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### Doing Well, Doing Good and Doing Both: A Framework for the Analysis of Noncommercial Boycotts under the Antitrust Laws, 30 St. Louis U. L.J. 385 (1986)

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**DOING WELL, DOING GOOD AND DOING BOTH: A  
FRAMEWORK FOR THE ANALYSIS OF NONCOMMERCIAL  
BOYCOTTS UNDER THE ANTITRUST LAWS**

DONALD L. BESCHLE\*

I. INTRODUCTION

The first step in the process of forming durable legal rules is defining the goals that the rules are meant to advance. Much of the difficulty of the lawmaking process flows from the fact that these goals are numerous and diverse, and a single-minded devotion to one goal can seriously impair achievement of another. In various areas of the law, scholars and practitioners argue over which asserted goal should be dominant. Should tort law be primarily concerned with deterring harmful conduct or with quickly and efficiently compensating losses?<sup>1</sup> Should criminal law seek to maximize the security of the individual or his freedom?<sup>2</sup> While these disputes are framed in "either-or" language, the usual outcome is a set of rules that attempt to address both alternatives, often through accommodations that prevent full satisfaction of any single interest.

Such compromises become even more likely, and perhaps inevitable, when a single legal rule affects different areas of the law that protect very different interests, and each interest is recognized as clearly legitimate by all or nearly all observers. In such cases, complete disregard for either interest is clearly unacceptable, and an attempt must be made to reconcile the diverse and perhaps conflicting goals in a way that will best preserve each of them.

There has been extensive discussion in recent years about the proper goals of antitrust law. The promotion of competition and the maintenance of efficiently functioning markets has emerged as the pri-

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1. See generally PERSPECTIVES ON TORT LAW (R. Rabin 2d ed. 1983) (collection of essays addressing tort theory and approaches, most of which address this issue).

2. The same question arises with respect to the law regarding "therapeutic" decisions concerning the mentally disabled, juvenile delinquents, and others who are in some way deviant. An interesting collection of materials addressing the tension between individual freedom and security for the community is found in F. COHEN, CASES AND MATERIALS ON THE LAW OF DEPRIVATION OF LIBERTY: A STUDY IN SOCIAL CONTROL (1980).

mary concern of antitrust in the opinion of most commentators.<sup>3</sup> Although some recognize the legitimacy of other, secondary goals—especially when the effect of a decision on efficiency is unclear<sup>4</sup>—and others insist that efficiency is the only proper goal of antitrust,<sup>5</sup> the primacy of economic concerns seems generally to be accepted. This conclusion permits a relatively consistent approach to analysis of antitrust problems. Occasionally, however, an antitrust rule will touch another area of law that is aimed at satisfying quite different interests. This occurs when the problem of group boycotts is confronted.

The boycott, or concerted refusal to deal, has often been used as an obvious and effective anticompetitive tool either for the discipline or the elimination of business competitors.<sup>6</sup> But the device also has a long and respected history of use as a tool of social and political reform.<sup>7</sup> Therefore, the first amendment implications of rules regarding boycotts must be examined. Some would argue that constitutional questions are subject to the overriding goal of economic efficiency.<sup>8</sup> Nevertheless, all but the most single-minded adherents of the microeconomic approach to law recognize that constitutional provisions, including the first amendment, seek to serve other ends and often reflect quite deliberately chosen inefficiencies when efficiency would threaten alternative fundamental values.<sup>9</sup> Reconciliation of the economic values central to anti-

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3. See generally ANTITRUST POLICY IN TRANSITION: THE CONVERGENCE OF LAW AND ECONOMICS (E. Fox & J. Halverson eds. 1984) (collection of essays on antitrust policy) [hereinafter cited as ANTITRUST POLICY]. The contributors are in agreement that economic efficiency is one of the principal objectives of the antitrust laws. See, e.g., Spivak, *The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response*, in ANTITRUST POLICY, *supra*, at 83, 106. The authors differ over whether other goals should also be taken into account. See Fox, *Discovering an Economic Consensus*, in ANTITRUST POLICY, *supra*, at 107, 110.

4. See, e.g., Spivak, in ANTITRUST POLICY, *supra* note 3, at 104-06; Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076 (1979).

5. See, e.g., R. BORK, THE ANTITRUST PARADOX 405 (1978).

6. See L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST, 232-38 (1977); see also *infra* notes 11-69 and accompanying text.

7. See Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 659, 659 (1978). The term itself comes from the name of the target of a concerted refusal to deal by Irish tenants in the nineteenth century, Captain Charles Boycott, an Englishman. The protest was largely motivated by Irish nationalism, yet also had economic overtones. It was triggered by Boycott's refusal to reduce rents. See Note, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131, 1131 n.1 (1980).

8. R. POSNER, THE ECONOMICS OF JUSTICE (1981). Professor (now Judge) Posner applies economic concepts to a broad range of legal problems, including constitutional questions involving the existence of a right to privacy, *id.* at 310-47, and issues of racial discrimination and "reverse discrimination," *id.* at 351-407.

9. Ronald Dworkin responds to Posner's single-minded commitment to wealth

trust law and the freedom to engage in political and social activity protected by the first amendment is not always easy. Reconciliation is necessary, however, especially in light of the extension of first amendment protection to commercial speech during the last decade.

This Article will propose a framework for analysis of boycotts conducted for noncommercial purposes. First, this Article will outline the basic antitrust approach to boycott problems. Next, it will examine existing case law on noncommercial boycotts. Then it will discuss the history and concepts of the first amendment protection for "commercial speech" developed in the last decade. Finally, all of the concerns discussed will be synthesized into a set of standards for analyzing whether a particular boycott should be per se illegal, per se legal, or subject to judgment under the rule of reason for antitrust purposes. As this Article explains, there will be boycotts that fall into each category, and the more clearly defined the categories are, the more confident both businessmen and others can be in planning their activities to assure full first amendment protection.

## II. ANTITRUST LAW CONCERNING BOYCOTTS—BASIC PRINCIPLES

From the earliest days of antitrust enforcement, the boycott has been recognized as a potential violation of the Sherman Antitrust Act.<sup>10</sup> The utility of the concerted refusal to deal as a tool to punish competitors or exclude potential competitors has long been apparent. In 1904, in *Montague & Co. v. Lowry*,<sup>11</sup> the Supreme Court affirmed a judgment which found that the Act was violated by a trade association whose bylaws prohibited its members from dealing with nonmembers.<sup>12</sup> Such a rule, combined with the power of the association to deny membership, gave the members the power to eliminate potential competitors, or at least place them at a grave disadvantage, by denying them access to important trade relationships.<sup>13</sup> A decade later, the Court re-

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maximization by, among other things, outlining a plausible situation which would lead to the conclusion that, at least in certain circumstances, slavery is efficient. Dworkin notes that "a theory that makes the moral value of slavery depend on transaction costs is grotesque." Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 211 (1980).

10. Act of July 2, 1890 (Sherman Antitrust Act), ch. 647, 26 Stat. 209 (currently codified as amended at 15 U.S.C. §§ 1-7 (1982)).

11. 193 U.S. 38 (1904).

12. Specifically, the bylaws provided:

No dealer and active member of this association shall purchase, directly or indirectly, any tile or fireplace fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association.

*Id.* at 41.

13. *Id.* at 44-47.

affirmed the illegality of group boycotts in *Eastern States Retail Lumber Dealers' Association v. United States*.<sup>14</sup> The Association had circulated a blacklist of lumber wholesalers who also sold at retail. The lumber retailers who received copies of the list were asked to refuse to deal with any wholesaler who appeared on it.<sup>15</sup> The obvious purpose of the scheme was to prevent, or at least discourage, wholesalers from integrating forward and entering the retail market as competitors of the Association members. Unlike *Lowry*, in which failure to adhere to the boycott would have led to expulsion from the trade association,<sup>16</sup> no explicit sanctions were imposed upon lumber retailers who chose not to boycott the offending wholesalers.<sup>17</sup> The boycotters acted not out of the fear of punishment, but rather out of a desire to gain by suppressing competition. Nevertheless, the Court rejected the argument that this was no more than unilateral activity on the part of each defendant in pursuit of his own economic self-interest. The Court found sufficient evidence of concerted activity to support its holding that a conspiracy existed under section 1 of the Sherman Act.<sup>18</sup> The boycott was declared illegal without any analysis by the Court of the extent of the defendants' market power.

These early cases clearly illustrated that a group boycott could be used as an anticompetitive weapon, and that, in such an instance, the Sherman Act could be violated. It then became necessary to determine whether such activity was invariably a violation, or whether it might be excused in certain circumstances. Much of the history of antitrust law has been concerned with the question of which practices, if any, are per se illegal, and which should be judged under the more lenient rule of reason. The analysis under the rule of reason permits the defendants to justify their conduct in a particular case by demonstrating beneficial effects that outweigh the anticompetitive consequences of their activity.<sup>19</sup> Courts label practices as per se violations cautiously and only af-

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14. 234 U.S. 600 (1914).

15. *Id.* at 605-08. The regular Association reports would state: "The following are reported as having solicited, quoted or as having sold direct to the consumers . . ." *Id.* at 605. Then, after listing offenders, the reports went on to state that "members upon learning of any instance of persons soliciting, quoting, or selling direct to consumers, should at once report same . . ." *Id.* at 606. Although there was no specific agreement that members would boycott those on the blacklist, counsel for the Association conceded, "That was of course the very object of the defendants in circulating [the Association reports]." *Id.* at 609 (quoting Brief for Appellants).

16. *See supra* note 12.

17. 234 U.S. at 608.

18. *Id.* at 612.

19. *See* L. SULLIVAN, *supra* note 6, at 165-86. The virtues of the per se designation flow from its supposed clarity. This leads to judicial efficiency by reducing the amount of time necessary to adjudicate a claim and also gives businessmen and their attorneys clear guidance in determining forbidden business practices. *Id.* at 193-94. Of course, this does not eliminate the need for careful analysis in deciding whether or not

ter sufficient experience leads the court to determine that the practice in question will rarely, if ever, satisfy the rule of reason test.<sup>20</sup> It was not until 1940 that the Supreme Court unambiguously labelled price-fixing by competitors—probably the most universally condemned of all concerted anticompetitive activities<sup>21</sup>—a *per se* violation.<sup>22</sup> Shortly thereafter, the Court decided *Fashion Originators' Guild of America v. Federal Trade Commission*.<sup>23</sup> While the Court did not use the term “*per se*,” its analysis suggests that boycotts should be considered invariably illegal.

The Guild, as its name suggests, was composed of designers and manufacturers of women's clothing.<sup>24</sup> Guild members refused to sell to retailers who also sold low price copies of members' designs produced by nonmembers.<sup>25</sup> Thousands of retailers formally agreed to “cooperate” with the Guild by refusing to sell such copies.<sup>26</sup> Clearly, this was

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a specific practice falls into the forbidden category, a question that itself is capable of producing uncertainty and lengthy litigation. *See, e.g.,* *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979). Still, *per se* analysis is less extensive than that conducted under the rule of reason even though the “beneficial effects” that may be taken into account are generally limited to those benefitting competition. *See infra* notes 62-69 and accompanying text.

20. *See* *White Motor Co. v. United States*, 372 U.S. 253 (1963), in which the Court refused to apply *per se* illegality to vertical territorial restrictions because “we know too little of the actual impact of . . . that restriction . . . .” *Id.* at 261. Just four years later, in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), the Court decided that the time had come to make such restrictions *per se* illegal. A decade after *Schwinn*, the Court again changed direction by holding that the *Schwinn per se* rule had been a mistake, and that vertical non-price restraints should again be judged under the rule of reason. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57-58 (1977). Even those who disagree with the *GTE Sylvania* approach, which accords all vertical non-price restraints the rule of reason treatment, tend to advocate *per se* treatment for only the most restrictive of such practices. *See GTE Sylvania*, 433 U.S. at 70-71 (White, J., concurring); Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 28 (1978).

21. Although widely condemned, price-fixing may not be the most harmful activity to competition. Strict market divisions or customer allocations among competitors stop all competition among sellers, while price-fixing sellers can still compete in matters of quality and other non-price considerations. *See* L. SULLIVAN, *supra* note 6, at 224-29.

22. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). There had been indications in earlier cases that price-fixing might be *per se* illegal. *See, e.g.,* *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927); *Dr. Miles Medical Co. v. John D. Park & Sons, Inc.*, 220 U.S. 373, 408 (1911) (concerning vertical price-fixing). The label “*per se*,” however, was first used in *Socony-Vacuum*.

23. 312 U.S. 457 (1941).

24. *Id.* at 461. Membership also included “manufacturers, converters or dyers of textiles from which these garments are made.” *Id.*

25. *Id.*

26. About 12,000 retailers signed agreements, but “more than half of these signed the agreements only because constrained by threats” that they would lose the ability to purchase from Guild members. *Id.* at 461-62.

at least as significant a boycott in the fashion market as the *Eastern States* boycott was in the lumber market.<sup>27</sup> Unlike the *Eastern States* defendants, however, the Guild members put forward a justification for their conduct: the practices of the low-price competitors that the Guild sought to curb were "unethical and immoral," even though they were not illegal because the original designs were not protected by patents or copyrights.<sup>28</sup>

The Court held that the district court properly refused to hear evidence on this justification.<sup>29</sup> Once it was established that the purpose of the boycott "was the intentional destruction of one type of manufacture and sale which competed with Guild members,"<sup>30</sup> no argument that the practices engaged in were nevertheless "reasonable and necessary" could be entertained.<sup>31</sup> This refusal to accept arguments in justification of the boycott, along with the Court's statement that the principles announced in two prominent rule of reason cases of the 1930's "have no application" in such a case,<sup>32</sup> suggest per se treatment of group boycotts. Yet the Court's reference to the substantial market power of the defendants,<sup>33</sup> an unnecessary element in a per se violation,<sup>34</sup> left the question of per se treatment still somewhat unclear.

This ambiguity was resolved in *Klor's, Inc. v. Broadway-Hale Stores*,<sup>35</sup> in which the Court unambiguously rejected the rule of reason as an analytical tool for assessing the legality of group boycotts.<sup>36</sup> The defendant, a department store chain, used its buying power to induce manufacturers and distributors of household appliances to refuse to deal with the plaintiff, an independent retailer competing with one of the defendant's stores.<sup>37</sup> While it is clear that the defendant meant to injure the plaintiff, the specific reason for the defendant's hostility is not evident. The defendant did not attempt to justify the boycott (an

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27. See *supra* notes 14-18 and accompanying text.

28. *Fashion Originators' Guild*, 312 U.S. at 461.

29. *Id.* at 468.

30. *Id.* at 467.

31. *Id.* at 467-68.

32. *Id.* at 468. The two rule of reason cases that the Court cited were: *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); *Sugar Inst. v. United States*, 297 U.S. 553 (1936).

33. The . . . members of the Guild occupy a commanding position in their line of business. In 1936 they sold in the United States more than 38% of all women's garments wholesaling at \$6.75 and up, and more than 60% of those at \$10.75 and above. The power of the combination is great . . . .

*Fashion Originators' Guild*, 312 U.S. at 462.

34. For example, horizontal division of markets was declared per se illegal in *United States v. Topco Assocs.*, 405 U.S. 596, 610-11 (1972), despite the fact that the market share of defendants averaged only six percent. *Id.* at 600.

35. 359 U.S. 207 (1959).

36. *Id.* at 212-13.

37. *Id.* at 209.

unpromising line of argument in light of *Fashion Originators' Guild*), but rather contended that the existence of hundreds of retailers of household appliances in the relevant geographic market, and the consequent lack of market power of the parties, made this a "purely private quarrel" with no significant anticompetitive effects.<sup>38</sup> The defendant argued that this "private quarrel" was not a violation of the Sherman Act. The Court, however, found that no demonstration of market power was required. "Group boycotts," held the Court, like price-fixing, are in that "forbidden category" of offenses which may not be saved by arguments that in the particular case in question such activity is reasonable, or that the harm to competition is minimal.<sup>39</sup>

Since 1959, then, group boycotts have been labelled per se anti-trust violations. Nevertheless, it has become apparent that the designation of a practice as per se illegal, while narrowing the relevant scope of judicial inquiry to some extent, does not eliminate the need for analysis of the practice in question in each individual case. A per se designation means that a court has determined that a practice falls into the forbidden category and, thus, no further inquiry into its reasonableness is necessary. It does not, however, eliminate the need to resolve the initial question of whether the practice does, in fact, deserve such categorization. In other words, the determination that conduct x falls into per se category y will eliminate the need to determine whether x is or is not reasonable, but it does not eliminate the initial need to decide whether x is, in fact, an example of y.

It has become evident in recent years that this initial step of categorization, of determining whether a particular activity does, in fact, fall into a category of per se offenses, often requires a judicial effort approaching the level of complexity involved in the full rule of reason analysis.<sup>40</sup> Such efforts have become necessary, however, upon discov-

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38. *Id.* at 210.

39. *Id.* at 212-13. The Court stated that "[g]roup boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category," and cited cases, including *Eastern States Lumber* and *Fashion Originators' Guild*. *Id.* at 212 (footnote omitted). Still, it took *Klor's* and its consideration of a boycott that would not, even if successful, have had much of an effect on the overall market to make it clear that these earlier cases did lead to the conclusion that group boycotts were illegal per se.

40. This is most clearly illustrated in *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979), in which the Court found that "price-fixing" in the literal sense of the term (i.e., a system in which prices are set by a group including competitors) was not necessarily "price-fixing" in the legal sense of the term (i.e., an agreement with the purpose and effect of stabilizing prices). *Id.* at 8-9. On the other hand, it is possible to engage in "price-fixing" in the legal sense of the word without actually directly agreeing on a set price. For example, in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), an agreement between competitors to terminate the practice of extending credit to buyers was held to constitute price-fixing and to be per se illegal. *Id.* at 650.



ery that some practices bearing superficial resemblance to those determined to be invariably anticompetitive are dissimilar in a more fundamental way, and may promote competition. This has forced antitrust courts to define more precisely the per se offenses to exclude practices with significant procompetitive potential.

The clearest example of this clarification of the boundaries of a per se category is the classic per se offense, price-fixing by competitors. For many years, copyright owners have used associations to negotiate licensing agreements with those who wish to obtain the right to perform the owner's copyrighted musical works.<sup>41</sup> The association's determination of the proper price for such licenses is, in the literal meaning of the words, "price-fixing," because competitors have a say in determining the price of each others' "products."<sup>42</sup> Yet the Supreme Court determined that such an arrangement is not necessarily illegal.<sup>43</sup> Rather than taking the drastic step of overruling the principle that price-fixing is a per se violation of the Sherman Act, the Court retained the per se rule, but stressed the need to define the legal term "price-fixing" more precisely than the dictionary meaning of this term.<sup>44</sup> In the first case clearly to enunciate the per se rule for price-fixing by competitors, *United States v. Socony-Vacuum Oil Co.*,<sup>45</sup> the Court described the category of offenses with which it was concerned as those arrangements "formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price" of a product.<sup>46</sup> It follows that when such stabilization is not the purpose of the arrangement, but rather merely an effect incidental to some other legitimate purpose, the practice does not fall into the per se category despite the fact that it is in a literal sense "price-fixing." So, for example, when literal "price-fixing" is necessary to allow copyright owners to pursue the legitimate goal of assuring compensation from those who perform their works, and history has demonstrated the impracticability, if not impossibility, of each owner's negotiating personally with each licensee,<sup>47</sup> the practice is not "price-fixing" in the legal sense and is not invariably illegal.<sup>48</sup>

Likewise, although *Klor's* declares "group boycotts" to be per se illegal,<sup>49</sup> it is still necessary to determine which practices that term

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41. *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 4-5 (1979).

42. *Id.* at 8.

43. *Id.* at 24.

44. *Id.* at 24-25.

45. 310 U.S. 150 (1940).

46. *Id.* at 223.

47. *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 20-21 (1979).

48. *Id.* at 24.

49. *See supra* note 39 and accompanying text.

does and does not include. Subsequent cases make it clear that not every "group boycott" in the literal sense of the term is subject to per se analysis. In *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*,<sup>50</sup> the defendants, two distillers, had each become dissatisfied with the performance of the same distributor. The distributor had simultaneously represented both of the defendants.<sup>51</sup> Because of scale economies in the business of liquor distribution, attracting a replacement distributor is much easier if the replacement distributor is offered contracts with both distillers.<sup>52</sup> The distillers therefore agreed that they would act in concert, dropping their old distributor and offering a distribution contract to a single agreed-upon replacement.<sup>53</sup> Although the defendants had acted together to withdraw business from the plaintiff, the Ninth Circuit held that the per se boycott rule was inapplicable.<sup>54</sup> The defendants' conduct was, therefore, analyzed under the rule of reason.<sup>55</sup> Likewise, in *Molinas v. National Basketball Association*,<sup>56</sup> the suspension of a professional basketball player from league play (i.e., the concerted refusal of the teams composing the league to deal with that player) because the player placed bets on his own team was judged under the rule of reason.<sup>57</sup>

These and other "rule of reason" boycott cases,<sup>58</sup> when compared to the per se treatment in *Klor's*, suggest that, just as "purpose and effect" is the key to categorization of conduct as price-fixing, so "purpose and effect" would serve to identify those group boycotts that should be considered per se antitrust violations. Per se boycotts, such as those in *Klor's*, *Fashion Originators' Guild*, and *Eastern States*, have as their purpose and effect harm to an actual or potential business competitor of at least one of the boycotters. In contrast, when the per se

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50. 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

51. *Id.* at 73-74.

52. *Id.* at 73. In addition to the two distillers, the distributor whom they had selected to replace the plaintiff was also a defendant.

53. *Id.* at 74.

54. *Id.* at 80. The court stated that "[t]he exclusion of the plaintiff was merely the incidental result of [the distillers'] agreement to transfer their [products] . . . ." *Id.*

55. *Id.* at 78-80.

56. 190 F. Supp. 241 (S.D.N.Y. 1961).

57. *Id.* at 243-44.

58. *E.g.*, *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) (brokers who were members of real estate listing service agreed to attempt to obtain exclusive rather than open listings, and then to pool those listings through the service); *Worthen Bank & Trust Co. v. National BankAmericard Inc.*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974) (credit card organization imposed bylaw upon member banks prohibiting them from also issuing rival card); *Deesen v. Professional Golfers' Ass'n of Am.*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966) (golfer denied right to play in PGA tournaments because he failed to satisfy eligibility rules).

rule is not applied, the courts have found that harm to a competitor was not the purpose of the refusal to deal. Any anticompetitive effects were merely ancillary to achievement of some legitimate goal. For example, in *Hawaiian Oke*, defendants were seeking to improve their distribution system. Thus, termination of the inadequate dealer could not possibly have any significant anticompetitive effects on the liquor market.<sup>59</sup> Likewise, in *Molinas*, the suspension was necessary to maintain the integrity and, therefore, the existence of the sport and the entire commercial enterprise built around it.<sup>60</sup>

Such an explanation of the existing per se boycott rule might, at first glance, seem to conflict with the holding in *Fashion Originators' Guild*. Defendants there were, after all, denied the right to produce evidence that their purpose was prevention of "immoral and unethical" practices, as opposed to the stifling of legitimate competition.<sup>61</sup> This apparent anomaly can be resolved by examination of the Supreme Court's decision in *National Society of Professional Engineers v. United States*.<sup>62</sup> At issue was a rule contained in the Society's Code of Ethics that prohibited competitive bidding by engineers to secure employment.<sup>63</sup> The Society contended that the purpose of the rule was not to stabilize prices, but rather to assure that price considerations would not lead to inferior and unsafe work.<sup>64</sup> The Court, however, held that

59. "A manufacturer or supplier has a legitimate interest in the quality, competence, and stability of his distributors. . . . A supplier who becomes dissatisfied with an existing distributor also has a legitimate interest in seeing that any new distributor to which it might turn would be viable." 416 F.2d at 80.

60. "Every league or association must have some reasonable governing rules, and these rules must necessarily include disciplinary provisions. . . . And, a disciplinary rule invoked against gambling seems about as reasonable a rule as could be imagined." 190 F. Supp. at 243-44.

61. 312 U.S. at 467-68.

62. 435 U.S. 679 (1978).

63. *Id.* at 682-83. Section II of the Society's Code of Ethics provided: "The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding. . . . He shall not solicit or submit engineering proposals on the basis of competitive bidding." *Id.* at 683 n.3.

64. *Id.* at 685. The Society's answer to the complaint in this case included the following language:

"The principles and standards contained in the NSPE Code of Ethics, particularly those [at issue in the lawsuit], are reasonable, necessary to the public health, safety and welfare insofar as they are affected by the work of professional engineers, and serve the public interest.

"Experience has also demonstrated that competitive bidding in most instances and situations results in an award of the work to be performed to the lowest bidder, regardless of other factors such as ability, experience, expertise, skill, capability, learning and the like, and that such awards in the case of professional engineers endanger the public health, welfare and safety."

this argument was impermissible. The antitrust laws do not allow the argument that one type of legal competition is socially harmful and that its suppression would, therefore, serve a legitimate purpose and be a factor to be weighed against anticompetitive effects in assessing its legality.<sup>65</sup> The only legitimate antitrust arguments are based upon benefits to competition, not merely benefits to society in general.<sup>66</sup> Determining the impact of conduct in question upon competition is the "purpose of the analysis" under either per se or rule of reason standards.<sup>67</sup>

It would appear, then, that in the process of determining the "purpose and effect" of a concerted refusal to deal in order to categorize it, the only legitimate purposes justifying the activity are those that are beneficial to competition, and not simply beneficial to society at large. Yet, while this is the general rule, the Court in *Professional Engineers* does leave open the possibility of "occasional exceptions" when arguments other than those based upon competition might be allowed.<sup>68</sup> Unfortunately, the opinion itself provides no guidance about what these exceptions may be. Giving a more definite content to this language will be of great importance in the analysis of noncommercial boycotts because defendants almost always define their goals in ways unrelated to promoting competition.

Analysis of the special problems posed by noncommercial boycotts

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*Id.* at 685 n.7 (quoting Appellant's Brief at 21-22).

65. *Id.* at 689-92.

66. *Id.* at 695.

67. *Id.* at 692. The Society did attempt to enunciate its defense in economic terms, claiming in its answer:

"Experience has demonstrated that competitive bidding for professional engineering services is inconsistent with securing for the recipients of such services the most economical projects or structures. Testing, calculating and designing the most economical and efficient structures and methods of construction is complex, difficult and expensive. It is cheaper and easier to design and specify inefficient and unnecessarily expensive structures and methods of construction. Consequently, if professional engineers are required by competitive pressures to submit bids in order to obtain employment of their services, the inevitable tendency will be to offer professional engineering services at the lowest possible price. Although this may result in some lowering of the cost of professional engineering services it will inevitably result in increasing the overall cost and decreasing the efficiency of those structures and projects which require professional engineering design and specification work."

*Id.* at 685 n.7 (quoting Appellant's Brief at 21-22). The Court rejected this "consumer deception" version of the Society's argument, finding that the Sherman Act works on the premise "that competition is the best method of allocating resources in a free market [and] recognizes . . . all elements of a bargain—quality, service, safety, and durability" as well as price. *Id.* at 695. The engineers would be entitled to prohibit deception by use of an ethical rule, but "the equation of competition with deception, like the similar equation with safety hazards, is simply too broad . . ." *Id.* at 696.

68. *Id.* at 695.

must begin with an understanding of the general approach taken by courts in dealing with more typical business-related refusals to deal. Group boycotts are per se violations of the Sherman Act if they are organized for the purpose, and with the effect, of harming an actual or potential business competitor of at least one of the boycotters.<sup>69</sup> A decision that conduct does not fall into such a per se category does not itself put an end to the inquiry. The defendants' conduct must still be evaluated under the rule of reason to determine whether the practice is procompetitive or anticompetitive, or whether the conduct comprises one of those "occasional exceptions" when considerations not related to competition might legitimately be taken into account to justify the activity.

### III. BOYCOTTS FOR NONCOMMERCIAL MOTIVES—EXISTING CASE LAW

Although most antitrust decisions concerning boycotts have involved boycotts designed to provide a boycotter with a commercial advantage, a number of cases have arisen in which the boycotters have explained and attempted to justify their acts as flowing from noncommercial motives. The word "commercial" will be used here, as suggested by Professor John Coons in an early article on this subject, to denote activity engaged in by businessmen for the purpose of increasing business profits.<sup>70</sup> This is a narrower category than "economic" activity, which would include all activity motivated by economic self-interest, which may or may not be "commercial."<sup>71</sup> This distinction, along with the distinction between "economic" purposes and "noneconomic" purposes (i.e., those that are entirely unrelated to direct material gains)<sup>72</sup> will be of central importance in developing an antitrust approach to boycotts that is consistent with first amendment concerns. In examining judicial treatment of "noncommercial" boycotts, it is useful to divide the cases into two groups: cases in which competitors boycott

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69. *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 212-13 (1959).

70. Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 *Nw. U. L. Rev.* 705, 712 (1962).

71. *Id.* Here my use of the term differs from the definition given by Professor Coons. He uses "economic purpose" to mean "all purposes relating to economic self-interest except the commercial purpose." *Id.* This is a convenient way to label noncommercial purposes that nevertheless are based on economic self-interest, but use of the term in this manner is somewhat confusing. In common usage, "economic" purposes include, rather than differ from, "commercial" purposes. The terms, therefore, will be used in this Article in this way. Although it is unwieldy to refer to "economic but noncommercial purposes," this phrase will be used when necessary to avoid confusion.

72. This is Professor Coons' definition of the term. *Id.* at 712-13. In this slightly modified version of Coons' terminology, "noneconomic" excludes both "commercial" and "economic" boycotts. "Noncommercial" includes all "noneconomic" and some "economic" boycotts, namely those not seeking to increase business profits.

other "bad" competitors for some allegedly justifiable reason and those in which the boycotters have no competitive relationship with the target.

#### A. *Competitors Acting for "Noncommercial" Reasons*

For many years, courts have heard antitrust defendants attempt to justify concerted refusals to deal on the grounds that the target was acting in some socially undesirable way that warranted the "punishment" inflicted by the boycott. When these justifications have been claimed by boycotters who are commercial competitors of the target, the justifications have usually been rejected. The protection of consumers from shoddy goods and deceptive, though legal, trade practices was rejected as a justification for the boycott in *Fashion Originators' Guild*.<sup>73</sup> Consumer protection was also put forward to legitimize the boycott in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*<sup>74</sup> The defendants, members of the American Gas Association (AGA), refused to issue the AGA's "seal of approval" to the plaintiff's oil burner.<sup>75</sup> The AGA included competitors of the plaintiff as well as utilities upon which the plaintiff and its competitors relied to supply gas for their burners. Without a seal of approval for its products, Radiant Burners was unable to sell them because the utilities would not supply gas for unapproved burners.<sup>76</sup> This two-level concerted refusal to deal (i.e., the refusal to issue the seal of approval and the subsequent refusal to provide gas to nonapproved burners) was presented by the defendants as an attempt to assure that dangerous, substandard burners were not sold to the public.<sup>77</sup> The Supreme Court rejected this argument, stating that, while consumer safety was undoubtedly a proper concern for Congress or state legislatures, it was not a proper basis for private "legislation" by trade associations or other groups of competitors that would deny access to the market to products which met all actual, applicable legal standards.<sup>78</sup>

Neither in *Fashion Originators' Guild*, nor in *Radiant Burners*, did the Court find it necessary to decide whether the "true" motive of the defendants was consumer protection or the elimination of competition. Motive appears to be irrelevant once it is proven that one or more competitors acted along with others directly to impair the ability of another competitor to compete. This is also true in cases in which the

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73. See *supra* notes 23-34 and accompanying text.

74. 364 U.S. 656 (1961) (per curiam).

75. *Id.* at 658.

76. *Id.*

77. The AGA seal of approval was purportedly given after a determination of "the safety, utility and durability of gas burners." *Id.*

78. *Id.* at 659-60.

sincerity of the defendants' motives seems less questionable.

This is evident in *In re Community Blood Bank of the Kansas City Area, Inc.*<sup>79</sup> Hospitals, doctors, and a non-profit community blood bank had jointly refused to deal with for-profit commercial blood banks.<sup>80</sup> A divided FTC held that even a sincere belief that profiting from the purchase and sale of blood is morally wrong, or that non-profit blood banks supplied a better quality of blood than commercial enterprises, would not justify a concerted attempt to drive one type of legal competitor from the market.<sup>81</sup> The dissenters characterized this factual situation as something far different from the "usual business boycott,"<sup>82</sup> and contended that such a case was inappropriate for per se treatment.<sup>83</sup> The Commission was reversed by the Court of Appeals for the Eighth Circuit on the grounds that the FTC had no jurisdiction over non-profit corporations.<sup>84</sup> This jurisdictional ruling, however, does not detract from the value of the case as an illustration of the general unwillingness of antitrust decisionmakers to accept any justifications for boycotts directed at those who deal in the same market as the boycotters.

There have, however, been occasional cases in which boycotts by competitors have not been subjected to per se analysis. In *Structural Laminates, Inc. v. Douglas Fir Plywood Association*,<sup>85</sup> the defendant Association refused to issue its stamp of approval to the plaintiff's plywood because the plywood failed to satisfy standards set by the Associ-

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79. 70 F.T.C. 728 (1966), *rev'd sub nom.* *Community Blood Bank, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969).

80. *Id.* at 894. The greater part of the opinion deals with the question of whether the evidence presented supported the existence of a conspiracy, or supported the contention that the respondents were merely making similar unilateral decisions not to deal with commercial blood banks.

81. *Id.* at 912-13.

Where there is evidence tending to show an illegal combination or agreement, the fact that individual acts committed in furtherance of the combination could be explained by reference to valid business and personal reasons is not excusatory of liability and does not erase the findings of combination. . . . The fact that some of these efforts might have been lawful if pursued outside the context of a combination or conspiracy does not prevent them from being counted as integral steps in the conspiracy.

*Id.* at 941-42.

82. This case is atypical, to the point of freakishness, of the kind of proceedings this Commission is equipped to bring in the restraint of trade area. It does not involve monopoly or competition in the usual sense. It does not involve conduct having commercial motives or ends; the participants are not business concerns actuated by the profit motive.

*Id.* at 958 (Elman, C., dissenting).

83. *Id.* at 954-58. *See also id.* at 960-62 (Reilly, C., dissenting).

84. *Community Blood Bank, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969).

85. 261 F. Supp. 154 (D. Or. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

ation's quality control program.<sup>86</sup> Plywood without the Association's stamp was much more difficult to sell.<sup>87</sup> Yet, despite the strong similarities between this case and *Radiant Burners*,<sup>88</sup> it was held that the defendants had not committed a per se violation of the Sherman Act.<sup>89</sup> Unlike the defendant association's program in *Radiant Burners*, the Plywood Association's standards had been accepted and published by the Department of Commerce pursuant to a "congressionally sanctioned" scheme.<sup>90</sup> This fact removes, to a large extent, the charge that the Association's activities constituted "private legislation" which set standards beyond those set by the government.

Overtones of legislative approval for the boycott activity, or at least for giving the boycotters in question some special status, were also present in *Wilk v. American Medical Association*.<sup>91</sup> Although it is now clear that professionals are not immune from antitrust liability,<sup>92</sup> and despite Supreme Court cases that apply per se rules to the behavior of professionals and which indicate that antitrust standards applied to professionals do not vary from those applied to nonprofessionals,<sup>93</sup> some courts remain reluctant to apply antitrust rules to professional conduct. In *Wilk*, the district court had allowed evidence to be presented to the jury that the alleged boycott by doctors against chiropractors was an action "in the interest of public health, safety and welfare."<sup>94</sup> Such evidence of motive had been held inadmissible in *Fashion Originators' Guild* and *Radiant Burners*.<sup>95</sup> The Seventh Circuit found that the trial court in *Wilk* should not have acceded to the plaintiff chiropractors' request that the jury be afforded an option to find a per se violation. Nevertheless, any error in the jury instructions regarding the per se violation (which the plaintiffs claimed led the jury incorrectly to under-

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86. The plaintiff manufactured ½-inch plywood made of three pieces of veneer, each 1/6-inch thick. *Id.* at 155. The Commercial Standard, on which the defendant Association based its approval, called for five 1/10-inch plies for ½-inch plywood. *Id.* at 157.

87. "Most state and local building codes require that plywood used for building construction comply with these Commercial Standards." *Id.* at 156 n.3. The Commercial Standards were published by the U.S. Department of Commerce, and the defendant Association played a dominant role in adoption of the Commercial Standards for plywood. *Id.* at 156.

88. See *supra* notes 74-78 and accompanying text.

89. 261 F. Supp. at 159.

90. *Id.* "The Department of Commerce will not publish [a Standard] which is not accepted as satisfactory by the producers and users." *Id.* at 158.

91. 719 F.2d 207 (7th Cir. 1983).

92. This was made clear in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975), in which the Court held that a minimum fee schedule for lawyers violated the Sherman Act.

93. See, e.g., *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982).

94. *Wilk*, 719 F.2d at 216.

95. See *supra* notes 23-39 and accompanying text.



stand that a boycott was legal if it resulted from a genuine belief by the doctors that chiropractic is dangerous quackery)<sup>96</sup> was not prejudicial to the plaintiff.<sup>97</sup> The court reasoned that "the evidence of the 'patient care motive' required that the rule of reason analysis be applied."<sup>98</sup> The court gives no reason why public safety is more at issue when the question is the efficacy of chiropractic treatment than when it concerns the safety of gas burners.

If there is justification for more lenient treatment of boycotts by professionals, it might be found in the fact that they are licensed by the state. Such state regulation arguably makes decisions of professionals within their areas of expertise less a matter of private lawmaking, and more a legitimate product of true legislative action. Such a rule might be consistent with *Structural Laminates*, then, indicating that noncommercial motives will be considered, at least to the extent of bringing about a rule of reason test rather than per se condemnation of the boycott.

In *Costello Publishing Co. v. Rotelle*,<sup>99</sup> the Court of Appeals for the District of Columbia Circuit held that officials of the Catholic Church were not immune from antitrust liability for allegedly organizing a boycott by retail distributors of religious books against the plaintiff's unauthorized translation of liturgical books.<sup>100</sup> But in remanding the matter for trial, the court indicated that, although religious motives did not immunize the defendants, first amendment guarantees required that such motives be considered as part of a "balancing process" in ruling on the plaintiff's claims.<sup>101</sup> In other words, the court appears to have called for application of a rule of reason test despite the fact that, as sellers of authorized liturgical works, the defendants were competitors in the religious book market.<sup>102</sup> As in *Structural Laminates* and *Wilk*, the defendants' noncommercial motive was supported by an independent law—the Constitution.

Not all exceptions to the rule of per se treatment for boycotts by competitors, regardless of motive, can be explained by the presence of support for the noncommercial motive in some independent constitutional or legislative policy. In *Hughes Tool Co. v. Motion Picture As-*

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96. *Wilk*, 719 F.2d at 211.

97. *Id.* at 221.

98. *Id.*

99. 670 F.2d 1035 (D.C. Cir. 1981).

100. *Id.* at 1046. The district court had held that the defendants' actions were exempt from antitrust scrutiny owing to their religious (noncommercial) motives. *Id.* at n.17.

101. *Id.* at 1049.

102. The plaintiff was in a vertical market relationship with the defendant book retailers, but was also horizontally related to the defendants (the Bishops' conferences) who published the officially sanctioned texts. *Id.* at 1046-47.

*sociation of America*,<sup>103</sup> the defendant's threatened revocation of its motion picture seal of approval from the plaintiff's film was challenged as an attempt to suppress competition in the film industry. This was because exhibitors would refuse to exhibit "unsealed" pictures for fear of losing their supply of Association-approved pictures, which were produced by the Association's members, the major producers and distributors of films in the United States.<sup>104</sup> The plaintiff's motion for an injunction restraining the defendants from revoking the seal of approval was denied.<sup>105</sup> Among other things, the district court found no actual proof that any exhibitor had refused or threatened to refuse to exhibit the film without the seal.<sup>106</sup> The court clearly stated that the defendants' purpose "to censor pictures that it may consider are not up to the highest possible moral and artistic standards"<sup>107</sup> was not only proper and therefore "reasonable," but also a duty that the Association owed to the public.<sup>108</sup> Certainly the age of this case and the fact that it is merely a district court opinion weaken its persuasive power. This case does serve, however, to illustrate the fact that courts have not been uniform in their rejection of justifications for trade boycotts, even by business competitors, when the justifications promote a purpose that the courts consider reasonable.

Courts, then, have not been entirely consistent in dealing with boycotts by competitors directed against other competitors when the boycotters put forward "noncommercial" reasons for their actions. Supreme Court cases indicate that such a motive will not usually be considered a justification in these circumstances. When exceptions to this rule are made, the motive asserted by the boycotters seems to be closely connected with some legislatively endorsed goal beyond the promotion of competition. But in at least one instance, a lower court has gone further and allowed boycotters to justify their acts against a competitor on broad notions that the boycott was consistent with proper public policy.

#### B. *Noncompetitors Acting for "Noncommercial" Reasons*

Occasionally, courts have been called upon to assess boycott behavior by defendants who were not commercial competitors of the target of the boycott. Invariably, such boycotts have been treated more leniently than those carried on by competitors. But this has not meant that such boycotts have been held to be invariably legal under antitrust

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103. 66 F. Supp. 1006, 1007 (S.D.N.Y. 1946).

104. *Id.* at 1008.

105. *Id.* at 1012.

106. *Id.*

107. *Id.* at 1013.

108. *Id.*

principles. Rather, it has caused some courts to apply the balancing principles of the rule of reason in place of the *per se* analysis.

The earliest such case was *Council of Defense v. International Magazine Co.*<sup>109</sup> The defendants organized a boycott of magazines published by William Randolph Hearst during World War I. The boycott was in retaliation against Hearst's allegedly pro-German views.<sup>110</sup> Hearst's company sued under the antitrust laws, and the boycott was enjoined despite its noncommercial motivation.<sup>111</sup> The court explained that the magazines themselves were not alleged to have carried any objectionable material. Rather, it was Hearst's newspapers, published by a separate corporation and not sold in the boycotters' state, that were offensive.<sup>112</sup> The court seemed to suggest that a direct boycott of objectionable material might be justified, but an indirect action against related publications could not be. The court appears to have applied some sort of rule of reason test in which the boycotters were permitted to cause some commercial losses for noncommercial reasons, but only if they acted directly against the material that the boycotters found objectionable.

In *Young v. Motion Picture Association of America*,<sup>113</sup> the court held that, in an antitrust case in which blacklisting in the film industry was alleged to be an illegal boycott, pretrial discovery into the political beliefs of the plaintiffs was relevant and proper.<sup>114</sup> The court must have felt that the evidence could show that the studios' motives were based upon distaste for employees who might have objectionable political affiliations rather than on any desire to harm competition, and that such a showing would outweigh any anticompetitive effects caused by

109. 267 F. 390 (8th Cir. 1920).

110. The defendants published articles in the *New Mexico War News* stating:

"What Hearst has said since America entered the war has been anti-British every day, and as openly un-American and pro-German as he dared to be.

...  
 "The Council of Defense calls upon every loyal, patriotic citizen of New Mexico not only to quit asking for the Hearst publications at the newsdealers, but to stop taking them on subscription, and to stop reading them; in other words, to say to Herr Wilhelm von Hearst, the Hearst publications and Hearstism in general: Good Night!"

*Id.* at 394-95 (quoting Complaint).

111. *Id.* at 411-12.

112. *Id.* at 410-11.

113. 28 F.R.D. 2 (D.C. Cir. 1961).

114. *Id.* at 5-6. "[A] fuller presentation of the facts in this case may indicate [the defendants'] actions do not constitute a conspiracy to restrain trade in violation of the antitrust laws, but their agreement was reasonable in view of the fact that the confidence of the public in the motion picture industry had been placed in question as a result of the Congressional investigations of the industry with respect to Communist infiltration . . ." *Id.* at 6.

the boycott.

Antitrust actions challenging boycotts by noncompetitors based on noncommercial motives were very rare throughout most of the history of antitrust law. Most frequently, such actions were brought in state court under various common-law theories of intentional interference with business relations.<sup>116</sup> These cases would invariably focus to some extent on the legitimacy of the boycotting defendants' motives,<sup>116</sup> but they are of limited use in understanding the application of the antitrust laws to these same situations. The common law is most likely to condemn action based solely on malice. Proof that a boycott or other act was motivated by economic self-interest will often serve to justify the challenged activity under common-law principles.<sup>117</sup> In antitrust analysis, the contrary is true. It is the promotion of economic self-interest that requires the most careful scrutiny because such motives often lead to serious anticompetitive consequences.

In recent years, the question of antitrust liability for noncommercial boycotts has been raised again in several cases, most prominently the 1980 case of *Missouri v. National Organization for Women*.<sup>118</sup> The National Organization for Women (NOW) had organized a convention boycott in states that had not ratified the proposed Equal Rights Amendment to the Constitution.<sup>119</sup> Missouri, one of the target states, brought a *parens patriae* suit based upon the injury caused by the boycott to the state's economy.<sup>120</sup> Antitrust claims, both federal and state, were combined with common-law claims of intentional interference with business advantage. Finding that the purpose of the boycott was political and not anticompetitive, the Eighth Circuit Court of Appeals held that the Sherman Act was inapplicable to NOW's actions.<sup>121</sup> The court held that, at least in those situations in which the ultimate aim of the boycotters is to bring about a change in the law, a politically motivated refusal to deal is immune from Sherman Act liability.<sup>122</sup>

The Eighth Circuit's suggestion of blanket immunity from anti-

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115. See generally Coons, *supra* note 70, at 713-26. The Supreme Court recently held that the first amendment protects noneconomically motivated boycotts from liability under state statutory and common-law rules prohibiting interference with business relations in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

116. "From the time of its emergence as a recognized tort, the intentional interference with business expectations has included the notion that a lawful purpose sometimes will provide justification for an otherwise prima facie cause of action." Coons, *supra* note 70, at 713 (footnote omitted).

117. *Id.* at 715.

118. 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

119. *Id.* at 1302.

120. *Id.* at 1303.

121. *Id.* at 1315. The court also dismissed the state law claims. *Id.* at 1316-19.

122. *Id.* at 1315.

trust liability for political boycotts has been criticized,<sup>123</sup> and seems clearly inconsistent with earlier precedent that seemed to apply the rule of reason to such refusals to deal even when the defendants were found not to have violated the Sherman Act.<sup>124</sup> It is not clear if other courts will extend immunity based upon political motivation quite so far. For example, in *Allied International, Inc. v. International Longshoremen's Association*,<sup>125</sup> the First Circuit held that a union's politically motivated refusal to handle cargo arriving from, or destined for, the Soviet Union did not violate the Sherman Act.<sup>126</sup> While it is clear that the court did not apply per se analysis, it is not clear whether it decided the antitrust claim under the rule of reason test, or whether it held that boycotts of this type are simply not subject to antitrust restrictions. The court stated that "it would be a rare case when . . . a mere refusal to work by members of a labor union . . . would be held to violate the Sherman Act."<sup>127</sup> This suggests that such cases may nevertheless arise, and, therefore, further suggests that the rule of reason, rather than absolute immunity, is the appropriate standard to be applied.

Existing case law concerning noncommercially motivated boycotts carried on by noncompetitors, then, appears just as unclear as the law concerning such boycotts organized by competitors. As we have seen, competitor-organized, noncommercial boycotts have been treated as per se violations and have also been subjected to rule of reason balancing. The same activity, when carried on by noncompetitors, is clearly not subject to per se rules, but existing case law is unclear about whether it should be tested under the rule of reason or declared per se legal as simply beyond the scope of the Sherman Act.

Before attempting to put forward a coherent framework for analysis of noncommercial boycotts, however, we must examine one further body of existing case law. The willingness of the *NOW* court to accord blanket immunity to political boycotts despite earlier cases applying

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123. See, e.g., Kennedy, *Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests*, 55 S. CAL. L. REV. 983, 1000-06 (1982).

124. See *supra* notes 109-12 and accompanying text.

125. 640 F.2d 1368 (1st Cir. 1981).

126. *Id.* at 1381. The boycott was called in protest of the Soviet invasion of Afghanistan, and according to union leadership, "[i]n response to overwhelming demands by the rank and file members of the Union." *Id.* at 1369 n.2.

127. *Id.* at 1381. The court focused not only on the absence of anticompetitive motives, but also on the fact that the defendant, as a labor union, was subject to the provisions of the National Labor Relations Act (NLRA) dealing with secondary boycotts. The plaintiff, it was held, did state a cause of action under the NLRA. *Id.* at 1379. The court stated that the fact that the plaintiff might seek recovery under the labor laws did not compel a finding that the antitrust laws did not also apply, but did serve to "fortify" the independent conclusion that the Sherman Act was not meant to reach such activity. *Id.* at 1381.

rule of reason balancing to such activity may be at least partly explained by the law involving "commercial speech." The Supreme Court, during the 1970's, enunciated the rule that "commercial speech," previously thought to be unprotected by the first amendment, was indeed entitled to at least some constitutional protection. In order to formulate a workable standard for analysis of antitrust liability for noncommercial, or even commercial, boycotts, it is necessary to examine this relatively new development in first amendment doctrine.

#### IV. FIRST AMENDMENT PROTECTION FOR COMMERCIAL SPEECH: IMPLICATIONS FOR ANTITRUST BOYCOTT DOCTRINE

The connection between the first amendment and any law prohibiting boycotts is obvious. Boycotts are typically organized by communicating with and cajoling others, convincing them that they should join the boycotting group. Attempts to make illegal the communication of what is often truthful information and sincere opinion must be troubling in light of the central place freedom of expression occupies in the system of constitutional values.

Yet the first amendment was not a consideration during the development of most antitrust doctrine concerning boycotts, at least those traditional boycotts of a commercial nature. This was, however, understandable in light of the long-standing, but now obsolete, view that "commercial speech" was not entitled to first amendment protection. In 1942, the Supreme Court, in *Valentine v. Chrestensen*,<sup>128</sup> upheld a statutory ban on the distribution of advertising handbills, which had been challenged on first amendment grounds.<sup>129</sup> Without extensive analysis, the Court held that the first amendment did not restrain government action directed at "purely commercial advertising."<sup>130</sup> For a generation, this case stood as authority for the proposition that once speech was classified as "commercial" it was, like obscenity<sup>131</sup> or "fighting words,"<sup>132</sup> entitled to no further first amendment consideration.<sup>133</sup>

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128. 316 U.S. 52 (1942).

129. *Id.* at 53-55.

130. *Id.* at 54. Perhaps anticipating such a ruling, the defendant had placed on the back of his advertising handbill a "protest against the action of the City Dock Department." *Id.* at 52. The Dock Department had refused request by the defendant made in relation to his business. *Id.* The Court dismissed the argument that this protest language altered the nature of the document so as to make it noncommercial. The Court held that attaching the protest was merely a maneuver to evade the statute and "[i]f that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal . . ." *Id.* at 55.

131. See *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

132. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

133. Of course, the doctrine that certain types of speech can be "single[d] out . . . for complete suppression" as not within the scope of the first amendment has been

While the validity of this proposition continued to be recognized into the 1970's, the boundaries of the commercial speech category were never drawn with anything approaching absolute clarity. Commercial speech might be so closely related to noncommercial speech, which is clearly entitled to constitutional protection, as to negate any exception to full first amendment protection for the commercial speech in question.<sup>134</sup> Still, if advertising (i.e., communication urging its audience to enter into a trade relationship) was the prototype of commercial speech, it is likely that the message conveyed by boycotters urging the audience to refrain from a trade relationship would also warrant classification as commercial speech. The absence of serious discussion of first amendment considerations in most pre-1970's antitrust boycott cases is hardly surprising.

The "commercial speech" doctrine of *Valentine* was overruled in a series of Supreme Court decisions in the 1970's. Even earlier, it had become clear that an enterprise was not deprived of first amendment protection simply because of its profit-making nature, or the fact that it expected to profit by publication of its speech in books<sup>135</sup> or newspapers.<sup>136</sup> A contrary position, of course, would do enormous damage to the first amendment in light of the private ownership, generally by profit-making concerns, of the mass media in the United States. The "commercial" label is to be attached to the speech itself, not the speaker. In 1978, in the *First National Bank of Boston v. Belotti*,<sup>137</sup>

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severely criticized. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-16, at 669 (1978). And the apparent clarity of a rule simply removing one type of speech from first amendment protection does not simplify the process of deciding whether a particular instance of speech actually falls into that unprotected category. The difficulty of defining these unprotected categories has been most apparent in obscenity cases that have "produced a variety of views among members of the Court unmatched in any other course of constitutional adjudication." *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704-05 (1968) (Harlan, J., concurring in part, dissenting in part).

134. In *NAACP v. Button*, 371 U.S. 415 (1963), for example, the Court held that the solicitation of legal business by the NAACP, when the planned litigation was not merely concerned with private disputes, but with "achieving the lawful objectives of equality of treatment . . . for the members of the Negro community," *id.* at 429, was political, not commercial, speech and therefore could not be prohibited by the State of Virginia. *Id.* at 444.

135. "That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (citations omitted). *Burstyn* extended that same principle to motion pictures. Most often, the commercial nature of the publishing enterprise is not even mentioned as a relevant consideration in determining first amendment rights of publishers. *E.g.*, *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2nd Cir. 1934).

136. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1963) ("That the Times was paid for publishing the advertisement is . . . immaterial . . .")

137. 435 U.S. 765 (1978).

the Supreme Court made it clear that all businesses, not only those whose primary business activity was itself communication, are entitled to first amendment protections.<sup>138</sup> A Massachusetts statute that prohibited business corporations from spending money to influence voters on any referendum question other than "one materially affecting any of the property, business or assets of the corporation"<sup>139</sup> was held unconstitutional.<sup>140</sup> The Court reaffirmed its position that the nature of the expression itself, rather than the identity of the speaker, must be the focus of concern in a case involving free speech claims.<sup>141</sup> Expressions of opinion on an issue being presented for a public vote are obviously protected by the first amendment, and the Massachusetts ban on such expressions could not be justified solely on the basis of the corporate nature of the speaker.<sup>142</sup>

It was the speech, not the speaker, that was the primary concern in the Supreme Court cases extending first amendment protection to commercial speech. In *Bigelow v. Virginia*,<sup>143</sup> a state ban on advertising the availability of out-of-state abortions was held unconstitutional.<sup>144</sup> Since the Court had recently declared that the act of obtaining an abortion was constitutionally protected,<sup>145</sup> it reasoned that a state could not suppress information concerning the availability of abortions.<sup>146</sup>

It was not entirely clear that the Court overruled *Valentine*. Possibly, *Bigelow* had merely carved out an exception to the general rule of non-protection of commercial speech when such speech advertised some object itself entitled to independent constitutional deference.<sup>147</sup> But a year later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>148</sup> the court clearly stated that commercial speech would no longer be regarded as unprotected by the first amend-

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138. *Id.* at 792-95.

139. MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977), *quoted in* 435 U.S. at 768 n.2.

140. 435 U.S. at 795.

141. *Id.* at 775-77.

142. *Id.* at 776-77.

143. 421 U.S. 809 (1975).

144. *Id.* at 811-12, 829.

145. *Roe v. Wade*, 410 U.S. 113 (1973).

146. "The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.' . . . Also, the activity advertised pertained to constitutional interests." 421 U.S. at 822.

147. "It appears that the rule allowing governmental regulation of advertising will remain in force and that advertisements receiving first amendment protection, such as the one involved in *Bigelow*, will remain the exception to the rule." Note, *Constitutional Law—The First Amendment Status of Commercial Advertising*, 54 N.C.L. REV. 468, 477 (1976).

148. 425 U.S. 748 (1976).



ment. Virginia prohibited pharmacists from advertising the prices of prescription drugs.<sup>149</sup> The communication was the most unadorned type of commercial speech because it advertised the availability and price of a product. As the Court noted, "The 'idea' [the pharmacist] wishes to communicate is simply this: 'I will sell you the X prescription drug at the Y price.'" <sup>150</sup> Unlike the message in *Bigelow*, the speech was not incidental to the exercise of some other constitutional right. Nevertheless, the ban was unconstitutional. The Court held that commercial speech was not so lacking in public value as to remove it from the scope of first amendment protection.<sup>151</sup> Both the individual consumer and society as a whole have an interest in "the free flow of commercial information."<sup>152</sup> The connection between economic decisionmaking and political decisionmaking leads to the conclusion that "even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal."<sup>153</sup>

Although first amendment protection was extended to commercial speech, the Court at the same time asserted that much regulation of that speech would still be acceptable. As is the case with all speech, reasonable restrictions on time, place, and manner may be constitutional.<sup>154</sup> And significantly, false and misleading advertising may be prohibited because "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake."<sup>155</sup> Finally, the Court recognized that the common-sense differences between commercial and noncommercial speech suggest a different degree of protection for the two types.<sup>156</sup> The specific ways in which analysis of commercial speech should differ from other first amendment inquiries were left for later elaboration.

The 1980 decision of *Central Hudson Gas & Electric Corp. v.*

149. Any pharmacist shall be considered guilty of unprofessional conduct who . . . publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription.

V.A. CODE § 54-524.35 (1974), quoted in 425 U.S. at 750 n.2.

150. 425 U.S. at 761.

151. *Id.* at 762.

152. *Id.* at 763.

153. *Id.* at 765 (footnotes omitted).

154. *Id.* at 771. As examples of such restrictions in noncommercial contexts, the Court cites *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (upholding an anti-noise ordinance as applied to picketing on school grounds while school is in session); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (upholding a statute prohibiting the destruction of selective service registration cards despite defendant's claim that such destruction was an anti-war statement entitled to first amendment protection).

155. 425 U.S. at 771 (citations omitted).

156. *Id.* at n.24.

*Public Service Commission*,<sup>157</sup> in which a regulation prohibiting promotional advertising by electric utilities was held unconstitutional,<sup>158</sup> provides a four-step test for assessing government regulation of commercial speech:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>159</sup>

This test, however, does not provide a definition of "commercial speech." Some courts and commentators would limit the category to speech that "did no more than propose a commercial transaction."<sup>160</sup> Others broaden the category to include any speech "related solely to the economic interests of the speaker and its audience."<sup>161</sup> Still others would go even further and hold that all speech by commercial entities should be classified as commercial speech.<sup>162</sup> On the other hand, the narrower category of speech proposing a commercial transaction may be further narrowed by insisting that, to be classified as "commercial," the speech not have any noncommercial overtones, even if its central purpose is to trigger a commercial transaction.<sup>163</sup>

It is not entirely clear, however, that the definitional problem is of any great significance. If speech is classified as noncommercial, it would not be subject to the four-part *Central Hudson* test. Rather, it would be treated like all other speech, presumably under a more protective standard. Yet such analysis, in fact, may differ little from the substance of the *Central Hudson* test.

Speech is often not uttered for its own sake, but rather as a means of achieving some end beyond communication of the message itself. Therefore, the law must apply rules that reconcile the protected nature

157. 447 U.S. 557 (1980).

158. *Id.* at 571-72.

159. *Id.* at 566.

160. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973). *See also* *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A.2d 1175, 1179 (1978), *appeal dismissed*, 442 U.S. 907 (1979).

161. *Central Hudson*, 447 U.S. at 561. *See also* *Rudledge v. Liability Ins. Indus.*, 487 F. Supp. 5, 8 (W.D. La. 1979).

162. *See* Alderman, *Commercial Entities' Noncommercial Speech: A Contradiction in Terms*, 1982 UTAH L. REV. 731, 743-44 (All speech should be classified as commercial that is "motivated by the economic decision making process of a business entity whose existence is solely for commercial purposes.").

163. *See* Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 1 (1979).

of the "speech" elements of the activity with the state's interest in proper regulation of the "conduct" of which the speech is a part. To the extent that "commercial speech" is defined as speech proposing a contractual arrangement, it is a central part of the conduct involved in bringing about such arrangements.<sup>164</sup> Thus, commercial speech has been subject to a large body of law, both statutory and decisional, regulating it in light of the clear need for regulation of the "conduct" of making and enforcing contracts.

The Supreme Court's test for weighing first amendment claims when the defendant has acted in a way that combines "speech" with "conduct" was set forth in *United States v. O'Brien*.<sup>165</sup> In *O'Brien*, the Court upheld a conviction for destruction of the defendant's draft registration card at a public gathering assembled to protest the Vietnam War.<sup>166</sup> The Court stated:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.<sup>167</sup>

This is not the precise equivalent of the *Central Hudson* test. Under *Central Hudson*, commercial speech must first be analyzed to determine whether it might not deserve first amendment protection at all because of its misleading nature or otherwise. Yet, despite the omission of this step from the explicit formulation of the *O'Brien* test, other first amendment doctrine clearly indicates that noncommercial speech must also run the gauntlet of initial assessment to determine whether it might fall into some nonprotected category such as obscenity.<sup>168</sup> The *O'Brien* test clearly states that the substantial governmental interest protected by the government regulation in question must be "unrelated to the suppression of free expression."<sup>169</sup> While this is not explicitly stated in *Central Hudson*, it seems obvious that this limitation does exist and that suppression of a nonmisleading commercial statement

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164. See Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U.L. REV. 372, 386-87 (1979) (likening commercial speech to a contract for sale, with advertising as part of the contractual arrangements). M. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 3.05 (1984). Nimmer's analysis is largely based on J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962).

165. 391 U.S. 367 (1968).

166. *Id.* at 382-86.

167. *Id.* at 377.

168. See Comment, *When Speech Is Not Speech: A Perspective on Categorization in First Amendment Adjudication*, 19 WAKE FOREST L. REV. 33 (1983).

169. 391 U.S. at 377.

cannot itself qualify as the substantial governmental interest under the four-part test.<sup>170</sup> Beyond these differences, which are apparently less a matter of substance than of the form in which the Court articulated the tests, the two analyses basically impose the same burden upon government when it seeks to justify regulation of speech that is linked to commercial or noncommercial conduct. The regulation must be narrowly focused to protect a substantial governmental interest and not simply intended to suppress the message itself.

Justice Rehnquist has recognized the similarity of the Court's tests. In his *Central Hudson* dissent, he contended that the Court's treatment of commercial speech was now indistinguishable from its treatment of any other speech.<sup>171</sup> Still, the Supreme Court, other courts, and most commentators continue to recognize a distinction and continue to attempt to classify speech as commercial or noncommercial. In forming rules for assessment of the legality of boycott activity, it is necessary, then, to look to the principles set down in *Central Hudson* and also in *O'Brien*. The essential similarity of the tests should minimize the consequences of an incorrect classification of boycott-related communication as either commercial or noncommercial speech.

Although the Sherman Act gives rise to far more civil actions, both private and public, than criminal indictments,<sup>172</sup> the statute does make violations of its provisions criminal offenses.<sup>173</sup> Elsewhere, I have proposed that whenever a state proposes criminal sanctions for communicative activity, whether "pure speech" or not, three elements must be present to satisfy first amendment concerns.<sup>174</sup> First, the statute by its terms must be directed not at suppressing the message of the speech, but rather at preventing some conduct that is clearly subject to state regulation.<sup>175</sup> Second, the speaker must specifically intend to bring about the illegal conduct rather than intend only to convey his message.<sup>176</sup> Finally, the speech in question must make the illegal conduct

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170. See *supra* text accompanying note 159.

171. 447 U.S. at 591 (Rehnquist, J., dissenting).

172. In 1981, for example, 71 criminal cases were filed by the Antitrust Division of the Justice Department. M. HANDLER, H. BLAKE, R. PITOFKY & H. GOLDSCHMID, *CASES AND MATERIALS ON TRADE REGULATIONS* 124 table (2d ed. 1983). In that same year, 1292 private antitrust suits were filed, along with 25 civil cases filed by the Justice Department. *Id.* at 129 Table.

173. "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 . . ." 15 U.S.C. § 2 (1985).

174. Beschle, *An Absolutism That Works: Revising the Original "Clear and Present Danger" Test*, 1983 S. ILL. U.L.J. 127.

175. *Id.* at 146. This part of the test draws upon the first amendment approach put forth in Linde, "Clear and Present Danger" Reexamined: *Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163, 1183-84 (1970).

176. Beschle, *supra* note 174, at 135-40.

so likely as to satisfy the common-law standards of proximity necessary to make the utterance of the speech an attempt or an inducement to engage in the ultimate crime.<sup>177</sup>

The Sherman Act is, of course, not directly aimed at speech. Rather, it prohibits actions that would reduce, or that attempt to reduce, the level of competition in any market.<sup>178</sup> The fact that the statute is not violated simply by the communication of any message, including any message that challenges the validity of the position that highly competitive markets are always desirable, obviously makes the statute itself free from first amendment problems. The balance of the three-part test would be satisfied by proof of actual intent to make a market less competitive and sufficient proximity of actual anticompetitive consequences to establish a common-law attempt. This first amendment test of specific intent and likelihood of reaching the intended goal is quite consistent with the standard antitrust inquiry into the defendant's "purpose and effect" in undertaking his actions.

If it was ever possible to discuss antitrust liability for boycott activity without taking into account first amendment principles, the "commercial speech" cases of the last decade make it clear that this is no longer the case. While it is arguable whether the appropriate first amendment test in any particular boycott case is the test for commercial speech, the test for noncommercial speech that is also conduct, or even the test used in cases of "pure speech," all of these standards have enough in common to allow statement of the basic first amendment principles necessary for this analysis.

The preservation of competitive markets is clearly a substantial governmental interest and is unrelated to the suppression of any message. This aspect of the *Central Hudson* and *O'Brien* tests should, therefore, pose no problems in any boycott-related Sherman Act case. The *Central Hudson* test states that misleading commercial speech is not entitled to first amendment protection. In the large majority of boycott cases, however, the boycott in question is organized and promoted by communication of truthful information and sincere opinion, even if such communication is aimed at achieving an objectionable anticompetitive goal. The core of both the *Central Hudson* and the *O'Brien* tests is the requirement that the governmental restriction not be applied in a manner more restrictive of speech than necessary to achieve the non-speech-related result. This requirement is closely related to the "pure speech" rule that an utterance may be punished only when it creates a real danger of a legitimately prohibited outcome. Punishment is not

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177. *Id.* These elements, set forth in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), can be traced to the earliest important first amendment cases, such as *Schenck v. United States*, 249 U.S. 47 (1919).

178. See *Council for Employment & Economic Energy Use v. WHDH Corp.*, 580 F.2d 9, 12 (1st Cir. 1978), *cert. denied*, 440 U.S. 945 (1979).

warranted under the "pure speech" rule merely for communication of the message itself. Finally, although neither *Central Hudson* nor *O'Brien* discusses the need for specific intent on the part of the defendant to bring about a non-speech result, the pervasive interest of antitrust law in the defendant's purposes indicates that the presence or absence of such an intent should be important in analyzing boycotts just as it is in analyzing the legality of utterances classified as "pure speech."

Having examined the history of boycotts in general, and noncommercially motivated boycotts in particular, under antitrust law, and having discussed the first amendment principles involved, this Article can now proceed to develop a framework for the analysis of future non-commercial boycotts.

## V. ANALYZING NONCOMMERCIAL BOYCOTTS

Clear rules of law are necessary to allow citizens to plan their activities with some degree of confidence. Some have advocated, possibly in the search of such clarity, the application of a single rule to all noncommercially motivated boycotts. The single rule proposed is usually either non-liability<sup>179</sup> or rule of reason treatment.<sup>180</sup>

Yet, clearly, all-inclusive rules have their own dangers. The most significant danger is the likelihood that a single rule will not recognize important differences among the situations subject to the rule. Non-commercial boycotts are not all alike in their purposes, or in the extent to which a governmental limitation on the boycott activity would interfere with first amendment principles. Thus, different types of non-commercial boycotts should receive different treatment under antitrust law. Boycotts organized by business entities and directed against competitors should be declared per se illegal regardless of any asserted non-commercial motives. At the other extreme, boycotts that are organized by noncompetitors of the target, or by those who would not gain any direct economic benefits from the boycott's success, should be per se legal under the antitrust laws if they are not directed at making any market less competitive. Noncommercial boycotts that do not fit these categories should be subject to antitrust analysis under the rule of reason.

None of these rules, however, nor any of the first amendment principles behind them, should alter antitrust rules with respect to commercial boycotts. When the purpose of the boycott is commercial (i.e., to

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179. See, e.g., Note, *NOW or Never: Is There Antitrust Liability for Noncommercial Boycotts?*, 80 COLUM. L. REV. 1317, 1340 (1980).

180. See, e.g., Kennedy, *supra* note 123, at 1029. But see Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247, 288-92 (arguing for per se treatment with certain "exceptions").

maximize the profits of the boycotters), the first amendment protections should be strictly applied. *Central Hudson* states that commercial speech must concern "lawful activity" to gain first amendment protection.<sup>181</sup> The purposeful destruction of competition for no motive other than the enhancement of one's own competitive position, or simply malicious harm to a competitor, clearly is not lawful activity. The per se rule of *Klor's* remains unaffected by the extension of first amendment protection to commercial speech when competitors act for the purpose of harming other competitors.<sup>182</sup>

#### A. "Doing Well": Continued Per Se Illegality for Boycotts Directed at Competitors

Any boycott organized by competitors of the target, or any in which competitors participate, raises obvious antitrust concerns. Success, whether defined as driving the target out of business or forcing him to alter practices that are considered objectionable by competitors,<sup>183</sup> will, however minimally, reduce competition to the benefit of the boycotting competitors. In the case of commercial boycotts, when the purpose and effect of the concerted activity is to deprive a boycotter's competitor of some important business relationship, the boycott should be classified as a per se violation of the Sherman Act.<sup>184</sup> This rule is consistent with overall principles of antitrust law. While the anticompetitive effects of classic commercial boycotts range from minimal to highly significant, malicious acts that cause harm to a competitor will almost never have significant procompetitive effects. Under the rule of reason approach as elaborated in *National Professional Engineers*,<sup>185</sup> boycotts of this type, when balanced against only the boycott's procompetitive effects, will rarely, if ever, survive.

The use of per se analysis is not as obviously appropriate when the purpose behind the refusal to deal is not malicious damage to the target. Such situations are most likely to arise in two types of cases. First, the boycott, and its anticompetitive effects, may be ancillary to some legitimate procompetitive activity of the boycotter. If the purpose of a group refusal to deal is the continued efficient existence or efficient conduct of the boycotter's own enterprise, the conclusion that anticompetitive effects will invariably outweigh procompetitive effects in rule of

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181. 447 U.S. at 566.

182. See *supra* notes 35-40 and accompanying text.

183. Compare the boycott in *Klor's*, *supra* notes 35-40 and accompanying text, which seems to have malicious harm to the target as its goal, with the boycotts in *Montague & Co.* and *Eastern States Retail Lumber Dealers' Ass'n*, *supra* notes 10-16 and accompanying text, which were aimed at bringing about anticompetitive action on the part of the target.

184. See *supra* notes 11-69 and accompanying text.

185. See *supra* notes 62-68 and accompanying text.

reason analysis is unwarranted. Therefore, procompetitive boycotts have not been found per se illegal, but rather have been analyzed, and often held permissible, under the rule of reason.<sup>186</sup> Although courts should evaluate suspiciously a boycottter's proffered motives, especially when success of the boycott would harm a competitor, actual proof of procompetitive motives should be sufficient to remove a case from per se categorization. This can be determined by reference to antitrust principles alone without the need to reflect seriously on first amendment considerations. Attempting to harm a competitor for anticompetitive reasons is not lawful activity and, therefore, has no first amendment protection under *Central Hudson*, even when done through speech.<sup>187</sup> Making such conduct per se illegal offends no first amendment principles. On the other hand, acting for procompetitive motives is not illegal, at least as long as procompetitive effects outweigh anticompetitive effects. This rule of reason test seems quite similar to the requirements of *Central Hudson* and *O'Brien* that restraints on communicative activity go no further than necessary to achieve the legitimate governmental interest of preventing a reduction of competition.<sup>188</sup>

The first amendment must be considered, however, in the second type of case in which boycotters who are competitors of the target deny that they are acting merely to reduce competition. It is quite possible that the managers of a commercial enterprise sincerely believe that practices engaged in by some competitors are unethical, immoral, unfair to consumers, or in some other way harmful to society.<sup>189</sup> The expression of these views should be protected by the first amendment. Given the extensive regulation of business conduct by all levels of government, criticism of business practices, with its express or implied message that such practices ought to be prohibited or regulated by law, is almost as clearly political as speech relating to an election or referendum.<sup>190</sup> It should be possible, therefore, to give appropriate first amendment protection to such expression, yet retain the rule of per se

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186. See *supra* notes 50-60 and accompanying text.

187. See *supra* notes 181-82 and accompanying text.

188. See *supra* notes 157-68 and accompanying text.

189. See, e.g., *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *In re Community Blood Bank of the Kansas City Area, Inc.*, 70 F.T.C. 728 (1966), *rev'd sub nom* *Community Blood Bank, Inc. v. F.T.C.*, 405 F.2d 1011 (8th Cir. 1969).

190. Professor (now Judge) Robert Bork has attempted to define "political speech" that deserves first amendment protection as "speech concerned with governmental behavior, policy, or personnel." Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27 (1971). But this definition, it has been noted, hardly excludes any speech at all because government policies, at least potentially, can deal with almost any area of public concern. See M. NIMMER, *supra* note 164, § 3.01, at 3-7 to -9. Clearly, business practices that are allegedly not in the public interest are at least potentially matters of government policy.



illegality for boycotts of competitors, even when such boycotts are not commercially motivated.

The compatibility of first amendment concerns with per se anti-trust liability for boycotts by competitors becomes evident in light of the types of activity that are not subject to such liability. The Sherman Act, except in rare cases involving firms with substantial market power,<sup>191</sup> does not prohibit unilateral refusals to deal.<sup>192</sup> A firm, acting alone, may choose to deal or not to deal with others for any reasons, despite the fact that such a decision might have anticompetitive effects.<sup>193</sup> In addition, antitrust law, even absent consideration of first amendment principles, supports the right of a firm publicly to state its intention not to deal with others who do not conform to behavior desired by the firm.<sup>194</sup> Despite criticism of this rule when the behavior at issue is clearly anticompetitive—such as adherence to a system of minimum resale prices<sup>195</sup>—the Supreme Court has recently reaffirmed the rule's existence.<sup>196</sup> Together, first amendment and antitrust principles create a "safe harbor" of permissible conduct that should permit a firm to engage in speech and even in unilateral conduct criticizing and shunning a competitor for any noncommercial reason that deserves first amendment protection.

A firm may not, however, go beyond this unilateral conduct by actively organizing or contracting with others to boycott. Such conduct should continue to be per se illegal. Such treatment would pose no serious first amendment problems because, while conduct that is linked with communication of a message is entitled to some first amendment protection, that protection is not absolute in cases involving commercial speech and activity, or in cases involving noncommercial instances of communicative conduct.<sup>197</sup> Incidental restrictions on speech are permissible when a substantial governmental interest is furthered and when the restrictions go no further than necessary to protect a non-speech-

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191. *E.g.*, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

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

193. *Id.* at 307.

194. *Id.*

195. *E.g.*, L. SULLIVAN, *supra* note 6, at 392-95. The "Colgate doctrine" was limited in cases such as *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45-47 (1960), to emphasize that it did not allow companies to go any further than unilaterally announcing policies concerning with whom they would deal and then carrying out those policies, but the doctrine was never overruled.

196. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 104 S. Ct. 1464, 1469 (1984).

197. *See supra* notes 154-67 and accompanying text. Nimmer makes the distinction between government restrictions that are "anti-speech" (i.e., directed at the meaning of the message), M. NIMMER, *supra* note 164, § 2.04, and those that are "non-speech" restrictions (i.e., directed at the conduct carried out by the speaker along with the message delivered), *id.* § 306[D]. While the latter may be valid, the former type of restriction is much more suspect.

related interest.<sup>198</sup> Per se rules for boycotts of competitors do not prohibit the unilateral dissemination of a firm's views, nor do they require a firm to act in disregard of those views. In addition, current antitrust law makes even concerted activity permissible when that activity consists of petitioning legislators or calling on citizens to implement changes in the law to conform to the firm's views.<sup>199</sup> With activity of this type protected, governmental restrictions on any other concerted activity raise minimal first amendment concerns. In light of the serious dangers to competition created by competitor boycotts, the marginal first amendment concerns raised by the current scope of the per se rule should not bar the rule's continued operation under the first amendment frameworks set forth in *Central Hudson* and *O'Brien*.

Of course, condemning concerted activity while permitting the same activity when it is unilateral does create another problem. This approach necessitates a decision about whether similar activity on the part of a number of firms or people is, in fact, "concerted," or whether it is simply parallel behavior engaged in as the consequence of independent, unilateral decisionmaking. This decision, however, is one that antitrust courts have dealt with for some time. Consciously parallel anticompetitive behavior results in antitrust liability only when there is some evidence of actual agreement between the alleged conspirators.<sup>200</sup> This agreement need not be express; evidence of an implied agreement may be sufficient. Often, the most telling evidence supporting the existence of an agreement is the fact that the behavior of each party would be economically damaging to it in the absence of similar behavior by others.<sup>201</sup> Such a test may have to be modified somewhat when the activity is arguably motivated by noncommercial concerns. If a firm is acting for moral, ethical, or other reasons apart from profit maximization, the fact that others act in the same way may indicate shared values and a willingness on the part of those engaged in the activity to risk some reduction of potential profits if those values are not shared throughout the specific industry, rather than the existence of an agree-

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198. See *supra* notes 165-70 and accompanying text.

199. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

200. *Theater Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954). This rule was most recently restated in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 104 S. Ct. 1464 (1984), although the Court found sufficient evidence to support the existence of a conspiracy in that case. *Id.* at 1471.

201. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1229 (1969). The classic example of a case in which the individual conspirator's conduct would make sense only if he knew that the others would act likewise is *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) (involving conspiracy among first-run theaters effectively to shut down subsequent-run theaters through supposedly unilateral raise of admission price).

ment. In the absence of an express agreement, a conspiracy should be implied only when parallel unilateral decisions would seem irrational in pursuance of any reasonable goals.<sup>202</sup>

It may be that, in light of all these qualifications, little of the force of the *per se* rule actually remains. Yet, this proposal is not a great departure from current law either in the areas of antitrust liability or first amendment protection. While the scope of the first amendment has been expanded to give greater protection to commercial speech and commercial speakers, *per se* categories throughout antitrust law have been, and continue to be, redefined. These redefinitions, while tending to narrow the scope of *per se* liability, delineate in a more defensible way categories of inevitably culpable conduct.<sup>203</sup>

*Per se* antitrust prohibition of noncommercial boycotts, then, should extend no further than *per se* antitrust prohibition of traditional commercial boycotts. Concerted boycott activity directed against competitors should be prohibited. The minimal restraints on a firm's first amendment rights, in light of the legality of any unilateral communicative activity in pursuance of these rights, should not alter the conclusion that the anticompetitive effects of a group boycott directed against a competitor will almost always outweigh both the procompetitive effects and any other permissible rule of reason factors.

#### B. "Doing Good": *Per Se* Legality for Boycotts Lacking Direct Economic Motives

If boycotts directed against commercial competitors, regardless of the boycottter's motives, occupy one end of the spectrum of analysis under antitrust and first amendment principles, then the other end of that spectrum consists of those boycotts in which the boycotters stand to gain no direct economic benefits from success. While the boycott directed against competitors calls for a rule of *per se* illegality in light of the dominance of antitrust concerns and the marginal first amendment concerns involved in any governmental restrictions, the boycott that is free of any direct economic motivation presents a situation in

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202. To support a finding of conspiracy, there must be evidence that the conspirators "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980) (citations omitted), *cert. denied*, 451 U.S. 911 (1981). Acting for motives other than short-term profit maximization, even if it might be uncommon, is certainly not illegal.

203. As noted, *supra* notes 40-48 and accompanying text, redefinitions of the scope of *per se* categories have taken place in other areas of antitrust law. *See, e.g.*, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551 (1984) (involving "tying arrangement" in which use of hospital operating rooms was tied to purchase of services of a particular firm of anesthesiologists); *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) (involving price-fixing scheme).

which antitrust concerns are minimal and first amendment concerns dominate. In these cases, the antitrust law should defer to first amendment concerns, and these boycotts should be deemed per se legal if challenged under the Sherman Act.

This conclusion might appear unwarranted in light of the possible harm to competition from such a boycott, despite its noncommercial motivation. Anticompetitive, or any other, effects of a boycott will depend largely on the degree to which it is successful. "Success" of a boycott can be defined in either of two ways: the target may be coerced into changing its behavior, or the target may be driven out of business or out of a particular market. When a boycott is organized by competitors for anticompetitive purposes, the latter form of "success" would seem preferable to the boycotters, because altered behavior that leaves the target in the market, while not necessarily irrelevant to the boycotters' goals, would be less of an achievement.

The noneconomic boycott, however, usually will have the alteration of the target's conduct as its true goal. In such a case, driving the target out of business is either irrelevant to the boycotters, or, at most, a second-best outcome that is useful mainly for its *in terroram* effect on other actual or potential targets. While the anticompetitive effects of a successful boycott that aims to put someone out of business are obvious, the anticompetitive effects of a successful boycott that seeks to alter conduct are less so. Unless the purpose of the boycott is to induce anticompetitive conduct, an unlikely possibility when the boycotters are not competitors, success will not have anticompetitive consequences. Some harm to competition might arise during the boycott in those situations in which the boycott does not change behavior, but rather, causes harm to some competitors who refuse to alter their conduct. But when harm to competition or competitors is not the goal of the boycotters, the likelihood that such harm will occur, and the likelihood that such harm will have serious and lasting effects, is less obvious.

Occasionally, however, noneconomic boycotts will seek, as their preferred goal, to put someone out of business, or, at least, to drive the target completely out of some distinct market that the boycotters find offensive. The classic example on the local level is a boycott by community or church groups of a theater exhibiting pornographic films. The boycott is aimed at driving that theater out of business, or at least out of the pornographic film market, rather than at altering the theater's conduct as a participant in that market. In these cases, it would appear that success will lead to anticompetitive consequences due to elimination of one or more participants in some market. But even in this case, competition may be more or less diminished by the boycott's success, depending on the circumstances of the individual case. If this type of boycott were aimed at only one firm in a multi-firm market, success in driving that firm out would, of course, leave the market less competitive and, consequently, shift some degree of market power to other firms in

the market. But this type of boycott is more likely to be aimed at all firms in the "offensive" market equally. If community groups object, for example, to pornographic films, they are likely to act against all theaters in their community that exhibit such films, not merely one such exhibitor. In such a case, success will not leave a market less competitive in the sense that remaining firms have enhanced their power over consumers, but will instead eliminate the market itself. While it cannot be said that complete elimination of a type of product from the market is not a blow to consumer welfare, when such a result is not sought to enhance the economic position of those who drove the product from the market, it is not the type of harm that antitrust law has traditionally condemned. Incidental harm to competition may be tolerated when it is not a product of an attempt to acquire market power, but is instead, an outgrowth of justifiably motivated activity.<sup>204</sup>

Harm to competition, then, is not the inevitable result of this type of boycott even when it is successful. This fact alone sufficiently justifies a conclusion that a rule of per se illegality would be inappropriate, but it does not necessarily require a rule of per se antitrust legality. Although different definitions of "commercial speech" have been put forward,<sup>205</sup> none has included speech not motivated to any extent by the prospect of economic gain. So, when a boycott does not produce direct economic benefits to the boycotters, either during the course of the boycott or after its successful completion, the case for per se legality is strongest. Thus, to the extent that such a boycott is speech, it is entitled to full first amendment protection.

Of course, this conclusion does not end the analysis. It must be noted that even communicative behavior entitled to full constitutional protection is not invariably immune from regulation. The *O'Brien* test for assessing conduct that comprises speech under the first amendment and, apart from its communicative aspects, is subject to regulation or prohibition, is quite similar to the *Central Hudson* test for assessing commercial speech.<sup>206</sup> Despite the fact that the anticompetitive dangers of noneconomic boycotts are generally lower than those posed by economic boycotts, and despite the fact that noneconomic boycotts present the strongest countervailing first amendment concerns, it is certainly possible that, under a balancing test, anticompetitive concerns will pre-

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204. This principle was set forth as early as 1898. In *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), Judge Taft stated that "contracts in which the covenant in restraint of trade was ancillary to the main and lawful purpose of the contract, and was necessary to the protection of the covenantee in the carrying out of that main purpose" could be judged under more lenient standards than those that sought, as their ultimate end, a reduction in competition.

205. See *supra* notes 160-62 and accompanying text.

206. See *supra* notes 165-68 and accompanying text.

vail in individual cases. In such a case, the key *O'Brien* requirement that the restriction on anticompetitive conduct go no further than necessary to protect the substantial non-speech-related governmental interest could be satisfied. This conclusion supports a rule of reason analysis, itself a balancing test, rather than a rule of per se legality for all noneconomic boycotts.

On the other hand, a rule of reason analysis also presents serious concerns. The existence of an antitrust suit itself, apart from any damages that might be awarded, is a serious burden on any defendant.<sup>207</sup> As long as the possibility of antitrust liability remains, the costs of defending a lawsuit, added to the possibility of substantial treble damages, cannot help but serve as a serious deterrent to boycotters. Unless one reaches the conclusion that all organized boycotts, even those based on political or moral reasons, should be strongly discouraged, some effort must be made to eliminate the chilling effect of possible liability under the imprecise contours of the rule of reason and to create a "safe harbor" of boycott activity that is clearly not subject to antitrust sanctions.

The limits of this "safe harbor" may be found, not in the *O'Brien* test, but in the analysis of the circumstances under which speech may be found to be criminal behavior as set forth in *Brandenburg v. Ohio*.<sup>208</sup> In *Brandenburg*, the Supreme Court held that speech advocating a violation of the law may be punished only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>209</sup> In other words, the advocate must both intend and make likely the non-speech evil at issue. If this framework is applied to noneconomic boycotts, it becomes clear that constitutional protection is called for. The noneconomic boycotter who seeks to affect the target's conduct rather than put it out of business, or who acts against all firms in a market equally, does not intend to reduce competition, the substantive evil proscribed by the Sherman Act. In addition, the fact that anticompetitive consequences are not sought, while it does not eliminate their possible occurrence, will itself make them somewhat less likely.

The *NOW* case<sup>210</sup> presented a clear example of the type of case that should be held per se legal under antitrust analysis. The boycotters, noncompetitors of the targets, did not seek direct economic gains from the boycott, nor did the existence of the boycott work to their

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207. See, e.g., M. HANDLER, H. BLAKE, R. PITOFSKY & H. GOLDSCHMID, *supra* note 172, at 154-56.

208. 395 U.S. 444 (1969).

209. *Id.* at 447.

210. *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980). See *supra* notes 118-22 and accompanying text.

economic advantage.<sup>211</sup> The goal sought by the boycott, ratification of the Equal Rights Amendment, would not reduce competition in any commercial market. Whatever harm the boycott may have caused to the hotel and tourism markets was clearly incidental to the overriding first amendment interests of the boycotters. Dismissal of the complaint was clearly warranted.

The Court, however, should have been more precise in its explanation of why antitrust liability was not appropriate and in its description of the type of boycott that would not violate the Sherman Act. When first amendment concerns are strongest and anticompetitive dangers least severe, the danger of chilling legitimate communicative activity requires clear definitions of protected activity. Boycotts should be declared per se legal under antitrust analysis when they do not bring economic benefits to the boycotters directly, and when the aim of the boycott is not to harm competition, but either to change the target's conduct or to harm all participants in a market that the boycotters find entirely objectionable.

### *C. Rule of Reason Analysis for Noncommercial Boycotts Not Satisfying the Test for Per Se Legality*

Some boycotts that raise first amendment concerns will not be subject to rules of per se illegality because they are not directed at competitors. At the same time, they will not qualify for protection as per se legal, either because they seek to create an effect that will leave the target's market less competitive, or because the boycotters, although acting for noncommercial reasons, are nevertheless motivated by economic self-interest. An example of the former case would be a community boycott of only one of a number of competing theaters that exhibit pornographic films, the success of which would leave the surviving theaters with increased market power. The latter category would include, for example, a consumer boycott of theaters organized not to protest the films they exhibit, but to protest high ticket prices. Success of this type of boycott would benefit the boycotters economically, but not commercially, and might have a negative effect on competition among theater owners because of stabilization of prices. In such cases, first amendment considerations may be weak in light of the economic motivation of the boycotters because this motivation may make any boycott activity "commercial speech." On the other hand, antitrust concerns may be strong if the boycott has the effect of eliminating a competitor or of compelling the adoption of anticompetitive practices. The uncertainty of the weight of the relevant factors on both sides of the analytical scales leads to the conclusion that such cases should be resolved on a

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211. 620 F.2d at 1302-03.

case-by-case basis under the rule of reason.

Rule of reason analysis is imprecise even in the least complicated of antitrust cases.<sup>212</sup> The weighing of anticompetitive effects of a practice and the balancing of such effects against procompetitive consequences of the same acts require some degree of guesswork about possible effects of the acts which may be based upon invalid assumptions about economics and human behavior.<sup>213</sup> This analysis is made even more complex in boycott cases involving noncommercial motives by the introduction of values unrelated to competition, specifically the guarantees of the first amendment. The fundamental societal value of first amendment rights requires that antitrust law, generally concerned only with questions of competition, make room for consideration of these concerns.<sup>214</sup> Such "balancing" gives rise to the charge that a court cannot balance or compare the weight of very dissimilar concerns. This criticism is no doubt valid, yet somehow, the decision whether to permit or prohibit behavior in an individual case must be made. However imprecise the weighing of dissimilar burdens and benefits to society may be, it cannot be avoided. The admission that a process is, and to some extent must be, imprecise does not lead to the conclusion that it is arbitrary, or that nothing useful can be said about it. Some general guidelines can be set forth regarding the rule of reason inquiry in noncommercial boycott cases.

In weighing likely anticompetitive effects, analysis of rule of reason noncommercial boycotts will proceed along lines similar to those applied to any other rule of reason inquiry. The structure of the market in question and the role that the target plays in that market must be assessed along with the particular practices used by the boycotters, their likelihood of success, and the consequent likely effect on the price, quality, or availability of products or services. While the strength of the anticompetitive considerations will vary from case to case, generally the following standards are valid. Anticompetitive consequences seem most likely and most significant in cases in which the object of the boycott is

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212. See L. SULLIVAN, *supra* note 6, at 186-89.

213. Lester Thurow, for example, who is highly critical of the antitrust laws as currently drafted and applied, see L. THUROW, *THE ZERO-SUM SOCIETY* 145-50 (1980), considers nearly all of traditional microeconomic thought to be founded on overly simplistic views of human behavior. To the extent that antitrust law accepts the classic view of man as a "rational short-term profit maximizer" it must, then, suffer from the consequences of such simplification. L. THUROW, *DANGEROUS CURRENTS* 3-28 (1983).

214. *E.g.*, *Eastern R.R. Presidents Conference v. Noerr Motor Freight Co.*, 365 U.S. 127 (1961) (first amendment protects concerted activity to obtain favorable legislation even when it would lead to anticompetitive consequences). See also *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933) (competitors allowed to set prices through common sales agent during Depression at the same time that Congress was encouraging industries to cooperate to improve market conditions).



to coerce practices that are themselves anticompetitive. A boycott that seeks as its ultimate goal the destruction of one or more, but not all, of the participants in a market is also strongly anticompetitive. When a boycott is directed against a market itself and all of the participants in it, anticompetitive concerns weigh less heavily. Although success of such a boycott would deprive consumers of access to a good or service, it does not lead to the classic antitrust concerns involving diversion of business to a market competitor who thereafter may exercise undue market power. Finally, when the boycott seeks a change in the target's conduct, which is not in itself anticompetitive and which leaves the target in no worse position as a participant in its market, anticompetitive concerns are weakest, despite the fact that the boycott itself may produce some distortion of competition as an incident of its ultimate goal.

On the other side of the rule of reason scales, beyond any possible procompetitive arguments that might be made with respect to a non-commercial boycott, some general statements concerning the weight of first amendment factors seem valid. First amendment protection for boycotts should be strongest when the boycotters stand to reap no direct economic benefits either during or after their action. Such a boycott can not be classified as "commercial speech" under any definition of that term and, thus, is entitled to full constitutional protection. It follows that the weight of the first amendment concerns will be less when, regardless of the fact that the boycott is not commercial because it does not involve competitors, the boycotters do seek to gain direct economic benefits.

It may also be helpful to examine whether the goal of the boycott is consistent with policies, other than the promotion of competition, endorsed by federal legislation. While the rule of reason does not give a court carte blanche to review all claims that the defendant's acts benefit society, courts in antitrust cases have been more sensitive to the acts of antitrust defendants when those acts are consistent with clearly enunciated federal policies outside of the antitrust laws.<sup>215</sup> This consistency may be relevant in resolving an otherwise closely balanced rule of reason inquiry.

The combination of all of these factors into a coherent whole will not always be easy, and each case will turn on its individual facts. Still, those contemplating a boycott that, while not per se illegal, does not fall into the "safe harbor" of cases appropriate for treatment as per se legal, will have some guidance in assessing the possible antitrust consequences of their actions. If in doubt, the potential boycotter will still not be entirely deprived of the right to express himself. As was the case with competitors, whose boycotts are per se illegal, noncompetitors who are not entitled to per se legality for group action still may take

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215. See *supra* notes 85-102 and accompanying text.

whatever unilateral action, or make any unilateral statement, they wish.

## VI. CONCLUSION

Although the reconciliation of first amendment values with the procompetitive goals of the antitrust laws in cases involving boycotts is not an easy process, it does seem possible to formulate standards that can minimize undue interference between the two. Doubtful cases should be resolved in favor of first amendment concerns in light of the importance of that constitutional guarantee in the fundamental law and value system of the United States. Yet, much antitrust enforcement can take place with respect to boycotts that is completely consistent with first amendment principles.

Competitors should be flatly prohibited from acting as a group when the purpose and effect of the concerted activity is harm to other competitors. Whatever first amendment rights competitors possess can be exercised fully through unilateral action. That has never been considered a violation of the antitrust laws. Conversely, boycotters who seek no economic gain from their activity, and whose goals do not entail a reduction of market competition, present a situation in which the importance of anticompetitive effects should always be overridden by first amendment concerns. Boycotts of this type should be per se legal. Other boycotts in which motives and effects are less clear must remain subject to the rule of reason, and that rule must be applied in a manner which takes full account of the central importance of first amendment values.

