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PROTEST BOYCOTTS AS RESTRAINTS OF TRADE UNDER THE SHERMAN ACT: A PROPOSED STANDARD

FRANCIS M. ALLEGRA*

I. INTRODUCTION

THE SHERMAN ANTI-TRUST ACT[1] WAS ORIGINALLY ENACTED to combat trusts[2]—powerful business combinations, capable of wielding concentrated economic power—created when individual shareholders from various corporations transferred their shares to a single trustee or governing board.[3] In pertinent part, section 1 of the Sherman Act states that "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal."[4] The comprehensive language of section 1, though subsequently limited in its scope,[5] evinces a congressional intent to utilize the plenary power of the Commerce Clause to its fullest extent.[6] Yet, while the broad language was designed to preserve economic freedom and unfet-

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[1] Sherman Anti-Trust Act of 1890, Pub. L. No. 51-647, 26 Stat. 209 (1890) (current version codified at 15 U.S.C. §§ 1-7 (1976)).

[2] *See* 1 E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 8-13 (1978).

[3] *See generally* Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911):

> [T]he main cause which led to the legislation was the thought that it was required by the economic conditions of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.

Id. at 50.

[4] 15 U.S.C. § 1 (1976).

[5] The Supreme Court, looking to the common law basis of the antitrust laws, has held that only unreasonable or undue restraints of trade are unlawful. This is commonly referred to as the "Rule of Reason" approach. *See* Board of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60-62 (1911).

[6] *See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398 (1978); United States v. Southern Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944); *see generally* American Crystal Sugar Co. v. Mandeville Island Farmers, Inc., 195 F.2d 622 (9th Cir.), *cert. denied*, 343 U.S. 957 (1952).

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tered competition,[7] it has instead sometimes been used as a weapon against individuals organizing to promote their political, social or religious views.[8]

One of the most prominent recent developments in antitrust litigation has been the increased use of the Sherman Act against protest boycotts.[9] Protest boycotts are concerted refusals to deal motivated by noncommercial objectives.[10] These boycotts have been employed by civil rights groups,[11] consumers,[12] religious leaders[13] and political activists.[14] The attractive characteristic of a protest boycott is its ability to convey a message. It is primarily a means of expression whereby the collective economic power of a number of individuals is brought to bear to influence change. When the precept of section 1 of the Sherman Act is applied to these boycotts, an apparent conflict arises between the antitrust laws and the protections afforded by the first amendment.[15] Antitrust regulation conceivably impinges on the constitutional protection

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[7] *E.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 338 (1963); Northern Pac. Railroad v. United States, 356 U.S. 1, 4 (1958).

[8] *See generally* Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247; Silbey, *Direct Action and the Struggle for Integration*, 16 HASTINGS L.J. 351 (1965); Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U. L. REV. 705 (1962) [hereinafter cited as Coons].

[9] *See* Missouri v. Nat'l Organization for Women, Inc., 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S 842 (1980); Council for Employment and Economic Energy Use v. WHDH Corp., 580 F.2d 9 (1st Cir.), *cert. denied*, 440 U.S. 945 (1978); Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978); Osborn v. Pennnsylvania-Delaware Serv. Station, 499 F. Supp. 553 (D. Del. 1980); Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n, 492 F. Supp. 334 (D. Mass. 1980); Crown Cent. Petroleum Corp. v. Waldman, 486 F. Supp. 759 (M.D. Pa.), *rev'd on procedural grounds*, 634 F.2d 127 (3d Cir. 1980). For a discussion of these cases see Part III *infra*.

[10] Missouri v. Nat'l Organization for Women, Inc., 620 F.2d at 1314; Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n, 492 F. Supp. at 338. A noncommercial objective is one unrelated to the production of business profit. *See* note 98 *infra*.

[11] *E.g.*, Baker v. F & F Investment, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970) (boycott of investment firm allegedly discriminating in its financing policies); Southern Christian Leadership Conference, Inc. v. A.G. Corp., 241 So. 2d 619 (Miss. 1970) (boycott of grocery store allegedly discriminating in its hiring practices).

[12] *E.g.*, Julie Baking Co. v. Graymond, 152 Misc. 846, 274 N.Y.S. 259 (Sup. Ct. 1934) (boycott of bakery because of its high-priced goods).

[13] *E.g.*, Kuryer Publishing Co. v. Messmer, 162 Wis. 565, 156 N.W. 948 (1916) (boycott of newspaper as containing heretical statements).

[14] *E.g.*, Council of Defense v. Int'l Magazine Co., 267 F. 390 (8th Cir. 1920) (boycott of Hearst publications thought to be undermining the war effort). Numerous examples of boycotts are illustrated in Coons, *supra* note 8, at 713-26.

[15] The first amendment to the United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

attaching not only to the expressive component of the boycott itself, but also to the activities which usually accompany a boycott, such as distributing leaflets, holding rallies and advertising.[16]

In attempting to resolve this apparent conflict, judges and commentators have sought to exempt certain protest boycotts from the antitrust laws. These implied exemptions[17] fall into two categories: those predicated upon the first amendment,[18] and those based on a statutory construction of the Sherman Act.[19] They are all extensions of a doctrine originally formulated by the Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[20] and *United Mine Workers v. Pennington*.[21] These exemptions have been cast as affirmative defenses available to defendants to rebut prima facie evidence of an antitrust violation.[22]

There are several drawbacks in using these exemptions. First, the scope of the protection they afford is constantly being narrowed[23] because, in antitrust law, there is a presumption against such implied exemptions.[24] Second, the application of these exemptions has not yielded a clear standard by which future contemplated boycotts may be evaluated in terms of their potential for generating antitrust liability.[25] This failure to assure consistent evaluation of similar actions may cause others to refrain from organizing what would be legal protest boycotts.[26]

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[16] *See generally* Robinson, *Reconciling Antitrust and the First Amendment*, 48 ANTITRUST L.J. 1335 (1979).

[17] Implied exemptions are court-created, and as such should be contrasted with antitrust exemptions specifically granted by Congress. For an example of a statutory exemption see 15 U.S.C. § 17 (1973) (Clayton Act—labor exemption).

[18] *E.g.*, Missouri v. Nat'l Organization for Women, Inc., 620 F.2d at 1319.

[19] *See generally* Coons, *supra* note 8; Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 94-96 (1977).

[20] 365 U.S. 127 (1961).

[21] 381 U.S. 657 (1965). *See* Part III *infra*.

[22] Feminist Women's Health Center, Inc. v. Mohammad, 415 F. Supp. 1258, 1263 (N.D. Fla. 1976), *aff'd in part, rev'd in part on other grounds*, 586 F.2d 530 (5th Cir. 1978).

[23] *E.g.*, Osborn v. Pennsylvania-Delaware Serv. Station Dealers, 499 F. Supp. 553, 557-58 (D. Del. 1980). *See* notes 125-36 *infra* and accompanying text.

[24] Lafayette v. Louisiana Power & Light Co., 435 U.S 389, 399 (1978); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350 (1963); *see also* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980).

[25] *See* Missouri v. Nat'l Organization for Women, 620 F.2d at 1324 (dissenting opinion of Gibson, J.).

[26] The situation is akin to that of a statute having a "chilling effect" on the exercise of first amendment rights. *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973). The absence of a clear standard enhances the threat of an antitrust suit, and this threat as such may be enough to discourage the use of a protest boycott. *See* Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076, 1083 (9th Cir. 1976).

Third, and most important, in using these exemptions the courts have avoided deciding the threshold issue of whether these protests are in fact anticompetitive. This determination is crucial, for if protest boycotts do not violate the Sherman Act, no implied exemption is necessary.

Alternate theories for evaluating protest boycotts must be developed. A recent Note[27] advocates the use of the Rule of Reason[28] for analyzing protest boycotts. The Pennsylvanian authors suggest that the noncommercial purpose underlying a protest boycott should be weighed as a factor in determining its reasonableness.[29] This paper will maintain that *genuine* protest boycotts are not anticompetitive because they do not restrict the economic freedom of either the participants or the boycotted entity; nor are they used to enforce an anticompetitive practice, such as collusion or horizontal exclusion. In Part II, cases dealing with unilateral and concerted refusals to deal will be examined to determine under which circumstances refusals to deal are illegal. Part III will analyze two recent protest boycotts cases: *Crown Central Petroleum v. Waldman*,[31] and *Osborn v. Pennsylvania-Delaware Service Station*.[32] The legal standards used in these cases will be rejected in Part IV as superfluous, and a clearer standard will be presented for determining the legality of protest boycotts.

II. BOYCOTTS AND REFUSALS TO DEAL: A PERSPECTIVE

A. *Some Definitions and Preliminary Case Law*

A refusal to deal with another economic actor, standing alone, does not violate the antitrust laws but may be subject to antitrust interdiction if it is employed to effectuate an otherwise anticompetitive course of conduct.[33] The refusal to deal is merely a self-help mechanism, which can be used as a tool by one or more parties to enforce a practice.[34] If the practice enforced is an anticompetitive one, such as price fixing or horizontal exclusion, then the refusal to deal, as a component of the overall scheme, is also illegal.[35] Where the practice enforced is per se il-

[27] Note, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131 (1980) [hereinafter cited as *Protest Boycotts*].

[28] *See* note 5 *supra*.

[29] *Protest Boycotts*, *supra* note 27, at 1157-61.

[30] 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

[31] 486 F. Supp. 759 (M.D. Pa. 1980).

[32] 499 F. Supp. 553 (D. Del. 1980).

[33] Report of the Attorney General's National Committee to Study the Antitrust Laws 137 (1933) [hereinafter cited as Attorney General's Report].

[34] R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 207 (1976).

[35] *See* Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969). *See generally* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

legal, the refusal will be per se illegal;[36] if the practice is examined under the Rule of Reason, so also will the refusal.[37] Thus, refusals to deal function like "economic chameleons," their treatment and legality being determined by the actions with which they are associated.

1. Unilateral Refusals to Deal

Initially, a distinction must be drawn between unilateral or individual refusals to deal and concerted or group refusals to deal. A unilateral refusal to deal is defined as a severing of economic ties by a single party; a concerted refusal to deal is the product of several parties collectively agreeing not to deal with a selected economic actor.[38] Unilateral refusals to deal can further be divided into two categories: simple unilateral refusals to deal and non-simple unilateral refusals. Simple unilateral refusals to deal derive from the independent judgment of an economic actor, and do not involve coercive enforcement or other parties.[39] Non-simple unilateral refusals implicate other economic actors, usually as accessories in a complex policing plan.[40] Concerted, simple unilateral and non-simple unilateral refusals to deal each have been the target of antitrust litigation.

The Supreme Court made its first definitive statements concerning the legality of simple unilateral refusals to deal in *United States v. Colgate Co.*[41] In *Colgate*, the defendant announced a resale price policy and terminated economic relations with those distributors who would not subscribe to it.[42] In its indictment, the government alleged that Colgate had unlawfully created and engaged in a combination, the purpose of which was to procure adherence on the part of distributors to the resale policy.[43] The Supreme Court affirmed the trial court's dismissal of the indictment for failure to allege an agreement between the distributors

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[36] *E.g.*, United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Fashion Originators' Guild of America v. Federal Trade Comm'n, 312 U.S. 457 (1941).

[37] *E.g.*, Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977). *See generally* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

[38] A single party's refusal to deal, which utilizes other economic actors in its enforcement, is nevertheless labeled a unilateral refusal to deal. *See* E. KINTNER, FEDERAL ANTITRUST LAWS § 10.19, at 130 n.342 (2d ed. 1971).

[39] *E.g.*, United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

[40] *E.g.*, United States v. Parke, Davis & Co., 362 U.S. 29 (1960) (other parties used as informants in enforcing price maintenance program).

[41] 250 U.S. 300 (1919). An earlier Second Circuit Court of Appeals decision, Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 F. 46 (2d Cir. 1915), had upheld a defendant's decision to discontinue sales to plaintiff's retail outlets.

[42] 250 U.S. at 303.

[43] *Id.* at 302-03.

and Colgate.[44] Additionally, the Court declared that a trader or manufacturer had the right to use independent discretion in determining with whom it would deal.[45]

Subsequent Supreme Court decisions have discounted any intention on the part of the *Colgate* Court to give a blanket sanction to all refusals to deal.[46] *Colgate* merely stands for the proposition that absent an agreement between a supplier and its distributors, a price maintenance program is not illegal, and consequently, a simple unilateral refusal to deal used to enforce such a maintenance program is also not illegal. Beginning with *United States v. A. Schrader's Son, Inc.*,[47] the Supreme Court began to imply the necessary agreement from the conduct of the parties.[48] Once an agreement is inferred, pointing to the existence of either a contract, combination or conspiracy, a price maintenance program will fall as a violation of the Sherman Act.[49] A corresponding label of illegality will be placed on any unilateral refusal to deal subsumed in such a program.[50]

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[44] *Id.* at 306-07. Absent a "contract, combination . . . , or conspiracy," there could be no violation of § 1 of the Sherman Act. *See* note 4 *supra* and accompanying text.

[45] 250 U.S. at 307. The Supreme Court stated what has become known as the Colgate doctrine:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

Id. See generally Comment, *The Colgate Doctrine: Its Past and Present*, 12 HOUSTON L. REV. 409 (1975); Note, *Dealer Recovery for Unreasonable Refusals to Deal Under Section 1 of the Sherman Act*, 53 CORNELL L. REV. 720 (1968).

[46] United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 723 (1944); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 455 (1922); United States v. A. Schrader's Son, Inc., 252 U.S. 85, 99-100 (1920). *See also* Comment, *Unilateral Refusals to Deal: King Colgate is Dead!*, 30 OHIO ST. L.J. 537 (1969).

[47] 252 U.S. 85 (1920).

[48] *See* Simpson v. Union Oil Co., 377 U.S. 13, 24 (1964). In FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922), the Court implied a combination from the complex procedure used by Beech-Nut to identify and isolate wholesalers and retailers not conforming to its resale policy. Other retailers and wholesalers were used as informants, aiding in the preparation of blacklists. *Id.* at 448-49. *See also* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

[49] Greene v. General Foods Corp., 517 F.2d 635, 650-58 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976); Osborn v. Sinclair Ref. Co., 324 F.2d 566, 573-75 (4th Cir. 1963). *See generally* Albrecht v. Herald Co., 390 U.S. 145 (1968) (program to hold down price of newspapers held to be illegal conspiracy between newspaper and replacement distributor).

[50] *Id.*

Non-simple unilateral refusals to deal are unilateral refusals embodied in practices which are anticompetitive. In addition to lending themselves to compel support for resale price maintenance programs, non-simple unilateral refusals to deal have been utilized to implement market allocation schemes,[51] tying arrangements[52] and attempts to monopolize.[53] The more restrictive treatment of these refusals results from the courts' sensitivity to the use of coercive economic power to restrain commercial freedom. While in non-simple refusals only one economic actor is actually severing or threatening to sever relations, other economic actors, usually competitors or direct suppliers of the target, combine their economic power with the principal actor to buttress the coercive potential of the refusal.[54] Via this combination, the commercial impact of the refusal is brought home to the target, making it easier to convince him to accede to the demands of the refusing party.

2. Concerted Refusals to Deal

It is not surprising, given the judicial attention paid to coercive uses of economic power, that most case law in the refusal area centers on concerted refusals to deal. A concerted or group refusal to deal is the end result of several parties collectively agreeing not to deal with a selected economic actor. It is brought into existence by a boycott.[55] A boycott is an explicit or implied agreement among actors to deprive

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[51] *E.g.*, Reed Bros., Inc. v. Monsanto Co., 525 F.2d 486 (8th Cir. 1975), *cert. denied*, 423 U.S. 1055 (1976). In Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), the defendant manufacturer included a provision in its franchise agreements barring its retailers from selling franchised products from locations other than those detailed in the contracts. *Id.* at 42. The Supreme Court held that the vertical territorial market allocation arrangement was not a per se violation, and that it, as well as the refusal to deal designed to enforce it, should be judged using the Rule of Reason approach. *Id.* at 59. The case is yet another example of a refusal to deal being judged under the same legal standard applied to the larger anticompetitive course of conduct of which it is a part.

[52] *E.g.*, Osborn v. Sinclair Ref. Co., 324 F.2d 566 (4th Cir. 1963).

[53] *E.g.*, Times-Picayune Publishing Co. v. United States, 354 U.S. 594 (1953); Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

[54] For example, in United States v. Parke, Davis & Co., 362 U.S. 29 (1960), the defendant manufacturer enlisted the aid of its wholesalers in forcing retailers to conform to its minimum resale price policy. *Id.* at 33. Parke, Davis & Co. also informed noncomplying retailers that their competitors would be able to continue selling the defendant's popular line of cosmetics by virtue of their agreement to the policy. *Id.* at 33-36.

[55] The term "boycott" derives from an action taken against one Captain Boycott, a British land agent, who paid his tenant farmers starvation wages and evicted those who protested. The farmers solicited the support of Boycott's other employees, who promptly ceased relations with the captain. *See* WEBSTER'S THIRD INTERNATIONAL DICTIONARY 264 (1971).

another party or parties of some trade relationship.[56]

There are two types of boycotts: primary and secondary. In a primary boycott, parties at one level of the production or distribution chain[57] agree to sever economic ties with an actor at another level or to deal only on certain terms. These boycotts are often employed to coerce the acceptance of some sales condition or business policy desired by the boycotting parties.[58] For example, a group of raw material suppliers might agree to refuse to deal with any manufacturer who does not sign a standard requirements contract. Frequently, a primary boycott is an unobserved component of some other anticompetitive activity, such as price-fixing[59] or horizontal exclusion.[60] As a result, it is not often analyzed as a boycott, but rather is treated under the legal standard applied to the larger violative course of conduct of which it is a part.[61]

Secondary boycotts have more readily been identified by the courts as autonomous anticompetitive acts. In a secondary boycott, a group of competitors at one commercial level extends its economic influence through the conscription of otherwise neutral suppliers or customers, who are forced to discontinue their economic relations with a competitor of the boycotting group.[62] For example, a group of retailers may threaten a wholesaler with the loss of their business to force it, in turn, to refuse to deal with a competing retailer.[63] In this instance, the

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[56] L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 83, at 230 (1977) [hereinafter cited as L. SULLIVAN].

[57] These parties could be consumers, manufacturers, distributors or retailers.

[58] *E.g.*, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) (distillers refused to sell to wholesalers who would not resell at prices fixed by Seagram); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930) (film distributors agreed not to deal with any exhibitor who refused to sign a standard contract). An example of a primary protest boycott would be the consumer boycott of J.P. Stevens & Co. goods in response to that company's anti-union practices. *See* N.Y. Times, Apr. 20, 1978, at 20, col. 6.

[59] *E.g.*, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

[60] *E.g.*, Binderup v. Pathe Exchange, Inc., 263 U.S. 291 (1923) (agreement among defendant film distributors not to deal with exhibitors who would not lease films from all the distributors).

[61] *See* L. SULLIVAN, *supra* note 56, at § 90.

[62] *E.g.*, Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild of America, Inc. v. Federal Trade Comm'n, 312 U.S. 457 (1941). Secondary boycotts can even exist on an international plane. The relatively recent Arab boycott of foreign countries which traded with Israel is one example. *See* Note, *The Arab Boycott: The Antitrust Challenge of* United States v. Bechtel *in Light of the Export Administration Amendments of 1977*, 92 HARV. L. REV. 144 (1979).

[63] Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). *See also* United States v. General Motors Corp., 384 U.S. 127 (1966).

economic freedom of the wholesaler is restrained because it cannot sell to the targeted retailer, and the economic freedom of the retailer is likewise restrained because it cannot buy from the wholesaler.

In a secondary group boycott there is a pooling of economic power to impose a horizontal restraint, which purpose might be to exclude competitors,[64] maintain oligopolistic market conditions[65] or coerce conformity to unreasonable trade practices.[66] A group boycott is primarily used to fend off competition from a nonparticipating horizontal competitor, either by eliminating that competitor or compelling it to compete less fervently.[67]

Unlike a unilateral refusal to deal, a secondary boycott, when present in a course of conduct, is rarely overlooked by the courts.[68] Despite the fact that a secondary group boycott is usually afforded an independent legal status under the antitrust laws, in a particular case the court will analyze it under the identical legal standard they apply to the horizontal restraint it generates. In this respect, group boycotts are treated no differently from unilateral refusals to deal.[69] This statement, by implying that in some situations concerted refusals to deal will be examined under the Rule of Reason, seemingly contradicts the widely accepted antitrust precept that all group boycotts are per se illegal.[70] To resolve this apparent inconsistency, it is necessary to consider briefly the cases from which this application of the per se rule springs.

B. *Group Boycotts: Per Se Rule or Rule of Reason*

Rules of law are often only clearly understood when the terms embodied in them are defined. To state, for example, that grand theft is il-

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[64] *E.g.*, Fashion Originators' Guild of America, Inc. v. Federal Trade Comm'n, 312 U.S. 457 (1941).

[65] *E.g.*, Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978); *In Re* Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072 (Jud. Pan. Mult. Lit. 1979).

[66] *E.g.*, National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1978); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (*per curiam*).

[67] Group boycotts have often been viewed as establishing private governments. In Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457 (1941), the Supreme Court, in referring to the Guild's complex system for battling the piracy of clothing designs, stated: "The combination is in reality 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." *Id.* at 465. *See generally* Addyston Pipe and Steel Co. v. United States, 175 U.S. 211, 242 (1899).

[68] *See* notes 59-61 *supra* and accompanying text.

[69] *See* notes 46-50 *supra* and accompanying text.

[70] United States v. General Motors Corp., 384 U.S. 127, 144 (1966); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 658-60 (1961); Klor's,

legal is to make a conclusory statement which takes on real meaning only when one defines "grand theft." Similarly, it is necessary to come to an understanding of what the courts mean by a group boycott when they refer to it in terms of the per se rule.

In *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[71] the Supreme Court stated: "Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive."[72] Alleged anticompetitive conduct will be treated as a per se violation of the Sherman Act if two criteria are met: 1) the practice, if effective, is likely in the wide majority of cases to cause substantial anticompetitive harm; and 2) inquiry into the practice's actual impact on competition is overly complex, costly and time consuming, and likely in most instances to yield no definitive results.[73] The plaintiff alleging a per se violation of the Sherman Act may dispense with proof of the actual anticompetitive effects of the restraint of trade.[74] The nature of the course of conduct, in and of itself, gives rise to a presumption of unreasonableness.

In 1914, when the first major Supreme Court opinion dealing with a group boycott was written, the Court was in the midst of ascertaining the limits of its then recently enunciated Rule of Reason doctrine.[75] In *Eastern States Retail Lumber Dealers' Association v. United States*,[76] a group of retail lumber dealers entered into a conspiracy to prevent wholesalers from selling their lumber directly to consumers. When a member of the retail association learned that a wholesaler was selling directly to its customers, it reported the name of the wholesaler to an officer of the association, who caused the name to be entered on a blacklist.[77] This list was distributed to the association's members, who then refused to purchase from that wholesaler.[78]

The defendants maintained that their course of conduct promoted

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Inc. v. Broadway-Hale Stores, 359 U.S. 207, 211-12 (1959); Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 612-13 (1914).

[71] 433 U.S. 36 (1977).

[72] *Id.* at 49-50. *See also* Crown Cent. Petroleum Corp. v. Waldman, 486 F. Supp. 759, 764 (M.D. Pa.) *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980).

[73] Crown Cent. Petroleum Corp. v. Waldman, 486 F. Supp. 759, 764 (M.D. Pa.), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980) (citing L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 70 (1977)). *See generally* Loutzenhiser, *The ERA Boycott and the Sherman Act*, 17 AM. BUS. L.J. 507, 516 (1980).

[74] Feminist Women's Health Center, Inc. v. Mohammad, 415 F. Supp. 1258 (N.D. Fla. 1976), *aff'd in part, rev'd in part*, 586 F.2d 530 (5th Cir. 1978).

[75] The Rule of Reason doctrine had been announced in the 1911 decision of Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

[76] 234 U.S. 600 (1914).

[77] *Id.* at 607.

[78] *Id.* at 608-09.

public welfare by guaranteeing access to local retail outlets.[79] In rejecting this argument, the Court applied the per se rule, finding that the association's practice was of such a character as to give rise to a presumption that it had been entered into with the intent to restrain the free flow of commerce.[80] The Court went on to state:

> An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be *hurtful* to the public or to the individual against whom the concerted action is directed.[81]

Two anticompetitive "hurts" were identified by the Court. First, the defendants were employing the threat of a boycott to horizontally exclude wholesalers from competing on the retail level. Second, the underlying effect of the entire course of conduct was to maintain higher retail prices for lumber goods.[82]

Eastern States might be viewed as authoritatively establishing that all group boycotts are per se violations of the Sherman Act. Yet in *Chicago Board of Trade v. United States*,[83] decided four years after *Eastern States*, the Supreme Court applied the Rule of Reason to an alleged anticompetitive course of conduct which included a primary boycott.

The Chicago Board of Trade is a commodities exchange governed by a set of regulations to which all members of the board subscribe. The federal goverment sought to enjoin enforcement of the exchange's "call rule," which prohibits member brokers from purchasing or offering to purchase, during the period between the close of one session and the opening of the next, at a price other than the closing price.[84] In effect, the board entered into a primary boycott, threatening to refuse to deal with any member who would not comply with the rule.[85] Since only members can deal on the exchange, expulsion from the board would severely restrict a broker's ability to conduct business.

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[79] *Id.* at 613.

[80] *Id. See generally* Loewe v. Lawlor, 208 U.S. 274, 300 (1908).

[81] Eastern States, 234 U.S. at 614 (emphasis added). Though there was no actual evidence of a conspiracy, the Court inferred its existence from the defendants' actions in circulating the reports. *Id.* at 612.

[82] *Id.*

[83] 246 U.S. 231 (1918).

[84] *Id.* at 237. The "call rule" controlled the sale of wheat, corn, oats and rye. The defendants averred that the purpose of the rule was "to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade acquired by four or five warehousemen in Chicago." *Id.*

[85] *See* R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 210 (1976). *See generally* notes 57-61 *supra* and accompanying text.

All the indices of a concerted refusal to deal were present. Nevertheless, the Supreme Court held that the legality of the call rule was to be tested by the Rule of Reason. Specifically, the Court dwelt on the absence of evidence showing that the call rule limited the amount of grain shipped, affected prices, discriminated against any party, or resulted in hardship to anyone.[86] It set forth a list of factors to be considered in determining the legality of a restraint, including: 1) the nature of the business on which the restraint operates; 2) the actual impact of the restraint on the business; 3) the nature of the restriction itself; 4) the history of the restraint; 5) the reason for adopting it; and 6) the end attained by it.[87] Applying these criteria, the Court found that the exchange's conduct was reasonable because it affected only a small portion of the commodities traded and had the overall effect of improving market conditions.[88]

At first impression, the tact used by the *Chicago Board of Trade* Court clashes with the approach taken in *Eastern States*. While in *Eastern States* the Supreme Court refused to analyze the anticompetitive impact of the group boycott, holding it a per se violation of the Sherman Act, the same Court, in *Chicago Board of Trade*, considered the lack of actual anticompetitive harm in finding the exchange's practice, which included a primary group boycott, reasonable. It would seem these two cases are diametrically opposed.

However, these cases can be reconciled if it is realized that the true test of a group boycott attacked under the Sherman Act is whether it is being used to enforce an otherwise anticompetitive practice.[89] In *Eastern States*, the boycott was employed to horizontally exclude competitors and as a collusive device for maintaining high lumber prices. Because horizontal exclusion and price fixing are substantive violations of the Sherman Act,[90] the boycott used to enforce them was deemed per se illegal. In *Chicago Board of Trade*, where the exchange's practice was

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[86] 246 U.S. at 238.

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

Id.

[88] *Id.* at 240.

[89] *See* note 85 *supra.*

[90] *See* Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958) (tying arrangement as horizontal exclusion); United States v. E.I. du Pont Nemours & Co.,

found not to be contrary to the policy of the antitrust laws, the boycott was overlooked. Thus, in these types of cases, the courts explore beyond the boycott's external shell to identify any substantive violations of the Sherman Act for which the concerted refusal to deal is only a means of implementation.[91]

The Supreme Court's staunch statement of the per se doctrine in *Klor's Inc. v. Broadway-Hale Stores, Inc.*,[92] can also be explained via this theory. In *Klor's*, a chain of department stores used a secondary boycott in attempting to drive a small retail competitor out of business. The defendant used its economic power to coerce ten national manufacturers into refusing to deal with the plaintiff.[93] In striking down this practice, the Court stated: "[T]here [are] classes of restraints which from their 'nature or character' [are] unduly restrictive and hence forbidden by both the common law and the statute . . . . Group boycotts, *or concerted refusals by traders to deal with other traders*, have long been held to be in the forbidden category."[94] Thus, according to the *Klor's* Court, all group boycotts are per se violations of the Sherman Act.

The apparent difference between this statement of the law and the theory set out above is actually a semantics problem revolving around the word "group boycott." When in *Klor's* the Supreme Court used the term "group boycott," it was referring only to those situations in which a group of traders at one level attempt to prevent nongroup members from competing at that level.[95] It was concerned with the exercise of monopoly power,[96] and it focused on the business nature of the

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353 U.S. 586 (1957) (vertical integration as horizontal exclusion); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing per se illegal); United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (price fixing).

[91] This approach can also be seen in the Supreme Court case of Fashion Originators' Guild of America, Inc. v. Federal Trade Comm'n, 312 U.S. 457 (1941). In that case the defendant manufacturers combined to force retailers to refrain from selling copies of their original creations. The Guild boycotted those retailers who continued to sell the copies, and hired investigators to detect violators. *Id.* at 461-62. The Court identified the practice as horizontal exclusion having "as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copies designs." *Id.* at 465. Based on this finding the Court found the boycott in violation of the Sherman Act. *See generally* Comment, *Antitrust: Political Activity Immune from Sherman Act*, 20 WASHBURN L.J. 130, 133 (1980).

[92] 359 U.S. 207 (1959).

[93] *Id.* at 209-10.

[94] *Id.* at 211-12 (emphasis added).

[95] *See* emphasized portion of text accompanying note 94 *supra*; Smith v. Pro Football, Inc., 593 F.2d 1173, 1178 (D.C. Cir. 1978); *see also Protest Boycotts*, *supra* note 27, at 1151.

[95] *See* emphasized portion of text accompanying note 94 *supra*; Smith v. Pro 'nature' and 'character,' a 'monopolistic tendency.' . . . Monopoly can as surely

Broadway-Hale boycott and its anticompetitive objective.[97] Hence, the Court in *Klor's* essentially defined a group boycott as a concerted refusal to deal employed to enforce an anticompetitive practice, and then used that term, so defined, in its application of the per se rule. In the end, attention is still directed to the issue of whether the boycott promotes an otherwise anticompetitive act.[98]

III. RECENT PROTEST BOYCOTT CASES

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[99] the defendant-railroads hired a public relations firm to conduct activities aimed at influencing legislators to adopt and retain laws destructive of the trucking industry.[100] In reversing the trial court's judgment enjoining this practice, the Supreme Court stated:

> [N]o violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws. . . .
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> [T]he Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or

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thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups." 359 U.S. at 213.

[97] Several lower federal courts have recently limited the Supreme Court's language in this fashion. *See* Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); Smith v. Pro Football, Inc., 593 F.2d 1173, 1177-91 (D.C. Cir. 1978); Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977); Hatly v. American Quarter Horse Ass'n, 552 F.2d 646 (5th Cir. 1977); Paralegal Inst., Inc. v. American Bar Ass'n, 475 F. Supp. 1123, 1130 (E.D.N.Y. 1979). *See generally* McCormick, *Group Boycott—Per Se or Not Per Se, That is the Question*, 7 SET. HALL L. REV. 703 (1976).

[98] Several Judges and commentators have suggested that if the purpose behind the boycott is noncommercial, *i.e.*, unrelated to the production of business profit, it should be presumed to be legal. *See* Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U. L. REV. 705 (1962). *See also* Council for Employment and Economic Energy Use v. WHDH Corp., 580 F.2d 9, 12 (1st Cir. 1978), *cert. denied*, 440 U.S. 945 (1979); *see generally* Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940). This proposition differs from the one supported here in two regards: 1) it is based, at least in part, on what the *boycotter* perceives as the objective of the boycott, whereas the test herein relies on an objective analysis of anticompetitive impact; and 2) it is couched as an implied exclusion from the antitrust laws which presumes the illegality of the group boycott, while the test advocated here goes to the threshold determination of whether in fact the boycott is a violation. The noncommercial purpose exclusion has been attacked as inconsistent with the Supreme Court's decision in National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1978). *See Protest Boycotts*, *supra* note 27, at 1155.

[99] 365 U.S. 127 (1961).

[100] *Id.* at 129-30.

> the executive to take particular action with respect to a law that would produce a restraint or a monopoly.[101]

Four years later, in *United Mine Workers v. Pennington*,[102] the Court extended the scope of the *Noerr* exemption, holding: "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."[103] This holding and the *Noerr* statement have been synthesized into a rule of law known as the Noerr-Pennington doctrine.[104]

Subsequent cases have indicated that the Noerr-Pennington antitrust exemption is predicated on the first amendment.[105] Given this basis, it comes as no surprise that the Noerr-Pennington doctrine has often been used as a defense in protest boycott litigation.[106] Yet several questions remain to be answered, including: "Does the Noerr-Pennington doctrine really apply to protest boycotts?" and perhaps more basic, "If analyzed correctly do protest boycotts require the protection of an antitrust exemption at all?" Before answering these questions it is necessary to examine two recent protest boycott cases.

A. *The* Crown Central Petroleum *Case*

In the three day period from July 13 to July 15, 1979, members of the

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[101] *Id.* at 135-36. The Court's conclusion was a natural extension of its earlier holding in Parker v. Brown, 317 U.S. 341 (1943). In that case, the Supreme Court declared that the Sherman Act does not apply to restraints of trade that proceed from valid governmental action. *Id.* at 352. It necessarily follows that petitioning the state to take such action must also be legitimate. *See In re* Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072 (Jud. Pan. Mult. Lit. 1979).

[102] 381 U.S. 657 (1965).

[103] *Id.* at 670. The plaintiffs in *Pennington* had alleged that the United Mine Workers Union was attempting to eliminate smaller coal mining companies by influencing the Secretary of Labor. *Id.*

[104] For a comprehensive article dealing with the Noerr-Pennington doctrine 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).

[105] *See, e.g.*, Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 399-400 (1978); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-15 (1972); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707-08 (1962); Subscription T.V. v. Southern California Theatre Owners, 576 F.2d 230, 233 (9th Cir. 1978).

[106] Recently, this has been especially true. *See, e.g.*, Missouri v. Nat'l Organization for Women, Inc., 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980); Council for Employment and Economic Energy Use v. WHDH Corp., 580 F.2d 9 (1st Cir. 1978), *cert. denied*, 440 U.S. 945 (1979); Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n, 499 F. Supp. 553 (D. Del. 1980); Crown Cent. Petroleum Corp. v. Waldman, 486 F. Supp. 759 (M.D. Pa.), *rev'd on procedural grounds*, 634 F.2d 127 (3d Cir. 1980).

Pennsylvania-Delaware Service Station Dealers Association (Dealers Association)[107] closed their gasoline pumps to bring public pressure to bear on the Department of Energy (DOE) in support of raising the maximum price at which gasoline could be sold. Several days later, the DOE increased the maximum retail price of gasoline.[108] Two separate legal actions were brought in response to this course of conduct.

In *Crown Central Petroleum Corp. v. Waldman*,[109] the parent company of one of the dealers who had participated in the shutdown sought a permanent injunction under section 16 of the Clayton Act,[110] seeking to enjoin the defendant Waldman from taking part in any future protest closures.[111] Specifically, the plaintiff sought to prevent potentially irreparable damage to its trademark resulting from Waldman's continuing involvement in the Dealer's Association.[112] It alleged that the defendant had joined in the planning and execution of a secondary group boycott in violation of section 1 of the Sherman Act.[113]

The defendant Waldman argued that the protest boycott was an expression of his first amendment right to petition the government for a redress of grievances. The defendant's argument was that the Noerr-Pennington doctrine protects "concerted activity by a commercial association to influence the government to pass and enforce laws and regulations that may help that association's member and injure competitors or consumers."[114] Fundamentally, Waldman's defense was that his actions came within an exception to the federal antitrust laws.

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[107] The association was formed by a group of independent dealers and did not involve company-owned stations.

[108] *See* 10 C.F.R. § 212.93 (1979).

[109] 486 F. Supp. 759 (M.D. Pa.), *rev'd on procedural grounds*, 634 F.2d 127 (3d Cir. 1980).

[110] Section 16 of the Clayton Act provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, . . . against threatened loss or damage by a violation of the antitrust laws . . . , when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts or equity, under the rules governing such proceedings.

15 U.S.C. § 26 (1976).

[111] 486 F. Supp. at 761. The plaintiff also sought a declaratory judgment that it had properly terminated Waldman's franchise agreement and was entitled to possession of his station. *Id.*

[112] *Id.* at 762. The gist of plaintiff's complaint was that the good reputation of its company stations had been damaged by the actions of the independent dealers.

[113] *Id. See* notes 62-63 *supra* and accompanying text.

[114] 486 F. Supp. at 763. The defendant also argued that since Crown Central was not the "target" of the boycott, it had no standing to assert the antitrust violation. This argument was summarily rejected by the court. *Id.*

The Pennsylvania district court began by considering whether to test the protest boycott under the Rule of Reason or to classify it as a per se violation. It concluded that all activities popularly referred to as boycotts are not per se offenses: The per se doctrine should only be applied to concerted refusals designed to "drive out competitors or to keep them out, but not those in which the concerted action is designed to achieve some other goal."[115] Thus, the protest boycott was to be tested under the Rule of Reason. However, the court notably avoided determining whether the protest boycott was a reasonable restraint of trade, opting instead to consider whether the activities in question were exempted from the antitrust laws by the first amendment.[116]

The court recognized that the *Noerr* doctrine was limited to situations where the course of conduct comprised *mere solicitation* of governmental action.[117] As a result, the central issue of the case became whether the dealers' refusal to deal was conduct protected as political speech.[118] If the closings were political speech aimed at petitioning the government, they could be protected under the *Noerr* doctrine. To make this determination the court applied a test originally formulated in the Supreme Court decision of *Spence v. Washington*.[119]

Under the *Spence* test, conduct is protected if: 1) it is a clear departure from the actor's normal conduct that can be explained only as an attempt by him to express himself; 2) the actor reasonably believes that the observers of his conduct will view his actions as expressive; and 3) the actor intends to and does communicate.[120] Applying these criteria to the station closings, the district court found that the dealers' actions were a departure from their normal operation, that the public was well-informed that the conduct was taken to protest the low maximum sale price of gasoline, and that the dealers obviously intended to com-

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[115] *Id.* at 764.

[116] "Whether the activities in question were unreasonable concerted actions in restraint of trade, however, is unimportant in our final deliberation. Not every form of combination or conspiracy that restrains trade falls within the ambit of the Sherman Act's protections." *Id.* at 765.

[117] *Id.* at 766. *See* Eastern President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961).

[118] This approach differs from the approach taken by the Eighth Circuit Court of Appeals in Missouri v. Nat'l Organization for Women, 620 F.2d 1301 (8th Cir. 1980). In that case the State of Missouri alleged that NOW's campaign to persuade organizations to boycott the convention industries of states which had not ratified the Equal Rights Amendment constituted a restraint of trade. The NOW court assumed that the campaign was a valid exercise of first amendment rights, and spent much of its time determining whether, completely aside from *Noerr*, the actions should be exempted as beyond the scope of the antitrust laws. *Id.* at 1315-16.

[119] 418 U.S. 405 (1974) (*per curiam*).

[120] *Id.* at 409-11. *See* Crown Cent., 486 F. Supp. at 767.

municate their frustration by the shutdown.[121] The Court thereby concluded that the dealers' actions were protected conduct.

As a final step, the court used the balancing test of *United States v. O'Brien*[122] to ascertain whether the dealers' interest in free expression outweighed the government's interest in free trade and unrestrained competition.[123] The district court noted that the dealers' ability to effectively express themselves would be severely inhibited if the boycott was not exempted. Relying heavily on this, the court resolved the balance in favor of the association, and held that Waldman's actions were protected under the Noerr-Pennington doctrine.[124]

B. *The* Osborn *Case*

Six months after *Crown*, the District Court for the District of Delaware, deciding a case based on the exact same factual situation analyzed by the Pennsylvania district court, held that the independent dealers' boycott was *not* protected by the Noerr-Pennington doctrine. In *Osborn v. Pennsylvania-Delaware Service Station Dealers Association*,[125] the plaintiff was not an oil company, but a consumer who brought a class action on behalf of all those who regularly purchased gasoline from one or more of the boycotting dealers.[126]

The plaintiff averred that the Dealers Association's concerted refusal to deal with consumers violated both the Sherman Act and the Clayton Act. In response, the dealers employed the same defense that had been used successfully in *Crown*, namely that the protest boycott was protected by the Noerr-Pennington doctrine.[127] As had the court in *Crown*, the Delaware court initially distinguished between expressive speech and expressive conduct, promptly placing the dealer's protest boycott in the latter category.[128] Having made this classification, the

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[121] Crown Cent., 486 F. Supp. at 768.

[122] 391 U.S. 367 (1968).

[123] 486 F. Supp. at 769. Under *O'Brien*, government regulation of political conduct is permitted if

> it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. 367, 377 (1968).

[124] 486 F. Supp. at 769.

[125] 499 F. Supp. at 553 (D. Del. 1980).

[126] *Id.* at 555. Under certain circumstances, consumers have standing to sue under the antitrust laws despite their lack of commercial interest. Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

[127] 499 F. Supp. at 556.

[128] *Id.* at 557.

court went on to apply the balancing test mandated by *United States v. O'Brien*.[129] At this point in the analysis the similarities with *Crown* end.

The court interpreted *O'Brien* as sanctioning government regulation "aimed at the non-communicative impact of expressive conduct," as long as the stated purpose justified the "incidental constriction of the flow of ideas."[130] The Noerr-Pennington doctrine was distinguished as having dealt with the regulation of ideas, and not with the regulation of coercive conduct.[131] The court went on to state that:

> The free speech case law suggests that the refusal of the Supreme Court to apply the antitrust laws in Noerr will not be considered controlling in a context *where the effect of the application of those laws would be content neutral*, would not materially inhibit effective expression, and would alleviate the coercive economic impact of a concerted refusal to deal.[132]

In the district court's opinion, a protest boycott, along with its expressive component, generates an anticompetitive impact which ordinarily may be subjected to regulation without jeopardizing first amendment interests.

The court, recognizing the strong governmental interest in regulating anticompetitive activity,[133] placed on the defendants the burden of showing that the application of the antitrust laws to their protest boycott would substantially impair their ability to be heard.[134] In other words, the defendants' actions would not be exempted unless they could show

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[129] *Id.*

[130] *Id.* The court quoted the following passage from United States v. O'Brien, 391 U.S. 367 (1968):

> [W]hen speech and non-speech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms so long as that interest is unrelated to the suppression of free expression.

Id. at 376-77.

[131] 499 F. Supp. at 553, 557. According to the court, liability could not have been imposed in *Noerr*, unless based on the anticompetitive nature of the message conveyed. This would have been impermissible under *O'Brien*. *Id.*

[132] *Id.* (emphasis added).

[133] *Id.* at 558 (*citing* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)).

[134] Conceivably, there may be situations in which application of those acts to such a boycott would substantially impair the participants' ability to be heard, but this possibility does not require an across-the-board antitrust immunity and nothing currently in the record suggests that this is such a situation.

Id.

that there was no less coercive alternative form of effective communication. In this case, the Delaware court deemed that this burden had not been met,[135] and refused to dismiss the claim against the Dealers Association.[136]

The *Crown* and *Osborn* courts applied essentially the same test to the same evidence and arrived at completely different results. This anomaly can be traced to the courts' discordant views on how much weight to give each of the interests weighed in the *O'Brien* test. The *Crown* court struck the balance in favor of first amendment interests, while the *Osborn* court, emphasizing the coercive nature of the protest boycott, placed greater weight with the regulatory interests. These incongruous results do more than just imply that one of the courts erred in its application of the balancing test; they strongly indicate that the legal standard employed by both benches was inappropriate.

IV. CRITIQUE

As exemplified by *Crown* and *Osborn*, the judiciary's approach to the protest boycott problem has two major flaws. First, it relies heavily on a balancing test which allows judges to arbitrarily assign values to the regulatory and first amendment interests being weighed, and which produces decisions having little precedential value. Second, and more importantly, it incorrectly presumes, as a first principle, that all protest boycotts are illegal, and consequently in many instances goes on to develop unnecessary and unwarranted extensions of the Noerr-Pennington doctrine. Each of these criticisms will be dealt with individually.

A. *Arbitrary Standards*

By their very nature, protest boycotts are volatile. They are directed at controversial issues,[137] often employed by unpopular or scorned

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[135] In *Crown*, the Pennsylvania district court had come to the exact opposite conclusion:

> It might reasonably be that the only means of effective expression was the boycott. For us to hold that [the dealers] must have continued to rely upon strictly written and oral communication would be to deny them what may have been their only effective means of communication—arousing public sentiment. This we will not do.

486 F. Supp. at 769.

[136] 499 F. Supp. at 558. The court dismissed the actions against the federal officials, advising the plaintiff to seek his remedy under the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1976).

[137] *E.g.*, Missouri v. Nat'l Organization for Women, Inc., 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980) (passage of the Equal Rights Amendment); Allied Int'l Inc. v. Int'l Longshoremen's Ass'n, 492 F. Supp. 334 (D. Mass. 1980) (protesting Russian invasion of Afghanistan).

groups,[138] and frequently support social principles which run counter to the then accepted norms of society.[139] They cause economic injury, and do so to extract often unquantifiable benefits. They are designed to generate support for a cause, but recurrently have the effect of creating negative public opinion.

Given the provocative nature of protest boycotts, it is unfortunate that the test used for determining their legality depends largely on the ideological sympathies of a particular bench. Within the confines of the *O'Brien* test a court must make three value judgments: 1) it must place a value on the government's interest in free trade and unrestrained competition; 2) it must estimate the defendant's interest in free expression; and 3) it must juxtapose these interests and determine which is weightier in a given set of circumstances.[140] While it is conceivable that these judgments can be made with perfect objectivity, it is more likely that courts will be swayed by the content of the message communicated.[141] Depending on the court's views, this type of subtle bias can affect adversely either the boycotter or the boycotted.

The *O'Brien* test, especially as used in *Osborn*, is essentially a cost-benefit analysis.[142] The *Osborn* court required the defendant to show that the boycott was the least coercive effective means of expression.[143] At a minimum this would require evidence that the benefits obtained through the boycott in terms of effective communication outweigh the costs to competition.[144] The latter factor is easily quantified for it can be based loosely on the damages incurred by the economic actors who were boycotted.[145] However, the benefit side of the equation is most likely un-

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[138] A prominent example would be the protest boycotts employed by black citizens of Montgomery, Alabama in the late 1950's and 1960's. *See* Silbey, *Direct Action and the Struggle for Integration*, 16 HASTINGS L.J. 351 (1965); Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U. L. REV. 705, 705 n.2 (1962).

[139] An example is the boycott by homosexuals of citrus products to protest against the Miami, Florida gay rights referendum. *See also* Missouri v. Nat'l Organization for Women, Inc., 620 F.2d at 1304 n.5.

[140] *See* Crown Cent. Petroleum Corp. v. Waldman, 486 F. Supp. at 768-69.

[141] *See* Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 659, 662 (1978) [hereinafter cited as *Political Boycott Activity*].

[142] *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW (1972).

[143] Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n, 499 F. Supp. at 558.

[144] *See* 1 AREEDA & TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 201-05 (1978) (Behavior "unnecessarily harmful" to competition when it is excessively dangerous without being indispensible to the political activity).

[145] Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), requires an antitrust plaintiff to demonstrate that he has been injured in his business or property. *See also* note 126 *supra.*

quantifiable. Thus, the formula itself is skewed in favor of the antitrust plaintiff. Defendants who have inflicted great economic injury on the target will be hard pressed to show that their boycott was the least coercive effective means of expression.[146]

A further criticism of the balancing approach is that it does not lend itself to the establishment of precedent. In an area of the law where potential liability is massive due to the looming presence of treble damages,[147] there is a controlling need to assure consistent evaluation of analogous claims.[148] As the conflicting holdings of *Crown* and *Osborn* illustrate, the *O'Brien* test, so dependent on value judgments colored by the socio-economic policies of a particular court, does not fulfill this need.[149] This absence of legal guidelines affects both the potential boycotter's ability to evaluate the legal ramifications of his anticipated conduct and the capacity of the antitrust laws to deter future illegal activity.

Faced with enormous possible liability, the potential boycotter has the impossible task of determining what balance a court might strike in the future.[150] No doubt this lack of knowledge will cause some organizations to eschew protest boycotts as a means of expression. In addition, still other organizations will enter into anticompetitive conduct, either with a hope that the courts will strike the balance in their favor, or in ignorance of the truly anticompetitive nature of the actions they are undertaking. In either situation the policies of the antitrust laws will be undercut.

B. *The Presumption of Illegality*

The ultimate defect in the judiciary's approach to protest boycott cases lies not in the ambiguous standard used to determine whether the Noerr-Pennington doctrine is applicable, but rather in its presumption that an affirmative defense is necessary at all. Before an affirmative

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[146] For example, a coalition of union leaders and church groups might be faced with a showing that their boycott activity had caused several million dollars of damages to an agricultural combine, and be required to demonstrate that they could not have effectively communicated their message by advertising instead of a boycott.

[147] Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), states that an injured party "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *Id. See Protest Boycotts, supra* note 27, at 682, for an argument that treble damages should not be recoverable in protest boycott actions. This approach attempts to remedy one of the inadequacies in the balancing approach while leaving the test intact. It treats a symptom, but not the illness.

[148] *See* Missouri v. Nat'l Organization for Women, Inc., 620 F.2d at 1320 (Gibson, J., dissenting).

[149] *See* Part IV.

[150] *See Political Boycott Activity, supra* note 141, at 662.

defense need come into play, it must be first found that the protest boycott is anticompetitive. The present approach glosses over this threshold issue and immediately proceeds to consider whether the boycott is protected under the first amendment.[151] This methodology effectively rearranges the burdens of proof, and provides a fertile medium for unnecessary extensions of the Noerr-Pennington doctrine.

All protest boycotts are not illegal. Whether they be a unilateral refusal to deal or a primary or secondary boycott, they should be tested by the same standard used to evaluate all other types of refusals to deal, that is, whether the refusal is employed to enforce an otherwise anticompetitive course of conduct.[152] In most cases, the protest boycott is not used as an enforcement mechanism in an anticompetitive scheme. Thus, it should be sanctioned, not because it is protected by the first amendment, but because it does not violate the policies of the antitrust laws.[153] This inquiry should be the starting point in all protest boycott cases.

An approach analagous to that suggested here was utilized by the District Court for the District of Massachusetts in *Allied International, Inc. v. International Longshoremen's Association, AFL-CIO*.[154] In *Allied*, the Longshoremen's Union refused to load and unload ships engaged in trade with the U.S.S.R. to protest the Soviet Union's invasion of Afghanistan.[155] The action was brought by an importer of Soviet wood products who alleged that the longshoremen had planned and executed a group boycott. In dismissing this claim, the Massachusetts court made passing reference to *Noerr*, but based its decision on a finding that the union members had not imposed a restraint of trade.[156] Thus, the district court focused on whether the refusal to deal violated the antitrust laws,

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[151] In Crown Cent. Petroleum Corp. v. Waldman, 486 F. Supp. 759 (M.D. Pa.), *rev'd on procedural grounds*, 634 F.2d 127 (3d Cir. 1980), the court did initially consider whether the boycott was unreasonable, but abandoned that inquiry in favor of examining whether the boycott was protected. *Id.* at 765. *See* note 116 *supra* and accompanying text. *See generally* Allied Int'l., Inc. v. Int'l Longshoremen's Ass'n, 492 F. Supp. 334 (D. Mass. 1980).

[152] See notes 33-37, 46-53, 89-91 *supra* and accompanying text.

[153] As Posner has stated:

> A boycott is simply a method of self-help enforcement. It can be used by firms to enforce a cartel, in which event it is bad because cartels are bad; but it can equally well be used, and often is, by firms or individuals to enforce a code of truthful advertising, to minimize credit risk, or to express opposition to communism, or racial discrimination, or the use of nonunion labor.

R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 207 (1976).

[154] 492 F. Supp. 334 (D. Mass. 1980) (action consolidated with Walsh v. Int'l Organization Longshoremen's Ass'n, 488 F. Supp. 524 (D. Mass. 1980)).

[155] 492 F. Supp. at 335-36.

[156] *Id.* at 339.

and in answering this question in the negative, found it unnecessary to rule on any affirmative defenses.[157]

Unlike the *Allied* court, most courts concentrate on the issue of whether the boycotter's actions are protected by an affirmative defense. The practical implication of such an approach is to always place the burden of proof on the defendants. As presently staged, in a protest boycott case the plaintiff need only make a prima facie showing that the defendants engaged in a refusal to deal.[158] At this point the burden shifts to the defendants to show that their action is exempted from antitrust scrutiny, usually under the Noerr-Pennington doctrine. This proof problem is then compounded by the demands placed on the defendant by the *O'Brien* test.[159]

Under the proposed approach the plaintiff should be required to not only show that the defendants refused to deal, but that the refusal was used to enforce an otherwise anticompetitive course of conduct. If he proffers such proof, then the burden should shift to the defendants to prove that their conduct was protected.

However, the negative impacts flowing from the judiciary's presumption of illegality are not felt *only* by antitrust defendants, for in attempting to reach an equitable result in these cases many courts have enlarged the scope of the Noerr-Pennington doctrine. This extension affects antitrust plaintiffs by giving their opponents an escape, and thereby generally undercuts the efficacy and comprehensiveness of the regulatory system. It is contrary to the prevailing policy of limiting as much as possible the coverage of antitrust exemptions,[160] and is of questionable legal validity.[161] In addition, the extension is not really

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[157] *Cf.* Feminist Women's Health Center, Inc. v. Mohammad, 415 F. Supp. 1258 (N.D. Fla. 1976), *aff'd in part, rev'd in part*, 586 F.2d 530 (5th Cir. 1978) (court looked to nature of doctor's boycott of abortion clinic).

[158] *See* notes 73-74 *supra* and accompanying text.

[159] *See* notes 142-46 *supra* and accompanying text.

[160] The 1979 National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General, states:

> 1. Free market competition, protected by the antitrust laws, should continue to be the general organizing principle. . . .
> 2. Exceptions should only be made where there is compelling evidence of the unworkability of competition or a clearly paramount social purpose.

Id. at 177. *See also* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398 (1978).

[161] Some commentators have contended, perhaps correctly, that the Noerr-Pennington doctrine should be applied only in situations where a defendant's course of conduct is directed towards influencing a governmental official to take an anticompetitive action, and not where the defendant engages in anticompetitive activity to procure governmental action which is itself legal. *See* Loutzenhiser, *The ERA Boycott and the Sherman Act*, 17 AM. BUS. L.J. 507, 515 (1980).

necessary. In many instances where it is applied, the defendant's boycott is not being availed of to enforce an anticompetitive course of conduct, and thus is not illegal to begin with.[162]

Before referring to the Noerr-Pennington doctrine, courts should first decide whether a protest boycott violates the Sherman Act. The Noerr-Pennington doctrine should not be extended by holdings which would qualify as dicta if the court had gone so far as to analyze the anticompetitive nature of the defendant's conduct.[163] Cases such as *Crown* and *Osborn* should be decided using antitrust principles, and unless dictated by the exigencies of particular facts, should be adjudicated without reference to implied exceptions based in other areas of the law. Courts should be wary of needlessly enlarging the Noerr-Pennington doctrine, for if the doctrine is further expanded, the antitrust laws may become exceptions to the first amendment instead of the reverse situation.

V. CONCLUSIONS

There is some tension between the protections afforded by the first amendment and the policies of the antitrust laws, but not nearly as much as most courts would have us believe. An apparent conflict is created when courts incorrectly presume that all protest boycotts are illegal, and then set about to derive implied exemptions for these allegedly violative actions. Under this methodology a boycott defendant is strapped with additional unnecessary pressures, which in turn discourage the potential utilization of protest boycotts as a means of expression.

The judiciary's present approach to the protest boycott problem has two major flaws. First, its use of the *O'Brien* test subjects the antitrust defendant to the ideological sympathies of a particular bench, and places on the boycotter the burden of showing that the concerted refusal to deal was the least coercive effective means of expression. It is ironic that the more successful the protest boycott is in terms of generating economic injury to influence change, the heavier the burden placed on the defendants.

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[162] *See* notes 152-53 *supra* and accompanying text.

[163] With the exception of protest boycott cases, the Noerr-Pennington doctrine has been limited in the past several years. For example, it is now commonly accepted that the doctrine does not apply to attempts to influence purely commercial functions of government. *See* Hecht v. Pro Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); Whitten v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970), *on remand*, 376 F. Supp. 125 (D. Mass.), *aff'd*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975). *See generally* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Fischel, *Antitrust Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 CHI. L. REV. 80 (1977).

Second, the present methodology is defective because it ignores the central issue, namely, whether the protest boycott is an unreasonable restraint of trade. Absent a finding of unreasonableness, no implied exemption is necessary. The present approach shifts the burden of proof to the defendant, who must demonstrate affirmatively that his actions are protected by the first amendment. In most cases such a shift is unwarranted. The approach also sets the stage for unnecessary extensions of the Noerr-Pennington doctrine since courts, sensitive to the underlying equities of a case, will look to the first amendment as a means of absolving the defendants from liability.

To correct these flaws this Article proposes a three-step standard. First, courts should classify the protest boycott as either a unilateral refusal to deal, a primary boycott or a secondary boycott. Second, they should determine whether the boycott is being used to enforce an otherwise anticompetitive course of conduct. The first step's classification will aid in this determination, as each of the types of refusals to deal lend themselves to certain categories of anticompetitive conduct. Third, only if the boycott is deemed anticompetitive should the courts look to implied exceptions. In this approach, the burden would remain on the plaintiff to show that the protest boycott was an unreasonable restraint of trade.