A Market Power Test for Noncommercial Boycotts

Since the 1940's, the Supreme Court has declared that group boycotts are per se violations of section 1 of the Sherman Act.[1] Lower courts and commentators have criticized the per se rule, arguing that group boycotts are too broad and varied to deserve automatic condemnation.[2] In particular, critics argue that boycotts undertaken not for commercial or economic gain, but for social or political reasons should be exempt from the antitrust laws[3] or, alternatively, treated under the rule of reason.[4]

The Eighth Circuit responded to those suggestions in *Missouri v. NOW*,[5] and held a politically motivated boycott exempt from the Sherman Act.[6] The Supreme Court acknowledged the *NOW* decision in *NAACP v. Claiborne Hardware Co.*[7] and, using a political motive test, extended

1. *See* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659–60 (1961) (per curiam); Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959); Fashion Originators' Guild v. FTC, 312 U.S. 457, 467–68 (1941).

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), proscribes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." The Supreme Court has applied a "rule of reason" to most conduct challenged under § 1, invalidating only restraints whose anticompetitive potential outweighs any procompetitive justifications. *See* Standard Oil Co. v. United States, 221 U.S. 1, 63–66 (1911).

2. *See, e.g.*, Products Liab. Ins. Agency v. Crum & Forster Ins. Cos., 682 F.2d 660, 663 (7th Cir. 1982) (vertical boycott is per se illegal only if purpose is to fix prices); United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781, 787–89 (7th Cir. 1981) (en banc) (courts should not blindly apply per se rule to any conduct resembling a group boycott); United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1365–69 (5th Cir. 1980) (per se rule should not apply to conduct that results in greater efficiency); Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685 (1979) (suggesting a return to rule of reason for certain types of boycotts); McCormick, *Group Boycotts—Per Se or Not Per Se, That is the Question*, 7 SETON HALL L. REV. 703 (1976) (Supreme Court has failed to define "group boycott" and formulate per se rule adequately).

3. Comment, *Political, Social and Economic Boycotts by Consumers: Do They Violate the Sherman Act?*, 17 HOUS. L. REV. 775, 777 (1980); Note, NOW *or Never: Is There Antitrust Liability for Noncommercial Boycotts?*, 80 COLUM. L. REV. 1317, 1319 (1980).

4. Bauer, *supra* note 2, at 705; Comment, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131, 1154–61 (1980). For a third approach, see Note, *Joint Ventures and Boycotts: Some Suggestions on Per Se*, 15 STAN. L. REV. 638 (1963). That approach views the per se rule as shifting the burden of proof to the defendant. The defendant could argue that the challenged practice generally promotes efficiency and therefore deserves treatment under the rule of reason, or that application of the antitrust laws would conflict with other legislative policies. *Id.* at 640.

5. 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980). The National Organization for Women (NOW) organized a convention boycott against Missouri in order to pressure that state's legislature to ratify the Equal Rights Amendment. The state, suing as *parens patriae*, sought to enjoin the boycott as an illegal restraint of trade.

6. The court did not rest its decision on the boycott's noncommercial purpose, but relied solely on the right of petition. *Id.* at 1315 n.16.

7. 102 S. Ct. 3409, 3426 n.48 (1982).

First Amendment protection to a boycott organized by a local NAACP chapter against white-owned businesses.[8]

This Note argues that the *NOW* and *NAACP* courts' approach to political boycotts is seriously flawed. Furthermore, courts should adopt an economic effects test rather than a political motive test. The Note therefore proposes a market power test for "political" and other vertical boycotts. Such a test would invalidate only boycotts that harm consumers in the aggregate and would do so without endangering the interests of political and social minorities.

I. Political Motivation Should Not Confer Legality

A. *Boycotts Defined*

The term "boycott" refers to a wide spectrum of activities that vary greatly in collusiveness and coerciveness. Protection of competitive and First Amendment values necessitates defining those boycotts that raise clear antitrust issues and those that raise clear First Amendment issues. The degree of overlap will determine the difficulty of constructing a meaningful antitrust standard.

In determining whether an antitrust violation has occurred, courts should conclude that a simple plea not to purchase a product, coupled with reasons why the speaker finds the product or its manufacturer objectionable, is not a boycott, nor is the individual consumer's response a boycott. First Amendment law and economics agree completely on this issue. The speaker or group of speakers that urges consumers not to buy a product adds to the available information about the product or its manufacturer. The First Amendment ensures the free dissemination of such information.[9] Similarly, economic theory recognizes the importance of information in allocating goods to their most valued uses.[10]

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8. *Id.* at 3425. In March 1966, a group of black citizens presented to the public officials of Port Gibson, Mississippi, a list of "Demands for Racial Justice" that the local NAACP chapter had adopted. It received no favorable response, and the local NAACP voted to impose a boycott on local white merchants. On October 31, 1969, a number of the affected merchants filed a suit in state court for damages and an injunction. *Id.* at 3413.

The trial court held the NAACP liable on three separate grounds: a tort claim, Mississippi's secondary boycott statute, and the state antitrust statute. The Mississippi Supreme Court reversed on all but the tort claim. *See* NAACP v. Claiborne Hardware Co., 393 So. 2d 1290 (Miss. 1980), *rev'd*, 102 S. Ct. 3409 (1982). The United States Supreme Court held that the First Amendment precluded any liability. 102 S. Ct. at 3427.

9. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (societal interest in free flow of commercial information mandates First Amendment protection for advertising); *see also* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising.").

10. In *Virginia Pharmacy Board*, the Court noted that accurate price information "is indispensable to the proper allocation of resources in a free enterprise system." 425 U.S. at 765. For this reason, the distinction between the mere dissemination of information and active collusion is important to antitrust law. *See* United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978) (ex-

An economically deleterious boycott, by contrast, includes an explicit agreement not to patronize or uses the prospect of physical or economic harm to force potential purchasers not to buy the targeted product. Both tactics take the place of free choice, thus harming allocative efficiency. A "political" boycott may incorporate one or both of these tactics. By voting in favor of a resolution directing their organization to cease holding conventions in Missouri, the members of NOW made an explicit agreement not to deal.[11] The *NAACP* plaintiffs alleged that boycott "enforcers" used intimidation and violence to induce blacks not to enter white-owned stores.[12]

The First Amendment mandates caution in inferring agreement when individuals or groups engage in a boycott.[13] Similarly, when deciding whether a group coerced consumers not to buy a product, the courts must be careful not to attach liability to ambiguous acts that may fall within the protection of the First Amendment.[14] The courts must apply narrow definitions of "agreement" and "coercion," but when they find either, they should subject the activity to antitrust scrutiny.

B. *Economic Effects of Political Boycotts*

Using a motive test[15] to determine the legality of a boycott ignores eco-

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change of price data among competitors may enhance efficiency and thus is not per se illegal); R. POSNER, ANTITRUST LAW 136 (1976) ("In general, the more information sellers have about the prices and output of their competitors the more efficiently the market will operate.").

11. A boycott by a group such as NOW also raises questions of freedom of association. This Note will conclude, based on the rule of United States v. Colgate & Co., 250 U.S. 300 (1919) (individual manufacturer may refuse to deal with anyone for any reason except to monopolize), that a boycott by an individual group should be presumptively valid. *See infra* p. 539. An intergroup agreement would trigger limited antitrust scrutiny, but such a restriction on the freedom of association serves a vital governmental interest. *See infra* pp. 532–33.

12. The *NAACP* boycott was enforced through a variety of coercive measures, including threats by NAACP leaders to "discipline" violators, NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409, 3420 (1982), posting of "store watchers" outside targeted stores, *id.* at 3421, publication of violators' names in a community newspaper, *id.*, and occasional violent reprisals against violators, *id.* at 3421–22.

13. *See* Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 659 (1978). That Note would require an antitrust plaintiff to prove that each defendant explicitly agreed to boycott. *Id.* at 689. Such a standard, however, would virtually preclude liability. Comment, *supra* note 4, at 1161–64. Courts must have the freedom to draw reasonable inferences. *Id.* at 1162 n.162.

14. *See* NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409, 3424 (1982) (speech does not lose its protected character simply because it may embarrass others or coerce them into action). Thus, a court should require proof of a credible threat of physical or economic harm. Labor law similarly draws a line between speech and coercion. An employer may, for example, publicize his opposition to unionization but may not threaten to respond to unionization with reprisals. NLRB v. Gissel Packing Co., 395 U.S. 575, 618–19 (1969).

15. The *NOW* court drew support for a motive test from dictum in Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 213 n.7 (1959), stating that the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." *See* Missouri v. NOW, 620 F.2d 1301, 1310–11 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980). That dictum is both analytically and historically inaccurate. Labor's experience with the antitrust laws demonstrates the Supreme Court's determination to

nomic effects and may impair competition. It is not true, despite the claim of some commentators,[16] that political motives will generally preclude anticompetitive results. Any successful boycott uses economic pressure to harm or bankrupt a merchant who was efficiently satisfying consumers' needs.[17] Even if the instigator does not seek a competitive advantage for himself, he may harm competition in the market in which the targeted business operates.[18] The magnitude of the harm depends on the structure of that market.[19]

A political boycott harms consumers generally if it harms competition in the target's market. A political boycott exemption, therefore, does not simply permit groups with political grievances to offset the superior economic power of businesses that are on the opposite side of a political dis-

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apply the Sherman Act to all restraints of trade. *See* Loewe v. Lawlor, 208 U.S. 274, 301 (1908) (unions not engaged in interstate commerce not exempt from Sherman Act). Labor's freedom to boycott derives from specific congressional mandates, *see* 15 U.S.C. § 17 (1982); 29 U.S.C. §§ 101–115 (1976), and not from a noncommercial purpose. Although some read Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), to allow an inquiry into the purposes of union activities, *see NOW*, 620 F.2d at 1311; *Klor's*, 359 U.S. at 213 n.7, that opinion actually seems to separate those activities that may tortiously interfere with business activity (e.g., violent strikes), from recognized antitrust offenses such as boycotts. *See Apex Hosiery*, 310 U.S. at 505–06 (distinguishing strikes from boycotts and noting that Supreme Court has regularly invalidated latter). The Court's antitrust decisions outside the labor area display a similar reluctance to use intent tests. *E.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975) (learned professions subject to Sherman Act despite public service objectives); United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 489 (1950) (price fixing illegal even if it "serves an honorable or worthy end").

16. *See, e.g.*, Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705, 747 (1962) (noncommercial purpose is frequently evidence that harm to competition is "insubstantial"); Comment, *supra* note 4, at 1153 (effects on competitive conditions will "almost always be incidental").

17. *Cf.* R. BORK, THE ANTITRUST PARADOX 332 (1978) (discussing *Klor's* case):

> If the decision is to find justification in antitrust terms, it must be because the boycott contained, so far as we can tell, no possibility of efficiency and did deprive consumers of an outlet they had shown they wanted. To remove Klor's artificially was to move the distribution pattern further from the optimal.

18. Both Posner and Bork argue that a boycotter will not risk harming competition in a vertically adjacent market for fear of facilitating the creation of a monopoly that will in turn raise its price to the boycotters. *See* Products Liab. Ins. Agency v. Crum & Forster Ins. Cos., 682 F.2d 660, 664 (7th Cir. 1982) (Posner, J.); R. BORK, *supra* note 17, at 332. Posner argues that boycotts by themselves are not anticompetitive; only those that seek to enforce anticompetitive practices violate the Sherman Act. R. POSNER, *supra* note 10, at 208.

Those arguments are inapplicable to political boycotts. A genuinely political boycott lacks an economic profit motive. As a result, the boycotters are indifferent to anticompetitive effects in the target's market. They will regard any resultant price increase as a cost of achieving their political goal, even though other consumers may not wish to bear that cost. These factors do not suffice to prove harm to competition in all cases, but they demonstrate the inaccuracy of presuming that such harm cannot ensue.

19. If the market is fragmented, the boycott will probably not harm competition. Removing one competitor from a highly competitive market, while technically inefficient, will frequently not affect price competition. *See Products Liab. Ins. Agency*, 682 F.2d at 663–64 (Posner, J.). If the market is highly concentrated, however, the boycott—like any predatory behavior—may be very anticompetitive. *Cf.* R. BORK, *supra* note 17, at 157 (successful predation may be possible if predator has over half the relevant market). Posner also recognizes that certain vertical boycotts can harm competition. *Products Liab. Ins. Agency*, 682 F.2d at 663.

pute. Rather, it favors the welfare of an interest group over the welfare of consumers in the aggregate. The Sherman Act is relevant to a boycott to the extent the boycott harms consumers. Rather than concentrating on the market effect of a boycott, however, the courts have chosen to focus on the motives behind it. Their use of a motive inquiry in an area for which it is ill suited[20] has produced a confused doctrine that fails to prevent anticompetitive boycotts, and may even encourage businesses to use them.

The *NOW* and *NAACP* decisions used a motive test that is particularly susceptible to abuse by businesses seeking anticompetitive ends. Both the *NOW*[21] and *NAACP*[22] courts decided that the boycotts before them were a form of petition protected by the *Noerr-Pennington* doctrine.[23] Under *Noerr*, neither anticompetitive motives nor anticompetitive results would support antitrust liability for an activity protected by the right of petition.[24] Thus the *NOW* and *NAACP* decisions implicitly validate a large set of anticompetitive boycotts. If business groups can petition the government regardless of anticompetitive results, and if boycotts are a legitimate form of petition,[25] then commercial groups may freely use boycotts to in-

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20. *See infra* note 32.

21. 620 F.2d at 1312–16. Commentators have criticized the Eighth Circuit's reliance on Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961), in ignoring the differences between boycotts and other petition activity. *See* Cockerill, *Application of* Noerr-Pennington *and the First Amendment to Politically Motivated Economic Boycotts:* Missouri v. NOW, 13 LOY. L.A.L. REV. 85, 105–07 (1979); Comment, *supra* note 4, at 1136–40; Note, *supra* note 3, at 1322–23. In addition, the *NOW* opinion overlooks the fact that *Noerr* was meant to permit *businesses* to petition. By broadening the definition of "petition," the *NOW* and *NAACP* courts necessarily gave some protection to politically motivated boycotts by commercial groups.

22. 102 S. Ct. at 3426.

23. *See Noerr*, 365 U.S. 127. In *Noerr*, railroads waged a publicity campaign for anti-trucking legislation for anticompetitive purposes. UMW v. Pennington, 381 U.S. 657 (1965), expanded the *Noerr* result to concerted attempts to influence any government officials.

The Court's opinion in *NAACP* rested on the First Amendment. 102 S. Ct. at 3427. That broad holding was necessary, however, because a state tort claim was technically the only claim remaining before the Court. *Id.* at 3416. The Court still used *Noerr* to shield the boycott from economic regulation. *Id.* at 3426.

24. *Noerr*, 365 U.S. at 136, 138–39.

The precise boundaries of the *Noerr-Pennington* doctrine are a subject of debate. *See* Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. CHI. L. REV. 80 (1977) (courts should exempt only activity protected by right of petition); Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 HARV. L. REV. 715 (1973) (courts should refuse to apply *Noerr-Pennington* to concerted litigation when action is groundless or judgment ostensibly sought is not the real objective). The general trend just prior to *NOW* was a gradual tightening of the *Noerr-Pennington* exemption. *See, e.g.*, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 400 (1978) (exclusion covers only antitrust enforcement that severely impinges upon fundamental national policies); California Motor Transp. v. Trucking Unltd., 404 U.S. 508, 513 (1972) (applying sham exception).

25. Using *Noerr* as the primary vehicle for protecting political boycotts creates the additional possibility that the courts' desire to protect a wide range of consumer boycotts will lead them to expand *Noerr* to cover other types of speech besides petition. This would result in a heightened protection for speech and association in the commercial context, even when competition may suffer as a result.

fluence the government.[26] Such groups could significantly increase the anticompetitive effects resulting from such petitioning by boycotting local merchants to pressure governmental officials directly—a tactic used in both *NOW* and *NAACP*.[27] Under the *NOW* doctrine, the defendants in *Noerr* could have gone so far as to refuse to ship the goods of any merchant who would not agree to lobby his state government for antitrucking legislation. Such an expansive definition of "political" boycotts would permit considerable predatory business behavior.[28]

The *NOW* and *NAACP* decisions embarked on a dangerous course by applying *Noerr* to a coercive activity. Expanding the *Noerr-Pennington* doctrine beyond such forms of petition as speech and the distribution of literature makes boycotts particularly attractive to would-be monopolists. Adding boycotts to the valid forms of petition expands a producer's opportunities to manipulate the discretion vested in government officials and agencies to achieve anticompetitive ends.[29] While courts theoretically will

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The Burger Court has broadened First Amendment protection of corporate speech. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (state may not require electric utility to cease advertising to promote consumption of electricity); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (state may not prohibit corporate expenditure to express views on referendum). Such protection, however, must be based on the First Amendment, not the *Noerr-Pennington* doctrine; otherwise, the latter may shield from the antitrust laws some activity that is not protected by the First Amendment. Fischel, *supra* note 24, at 94.

26. For example, in Crown Cent. Petroleum Corp. v. Waldman, 486 F. Supp. 759, 763–69 (M.D. Pa.), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980) (mem.), the court extended protection under *Noerr-Pennington* to a concerted closing of gas stations because it was intended to protest federal energy policy.

27. It is unlikely that a boycott would directly target a governmental agency. Opportunities to put pressure on a state through its industries, however, are plentiful, as both *NOW* and *NAACP* show.

28. It is not difficult to find a "political" dispute in a business context, as *Noerr* demonstrates. One consequence of the scope of modern governmental regulation is that most significant business decisions are subject to some regulatory limitations. Thus, by changing the focus of disagreement from the decision itself to the regulatory context, as in *Noerr*, a competitor can easily create a colorable "political" dispute to justify nearly any predatory behavior.

Indeed, the Court recently refused to broaden the scope of permissible commercial speech because of a similar concern. In Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 581 (1980) (Stevens, J., concurring), Justice Stevens suggested that the First Amendment should protect promotional advertising relevant to a current political issue. The majority, however, felt that such a doctrine would blur the distinction between commercial and political speech. "[M]any, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety." *Id.* at 562–63 n.5.

29. Misuse of governmental processes is a common and effective form of monopolization. *See* R. BORK, *supra* note 17, at 347–64. Business groups have used federal safety, environmental, and other regulations to protect existing firms from competition. *See, e.g.*, B. ACKERMAN & W. HASSLER, CLEAN COAL/DIRTY AIR 31 (1981) (Clean Air Act requirement of scrubbers for all new coal-burning power plants inspired in part by producers of high-sulfur coal seeking competitive advantage over producers of low-sulfur coal); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (analyzing output of regulators in terms of industry demand for beneficial regulation and regulators' supply of same).

A business group could use the expanded right of petition as an important step in manipulating government officials. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), provides an example. When the defendant electric utility's exclusive franchises for several towns expired, the towns attempted to establish municipal distribution systems. *Id.* at 371. Otter Tail refused to sell power at

not apply *Noerr* where the activity "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor,"[30] the sham exception remains weak and confused.[31] Protecting competition against boycotts requires a more fundamental doctrinal revision.

The *NOW/NAACP* approach follows the *Noerr* sham exception by using a motive test to determine the legality of a boycott. This focus on the motives behind the boycott is inadvisable, however, because any inquiry into subjective motivations is inherently imprecise, and will produce costly mistakes.[32] An attempt to reduce these error costs cannot succeed completely,[33] and will require an intrusive examination into the sincerity of the boycotting group's political convictions.

A consistent exemption for noncommercial boycotts must tolerate any motive other than the desire for monopoly profit.[34] This leaves a vast area

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wholesale or use its lines to "wheel" power from other wholesale sellers to the municipal systems, thus making the cost of such systems prohibitively high. *Id.* at 371–72. By successfully "petitioning" the town governments through a boycott, Otter Tail gained a governmentally protected monopoly for 10 to 20 years. *See id.* at 369.

30. *Noerr*, 365 U.S. at 144.

31. *See* Fischel, *supra* note 24, at 104–06 (identification of "sham" arrangements plagued by confusion); *see also supra* note 28 (in a highly regulated society, producer can easily inject a plausible political objective into most business decisions). In addition, even an analytically rigorous sham exception would not guard against commercial boycotts sincerely intended to influence government action.

32. The same problems arise in any branch of the law that requires a motive inquiry, such as criminal or antidiscrimination law. The reasons for tolerating those costs, however, are inapplicable to antitrust.

Courts traditionally require proof of criminal intent for crimes derived from the common law. *See* Morissette v. United States, 342 U.S. 246, 250–63 (1952). That requirement reflects a view that only a malicious will deserves societal condemnation. No such requirement exists, however, for "public welfare" statutes, which seek primarily to regulate, not to stigmatize. *See id.* at 252–56.

A closer analogy to an "anticompetitive intent" standard is the "discriminatory intent" standard announced in Washington v. Davis, 426 U.S. 229 (1976) (statute or other official act violates equal protection clause only if purpose to discriminate is shown). But that standard applies only to official conduct challenged on equal protection grounds. *Id.* at 247–48. Furthermore, critics have argued that the discriminatory intent standard subverts the process of attaining racial equality. *See, e.g.*, Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 557–58 (1977) (social and economic disadvantages create potential for facially neutral laws to disproportionately burden blacks); Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328, 349 (1982) (intent standard has "ominously restricted the capacity of disadvantaged minorities to vindicate constitutional rights").

A detailed inquiry into the cause of animosity between the boycott organizers and their victims would severely undercut Sherman Act enforcement. Even the intent test contemplated in *Washington v. Davis* is less subjective than an inquiry into the sincerity of political motives. "It is unrealistic . . . to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker . . . ." Washington v. Davis, 426 U.S. at 253 (Stevens, J., concurring).

33. There are two types of error costs involved: e_1 (political boycotts held economic), and e_2 (economic boycotts held political). The magnitude of each depends on whether the courts will accept any political motive, however ancillary, or will validate only boycotts whose primary goal is political. The former test produces a large e_2; the latter both produces a large e_1 and creates a risk of arbitrary results, *cf. infra* p. 531 (discussing judicial discretion). If the First Amendment requires that e_1 be reduced to zero, the price will be an extremely high e_2.

34. An antitrust exemption for politically motivated boycotts must derive either from the antitrust laws themselves, *see* Coons, *supra* note 16, at 707 (political boycotts outside "traditional market mi-

where commercial and political objectives overlap. A dispute among businessmen may include substantial disagreements over moral, social, or political issues.[35] A practice that seems smart and competitive to its originator may seem unfair, illegal, or contrary to public policy to rival merchants.[36]

Moreover, political disputes may involve the opportunity for economic gain. The *NAACP* boycott sought increased hiring of blacks—an "economic" objective[37]—and a number of the boycott organizers were partial owners of a grocery and clothing store that profited greatly from the boycott.[38] Even if no political dispute exists ex ante, the boycotters can easily invent one if litigation ensues. Finally, the analysis of intent is especially problematic if the defendant is an organization like the NAACP or a business corporation rather than a solitary individual.[39] Any large institution is a battleground for competing interests,[40] and the difficulty of ascribing a "motive" to an institutional actor further complicates an exception for political boycotts.

Limiting the exemption to political boycotts by consumers, as some commentators advocate,[41] would decrease but not eliminate uncertainty and mistakes.[42] No bright line clearly separates producers from consum-

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lieu" that is concern of antitrust laws), or the First Amendment, *see* Note, *supra* note 3, at 1331 (political boycott exemption may further First Amendment rights). But the only motivation objectionable on antitrust grounds is the desire to gain a monopoly profit. Similarly, a person's rights under the First Amendment to express his views, through a boycott or otherwise, cannot turn on the content of the views expressed. Police Dep't v. Mosley, 408 U.S. 92 (1972) (First Amendment does not permit regulation of expression based on message, ideas, subject matter, or content). Thus, any exemption must cover boycotts motivated by any political, social, or public policy concerns, or by plain animosity—in short, anything other than the desire for monopoly profits.

35. *See, e.g.*, Young v. Motion Picture Ass'n, 299 F.2d 119 (D.C. Cir.) (refusal to hire "communist" screenwriters and actors), *cert. denied*, 370 U.S. 922 (1962); Konecky v. Jewish Press, 288 F. 179, 180 (8th Cir. 1923) (instigation of concerted refusal to deal by one newspaper publisher against another allegedly motivated by "personal malice"); Hughes Tool Co. v. Motion Picture Ass'n, 66 F. Supp. 1006 (S.D.N.Y. 1946) (association of film producers and distributors pressured exhibitors to show only films bearing association's "seal of approval" awarded to morally inoffensive films and advertisements).

36. *See* Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247, 264-66 (illustrating with cases the difficulty of distinguishing between boycotts for economic advantage and ones that aim to prevent unfair or illegal trading practices).

37. NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409, 3419 (1982). For a detailed listing of the NAACP's demands, see NAACP v. Claiborne Hardware Co., 393 So. 2d 1290, 1295-96 (Miss. 1980), *rev'd*, 102 S. Ct. 3409 (1982).

38. Brief of Respondents at 45, NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409 (1982).

39. *See* Note, *supra* note 32, at 336 ("The subjective intent of corporate bodies is at best a nebulous concept . . . .").

40. *See* Starr, *Accommodation and Accountability: A Strategy for Judicial Enforcement of Institutional Reform Decrees*, 32 ALA. L. REV. 399, 402-03 (1981) (many operational practices of a large organization result from accommodation of competing interest groups).

41. *See* Note, *supra* note 3, at 1319 n.16 (consumers with political motives may use boycotts).

42. In addition, such a test might not pass constitutional scrutiny. The Burger Court has narrowed the gap between the political rights of corporations and individuals, *see* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (state may not prohibit corporate expenditure to influence opinion on referendum), and has disallowed many legislative restrictions on the political and social benefits which

ers. Many non-profit and non-commercial groups affect commerce,[43] and such groups may receive money and support from businesses.[44] More important, any right to use political boycotts keeps the emphasis on subjective motivations rather than market effect.

Any rule exonerating political boycotts will encourage a boycotting group or a potential monopolist to emphasize political motivations and conceal commercial ones,[45] and an ambiguous definition of "political" boycotts will make it difficult for a court to avoid mistakes. The imprecision of a motive test, moreover, leaves a court with considerable discretion and little guidance. If an antitrust case is transformed into a contest between competing moral standards, the judge is left with only her own moral values and policy preferences to shape her decision. This creates a risk that the definition of "political" will turn in part on the popularity or orthodoxy of the group and its cause.[46] In addition to threatening the rights of minorities directly, a vague, discretionary standard hurts all consumers by drastically broadening the category of boycotts that a court might find valid, and thereby increasing the probability of anticompetitive effects.

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wealth can purchase, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-56, at 1134–35 (1978). While there are some political rights that individuals possess exclusively, such as the right to vote, the Court might be unwilling to deny a powerful economic and expressive tool such as the boycott to corporations while providing it to individuals.

43. Examples are trade associations and other non-profit groups composed of businessmen or professionals. The courts routinely invalidate boycotts used to pursue what these groups regard as sound public policy. *See* National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978) (ban on competitive bidding); American Medical Ass'n v. United States, 317 U.S. 519 (1943) (refusal to cooperate with group prepaid health plan).

The actions of groups of private citizens working for the public welfare may also restrain trade. *See* American Mercury, Inc. v. Chase, 13 F.2d 224 (D. Mass. 1926) (private organization scrutinized publications looking for violations of law and threatened publishers of offending works with prosecution); Community Blood Bank v. FTC, 405 F.2d 1011 (8th Cir. 1969) (private voluntary association refused to use blood that had been purchased from donors).

44. *See NAACP at Crossroads: Time for a New Direction?*, N.Y. Times, June 21, 1983, at A19, col. 1 (most of NAACP's funding comes from corporations and foundations). For a detailed description of the economic aspects of political and other non-profit associations, see Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980).

45. For example, in National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 684–85 (1978), a professional society attempted to justify a rule forbidding competitive bidding by claiming that price competition among engineers endangered the public safety. That claim is typical of "public policy" considerations raised by professional associations in defense of anticompetitive ethical rules. *See, e.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773, 786 (1975) (bar association claimed minimum fee schedule furthered profession's public service objectives); United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 488 (1950) (code of ethics required that all real estate brokers charge standard commission).

46. This flaw is even more pronounced in proposed tests that more readily afford protection to a boycott if its goals correspond to a "specific object of policy." Coons, *supra* note 16, at 749. Minorities who seek to change the social or political status quo would probably not pass such a test. *See* Comment, *Political Boycotts and the Sherman Act*, 32 BAYLOR L. REV. 617, 627 (1980); *see also* Note, *supra* note 13, at 661–62 (1978) (ad hoc balancing test too dependent on shifting ideologies).

C. *Boycotts and the First Amendment*

Boycotts not only are objectionable on grounds of efficiency, but also deserve less First Amendment protection than other protest activities. While boycotts may contain elements of speech,[47] association,[48] and petition,[49] they also introduce collusive economic pressure into political disputes.[50] A truly effective boycott succeeds not by persuading, but by forcing a choice between political capitulation and economic bankruptcy.[51] The claim that political boycotts are a form of protected speech therefore possesses little merit.[52] The category of protected political speech is broad, but the most vigorous arguments, exhortations, and threats still allow the target more freedom than does direct economic pressure. The former can promise only adverse publicity, embarrassment, or ostracism; the latter holds the victim's very livelihood hostage until he changes his political position. However laudable the goals behind a boycott, courts should not allow a private group to dictate who will have access to the market and on what terms.

The confusion between economic coercion and protected speech is unnecessary; it is possible to draw a line between them that does not unduly infringe First Amendment rights. Indeed, Congress and the Supreme Court have already done so for labor boycotts. The Court has held that the First Amendment protects peaceful picketing and distribution of literature to publicize a labor dispute.[53] At the same time, however, Congress has prohibited labor unions from using secondary boycotts[54]—even those

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47. *See* Note, *supra* note 3, at 1331–36.

48. *See id.* at 1339.

49. *See id.* at 1337–38.

50. *See* Kennedy, *Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests*, 55 S. CAL. L. REV. 983, 1008 (1982) (boycott is a means of altering behavior without engaging in reasoned persuasion to secure voluntary compliance; government has clear interest in regulating that coercive aspect).

51. A boycott operates with respect to its target in a manner wholly unrelated to speech. The Supreme Court has recognized the distinction between speech and economic coercion implemented through speech. *See, e.g.*, NLRB v. Gissel Packing Co., 395 U.S. 575, 618–19 (1969) (distinguishing between employer's objective prediction of consequences of unionization and threats of retaliation); Thomas v. Collins, 323 U.S. 516, 543–44 (1945) (Douglas, J., concurring) ("once [one] uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment").

52. A political boycott may, of course, include speech, but the economic and speech components can be separated. *See infra* pp. 532–33 (arguing that such separation has occurred in the labor boycott area). Even if the separation is imperfect, the rule announced in United States v. O'Brien, 391 U.S. 367 (1968), should validate regulation of economic activities (such as boycotts) that incidentally infringes on political speech. The Court in *O'Brien* allowed regulation of symbolic speech that advanced an important governmental interest unrelated to the suppression of speech. *Id.* at 377. For an excellent treatment of the First Amendment issue in boycott cases, see Comment, *supra* note 4, at 1144–48.

53. Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940).

54. Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(ii)(B) (1976); *see also* NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607, 616 (1980) (plurality opinion) (§ 8(b)(4)(ii)(B) does not violate First Amendment).

imposed purely for political reasons.[55] Congress did so to restrict the scope of labor conflict,[56] and the Sherman Act should similarly limit the scope of political boycotts in order to protect all consumers. More generally, the Supreme Court has permitted regulation of speech if that speech, regardless of content, unduly interferes with the rights of others.[57] A boycott, of course, interferes not only with the economic right to make independent business decisions but also with the political right to choose freely which causes to support and which not to support.

Congressional regulation of "political" boycotts is similarly justified as a protection of the political process itself. Congress regularly applies restraints to political activities to ensure fairness. It has, for example, passed laws controlling the conduct of election campaigns,[58] forbidding intimidation or coercion of voters,[59] and prohibiting lying before government officials.[60] Regulation of political protest to prevent economic coercion seems equally valid—and necessary to protect the integrity of the legislative process.

Finally, boycotts can suppress political dissent as well as express it.[61] Side by side with the *NAACP* and *NOW* boycotts stand the motion picture industry's boycott of screenwriters and actors suspected of communist leanings,[62] and the refusals of some Southern merchants to sell to blacks who registered to vote.[63] A commitment to civil liberties does not unambiguously determine the proper reach of the Sherman Act.[64]

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55. *See, e.g.*, International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982) (refusal to handle cargo bound to or from Soviet Union to protest invasion of Afghanistan).

56. Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 100 (1958) (Congress "aimed to restrict the area of industrial conflict" by prohibiting coercion of neutral employers).

57. Comment, *supra* note 4, at 1147 (citing, inter alia, Rowan v. Post Office Dep't, 397 U.S. 728 (1970) (Congress may prohibit vendor from mailing advertisements to any individual who requests that his name be removed from mailing list)).

58. *See, e.g.*, 18 U.S.C. § 597 (1976) (making or soliciting expenditure to any person to influence that person's vote illegal); *id.* § 600 (promise of government employment in return for political activity illegal).

59. 18 U.S.C. § 594 (1976).

60. 18 U.S.C. § 1621 (1976).

61. *See, e.g.*, I.P.C. Distribs. v. Chicago Motion Picture Mach. Operators Union, 132 F. Supp. 294 (N.D. Ill. 1955) (concerted refusal of projectionists' union to show allegedly communist film); Council of Defense v. International Magazine Co., 267 F. 390 (8th Cir. 1920) (boycott of Hearst publications to protest William Randolph Hearst's allegedly pro-German sympathies).

62. *See* Young v. Motion Picture Ass'n, 299 F.2d 119 (D.C. Cir.), *cert. denied*, 370 U.S. 922 (1962); Note, *"Political" Blacklisting in the Motion Picture Industry: A Sherman Act Violation*, 74 YALE L.J. 567 (1965).

63. *See* United States v. Beaty, 288 F.2d 653 (6th Cir. 1961) (per curiam).

64. Comment, *supra* note 4, at 1134 n.20. One might argue that the boycotts described above are atypical. Boycotts should theoretically be most useful to a cohesive minority that can exploit its low organizational costs and the intensity of its political preferences to achieve success out of proportion to its numbers. *Cf.* A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 55–60 (1957) (demonstrating how coalition of minorities with strong preferences can defeat majority with weak preferences). It is also true, however, that the intensity of certain majority beliefs, such as racial prejudice, has sustained prolonged refusals to deal. Indeed, discrimination against blacks and women has proceeded largely

II. Alternative Approaches to Boycotts

A. *The Economics of Boycotts*

This Note has argued that the commercial/political distinction may fail to prevent the anticompetitive effects of a boycott. Instead, courts should classify boycotts according to the horizontal or vertical nature of the restraint. A per se rule is appropriate for horizontal boycotts, but not for vertical boycotts. A market power test for vertical boycotts—the category into which political boycotts fall—would protect economic competition while providing adequate safeguards for political rights.

1. *Horizontal Boycotts*

In a horizontal boycott, the instigators compete, or seek to compete, with the target. The instigators usually coerce or convince an intermediate victim to discontinue commercial dealings with the target. Thus, in *Fashion Originators' Guild v. FTC*,[65] a trade association of dress designers threatened to boycott retailers (the intermediate victims) unless the latter refused to purchase dresses from the targeted designers. Groups of retailers achieved similar results in *Klor's, Inc. v. Broadway-Hale Stores*[66] and *United States v. General Motors*[67] by asking manufacturers to refuse to deal with the retailers' competitors.[68]

The unifying factor in these boycotts is that the instigator wishes to eliminate competitors or competitive practices. The Supreme Court developed a per se rule against horizontal boycotts because it felt that such boycotts nearly always injure competition.[69] The per se rule causes occasional problems, however, when applied to horizontal boycotts that are incidental to a joint venture.[70] In some cases, a group of competitors with

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through the denial of certain economic relationships. Since constitutional adjudication has not stopped private discrimination, minority plaintiffs should consider using the Sherman Act to secure economic rights. *See, e.g.*, Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723 (6th Cir. 1967) (per curiam) (allegation of conspiracy to keep blacks from purchasing or renting in white neighborhoods states cause of action under Sherman Act); Marcus, *Civil Rights and the Anti-Trust Laws*, 18 U. Chi. L. Rev. 171 (1951) (antitrust laws can be used to protect civil rights).

65. 312 U.S. 457 (1941).

66. 359 U.S. 207 (1959).

67. 384 U.S. 127 (1966).

68. *General Motors*, 384 U.S. at 133–34; *Klor's*, 359 U.S. at 209. Competitors may deal frequently with one another, as do stockbrokers and real estate agents. The instigators can then boycott the target directly without using an intermediate victim. *See* Silver v. New York Stock Exch., 373 U.S. 341 (1963) (stock exchange discontinued without notice plaintiff's private wire and stock ticker service). Alternatively, the instigators can refuse to trade with a supplier or customer to prevent the latter from integrating vertically to compete with the instigators. *See* Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914) (lumber retailers circulated blacklist of wholesalers who made retail sales).

69. *See* cases cited *supra* note 1. In each case, the Court invalidated a boycott intended to harm a competitor of the boycotting group.

70. The features that distinguish a joint venture from other interfirm contractual relationships are

an ongoing business relationship develop a collective asset to simplify their dealings.[71] To encourage investment in efficient combinations, courts have allowed the investors to exclude competitors to bar free riders.[72] Alternatively, an industry may want to set safety or quality standards for its products.[73] A court might permit a refusal to award the "seal of approval" to a competitor's product, even though such action will lead consumers to cease buying the product. Analogously, courts have allowed certain combinations to fix prices when large efficiency gains could result.[74] Courts have thus recognized the importance of promoting efficient organizational arrangements without opening every horizontal restraint to a full reasonableness inquiry.[75]

2. *Vertical Boycotts*

In a vertical boycott, the instigators and target are in a buyer-seller relationship.[76] Any boycott by consumers, therefore, must fall into this

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the partial or total integration of operations and the potential for an expansion of output. *See* Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1524–25 (1982). Brodley formally defines a joint venture as an integration of operations in which the following conditions are present: (1) the enterprise is under the joint control of the parent firms, which are not under common control; (2) each parent makes a substantial contribution to the venture; (3) the enterprise exists as a separate business entity; and (4) the venture creates new productive capacity, new technology, a new product, or entry into a new market. *Id.* at 1526. Bork refers to boycotts incorporating a total or partial integration as "ancillary" boycotts. R. BORK, *supra* note 17, at 337–38.

71. *See, e.g.*, Associated Press v. United States, 326 U.S. 1 (1945) (cooperative association of publishers to exchange news among members); United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980) (multiple listing service for real estate brokers); Gamco, Inc. v. Providence Fruit & Produce Bldg., 194 F.2d 484 (1st Cir.) (building located near shipping facilities used as wholesale produce market for, and controlled by, local dealers), *cert. denied*, 344 U.S. 817 (1952).

72. *See* United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980) (restrictive criteria for membership in real estate multiple listing service not per se illegal); Worthen Bank & Trust v. National Bankamericard Inc., 485 F.2d 119 (8th Cir. 1973) (bank credit card system's by-laws restricting membership not per se illegal), *cert. denied*, 415 U.S. 918 (1974). If the asset confers monopoly power, however, a court may require that the owners grant access to competitors. *See* United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).

73. *See* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (per curiam) (association of appliance manufacturers and utilities awarded seal of approval to gas-burning appliances supposedly based on safety and quality criteria); Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n, 261 F. Supp. 154 (D. Or. 1966) (trade association may set quality standards), *aff'd per curiam*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

74. In Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1 (1979) (*ASCAP*), the Court held that an association formed to protect the copyrights of its members could refuse to license individual compositions without violating the per se rule against price fixing. The association granted only a "blanket license" allowing unlimited use of all compositions in the association's repertory.

75. Brodley proposes an approach that would evaluate a joint venture's anticompetitive potential by analyzing the competitive relationship between the joint venture and its parent firms, the market power of the joint venture and its parents, and the restraints ancillary to the venture. Brodley, *supra* note 70, at 1540. Remedies would be carefully tailored to remove the threat to competition without destroying the potential for increased output. *Id.* at 1544.

76. *See, e.g.*, United States v. First Nat'l Pictures, 282 U.S. 44 (1930) (refusal of film distributors to deal with certain exhibitors); Williams v. St. Joseph Hosp., 629 F.2d 448 (7th Cir. 1980) (refusal of doctors to treat any person who had filed a malpractice suit against any doctor in area).

category. Some joint ventures also incorporate vertical boycotts.[77] Finally, a group that competes in some respects may find it necessary to cooperate in others to offer its product,[78] and that combination may wish to put some restrictions on the sale of its joint-input product.[79] Although vertical boycotts do not seek to harm competitors through predation, cartels may employ vertical boycotts to facilitate collusion and thereby diminish competition in their market.[80]

Since the restraint is vertical rather than horizontal, and since it is possible that the combination may produce greater efficiencies, a rule of reason treatment may initially seem appropriate.[81] Under the rule of reason, however, a restraint must offer potential pro-competitive justifications.[82] The joint venture boycotts may offer such justifications, but political boycotts cannot. Like cartels, they substitute collective pressure for the individual consumptive or productive decisions that comprise the free market.

Drawing upon Justice Brandeis' formulation of the rule of reason in *Chicago Board of Trade*,[83] some commentators have suggested that political purpose should be relevant to the reasonableness inquiry as evidence of a probable lack of anticompetitive effect.[84] But part of the reason for eschewing a commercial-or-political motive test is the difficulty of defining political boycotts with sufficient precision to assure that no anticompetitive boycotts will escape condemnation.[85]

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77. An example is *ASCAP*, 441 U.S. 1, discussed *supra* note 74. The horizontal effect of the restraint was similar to price fixing since competing composers agreed to license their works on identical terms, but the blanket license also resembled a vertical refusal to deal, because the association refused to license individual compositions to broadcasters.

78. The best examples are sports leagues. Courts have allowed such leagues to determine and enforce uniform eligibility rules for athletes. *See* United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781, 788–91 (7th Cir. 1981) (en banc) (harness racing association's by-laws designed to ensure honest racing events not per se illegal); Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir.) (PGA may set and enforce eligibility rules to limit size and ensure quality of tournaments), *cert. denied*, 385 U.S. 846 (1966). *But see* Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978) (NFL draft unreasonable but not per se illegal).

79. An example is the refusal to grant individual licenses in *ASCAP*, 441 U.S. 1. *See supra* note 74.

80. In Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930), the Court struck down a concerted refusal of film distributors to deal with exhibitors except under industry-wide standard contracts. *See also* cases cited *supra* note 76.

81. *See* McCormick, *supra* note 2, at 736 (boycotts condemned by Supreme Court have been horizontal; less restrictive standard appropriate for vertical boycotts); *cf.* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (striking down per se rule in favor of rule of reason for vertical market division).

82. *See* National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 687–92 (1978).

83. *See* Board of Trade v. United States, 246 U.S. 231, 238 (1918):

> The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

84. Coons, *supra* note 16, at 747–48; Comment, *supra* note 4, at 1157–60.

85. *See supra* pp. 529–30.

B. *Market Power and Vertical Boycotts*

Each of the conflicting goals at stake in boycott cases—protecting competition, preserving First Amendment rights, and preventing widespread use of economic coercion—deserves attention. For vertical boycotts, a focus on the market power of the boycott would best answer those concerns. Such a test would invalidate any vertical boycott with more than a specified amount of market power, regardless of the reasons for the boycott. A market power test is consistent with the goals of antitrust policy.[86] It is more objective than a motive test and would therefore guard more reliably against anticompetitive effects in the instigators' market. Finally, it would protect competition in the target's market.

The market power test, moreover, is a general rule that courts can apply uniformly regardless of the motivation behind the boycott or the identity of the boycotting group. This broad applicability provides a restraint on judicial discretion and an important safeguard for politically unpopular groups, which would not be required to convince a judge of the propriety or sincerity of their goals.

The emphasis on market power will also help to protect First Amendment rights.[87] It will assure that the right to use a boycott to express a grievance will not depend on the content of the ideas expressed, and will affirm the primacy of reasoned persuasion on the scale of First Amendment values. The narrow antitrust definition of "boycott" will already have screened out those boycotts that most deserve First Amendment protection.[88]

Of course, if the court finds a horizontal restraint hidden in a vertical boycott, it can disregard the market power inquiry. Moreover, since a successful cartel will possess significant market power, the market power test should identify any camouflaged horizontal restraints that escape per se treatment. The refusal to allow all competitors in a given market to com-

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86. Boycotts are, of course, traditionally analyzed under § 1. But vertical boycotts bear a close resemblance to § 2 offenses. In fact, there is growing authority for a market power requirement in some § 1 cases, including vertical boycotts. *See* Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 956 n.35 (1981) (citing, inter alia, Oreck Corp. v. Whirlpool Corp., 563 F.2d 54, 56 (2d Cir. 1977), *aff'd on rehearing en banc*, 579 F.2d 126 (2d Cir.), *cert. denied*, 439 U.S. 946 (1978)).

87. In his *NOW* dissent, Judge Gibson argued that the majority had misunderstood its role in harmonizing the Sherman Act with the First Amendment. He advocated balancing defendants' First Amendment rights against the state's interest in preventing certain forms of economic behavior. Missouri v. NOW, 620 F.2d 1301, 1324–26 (8th Cir.) (Gibson, J., dissenting), *cert. denied*, 449 U.S. 842 (1980).

88. *See infra* pp. 524–25. One might argue that the very existence of a boycott is a form of symbolic speech. *See* Note, *supra* note 13, at 683. Limiting the size of a boycott, however, would not strip it of symbolic significance.

bine to pressure a supplier or customer for any reason will also discourage the use of economic coercion.[89]

C. *The Market Power Standard in Practice*

Both the *NOW* and *NAACP* boycotts involved some amount of market power.[90] The courts must ultimately decide how much market power is tolerable and, as in other contexts, that decision will be imprecise.[91] Yet it is possible to establish some guidelines.

A market power test should invalidate only those boycotts that pose a genuine threat to competition, and thus to consumer interests. It would not permit only ineffective boycotts. As previously noted, harming the target—or forcing capitulation—is not always equivalent to harming competition.[92] A discrete and insular minority will be able to exploit the marginal effects of its collective purchasing decisions without running afoul of a market power standard.[93] Furthermore, the social cost of a boycott de-

89. A boycott is self-deterring because waging it is costly. While refusing to deal with the target, the boycotters must either forego utility they would otherwise gain from the target's product, or seek out an alternative, and presumably costlier, supplier. The costs of waging a boycott fall, however, as its market power rises. A group with a high market share can cause a greater revenue loss over a given time period than a group with a low market share. A high market share also makes it more difficult for the target to attract fringe buyers. The target must lower his price more to attract a given number of fringe purchasers, assuming a constant demand elasticity. For a similar calculation in the monopoly context, see Landes & Posner, *supra* note 86, at 947. Since such a boycott will cause greater harm over a given time period than one with a low market share, it should force capitulation earlier. A group with a 100% market share can force concessions almost instantaneously by threatening to boycott. Such a boycott is not self-deterring; rather, the group will be able to use it even in trivial disputes.

90. The trial court in *NAACP* found that the twelve complainants lost an aggregate total of $606,357 in business earnings during the six-year boycott. NAACP v. Claiborne Hardware Co., 393 So. 2d 1290, 1303 (Miss. 1980), *rev'd*, 102 S. Ct. 3409 (1982). The *NOW* boycott caused an estimated revenue loss of over $19 million. Missouri v. NOW, 467 F. Supp. 289, 297 (W.D. Mo. 1979), *aff'd*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

91. *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) (*Alcoa*) (Learned Hand, J.) (90% market share is sufficient to constitute a monopoly, 60% would be doubtful, and 33% would not constitute a monopoly). For a more rigorous definition, see Landes & Posner, *supra* note 86 (defining market power as the ability to raise price above marginal cost).

92. *See supra* p. 526; Kennedy, *supra* note 50, at 992 (anticompetitive results follow only where group has market power and imperfections are present in market). The Landes and Posner formulation is more sophisticated in that it incorporates the so-called "imperfections" within the definition of market power by deriving market power as a function of the supply elasticity of fringe firms. *See* Landes & Posner, *supra* note 86, at 985–86.

Of course, knowing the *boycotters'* market power does not directly indicate the structure of the *target's* market, which is a vital factor in estimating the amount of harm the boycott will cause. Several variables that would indicate a low probability of anticompetitive effects in the targeted firm's market, however—particularly a high demand elasticity on the part of the non-boycotting consumers, and a high market supply elasticity for the product—will also reduce the magnitude of the boycotters' market power. (Notes on file with author).

93. *Cf.* Comment, *supra* note 4, at 1160–61 (improbable that protest boycott would have high market power).

pends on the size of the affected market.[94] The prohibitive level of market power should vary with the size of the market.

If a boycott is carried out by only one entity—if NOW by itself had refused to hold conventions in Missouri—the presumption should be that the boycott lacked market power.[95] Under *United States v. Colgate & Co.*,[96] an individual may refuse to deal with anyone for any reason.[97] Since General Motors could refuse to hold business meetings in Missouri until the state ratified the ERA, it would be anomalous to forbid NOW from doing so.

If "individual" refusals to deal by consumer or political groups are presumptively valid, trade associations and groups of merchants may claim individual status for their refusals to deal as well. Such a group may argue that although its members ordinarily compete with one another, their interests are identical in a particular dispute.[98] Such an argument would make sense, however, only if horizontal boycotts were the sole problem. Once we accept the relevance of market power, it is absurd to claim that an association of merchants presumptively lacks market power. Clearly, "individual" status should attach only to groups consisting solely of natural persons.

A market power test for vertical boycotts puts monopolists and monopsonists on the same footing. This symmetrical treatment is workable because we can analyze monopsony power in the same way as monopoly power.[99] Such treatment is also desirable, because the social cost resulting from monopsony is similar to that resulting from monopoly.[100]

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94. Landes & Posner, *supra* note 86, at 953.

95. The *NOW* dissent stated that the antitrust laws would permit NOW individually to boycott states that had not ratified the ERA and to publicize that action. Missouri v. NOW, 620 F.2d 1301, 1323 n.13 (8th Cir.) (Gibson, J., dissenting), *cert. denied*, 449 U.S. 842 (1980). It is unlikely that a single political organization would have prohibitively great market power. That presumption would not, however, displace the market power standard. Its function would be one of administrative convenience.

A boycott is in part an exercise of the freedom of association. *See supra* note 11. While the proposed market power test does not confer absolute protection to the associational aspects of a boycott, a presumption in favor of single-group boycotts would explicitly offer political groups an opportunity to offset the economic power of business groups.

96. 250 U.S. 300, 307 (1919).

97. The decision recognized an exception for refusals to deal "to create or maintain a monopoly." *Id.* at 307.

98. *See, e.g.*, Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941) (trade association used boycott to stop alleged tortious interference with its property rights); Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc., 356 F.2d 371, 376 (9th Cir.) (invalidating rule limiting eligibility for bowling tournaments to persons who do their tournament bowling exclusively at establishments approved by defendants, despite claim that rule necessary to preserve integrity of sport), *cert. denied*, 384 U.S. 963 (1966).

99. The Landes and Posner formulation can be applied to monopsonists by defining their Lerner index as the reciprocal of the supply elasticity facing the monopsonist, which is in turn a function of the market supply elasticity and the monopsonist's market share. (Notes on file with author).

100. Both monopoly and monopsony create a social deadweight loss. Like a monopolist, a monop-

Courts have only recently begun to appreciate the problem of monopsony buying power.[101] The use of an inquiry into market power at all stages of a chain of distribution in examining a practice traditionally analyzed under section 1 might prove successful in other situations, particularly when agreement is difficult to prove.[102]

CONCLUSION

The Supreme Court's decision in *NAACP* opens the door to widespread abuse of boycotts. Attempts to distinguish between commercially motivated and politically motivated boycotts allow potentially anticompetitive results. Neither the Sherman Act nor the First Amendment mandates such an imprecise inquiry. Instead, courts should be concerned with the impact of a boycott in all affected markets, not only because the strictly horizontal effects may be difficult to isolate, but also because economic coercion should not be a favored tool for seeking commercial or political advantage. In examining boycotts that appear to have no horizontal effects, the courts should look to the market power generated by the boycott as an estimate of its effect on consumer welfare.

—*Paul G. Mahoney*

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sonist may either passively extract his profits or engage in active predation such as a boycott. For a formal analysis of monopsony, see R. POSNER & F. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS 148–50 (2d ed. 1981).

101. The Supreme Court first recognized the problem of monopsony buying in Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948). The only three sugar refiners in a local market agreed to pay a uniform price for beets. The Court held that the practice violated § 1, stating "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these." *Id.* at 236.

Recently, a number of courts have struggled with the significance of monopsony power. *See* Williams v. St. Joseph Hosp., 629 F.2d 448, 453 (7th Cir. 1980) (monopsony and monopoly equally objectionable); *In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1158–59 (5th Cir. 1979) (concluding that while monopsony is as harmful as monopoly, it is not more so, and therefore will not confer standing on an indirect seller), *cert. denied*, 449 U.S. 905 (1980).

102. For example, in Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939), a group of film distributors were found to have conspired to fix prices despite the lack of evidence of an explicit agreement, even though it seems clear that the real blame lay with monopsonistic theater owners who forced the distributors to adopt the price-maintenance scheme. *See id.* at 215–18.

An examination of market power would also have been helpful in American Column & Lumber Co. v. United States, 257 U.S. 377 (1921). There, the Court struck down a system for exchanging production, price, and inventory information and projections among competing sellers of lumber. The Court concluded that the information exchange was conducive to noncompetitive pricing. *Id.* at 409. The Court erred in not examining the market to which the defendants sold. The market for lumber may have been dominated by a few powerful buyers. *See* R. POSNER, *supra* note 10, at 141 & n.15. If so, the likelihood of 365 sellers fixing prices without even agreeing to do so is very slim.