PROTEST BOYCOTTS UNDER THE SHERMAN ACT

Consumer activism charged with keen political feelings gave rise to the "original" boycott of an English land agent by his Irish tenants.\(^1\) By contrast, the boycotts figuring prominently in American antitrust law have for the most part been strictly commercial affairs, designed to extract a business advantage at the expense of competitors.\(^2\) In recent years, however, as social and political activists have looked increasingly to the marketplace as a forum for effective protest,\(^3\) the boycott has been adapted to a wide variety of social and political purposes.\(^4\) Remarkably, these activities have induced only sparse litigation, perhaps because of an uncritical but widely-shared belief that laws enacted for the protection of free enterprise offer no relief against behavior that is essentially political.\(^5\) As this de facto immunity to legal challenge recedes,

\(^1\) Captain Charles Cunningham Boycott, a retired British army officer serving as an estate manager in Ireland, refused in 1880 to reduce rents in response to demands by the Irish Land League and served writs of eviction on his tenants. When, at the urging of Charles Parnell, an Irish nationalist leader, Boycott's tenants refused further dealings with him, the captain was obliged to import workers from Ulster to harvest his crops under the guard of hundreds of soldiers. II ENCYCLOPAEDIA BRITANNICA 212 (15th ed. 1974).


\(^4\) E.g., Missouri v. NOW, 958 ANTITRUST & TRADE REG. REP. (BNA) F-1 (8th Cir. Mar. 28, 1980) (convention boycott to press for ratification of Equal Rights Amendment); Henry v. First Nat'l Bank, 585 F.2d 291 (5th Cir. 1979), cert. denied, 100 S. Ct. 1020 (1980) (civil rights boycott of white merchants, seeking municipal action to end racial discrimination); N.Y. Times News Service, Nov. 1, 1978, at 85 (microfiche) (National Federation for Decency's call for boycott of ABC-TV's "sleazy sex" programming) (study of suggestive scenes and references over 15-week period shows 1109 on ABC, 777 on CBS, and 547 on NBC programs); N.Y. Times, Apr. 20, 1978, at 20, col. 6 (church-group support for consumer boycott of J.P. Stevens & Co. textiles in response to illegal, antunion practices); N.Y. Times, Mar. 9, 1978, at 18, col. 6 (anti-abortionist boycott of March of Dimes because of funding for prenatal diagnostic programs); N.Y. Times, Feb. 2, 1978, at 16, col. 2 (end of farmworkers' boycott of iceberg lettuce, table grapes, and Gallo wine); N.Y. Times, Sept. 21, 1977, at 16, col. 6 (California Ku Klux Klan plan to "help whites" by boycotting businesses unfriendly to Klan); N.Y. Times, Aug. 1, 1977, at 21, col. 4 (homosexual organization's boycott of Florida citrus products in retaliation for antigay campaign of Anita Bryant); N.Y. Times, Mar. 17, 1973, at 28, col. 2 (consumer boycott to protest high meat prices); Wall St. J., Nov. 9, 1979, at 2 (refusal of dockworkers to unload Iranian goods).

difficult problems of legal analysis are brought to the fore. Does use of the boycott form subject protest activity to regulation under the Sherman Act? Or do the political purposes and symbolic qualities of a protest boycott entitle it to protection by the first amendment? And if protest boycotts fall within the scope of the federal antitrust laws, how should they be treated? The answers to these questions are of critical importance in a democratic society because of the role they will play in defining the limits of permissible political activity.

Missouri v. National Organization for Women (NOW), a recent case decided by the Court of Appeals for the Eighth Circuit, vividly illustrates the difficulties these protest boycotts entail. NOW launched in 1977 a campaign urging groups sympathetic to the passage of the Equal Rights Amendment (ERA) to boycott convention sites within states that had not voted for ratification. NOW’s purpose in this undertaking was exclusively political—to secure ratification of the ERA by the necessary three-fourths majority of the states. The campaign consisted of direct solicitation by mailings, phone calls, and personal appearances. By exchanging information with other groups also urging the boycott, NOW had compiled in early 1978 a list of 110 organizations, cities, and counties which purportedly had agreed to the convention boycott.

Because this effort was having a noticeable effect on Missouri convention revenues, the state, claiming parens patriae standing, sought to enjoin NOW’s activities. Missouri charged that the boy-
cott was a combination in restraint of trade violating both section I of the Sherman Act and the Missouri antitrust statute; the state also alleged that NOW's boycott constituted a tortious infliction of economic harm without legal justification or excuse. Finding for the defendant on all issues, the district court and the court of appeals both read the Sherman Act as inapplicable to protest boycotts of the NOW variety.

The NOW boycott, although better organized and apparently more effective than most, is a prime example of a protest boycott. As this Comment defines that term, a "protest boycott" signifies a concerted refusal to deal motivated by a political, social, religious, or other noncommercial purpose. More precisely, the participants in a protest boycott lack, first, the commercial objective to achieve an effect traditionally held violative of the Sherman Act, such as monopolizing, raising prices, or excluding competitors from a market. Second, they lack a significant business interest that might be advanced by the boycotting activity. So defined, the term "protest boycott" encompasses boycotts against offensive products or services and against products and services not offensive

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16 958 Antitrust & Trade Reg. Rep. (BNA) at F-1 to F-2, F-9.
17 Boycott activity typically involves an agreement among individuals to follow a particular course of action, such as terminating business relations with a designated firm, as well as attempts to induce others to follow suit. See L. Sullivan, Handbook of the Law of Antitrust § 83, at 229-32 (1977); Political Boycott Activity, supra note 7, at 659 n.4, 677. Especially in protest boycotts, inducement efforts are likely to be more visible than the concerted refusal to deal. But for the purposes of this Comment, the term "protest boycott" shall be used to refer only to the concerted refusal to deal itself, and not to the inducement activities that ordinarily accompany it. When speaking of protest boycotts, it will be assumed that an agreement among the boycotters exists sufficient to establish a "contract, combination or conspiracy" under § 1 of the Sherman Act. For discussion of the problems that arise in the protest boycott context in determining the presence of such an agreement, see note 162 infra.
18 This definition does not foreclose the possibility of business firms engaging in a protest boycott, provided that the boycotting businesses have no commercial interest in the boycott's success. Professor Sullivan's hypothetical case of a consumer boycott instigated by a competitor of the target raises thorny problems that need not be addressed here. See L. Sullivan, supra note 17, at § 92, at 252-65. In addition, this Comment will not discuss the status of labor boycotts.
in themselves but supplied or distributed by offensive parties or by parties engaging in objectionable practices. It also includes "secondary" boycotts against parties who are themselves neutral, but who are associated in some way with the boycott's ultimate target.\textsuperscript{19}

Many who are sympathetic to the goals of protestors and to the need for a public airing of controversial issues naturally believe, along with the Eighth Circuit, that the antitrust laws simply do not apply to protest boycotts.\textsuperscript{20} This Comment will contend in part I that the legal arguments advanced to support that view are unconvincing and that no implied exclusion from the Sherman Act for protest boycotts can be made out. In determining whether a particular boycott violates the antitrust laws, however, part II demonstrates that the standard employed should be the rule of reason and not the per se rule of illegality ordinarily applied to commercial boycotts. Although a protest boycott's noncommercial purpose cannot serve as a defense to a serious restraint of trade under the rule of reason, in many cases a protest boycott's purpose is predictive of a lack of significant anticompetitive effect, and should therefore trigger a presumption of reasonableness.

\textsuperscript{19}By this definition, a consumer boycott protesting high prices would be a protest boycott, but the Arab League's secondary boycott of foreign companies trading with Israel would not, despite its political motivation. Under the terms of the Arab boycott, companies wishing to deal with the Arab nations are prohibited from dealing with Israel or with any firm having commercial relations with Israel. This horizontal agreement is aimed not only at Israeli businesses but also at "Zionist sympathizers," who may be competitors of the complying companies. Thus, firms participating in the Arab boycott cannot be said to lack a significant business interest in the boycott's success. See Note, \textit{The Arab Boycott: The Antitrust Challenge of United States v. Bechtel in Light of the Export Administration Amendments of 1977}, 92 HARV. L. REV. 1440, 1446 (1979). Other articles on the Arab boycott include Johnstone & Paugh, \textit{The Arab Boycott of Israel: The Role of United States Antitrust Laws in the Wake of the Export Administration Amendments of 1977}, 8 GA. J. INT'L & COMP. L. 661 (1978); Kestenbaum, \textit{The Antitrust Challenge to the Arab Boycott: Per Se Theory, Middle East Politics, and United States v. Bechtel Corporation}, 54 TEX. L. REV. 1411 (1976); Schwartz, \textit{The Arab Boycott and American Responses: Antitrust Law or Executive Discretion}, 54 TEX. L. REV. 1260 (1976).

\textsuperscript{20}The antitrust laws on occasion have been used as a sword to attack noncommercially motivated exclusionary practices that threaten civil liberties. See, e.g., Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723 (6th Cir. 1967) (per curiam) (racially exclusionary real estate practices); Young v. Motion Picture Ass'n, 299 F.2d 119 (D.C. Cir.), cert. denied, 370 U.S. 922 (1962) (blacklisting of "subversives" in the film industry); I.P.C. Distrb., Inc. v. Chicago Moving Picture Mach. Operators Local 110, 132 F. Supp. 294 (N.D. Ill. 1955) (concerted refusal to show "communist" film); United States v. Mortgage Conference, [1948-1949] Trade Cas. (CCH) \textsuperscript{\textregistered} 62,723 (S.D.N.Y. 1948) (consent decree) (discrimination on basis of race and nationality in mortgage lending). See generally Marcus, supra note 6; Note, "Political" Blacklisting in the Motion Picture Industry: A Sherman Act Violation, \textit{74 YALE L.J.} 567 (1965). A commitment to civil liberties is thus not very helpful in deciding whether the antitrust laws should apply to protest boycotts.
I. THE ARGUMENT FOR ANTITRUST EXCLUSION

A. The Noerr Doctrine

The court of appeals in NOW held that the convention boycotters were not liable under the antitrust laws because the boycott lay outside the scope of the Sherman Act, a decision based largely on the authority of Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. The Supreme Court had ruled in Noerr that the antitrust laws did not apply to a lobbying and publicity campaign by several railroads seeking legislation imposing stricter governmental regulation of the trucking industry. The Court reached this decision even though the railroads' campaign employed several unethical tactics and even though adoption of the proposed legislation would have resulted in a serious restraint of trade. Declining to decide whether the railroads' activities were protected by the first-amendment right to petition, the Court instead gave a narrowing construction to the Sherman Act and observed that a contrary interpretation would "raise important constitutional questions." In effect, the Court recognized an implied exclusion from antitrust regulation for lobbying activities.

Two arguments were advanced in support of the Noerr exclusion. First, the Court noted the "essential dissimilarity" between "mere solicitation of governmental action" and conduct traditionally prohibited by the Sherman Act, such as price-fixing and boycotts. Second, the Court emphasized that prohibitions of concerted lobbying activities would impair the proper functioning of the democratic system by diminishing the ability of the electorate to communicate its views to public officials. Thus, application of the antitrust laws to joint lobbying efforts would be a mistake, for it "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity."
While extending Noerr's implied exclusion to cover attempts to gain access to administrative agencies and courts, as well as attempts to influence the electorate, subsequent cases have also narrowed its reach. Most recently, in City of Lafayette v. Louisiana Power & Light Co., the Supreme Court cautioned that implied exclusions, like the one inaugurated by Noerr, "have been unavailing to prevent antitrust enforcement which, though implicating . . . fundamental [constitutional] policies, was not thought severely to impinge upon them."

B. The NOW Opinion

Taking its cue from the Supreme Court in Noerr, the court of appeals in NOW cast its holding in terms of the limited reach of the Sherman Act. It began by setting out some congressional debates preceding adoption of the Sherman Act, conceded them to be inconclusive, and concluded that at least the Act's legislative history did not contain any affirmative indication of a congressional intent to bring protest boycotts within the Act's scope. Turning to the case law, the court noted several Supreme Court cases intimating that the Sherman Act was meant primarily to regulate business, as opposed to social or political activities. But the bulk and chief thrust of its opinion consisted of an unconvincing attempt to bring the facts of NOW within the reach of the Supreme Court's decision in Noerr.

The task was a difficult one. It is not easy to argue that a boycott aimed at a state's convention industry is essentially similar to a direct attempt to influence legislation. The Noerr Court, emphasizing the "essential dissimilarity" between "mere solicitation

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33 For a general discussion of subsequent cases, see Fischel, supra note 22, at 85-94.
36 Id. 400.
37 Missouri v. NOW, 958 ANTITRUST & TRADE REG. REP. (BNA) F-1, F-2 to F-6 (8th Cir. Mar. 28, 1980).
38 Id. F-4 to F-5. See text accompanying notes 59-64 infra.
of governmental action” and traditionally proscribed devices by which the participants “give up their trade freedom, or help one another to take away the trade freedom of others,” 39 made specific mention of boycotts as an example of the latter. Observing that all of the evidence in the record concerned “the railroads’ efforts to influence the passage and enforcement of laws,” the Noerr Court noted in particular the lack of any “specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers.” 40 Nevertheless, the court of appeals insisted that under Noerr, NOW’s use of a boycott was irrelevant to the applicability of the Sherman Act.41

The NOW court sought refuge in Noerr’s treatment of the railroads’ unethical publicity campaign. In that case, the Supreme Court concluded that the unethical and harmful aspects of the campaign, waged against the trucking industry as a supplement to the railroads’ direct lobbying efforts, did not serve to bring the railroads’ conduct within the ambit of the Sherman Act:

It is inevitable whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. . . . To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.42

Fixing on the convention boycott’s goal of influencing legislative action, the NOW court characterized the boycott as a political tool for petitioning the government, essentially no different than the publicity campaign in Noerr. Thus, whatever harm the boycott caused to Missouri’s convention industry was merely an incidental effect of NOW’s appeal to the legislature and did not subject NOW’s activities to antitrust coverage.43

In another portion of its opinion rejecting the state’s intentional tort claim, the court of appeals found NOW’s boycott privileged by the first amendment’s right of petition.44 Its reason-

40 Id. 142.
41 958 Antitrust & Trade Reg. Rep. (BNA) at F-7.
42 365 U.S. at 143-44, quoted in Missouri v. NOW, 958 Antitrust & Trade Reg. Rep. (BNA) at F-7.
43 958 Antitrust & Trade Reg. Rep. (BNA) at F-7.
44 Id. F-7 to F-9.
ing not altogether lucid, the court seems to have inferred from the Supreme Court's avoidance of the first-amendment question in *Noerr* that the activities depicted there actually enjoyed a constitutional privilege. Because the boycott in *NOW* differed only superficially from the railroads' activities in *Noerr*, according to the court, it followed that the NOW boycott was likewise protected by the first amendment.\(^4\) Thus, although the court of appeals was careful to present its resolution of the Sherman Act claim in terms of the Act's intended scope, its holding as to the tort claim reveals that caution to be a purely formal gesture; no matter what Congress intended to include within the Sherman Act, the Eighth Circuit would apparently hold practices like NOW's boycott immune to governmental regulation by virtue of the first-amendment right to petition.

It is not surprising that the court of appeals' opinion failed to command unanimity. In a well-reasoned dissent, Judge Gibson took the majority to task for its lack of analysis.\(^4\) Not persuaded by the majority's attempt to obscure the difference between the convention boycott and the solicitation efforts in *Noerr*, the dissenting judge emphatically denied that *Noerr* dictated the majority's result.\(^4\) He repeated the Supreme Court's recent reminder of the heavy presumption against implied exclusions and of the necessity of proving "countervailing policies which are sufficiently weighty to overcome" it.\(^4\) Judge Gibson thus saw the court as obliged to "undertake a more comprehensive balancing of the important governmental interest in preserving the free enterprise system with the interest of people to use this particular method of influencing legislation."\(^4\)

The majority opinion of the court of appeals stands *Noerr* on its head. *Noerr* established an implied exclusion for a certain form of political activity—direct solicitation of legislative and executive action—and held that activities taking that form lie outside the Sherman Act even if the motivation for them is strictly anticompetitive and even if they are pursued in an unethical manner. It is this focus on the form of the railroads' activity that explains the

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\(^4\) Id. F-9.
\(^4\) Id. F-9, F-12 (Gibson, J., dissenting).
\(^4\) Id. F-11.
\(^4\) 958 ANTITRUST & TRADE REG. REP. (BNA) at F-11 (Gibson, J., dissenting) (footnote omitted). Reluctant to venture such a balancing on his own, Judge Gibson would have remanded to the district court with instructions for that undertaking.
Noerr Court's emphasis on the "essential dissimilarity" between petitioning the government and trade practices like boycotts, traditionally thought to be anticompetitive. Had the Court in Noerr thought motivation decisive, it could not have reached its result, since the motivation of the railroads was conceded to be anticompetitive. Yet the holding of the court of appeals rests entirely on the NOW boycott's motivation50 and views the difference in form between a boycott and direct solicitation of the legislature as having only a "superficial impact." 51 Where Noerr was careful to preserve inviolate the traditional domain of antitrust enforcement, the NOW court's interpretation would alter the entire landscape; every conceivable anticompetitive practice would be immunized from antitrust scrutiny, if only its goal was to exert an influence on the government.52

Even if one were to concede that the convention boycott were entitled to some degree of protection by virtue of the first-amendment right to petition, it does not follow that any form of governmental regulation is invalid. As the dissent correctly pointed out, it was not sufficient for the court merely to find that antitrust regulation of NOW's boycott would raise serious constitutional questions. According to the City of Lafayette case, the court needed to show that regulation would have "severely impinged" upon the right to petition.53

A general discussion of the possibility of implying an exclusion for protest boycotts from the antitrust laws grounded in the first amendment will be taken up in a later section of this Comment.54 Here it suffices to say that the right to petition on which

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50 See Missouri v. NOW, 958 Antitrust & Trade Reg. Rep. (BNA) at F-7 & n.15 ("the crux of the issue is that NOW was politically motivated to use a boycott to influence ratification of the ERA").

The extent of the circuit court's misunderstanding of Noerr, and first-amendment doctrine generally, is revealed by its argument based on the content of the legislation sought by NOW as compared to that sought by the railroads in Noerr. The court reasoned that because ratification of the ERA is political or social legislation, NOW's efforts to induce ratification lay further beyond the reach of the Sherman Act than the railroads' efforts to secure commercial legislation harmful to the trucking industry. It is precisely the significance of Noerr, however, that the content of the legislation sought is irrelevant to the issue of Sherman Act coverage. See Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 139-40 (1961).

51 958 Antitrust & Trade Reg. Rep. (BNA) at F-7.

52 See, e.g., Crown Central Petroleum Corp. v. Waldman, No. 79-1086 (M.D. Pa. Mar. 21, 1980) (concerted closings by independent gas-station owners to protest federal energy policies held symbolic speech directed at federal government and thus protected from antitrust attack under Noerr-Pennington doctrine).


54 See text accompanying notes 81-98 infra.
the circuit court relied has not received special treatment from the Supreme Court, but rather has enjoyed equal status as a cognate right along with the right to assemble peaceably, and to freedom of speech and of the press. Like those rights, the right to petition is not absolute. As the Court held in a recent case involving the right to petition, first-amendment rights are subject to regulation that furthers a substantial governmental interest unrelated to the suppression of free expression. Thus, characterizing NOW's boycott as an exercise of the right to petition does not automatically render any government regulation unconstitutional. Rather, such a characterization only triggers the need for a first-amendment inquiry, an inquiry, Judge Gibson aptly noted, the NOW court never began.

Before proceeding to analyze the first-amendment arguments for keeping protest boycotts out of the Sherman Act, it will be worthwhile to explore an alternative approach that figured in the district court's treatment of the convention boycott in NOW. The district court rested chiefly on the authority of Noerr, but sought to buttress its opinion by stressing the boycott's noncommercial character. Although the circuit court rejected this distinction as a ground for its decision, one may still ask whether the noncommercial nature of protest boycotts in general suffices to establish an implied exclusion from the federal antitrust laws.

C. Noncommercial Nature as a Basis for Antitrust Exclusion

The decisions of several courts lend some support to the proposition that the Sherman Act was simply not intended to reach activities like protest boycotts, which have noncommercial objec-


The NOW court hinted at a greater protection for the right to petition than for the right of free speech. In an effort to distinguish its former holding in Council of Defense v. International Magazine Co., 267 F. 390 (8th Cir. 1920), which found a protest boycott of pro-German publications subject to antitrust sanctions, the court of appeals reasoned that the earlier case involved political speech and not the right to petition. Missouri v. NOW, 958 Antitrust & Trade Reg. Rep. (BNA) at F-2 n.4.


58958 Antitrust & Trade Reg. Rep. (BNA) at F-7 n.16. The court of appeals distinguished cases holding boycotts subject to the Sherman Act despite their noncommercial character and eschewed any reliance on the NOW boycott's noncommercial nature, declaring: "Our decision is based upon the right to use political activities to petition the government . . . ." Id.
tives. In *Apex Hosiery Co. v. Leader*, the Supreme Court described the Sherman Act as a law

enacted in the era of "trusts" and of "combinations" of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . . .

Years later, in a footnote to a leading boycott decision, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, the Court construed *Apex Hosiery* as having "recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." Similarly, the Court of Appeals for the District of Columbia Circuit ruled, in *Marjorie Webster Junior College v. Middle States Association of Colleges and Secondary Schools, Inc.*, that the denial of accreditation to a junior college by an association of colleges and secondary schools was not a restraint of trade coming within the purview of the antitrust laws:

[T]he proscriptions of the Sherman Act were "tailored . . . for the business world," not for the non-commercial aspects of the liberal arts and the learned professions. In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws.

59 310 U.S. 469 (1940).
60 Id. 492-93.
62 Id. 213 n.7.

The continuing validity of the learned-profession exemption relied on in *Marjorie Webster* is questionable, however, in light of subsequent Supreme Court decisions in which the Sherman Act was applied to restraints with allegedly non-
Arrayed against these occasional qualifications, however, stands a long line of cases giving the Sherman Act the broadest possible reading, and erecting a strong presumption against implied exclusions. And, in fact, although both the Klor's footnote and the Marjorie Webster decision emphasized the importance of non-commercial objectives, neither seriously suggested that a non-commercial objective would suffice by itself to establish an implied exclusion from the Sherman Act. Both opinions implicitly required that the noncommercial objective involve an important social policy—such as the policy favoring labor organization or academic freedom—with which antitrust regulation would interfere. As noted above, the Supreme Court made this requirement explicit in City of Lafayette v. Louisiana Power & Light Co. Reaffirming the presumption against implied exclusions from the Sherman Act, the Court declared that such exclusions were appropriate only when antitrust regulation would severely impinge upon "policies of signal importance in our national traditions."

Can City of Lafayette and the line of precedent that it represents be distinguished? One might attempt to characterize this extreme reluctance to sanction exclusions from the antitrust laws as limited to situations involving economic actors engaged in economically motivated conduct—situations that contain a significant danger of injury to competition. The logic of the Supreme Court's decisions, according to this view, is that exceptions to antitrust regulation allowing significant inroads on the national policy favoring free competition cannot be tolerated, unless in the name of some other national policy of overriding importance. Given this rationale, the argument continues, the strict view of antitrust commercial purposes. See National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); Goldfarb v. Virginia State Bar, 421 U.S. 773, 781 (1975); see also Hennessey v. NCAA, 564 F.2d 1136, 1148 (5th Cir. 1977) (questioning validity of blanket educational exemption after Goldfarb).


The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these... The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

See also Pfizer, Inc. v. Government of India, 434 U.S. 308, 312 (1978).


See text accompanying notes 35-36 supra.


Id. 400.
exclusion reiterated in *City of Lafayette* cannot sensibly be applied to protest boycotts. Composed of individual consumers and/or noncommercial organizations and lacking any commercial objective, protest boycotts present a low risk of injury to competition and ought, therefore, to be treated more favorably than those business combinations which the Sherman Act was primarily intended to reach.

Although not without force, this argument cannot be reconciled with the counterexample of organized labor’s experience under the antitrust laws. Most labor-union activity no more resembles the anticompetitive business practices the Sherman Act was intended primarily to control than does the typical protest boycott. Yet, the history of the labor-antitrust exemption provides solid evidence of the Supreme Court’s refusal to recognize an implied exclusion from the antitrust laws when that exclusion is predicated solely on the “intended” scope of the Sherman Act and not on any countervailing policies of special significance. In *Loewe v. Lawlor*, the Supreme Court first ruled that labor unions were subject to antitrust liability, declaring that the Sherman “act made no distinction between classes. It provided that ‘every’ contract, combination or conspiracy in restraint of trade was illegal.” Despite the attempt by Congress in the Clayton Act in 1914 to offer labor some protection, the Court in *Duplex Printing Co. v. Deering*, read the statute narrowly and again applied antitrust sanctions. It was not until after Congress passed the Norris-LaGuardia Act in 1932 that the Supreme Court finally recognized an antitrust exemption for the efforts of labor unions. Even this exemption has proven to be less than absolute, for there remain...
situations in which the activities of labor organizations may be subject to antitrust liability.\textsuperscript{78}

If, absent a strongly articulated, countervailing policy, the antitrust laws apply to the collective activities of individual “sellers of labor,” it is difficult to see why those same laws do not reach the collective activities of individual consumers who marshall their buying power to wield influence in the marketplace.\textsuperscript{79} The history of the labor cases under the Sherman Act, therefore, suggests that an exclusion for protest boycotts will not be forthcoming unless it can be shown that antitrust regulation would trench heavily upon a countervailing policy of national importance.\textsuperscript{80} Because no congressional declaration favoring protest activity exists, the search for such a policy turns next to the first amendment.

D. Protest Boycotts and the First Amendment

An implied exclusion from the antitrust laws based on the first amendment would require a finding of serious conflict between

\textsuperscript{78} Antitrust liability may still be found when labor organizations act in concert with employers in a market-control scheme that would be proscribed for employers acting without labor-union involvement. See Amalgamated Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965); UMW v. Pennington, 381 U.S. 657 (1965); Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945). Antitrust liability may also be found when labor unions engage in activities specifically proscribed by the labor laws. See, e.g., Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975).

\textsuperscript{79} Perhaps one could erect a distinction between labor and consumer activities by reason of labor’s greater economic muscle: because a firm’s employees are ordinarily fewer, more concentrated, and more strategically located than the consumers of its products, the employees are generally more capable of effective concerted action. But such an attempt to exclude activities from antitrust scrutiny on the basis of relative estimates of the likelihood of anticompetitive effect seems ill-advised. Weighing the effect of certain practices on competition is an exercise more appropriate to antitrust analysis under the rule of reason. See text accompanying notes 145-59 infra.

Reiter v. Sonotone Corp., 442 U.S. 330 (1979), which held that consumers can bring antitrust actions based on injuries to their pocketbooks, suggests another way of looking at this issue. In Reiter, the Supreme Court specifically rejected the argument that the antitrust laws reach only commercial injuries. Once harm to consumers’ purchasing power is recognized as actionable under the antitrust laws, it would indeed be anomalous if concerted use of that power were deemed to lie beyond antitrust attack. The life of the law may not be logic, but symmetry should not be sneezed at either.

\textsuperscript{80} The early cases subjecting labor organizations to antitrust regulation have been criticized for applying a double standard to business and labor. See, e.g., Cox, supra note 70, at 256-66. Significantly, however, those cases have never been overruled. Moreover, the labor-antitrust exemption more recently has received a narrowing construction from the Supreme Court. See Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 622 (1975). Thus the exemption from the antitrust laws which labor unions enjoy today extends no further than that expressed in the statutes and implied as required to implement the national policy in favor of collective bargaining.
antitrust regulation and first-amendment freedoms. Two possible sources of such a conflict can be identified. First, constitutional protection might attach to the expressive aspect of the boycott itself, that is, to the agreement among the boycott participants not to deal with the target. Second, even if the first amendment does not shield the concerted refusal to deal, antitrust regulation might unduly interfere with boycott-related publicizing activities of a type entitled to first-amendment protection, such as distributing leaflets, making speeches, holding rallies and marches, and buying advertisements.

This distinction between concerted refusals to deal, on the one hand, and activities aimed at inducing third parties not to deal, on the other, forms the foundation of a recent attempt, in a Harvard Law Review Note, to analyze the status of politically motivated boycotts under the first amendment. According to that Note, the inducement efforts of protest boycotters are shielded by the first amendment under the analysis typified by the Supreme Court's decision in Brandenburg v. Ohio, but concerted refusals to deal, in light of United States v. O'Brien, are not.

O'Brien involved the constitutionality of a federal regulation prohibiting the destruction of draft cards. The defendant alleged that the burning of his draft card was symbolic speech protected by the first amendment, but the Supreme Court held that the defendant's activity entailed not merely speech, but speech plus conduct. The Court further held that governmental regulation of the conduct in symbolic speech was justified if it advanced "an important or substantial governmental interest . . . unrelated to the suppression of free expression." Because antitrust regulation of boycotts in general serves the important governmental interest of enforcing a regime of competition, an interest "unrelated to the suppression of free expression," antitrust regulation of protest boycotts, examined in light of the O'Brien analysis, does not run afoul of the first amendment.

The analysis in O'Brien serves to distinguish those cases in which the Supreme Court has extended the protection of free speech

81 See Political Boycott Activity, supra note 7, at 679-87.
84 Political Boycott Activity, supra note 7, at 679-87.
85 391 U.S. at 377.
beyond merely verbal communication.\textsuperscript{66} \textit{Spence v. Washington},\textsuperscript{87} which characterized as protected speech the displaying of an American flag with a peace symbol taped to it, and \textit{Buckley v. Valeo},\textsuperscript{88} which held unconstitutional a federal law limiting political expenditures, are both examples of cases in which the questioned laws violated the first amendment because the interests they served were directly related to suppression of free expression. By contrast, the interests served by the Sherman Act's ban on contracts, combinations, and conspiracies in restraint of trade, relate only incidentally to the silencing of free communication.\textsuperscript{89}

Employing the \textit{O'Brien} test in this situation, however, seriously understates the strength of the argument against according constitutional protection to protest boycotts. The governmental interest supporting the regulation in \textit{O'Brien} was chiefly bureaucratic, and, as such, offered weak justification for restraining fundamental rights, even if only incidentally. In contrast, the government's interest in preserving competition is of major significance;\textsuperscript{90} wherever the antitrust laws apply, they invest individual businesses with impor-


\textsuperscript{87} 418 U.S. 405 (1974).

\textsuperscript{88} 424 U.S. 1 (1976).

\textsuperscript{89} Two decisions in the Fifth Circuit, Henry v. First Nat'l Bank, 595 F.2d 291 (5th Cir. 1979), \textit{cert. denied}, 100 S. Ct. 1020 (1980), and Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969), struck down on constitutional grounds injunctions prohibiting picketing associated with civil rights boycotts. Although the \textit{Henry} decision might be read as extending first-amendment protection to a civil rights boycott because of its lack of commercial purpose, that reading is too broad. In that case, the district court had granted an order enjoining the enforcement of a state antitrust judgment. The plaintiffs argued that the state law prohibited and penalized activities that were protected by the first amendment. Appellate review was limited to the question "whether the district court could . . . have found that the . . . plaintiffs were likely to succeed on the merits of their claim. . . . [The court] intimate[d] no opinion regarding the ultimate merit of their contentions." 595 F.2d at 302. The court went on to say that "[g]iven the procedural posture of this case, we have no need and, hence, make no attempt to articulate a comprehensive scheme for reconciling a state's interest in regulating economic activity with the First Amendment's protection of political speech." \textit{Id.} 304. Thus, the court did not reach the question whether all protest boycotts are constitutionally protected.

\textit{Machesky} considered the proper scope of a state court injunction where the federal plaintiffs were engaging in boycotting and picketing. The court merely held that the state court injunction was "constitutionally overbroad" because "it lumps the protected with the unprotected." 414 F.2d at 291.

\textsuperscript{90} California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 100 S. Ct. 937, 946 (1980).
tant economic rights. In United States v. Topco Associates, the Court stated:

[The antitrust laws] are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

Unlike a draft-card burning, which impinges merely upon the government's interest in efficient administration, a protest boycott seeks to apply economic coercion to the target business, and to interfere with its right to compete freely.

This coercive tendency of boycotts is of considerable importance in assessing the claim of first-amendment protection. Although the Supreme Court has often extended first-amendment protection to expression whose content offends or disturbs its audience, it nevertheless has consistently upheld regulation when the form or mode of the questioned expression, independent of its content, threatens to interfere with the rights of others. It therefore follows that, whatever the symbolic content of a concerted refusal to deal, the coercive nature of that particular form of expression renders it susceptible to regulation by the government.

The impulse to take protest boycotts out of the Sherman Act probably derives not so much from solicitude for the symbolic message of concerted refusals to deal as it does from a sense that the threat of antitrust liability will unduly chill the publicizing activities that ordinarily accompany a protest boycott. Indeed, in the

91 405 U.S. 596 (1972).
92 Id. 610. Although the antitrust laws exist for the benefit of the public and not, in the first instance, for the protection of businessmen, several of the Supreme Court's boycott decisions demonstrate that "competition is not valued solely to advance consumer interests," but also "to protect the access of individual traders to the market-place, free of coercion or restraint." L. Sullivan, supra note 17, at § 84, at 238 n.19 (citing United States v. General Motors Corp., 384 U.S. 127 (1966); Silver v. New York Stock Exch., 373 U.S. 341 (1963); and Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)).
typical protest boycott, the expressive voice of the concerted refusal to deal itself can hardly be discerned in the din of related speeches, leaflets, marches, advertisements, and media coverage. One who believes, with the commentator noted above, that such publicizing efforts enjoy constitutional protection, might argue that even though the first amendment does not protect concerted refusals to deal, the latter should not be subjected to antitrust scrutiny, because to do so would unduly encroach upon those accompanying activities.

Such an argument does not merit extended consideration. Although due regard for activities protected by the first amendment will no doubt influence a court's handling of a protest-boycott case, there is no reason to think that the problems are insurmountable. In the labor context, for example, Congress has prohibited secondary boycotts while preserving the right of labor organizations to publicize the nature of the underlying dispute. Thus, whether or not publicizing activities in furtherance of a protest boycott are protected by the first amendment, they present no constitutional impediment to including protest boycotts within the ambit of the antitrust laws.

 Practically speaking, of course, subjecting protest boycotts to potential treble-damage liability and equitable sanctions under the antitrust laws will doubtless act as a significant deterrent to groups contemplating a protest boycott. Even if, as this Comment will attempt to show in part II, most protest boycotts do not unreasonably restrain trade, the mere prospect of the costs involved in defending antitrust suits will exert a chill on protest-boycott activity. While these consequences are troubling, it is hard to see how they can alter the conclusion that under the existing case law, protest boycotts do not qualify for an implied exclusion from antitrust scrutiny. As the Supreme Court observed recently in rejecting a different list of horribles: “These are not unimportant considerations, but they are policy considerations more properly addressed to Congress . . . .”

95 In determining the existence of the concert of action necessary to a suit under § 1 of the Sherman Act, for instance, courts may be led by first-amendment considerations in protest-boycott cases to apply a different standard than they would in an ordinary commercial context. See note 162 infra. First-amendment overtones may also influence the decision whether to employ a per se or rule-of-reason approach. See text accompanying note 129 infra.


97 See text accompanying notes 160-67 infra.

II. PROTEST BOYCOTTS UNDER THE SHERMAN ACT

To argue that protest boycotts cannot under existing law be excluded from the scope of the Sherman Act is not to say that they violate the antitrust laws. Although the Sherman Act proscribes "[e]very contract, combination . . . or conspiracy, in restraint of trade," this proscription has not been applied literally. Ever since the decision in Standard Oil Co. v. United States, the Act has been given force to prohibit only those agreements that impose an unreasonable restraint of trade. For determining which restraints are unreasonable, courts have developed two complementary modes of analysis. Under the rule-of-reason approach, competitive effect of a restraint is examined in detail; the facts peculiar to the business, the nature of the restraint and its effects, the history of the restraint, and the reasons for its imposition are all taken into consideration. Under the per se rule, certain classes of restraints are conclusively presumed to be unreasonable because experience has shown they have a high probability of causing deleterious effects on competition. Given these two modes of antitrust analysis, protest boycotts can escape antitrust liability if the per se rule does not apply to them, and if, when examined under the rule of reason they are found to lack significant anticompetitive effects, thus qualifying as reasonable restraints of trade.

A. The Argument Against Per Se Treatment

Although the Supreme Court has repeatedly listed group boycotts among the classes of restraints that should be governed by the per se rule, lower federal courts have frequently decided boycott

100 221 U.S. 1 (1911).
cases on the basis of rule-of-reason analysis.\textsuperscript{105} This situation has prompted one commentator to quip that "[t]he law in Washington . . . is quite different from the law in the rest of the country."\textsuperscript{106} The problem, however, is not the lower courts' callous disregard for the clear directives of the Supreme Court; rather, the problem is that the Supreme Court's decisions applying the per se rule to group boycotts have produced narrow holdings that leave ample room for circumvention.\textsuperscript{107} Yet it requires no effort at circumvention to argue that the Court's group-boycott decisions do not dictate per se treatment of protest boycotts.

Protest boycotts are not the kind of boycotts that have traditionally elicited application of the per se rule. In \textit{Klor's, Inc. v. Broadway-Hale Stores, Inc.},\textsuperscript{108} for example, the Court found a per se violation of the Sherman Act in a chain department store's use of its buying power to cause manufacturers and distributors to refrain from dealing with a competing, small retailer. In reaching this conclusion, the Court stressed the distinction between those restraints whose legality was determined by the rule of reason and those "restraints which from their 'nature or character' were unduly restrictive, and hence forbidden by both the common law and the statute."\textsuperscript{109} In summarizing its previous cases, however, the Court observed that "[g]roup boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category."\textsuperscript{110} The careful use of the term "trader" in conjunction with the recognition in \textit{Klor's} that the Sherman Act is concerned only to a very limited extent with organizations having noncommercial objectives,\textsuperscript{111} is significant. Although the Court has never squarely confronted a boycott, like a protest boycott, which did not


\textsuperscript{106} Woolley, \textit{supra} note 6, at 774.

\textsuperscript{107} See McCormick, \textit{supra} note 105, at 722-36; see also Bauer, \textit{supra} note 6, at 692. Bauer suggests that the Supreme Court's most recent decision touching on boycotts, St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978), foreshadows a change in the broad scope of the per se rule for boycotts.

\textsuperscript{108} 359 U.S. 207 (1959).

\textsuperscript{109} \textit{Id.} 211 (quoting \textit{Standard Oil Co. v. United States}, 221 U.S. 1, 58 (1911)).

\textsuperscript{110} \textit{Id.} 212 (emphasis added) (footnote omitted).

\textsuperscript{111} \textit{Klor's, Inc. v. Broadway-Hale Stores, Inc.}, 359 U.S. 207, 213 n.7 (1959).
at some level involve a refusal by traders to deal with other traders, Klor's suggests that per se treatment would not be appropriate.

It is not simply the absence of boycotters who are traders that distinguishes protest boycotts from the group boycotts that have been held to the per se standard. According to the Court of Appeals for the District of Columbia Circuit, per se treatment is appropriate only for those concerted refusals to deal that can be properly termed "classic group boycotts":

The classic "group boycott" is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level. Typically, the boycotting group combines to deprive would-be competitors of a trade relationship which they need in order to enter (or survive in) the level wherein the group operates.

Analysis of the Supreme Court's decisions invoking the per se rule for group boycotts confirms that it is attempts by competitors to exclude horizontal competitors which trigger the per se rule. In Klor's, for instance, the boycott organized by the chain department store involved manufacturers and distributors and so had some vertical elements. But it also had a strong horizontal component since the concerted refusal was directed by one retailer against a second retailer. Most protest boycotts, however, involve a concerted refusal to deal by consumers at one level against sellers at another level, and thus lack any horizontal component.

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112 In St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978), the Court held that a concerted refusal by certain insurance companies to deal with customers of competing companies was a boycott subject to the antitrust laws. Although the Court's opinion found no significance in the fact that the targets of the boycott were consumers who were not in competition with the boycotters, the Court declined to say whether the per se rule governs such a boycott. See note 107 supra.


114 See, e.g., United States v. General Motors Corp., 384 U.S. 127 (1966) (per se rule appropriate where retailers induced manufacturer not to sell to competing retailers); Silver v. New York Stock Exch., 373 U.S. 341 (1963) (in absence of conflicting governmental regulatory scheme, per se rule would have applied to concerted refusal by traders against another trader); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941) (per se rule appropriate where manufacturers induced retailers not to buy from other manufacturers). But see Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119, 124-25 (8th Cir. 1973), cert. denied, 415 U.S. 918 (1974) (per se rule may be applied to vertical combination to exclude competitors).

115 Some protest boycotts could be characterized as having a horizontal element. For example, a boycott by white citizens of a real estate agent who
Underlying this concern with the horizontal relationship between the parties involved in a group boycott is the Court's more critical concern with the anticompetitive purposes and effects that typically accompany horizontal restraints. Among the anticompetitive purposes and effects identified in the Court's boycott decisions are attempts to exclude competitors from competition,\footnote{E.g., United States v. General Motors Corp., 384 U.S. 127, 146 (1966); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959); Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 465 (1941). See generally Bauer, supra note 6, at 686-92; McCormick, supra note 105, at 722-36.} attempts to maintain artificially high prices,\footnote{E.g., United States v. General Motors Corp., 384 U.S. 127, 147 (1966).} attempts to foster monopoly conditions,\footnote{E.g., Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959); Associated Press v. United States, 326 U.S. 1, 8, 13 (1945).} and attempts to coerce conformity to certain trade practices.\footnote{E.g., United States v. General Motors Corp., 384 U.S. 127, 144 (1966); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659 (1961) (per curiam); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).} Lower courts, however, have often pointed to the absence of some or all of these anticompetitive aims and effects to justify discarding the per se rule and considering a given boycott under the rule of reason.\footnote{See, e.g., Feminist Women's Health Center v. Mohammad, 586 F.2d 530, 546-47 (5th Cir. 1978), cert. denied, 100 S. Ct. 262 (1979); Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 132-33 (2d Cir.) (en banc), cert. denied, 439 U.S. 946 (1978); Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 659-53 (5th Cir. 1977); Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76-78 (9th Cir. 1970), cert. denied, 396 U.S. 1062 (1970); Optivision, Inc. v. Syracuse Shopping Center Assocs., 472 F. Supp. 665, 676 (N.D.N.Y. 1979). See generally Comment, supra note 6, at 822-30.} In particular, a number of courts have held that the per se rule is unwarranted where the boycotters lack commercial motives\footnote{See, e.g., Hennessey v. NCAA, 564 F.2d 1136, 1153 (5th Cir. 1977); Paralegal Inst., Inc. v. American Bar Ass'n, 475 F. Supp. 1123, 1130 (E.D.N.Y. 1979); Nankin Hosp. v. Michigan Hosp. Serv., 361 F. Supp. 1198, 1207 (E.D. Mich. 1973); Tropic Film Corp. v. Paramount Pictures Corp., 319 F. Supp. 1247, 1253-54 (S.D.N.Y. 1970). It is also possible to read National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 693-95 (1978), as implying the propriety of rule-of-reason analysis where the concerted activity has an allegedly noncommercial objective. The Court, never once mentioning the term "per se," fails to explain why it applies the rule of reason when the lower courts found the activity illegal per se. See United States v. National Soc'y of Professional Eng'rs, 555 F.2d 978, 993-84 (D.C. Cir. 1977), aff'd, 435 U.S. 679 (1978). See also L. Sullivan, supra note 17, at § 92, 261-65.} or act in furtherance of some public policy.\footnote{See, e.g., Silver v. New York Stock Exch., 373 U.S. 341, 348-49 (1963); America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328, 334 (N.D. Ind. 1972).}
Consistent with the rationale of these cases, protest boycotts should be treated under the rule of reason. In most instances they will lack both the purpose and effect of inhibiting competition. By definition, protest boycotters do not have traditional commercial objectives, so there is no danger that concerted pressure might be exerted for the purpose of accomplishing an anticompetitive end, such as excluding a competitor or monopolizing a market. In many cases the purpose of a protest boycott will be to further a public policy, such as preventing race discrimination in hiring or discouraging the sale of an “alcoholic beverage” to minors.

The effect of a protest boycott on competitive conditions will almost always be incidental, and even that assumes the boycott can muster sizeable public support for a long enough period of time. Such minimal effects do not justify placing protest boycotts as a class in the per se category. As the Supreme Court recently noted: “Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive.” Finally, the symbolic element in protest boycotts, although not sufficient to qualify them for the protection of the first amendment, surely serves to distinguish such boycotts from practices lacking “any redeeming virtue.”

The novelty of antitrust prosecutions against protest boycotts is another factor bearing on the appropriateness of per se or rule-of-reason treatment. The Supreme Court has repeatedly affirmed the principle that per se rules should not be applied in novel situations in which experience has not shown the manifestly anticompetitive character of a particular type of restraint. The Court of Appeals for the Eighth Circuit adhered to this principle in Worthen Bank & Trust Co. v. National BankAmericard, Inc. In that case, the circuit court refused to apply the per se rule to a bylaw in a national bank-credit-card system which prohibited cer-

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123 See text accompanying notes 17-19 supra.
124 E.g., Henry v. First Nat'l Bank, 595 F.2d 291 (5th Cir. 1979), cert. denied, 100 S. Ct. 1020 (1980).
125 See N.Y. Times, Oct. 18, 1978, at 38 (nurses association urges boycott of new soft drink containing 0.5% alcohol).
126 See text accompanying notes 159-60 infra.
128 See text accompanying notes 81-98 supra.
tain member banks from membership in competing credit-card systems. The court noted that the bylaw constituted a group boycott, but held that per se treatment was inappropriate because courts lacked sufficient experience with the bank-credit-card industry and the specific bylaw in question. Protest boycotts, having noncommercial objectives and lacking intercompetitor relationships, pose an even more novel situation than that involved in the Worthen Bank case. Indeed, no court has ever decided whether such boycotts should be treated under the per se rule. The novelty of this issue thus dictates that per se treatment of protest boycotts would, at least initially, be inappropriate.

B. Protest Boycotts Under the Rule of Reason

The rule of reason does not offer a precise and well-defined model of analysis. Courts are given little guidance other than a mandate to examine all the relevant circumstances surrounding the challenged restraint. If this inquiry reveals significant anticompetitive effects or an unlawful purpose, the restraint is declared illegal. Otherwise, no antitrust violation is established. Given vague terms such as "significant anticompetitive effect" and "surrounding circumstances," it is difficult to predict how courts will regard particular restraints. Nevertheless, several general principles can be identified.

1. Noncommercial Purpose as an Excuse

One method for effecting an accommodation under the rule of reason between the antitrust laws and protest activities would be to allow a noncommercial objective to be treated as a counterweight to any negative impact a protest boycott exerts on competition. That notion, however, appears to have been scotched at an early date by Justice Brandeis, in his classic formulation of rule-of-reason analysis in Chicago Board of Trade v. United States. After state-

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133 "The content of the Rule of Reason is largely unknown; in practice, it is little more than a euphemism for nonliability." Posner, supra note 101, at 14.


135 246 U.S. 231 (1918).
ing that the true test of a restraint's legality is its effect on com-
petition considered in light of all the relevant facts, he observed:

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. This is
not because a good intention will save an otherwise ob-
jectionable regulation or the reverse; but because knowl-
edge of intent may help the court to interpret facts and to
predict consequences.136

Accordingly, the purpose for which a restraint is imposed can only
be considered as evidence of the restraint's probable effect on com-
petition. Courts are not at liberty to consider whether the purpose
motivating a restraint is of sufficient social value to excuse its effects.
Only recently, this conception of the rule of reason was reaffirmed
in National Society of Professional Engineers: 137 "[T]he purpose of
the analysis is to form a judgment about the competitive significance
of the restraint; it is not to decide whether a policy favoring com-
petition is in the public interest . . . . Subject to exceptions
defined by statute, that policy decision has been made by the
Congress." 138

Professor Coons, whose argument in favor of a justifying role
for noncommercial purpose predates Engineers, has insisted that
such pronouncements do not dictate a like result for protest boy-
cotts.139 He would distinguish the precedents as uniformly involv-
ing the conduct and purposes of businessmen. Because the business-
man's purpose is invariably economic, the Court has wisely
considered purpose to be irrelevant; no matter how honorable the
motives advanced in litigation, it is assumed that the search for
higher profits is the true determinant of business behavior. In this
regard, Professor Coons finds instructive the Supreme Court cases
establishing labor's nonstatutory antitrust exemption. Confronted
with recurring scenarios in which noncommercial purposes domi-
nated and assumptions about business behavior did not apply, the
Court was compelled to acknowledge a justificatory role for non-

136 Id. 238. Professor Sullivan points out that Justice Brandeis did not
practice what he preached in Chicago Board of Trade, the case having been decided
largely on the basis of the social value of the defendants' purpose and not on the
basis of the restraint's effect on competitive conditions. L. Sullivan, supra note 17,
at § 66, 175-79.


138 Id. 692 (footnote omitted).

139 Coons, supra note 5, at 726-29, 746-54.
commercial purpose. In protest boycotts, he concludes, noncommercial purpose should serve as an excuse for deleterious effects on competition, provided that the purpose of the boycott accords with an affirmative public policy.\footnote{140} Professor Coons is partly correct when he observes that the special treatment accorded to labor unions can be explained by the noncommercial purpose of labor activities. But his conclusion by no means follows. The method chosen by the Supreme Court for accommodating antitrust and labor policies has been to create an implied exemption for certain labor activities.\footnote{141} If the analogy to labor activities is a good one, then it would seem that protest boycotts should also be placed beyond the reach of the antitrust laws. For the reasons set forth in part I of this Comment, however, no such immunity can be maintained, a conclusion which Professor Coons accepts.\footnote{142}

The difference between excluding protest boycotts from antitrust scrutiny altogether and letting noncommercial purpose in as a justification is not a meaningless one. Limiting rule-of-reason analysis to the competitive significance of a given restraint makes good sense. Although in a common-law-tort or conspiracy action courts are permitted to evaluate the social worth of the boycotters' objective,\footnote{143} the antitrust laws were designed to protect competition. The Sherman Act was not intended to provide a forum for deciding which forms and purposes of social and political protest are sufficiently weighty to justify the use of some degree of coercion. Any attempt by courts to decide antitrust boycott cases on a basis other than competitive effect would be likely to produce unprincipled

\footnote{140}Id. 748-54. See also Bauer, supra note 6, at 701-02. Professor Bauer argues that Engineers is a price-fixing case and so distinguishes it from boycott cases where the societal benefit of the restraint should be considered. This distinction, however, does not answer the Court's argument that the Sherman Act was designed to protect a regime of competition and does not allow judges to consider other factors not sanctioned by statute. Engineers, 435 U.S. at 694-96.

\footnote{141}Some labor activities are still subject to antitrust liability, despite their noncommercial purpose. See, e.g., Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975).

\footnote{142}Coons, supra note 5, at 706-07.

decisions, guided solely by the policy preferences of individual judges.\textsuperscript{144}

2. Noncommercial Purpose as Evidence of Probable Effects

Although a noncommercial purpose may not, consistently with precedent and sound policy, be considered a justification for anti-competitive effects, it can be used as evidence of the likelihood of a protest boycott's effect on competition. As the Court reiterated in \textit{Engineers}, "competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and \textit{the reasons why it was imposed}."\textsuperscript{145}

Analysis of the purposes motivating protest boycotts leads to the conclusion that many, though not all, should enjoy a presumption of reasonableness. By definition, a protest boycott lacks a traditional commercial objective, such as excluding competitors or fixing prices, so that the anticompetitive effects, if any, that such a boycott might cause are incidental to the reasons for its imposition. These incidental and unintended effects on competition are not likely to rise to a significant level, and do not provide a basis for treating protest boycotts as unreasonable restraints of trade.

It is true, of course, that the immediate object of a protest boycott is to exert economic pressure on the target business, but it is not true that every injury sustained by the target as a result of a protest boycott is an injury to competition subject to antitrust sanctions. The antitrust laws are designed to protect competition, not competitors.\textsuperscript{146} Before a protest boycott can be found unreasonable, the target business must show that the boycott causing its losses was one having significant anticompetitive effects. It will not be enough for the target merely to show that it has suffered

\begin{itemize}
\item \textsuperscript{144}Professor Coons, for example, would allow a boycott's purpose to serve as justification only if it is "a specific object of policy," and not if the purpose is an unlawful one or one to which the law is indifferent. Coons, \textit{supra} note 5, at 748-49. It might be contended that so long as a court observes Professor Coons's categories, it would be upholding the reasonableness of the boycott not according to its own policy preferences, but according to legislative decisions. The problem with this reasoning is that it allows a court to use an antitrust action to "try" the plaintiffs for violations not related to the Sherman Act. See \textit{Fashion Originators' Guild of America v. FTC}, 312 U.S. 457, 468 (1941) (rejecting argument that boycott could be justified by a purpose to prevent tortious conduct).
\item \textsuperscript{145}National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978) (emphasis added).
\item \textsuperscript{146}Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977); Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). \textit{See note 157 infra.}
\end{itemize}
losses as a result of a boycott, even though the boycott is a form of restraint typically condemned in commercial contexts as unreasonable.

A common form of boycott, both in the commercial and the protest arenas, will serve to illustrate this point. A commercial boycott that seeks not to drive the target out of business altogether, but only to persuade it to terminate certain objectionable practices, such as discount pricing or free servicing, is anticompetitive because, if successful, the target will either go out of business or agree to observe anticompetitive restraints. If the target resists and is excluded from the market, any business that seeks to replace it will face the same choice. Thus, the boycott portends a permanent lessening of competition by extinguishing certain forms of competitive business practice.

In contrast, a protest boycott focusing on objectionable conduct of the target, such as racial discrimination\textsuperscript{147} or a particular advertising campaign,\textsuperscript{148} presents no such anticompetitive dilemma. If the target complies and desists from the irritating practices, competition will not be injured because the practices are only indirectly, if at all, related to competition. If, on the other hand, the target resists and goes out of business, a firm replacing it in the market can choose to comply without any adverse effects on the structure of competition. In either event, any injury suffered by the target as a result of this type of protest boycott does not flow from a restraint on competition, but rather from the target's insistence on, and the boycotters' reaction to, conduct that is only remotely related to any competitive advantage.\textsuperscript{149}

\textsuperscript{147} E.g., O'Shea v. Littleton, 414 U.S. 488 (1974).

\textsuperscript{148} E.g., N.Y. Times, Aug. 1, 1977, at 21, col. 4 (boycott of Florida citrus products in opposition to use of Anita Bryant, the anti-gay crusader, as advertising personality).

\textsuperscript{149} According to this analysis, whether the presumption of reasonableness attaches depends upon the nature of the practices which are thought to be offensive. When the practices of the target business to which the boycotters object are competitive ones, the presumption would not apply. For example, if in order to protect the jobs and communities of American garment workers, a consumer boycott sought to prevent a retail men's clothing store from selling imports at a sharp discount, the boycott's goal, even though noncommercially motivated, would herald anticompetitive effects. Likewise, a protest boycott seeking to lower prices rather than to raise them would not be presumptively reasonable, since its goal is to restrain competitive pricing. This is not to say, however, that such boycotts are unreasonable restraints of trade; as developed in the following section, most protest boycotts are too sporadic and too weak to have the substantial impact on competition that a finding of unreasonableness requires. See text accompanying notes 159-60 infra. Moreover, protest boycotts aimed at practices closely related to competitive conditions may also have procompetitive aspects offsetting any anticompetitive effects.
A second type of protest boycott, illustrated by the NOW case, targets strategically situated businesses, or an entire industry, as a means of pressuring a governmental body to adopt specified measures. The businesses selected may have done nothing to merit this unfortunate treatment and may not even be in a position to influence the desired governmental action. They are, in effect, held hostage. Although the secondary nature of such boycotts raises questions of fairness that may be relevant to state-law tort claims, looked at solely in terms of the effect on competition, these boycotts are not inherently anticompetitive. Like "practice" boycotts, they do not seek to impose anticompetitive conditions on the targets, nor will acquiescence by the governmental body entail any impairment of competition. Similarly, boycotts of Iranian or, in an earlier day, Egyptian goods, based on patriotic perceptions of foreign affairs, although perhaps effecting a temporary distortion of the markets for those goods, cannot be said in any meaningful sense to signal a significant lessening of competition.

Often protest boycotts are directed at products or services thought to be offensive, such as "unpatriotic" publications or "radical" films. Insofar as such boycotts aim permanently to exclude from the marketplace a particular product or service, their objective may be characterized as anticompetitive in nature, even if their motivation is not. Similarly, a consumer boycott seeking to exclude members of a certain race is anticompetitive because it promises to erect permanent barriers to entry. When the goal of the protest boycott is the exclusionary one of restricting the range of choices available to consumers, it is hard to see how

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150 See, e.g., Henry v. First Nat'l Bank, 595 F.2d 291 (5th Cir. 1979), cert. denied, 100 S. Ct. 1020 (1980); Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969).

151 See generally Sandifer & Smith, supra note 15.

152 E.g., Wall St. J., Nov. 9, 1979, at 2 (refusal of dockworkers to unload Iranian goods).

153 E.g., Khedivial Line, S.A.E. v. Seafarers' Int'l Union, 278 F.2d 49 (2d Cir. 1960) (per curiam) (refusal to unload Egyptian ship in retaliation for Arab boycott of American ships trading with Israel).


156 Cf. Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723 (6th Cir. 1967) (per curiam) (conspiracy of white realtors to exclude blacks from renting or owning in white neighborhoods).
the boycott's concededly noncommercial motivation could make any difference to the calculus of competitive effect. This type of boycott should not, therefore, enjoy a presumption of reasonableness, although it might be that exclusion of a single product or race from the marketplace would be viewed as an insignificant restraint on competition \(^{157}\) and a not unreasonable one.\(^{158}\)

3. The Market Power of Protest Boycotts

To predict the effect on competition of a protest boycott, courts will be obliged to inquire into the boycott’s market power over time.\(^{159}\) If the boycott is of a type whose purpose suggests anticompetitive effects, as outlined in the preceding section, then the greater its market power, and the longer it continues, the greater the chance that it will succeed in significantly disrupting competition. As a practical matter, however, it seems improbable that many protest boycotts will be found to satisfy these conditions. Most protest boycotts are ad hoc, short-lived affairs, which ride the crest of a wave of public indignation. To be effective, protest boycotts must win the support of a broad range of consumers, a difficult if not largely impossible task. To the extent that they are organized at all, protest boycotts are directed by loose and unstable confederations of nonprofit groups, often lacking in the financial resources or the know-how necessary to sustain an effective campaign. Moreover, protest boycotts are easily co-opted; unlike commercial boycotts, protest boycotts often have vaguely defined demands, and conciliatory efforts by the targeted businesses or concerned public officials may serve to dissipate the boycotts’ support. And once dissolved, protest boycotts are difficult to reactivate.

\(^{157}\) In \textit{Klor's, Inc. v. Broadway-Hale Stores, Inc.}, 359 U.S. 207 (1959), the district and circuit courts had found that a combination to exclude a single appliance retailer did not violate the Sherman Act because many other competitors were in the market and no injury to competition had been shown. The Supreme Court reversed, holding group boycotts to be per se violations of the Act, not requiring proof of anticompetitive injury. Although \textit{Klor's} appears to stand for the proposition that exclusionary conduct violates the Act, no matter how insignificant its impact on competition, the breadth of the decision has been questioned. See L. Sullivan, \textit{supra} note 17, at § 84, at 236. More significantly, \textit{Klor's} itself contains language indicating that similar activities by nontraders should be treated more leniently. See text accompanying note 62 \textit{infra}. Thus, \textit{Klor's} would not be controlling in a protest-boycott case.

\(^{158}\) If a benign purpose may not serve to justify a restraint on competition, see text accompanying notes 135-44 \textit{infra}, it seems inescapable that a maleficient purpose, such as racial discrimination, should not serve to condemn a boycott that is harmless from an antitrust point of view.

\(^{159}\) See L. Sullivan, \textit{supra} note 17, at § 69, 189-92; Bauer, \textit{supra} note 6, at 711-12.
all these reasons, protest boycotts are unlikely to exert any lasting, significant effect on competition.

C. The Scope of Liability

According to the preceding analysis of protest boycotts under the Sherman Act, most protest boycotts are entitled to a presumption of reasonableness because their purposes indicate the improbability of significant anticompetitive effects; other protest boycotts, although not presumptively reasonable, are nevertheless likely to have but a slight impact on competition because of the nearly insurmountable problems of organization implicit in the noncommercial setting. To say that the probability of finding an "unreasonable" protest boycott is slim is not, however, to say that none will occur. When the occasion arises, a court will have to face remedial problems of some difficulty.

A recent Note in the Harvard Law Review maps a course through this thicket which, if reliable, would maximize the constitutional protection afforded to protest boycotts while minimizing the scope of relief available to businesses injured by them. The authors of that Note draw a constitutional line between efforts of boycotters to induce allegiance to the boycott, and the concerted refusal to deal itself. The former they find protected by the first amendment, the latter not. Reasoning that "liability cannot, consistently with the first amendment, extend to the patronage withheld by parties who were only induced or persuaded not to deal," they conclude that damages can only be awarded for the loss of the patronage of those boycotters who expressly commit themselves to the concerted refusal. Although they do not discuss it, presum-

160 Political Boycott Activity, supra note 7. Although the Harvard Note is not specifically addressed to cases arising under the Sherman Act, its analysis would seem to apply equally to federal as well as state antitrust actions.


161 Political Boycott Activity, supra note 7, at 690.

162 The Harvard Note finds the behavioral assumptions underlying the traditional conspiracy theories employed in antitrust cases inapplicable to protest boycotters, and would require conspiracy to be proved by "direct evidence of an express agreement." Id. 689. In traditional antitrust analysis, proof of an agreement can be established in three different ways: (1) by evidence of an express agreement, see, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); (2) by evidence of an agreement implied from a common pattern of conduct, see, e.g., United States v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1948); or (3) by
ably the Harvard authors would also restrict injunctive relief to prohibitions against express agreements, and would label any attempt to enjoin continued inducement activities a violation of the first amendment.

One need not ponder this argument very long to discover its flaw. Assuming that the Note is correct in thinking that persuasion or inducement activities, without more, are protected by the first amendment, it hardly follows that those activities retain their constitutional mantle when they form an integral part of an illegal concerted refusal to deal. On more than one occasion, the Supreme Court has observed that conduct otherwise protected by the first amendment loses its protective shield if undertaken in furtherance of an illegal scheme. Thus, if the protest boycott is illegal, there is no constitutional barrier to holding conspirators liable for losses evidence of interdependent behavior, i.e., conscious, parallel action which would not be undertaken without a mutual understanding that all the actors will follow the same course, see, e.g., Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939). See generally Markovits, A Response to Professor Posner, 28 Stan. L. Rev. 919 (1976); Posner, A Program for the Antitrust Division, 38 U. Chi. L. Rev. 500, 514-25 (1971); Turner, The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962).

The Harvard authors would thus disallow a finding of conspiracy based on an implied agreement or on "conscious parallelism." They explain that in the commercial context it is reasonable to assume that participants in an alleged boycott would not limit their trade freedom without assurances that others will do likewise. But in the protest-boycott setting, they point out, it is just as likely that individuals will refuse to deal as a matter of principle, without regard for the course others pursue. It follows that only evidence of an express agreement will do. The Harvard authors even go so far as to state that it would be "improper" for courts to infer that the organizers of a protest boycott have themselves agreed to participate in it. Id. 689 n.153.

This argument is more than a little disingenuous. Granting the correctness of distinguishing between the behavioral assumptions appropriate to the commercial and noncommercial contexts, it surely does not follow that the only possible solution is to deprive courts of the power to draw plain inferences from the facts. A requirement of conspiracy is not unique to antitrust violations, and, in other areas of the law where commercial motives play no part, the ability to imply an agreement has necessarily been recognized. See, e.g., United States v. Spock, 416 F.2d 165 (1st Cir. 1969). A conspiracy law that requires "direct evidence of an express agreement" is really no law at all.

It is not hard to understand why the Harvard authors might have felt compelled to assume such an unreasonable position. The danger to be avoided, of course, is a finding of the concert of action required under § 1 of the Sherman Act based solely on evidence of inducement activities protected by the first amendment. One who does no more than sign a newspaper ad or speak at a boycotters' rally should not have to fear treble-damage liability. Cf. United States v. Spock, 416 F.2d 165 (1st Cir. 1969) (antiwar "conspiracy" to counsel, aid and abet draft resistance). Yet, courts are not so heedless of first-amendment concerns that their hands must be tied by the extreme standard of proof urged by the Harvard Note. Allowing conspiracy to be demonstrated by implied agreements will do no harm, provided that courts pay due respect to the first amendment.

due to the withdrawal of patronage by nonconspirators. Nor would there be any constitutional difficulty in enjoining the conspirators from engaging in further acts of inducement. Rejecting a first-amendment attack on the scope of injunctive relief in National Society of Professional Engineers v. United States, the Supreme Court observed: "While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. . . . The First Amendment does not 'make it . . . impossible ever to enforce laws against agreements in restraint of trade . . .'"

The approach of the Harvard authors would indeed make it impossible to enforce the antitrust laws. Although they concede that a politically motivated concerted refusal to deal may be outlawed without abridging constitutional rights, their view of the first amendment would deny effective sanctions to successful plaintiffs. Without a damage award commensurate with the injury inflicted, or injunctive relief against the defendants' ongoing solicitation activities, a finding of illegality would have little or no effect on the continuing harm which the Sherman Act proscribes. The point is not that a violation of the Act renders the first amendment a nullity—surely remedial steps should be as little restrictive of constitutional

164 But see Henry v. First Nat'l Bank, 595 F.2d 291, 302-05 (5th Cir. 1979), cert. denied, 100 S. Ct. 1020 (1980).

The ordinary difficulty of proving damages would remain. Liability for injury attributable to nonconspirators would require a finding of causal connection between the proscribed activities of the conspirators and the independent actions of the nonconspirators responding to inducement. In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), the Court noted that the plaintiff in an antitrust suit must "prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Id. 489. Actord, Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), cert. denied, 411 U.S. 938 (1973); American Infra-Red Radiant Co. v. Lambert Indus., Inc., 360 F.2d 977, 996 (8th Cir. 1966). Thus, the plaintiff would have to show, first, that loss of the nonconspirators' patronage was actually caused by the inducement activities of the conspirators and, second, that the inducement was itself an antitrust violation. Neither requirement poses serious obstacles. The causation element would be no more difficult to satisfy than usual; the conspirators would be held responsible for the predictable, intended consequences of their conduct. As for the second requirement, in most instances, inducement activities will be centrally organized and themselves the subject of express or implied agreement. Conceivably, a conspirator might be able to present convincing evidence that he undertook inducement efforts solely on his own initiative, but such cases are likely to be rare.


liberties as possible. But relief must be afforded so as to effectuate the purposes of the antitrust laws.

CONCLUSION

The increasing frequency of antitrust challenges to protest boycotts presents difficult problems of legal analysis. In an attempt to apply existing case law to those problems, this Comment began by asking whether protest boycotts qualify for an implied exclusion from the Sherman Act. An initial examination of the opinion of the Court of Appeals for the Eighth Circuit, in Missouri v. National Organization for Women, found its reliance on Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. to be misplaced. The remaining sections of part I concluded that neither the noncommercial objectives of protest boycotts nor their character as symbolic speech suffice, under current Supreme Court doctrine, to carve out an exemption from the antitrust laws. Part II found ample precedent for scrutinizing protest boycotts under the rule of reason, rather than disposing of them in accordance with the per se treatment normally accorded to group boycotts. It rejected as unsound the argument that the noncommercial purpose of protest boycotts should be permitted to justify the restraints they impose on competition. Considered as evidence of probable effect, however, noncommercial purpose was shown to provide a guide for determining which types of protest boycotts are likely to lack any significant effect on competition. According to this analysis, the purpose of some protest boycotts was thought to indicate a potential for serious restraints of trade, but part II found little reason to expect those or any protest boycotts to be capable of mustering the necessary market power. Were a protest boycott to be held unreasonable, however, this Comment argued that the first amendment would present no obstacle to effective relief.

Putting the precedents to one side, what legal status should protest boycotts have with respect to the Sherman Act? Although the matter is surely open to dispute, an initial premise would be that in a modern, democratic society, the collective use of economic coercion carries a presumption of the need for close governmental supervision. A noncommercial motivation for the organized use of


168 958 ANTITRUST & TRADE REP. (BNA) F-1 (8th Cir. Mar. 28, 1980).

such force should not outweigh that presumption, because it is the existence of unbridled power, and not the ends for which it is exercised, that necessitates governmental control. Nor does the fundamental right of free expression counsel otherwise. Whatever social utility protest boycotts have is in their ability to express in a symbolic form the strongly held belief of the boycotters. But as the anticompetitive effects caused by a boycott increase, the boycott's value as a mode of expression is at some point outweighed by its interference with the conflicting value of the right of businesses to compete freely. Thus, sound public policy dictates that a balance be struck, preserving the expressive worth of protest boycotts, while at the same time keeping within bounds the harm they cause to competition.

170 See Bird, supra note 6, at 259-60.