer selection, a better understanding may be gained not only of the purpose and effect of the antitrust laws, but also of indicators of future developments in the area of refusals to deal.⁷ Moreover, this inquiry into a trader's right to refuse to

government charged with keeping American business competition free and fair. The general duties of the FTC are to promote fair competition through the enforcement of certain antitrust laws; to prevent false and deceptive advertising; and to investigate the workings of business and keep Congress and the public informed of the efficiency of such antitrust acts, as well as practices that may call for further legislation.

4. If, because of the natural operations of competition, one is unable to survive in his market due to inferior operational facilities or inefficient production or distribution systems, his failure should, in most instances, be considered a manifestation of the viability and dynamics of the system itself, and should not be condemned by the general law as an injury to public interest.

5. See notes 23-38 and accompanying text *infra*.

6. The terms "businessman" or "businessmen", as used in this article, refer to both men and women in business and are used merely for ease of reading.

7. Simple refusals to sell to others who do not maintain the first seller's fixed resale prices have been held to be lawful; however, a seller cannot consistently with the Sherman Act go beyond this right to refuse to deal if aided by contracts or combinations, express or implied, that "unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade." *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 453 (1922).

deal (*i.e.*, unilateral refusals to deal, self-restricting refusals to deal, and group boycotts) will create a greater awareness of the considerations that must be entertained by the businessman before making vital decisions about potential customer selection.

This article will define what constitutes an illegal refusal to deal under the Sherman Antitrust Act. An examination of the Sherman Act and other relevant antitrust laws, coupled with a detailed analysis of Supreme Court and lower federal court decisions interpreting these laws, will aid in this study. This discussion will provide the novice with a thorough understanding of the problems and approaches that should be considered in the area of antitrust law in general, and refusals to deal in particular.

ANTITRUST STATUTES

The concern of the United States government for preserving the safeguards of free and open competition has been manifested in the legislation of several antitrust statutes, including the Sherman Act,⁸ the Clayton Act,⁹ and the Federal Trade Commission (FTC) Act.¹⁰ However, unlike actual terms in a sale of goods, refusals to deal are not expressly governed by any particular antitrust provisions. Instead, the ultimate determination of whether a concerted refusal to deal¹¹ or group boycott¹² is legal depends upon judicial interpretation of the Sherman Act's provisions against agreements in restraint of trade¹³ and

8. See note 3 *supra*.

9. *Id.*

10. *Id.*

11. The term "concerted refusal to deal" has been defined as "an agreement by two or more persons not to do business with other individuals, or to do business with them only on specified terms." *Mackey v. NFL*, 543 F.2d 606, 618 (8th Cir. 1976), citing Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 HARV. L. REV. 1531 (1958).

12. The term "group boycott" has been referred to as "a refusal to deal or an inducement of others not to deal or to have business relations with tradesmen." *Mackey v. NFL*, 543 F.2d 606, 618 (8th Cir. 1976), citing Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A. L. REV. 569, 580 n.49 (1964).

13. 15 U.S.C. § 1 (1976) provides:

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 declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

against monopoly;¹⁴ the Clayton Act's provisions against discrimination in price and selection of customers;¹⁵ and the FTC Act's provisions against unfair competition.¹⁶

Section 2 of the Sherman Act¹⁷ has been referred to in dicta by the United States Supreme Court as making "the prohibitions of the Act all the more complete and perfect by embracing all attempts to reach the end prohibited by the 1st section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof."¹⁸ Moreover, in the area of concerted refusals to deal, section 5 of the FTC Act¹⁹ has been utilized by complainants where individual conduct or concerted conduct falls short of being a Sherman Act violation but may, as a matter of law,

Section 3 of the same title provides:

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

14. 15 U.S.C. § 2 (1976) provides:

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 commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15. 15 U.S.C. § 13 (1976) provides in relevant part:

(a) It shall be unlawful for any person engaged in 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 either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and 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. . . .

16. 15 U.S.C. § 45(a)(1) (1976) provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

17. See note 13 *supra*.

18. Standard Oil Co. of N. J. v. United States, 221 U.S. 1, 61 (1911).

19. See note 16 *supra*.

constitute an unfair method of competition prohibited by the FTC Act.²⁰ The Supreme Court has considered the major purpose of the FTC Act to be enabling the FTC to restrain as unfair practices which have not yet reached Sherman Act proportions, but which would do so if left unrestrained.²¹ Therefore, this statutory provision, like section 2 of the Sherman Act, has become a catchall in the area of group boycotts where plaintiffs have been unable to produce sufficient evidence to prove the required agreement under sections 1 and 3 of the Sherman Act.²²

DEVELOPMENT OF THE STATUTES THROUGH JUDICIAL DECISIONS

The antitrust laws were intended to encourage, foster, and protect the competition that is the foundation of our economic life. In deciding whether a refusal to deal violates antitrust law, the purpose, form, and effect of the challenged activity must be examined. The Sherman Act generally does not reach refusals to sell or buy which are completely arbitrary and isolated, for such behavior is probably not pursuant to a conspiracy, nor would it constitute a scheme to monopolize, for it lacks the element of intent.²³

20. See *FTC v. Cement Inst.*, 333 U.S. 683 (1948).

21. *Id.* at 721 n.19 (although the FTC had found the existence of a combination, it did not mean that this was an indispensable ingredient of an unfair method of competition under the FTC Act). See also *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 445 (1922).

Section 5 of the FTC Act is even broader than the Sherman Act because it can permit prosecution of Sherman Act violations as violations of the FTC Act's prohibition of unfair methods of competition, without some of the Sherman Act violations. See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 n.5 (1972); *FTC v. Brown Shoe Co., Inc.*, 384 U.S. 316, 320-22 (1966).

22. Section 1 of the Sherman Act requires proof of an agreement. However, courts have relaxed the traditional requirements of conspiracy when considering alleged violations of § 1. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948) (an express agreement is not necessary in order to find a conspiracy); *United States v. Masonite Corp.*, 316 U.S. 265, 275 (1942) (an awareness of the general scope and purpose of the undertaking was sufficient to find an unlawful conspiracy). Also, proof of a formal agreement is no longer required before an unlawful conspiracy can be established. See *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946) (conspiracy proved by evidence of the action of the parties taken in concert); see also *Standard Oil Co. of Cal. v. Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958) (where the court held evidence of a conspiracy could be established by showing that the defendant, knowing that concerted action was contemplated and invited, had participated in such action).

23. Justice Holmes, in delivering the opinion of the Court in *Swift & Co. v. United States*, 196 U.S. 375 (1905), enunciated best the importance of the element of intent in determining whether there has been an attempt to monopolize:

Intent is almost essential to such a combination and is essential to such an attempt [to monopolize]. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance,

Perhaps the earliest and most important judicial interpretation of the purview of the Sherman Act was made in *United States v. Colgate & Co.*,²⁴ in which the Supreme Court made one of the classic statements of the rule to be followed in the area of refusals to deal:

The purpose of the Sherman Act is to . . . preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.²⁵

Colgate held that, absent monopoly, unilateral refusals to deal are lawful, even if the actual or intended result would be unlawful if it were accomplished by agreement.²⁶ However, the courts have taken a different, more critical approach to boycotts where more than one party has been involved.²⁷ The distinguishing feature of the group boycott cases is multilateral action to coerce third parties to conform, or to eliminate them from competition. In holding such concerted refusals to deal unlawful, the courts have focused on the means used.²⁸ When coercion is absent, a more liberal approach has generally been used.

After *Colgate* the courts began to construct what some consider to be a limitation on the absolute right of an individual to buy from or sell to any person for any reason.²⁹ The courts began to interpret the Supreme Court's holding in light of the proviso that the absolute right of an individual to customer selection existed "[i]n the absence of any purpose to create or maintain a monopoly."³⁰ They recognized that although the truly independent activity might in itself be legitimate in terms of the reasons behind the antitrust law, this activity might be only one small component of an overall scheme of business conduct that was directed toward, or resulted in, monopolization. Since monopolization inherently implied injury to competition and restraint of trade, the conduct in question must be within

the monopoly—but require further facts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. 196 U.S. at 396.

24. 250 U.S. 300 (1919).

25. *Id.* at 307.

26. The absolute nature of this right was further demonstrated by the Court's declaration that a trader could announce in advance the circumstances under which he would refuse to sell. *Id.*

27. See notes 67-86 and accompanying text *infra*.

28. See notes 100-14 and accompanying text *infra*.

29. See Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955) [hereinafter cited as Barber].

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

the prohibition of section 2 of the Sherman Act.³¹ In adopting this approach, the courts came to view section 2 as a catchall for undesirable activity that would not, technically, fall within the prohibitions of sections 1 and 3. Therefore, section 2 has been construed as making the prohibitions of the Sherman Act more complete by embracing all attempts to reach the end prohibited by the first and third sections, that is, restraints of trade by any *attempt* to monopolize.

In *Montague & Co. v. Lowry*,³² an early Sherman Act case dealing with section 1, an association of manufacturers and dealers in tiles formed an agreement among its members not to purchase materials from manufacturers who were not members of the association, and not to sell unset tiles to nonmembers for less than list prices, which were fifty percent higher than the prices paid by members. Violations of the agreement rendered the members subject to forfeiture of membership. The United States Supreme Court held that the association constituted an agreement or combination in restraint of trade within the meaning of the Sherman Act, and that plaintiff, an independent tile dealer and competitor of certain members of the association, was entitled to recover treble damages.³³ In 1914, the Court was asked to determine whether an arrangement between certain retail lumbermen's associations regarding their relations with wholesale dealers amounted to a combination and conspiracy in restraint of trade as proscribed by section 1 of the Sherman Act.³⁴ The Court held the blacklisting procedure an illegal agreement under section 1.

However, it was not until the landmark decision of *Colgate* in 1919 that the Court recognized that the real issue in this area was the extent to which one may control and dispose of his own property, and acknowledged that one may not do so fraudulently, collusively, or in unlawful combination with others.³⁵

31. See Barber, *supra* note 29, at 861-62.

32. 193 U.S. 38 (1904).

33. The rationale for the Court's holding was that plaintiffs could not be forced to become members of the association merely to conduct business as they had done before its organization by virtue of any stipulation in the bylaws of the corporation. The Court also said that the amount of trade among the parties was not material, implying that the broader injury to competition was the evil to be prevented. *Id.* at 46.

34. *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914).

35. Ultimately, the Court held that the indictment did not charge the defendant with selling its products to dealers under an agreement as envisaged by Congress in the Sherman Act, and therefore the lower court's order sustaining *Colgate's* demurrer was affirmed. In dicta, the Court said: "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of

The Court implied that any combination or conspiracy aimed at coercing a third party into compliance with the group's wishes smacked of an interference with freedom of trade, and was therefore in violation of the Sherman Act. Although the Court broadly affirmed the right to refuse to sell unilaterally, it also clearly decided that the antitrust laws precluded combining with others for the same purpose. The reluctance with which the Court refused to find a violation of the law in a single concern's refusal to sell contrasts with the speed with which the Court implied it would strike down a group boycott.³⁶

In these early cases the Supreme Court set the tone for future analysis of Sherman Act complaints and established the pattern that a business or person acting alone had an absolute right to choose those with whom he wished to buy and sell, in the absence of special factors such as a monopolistic position in the market. But the courts became very sensitive to the fact that combination was an extremely useful tactic to accomplish undesirable business objectives that could not be reached unilaterally.³⁷ While the independent refusal of one party to deal with another might represent a stimulus to competition, the joint efforts of more than one party to accomplish the same objective could easily impede or threaten the operation of competition, and consequently effect an undue restraint on trade.

After *Colgate*, the apparently clear statement of the Court that individual customer selection was permissible began to undergo a process of confinement. Although the Court reaffirmed the right to refuse to sell unilaterally, it also decided that the antitrust laws precluded the combining of others for the same purpose. The difficulty with this generalized approach was determining when this combination occurred. The focal question became what guidelines or tests the courts could apply to determine when a combination had taken place. By looking to see whether the refusal stemmed from group action (perhaps because of an assumption that group action is more effective), courts began to have less difficulty in bringing refusals to deal within the statutory prohibitions. Thus, the emphasis in many cases following *Colgate* shifted from the refusal itself to the *agreement or combination*.³⁸

their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade." 250 U.S. at 307.

36. *Id.* at 307-08.

37. See note 38 *infra*.

38. In *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923), the Supreme Court said that a combination or conspiracy could be formed without any specific (formal) agreement on the part of the competitors. The Court began to identify more clearly the agreement or conspiracy as the

"ILLEGAL PER SE" AND "RULE OF REASON" CONCEPTS

Before attempting to ascertain what legal treatment will be given under the Sherman Act to the relationship and actions of two or more traders vis-a-vis third parties, one must first inquire

primary component of the restraint, and the refusal to deal became a manifestation of the primary agreement element. In 1930, in *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930), ten competitors in interstate commerce controlling 60% of the entire film industry agreed to restrict their liberty of action by refusing to contract with exhibitors for the display of motion pictures except on a standard form contract. This contract provided for compulsory joint action in respect to their dealings with one failing to observe the contract's provisions. The Supreme Court affirmed the lower court's decree of injunction against future action on the unlawful plan on the theory that the necessary and inevitable result of such an agreement was to restrain trade materially and unreasonably in violation of the Sherman Act. The Court once again emphasized that the purpose of the Act was to *protect the public* against the evils commonly incident to the unreasonable destruction of competition—that the interest of the public in the preservation of competition was the primary consideration.

Perhaps the next major case in the logical line of decisions was *Fashion Originators Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941). Here, in a § 5 FTC Act proceeding the defendants, a combination of manufacturers of textiles used in women's garments, sought to suppress competition by others who allegedly copied their designs and sold them at generally lower prices. Defendants registered their designs and refused all sales to retailers and manufacturers of garments who dealt in the copies or would not agree not to sell them. The FTC concluded that the practices of the combination constituted an unfair method of competition tending to monopolize, and issued a cease and desist order. Defendants claimed their methods were a necessary form of self help devised to prevent what they claimed to be activity approaching a common law tort. The Supreme Court reaffirmed the FTC's ruling, citing the power of the combination and the fact that its goal was the intentional destruction of one type of manufacture and sale that was in competition with the Guild and its members. This case further illustrated the clear trend in judicial thinking supporting the proposition that competitors who combine in a refusal to sell do so at their own peril, and foreshadowed the tendency to condemn a coercive group boycott as illegal per se.

The more recent cases in the group boycott area show no tendency to deviate from the well settled principles of judicial analysis discussed above. The cases show a trend toward scrutinization of group activities geared to accomplish certain economic objectives in light of the group's power, potential or real, in its particular market environment, and demonstrate a feeling that size and economic strength of such groups are directly related to the potential for interference with competition.

In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), Justice Black, speaking for a unanimous Court, said that group boycotts were within a class of restraints which were inherently unduly restrictive, and that Congress has determined its own criteria of public injury as to them. Group boycotts, or concerted refusals by traders to deal with other traders, had long been regarded as being in a forbidden category, and were not saved by allegations that they were reasonable in the specific circumstances. The activities of Broadway-Hale vis-a-vis Klor's were seen to interfere with the natural course of interstate commerce, and this would not be tolerated merely because the victim was just one merchant whose business was so small that its destruction would make little difference to the economy as a whole.

In *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656

whether the activity constitutes an agreement, *i.e.*, a contract, combination, or conspiracy. If it is found that an agreement was made, then the next question is whether this concerted action, or group boycott, is an illegal restraint of trade. Two different approaches to this problem have been adopted by the courts. An understanding of them is fundamental to an analysis of the past developments and future trends in the area of concerted refusals to deal. These two methods are known as the "illegal per se" and the "rule of reason" concepts.³⁹

(1961), the Supreme Court cited *Klor's* in overturning a Seventh Circuit Court of Appeals affirmation of a district court decision dismissing plaintiff's complaint. Here defendant American Gas Association (AGA) allegedly combined to restrain interstate commerce in the manufacture, sale, and use of gas burners in violation of § 1 of the Sherman Act. The Court found a conspiracy in the AGA's refusal to approve plaintiff's burners, and said that this conspiratorial refusal fell within one of the "classes of restraints which from its very 'nature' or 'character' was unduly restrictive." 364 U.S. at 659.

The trend in case development in this area is forecast by one of the most recent cases, which indicates that the courts will continue to adhere closely to the principles and guidelines established in cases already discussed. In *Boise Cascade Int'l, Inc. v. Northern Minn. Pulpwood Producers Ass'n*, 294 F. Supp. 1015 (D. Minn. 1968), the Minnesota District Court followed the principle established in *Colgate* that any individual (operator) acting alone and not in concert with others is free to sell his product or labor to anyone he chooses at any price he cares to demand, or to withhold his product from the market completely if he so desires. However, as to defendants' claim that any group action resulting from their activity was the result of an ad hoc group of individuals expressing common grievances against a particular person (corporation), and not an association conducting a group boycott, the court said: "The statute, however, Section 1 of the Sherman Act, requires no formal association but only a 'combination or conspiracy' and this has always been interpreted to countenance some type of agreement among the parties to the conspiracy or combination, whether formal or informal." 294 F. Supp. at 1021. The court said that the major evil at which the antitrust laws were aimed was a situation where two or more individuals begin to act in concert, that is, jointly, in agreeing to withhold their products from the market or a specific customer.

It thus appears that the crucial element that will make group behavior violative of the antitrust laws is not the boycott or refusal in itself, but the agreement, formal or constructive, utilized to make the business objectives more easily attainable.

39. An act is illegal per se if it is known or proved to have occurred, and it is declared illegal without an examination of its possible justifications. The reasoning behind this is discussed by the Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977). See also Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 YALE L.J. 373 (1966) [hereinafter cited as Bork]; Van Cise, *The Future of Per Se in Antitrust Law*, 50 VA. L. REV. 1165 (1964); Note, *Antitrust—Vertical Restrictions—The Rule of Reason*, 1977 WIS. L. REV. 1240.

The rule of reason applies "where the restraints on trade and commerce have restrained competition but certain redeeming features exist which save them from being conclusively presumed unreasonable. The concerted conduct sought to be insulated from antitrust scrutiny must be no more restrictive than necessary to achieve its legitimate purpose." Note, *Antitrust—Restraint of Trade—Group Boycott—NFL College Draft*, 15 DUQ. L. REV. 747, 749 n.14 (1977).

The Rule of Reason

Relative to section 1 of the Sherman Act, the rule of reason was invoked for the first time by the United States Supreme Court in 1911 in *Standard Oil Co. of New Jersey v. United States*.⁴⁰ The Court adopted this concept to provide some workable guidelines to determine what activity fell within the purpose and prohibitions of the law—what activity constituted a *sufficient* restraint of trade or commerce⁴¹ in a section 1 or 3 case—and clarified it by the following dicta:

[T]he criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve.⁴²

This concept was applied in deciding at what point the actions of a commercial entity exceed the bounds of acceptability or social desirability. Consequently, the Court's reasoning seemed to indicate that even where the requisite group action was present, the effects of the conduct would be analyzed to determine whether its restraining characteristic was severe enough to counterbalance any positive implications, for example, the achievement of greater efficiency in performing valuable economic functions. All relevant factors, such as the relative economic strengths of the combining parties in the market in which they operate,⁴³ and even the motives underlying their conduct, would be considered. Only after these variables were considered would the Court determine whether the business activity in question fell outside the ambit of desirable business conduct, measured in light of the antitrust law policy to cultivate and protect competition.

The basic function of the rule of reason has been to serve as a vehicle with which to interpret the ultimate effects of the challenged conduct. Where the court goes beyond the actual agreement of the parties, it will employ this rule to filter facts pertaining not only to the agreement itself, but also to the rea-

40. 221 U.S. 1 (1911).

41. A restraint of trade has been seen as embracing only "acts or contracts or agreements or combinations which operated to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade. . . ." *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 610 (1914), citing *Standard Oil Co. of N. J. v. United States*, 221 U.S. 1 (1911). *Accord*, *Nash v. United States*, 229 U.S. 373, 376 (1913).

42. 221 U.S. at 62.

43. *See generally* Comment, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case*, 73 COLUM. L. REV. 1451 (1973).

sons for the agreement, its goals, its immediate effect, and the long range and perhaps indirect effects the agreement will have on the competitive structure of the market as a whole.⁴⁴ Thus, the objectives of the antitrust law of maintaining free and open competition will be balanced against any positive effect the conduct may have, as a legitimate business function, on the particular market situation or the economy as a whole. If the detrimental results of the activity outweigh the positive results, the court will deem it illegal and order its discontinuance.⁴⁵

Illegal Per Se

By using the rule of reason the courts, in certain situations, have been able to go behind or beyond the contract, combination, or conspiracy to analyze the facts, and then make the ultimate decision whether the restraint will be declared illegal.⁴⁶ This determination has depended upon a balancing of interests or competing values, in view of the objectives of the general law and the specific antitrust statutes.⁴⁷ However, this detailed ex-

44. In *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918), Justice Brandeis provided this often-quoted rule of reason standard:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

45. The use of the rule of reason is demonstrated in *Associated Press v. United States*, 326 U.S. 1 (1945). The bylaws of the Associated Press (AP) prohibited service of AP news to nonmembers, prohibited members from furnishing spontaneous news to outsiders, and empowered members to block membership applications of competitors. The Supreme Court, in finding these bylaws and the resulting conduct to be in violation of the Sherman Act as an illegal conspiracy in restraint of trade, admitted that certain restraints—*e.g.*, a reporter's contract to deliver his news exclusively to a single newspaper—might well be "reasonable" and therefore not within the scope of the Sherman Act prohibitions. However, finding that individual freedom to trade in news had been limited by the group compact, the Court refused to regard the exclusionary provisions as illegal *per se*, and said that the restraints must be judged only after the rule of reason had been applied. Ultimately, the rule of reason required the Court to weigh the advantages to the combining parties, flowing from their restraints, against the conflicting interests of the public in freedom of opportunity and action. Here, the Court found the balance to be in favor of the public interest, and found the exclusionary provisions of the AP's bylaws to be an unlawful restraint.

46. *Id.*

47. However, reasonable restraints have been upheld despite some risks of anticompetitive effects. In *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231 (1918), Justice Brandeis stated that the Board's

amination is not always made. In certain types of offenses, the judicial investigation has not considered all relevant facts extraneous to the agreement itself. Many times, factors that might be considered in arriving at a decision under the rule of reason are ignored or presumed to exist. In these cases, as soon as the requisite agreement is proven, the activity will be considered illegal *per se*.⁴⁸

The *per se* concept grew out of the price fixing conspiracies of the 1920s, a time when the competitive nature of our economy was threatened.⁴⁹ By its purpose and effect, a *per se* offense includes certain forms of conduct that are conclusively presumed to restrain trade unreasonably. This *per se* category of antitrust violations consists of "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they

employment of the "call rule" (which prohibited Board members, until the opening of the next trading session, from purchasing or offering to purchase grain at a price other than that quoted at the close of the previous session) was not an illegal combination or conspiracy in restraint of trade, and that every agreement concerning trade must by its nature restrain. The Court held that the true test of legality must be whether the restraint imposed merely regulates, and thereby promotes competition, or whether it suppresses or destroys it. To determine that question, the Court should consider the facts peculiar to that business, the condition of the business environment before the restraint was applied, and the nature and probable effect of such a restraint.

48. In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959), the Court said: "Group boycotts, or concerted refusals by traders to deal have long been held to be in the forbidden category."

This illegal *per se* approach to group activity has been used often by the courts. See *United States v. General Motors Corp.*, 384 U.S. 127 (1966) (joint collaborative action by car dealers, associations, and GM to eliminate a class of competitors held to be a conspiracy in restraint of trade); *Evening News Publishing Co. v. Allied Newspaper Carriers of N.J.*, 263 F.2d 715 (3d Cir. 1959) (boycott by home newspaper delivery dealers to force a newspaper to eliminate newsboy home delivery constituted a restraint affecting interstate commerce); *Paramount Pictures, Inc. v. United Motion Picture Theatre Owners*, 93 F.2d 714 (3d Cir. 1937) (independent motion picture theater owners found to be carrying out an unlawful interstate combination in restraint of trade by attempting to secure better contract terms with film manufacturer and film distributor through use of advertising aimed at appealing to the public to support their cause).

49. See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933) (competing coal producers formed a corporation to act as their selling agent with authority to set prices); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (competing manufacturers and distributors of sanitary pottery entered an agreement to fix and maintain uniform prices); *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231 (1918) (Court held that the true test of whether an agreement that concerns or regulates trade is illegal is to see whether the restraint is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition).

have caused or the business excuse for their use."⁵⁰ Thus, use of per se concepts limits the rule of reason approach, which looks to the overall purpose and effect of the practices involved.⁵¹

A common element in many of the illegal per se cases is that the immediate objective of the group boycott or refusal to deal in question was either to compel the object of the boycott to adopt a certain standard of trade practice, or to force such third party out of business, and therefore out of competition with the instigating group.⁵² Such group action coercing outside parties is deemed by its very nature to be an undue restraint of trade. Whatever its purpose, it is likely to fall as illegal per se because of its improper purpose or effects.⁵³

The Doctrine of Ancillary Restraints

An interesting analysis of the application of the illegal per se and rule of reason concepts and the conflict they present seeks to explain the problem in terms of the intended purpose and actual immediate effect of the group boycott through a doctrine of ancillary restraints.⁵⁴ If the actual purpose or effect of the group action is incidental or ancillary to a lawful transaction, the restriction should be measured against the rule of reason to determine its legality. Some of the criteria to be used would include the legitimacy, *i.e.*, positive socioeconomic value, of the principal transaction; whether the restraint is more oppressive than necessary for the protection of the underlying relationship; and whether the restriction is excessively injurious to the competitive structure of the market. In such business activity as an exclusive dealing arrangement the purpose of the course of action is not primarily anticompetitive, but instead represents a legitimate attempt to organize the most desirable and inexpen-

50. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

51. See Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A. L. Rev. 569 (1964).

52. See *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

53. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Klor's, a retail electrical appliance store, charged that Broadway-Hale, a department store chain operating an outlet next door to Klor's, was able by virtue of its greater buying power to induce a concerted refusal to deal with Klor's by major appliance manufacturers, so that they would sell to Klor's, if at all, only on very unfavorable terms. The district court granted Broadway-Hale's motion for summary judgment, which was affirmed by the Ninth Circuit Court of Appeals. The Supreme Court, in reversing and remanding, found that the alleged conspiracy represented an illegal per se restraint of trade. It is significant that nowhere in the opinion does the Court refer to any limitations which would except a self-restricting, non-coercive refusal to deal from the operation of the per se rule.

54. See generally Bork, *supra* note 39.

sive method of distribution, and to compensate distributors for concentrated effort by protecting them against competition from their own products in a limited area. Although such agreements might be called concerted refusals to deal or group boycotts, the concept of ancillary restraint of trade comes into play and has the effects of precluding a determination of illegality per se, and requiring adoption of the rule of reason.

Applying the Reasonableness Test

The illegal per se and rule of reason concepts, as conduits for judicial analysis of alleged group boycotts under the Sherman Act, represent a developing attitude toward what form of group or combined behavior, which results in either a direct or indirect restraint of trade, has sufficient economic implications to require balancing the interests of the parties against the anti-competitive prohibitory objectives of the antitrust law. Where the primary objective or actual effect of the challenged group conduct is to coerce a desired form of business conduct or to eliminate competition, courts will generally ignore the actual purpose or effect of the activity that might otherwise have a mitigating effect. The cases have indicated that where the primary element of coercion is absent, wider limits will be set for judicial inquiry before declaring such agreements illegal.⁵⁵

One of the basic considerations in applying the reasonableness test, or perhaps the crucial criterion used in deciding whether inquiry will go further than a declaration of per se illegality, is the size and market power of the organization or group in question, rather than the nature of the business affected. Perhaps where an enterprise controls a large portion of the market, it must necessarily provide the means for all comers to be served or be found guilty of violating the Sherman Act. It appears that the greater the group's *potential* for damage or injury to competition, the more restricted will be the judicial approach to determining the legality of the behavior on the basis of its actual results.

In considering these two approaches to sections 1 and 3 of the Sherman Act, it is extremely important to realize that both the rule of reason and illegal per se concepts are used as tools to

55. In *Associated Press v. United States*, 326 U.S. 1 (1945), the majority implied that where powerful, although not necessarily dominant, interests combine to prevent others from obtaining a certain commodity, or conversely from selling such a commodity, for the purpose of restricting competition, resulting injury to the public will be conclusively presumed. A reasonableness test should only be employed for agreements on a smaller scale.

implement the objectives of the antitrust laws.⁵⁶ If the group activity results in a passive restraint of trade, where the element of direct coercion or purpose to coerce is absent and the combination is employed to further legitimate goals and business interests of the parties directly, the resulting indirect or ancillary restraint of trade and competition will be more liberally interpreted. However, where the combination is deemed to involve an attempt by two or more parties to avoid dealing with a third party, with resulting foreclosure of access to or participation in the perpetrators' market, the activity will be subject to much closer scrutiny, and the courts will be very apt to give little or no consideration to the actual, practical effect of the conduct in question. An attorney must be prepared to meet the illegal *per se* obstacle if he wishes to invoke a complete court analysis of a defendant's conduct.

UNILATERAL REFUSAL TO DEAL

Before analyzing the effect of the antitrust laws on group boycotts, it is first necessary to understand what, if any, limits are placed on the activity of an individual trader in commerce in a purely independent and unilateral implementation of a selective or restrictive sales or distribution plan. The first and third sections of the Sherman Act appear to prohibit only the combined activity of two or more parties which results in a restraint of trade or commerce. This combined activity was the primary evil toward which the Sherman Act was directed.⁵⁷ The fear of economic strength resulting from combination or agreement, and the resulting potential for exertion of this power against a third party as a threat to competition, was considered a threat to the viability of the economy as a whole. However, totally autonomous activity did not pose the same threat, and indeed was considered the ultimate value to be cultivated and protected. Congress thought the free and open exercise of independent business judgment was the very foundation of the competitive economic system.⁵⁸

56. In *Travelers Ins. Co. v. Blue Cross of Western Pa.*, 1973-1 Trade Cases (CCH) ¶ 74,596 (3d Cir. 1973), the court stated: "The antitrust laws . . . protect competition, not competitors; and stiff competition is encouraged, not condemned."

57. See notes 24-31 and accompanying text *supra*.

58. "In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). See *Associated Press v. United States*, 326 U.S. 1, 15 (1945); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 721-23 (1944).

One of the initial cases which tested a unilateral or independent refusal to deal under section 2 was *Eastman Kodak Co. v. Southern Photo Materials Co.*⁵⁹ Kodak cut off supplies to Southern Photo, an established Kodak dealer, after Kodak acquired control of a competing supply house and unsuccessfully attempted to purchase Southern's business. Southern Photo alleged that this refusal to deal with it was in pursuance of a monopoly, and therefore a violation of the Sherman Act. In finding Kodak to be in violation of the Act, the Court found that the defendant's action, although technically unilateral, was a prohibited attempt at monopolization. Once this scheme was established, it was necessary only to connect Kodak's refusal to deal with the illegal scheme to establish plaintiff's right to relief.⁶⁰

Another demonstration of how an attempt to monopolize will bring an otherwise legitimate unilateral refusal to deal within the scope of the antitrust laws can be seen in *Lorain Journal Co. v. United States*.⁶¹ The Journal, a Lorain, Ohio newspaper, attempted to use its powerful position as the only daily publication in its immediate area to prevent a newly created local radio station from competing for advertising. The Journal gave notice to local businesses that wished to advertise in the paper that such advertising would not be accepted from firms that also advertised on the radio station. The effectiveness of this boycott threatened to force the station out of business, and it brought suit against the paper alleging violation of the Sherman Act. The Supreme Court held that the Journal's scheme constituted an unlawful attempt to monopolize under section 2. The Court acknowledged the general right of a private business concern to refuse to sell, but held that this was no defense, for its "exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act."⁶² Once again, the Court addressed itself to a purely independent or unilateral refusal to deal, and found it illegal on the basis of the overall scheme of monopoly that is prohibited by section 2. The general guidelines established in these cases are followed today, as illustrated by the Fifth Circuit Court of Appeals decision in *Six-Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*⁶³

59. 273 U.S. 359 (1927).

60. "[A]lthough there was no direct evidence—as there could not well be—that the defendant's refusal to sell to the plaintiff was in pursuance of a purpose to monopolize, we think that the circumstances disclosed in the evidence sufficiently tended to indicate such purposes. . . ." *Id.* at 375.

61. 342 U.S. 143 (1951).

62. *Id.* at 155.

63. 365 F.2d 478 (5th Cir. 1966).

The court noted that the Supreme Court had firmly established the principle that section 2 prohibits an enterprise from refusing to deal with another business entity when the refusal is in furtherance of a plan to monopolize a relevant market.⁶⁴

It should be noted that the general economic and social desirability of encouraging, and therefore protecting, the general right of an individual trader to complete customer selection has been expressly stated in section 2(a) of the Clayton Act, which contains the proviso that "nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."⁶⁵ This relatively recent amendment to the Clayton Act seems to be a congressional mandate for the absolute exercise of business judgment by a trader acting unilaterally and in the absence of undesirable monopolistic implications.

A trader can feel relatively sure that if his business judgment is challenged, his unilateral decision not to deal (buy or sell) with a potential customer will stand up under judicial scrutiny as long as he is not in a monopolistic, or potentially monopolistic, market position. If he doesn't enter into an agreement, *i.e.*, is not party to a contract, combination, or conspiracy, his business conduct should not be vulnerable to a successful Sherman Act prosecution. However, these considerations are obviously incomplete without a detailed consideration of what constitutes the proscribed *agreement* under the Act.

GROUP BOYCOTTS OR CONCERTED REFUSALS TO DEAL

Sherman Act and "Contract, Combination or Conspiracy"

The Sherman Act in sections 1 and 3 declares contracts, combinations, and conspiracies that result in restraint of trade to be illegal.⁶⁶ One of the major obstacles in bringing an action against another or others under these provisions has been the difficulty in establishing that the defendant has, in fact, agreed or conspired with another, manifested by a refusal to deal in restraint of trade.

64. The court noted that a complaint is sufficient to establish a cause of action under § 2 of the Sherman Act if the "refusal of defendant to accept advertising from plaintiff by setting up unreasonable standards or by adopting an arbitrary course of action is for the purpose of destroying plaintiff as an agency and thereby furthering a course toward monopolization." *Id.* at 483.

65. 15 U.S.C. § 13(a) (1976).

66. See note 13 *supra*.

One of the predominant characteristics of the cases brought under the Sherman Act is the inability of most plaintiffs to prove that the defendant entered into a formal contract with another to combine in refusing to deal with a third party. Indeed, in *Interstate Circuit, Inc. v. United States*,⁶⁷ the United States Supreme Court alluded to the fact that the government is rarely aided by direct testimony in proving the element of agreement, and must usually rely on the conduct of the alleged conspirators. Because of the obvious risks involved, it would be foolish for a trader who desired to combine with another to agree formally to coerce a third party. Instead, such an agreement would usually be made informally, and proof of such agreement frequently is difficult, if not impossible. Therefore, it is essential to the understanding of such an agreement to note how plaintiffs and the courts have implemented the prohibitions of the Sherman Act in the absence of a formal contract.

*Eastern States Retail Lumber Dealers' Association v. United States*⁶⁸ presented the question of whether an arrangement among various retail lumbermen's associations concerning their dealings with wholesalers amounted to a combination and conspiracy in restraint of trade, as proscribed by section 1 of the Sherman Act.⁶⁹ The government alleged that the defendants, mainly retail lumber dealers in New York, New Jersey, and other eastern states, had conspired to prevent wholesale dealers from selling directly to consumers of lumber. The defendants had circulated "official lists" whose purpose was to record the names of dealers who did sell directly to consumers. If a wholesaler's name appeared on this list, the other members of the association would refuse to deal with him. The defendants contended that no combination agreement under which such concerted action was taken could be shown. In finding this business conduct illegal, the Court said that the agreement was difficult to prove by direct testimony, but could be *inferred* from the things actually done.⁷⁰ Although the Court acknowledged that a retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, a combination is not within the spirit of free competition. An act which is harmless

67. 306 U.S. 208 (1939).

68. 234 U.S. 600 (1914).

69. See text accompanying note 34 *supra*.

70. The Court noted that the circulation of these reports not only tends to directly restrain the freedom of commerce by preventing the listed dealers from entering into competition with retailers, but also tends to prevent other retailers with no direct grievance against the listed wholesaler from trading with him. This practice takes the case out of the normal and usual agreements in aid of trade which may be found not to be within the act. 234 U.S. at 612.

when done by one may become a public wrong when done by many acting in concert.⁷¹

In *Interstate Circuit, Inc. v. United States*,⁷² the District Court for the Northern District of Texas restrained appellants from continuing in combination or conspiracy in violation of section 1 of the Sherman Act, and from enforcing or renewing certain contracts found to have been entered in pursuance of the conspiracy. The agreements involved distributors and exhibitors of motion pictures, and embodied restrictions against subsequent-run exhibitors in the admission prices to be charged for certain films. The injunction restrained the distributors from enforcing the restrictions in their licensing agreements. The Supreme Court affirmed the injunction, holding that although there was no direct testimony as to a formal agreement to restrain trade, the evidence was more than sufficient to support the lower court's finding of a constructive agreement. This evidence included strong motives for the action of appellants, the risk that lack of agreement would result in diversity of action, and the lack of any persuasive explanation by appellants of the singular unanimity of action by the distributors.⁷³ In view of the appellants' unanimity, and the strong motive for it, the Court refused to speculate about whether there may have been other more legitimate reasons for the action. The Court emphasized appellants' failure to introduce testimony by their officers that an agreement for concerted action had not been reached. Moreover, the Court said that an agreement to impose restrictions upon subsequent-run exhibitors was not a prerequisite for finding an unlawful conspiracy. It was enough that the distributors participated in the *scheme* knowing that concerted action was

71. *Id.* at 614, citing *Grenada Lumber Co. v. Mississippi*, 217 U.S. 433, 440 (1910).

72. 306 U.S. 208 (1939).

73. The Court ruled that the acceptance by competitors of an invitation to participate in a plan which if carried out would result in restraint of trade would be sufficient to establish an unlawful conspiracy under the Sherman Act, regardless of whether a previous agreement between the competitors had been made. *Id.* at 227.

See *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923) (large manufacturers of linseed oil entered into an agreement for the avowed purpose of substituting so-called "open competition" for normal competition previously existing between them was in violation of Sherman Act); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921) (an "Open Competition Plan" whereby manufacturers of one-third of the hardwood output in the country exchanged full details of their businesses by use of a central office violated the Sherman Act); *Lawler v. Loewe*, 235 U.S. 522 (1915) (circulation of an "unfair dealers" list violative of Sherman Act); *Eastern States Retail Lumber Ass'n v. United States*, 234 U.S. 600 (1914) (so-called official report circulated among members of an association of retail dealers held within prohibitions of Sherman Act).

contemplated and invited.⁷⁴ *Eastern States* and *Interstate Circuit* indicate that courts have little difficulty in finding an agreement, even where there was no formal contract or even discussion among the alleged wrongdoers.

Consciously Parallel

Eventually, courts began to adopt specific but generally flexible guidelines for approaching the agreement problem. These guidelines were clearly defined in *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*,⁷⁵ which involved an action by a retail dealer in cemetery monuments against several cemeteries and manufacturers of monuments. The District Court for the Eastern District of Virginia held the evidence insufficient to show concert of action or joint activity among the defendants sufficient to invoke the prohibitions of section 1 of the Sherman Act. The court of appeals noted that no joint action was disclosed by the evidence in that there were no conferences, meetings, or other communications alleged or proved, and it therefore affirmed the granting of defendants' motion for summary judgment.⁷⁶ In a vigorous dissent, Judge Craven agreed that "before it can be concluded that there has been a 'contract, combination, or conspiracy' sufficient to invoke Section 1 of the Sherman Antitrust Act, it must be found that there was an 'agreement' between two or more persons or corporations."⁷⁷ However, citing *Interstate Circuit*, he said that the real issue was not necessarily whether there was any formal agreement, but whether agreement could be found in consciously parallel decisions by competitors to adopt substantially similar exclusionary restrictions.⁷⁸

74. "It is elementary that an unlawful conspiracy may be and is often formed without simultaneous action or agreement on the part of the conspirators." *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939).

75. 404 F.2d 1008 (4th Cir. 1968), *rev'd on other grounds*, 394 U.S. 700 (1969).

76. Petitioner's writ of certiorari was granted and the Supreme Court reversed, holding that the alleged conspiracy had not been conclusively disproved by pretrial discovery and there remained material issues of fact which could only be resolved by a jury. 394 U.S. at 704.

77. 404 F.2d 1008, 1011 (4th Cir. 1968).

78. *Id.* The term conscious parallelism refers to the common practice among firms in a concentrated industry of conducting their similar businesses in a uniform manner, aware that their counterparts are pursuing the same course of action. The result of such coordinated activity is the elimination of competition among the participants and the restraint of trade in general. Though each collaborator may decide independently upon its own course of action, any major decision takes into account the prospective reaction of the other firms. Thus the decisions are in effect interdependent. See Note, *Conscious Parallelism and the Sherman Act: An Analysis and a Proposal*, 30 VAND. L. REV. 1227 (1977). See generally Turner, *The Definition*

Long before *Norfolk Monument*, the concept of conscious parallelism became the crucial test in determining whether the Sherman Act should be invoked in a case of alleged group boycott or refusal to deal.⁷⁹ The concept probably evolved because of the above-mentioned difficulty in producing any concrete evidence of formal agreements to combine which eliminated or interfered with competition. The courts will weigh the evidence, and if the facts are compelling, will infer an agreement from simultaneous and similar conduct by two or more traders in the same or related markets vis-a-vis a third party.⁸⁰ Consequently, most plaintiffs' counselors must convince the court either that there was an actual formal or informal agreement, or that the defendants' methods and the actual effect thereof were so *identical* that the defendants' conduct must fall within the purview of the Sherman Act to safeguard competition.⁸¹

Establishing the Agreement

Even in light of the broad scope of the conscious parallelism approach, convincing a court that the activity of the defendants was either precipitated or aided by an agreement is seldom easy, as *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*⁸² illustrates. In affirming a jury verdict for defendant respondents, the Supreme Court noted that the crucial issue was whether respondents' conduct toward petitioner stemmed from an independent decision or from an agreement, tacit or express. The Court acknowledged that business behavior is admissible circumstantial evidence from which the finder of fact might infer agreement. However, the Court had never held that proof of parallel business behavior, in itself, conclusively established agreement and therefore a Sherman Act offense.⁸³

of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 HARV. L. REV. 655 (1962) [hereinafter cited as Turner].

79. In *Milgram v. Loew's, Inc.*, 192 F.2d 579, 583-84 (3d Cir. 1951), evidence of conspiracy was found in participation in, or mere acquiescence in, parallel business practices, even without a showing of invitation and acceptance.

80. *Id.*

81. If this attempt to convince the court of an existing agreement, either formal or informal, or of consciously parallel behavior fails, the plaintiff might still be left with a good argument under § 2 of the Sherman Act pertaining to monopolistic prohibitions, or the FTC Act's provisions against unfair competition.

82. 346 U.S. 537 (1954).

83. "Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitudes toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." *Id.* at 541.

It should be noted that in the lower court each of the respondents denied the existence of any collaboration and introduced evidence of local

Theatre Enterprises establishes a caveat to plaintiffs attempting to prosecute a section 1 or 3 Sherman Act action: Conscious parallelism, in itself, is not particularly meaningful, but must be accompanied by additional facts. One writer concludes that such parallel activity is not even valid evidence of agreement unless there are some additional facts indicating that the decisions of the alleged coconspirators were interdependent—that the decisions were consistent with the individual self-interests of those concerned only if they all decided the same thing.⁸⁴ He argues that even identical prices may be consistent with independent competitive decisions, as might be the case in an oligopoly market under stable conditions.⁸⁵ Identical prices, under these circumstances, become suspicious only where prices have remained stable or risen in the face of lessening demand or excess supply. Depending on surrounding economic factors such as the market situation at the time and place of the alleged combination, conscious parallelism, at least in a price fixing context,⁸⁶ might or might not reasonably imply an actual agreement. It is conceivable that even identical business conduct may be completely devoid of any form of agreement where a group of individual actions are simply well-informed independent responses to the same set of economic facts.

It is valid to base the legality of what might, on the surface, seem to be conspiratorial group action on whether or not there is an interdependence of decision in the price fixing situation.

conditions surrounding petitioner's operations which precluded it from being successful. See generally Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743 (1950).

84. See generally Turner, *supra* note 78.

85. The theory of oligopoly is that where only a few sellers have a large share of the market, monopoly pricing will occur even though the dominant sellers neither expressly agree on prices nor communicate with each other about prices. See *United States v. E.I. DuPont De Nemours & Co.*, 118 F. Supp. 41, 49 (D. Del. 1953) (oligopoly consists of those situations where a few sellers sell only a standardized product). For an excellent discussion of the oligopoly theory see Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969). See also Levy, *Some Thoughts on "Antitrust Policy" and the Antitrust Community*, 45 MINN. L. REV. 963 (1961); Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745 (1949); Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567 (1947).

86. Price fixing refers to explicit agreements by independent or competing companies to fix prices in order to gain a superior market position. Compare *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897) (18 defendant railroads were found guilty of a restraint of trade under § 1 when they created an association for the purpose of establishing uniform freight rates to eliminate rate wars) with *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified & aff'd*, 175 U.S. 211 (1899) (six producers of iron pipe were found guilty of price fixing when they agreed among themselves to divide their markets into regional monopolies to avoid ruinous price competition in the industry).

Here, as already suggested, the nature of the market itself may require that some or all companies charge identical or substantially similar prices. In such circumstances, it might appear that such similar conduct implies a consciously parallel scheme of action, and that such informal agreement clearly falls within the prohibitions of the Sherman Act. However, upon closer analysis, the trained observer might conclude that the action by the alleged wrongdoers was required by the market situation, and that the end results are the nurturing and stimulating of competition—a socioeconomically desirable goal. Some of the arguments made in support of limiting the conscious parallelism theory might not be as valid in the context of a refusal to deal as in price fixing. It seems much more difficult to say that several companies or persons simultaneously refusing to buy from or sell to a particular party can be considered to have come coincidentally to the same conclusion about the efficacy of coercing or eliminating the same third party.

The question of exactly what behavior constitutes combination or conspiracy as it is used in the Sherman Act has been the subject of much judicial inquiry since the Act's passage. Since an actual contract aimed at combining efforts in refusing to deal with a third party seems to define agreement, and thus implement the antitrust law, it is of critical importance to understand what effect the courts will give to business conduct in the future. As this discussion has attempted to illustrate, courts have heretofore avoided creating any rigid definitions or categories of conduct constituting group activity that must be deemed illegal. Within the limits of *stare decisis*, where there is no formal agreement by two or more parties, incidents of alleged misconduct have usually been scrutinized on an *ad hoc* basis. If the action of the parties raises the inference that it is part of a plan or scheme to interfere with or destroy competition, the element of agreement will be deemed to be present.

The concept of conscious parallelism has been used by many courts as the ultimate test, while other courts have cautioned of the dangers of inferring agreement from the sole fact that more than one party has reached and acted on a similar business decision at the same time, or under a like set of circumstances. While it seems safe to say that a refusal to deal with another party will not be enjoined merely because another businessman simultaneously made the same decision through an independent determination, it must also be remembered that such similar decisions are likely to cause a court to be more thorough and cautious in its analysis. Moreover, knowledge of the second party's action may cast further suspicion on a refusal to deal,

since when a number of enterprises follow a similar course of action in the knowledge and contemplation that they are all acting alike, they have, in effect, formed an agreement. There have been no rigid criteria for defining agreement under the Sherman Act, which is perhaps the most positive characteristic of the case law on the subject and the most encouraging indicator that the judicial approach will continue to be thorough and equitable.

SELF-RESTRICTING REFUSALS TO DEAL

In discussing concerted refusals to deal, this article has thus far concentrated on the more aggressive forms of group activity. Courts tend to deal more harshly with group behavior initiated with the purpose or effect of applying direct coercion on a third party trader.⁸⁷ In an attempt to further illustrate the importance of the element of coercion, it is essential to examine the more passive form of group business behavior, the self-restricting refusal to deal.

When the element of direct coercion is lacking, courts have set wider limits and broadened the scope of analysis before reaching a determination of the legality of business agreements.⁸⁸ Good examples occur where trade associations limit the availability of their services or products to their members, or establish rules for governing the conduct of their members.⁸⁹ For the most part, these forms of behavior do not involve combining for the primary purpose of coercion or exclusion, but rather represent combinations directly to further legitimate business objectives of the parties involved. Any effect of their conduct on third parties is, for the most part, indirect. The issue in this class of cases does not seem to be the existence or nonexistence of an agreement or conspiracy; rather, it is whether the purpose and effect of the combination unreasonably excludes others from their right to participate in the market in question. Generally, this type of case is not approached from an illegal per se perspective.⁹⁰

87. See notes 59-81 and accompanying text *supra*.

88. See, e.g., *District of Columbia Citizen Publishing Co. v. Merchants and Mfrs. Ass'n*, 83 F. Supp. 994 (D.D.C. 1949) (complaint failed to state facts tending to show that defendants had attempted to monopolize any part of interstate commerce within prohibition of Sherman Act).

89. See, e.g., *Associated Press v. United States*, 326 U.S. 1 (1945) (interstate and foreign news services); *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231 (1918) (grain trade).

90. Even though the Court in *Associated Press v. United States*, 326 U.S. 1 (1945), enjoined a self-restricting concerted refusal to deal, this did not mean that self-restricting refusals to deal were per se violations of the Sherman Act. The Court stated that this type of refusal to deal was invalid only when considered in light of the membership provision.

An early case was *Board of Trade of the City of Chicago v. United States*.⁹¹ In 1906, the Board adopted a "call rule" whereby members were prohibited from purchasing or offering to purchase any commodities during the time before the close of the "call"⁹² and the opening of the session on the next business day at a price lower than that day's closing bid. In 1913, the government brought suit against the Board to enjoin enforcement of the rule, alleging that it violated the Sherman Act. In reversing the district court's injunction, the Supreme Court found the "call rule" to be a *reasonable* regulation of business consistent with the provisions of the Sherman Act.⁹³ Thus, although individual members of the association were restricted as to the purchase price of the commodities after the closing bid had been made, the policy was seen as a reasonable form of self regulation. Even though there had to be an adverse effect on free and open competition because all prices were frozen after the "call," and a consequent restraint of trade, the Court felt that this restraint would ultimately promote competition and was therefore legitimate.

From *Chicago Board of Trade* until 1944, the distinction between self restriction and coercion appears to have been the dividing line between illegal and legal activity in this area.⁹⁴ Then, in 1945, the Supreme Court decided *Associated Press v. United States*.⁹⁵ The district court held that the AP's bylaws unlawfully restricted admission to membership in the Association. The bylaws also violated antitrust law insofar as their provisions clothed members with the power to impose or dispense with the conditions for membership of business competitors. In affirming, the Supreme Court said that the Sherman Act was designed to prohibit independent businesses from becoming associates in a common plan which was bound to reduce their competitors' opportunity to buy and sell news. The Court stated that these bylaws, especially the provisions giving members the means to block a competitor's admission, did not constitute one of the "normal and usual agreements in aid of trade and commerce"⁹⁶ which may escape coverage by the Sherman Act.

The decree in *Associated Press* was not a mandate to the AP to serve all applicants, it was a ban on its practice of discriminat-

91. 246 U.S. 231 (1918).

92. For a further explanation of the "call rule" see note 47 *supra*.

93. 246 U.S. at 238.

94. See Comment, *Concerted Refusals to Deal: A Per Se Violation of the Sherman Act?*, 51 Nw. U.L. Rev. 628 (1956).

95. 326 U.S. 1 (1945).

96. *Id.* at 19, citing *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 612 (1914).

ing against competitors of its members. In a vigorous dissent, Justice Murphy expressed his view that the members of the AP were entirely within their legal rights in forming a cooperative organization with facilities for the collection and exchange of news, and in limiting the membership therein. He stated that members of an unincorporated society should be allowed, as a general rule, to extend or withhold membership as they see fit, and that the majority was using the Sherman Act to outlaw a reasonable competitive advantage without the evils that Congress attempted to eradicate by the enactment of the statute.⁹⁷

The *Associated Press* decision has been the subject of much discussion and criticism. Some critics felt the Court's decision extended the Sherman Act, in view of the government's position that contractual denial of a member's freedom to deal with whomever he pleased in the disposal of his own product constituted a primary boycott of nonmembers.⁹⁸ However, it should be noted the Court did not renounce its holding in *Chicago Board of Trade*, since the rules and regulations relative to the members' conduct in gathering and supplying news was not declared illegal. The case turned instead on the bylaws provision which made it possible arbitrarily to bar entrance of competitors into the association.

The treatment accorded these self-restricting forms of group action can readily be distinguished from the more commonly litigated case where there is a predatory purpose to coerce third parties directly to injure competition. The effect of the agreements in self-restricting refusals to deal is usually the creation of more efficient control of a group's conduct to maximize overall operational efficiency; any coercive effect on a competitor's business opportunity is generally incidental. Even in *Associated Press*, the Court refused to regard the exclusionary provision as illegal per se. It apparently felt the field of illegal per se restraints was confined to market price arrangements and certain types of monopolization. The final decision was reached only after the rule of reason had been applied. The Court consequently broadened its inquiry into the total scope of the group's activity, balancing the positive effect on the association itself against the public interest.⁹⁹

97. *Id.* at 49 (Murphy, J., dissenting).

98. See Lewin, *The Associated Press Decision—An Extension of the Sherman Act?*, 13 U. CHI. L. REV. 247 (1946).

99. 246 U.S. 231 (1918). The primary obstacle to a combination's attempt to consolidate its efforts in pursuing mutual business objectives has been the illegal per se doctrine. However, once this hurdle has been successfully negotiated, defendants will have an opportunity to invoke a balancing of

The trade exchange and association cases are not an exception to the general rule of placing rigid limitations on group activity, but are distinguishable because the presumed purpose of eliminating competition is replaced by an improvement of public service. This area, having broad public interest implications, requires a careful balancing of competing interests within the framework of the rule of reason.

JUSTIFICATION FOR REFUSING TO DEAL

In dealing with the courts' treatment of refusals to deal under the antitrust laws, this article has attempted to analyze the case law in terms of the various approaches and criteria used to implement the objectives of promoting and safeguarding free and open competition. This analysis has shown that group boycotts or concerted refusals to deal have repeatedly been struck down when the requisite agreement, either formal or constructive, can be proven. The presence of an intent or purpose to coerce has had the ultimate effect of limiting the scope of judicial inquiry, and thus of expediting the complainant's attempt to invoke the prohibitions of the Sherman Act. Although the individual trader, acting independently and without a monopolistic position or scheme, has an absolute right to refuse to deal, absolute prohibitions against all group activity in this area have been less consistent.¹⁰⁰ The final issue to be discussed is whether the courts should entertain a defendant's contention that the agreement to which it has been found a party is a *justifiable* exercise of an otherwise illegal course of conduct and, if so, to what extent the defense of justification will take such group activity out of the prohibitory scope of the Sherman Act.

Where the issue of justification arises, the defendant is usually found by the court to have entered into an agreement as defined by sections 1 and 3 of the Sherman Act. He then attempts to convince the court either that his actions were necessary to the exercise of an ultimately legitimate business function, or that the agreement was necessary to eradicate some existing business evil. Such a contention was dismissed by the Supreme Court in *Eastern States Retail Lumber Dealers' Association v. United States*.¹⁰¹ The Court said the defendants' argument—that their action was necessary to protect retail trade and promote the public welfare by providing retail facilities—was

interests approach. This comprehensive treatment offers a better opportunity for success.

100. See notes 101-14 and accompanying text *infra*.

101. 234 U.S. 600 (1914).

countered by the Sherman Act, and that private choice must yield to national authority.¹⁰²

Although in later cases the Court did not specifically speak in terms of justification, it left the question less clear. For example, in *Binderup v. Pathe Exchange, Inc.*¹⁰³ the Supreme Court, in dicta, said:

Although by itself the charge that the defendants conspired to ruin the plaintiff's business might constitute an illegal purpose, yet, when stated in conjunction with facts which show that this was not the purpose of the alleged concerted action of defendants, it becomes clear that, even if ruination of plaintiff's business resulted from the acts of the defendants in the protection of their own business, if these acts were lawful, that result was a mere incident of a lawful purpose, executed by lawful means and gave rise to no cause of action against defendants.¹⁰⁴

The Court avoided any discussion of justification, based on defendants' contention that their actions were necessary for the preservation of business, by finding the purpose and therefore the means used in protection of the business to be lawful. Moreover, in a 1932 case, the Supreme Court also implied that the use of self help in business conduct might be legitimate in certain circumstances notwithstanding some adverse effect or restraint on an individual competitor.¹⁰⁵ The Court stated: "Voluntary action to rescue and preserve these [competitive] opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis, may be more efficacious than an attempt to provide remedies through legal processes."¹⁰⁶ Once again, no mention is made of possible excuses or justification for illegal (agreement) conduct, and it is not clear whether or not the Court felt that the negative implications of agreement could be effectively neutralized, within the purview of the Sherman Act, by the ultimate purpose of combating business evils. The Court seemed to avoid the issue of justification of an otherwise unlawful combination or conspiracy by

102. *Id.* at 613. See also *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 241-42 (1899) (an agreement which regulates interstate commerce "trenches upon the power of the national legislature and violates the statute").

103. 263 U.S. 291 (1923).

104. *Id.* at 300-01. See also *American Steel Co. v. American Steel & Wire Co.*, 244 F. 300, 303 (D. Mass. 1916) (in an action for damages under the Sherman Act against an illegal monopoly, the plaintiff's declaration must sufficiently describe the conditions in the trade in question, the alleged conspiracy or combination, and the business of the plaintiff so that the court can see that this alleged conspiracy or combination, and its act, have affected the general conditions in the trade, and that plaintiff's business and situation were such that it might have been damaged by its conduct).

105. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

106. *Id.* at 374.

entertaining the facts that might lead to such a determination before deciding the legality of the group activity in question.

In *Sugar Institute, Inc. v. United States*,¹⁰⁷ the Supreme Court once again discussed in dicta the various circumstances under which concerted action directed toward self help might be valid:

Designed to frustrate unreasonable restraints, [restrictions imposed by the Sherman Act] . . . do not prevent the adoption of reasonable means to protect interstate commerce from destructive or injurious practices and to promote competition upon a sound basis. . . . Accordingly we have held that a cooperative enterprise otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities.¹⁰⁸

However, the Court cautioned that freedom of concerted action to improve conditions has definite limitations: a desirable end does not justify illegal means, and the attempt to eradicate illicit business practices must not itself become illicit. The Court continued: "As the statute draws the line at unreasonable restraints, a cooperative endeavor which transgresses that line cannot justify itself by pointing to evils afflicting the industry or to a laudable purpose to remove them."¹⁰⁹

This rationale has apparently provided the framework within which later attempts at justification defenses have been considered. If the group activity involves an element of obvious coercion and the requisite agreement under section 1 can be found, the negative effects of the means used, with their anti-competitive implications, will generally be found to offset the legitimate end of eradicating recognized business evils.

This conclusion appears valid in light of *Fashion Originators' Guild of America, Inc. v. FTC*.¹¹⁰ In this case, defendants contended that their action did not violate section 5 of the FTC Act because its sole consequence was to curb the unlawful competition of alleged style pirates. Defendants argued that a person's interest in his business was a subject of protection against unlawful invasion by others, and that the antitrust laws could not be interpreted as barring all self help to a trader. The Court found the defendant's business practice of refusing all sales to manufacturers and retailers of garments who dealt in the copies illegal, emphasizing the Guild's dominant market position and

107. 297 U.S. 553 (1936).

108. *Id.* at 597-98.

109. *Id.* at 599.

110. 312 U.S. 457 (1941).

interpreting the aim of the combination as intentional destruction of a competitor's business. Furthermore, the Court said, even if style copying were an acknowledged common law tort, the defendants would not be justified in utilizing self help to force these competitors out of the market.¹¹¹

Another aspect of the justification issue has arisen where the Sherman Act has come into conflict with the express provisions of another federal law. In *Silver v. New York Stock Exchange*¹¹² the Supreme Court addressed itself specifically to the defendants' argument that their concerted action was justified under the Securities Exchange Act of 1934.¹¹³ The New York Stock Exchange, pursuant to the rules it had adopted under the Act of 1934, ordered a number of its members to remove private direct telephone connections previously in operation between the offices of these members and the plaintiff, a nonmember. The Court found this to be a concerted refusal to deal which, absent any "justification derived from the policy of another statute or otherwise,"¹¹⁴ constituted a Sherman Act violation. Defendants claimed that their action was authorized by the Securities Exchange Act's policy of self-regulation by private exchanges, and that the Sherman Act was preempted. The Court recognized that certain reasonable regulations might supersede the Sherman Act's provisions against agreements in restraint of trade, and said that the act of self-regulation must be consistent with traditional antitrust concepts, under the aegis of the rule of reason. The collective refusal here was found not to be justified since petitioners were not informed of the charges underlying the Exchange's action, and were not given an opportunity to refute or explain such charges.

Although the Court hinted in *Silver* that there might be justification for a concerted refusal under circumstances other than conflicting statutory provisions or policy, no such possible conditions were mentioned. In fact, Justice Goldberg, speaking for the majority, said:

There is also no need for us to define further whether the interposing of a substantive justification in an antitrust suit brought to challenge a particular enforcement of the rules on its merits is to be governed by a standard of arbitrariness, good faith, reasonableness, or some other measure. It will be time enough to deal with that problem if and when the occasion arises.¹¹⁵

111. *Id.* at 468.

112. 373 U.S. 341 (1963).

113. 15 U.S.C. §§ 78a-78kk (1976).

114. 373 U.S. at 348-49 (emphasis added).

115. *Id.* at 365-66.

The issue of whether there is a valid justification for a concerted refusal to deal remains undetermined. Very seldom do courts talk expressly about "justification." Instead, it appears that courts consider facts relevant to the issue of legitimate excuse or mitigation before they reach an ultimate decision as to the legality of the activity in question. Therefore, justification really is included in a consideration of reasonableness of the activity in question, resulting from an implementation of the rule of reason. If coercion is absent and the agreement and subsequent conduct by the group are not patently offensive, and if the ultimate goals of the concerted action are economically desirable and justifiable, the activity may be found to lie outside the Sherman Act prohibitions in that the restraint of trade may not be sufficient to warrant judicial intrusion. If the courts find sufficient reasons to declare the combination or conspiracy illegal, the chances for preventing an order to discontinue such conduct (and other relief) based on a claim of justification seem unfavorable.

CONCLUSION

By defining the scope of a trader's right to customer selection, courts have tried to interpret congressional intent as expressed in the words of the antitrust laws. These laws, especially the Sherman Act, are intentionally broad. A result of this generality has been the problem of deciding what specific kinds of business activity were sought to be prohibited. This task has involved an attempt to balance public interest with private rights—to encourage individual freedom to pursue competitive opportunities, while safeguarding the viability and dynamism of the competitive market structure. Ultimately, this process has necessitated a determination or definition of the point where individual or group conduct begins to encroach unreasonably on the general right of all others to participate in the market. It is at this point that private right must yield to public will.

Generally, the decisions in the field of group boycotts have evaluated refusals to deal in the business setting in which they occur. The intent of Congress has been interpreted as authorizing (and encouraging) the absolute right of an individual, acting unilaterally and nonmonopolistically, to refuse to deal with any other person or entity for any reason sufficient to himself.¹¹⁶ This complete freedom of the individual is the most fundamental component of continued economic development, and is seen as the very embodiment of competitive vitality. Conversely, a

116. See notes 59-65 and accompanying text *supra*.

decision to refuse to deal made in concert with others or in furtherance of a monopoly is viewed as a threat to the principles of equal competitive opportunity, and is consequently treated harshly.¹¹⁷ The concept of strength in numbers is deeply rooted in American economic philosophy, and such increased strength apparently breeds apprehension when it is potentially exercisable in a predatory or coercive manner. This attitude toward concerted action has also become entrenched in the antitrust theory of American jurisprudence, and has been reflected in the traditionally cautious attitude of the courts toward group activity.

A businessman must initially determine whether he will deal at all with particular buyers or customers and, as we have seen, may encounter a broad range of implicit antitrust provisions. He must be prepared to demonstrate that his conduct is purely arbitrary and noncollusive, and represents a lawful exercise of business judgment. If he can do so, his refusal to deal will invariably withstand a Sherman Act challenge.

For the most part, courts have made a discerning market analysis of refusals to deal in an attempt to reconcile the preservation of legitimate individual business discretion with the protection of free enterprise from monopolistic tendencies and restraints of trade. The approach to defining Sherman Act agreements has, absent an element of direct coercion, been characterized by a thorough evaluation of all relevant market factors through the rule of reason. A similar approach has been adopted to decide what restraints of trade are necessarily evil and therefore unlawful. It seems well settled that a failure to commence or continue business relationships may be a functional decision based on business judgment, and as such may be absolutely legitimate. But it is equally true that a refusal can be a tool of monopoly power and can, if effectively used and left unchecked, prevent equal access to channels of business opportunity that must be left free and open if competition is to survive. Viewed in the context of reasonable bounds of business behavior, this latter refusal is inherently incompatible with antitrust objectives. Individual freedom to trade should not be allowed to encompass a right to preclude others from the right to that same opportunity, for if it is, the very existence and perpetuation of competition are necessarily jeopardized.

The development of the case law during the past seventy years has resulted from a judicial attempt to achieve an appropriate and lasting balance between the preservation of an indi-

117. See notes 67-86 and accompanying text *supra*.

vidual's freedom to deal, and protection of the public from undue restraints. The principles and analytical criteria created by the courts have resulted from a logical consideration of the interests that must be protected, and the very flexibility of the standards and tests developed ensure a continued case-by-case approach that will not only provide the individual with a guarantee of future latitude in permissible business conduct, but will also ensure the continued growth of a viable and free economy.