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SHERMAN ACT LIABILITY FOR A RELIGIOUSLY MOTIVATED BOYCOTT

INTRODUCTION

For almost a century the Sherman Act[1] has been the "Magna Carta"[2] of the American free enterprise system. The principle of commercial competition protected by the Act is rooted in religious doctrine.[3] Nevertheless, as evidenced by the Sherman Act, it has been necessary to restrain those in competition from undue destruction of competitors and oppression of consumers.[4] The Act prohibits unfair practices to insure equality of opportunity.

Congress left interpretation and application of the competitive objectives of the antitrust laws to the discretion of the courts.[5] The

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1. The substantive provisions of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976) contain two main prohibitions:

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal.
. . .

Section 2. 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 misdemeanour. . . .

2.
> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedoms guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

United States v. Topco Assocs., 405 U.S. 596, 610 (1972) (Marshall, J.). *See also* Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398 n.16 (1978).

3. John Calvin proclaimed man's obligation to work—manufacture and trade in articles of commerce—to continue the creative work of God. Resulting profits were God's rewards. The Puritan form of Calvinism sanctified the "work ethic," giving rise to the doctrine of *laissez faire*. Even the Catholic Church commended commercial competition. But all religions tempered the commandment to compete with an admonition to "do justice and to love mercy": a religious ethic for businessmen. *See* J. VAN CISE & W. LIFLAND, UNDERSTANDING THE ANTITRUST LAWS 2-15 (8th ed. 1980).

4. *Id.*

5. In the antitrust field courts in particular "have been accorded, by com-

courts have unflinchingly applied and enforced the antitrust laws[6] when the actors are businessmen and their conduct tends to restrain or monopolize commercial intercourse. But when the actors are not businessmen and their purpose is not commercial, the appliciability of the antitrust laws becomes questionable, especially when the actors' motivation is integrally intertwined with the exercise of first amendment rights.[7] Accordingly, a boycott[8] motivated by political, religious or social concerns, as opposed to a boycott designed to extract a business advantage at the expense of competitors,[9] poses a problem requiring "delicate balanc[ing]"[10] by the judiciary.

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mon consent, an authority they have in no other branch of enacted law." United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954).

6. *See, e.g.*, United States v. Southeastern Underwriters Ass'n, 322 U.S. 533 (1944). *See also infra* note 9.

7. U.S. CONST. amend. I. "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for a redress of grievances."

8. Typically, a boycott, or concerted refusal to deal, is an agreement among individuals to sever or limit relations with a designated firm(s) or individual(s) as well as attempts to induce others to do so. *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 229-32 (1977).

9. *See e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966) (invoking a boycott *per se* rule where retailers induced manufacturers not to sell to competing retailers); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (invoking a boycott *per se* rule where retailer induced manufacturers and distributors not to sell to competing retailer); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941) (invoking a boycott *per se* rule where manufacturers induced retailers not to buy from competing manufacturers). *See also*, Cockerill, *Application of Noerr-Pennington and the First Amendment to Politically Motivated Economic Boycotts: Missouri v. NOW*, 13 LOY. L.A.L. REV. 85 (1979):

> The common thread running through these leading boycott cases is the intent, express or implied, to impair or destroy competition in a commercial setting. The *per se* rule developed in these cases is applied when there exists a combination to boycott or refuse to deal that restrains trade, monopolizes, or lessen competition. An important factor in these and other group boycott cases in which antitrust liability has been imposed is that economic benefit can be traced to the principals, while economic detriment is suffered by the target of the boycott.

Id. at 89.

10. Costello v. Rotelle, 670 F.2d 1035 (D.C. Cir. 1981) (reversing district court's grant of summary judgment and holding Roman Catholic Church organizations that allegedly engaged in boycott activities directed at the distributor of an unauthorized religious book were not altogether exempt from antitrust scrutiny simply because their motives were religious; on remand the court must "balance" the competing interests of religious freedom and competition).

Courts have "balanced" political and social concerns expressed through anticompetitive boycotts or restraints of trade and have resolved the issue—though somewhat ambigously—in favor of the first amendment right to petition,[11] federalism[12] and the national labor policy.[13] An unresolved conflict exists between the free exercise of religion guaranteed by the first amendment[14] and the antitrust laws: does a religiously motivated boycott fall within the realm of antitrust laws? Consider the following hypothetical situation:

> A religious organization notifies booksellers that a publisher's book is not an approved copy of their liturgy. They request the booksellers not distribute the book in order to preserve the integrity of the liturgy (public prayer). As a result the market for the publisher's book vanishes.[15]

Absent the religious purpose of maintaining the integrity of their adherents' beliefs, the religious organization's conduct, coupled with

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11. *See, e.g.*, United Mine Workers v. Pennington, 381 U.S. 657 (1965) (concerted efforts to influence public officials do not violate antitrust laws even though intended to eliminate competition); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (concerted effort to persuade legislature or executive to take action with respect to a law that would produce a restraint or monopoly not prohibited by the Sherman Act). *Accord*, California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (concerted efforts to influence administrative agencies and courts respecting resolution of business and economic interests vis-6a-vis competitors not proscribed by Sherman Act; held, however, defendants' actions a "sham" and not exempt). *See also infra* notes 101-23 and accompanying text.

12. *See, e.g.*, Parker v. Brown, 317 U.S. 341 (1943) (action of the state in its sovereign capacity exempt from antitrust scrutiny); Missouri v. NOW, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980) (boycott to influence passage of Equal Rights Amendment not within the scope of the antitrust law). *See also infra* notes 68-80 and accompanying text.

13. *See e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) (a combination of employees restraining competition in the sale of their services to an employer not condemned by the Sherman Act); Allied Int'l., Inc. v. International Longshoreman's Ass'n, AFL-CIO, 640 F.2d 1368 (1st Cir. 1981), *aff'd on other grounds*, 102 S. Ct. 1656 (1981) (*see especially* 1659, n.6). (union's refusal to handle cargoes bound for or arriving from Soviet Union in protest of invasion of Afghanistan not violative of Sherman Act). *See also infra* notes 81-100 and accompanying text. *See generally* Bird, *Sherman Act Limitations on Non-Commercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247 (1970); Cockerill, *supra* note 9; Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705 (1961-62); Fischell, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80 (1977-78); Note, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131 (1980).

14. *See supra* note 7.

15. *See* Costello v. Rotelle, 670 F.2d 1035 (D.C. Cir. 1981); *see also infra* notes 125-32.

the booksellers' cooperation, would clearly be an unlawful restraint of trade. Yet when political and social concerns are at issue, the exemptions the Court has carved out indicate motive or purpose is an important consideration in ascertaining antitrust liability. The general community's interest in conducting commerce free of anticompetitive arrangements must be balanced against the first amendment's guarantee of religious freedom.

Immunity or exemption from the Act, based upon the free exercise clause, is complicated, however, by the tension between the religious group's free exercise guarantee and the establishment command. Though belief is held inviolate, protecting religious action that trenches upon other protected rights violates the establishment ban. More specifically, even if the religious group's activity were in furtherance of a genuine expression of belief, an immunity from antitrust liability in spite of anticompetitive market impact would run afoul of the establishment clause.[16] In short, a court must balance the first amendment against the antitrust policy and in so doing maintain the balance between the free exercise and establishment mandates.

The focus of this note is the interplay of antitrust objectives with the first amendment free exercise clause and its correlative establishment clause, which results in the inevitable encroachment of each upon the other. An examination of judicial interpretation of the Sherman Act, in light of its legislative history, suggests that, despite anticompetitive effects, a religiously motivated boycott is not within the scope of the Act. This is particularly true when viewed in light of other judicially created exemptions. Regardless, the interrelatedness of the seemingly opposing demands of the two religion clauses and the problem of defining religion for determining the bona fides of an asserted religious belief makes a blanket exemption unjustified. Most importantly, national antitrust policies are not lightly to be set aside.[17] Hence, it appears inevitable that the courts must undertake the "delicate balancing," and where less drastic means are available to a religious group, it must comply with the dictates of the Sherman Act.

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16. *See infra* note 167.

17. The court has repeatedly stressed the pre-eminence of the public policy embodied in the antitrust laws. "Congress, exercising the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country." *Lafayette*, 435 U.S. at 398. "Congress 'exercis[ed] all the power it possessed' under the Commerce Clause when it approved the Sherman Act." California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (citation omitted).

THE APPLICABILITY OF THE SHERMAN ACT TO RELIGIOUSLY MOTIVATED BOYCOTTS

Legislative History

Whether religious organizations whose activities restrain trade are excluded from the Sherman Act is initially a question of statutory construction. The prohibitions of the Act are not precisely stated, nor are they defined.[18] The critical words relevant to a religiously motivated boycott are, "Every . . . combination . . . or conspiracy in restraint of trade or commerce." A literal reading of this language indicates liability no matter how laudable the actors' aim or how incidental the restraint. As a result, the Supreme Court has noted, while considering the breadth of the Act's language, that "the Sherman Act . . . cannot mean what it says."[19] But the Court has always interpreted the Act expansively: "[l]anguage more comprehensive is difficult to conceive. On its face it shows a careful, studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states."[20] Courts have necessarily relied on the legislative history in ascertaining the Act's applicability to a given case.[21]

Legislative history is not conclusive of a statute's interpretation. This is particularly true of laws formulated in the democratic process where diverse opinions and cross purposes exits. But the history does provide a frame of reference for determining legislative intent. The Sherman Act's legislative history,[22] read in light of the then public sentiment,[23] indicates a clear intent to proscribe commercially motivated restraints. Little or nothing is said, however, regarding a religiously motivated restraint. The law was inspired by the predatory tactics of the giant trusts[24] of the day. These commercial combinations

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18. *See supra* note 1.

19. National Society of Professional Eng'rs v. United States, 435 U.S. 679, 687 (1977).

20. United States v. Southeastern Underwriters Ass'n, 322 U.S. 533, 553 (1944).

21. Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940). "[T]he courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its words in light of its legislative history and of the particular evils at which the legislation was aimed." *Id.* at 489.

22. *See generally* Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. OF CHI. L. REV. 221 (1951); E. KINTNER, FEDERAL ANTITRUST LAW § 4 (1980); A. WALKER, HISTORY OF THE SHERMAN LAW (1910).

23. *See* Letwin *supra* note 22, at 222-25.

24. For a judicial description of the trust device created by Dobb, a Standard Oil lawyer, *see* Standard Oil Co. v. United States, 211 U.S. 1 (1911); State *ex rel.* At-

were injurious to purchasers and consumers of goods and services and threatened the competitive system. But the language of the Act sweeps beyond the regulation of trusts.

The debates between Senator Sherman and the bill's opponents indicate a narrower focus. In response to questions regarding the commercial scope of the bill, Sherman emphasized that many trusts were desirable and an important source of America's wealth. Only the "unlawful combination, tested by the rules of the common law and human experience"[25] were to be proscribed. The debators repeatedly emphasized that only commercial or business combinations were among those deemed unlawful.[26]

A religious organization exercising purely ecclesiastical duties[27] in furtherance of its beliefs is not a commercial or business combination. Such a group seemingly would not be included within the Act. During debate, Senator Sherman noted that "churches" would not be considered a combination that would violate the prohibitions of the

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torney General v. Standard Oil Co., 49 Ohio St. 137, 30 N.E. 279 (1982). Very basically, the trust concept involved the transfer of shares by stockholders to a single trustee who would exercise complete managerial control. Stockholders were entitled to dividends based upon their trust certificates. Unlike corporations, trusts did not require state sanctions nor were they subject to state regulation and control.

25. 21 CONG. REC. 2457 (1890).

26. In response to fears that the bill would proscribe the lawful monopoly resulting from a patent, agricultural or labor organizations, Senator Sherman stated:

> The bill [S. 1] as reported contains three or four simple propositions which relate only to contracts, combinations, agreements made with a view and designed to carry out a certain purpose, which the laws of all the States and of every civilized community declare to be unlawful. It does not interfere in the slightest degree with voluntary associations made to affect public opinion to advance the interests of a particular trade or occupation. It does not interfere with the Farmers' Alliance at all, because that is an association of farmers to advance their interests and to improve the growth and manner of production of their crops and to secure intelligent growth and to introduce new methods. No organizations in this country can be more beneficial in their character than Farmers' Alliances and farmers' associations. They are not *business combinations*. They do not deal with contracts, agreements, etc. They have no connections with them. And so the combinations of workingmen to promote their interests, promote their welfare, and increase their pay if you please, to get their fair share in the division of production, are not affected in the slightest degree, nor can they be included in the words or intent of the bill as now reported.

21 CONG. REC. 2562 (1890) (emphasis supplied).

27. "Ecclesiastical. Pertaining to anything belonging to or set apart for the church, as distinguished from 'civil' or 'secular,' with regard to the world." BLACK'S LAW DICTIONARY 459 (5th ed. 1979). The preparation, editing and distribution of

bill.[28] No one had directly challenged the lawfulness of a church organization. Rather, Sherman's remarks were in response to fears that the bill would condemn agricultural and labor organizations. Sherman stressed that the thrust of the bill was to regulate only those producing or selling articles in order to protect the consumer from prohibitive prices for the necessities of life.[29] Apparently labor, agricultural, temperance, or church organizations were not to be proscribed.

Although exchanges during debate cannot conclusively define the parameters of the Act, they do provide an indication of congressional intent. One can glean an affirmative intent to regulate business competitors, not organizations motivated by social, moral, religious or political concerns. During the House debates one representative declared that no one seemed to understand the meaning of the bill, referring to it as "experimental legislation" and "a blind legislation to answer the popular demand that something . . . be done about trusts."[30] Despite such statements expressly limiting the Act to the control of trusts, the courts have broadly interpreted the Act in its application to concrete situations.[31] The courts have consistently read the Act as a "comprehensive charter of economic liberty aimed at

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liturgical materials (*i.e.*, texts used in the liturgical rites and prayer of the church) would constitute an ecclesiastical duty or function. *See e.g.*, Metropolitan Baptist Church v. Younger, 48 Cal. App. 3d, 850, 858, 121 Cal. Rptr. 899, 903 (1975):

> Ecclesiastical matters ordinarily concern creeds and the proper mode of exercising one's belief, considerations of faith, including questions of what constitutes an essential of a church's faith, and matters of church discipline, tenets and general policy. In such matters the state, and its courts, have no legitimate concern or jurisdiction." (Citations omitted).

28. Sherman's remarks were made in speaking to an amendment which would specifically exempt temperance societies from the bill:

> I have no objections to the amendment, but I do not see any reason for putting in temperance societies any more than *churches* or school houses or any other kind of moral or educational association that may be organized. Such an association is not in any sense a combination or arrangement made to interfere with interstate commerce.

21 CONG. REC. 2658-59 (1890) (Emphasis supplied). The implication of Senator Sherman's remarks are unclear. Although such an association or combination may not have been "made" to interfere with interstate commerce, that is, their motive was not such, in fact the effect would. For example, the temperance movement virtually curtailed the legal interstate movement of liquor.

29. *See* 20 CONG. REC. 1458-59 (1889).

30. 21 CONG. REC. 4095 (1890).

31. *E.g.*, the Court initially refused to exempt labor unions from the Sherman Act. As a result, Congress enacted the Clayton Act of 1914, 15 U.S.C. §§ 17, 52 (1976), to immunize cetain labor activities. *See also infra* notes 81-100 and accompanying text.

preserving free and unfettered competition."[32] A religious organization is not a competitor in the classic sense, but its actions can inhibit competition. A literal reading of the Act would make an interference with competition unlawful. But clearly the text of the Act was not intended to delineate the full meaning of the statute. A religious organization's liability for conduct restraining competition must be determined, therefore, in light of the common law tradition referred to during the debates.[33]

The Common Law Rule of Reason: A Mode of Antitrust Analysis

Despite the expansive wording of the Sherman Act, it has long been settled that not every combination restraining trade falls within its scope.[34] Though remarks made during the legislative debates suggest that a religiously motivated boycott is not within the ambit of the Act, ultimately, liability under the Act is a function of judicial discretion. The courts must first determine if the Sherman Act applies in a given factual situation. If the Act applies, the court must then assess the reasonableness of the anticompetitive conduct and resultant restraint of trade. Congress intended that the common law tradition would provide the necessary guidance for courts to give shape to the statute's broad mandate.[35] Unfortunately, the common law can be as elusive and opaque as the Sherman Act itself.

One commentator has noted that the common law Senator Sherman saw as relevant to his act was an "artificial construct" devised by selecting those cases which fit the "senator's own policy prescriptions."[36] The senator's "prescription" for regulating combinations and competition was undoubtedly intertwined with notions of consumer welfare.[37] Using a consumer based standard, "religious" combinations which restrain trade should be subject to the same liability as business combinations whose activities restrict competition. Yet in determining liability, the judiciary has used the common law standard of reason as the prevailing mode of antitrust analysis.[38] The rule

32. Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

33. *See supra* note 25 and accompanying text.

34. Standard Oil Co. v. United States 221 U.S. 1, 59-60 (1911).

35. *See supra* note 25 and accompanying text.

36. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 20 (1978).

37. 21 CONG. REC. 2,457 (1890).

38. *Standard Oil,* 211 U.S. at 60. The origin of the rule of reason is generally attributed to the decision in Mitchel v. Reynolds:

> [A]ll contracts, where there is a bare restraint of trade and no more, must be void; but this is taking place only where the consideration is not shown can be no reason why, in cases where the special matter appears so as

of reason approach allows for "flexibility,"[39] but it also leads to uncertainity.

The Supreme Court's antitrust holdings have failed to articulate a clear or consistent standard of liability. However, the following four-step analysis may suggest a method for ascertaining the reasonableness of the challenged conduct.

Step 1: Initially a determination must be made as to reasonableness of the application of the Act itself. Where a constitutional guarantee[40] or statutorially protected right[41] is present, liability under the Act should be found unreasonable; that is, immunity obtains or the actors are exempt from liability. Although there is a significant difference between the concepts of "immunity" and "exemption," the Court has clouded the distinction by using these terms interchangeably.[42] Exemption suggests that there may be situations in which the courts will find liability despite the existence of a constitutional or statutory right: the Act preempts. Immunity is predicated upon a superior policy consideration such as an inviolable constitutional guarantee: The Act cannot preempt.

Step 2: If the challenged conduct is not found to be immune or exempt in Step 1, the reasonableness of the application of the Act will be analyzed in terms of economic consequences.[43] Here the reasonableness or legality of the conduct is determined by asking whether competition is promoted or supressed, "[t]he inquiry [being] confined to a consideration of impact on competitive conditions."[44]

The statutory policy embodied in the Act precludes consideration of whether competition is good or bad. Hence, liability under the

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to make it a reasonable and useful contract, it should not be good.

1 P. Wms. 181, 24 Eng. Rep. 347 (K.B. 1711). *But cf.* King v. Norris, 2 Kenyon 300, 96 Eng. Rep. (K.B. 1758) (reasonableness of restraint irrelevant).

39. National Soc'y of Professional Eng'r v. United States, 435 U.S. 679, 688 (1977).

40. *See infra* notes 101-23.

41. *See infra* notes 81-100.

42. *See, e.g.*, Community Communications Co., Inc. v. City of Boulder, 102 S. Ct. 835 (1982). In *Community Communications* the Court held that the ordinance at issue, *see infra* note 78, did not "qualify" for the *Parker* state action exemption. In his dissent, Justice Rehnquist challenged the Court's characterization of the *Parker* doctrine as an "exemption," noting that the Court's holding in *Parker* was based on a finding that state economic regulations were "immune" from the Sherman Act. *Id.* at 845-50.

43. *National Soc'y of Professional Eng'r*, 435 U.S. at 690-91.

44. *Id.*

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Sherman Act can be predicated upon purpose or effect alone, irrespective of purpose. Since 1897 the Supreme Court has held that wrongful or unlawful purpose is not necessary to a finding of section one liability.[45] A benign or other lawful purpose may be irrelevant to a finding of the Sherman Act liability where the "direct, immediate, and necessary effect" is to restrain trade unreasonably and, therefore, unlawfully.[46] Proof that the combination or agreement was entered into with intent or purpose to effect the restraint is unnecessary to a finding of liability. Thus, a contract, combination or conspiracy violates section one if it "eliminates," "hampers," "injures," "restricts," "restrains," "limits," "harms," "diminishes," "chills," or "clogs"[47] competition even though the parties' purpose is "neutral or benign."[48]

Liability can also be predicated upon purpose alone: the unreasonableness of the restraint can be inferred from the evident purpose.[49] An "otherwise reasonable trade arrangement must fall if conceived to achieve forbidden ends."[50] Agreements with no demonstrable impact may violate section one if entered into with the purpose of restraining trade.

In short, at the Step 2 level, the courts use the rule of reason to decide if the challenged conduct falls within the scope of the Act because of its effect or potential effect on competition. If the procompetitive effects outweigh anticompetitive effects, the Act does not apply.[51]

Step 3: If the challenged conduct can be characterized as anticompetitive at Step 2, a *per se* rule of illegality is used for those agreements or practices, such as boycotts, which experience has shown have a generally "pernicious," unreasonable effect on competition.[52]

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45. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897). The Court struck down the defendants' rate-fixing scheme on the ground that the agreement's "direct, immediate and necessary effect" was to restrain trade. *Id.* at 342.

46. *Id.*

47. Wirtz, *Purpose and Effect in Sherman Act Conspiracies*, 57 WASH. L. REV. 1, 7 (1981-82).

48. *Id.*

49. United States v. American Tobacco, 221 U.S. 106, 179 (1911).

50. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 622 (1953).

51. *See* Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36 (1977).

52. The *per se* doctrine was explained in *Northern Pac. Ry. v. United States*, 365 U.S. 1 (1958):

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business

Regardless of purpose or effect they are condemned by the Sherman Act. If the extent of the anticompetitive effect is not so obvious, the Court will use the rule of reason approach.[53] The reasonableness of the effect is viewed from an economic standpoint. The legality of the conduct at this step turns upon 1) whether the conduct is governed by a *per se* rule or the rule of reason; and 2) whether the conduct, if tested by the rule of reason, is reasonable.[54]

Step 4: Finally, the Court has not found liability for an otherwise anticompetitive restraint where the purpose is so extraordinary as to "save" the conduct. Compelling circumstances unique to a specific industry might save an otherwise unlawful restraint.[55] However, the

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> excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

Id. at 5.

Some of the commercial arrangements which have been held to be *per se* violations include price-fixing, division of markets, resale price maintenance, tying arrangements, and group boycotts. For a comprehensive listing of cases where *per se* liability has been found, *see* E. KINTER, *supra* note 22 at 57-59, n.224-31; L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 199-03, n.2-18 (1977).

53. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (vertical market division not properly subject to the *per se* rule). "[C]ompetitive economics have social and political as well as economic advantages, but an antitrust policy divorced from market considerations would lack any objective benchmarks. . . . [Any] departure from the rule of reason standard must be based upon demonstrable effect." *Id.* at 53, n.21 (citations omitted). *See* also Liebeler, *Antitrust Law and the New Federal Trade Commission*, 12 SW. U.L. REV. 66 (1980-81); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1 (1977).

54. *See* Smith v. Pro Football, Inc., 593 F.2d 1173, 1177 (D.C. Cir. 1978). The *per se* test is evidentiary in nature: once a particular practice has been characterized as unreasonable, the plaintiff need only show evidence of an act or a conspiracy to act which has been held to be illegal *per se* irrespective of the defendant's motive or intent. Using the rule of reason the court would need to determine if the economic pressure brought by the Church was legitimately geared to the Church's protection of its liturgy rather than its survival in the marketplace of religious books. Even assuming that the Church's activity is a genuine expression of the right to exercise freely, the reasonableness of the tactics used must be assessed (*i.e.*, a weighing of the nature and extent of the antitrust violation with the religious goals sought to be implemented.)

55. *See, e.g.*, Cement Mfr. Protective Ass'n v. U.S., 268 U.S. 588 (1925) (Due to unique circumstances within the cement industry, the gathering and dissemination of information by sellers to prevent the perpetration of fraud upon them held not to be an unlawful restraint, despite a resultant uniformity of price). A narrow exception may also exist for professional associations where the restraint is predicated upon

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existence of "saving purpose" at Step 4 is unlikely. A compelling purpose would most likely be reflected in protected rights, analyzed at Step 1, which may preclude application of the Act.

Reasonableness is assessed on two planes: first, the reasonableness of application of the Act itself, and secondly, if applicable, the reasonableness of the anticompetitive conduct.[56] In the case of a religiously motivated boycott, either reasonableness of application or reasonableness of exemption is contingent upon first amendment concerns. Application of the Act may constitute an unreasonable interference with the free exercise of religion guarantee. Conversely, immunity or exemption from the Act may be tantamount to a violation of the establishement ban. Practical application of the rule of reason has yielded immunity or exemption from antitrust liability in certain areas. A review of these cases provides guidance in analyzing the reasonableness of a religiously motivated boycott.

Judicially Created Immunity and Exemptions from the Sherman Act

Boycotts or concerted refusals to deal have been consistently condemned as violative of the antitrust laws, irrespective of the alleged motive, intent or purpose.[57] These cases involved businessmen acting (refusing to deal) in relationship to their business. The Court has, however, recognized immunity from the Sherman Act when the actor is not a businessman and the purpose is not commercial, irrespective of effect.[58] A religiously motivated boycott would involve non-businessmen acting in furtherance of non-commercial purpose.

In considering liability for non-commercial activity, it is necessary to define non-commercial purpose. Professor Coons has set out an

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an effort to control "unethical" practices. *See, e.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Though finding a fee schedule violated section one of the Sherman Act, the Court noted a restraint operating upon a profession may be distinguishable from a business: "The public service aspect, and other features of the professions, may require that a particular practice, which could be properly viewed as a violation of the Sherman Act in another context, be treated differently. . . ." *Id.* at 788, n.17. *But cf.* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978). The Court again found a section one violation based upon the anticompetitive effect of the society's bid canon, noting that the "cautionary footnote" in *Goldfarb* was not intended to create a "broad exemption under the Rule of Reason for learned professions." *Id.* at 696. *See generally Bauer, Professional Activities and the Antitrust Laws*, 50 NOTRE DAME L. REV. 570 (1975).

56. *See infra* notes 130-32 and accompanying text.

57. *See supra* note 9.

58. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

analytical framework for distinguishing relevant purposes.[59] The purpose is "commercial" if the objective is profit and the actors are businessmen. Non-commercial purpose can be economic or non-economic. The purpose is "economic" if advancement of the group's economic self-interest, that is, relating to production, distribution, and consumption of goods and services, is the objective. A "non-economic" purpose is one where the actors lack "substantial . . . material self-interest."[60] Entrepreneurs, hired labor, and church groups, respectively, are typical actors in the above enterprises. Despite the existence of three separate categories, classifying a given purpose is often difficult. For example, Professor Coons notes that an anti-Negro real estate boycott could have an economic and non-economic purpose. Regardless, identification of purpose seems necessary before exemption from liability can even be contemplated.

Additionally, the status of the defendant seems important in ascertaining liability. Status as a businessman tends to trigger liability; therefore, non-business status must be computed in the calculus. As Professor Coons notes, status and purpose are often inextricably intertwined; a particular purpose is essential to the recognition of a particular status.[61] Immunity and judicially created antitrust exemptions seem to hinge upon a finding of status and a correlative purpose which are equal to or greater than the purpose or policy objective of the antitrust laws: competition. Chief Justice Hughes stated that as a charter of freedom, the Sherman Act had a generality and an adaptability which characterizes constitutional provisions.[62] Hence, any exemption must be based upon a weighty, if not lofty, countervailing policy consideration. Absent statutory exemption[63] the Court has established a heavy presumption against implicit exemptions.[64] Those

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59. Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. L. REV. 705, 710-11 (1961-62).

60. *Id.* at 712-13; *see also* Bird, *Sherman Act Limitations on Non-Commercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247, 248-49 (1970).

61. Coons, *supra* note 59, at 716.

62. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1932).

63. *See, e.g.*, 7 U.S.C. §§ 291-92 (1976) (Capper-Volsted Act, agricultural cooperatives); 15 U.S.C. §§ 1011-1013 (1976) (McCarran-Ferguson Act, insurance); 49 U.S.C. § 5(b) (1976) (Reed-Bulwinkle Act, rail and motor carrier rate-fixing bureaus); 15 U.S.C. § 1801 (1976) (newspaper joint operating agreements; 15 U.S.C. §§ 17, 52 (1976) (Clayton Act, labor, agriculture and horticultural organizations); 29 U.S.C. §§ 101-115 (1976) (Norris-LaGuardia Act, labor).

64. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963); California v. EPC, 369 U.S. 482, 485 (1962).

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cases where the Court has recognized immunity or exemption reflect a merging of the status and purpose requirement. The state action,[65] non-statutory labor,[66] and right to petition[67] cases all implicitly rely upon a finding of non-commercial purpose coupled with a non-business status which manifest a policy consideration of equal or greater force to the antitrust laws. Analysis of these exemptions should assist in ascertaining liability for a religiously motivated restraint.

The State Action Exemption:

The question whether the federal antitrust laws prohibit a state, in the exercise of its sovereign powers, from imposing competitive restraints was first addressed in *Parker v. Brown.*[68] In *Parker* the Court found that an anticompetitive agricultural marketing program adopted by the State of California did not violate the Sherman Act. The Court held that the act was intended to regulate "business combinations" and not to prohibit a state from imposing a restraint as "an act of government."[69] The declared purpose of the state regulatory program, although intended to restrain competition, was to rectify an allegedly serious local economic problem.[70] Implicit in the Court's holding was 1) a recognition of the status of the defendant—constitutional sovereignty of the state under our dual system of government,[71] and 2) a deference to the purpose of the activity—the economic health, safety and well-being of local communities.[72]

The availability of this state action immunity has been severely limited by the Court in subsequent cases. The "anticompetitive activities . . . [must] be compelled by direction of the State acting as a sovereign."[73] Mere "state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity."[74] Further, the Court has rejected *ipso facto* immunity for

65. *See infra* notes 68-80 and accompanying text.

66. *See infra* notes 81-100 and accompanying text.

67. *See infra* notes 101-23 and accompanying text.

68. 317 U.S. 341 (1942).

69. *Id.* at 350-52.

70. The regulatory program was necessary to curtail "the evils attending the production and marketing of raisins . . . [which] present a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its [California's] important industries." *Id.* at 363.

71. *Id.* at 351.

72. *Id.* at 362.

73. Goldfarb v. Virginia State Bar, 421 U.S. 773, 790-91 (1975). *See supra* note 55.

74. Cantor v. Detroit Edison Co., 428 U.S. 579, 592-93 (1976) (public utilities' lightbulb dissemination program not immune from antitrust liability despite provision for the program in the state-operated tariff). *But cf.* Bates v. State Bar of Arizona,

subordinate state governmental bodies.[75] Immunity is recognized only where the anticompetitive restraints engaged in by state municipalities or subdivisions are "clearly articulated and affirmatively expressed"[76] as state policy. Finally, the activity must be actively supervised by the state.[77] The Court recently denied a municipality state action immunity even though active state supervision of a clearly articulated state policy would contravene the Colorado Constitution's Home Rule provision.[78] Quite simply, immunity from liability obtains only when the state as sovereign performs a governmental act.

Using the four step analysis[79] it is determined at step 1 that a state's anticompetitive regulation cannot reasonably be found unlawful under the Sherman Act in light of federalism and comity concerns.[80] Although the language of Sherman Act prohibits all anticompetitive practices, the Court has held it cannot be, nor does the legislative history suggest it should be, interpreted to impinge upon the constitutional sovereignty of the states. *A fortiori* religiously motivated conduct, also protected by the Constitution, should not be within the realm of the antitrust laws.

The Labor Exemption:

Though constitutionally unprotected, the "labor" status and a correlative non-commercial, economic purpose present another line of special cases delimiting the scope of the Sherman Act. Laborers classically combine together for the purpose of bettering their wages,

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433 U.S. 350 (1977) (restraint imposed on advertising of legal services exempt from Sherman Act claims [though violative of first amendment] as the restraint was an affirmative command of the Arizona Supreme Court).

75. Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (exemption unavailable to city owned and operated utility unless acting pursuant to affirmative state policy).

76. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (California resale price maintenance system, affecting all wine producers and wholesalers within the state, not entitled to exemption).

77. *City of Lafayette*, 435 U.S. at 410; *Bates*, 433 U.S. at 359-60; *California Retail Liquor Dealers Ass'n*, 445 U.S. at 105.

78. Community Communications Co., Inc. v. City of Boulder, 102 S. Ct. 835 (1982) (city's moratorium ordinance restricting cable television business expansion pending enactment of city's model ordinance subject to antitrust liability). *See supra* note 42.

79. *See supra* notes 40-56 and accompanying text.

80. "In a dual system of government in which, under the Constitution the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker*, 317 U.S. at 351. *Accord* "Cities are not themselves sovereign; they do not receive all the federal deference of the State that created them." *City of Lafayette*, 435 U.S. at 412-13 (citation omitted).

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hours, and working conditions.[81] As such, the purpose of the labor combination is not to supplant the businessman enterpreneur. The relationship is "symbiotic rather than competitive."[82] Regardless of purpose, labor boycotts, both primary and secondary,[83] can effect severe competitive restraints, ostensibly in violation of the antitrust laws.

Initially, the Court held the Sherman Act fully applicable to labor unions.[84] In the *Danbury Hatters* case[85] the Court noted the lack of any distinction between classes in the Sherman Act, which covers "every" contract or combination in restraint of trade. The Court further noted the failure of congressional attempts to legislatively exempt labor organizations from the Act.[86] Under such a reading of the Act the union was subject to liability for its national consumer boycott of the plaintiff's hats. Congress reacted by providing protection for labor in the Clayton Act in 1914,[87] but the Court read this provision narrowly and the Sherman Act broadly and continued to apply antitrust sanctions against labor.[88]

The development of modern Supreme Court antitrust principles in relation to labor began in 1940 with *Apex Hosiery Co. v. Leader.*[89] Members of a labor union, bent on unionizing a factory, had forcibly seized the plant in violation of civil and criminal laws of the state. For over six weeks the union held the plant, totally disrupting business and extensively damaging property and equipment. The Court found no antitrust liability as the local labor union had been furthering its organizational goals in the labor market rather than acting on behalf of an employer to suppress competition. Regardless of the intended

81. *See generally* Leslie, *Principles of Labor Antitrust,* 66 VA. L. REV. 1183, 1185-92 (1980).

82. Coons, *Non-Commercial Purpose as a Sherman Act Defense,* 56 NW. L. REV. 705, 730 (1961-62).

83. A union strike or work stoppage would be a typical primary boycott. When a union enlists the aid of a secondary employer or the public in an attempt to coerce the primary employer to acquiesce to the union's demands, they affect a secondary boycott. *See generally* Leslie, *supra* note 81.

84. Loewe v. Lawlor, 208 U.S. 274 (1908) (The "Danbury Hatters").

85. *Id.*

86. Beginning in 1908, "[t]he records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the Act and that all these efforts failed, so that the act remained as we have it before us." *Id.* at 301.

87. 15 U.S.C. §§ 17, 26 (1976).

88. Duplex Printing Co. v. Deering, 254 U.S. 443 (1921).

89. 310 U.S. 469 (1940).

effect, the touchstone of liability for businessmen,[90] labor was immunized by its status and purpose.

In *United States v. Hutcheson*[91] the Court found exemption from the antitrust laws in light of the Clayton Act[92] and the Norris-LaGuardia Act[93] "so long as [the] union acts in its self-interest and does not combine with non-labor groups."[94] A statutorily defined status and purpose, evincing a countervailing policy objective, precluded imposition of antitrust liability.

Even where a statutory exemption is not afforded, the courts can refuse to find liability on the basis of the status and purpose. In *Allied International v. International Longshoremen's*[95] the circuit court found the ILA's refusal to load or unload cargo on ships en route to or from the Soviet Union, in protest of the Soviet armed forces' invasion of Afghanistan, not immunized by statute from the operation of the antitrust laws. Such a "political dispute" did not relate to the statutorily protected legitimate union interest in better wages, hours, or conditions.[96] Despite the lack of statutory exemption the court found no Sherman Act liability as the purpose of the boycott was "not the sort of evil at which the Sherman Act was aimed."[97]

Citing to *Apex* for the pivotal commercial/non-commercial distinction, the court noted in sweeping language that it would be a rare case, absent a specific anti-competitive object or collaboration with non-labor groups, where labors' concerted refusal to work would violate antitrust laws.[98] *Allied* seemingly stretches the labor status-purpose exemption to the limit, for unlike *Apex* where the victim's capitulation to the union demands would have the effect of removing the restraint, the ILA's purpose was to suspend all trade with the Russians. This type of secondary boycott (the plaintiff being a neutral victim), the purpose of which was to eliminate competition, would

90. *Compare* Eastern States Retail Lumber Dealer Ass'n v. United States, 234 U.S. 600 (1914) (retailer association's boycott of manufacturers selling directly to customers held violation though restraint left manufacturers free to sell to retailers) *with Apex*, 310 U.S. 469 (union association's restraint not violation even though closure of plant ended sales to everyone). *See also supra* notes 45-50 and accompanying text.

91. 312 U.S. 219 (1941).

92. 15 U.S.C. § 17 (1976).

93. 29 U.S.C. §§ 101-15 (1976).

94. *Hutcheson*, 312 U.S. at 232.

95. 640 F.2d 1368 (1st Cir. 1981), *aff'd on other grounds* 102 S. Ct. 1656 (1982).

96. *Id.* at 1380.

97. *Id.*

98. *Id.*

clearly be a Sherman Act violation if engaged in by a business group. It is worth noting that the status of the actors' here had a dual aspect: the actors were both laborers and political advocates. Again, as in the state action cases, there is judicial deference to values other than, and sometimes inconsistent with, those of an unrestricted market.[99] Where antitrust regulation would trench heavily on a countervailing policy of national importance, the group boycott, regardless of effects upon competition, is sanctioned.

Though a restraint effected by a labor monopoly can be as anti-competitive as those effected by a business monopoly, application of the Act may not be appropriate. If the union's purpose is self-interest, the restraint is reasonable. The right of workers to organize and to engage in concerted activities in furtherance of unionization goals, though often anticompetitive in effect, is legislatively protected.[100] The right of the religious to organize, free from governmental interference, is constitutionally protected. Where a religious organization acts in its self-interest in furtherance of its beliefs, antitrust liability should not attach. Under an *Apex* commercial/non-commercial test, any restraint of trade resulting from a religiously motivated purpose should be reasonable.

The issue addressed in the labor and state action cases is the primary issue addressed in all antitrust cases: are there policy considerations which transcend the protection of competition? These cases indicate that there are areas of our economic and political life to which antitrust objectives must yield. The state action cases reflect solicitude for the constitutional status afforded state governments. The labor cases reflect a deference to labor contingent upon a non-commercial purpose. Further policy considerations which transcend the importance of competition exist in first amendment rights.

The First Amendment Right to Petition Exemption:

In a trilogy of cases the Court has recognized the broadest of all immunities from antitrust liability based upon the first amendment right to petition.[101] Beginning with *Noerr*,[102] and following with

99. Coons, *supra* note 82, at 742.

100. In 1935 Congress passed the National Labor Relations Act (Wagner Act), 29 U.S.C. § 157-69 (1976), which protects the rights of workers to organize. Supplemented by the Taft-Hartley Act, 29 U.S.C. §§ 141-88 (1976), and the Landrum-Griffin Act, 29 U.S.C. §§ 153, 158-60, 164, 186-87, 401-531 (1976), the Wagner Act establishes a national labor policy that permits, and even encourages, unionization.

101. *See supra* note 7.

102. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

Pennington[103] and *California Motor Transport*,[104] the Supreme Court has held that concerted efforts by competitors seeking to influence governmental officials to take action that injures their rivals does not violate the antitrust laws. The Court in *Noerr* and *Pennington* found such immunity as a matter of statutory construction[105] in order to avoid first amendment questions.[106] The holding in *California Motor Transport* made it explicit that the Constitution itself precludes imposition of liability for concerted efforts to influence any governmental official: legislative, judicial, or administrative.[107] This immunity insulates those who seek anticompetitive ends via legislative enactment, executive veto, agency licensing, or judicial determination. The sweeping nature of the *Noerr* doctrine was summed up by Mr. Justice White, writing in *Pennington*: "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition" and even though the conduct may be "part of a broader scheme violative of the Sherman Act."[108]

Under the status-purpose analysis suggested, the actors are no longer business competitors but political advocates seeking to inform the government of their wishes. Their purpose is concededly anticompetitive: enhancement of competitive advantage. But the vehicle for realization of this purpose, governmental action, immunizes this conduct from antitrust liability. An objective to influence government to affect marketplace goals is protected by the first amendment.[109]

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103. United Mine Worker v. Pennington, 381 U.S. 657 (1965).

104. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

105. "We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws. . . ." *Noerr*, 365 U.S. at 135.

106. [O]f at least equal significance, such a construction of the Sherman Act [proscribing political activity having an anticompetitive effect] would raise important constitutional questions. The right to petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 137-38.

107. We conclude that it would be destructive of the rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interest vis-a-vis their competitors.

California Motor Transport, 404 U.S. at 510-11.

108. Pennington, 381 U.S. at 670.

109. "[T]o hold that . . . people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity,

A representative form of government relies upon citizen input regarding needs and grievances. The prosecution of individuals engaged in such activity would chill the free interchange of ideas between the governed and the governing.[110] Thus, an anticompetitive purpose is legally irrelevant when the objective is the passage or enforcement of certain laws.[111]

The Court has imposed a limit on the immunity afforded political activity in the antitrust context. The genesis of the "sham" exception to first amendment immunity was the ruling in *Noerr*. The Court stated that where a publicity campaign to influence governmental action was a "mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor . . . application of the Sherman Act would be justified."[112] The Court elaborated upon the scope of the sham exception in *California Motor Transport*. Though holding that attempts to influence administrative or judicial officials were protected, the Court cited practices or conduct which would not be immune, such as perjury of witnesses, conspiracy with a licensing authority, or bribery of a public official.[113] The fundamendal question in cases involving the sham exception is purpose.[114] If the defendants' true purpose is to injure competitors directly rather than influence government action, immunity predicated upon first amendment rights will fail.[115] But if the defendants' efforts are genuinely aimed at in-

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but political activity, a purpose which would have no basis in the legislative history of the Act." *Noerr*, 365 U.S. at 137.

110. *Id.*

111. *Id.* at 138-40.

112. *Id.* at 144.

113. *California Motor Transp.*, 404 U.S. at 512-13. The Court in *California Motor Transp.* concluded that the defendants had formed "[a] combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts, to defeat that right by massive, concerted, and purposeful activity," *id.* at 515, and therefore were within the sham exception.

114. Mark Aero, Inc. v. TWA, Inc., 850 F.2d 288 (8th Cir. 1978) (defendants' opposition to the reopening of old airport not intended to injure plaintiff directly; therefore, not a basis for the sham exception).

115. This direct-indirect distinction was alluded to by the Court in Fashion Originator's Guild of America v. FTC, 312 U.S. 456 (1941). The Guild, composed of designers and manufacturers of women's clothing and fashion textiles, entered into agreements to boycott and refused to sell to retailers who sold garments copied by non-member manufacturers from exclusive designs put out by Guild members. The Guild devised elaborate trial and appellate procedures to weed out "style pirates" and enforce their boycott. The Court held the combination not only monopolistic, but "an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature

fluencing governmental action or policy which itself inflicts injury on a rival, the defendant is immune from the antitrust laws.[116]

By analogy to the right to petition cases, a religiously motivated boycott would be immune from the antitrust laws. Immunity, based upon the first amendment guarantee, should be afforded as long as the actor's true purpose is the exercise of religious belief and not a sham cover for a purpose to directly interfere with a competitive rival. An indirect anticompetitive effect would be legally irrelevant where the exercise of a first amendment right is at stake.[117]

The right to petition immunity was given its broadest reading in *Missouri v. NOW*.[118] In *NOW* the National Organization for Women initiated state convention boycotts hoping such economic coercion would convince state legislators to support passage of the Equal Rights Amendment. Although the purpose of the boycott was ratification of the constitutional amendment, NOW's purpose was to directly restrain trade. In *Noerr*, the Court held a direct restraint of competition violative of the Sherman Act.[119] The *NOW* court discarded the direct/indirect distinction and held that antitrust liability was predicated upon a finding of "commercial competitors" not "political opponents."[120] NOW's objectives were political, not marketplace goals; consequently, they were beyond the scope of the Sherman Act.[121]

NOW expands considerably the immunity afforded in *Noerr*. The combination in *Noerr* sought passage of legislation that would restrain trade. In *NOW* a boycott which itself restrained trade was utilized to encourage ratification of the ERA. Despite direct commercial injury to the convention industry, the actors' status as political activists and their purpose to coerce ratification of ERA immunized them from

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and violates the statute.' " *Id.* at 465. The Court suggested that the defendants could have sought relief from the tortious conduct of the "style pirates" in state court, but could not directly restrain the purportedly illegal competition.

116. *See, e.g.*, Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976) (en banc), *cert. denied*, 430 U.S. 940 (1977); Metro Cable Co. v. CATV, Inc., 516 F.2d 220 (7th Cir. 1975).

177. The direct/indirect anticompetitive effect distinction is somewhat misleading. Advocates of legislative change or those conducting a religiously motivated boycott may "intend" to directly affect competition. Their overriding purpose, however, would be a political or religious one (*i.e.*, motive), and hence, the resultant interference with competition is deemed indirect. The direct/indirect distinction was abandoned by the court in *Missouri v. NOW*, 620 F.2d 1301 (8th Cir.) *cert. denied*, 449 U.S. 842 (1980).

118. *Id.*

119. *See supra* note 112 and accompanying text.

120. *NOW*, 620 F.2d at 1311-12.

121. *Id.*

antitrust liability on the basis of their first amendment rights.[122] The court based its holding on its reading of the Sherman Act's legislative history. The court further noted the Act could not be applicable to politically motivated conduct without impinging upon first amendment rights.[123]

The *NOW* holding has far-reaching implications for Sherman Act liability when the first amendment right to petition is at issue. The holding cannot be generalized, however, to all first amendment rights. The religion clause of the first amendment is double-edged: the government can neither prohibit nor promote religion. Imposing liability for the anticompetitive effects of a religiously motivated boycott might violate the free exercise guarantee. But immunity from the Sherman Act, despite direct, intentional anticompetitive effects, could violate the establishment clause.[124] The problem is further complicated by the need to define or identify religious as opposed to non-religious motives. A blanket immunity for religiously motivated conduct would necessarily include expressions of traditional religious beliefs, fad-faiths, as well as deeply felt and sincerely held atheistic beliefs. Any exemption of this magnitude would significantly undermine the antitrust laws.

THE REASONABLENESS OF A RELIGIOUSLY MOTIVATED BOYCOTT

The antitrust laws have not, as yet, been applied against a religious organization.[125] A recent suit,[126] brought by the owner of a religious publishing house to pursue a claim that the National Conference of Catholic Bishops and other church officials conspired in violation of the Sherman Act to prevent the publisher from selling an English translation of the Latin *Liturgia Horum*, compels the question of the antitrust laws' scope. The district court dismissed the suit,

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122. Chief Judge Gibson states in his dissent that the majority's holding was an "over-broad interpretation of *Noerr*," *id.* at 1319; that the factual distinctions (direct versus indirect restraint) mandated a "comprehensive balancing of the important governmental interest in preserving the free enterprise system with the interest of people to use this particular method of influencing legislation," *id.* at 1324. *See* Bird, *supra* note 13, in which the author argues that noncommercial boycotts should be *per se* violations under the Sherman Act. The district court addressed and rejected Bird's theory, failing to see how a *per se* rule would adequately protect the first amendment guarantees of freedom of association and the right to petition. Missouri v. NOW, 467 F. Supp. 289, 305 n.32 (W.D. Mo. 1979).

123. *NOW*, 620 F.2d at 1302-09.

124. *See infra* note 167.

125. Costello v. Rotelle, 670 F.2d 1035 (1981).

126. *Id.*

holding that the efforts of the Catholic officials to maintain the integrity of their liturgy by preventing the dissemination of an unauthorized and unapproved liturgical text were in furtherance of their ecclesiastical duties. The court found the antitrust law applicable "solely within a commercial competitive framework."[127] Any anticompetitive effect from the religious boycott was legally irrelevant.

The circuit court, however, overturned the lower court's decision, finding "no absolute exemption from the antitrust laws for economic pressure tactics . . . that are religiously motivated."[128] Although noting motivation to be an important consideration, the court held good motive cannot immunize action.[129] On remand, the trial court must balance the first amendment guarantee of free exercise of religion and the general communities' interest in conducting commerce free of anticompetitive arrangements.[130]

The circuit court rejected immunity at step 1 because of the tension between the free exercise clause and establishment ban. On remand the district court must determine the reasonableness of religiously motivated boycotts. Using a rule of reason standard, the court must review common law precedents where religiously motivated conduct has occasioned a restraint of trade.[131] Any conclusion as to liability must be made with two factors in mind. First, the reasonableness of the restraint must be viewed in light of the compelling public policy embodied in the Sherman Act. Secondly, justification of a religiously motivated anticompetitive effect cannot violate the establishment ban. Furthermore, the weighing of antitrust costs against religious benefits from concerted activities cannot itself run afoul of the ban against governmental entanglement in religious affairs.[132]

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127. Costello v. Rotelle, 1980-2 Trade Cas. (CCH) ¶ 63,499, at 76,664 (D.D.C. Aug. 22, 1980).

128. *Costello*, 670 F.2d at 1049.

129. *Id.*

130. *Id.*

131. As noted previously, *see supra* notes 34-38 and accompanying text, the legislative history of the Sherman Act indicates the common law was to provide the standard for ascertaining which business practices or combinations were unlawful under the Sherman Act. Accordingly, consideration of those cases in which religiously motivated action has affected a restraint of trade should guide the antitrust analysis.

132. *See, e.g.*, Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970) (excessive state involvement with religious affairs unconstitutional; accommodation of the establishment and free exercise clauses requires adherence to a policy of neutrality).

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Common Law Precedents for Religiously Motivated Restraints of Trade

The judiciary has shown considerable deference to religious groups whose actions have resulted in anticompetitive effects. An otherwise actionable common law restraint of trade has been justified if the defendant has acted with the purpose of protecting the spiritual well-being of its church. In *Krueger Publishing Co. v. Messmer*,[133] a 1916 Wisconsin decision, the court found no liability for a religiously motivated boycott. In *Krueger* most of the Catholic bishops of the state were joined as defendants as a result of their boycott of the plaintiff's newspaper. The plaintiff sued for injury resulting from a pastoral letter circulated and read in all of the churches of the dioceses describing the plaintiff's newspaper as injurious to faith and strongly proscribing its reading or possession.[134] Noting that the fundamental purpose of the boycott was to preserve the spiritual well-being of the church members, the court held any incidental interference with the plaintiff's business was "daumnum absque injuria."[135] But the court did add that it might have found otherwise if the church had purposefully interfered with the plaintiff's business with respect to something that ordinarily could not affect the faith of its members.[136] The decision implies a balancing of first amendment religion guarantees with freedom of trade.

The same result was reached in a secondary boycott case involving religious leaders as defendants. In *Watch Tower Bible & Tract*

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133. 162 Wis. 565, 156 N.W. 948 (1916).

134. The following is the portion of the pastoral letter complained of:

> Obedient to this apostolic command we hereby solemnly condemn the said Kuryer Polski, published in the city of Milwaukee, and the Dziennik Narodowy, published in Chicago, as publications greatly injurious to Catholic faith and discipline and falling under the rules and prohibitions of the Roman Index. Therefore, should any Catholics still dare in the face of this solemn warning to read or keep or subscribe to or write for the said Kuryer Polski and Dziennik Narodowy, as long as these papers continue their present course and attitude in ecclesiastical affairs, a matter to be decided by ourselves, let them know that they commit a grievous sin before God and the Church. Should any such Catholic dare to go to confession and communion without confessing or telling to the priest that they still read or keep or subscribe to the papers mentioned, let them understand that by such confession and communion they commit a horrible sacrilege. This solemn warning will also hold good in case that the aforementioned papers should in future be conducted under changed names though still in the same anti-Catholic spirit.

Id. at ___, 156 N.W. at 949.

135. "Harm without injury." *Id.*

136. *Id.*

Society v. Dougherty[137] the Catholic clergy organized protests threatening to boycott a department store which sponsored a radio broadcast found offensive by the church. As a result the station cancelled the plaintiff's contract and he sued. In a brief opinion the court held the defendants' action was legitimate as they were church leaders whose purpose was to protest attacks on the church.

In *Swan v. First Church of Christ Scientist*[138] the court dismissed an author's claim against the church arising out of the church's disapproval of his book on the Christian Science faith.[139] The court held the plaintiff's enterprise and that of the church had little or no resemblance to the activities recognized as unlawful restraints of trade.[140] Furthermore, the church's right to select its own ministers, advocates, authors and sacred writings was "absolute" as protected by the first amendment. *Swan* closely resembles *Costello*.[141] In both cases the church attempted to preserve the doctrinal integrity of its beliefs by boycotting the plaintiff's publication. It is uncertain whether the organizational tie between the Christian Science Church and its branches and reading rooms, absent in *Costello*,[142] is significant. If immunity from liability is predicated upon the non-commercial, religious purpose of the boycott, and any resulting interference with the plaintiff's business is irrelevant, the relationship between the parties should equally be irrelevant. The reasonableness of the restraint is a function of purpose, not effect.

One court has found liability based upon effect, irrespective of

137. 337 Pa. 286, 11 A.2d 147 (1940).

138. 225 F.2d 745 (1955).

139. The Church had notified its branch churches and Christian Science reading rooms not to purchase, acquire or sell the plaintiff's book.

140. *Id.* at 751.

141. *Costello v. Rotelle*, 670 F.2d 1035 (D.C. Cir. 1981).

142. The Catholic officials in *Costello* sent a memorandum to various independent retailers requesting they not purchase the accused book for resale. The memo did not explicitly threaten reprisals for rejecting the request, nor did it advocate a complete boycott of the plaintiff's other merchandise. In pertinent part, the letter from Father Rotelle to the retail distributors read:

> Costello Publishing Company has circulated a flyer with inaccurate and misleading information. . . . They are importing this book from Ireland into this country without the authorization of the local hierarchy of that country. . . . We have kindly asked the publishing firm in question not to distribute the book, but they insist on going against the decisive vote of the episcopal conference.

Brief of Appellants at 27, Costello v. Rotelle, 1980-2 Trade Cas. (CCH) ¶ 64, 352 (D.C. Cir. Nov. 10, 1981). In *Swan* the church officials expressly forbade their own branches and reading rooms to acquire, purchase, or sell the plaintiff's book.

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a religious purpose. In *Bear v. Reformed Mennonite Church,*[143] the Supreme Court of Pennsylvania reversed a lower court's dismissal of a suit against the church for interference with business relations. The plaintiff, a member of the church, alleged that after his excommunication his business was in a state of collapse because of the church's practice of "shunning."[144] The court held the shunning practices of the church might constitute an unreasonable interference with areas of paramount state concern such as business and commerce. The free exercise of religion was not an absolute defense where overt acts, though prompted by religious beliefs or principles, posed a substantial threat to public safety, peace or order.[145] The *Bear* court did not address the *Swan* case decided by it thrity-five years before, making unclear the relative importance of purpose and effect in establishing liability. *Swan* held religious purpose alone justifies non-imposition of liability. *Bear* suggests religious purpose will immunize anticompetitive conduct only within reasonable bounds. The test of reasonableness in *Bear* was that articulated by the Supreme Court in judging all free exercise claims.

The Reasonableness of Free Exercise Claims

In weighing free exercise claims against secular regulations the Court has adopted a "balancing approach."[146] Initially the Court held that the free exercise clause made only belief inviolate.[147] Religiously motivated action was held subject to the police power of the state to the same extent as other, non-religiously motivated action would be.[148] The Court narrowly read the free exercise clause as depriving Congress of all legislative power over mere opinion, but free to reach actions which were in violation of social duties or subversive of good

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143. 462 Pa. 330, 341 A.2d 105 (1975).

144. "Shunning," as practiced by the church, involved total boycotting of the plaintiff by other members of the church, including his wife and children, under pain that they themselves be excommunicated and shunned. *Id.* at ___, 341 A.2d at 106.

145. *Id.* at ___, 341 A.2d at 107.

146. Wisconsin v. Yoder, 406 U.S. 205 (1972). *See generally* R. MORGAN, THE SUPREME COURT AND RELIGION (1972); Giannella, *Religious Liberty, Nonestablishment, Doctrinal Development,* 80 HARV. L. REV. 1381 (1967); Kurland, *The Irrelevance of the Constitution: The Religion Clause of the First Amendment and the Supreme Court,* 24 VILL. L. REV. 3 (1978-79).

147. Reynolds v. United States, 98 U.S. 145 (1898) (the Court upheld a conviction under a criminal statute proscribing polygamy despite defendant's contention that polygamy was commanded by the religious doctrine to which he subscribed and thereby protected by the free exercise clause of the first amendment).

148. *Id.* at 164.

order.[149] The Court has since retreated from this belief-act distinction.[150] However, its behavior in what it labels freedom of religion cases has been described by one commentator as comparable to the ancient prerogative of dispensation pursuant to which the Crown could exempt individuals from conforming to the laws of Parliment, especially for reasons of religious belief[151]

Claims for religious-based exemptions have been made against a wide variety of laws, including driver's license photograph requirements,[152] compulsory education requirements,[153] tax laws,[154] unemployment insurance rules,[155] narcotic statutes,[156] civil rights statutes,[157] labor laws,[158] and snake handling prohibitions.[159] The Court has afforded protection for religious actions, as well as beliefs, but a compelling state interest will still justify imposition of a burden

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149. The Court found the statutory prohibition of polygamy not only compelling but vital to the very existence of a democratic society. The Court made reference to sociological studies indicating the practice of polygamy ultimately led to an autocratic society. *Id.* at 165-66.

150. *See infra* notes 152-59.

151. Kurland, *supra* note 146, at 17.

152. *E.g.*, Johnson v. Motor Vehicle Div., 197 Colo. 455, 593 P.2d 1363, *cert. denied*, 444 U.S. 885 (1979); Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc., 380 N.E.2d 1225 (Ind. 1978).

153. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); State v. Kasuboski, 87 Wis. 2d 407, 275 N.W.2d 101 (Ct. App. 1978).

154. *E.g.*, United States v. American Friends Serv. Comm. 419 U.S. 7 (1974) (withholding tax); Jaggard v. Commissioner, 582 F.2d 1189 (8th Cir. 1978), *cert. denied*, 440 U.S. 913 (1979) (self-employment tax).

155. *E.g.*, Sherbert f. Verner, 374 U.S. 398 (1963); Thomas v. Review Bd., 391 N.E.2d 1127 (Ind. 1979), *rev'd*, S. Ct. 1425 (1981).

156. *E.g.*, People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal Rptr. 69 (1964) (peyote); Town v. State *ex rel.* Reno, 377 So. 2d 648 (Fla. 1979), *appeal dismissed and cert. denied*, 101 S. Ct. 48 (1980) (marijuana).

157. *E.g.*, Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978) (claim that private school's racial discrimination on religious grounds was protected from civil rights action); Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975) (similar claim against federal funding cutoff).

158. *E.g.*, Catholic Bishop v. NLRB, 559 F.2d 1122 (7th Cir. 1977), *aff'd on other grounds*, 440 U.S. 490 (1979) (free exercise challenge to NLRB jurisdiction over lay teachers in parochial schools).

159. *E.g.*, State v. Massey, 229 N.C. 734, 51 S.E.2d 179, *appeal dismissed sub nom*, Bunn v. North Carolina, 336 U.S. 942 (1949) (denying religious defense to municipal ordinance prohibiting handling of venomous and poisonous reptiles as to endanger public health, safety, and welfare); State *ex rel.* Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976) (upholding, and justifying as abatement of public nuisance, injunction against snake handling by members of religious group).

upon the exercise of religion.[160] Though the case holdings seem inconsistent,[161] a rough composite test has emerged for balancing religious acts against secular regulations.

In considering free exercise claims a court must first determine if the government regulation creates a burden on the exercise of the plaintiff's religion,[162] assuming the belief espoused or acted upon is considered "religious"[163] and sincerely held by the person asserting the infringement. If a burden is found, the government must establish an interest of "sufficient magnitude to override the interest claiming protection under the free exercise clause."[164] The secular value underlying the regulation must be of the "highest order" and "overbalance" legitimate free exercise claims.[165] The impact of an exemption on the regulatory scheme and the availability of a less restrictive alternative are also considered.[166]

In weighing the interests, the court's assessment of the governmental interest appears to be the critical element, especially in light of the ever-changing and expanding concept of religion. A court must weigh the importance of the secular value involved, the proximity and necessity for the regulatory means to achieve it, and the cost of a

160. United States v. Lee, 102 S. Ct. 1051 (1982) (policies embodied in the Social Security and unemployment tax systems a compelling state interest which justified imposition of burden on exercise of Amish religion whose belief is paying taxes is a sin).

161. The result of the Court's balancing reveals that Mormons may be prosecuted for polygamy although it was mandated by their religion. *Reynolds*, 98 U.S. 145. On the other hand, the Amish may be exempted from compulsory education laws. *Yoder*, 406 U.S. 205. Adverse economic effects on seventh-day observers resulting from the state's requirement of absention from business affairs on Sunday are not invasions of religious freedom. Braunfeld v. Brown, 366 U.S. 599 (1961). But adverse economic effects on seventh-day observers from unemployment compensation laws requiring availability for employment are invasions of religious liberty. *Sherbert*, 374 U.S. 398. Most recently the Court has ruled that members of the Old Order Amish Church who operate businesses must pay the Social Security and unemployment taxes required of employers, despite their religious belief that paying taxes is a sin. United States v. Lee, 102 S. Ct. 1051 (1982).

162. "[I]t is necessary in a free exercise case to show the coercive effect of the enactment as it operates against . . . the practice of religion." School Dist. of Abington v. Schempp, 374 U.S. 203, 223 (1963).

163. The Court has significantly broadened the definition of religion as well as the scope of religious belief. *Compare* Davis v. Beason, 133 U.S. 333, 341-42 (1890) (to call advocacy of polygamy "a tenet of religion is to offend the common sense of mankind") *with* United States v. Ballard, 322 U.S. 78, 86-87 (1944) (unusual religious beliefs are not less worthy of protection).

164. *Yoder*, 406 U.S. at 214.

165. *Id.* at 215.

166. *Sherbert*, 374 U.S. at 407.

limited exemption for religious reasons. In the case of an economic interest the court must also consider the degree to which exemption would violate the non-establishment principles. If exemption does not merely relieve the religious practitioner from a burden on free exercise, but in essence becomes a preference advancing a particular religion or even religion in general, the exemption must be denied.[167]

The Probable Outcome of Costello v. Rotelle[168]

The Catholic defendants in the *Costello* case maintan that any application of the antitrust laws to their actions would deprive them of their first amendment right to freely exercise their religion. They argued that their actions had no commercially competitive motive and therefore were not proscribed by the Sherman Act, regardless of incidental anticompetitive effect.[169] In support of this argument the defendants relied upon *Parker*, *Noerr*, and *Allied International*.[170] In each case the court concluded that the defendants' actions were not subject to the Sherman Act. The court based its decisions not on a literal reading of the Act but from the purpose, the subject matter, the context, and the legislative history of the statute.[171] It should follow that the existence of a non-commercial, religious purpose coupled with a non-business status, manifesting a policy consideration of equal or greater force than the antitrust laws,[172] should mean the Sherman Act does not apply. Since the Church defendants are not commercial businessmen engaged in a traditional manufacturing enterprise, they should not be subject to antitrust scrutiny.

If, under a *Parker* or *Noerr* rationale, the Sherman Act proscribes

167. The broadest reading given the establishment clause would outlaw all aids to religion. Everson v. Board of Educ., 330 U.S. 1, 15 (1947). The narrowest reading would outlaw state action which tended to confer preferential benefits on particular sects or members of particular sects. *See* C. ANTREAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT 10-29 (1964).

168. *See supra* note 10. *See also supra* notes 125-132 and accompanying text.

169. Brief for Appellee at 17, Costello v. Rotelle, 1980-2 Trade Cas. (CCH) ¶ 64,352, 74,633 (D.C. Cir., Nov. 10, 1981).

170. *See supra* notes 11-13.

171. Brief for Appellee at 19.

172. In Zorach v. Clauson, 343 U.S. 306 (1952) (constitutionality of a state program making textbooks available to pupils in parochial schools upheld), Mr. Justice Douglas wrote:

> [W]e are a religious people. . . . We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. . . . When the state encourages religion . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.

Id. at 313-14.

only commercially motivated conduct by businessmen, direct injury to Costello and financial gain[173] to the Church, as a result of the boycott, should be irrelevant. The protected nature of the religious activity, regardless of possible underlying motives and actual effect, should preclude application of the antitrust laws. The basis for the Court's holding in *Noerr* was the nature of the railroad's publicity campaign as a form of protected expression.[174] Similarly, in *Parker*, the state as sovereign was not subject to liability.[175] Immunity from the Sherman Act was afforded irrespective of competitive injury. This result, a finding that the Act was inapplicable, was reached based upon the statutory construction of the Sherman Act, its legislative history, and constitutional considerations.

Status and purpose were constitutionally protected in *Noerr* and *Parker*. The church defendants argue that they are similarly protected. But the Supreme Court has never held that the free exercise clause protects all religious acts or conduct. Only belief is held inviolate. The church defendants contend that immunity is predicated not upon the religious motivation but on the lack of a commercial motivation. Defining religion and weighing the belief-act distinction would be necessary only to the extent necessary to prove a non-commercial motive. Such a narrow reading of the Sherman Act would significantly diminish its importance and effect, for there is no limit to the range of purposes a group might characterize as religious to promote their own competitive interests.

The Sherman Act is presumed applicable to all anticompetitive conduct except that constitutionally protected. Any exemption for religiously motivated conduct would, therefore, be contingent upon a finding of constitutional protection for the free exercise claim. Free exercise can be burdened where a governmental interest of the highest order overbalances the claim.

The Sherman Act has been characterized as an act of constitutional proportions.[176] Protection and promotion of competition in our free enterprise system is undoubtedly a compelling interest. The question then becomes whether the exercise of belief to be regulated by the antitrust laws poses a substantial threat to public safety, peace or order. Only the "gravest abuses, endangering paramount interests,

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173. *See infra* note 180.
174. *See supra* notes 101-23 and accompanying text.
175. *See supra* notes 68-80 and accompanying text.
176. *See supra* note 62 and accompanying text.

give occasion for permissible limitation" of religious practices.[177] The commercial harm to Costello must be found to be tantamount to a threat to public safety, peace or order.

In light of the Court's reluctance to find implied exemptions from the antitrust laws[178] and its willingness to limit religious conduct when an overriding interest is at stake, absolute immunity for a religiously motivated boycott seems implausible. At best, the religious nature of the boycott may provide a defense[179] to the Sherman Act liability. The success of a first amendment defense will depend upon whether the economic pressure tactics used by the church were legitimately geared to the Church's protection of the liturgy or its survival in the marketplace of books.[180] Even assuming the Church's activity was a legitimate expression of religious belief, the general community's interest in conducting commerce free of anticompetitive arrangements may justify a denial of their free exercise claim. This is true especially where less drastic means are available to the group.[181] Most importantly, the balance struck between the Sherman Act and the free exercise of religion cannot significantly encourage or discourage religious life.

CONCLUSION

An intent to infringe upon the first amendment free exercise of religion by the Sherman Act should not lightly be imputed to Congress.[182] Thus, the Sherman Act cannot mean precisely what it says. "[A]ll combinations in restraint of trade" must primarily refer to commercially motivated and not politically, socially, or religiously

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177. Sherbert v. Verner, 374 U.S. 398, 402 (1963).

178. *See, e.g.*, Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (exemptions "given reluctantly and only after there has been a clear showing of overriding need"). *Id.* at 138 n.34.

179. *See supra* note 54 and accompanying text.

180. As the copyright holder for approved, authorized liturgical texts, the Catholic Church officials receive royalties from their sale. If the boycott of the unauthorized text was to enhance the sales of the books from which they received royalties, rather than merely to preserve the integrity of the liturgy, their purpose is no longer religious but commercial (profit inspired).

181. The church officials could have communicated directly with their members admonishing the acquisition or purchase of the unauthorized, unapproved texts, rather than provoking a retail boycott of the publisher's text.

182. *Cf.* Parker v. Brown, 317 U.S. 341, 351 (1943) (congressional purpose to nullify or restrain a state's officers or agents not lightly to be imputed to Congress); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1960) (intent to invade the right to petition not lightly to be imputed to Congress).

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motivated groups. The legislative history of the Act evinces a clear intent to prohibit commercial combinations whose conduct restains trade. Whether Congress intended a non-commercial status and purpose to shield an actor from liability is less clear. Congress left to the judiciary the task of balancing policy conflicts under the Sherman Act.

In according antitrust exemptions the Court has considered the status and purpose of the actor in light of constitutional guarantees or compelling policy considerations. Where imposition of antitrust liability impermissibly burdens or virtually prohibits the protected conduct, the antitrust laws must give way. In the case of a religiously motivated boycott the constitutional guarantee of free exercise must be weighed against the interest of free and unfettered competition. However, the dual aspect of the religion guarantee strongly suggests that application of the antitrust laws would be appropriate. If liability under the Sherman Act is not tantamount to a virtual prohibition of the right of free exercise, it is constitutionally permissible. This is particularly true where the lawful purpose claimed by the defendants as their main one could have been achieved by other means at less cost to competition and at little or no cost to the defendants. To hold otherwise would impermissibly advance the exercise of a particular religion, thereby violating the establishment ban. Government may justify a limitation on religious liberty by showing that it is essential to the accomplishment of an overriding governmental policy or program. The need to maintain an organized society that guarantees religious freedom to all legitimizes this limitation on acts, not belief. Such a guarantee requires that some religious practices yield to the common good—free and unfettered competition.

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