POLITICALLY MOTIVATED BOYCOTTS WITH COMMERCIAL BENEFITS: A CONSOLIDATED RULE OF REASON JUDICIAL STANDARD

INTRODUCTION

The founding documents of the United States provide each citizen with certain inalienable rights, including the right to speak and assemble freely, the right to petition the government,[1] and the right to pursue life, liberty, and happiness.[2] Economic rights, such as the right to maximize one's individual potential and to participate in our free enterprise system, are not inalienable. Yet, they have historically enjoyed substantial, if now less rigorous, protection by the judiciary from our democratic political process.[3]

The government's attempt to protect the first amendment rights of its citizens may, however, conflict with its duty to ensure the maintenance of a vigorous, uninhibited free trade system. One such conflict may arise when commercial or economic organizations, legitimately motivated by political reasons, exercise their first amendment rights and refuse to deal with another commercial organization or with the government, thereby resulting in a potential violation of federal antitrust laws under the Sherman Antitrust Act.[4] Although the United States Supreme Court has not determined whether such conduct violates federal antitrust laws,[5] several federal courts have addressed the issue[6] with inconsistent results.

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1. U.S. Const. amend. I.

2. The Declaration of Independence para. 2 (U.S. 1776).

3. *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578 (1897) (statute prohibiting anyone from obtaining insurance in Louisiana from any company not licensed in Louisiana impedes the freedom of contract protected by the due process clause of the fourteenth amendment); Lochner v. New York, 198 U.S. 45 (1905) (New York maximum hours law for bakery employees abridges "liberty of contract" protected by fourteenth amendment due process clause), *overruled*, Bunting v. Oregon, 243 U.S. 426 (1917); Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating a "yellow dog" contract as a violation of the freedom to contract protected by the fourteenth amendment); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (invalidating minimum wage law for women as a violation of the "freedom of contract" protected by the fourteenth amendment), *overruled*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

Cases after *West Coast Hotel* adopt an even less strict standard of scrutiny of the means and ends of economic regulations. *See, e.g.*, United States v. Carolene Prods., 304 U.S. 144 (1938) (economic legislation need only rest upon "some rational basis within the knowledge and experience of the legislators"); Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (economic legislation will be sustained where legislators "might have concluded" that the law had a rational basis).

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

5. *Cf.* International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982) (invalidating a politically motivated concerted refusal to unload Russian cargo ships because it violated the National Labor Relations Act).

6. *See* COMPACT v. Metropolitan Gov't of Nashville & Davidson County, 594 F. Supp.

There are three types of boycotts. First, there is the "group" boycott. The group boycott, also known as the "classic" or "naked" boycott, is the concerted refusal by a commercial organization to conduct business with another commercial entity, for the purpose of excluding that entity from competition.[7] The second type of boycott, often described as the politically motivated non-commercial boycott, involves the refusal by a non-commercial organization to conduct business with another entity because of political or other non-commercial reasons. The lack of a "commercial objective to achieve an effect traditionally held violative of the Sherman Act, such as monopolizing, raising prices, or excluding competitors from a market, [and the] lack of a significant business interest that might be advanced by the boycotting activity"[8] distinguishes the politically motivated non-commercial boycott from the aforementioned classic commercial group boycott. The third type of boycott, and the subject of this note, is the politically motivated boycott by a commercial organization. This type of boycott contains characteristics of both the group boycott and the politically motivated non-commercial boycott. It involves the concerted refusal of a commercial organization to deal with another commercial, governmental or non-commercial organization.[9] Since incidental commercial benefits usually inure to the boycotters as a result of their protest, both lower federal courts, federal agencies,[10] and commentators[11] have questioned the legality of politically motivated boycotts.

The few cases involving this type of boycott have yielded a wide variety of outcomes. The diverse rationales utilized by the ruling authorities include a reliance upon traditional *per se* treatment of horizontal restraints, the *Noerr-Pennington* doctrine, and first amendment expressive speech and conduct considerations. These rationales will be discussed below.

The Supreme Court has yet to provide a concise rule of law that would clarify the legality of politically motivated commercial boycotts and thereby resolve the disharmony among the federal courts. In *International Longshoremen's Association v. Allied International*,[12] the Court held that a politically motivated refusal by an American longshoremen's union to unload cargo shipped from the Soviet Union was an illegal secondary boycott under section

1567 (M.D. Tenn. 1984); Crown Central Petroleum Corp. v. Waldman, 486 F. Supp. 759 (M.D. Pa.), *rev'd on procedural grounds*, 634 F.2d 27 (3d Cir. 1980); Osborn v. Pennsylvania-Delaware Serv. Station, 499 F. Supp. 553 (D. Del. 1980); In re Super. Ct. Trial Lawyers Ass'n, No. 9171, slip op. (F.T.C. Oct. 18, 1984).

7. *See* 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); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).

8. Note, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131, 1157-58 (1980).

9. *See supra* note 6.

10. *See supra* note 6.

11. *See, e.g.*, Note, *A Market Power Test for Noncommercial Boycotts*, 93 YALE L. J. 523 (1980).

12. 456 U.S. 212 (1982).

8(b)(4) of the National Labor Relations Act (NLRA).[13] In so doing, the Court declined the opportunity to determine whether a politically motivated protest boycott violated the antitrust laws under the Sherman Act.

This note addresses the above antitrust issue and proposes a "consolidated rule of reason" analysis as the appropriate judicial standard. Part I discusses antitrust boycott law. Part II discusses various proposals by scholars on the applicability of the federal antitrust laws to boycotts. It also presents four cases decided by lower federal courts involving politically motivated commercially beneficial boycotts. Part III suggests that a "consolidation" of the various judicial standards postulated by lower federal courts and commentators would comprise a fair and equitable rule of reason by which to analyze such boycotts. The final section concludes that a "consolidated rule of reason" is the appropriate judical standard to be applied when the courts consider the legality of politically motivated, commercially beneficial boycotts.

I
GENERAL ANTITRUST BOYCOTT DOCTRINE

A. Section 1 of the Sherman Act

The Sherman Antitrust Act was enacted originally to prevent individual shareholders from creating powerful business trusts by transferring their shares to a single trustee or governing board, and thereby causing the concentration of an enormous amount of economic power in the newly created trust.[14] 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."[15] Although the Sherman Act's proscription is broad, it has not been applied literally. Since the Supreme Court's decision in *Standard Oil Co. v. United States*,[16] the Act has been interpreted to prohibit agreements that impose unreasonable restraints on trade.[17]

The courts have developed two methods for identifying unreasonable trade restraints: the "rule of reason" approach and the *per se* rule. Under the rule of reason approach, the court focuses on the competitive effect of the restraint. Hence, if a disputed boycott serves to discourage competition, it will be found unreasonable. In determining the reasonableness of the boycott, the court considers the facts peculiar to the type of business involved, the nature and history of the restraint, the effects of the restraint, and the reasons for its imposition.[18]

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13. 29 U.S.C. § 158(b)(4).

14. *See generally* 1 E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 8-13 (1978); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 50 (1911).

15. 15 U.S.C. § 1 (1976).

16. 221 U.S. 1 (1911).

17. *See infra* notes 18, 19.

18. *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1979); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

On the other hand, the *per se* rule automatically presumes the illegality of certain types of restraints because they have consistently demonstrated a propensity for causing pernicious effects on competition and lack any redeeming virtues.[19]

B. Antitrust Boycott Law

In the few group boycott cases involving the exclusion of competition that it has decided, the Supreme Court has found *per se* antitrust violations. However, none of these cases involved a commercial entity's politically motivated boycott against another commercial enterprise. The following cases illustrate the Court's treatment of group boycotts.

In *Eastern States Retail Lumber Dealers' Association v. United States*,[20] the Supreme Court held that the concerted refusal of a group of lumber retailers to conduct business with wholesalers, who also sold at retail, violated antitrust laws. The Court reasoned that when a retailer "conspir[es] and combin[es] with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence [of the concerted action] . . . such action brings him and those acting with him within the condemnation of the act."[21]

In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[22] the Supreme Court condemned as a *per se* offense an agreement between a department store chain and leading appliance manufacturers to refuse to sell (or to sell only on highly unfavorable terms) to an independent retail store competing with the chain. The Court stated that "[g]roup boycotts, or concerted refusals . . . to deal, . . . have long been held to be in the forbidden category."[23] Similarly, in *Silver v. New York Stock Exchange*,[24] the Court held that "absent any justification derived from the policy of another statute or otherwise,"[25] an agreement among stock exchange members prohibiting non-members from obtaining access to essential stock market information constituted a *per se* antitrust violation.[26]

Despite the Supreme Court's characterization of group boycotts or concerted refusals to deal as *per se* antitrust violations, lower federal courts[27] and

19. *See* Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977); Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

20. 234 U.S. 600 (1914).

21. *Id.* at 614.

22. 359 U.S. 207 (1959).

23. *Id.* at 211-12.

24. 373 U.S. 341 (1963).

25. *Id.* at 348-49.

26. *See also* United States v. General Motors Corp., 384 U.S. 127 (1966) (reaffirming the *per se* approach and announcing market exclusion as the rationale for that approach).

27. *See* Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n, Inc., 672 F.2d 1280 (7th Cir. 1982); Feminist Women's Health Center v. Mohammad, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.)(en banc), *cert. denied*, 439 U.S. 946 (1978); Worthen Bank & Trust Co. v. National Bank Americard, Inc., 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415

commentators[28] traditionally have supported a rule of reason approach to group boycotts or concerted refusals to deal, except when the sole purpose of the restraint is to eliminate competition.

A rigid application of the *per se* rule to group boycotts may ban genuine politically motivated boycotts and legitimate joint ventures, and as a consequence, have detrimental effects on both first amendment and economic rights. In recent antitrust decisions the Supreme Court has cautioned against overzealous application of the *per se* rule. In *Broadcast Music Inc. v. Columbia Broadcasting System Inc.*,[29] the Court stated that *per se* treatment was justified only where the purpose and effect of the challenged practice "threaten[ed] the proper operation of our predominantly free-market economy,"[30] or where the "practice facially appear[ed] to be one that would always or almost always tend to restrict competition and decrease output."[31] Similarly, in *Continental T.V., Inc. v. GTE Sylvania Inc.*,[32] the Court stated that "per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive."[33]

C. *Commentators*

Leading antitrust scholars have echoed the growing concerns of the Supreme Court and the lower federal courts over *per se* treatment of group boycotts. Commentators have advocated scrutinizing boycotts under the rule of reason approach, except in those cases involving perniciously anti-competitive conduct such as price-fixing agreements or agreements to exclude competitors.[34] While differing theories have been postulated by commentators and lower federal courts, the rising tide of opposition to *per se* treatment of group boycotts and concerted refusals to deal suggests that it is time to re-examine the issue and formally introduce a rule of reason analysis for these particular types of antitrust cases.

Judges Richard Posner and Robert Bork[35] lead the movement for legal reform of *per se* analysis of commercial boycotts. Guided by what they consider to be the goals of antitrust law, efficiency and consumer welfare, Posner and Bork claim that a boycott or a concerted refusal to deal is "proper object

U.S. 918 (1974); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

28. *See* Kissam, *Antitrust Boycott Doctrine*, 69 IOWA L. REV. 1165 (1984); McCormick, *Group Boycotts — Per Se or Not Per Se, That Is the Question*, 7 SETON HALL L. REV. 703 (1976).

29. 441 U.S. 1 (1979).

30. *Id.* at 19.

31. *Id.* at 19-20.

32. 433 U.S. 36 (1977).

33. *Id.* at 49-50.

34. *See infra* notes 32-45 and accompanying text.

35. Richard Posner is a federal judge in the Seventh Circuit Court of Appeals; Robert Bork is a federal judge in the District of Columbia Circuit Court of Appeals. The jurisprudence of both judges has been strongly influenced by the "supply side" economic analyses developed and popularized at the Chicago School of Economics.

of concern under the antitrust laws, . . . when, and only when, it is used to enforce an anticompetitive practice."[36] Thus, under the Chicago School approach, boycotts and concerted refusals to deal are unlawful only when, like price-fixing and exclusionary agreements among horizontal competitors, they decrease efficiency and restrict output. The purpose of the restraint is ancillary, if not irrelevant. In fact, Judge Bork argues that "[b]oycotts are the means used to enforce . . . efficiency-producing restraints,"[37] and the issue need only be "put in efficiency terms by the court, [where] the probing of counsel will disclose the purpose and effect of most restraints."[38]

In *Marrese v. American Academy of Orthopedic Surgeons*,[39] Judge Posner held that the failure to provide due process to two applicants who were denied admission to a professional association was not subject to *per se* treatment.[40] In effect, Judge Posner found that no separate *per se* rule against group boycotts and concerted refusals to deal exists.[41] This view has led one commentator to conclude that Judge Posner is "call[ing] for an antitrust jurisprudence that is free of any separate boycott rule, as a means of promoting the economic theory of antitrust law."[42]

Another major approach to antitrust law is that of adherents to a "liberal/political" philosophy. Generally, proponents of this approach argue that the goal of antitrust laws is to promote consumer interests, to preserve competition as a process, to decentralize the economic system and to promote freedom of opportunities, particularly for small entrepreneurs.[43] In contrast to those in the Chicago School, those in the "liberal/political" school do not view efficiency as the ultimate goal of the antitrust laws. Rather, they view efficiency as "an intermediate goal pursued in order to facilitate freedom of choice, to serve other interests of consumers, and to make the best use of society's resources."[44] Thus, while their proposals vary semantically, proponents of the "liberal/political" school of antitrust law would maintain the current purpose-based *per se* rule against anti-competitive "horizontal" boycotts,[45] and apply the rule of reason approach, based on both purpose and effect, to other types of boycotts.[46]

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36. R. POSNER, ANTITRUST LAW 208 (1976); *see* R. BORK, THE ANTITRUST PARADOX 330-46 (1978).

37. R. BORK, *supra* note 36, at 338.

38. *Id.* at 336.

39. 726 F.2d 1150 (7th Cir. 1984) (en banc) (same result), *rev'd on other grounds*, 470 U.S. 373 (1985).

40. 726 F.2d at 1155.

41. *Id.*

42. Kissam, *supra* note 28, at 1193.

43. *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 1-3 (1977); Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1182 (1981); Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 382-84 (1965); Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 422-40 (1965).

44. Fox, *supra* note 43, at 1180.

45. *Id.* at 1183-84; L. SULLIVAN, *supra* note 43, at 84-85.

46. L. SULLIVAN, *supra* note 43, at 86-92.

Recently, Professor Phillip C. Kissam developed a third approach for analyzing boycotts and concerted refusals to deal under the antitrust laws.[47] Criticizing both the Chicago and the "liberal/political" schools for their social policy views of antitrust law, Professor Kissam postulates that "antitrust law's rule of reason, at least in the boycott context, can best be understood and implemented by . . . a 'purpose-based' inquiry that focuses on the purposes or goals of a defendant's behavior rather than on a balancing of effects as the ultimate antitrust standard."[48] Under the purpose-based approach, "a court's basic task will be to determine whether the defendant's activity had a substantial procompetitive purpose or instead was motivated predominantly by anticompetitive purposes."[49]

The aforementioned approaches of antitrust law to boycotts and concerted refusals to deal reflect the current literature and debate on this topic. Although the above theories are based upon different interpretations of the legislative intent and purpose of the antitrust laws, they address three common concerns: the purpose of the boycott or concerted refusal to deal, its positive or negative effect on competition, and its efficiency or market power.

Furthermore, despite the differing ideological grounds upon which the theories rest, subscribers to all three generally support a *per se* rule against boycotts and concerted refusals to deal that specifically aims to exclude or stifle competition. Adherents to the Chicago School could plausibly go one step further and argue that, as Judge Posner held in *Marrese*,[50] there is no separate *per se* rule against group boycotts.

However, as previously stated, believers in each of the three approaches differ substantially in their view of the criteria or burdens of proof that one should utilize under a rule of reason analysis to determine whether an antitrust law violation has occurred. Representatives of the Chicago School hold that only efficiency and consumer welfare should dictate the rule of reason anaylsis. Those who adopt a "liberal/political" view contend that efficiency should be an intermediate goal only; the restraint's purpose and effects should govern the analysis. Similarly, Professor Kissam postulates that the analysis should be based solely upon the purpose of the restraint. In section III, I will "consolidate" all of these theories to develop a single coherent judicial rule of reason for boycotts and concerted refusals to deal.

II
POLITICALLY MOTIVATED BOYCOTTS WITH COMMERCIAL BENEFITS

There have been relatively few reported cases concerning politically motivated boycotts with commercial benefits. As the following representative

47. Kissam, *supra* note 28.
48. *Id.* at 1177.
49. *Id.*
50. 726 F.2d 1150 (7th Cir. 1984).

cases illustrate, the courts, in both holdings and reasoning, have been inconsistent and have failed to determine whether such boycotts violate antitrust law.

A. COMPACT v. Metropolitan Government of Nashville & Davidson County

COMPACT v. Metropolitan Government of Nashville & Davidson County,[51] involved a newly-created, black-owned joint venture, COMPACT, that refused to conduct business with a large, white-owned architectural firm. COMPACT employed the boycott to protest repeated discrimination against it in the awarding of prime public contracts in Tennessee. COMPACT's goal was to "immediately alleviat[e] and ultimately eliminat[e] . . . racial discrimination."[52]

Despite the political motivation of the boycott, the district court found that it constituted a *per se* violation of the antitrust laws under section 1 of the Sherman Act.[53] The court stated that it would "consider COMPACT's conduct only in light of its competitive significance."[54] Accordingly, the court refused to consider COMPACT's avowed goal of increasing the participation of black architectural firms in the general architectural market. The court noted that "the current consensus among both courts and commentators embraces consumer welfare as the objective served by enforcement of the antitrust laws."[55]

The district court rejected COMPACT's claim that the *Noerr-Pennington* doctrine, which allows individuals to lobby or petition governmental bodies to effect legislative change,[56] exempted it from antitrust liability. The court stated that the doctrine provides "no such protection of commercial activity by businessmen when dealing with the government in its proprietary capacity."[57] It concluded that COMPACT's boycott constituted this type of activity and added that "[i]n the absence of legislation or a valid quasi-legislative ruling, a private person dealing with government as a buyer, seller, lessor, lessee, or franchisee has no greater antitrust privilege or immunity than in similar dealings with non-governmental parties."[58]

The court went on to find COMPACT liable for every horizontal *per se* violation available under the antitrust laws, including the rare joint venture

51. 594 F. Supp. 1567 (M.D. Tenn. 1984).

52. Brief for Plaintiff-Appellants at 7-8, COMPACT v. Metropolitan Gov't of Nashville & Davidson County, 594 F. Supp. 1567 (M.D. Tenn. 1984).

53. 594 F. Supp. at 1581.

54. *Id.* at 1573.

55. *Id.* at 1572.

56. "The Noerr-Pennington doctrine recognizes that in light of the basic constitutional right of all citizens to petition government, individuals have a right to lobby legislative and administrative bodies to pass or repeal laws and regulations that protect their interests." *Id. See generally* 1 P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATIONS ch. 2A (1978).

57. 594 F. Supp. at 1573.

58. *Id.* citing 1 P. AREEDA & D. TURNER, *supra* note 56, at 52.

per se violation,[59] allocation of territories and customers,[60] and price-fixing.[61] It concluded that COMPACT imposed horizontal trade restraints on actual competitors which lacked any pro-competitive efficiencies. The court granted the defendants' motion for summary judgment on the antitrust issues.[62]

B. In the Matter of Superior Court Trial Lawyers Association

In *In the Matter of Superior Court Trial Lawyers Association*,[63] an administrative law judge held that the Superior Court Trial Lawyers Association's ("SCTLA") concerted refusal to represent their indigent clients was not a violation of federal antitrust law. SCTLA, a group of approximately 100 lawyers that represents 25,000 indigent criminal defendants under the District of Columbia's Criminal Justice Act (CJA) program, went on strike after city officials ignored their repeated demands for a salary increase. Their rate of pay had not been changed since 1971.[64]

The Federal Trade Commission ("FTC") brought an antitrust action against the group on the ground that its concerted refusal to represent its clients for two weeks was a *per se* price-fixing antitrust violation because its goal was to force city officials to increase their legal fees.[65] Applying a rule of reason analysis, Judge Needleman held that the FTC's claim against SCTLA group could not be upheld since the strike produced no adverse effects on competition.[66] He found that special circumstances, such as the city's "knowing wink" of support for the strike, distinguished the SCTLA's actions from typical *per se* price-fixing antitrust violations.[67] He admonished the FTC for bringing this action against the SCTLA and cautioned "against pressing for an unnecessary and possibly uncertain confrontation between the commission's antitrust perspective . . . and broader constitutional principles, which may allow for an expressive demonstration if the political motivation evidence is credible."[68]

C. Crown Central Petroleum Corp. v. Waldman

In *Crown Central Petroleum Corp. v. Waldman*,[69] a district court held

59. 594 F. Supp. at 1575. The court stated that COMPACT's blanket prohibition on its individual members' right to compete for the airport contract preempts competition between COMPACT and its members and, also, between the individual COMPACT members themselves. Net productive capacity of all members of COMPACT is not increased by COMPACT's operation; it is reduced. Consumer welfare is thus compromised by COMPACT's operation.

60. *Id.* at 1575-77.

61. *Id.* at 1577-79.

62. *Id.* at 1581.

63. In re Superior Court Trial Lawyers Ass'n, No. 9171, slip op. (F.T.C. Oct. 18, 1984).

64. *Antitrust Law v. Lawyers*, Nat'l. L.J. (Feb. 25, 1985) at 13, col. 1.

65. *Id.*

66. No. 9171 at 93-94, 96.

67. *Id.* at 91-93.

68. *Id.*

69. 486 F. Supp. 759 (M.D. Pa.), *rev'd on procedural grounds*, 634 F.2d 127 (3d Cir. 1980).

that a concerted shutdown of gasoline service stations by their dealers association came within the scope of the *Noerr-Pennington* doctrine. The shutdown thus constituted a valid exercise of the first amendment right to petition government, and was exempt from prosecution under federal antitrust law.[70] The defendant Waldman, an independent franchisee of the plaintiff Crown, participated with other dealers in a three-day shutdown of gasoline stations to protest a price ceiling on gasoline newly enacted by the Department of Energy ("DOE"). Crown sought an injunction against further shutdowns on the ground that participation in such activity was an antitrust violation.[71]

The district court applied a rule of reason analysis to the case. Yet, because it found the dealers' boycott to be protected political speech, it did not reach the question of whether the dealers' boycott was a reasonable trade restraint.[72] Even though the dealers' ultimate goal was higher profits, the court concluded that their shutdowns constituted political speech since their purpose was to communicate dissatisfaction with the DOE's price ceiling for gasoline.[73] The court said that the dealers' first amendment interest in the boycott as political speech outweighed the government's interest in promoting free trade and unrestrained competition.[74]

D. Osborn v. Pennsylvania-Delaware Service Station Dealers Association

Osborn v. Pennsylvania-Delaware Service Station Dealers Association[75] involved the same dealers' boycott as that in *Crown Central Petroleum Corp.* The plaintiff, a consumer, brought a class action lawsuit on behalf of all consumers who purchased gasoline regularly from a boycotting dealer. The district court denied the defendant dealers association's claim that the *Noerr-Pennington* doctrine, upheld only six months earlier in *Crown Central Petroleum Corp.*, exempted the boycott from prosecution under federal antitrust laws.[76] The court deemed the boycott to be expressive conduct, and therefore less entitled to first amendment protection than expressive speech.[77] The court held "that a boycott, along with its communicative component, has a coercive economic effect which ordinarily may be regulated without serious

70. *Id.* at 763, 769.

71. *Id.* at 761-62.

72. *Id.* at 765.

73. *Id.* at 768.

74. *Id.* at 769. On appeal, the Third Circuit held that the district court, by converting the motion to dismiss into a motion for summary judgment, denied Crown the notice required to support its antitrust claims. The Third Circuit reversed the case and remanded it to the district court. 634 F.2d at 129. On remand, the district court held, on other grounds, that Crown had properly terminated Waldman's franchise. 515 F. Supp. 477, 486 (M.D. Pa. 1981), *aff'd* 676 F.2d 684 (3d Cir. 1982). The court noted, however, that since the Third Circuit had not overruled the antitrust issue, its earlier decision on the issue, although moot, remained. 515 F. Supp at 487 n.7.

75. 499 F. Supp. 553 (D. Del. 1980).

76. *Id.* at 556.

77. *Id.* at 557.

jeopardy to First Amendment interests."[78] Applying the first amendment analysis enunciated in *United States v. O'Brien*,[79] the court concluded that the dealers were not entitled to immunity from prosecution because their right to political expression was outweighed by the government's strong interest in regulating anti-competitive activity and the great anti-competitive potential of a concerted refusal to deal.[80] Thus, the court found that the *Noerr-Pennington* doctrine did not apply where the application of antitrust laws to coercive conduct such as a boycott "would be content neutral, would not materially inhibit effective expression, and would alleviate the coercive economic impact of a concerted refusal to deal.[81] The *Osborn* court, like the *Crown* court, scrutinized the dealers' boycott under the rule of reason approach, and yet reached an opposite result.

E. Summary

The cases presented above illustrate the glaring differences in the results reached by the courts when they consider the legality of politically motivated boycotts with commercial benefits. The *COMPACT* court used a *per se* rule to strike down the black architectural firm's politically motivated, concerted refusal to deal with a white-owned architectural firm, finding horizontal restraints of trade such as price-fixing and division of markets. Under the rule of reason approach, the *SCTLA* court found that the lawyers' boycott did not violate federal antitrust laws. The *Crown Central Petroleum Corp.* and *Osborn* courts both utilized the rule of reason analysis in reaching opposite results regarding the same boycott.

The discordance among the courts' resolutions manifestly demonstrates the need for a judicial standard that can be applied universally to politically motivated boycotts with commercial benefits. The following section attempts to satisfy this need by proposing a "consolidated rule of reason" analysis.

III
TOWARD A CONSOLIDATED RULE OF REASON

A. The Inappropriateness of Per Se *Treatment of Politically Motivated Boycotts with Commercial Benefits*

As discussed above, *per se* treatment is appropriate only for those concerted refusals to deal that properly can be called "classic" or group boycotts because their primary objective is the purposeful exclusion of competition.[82]

78. *Id.*

79. 391 U.S. 367, 377 (1978) ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

80. 499 F. Supp. at 558.

81. *Id.* at 557.

82. *See supra* text accompanying note 7.

Unlike the group boycott, whose goal is to eliminate a competitor, a politically motivated boycott with commercial benefits aims to achieve a legitimate non-commercial purpose — usually to protest a competitor's or another entity's unconscionable acts — although a commercial benefit often inures to its participants as a result of the protest.

Furthermore, the Supreme Court has expressed concern over the harsh effects that strict *per se* treatment may have on both the parties and the market, thereby creating an uncertain future for the rule. The Court has affirmed repeatedly the principle that *per se* rules should not be applied to situations in which the manifestly anti-competitive character of a particular type of restraint has not yet been shown.[83] The inconsistency of the lower courts' findings reflect this same uncertainty about the efficacy of the rule.[84] In light of this uncertainty, it would be unwise and inappropriate to extend the *per se* rule to politically motivated boycotts with commercial benefits.

Finally, the minimal effect on competition that ordinarily results from politically motivated boycotts with commerical benefits, as well as the important symbolic speech element of this method of protest, distinguishes it from boycotts that are merely anti-competitive and lack any redeeming social value.

B. Rule of Reason Analysis

Having outlined the reasons for the inappropriateness of applying the *per se* rule to politically motivated boycotts with commercial benefits, the following section suggests that such boycotts should be scrutinized under a rule of reason approach. Additionally, the section attempts to integrate the various aforementioned competing philosophies of antitrust law [85] into a "consolidated," standardized rule of reason for analyzing such boycotts.

1. The Rule of Reason

The Supreme Court has held that "the inquiry mandated by the rule of reason is whether the challenged agreement is one that promotes competition or one that suppresses competition."[86] Justice Brandeis stated the leading exposition of the rule as follows: "The true test of legality is whether the restraint imposed . . . merely regulates and perhaps thereby promotes competition or whether it . . . 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."[87]

The Sherman Act reflects a legislative judgment that competition is the

83. *See, e.g.*, Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 7-10 (1979).
84. *See supra* text accompanying notes 47-75. *Cf. supra* note 27.
85. *See supra* text accompanying notes 34-49.
86. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 691 (1978).
87. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

governor of the free market, and the courts must rule in light of this policy.[88] Thus, the purpose of the rule of reason is to form a judgment about the competitive significance of the restraint. It is not the court's role to determine whether a policy favoring competition is in the public interest, or in the interest of members of a particular industry.[89] If an inquiry under the rule of reason approach reveals that the boycott has a significant anti-competitive purpose or effect, it is declared illegal. If no such purpose or effect is revealed, no antitrust violation is established.

2. *Debate and Means*

In general, the rule of reason approach is recognized as lacking, a clear definition and a precise application. Both federal judges and commentators are engaged in a continuing debate regarding the appropriate method of analysis to use when examining commercial protest boycotts. The debate centers on the number and relative weight of factors that should be utilized by the courts in applying this method. The competing views within the federal judiciary are primarily responsible for the inconsistent holdings and reasoning in the cases discussed above.

3. *The Consolidated Rule of Reason*

Despite the above-mentioned controversy, it is possible to construct an appropriate rule of reason standard for handling this type of protest. The consolidation of the various antitrust philosophies as well as the standard formulation of the rule of reason may provide a solution.

The "consolidated" rule of reason herein set forth is comprised of a three-prong analysis. The first prong analyzes the purpose(s) of the challenged restraint and the goals of the participants. The second prong analyzes the challenged restraint for the purpose of determining its effects on competition. The economic efficiency of the challenged restraint will also be considered. The third prong inquires whether a less restrictive alternative to the boycott exists and, if so, whether it was utilized before the boycotters engaged in the challenged action. These three inquiries are not dispositive on their own, but are integral to the "consolidated" rule of reason approach.

a. The First Prong: A Purpose Inquiry

The first prong focuses on the purposes or goals of a defendant's challenged behavior.[90] Under this first prong inquiry, the court's task is to determine "whether the defendant's activity had a substantial procompetitive

88. *See generally*, National Soc'y of Professional Eng'rs, 435 U.S. at 695.

89. *Id.* at 692.

90. This first prong analysis borrows Professor Kissam's purpose-based "Rule of Reason" for antitrust boycotts. However, this author differs from Professor Kissam in that the consolidated rule of reason examines the pro-competitive and anti-competitive effects of a challenged restraint, whereas Professor Kissam's purpose-based rule does not. *See* Kissam, *supra* note 28, at 1177.

purpose or . . . was motivated predominantly by anticompetitive purposes."[91]

The main problem with a purpose inquiry is that it is impossible to ascertain the intent of the participants. Professor Kissam states that "the basic search for purposes . . . will involve inferring an ultimate objective conclusion from indirect, circumstantial evidence about the plausible or rational purposes of any given behavior."[92]

Thus, a boycott will be condemned if a court finds that it was undertaken for an exlusively or predominantly anti-competitive purpose. However, if the court finds that the boycott's purpose was not anti-competitive, it may balance the defendant's purpose against any negative impact the boycott may have on competition. The courts may not consider whether the purpose motivating a restraint is of sufficient social value to excuse its effects.[93] A court's finding that a defendant's behavior was not undertaken for a predominantly or exclusively anti-competitive purpose may be used as evidence in support of the restraint's likely effect on competition. As the Supreme Court re-affirmed in *National Society of Professional Engineers*, "competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."[94]

An analysis of the purposes underlying politically motivated boycotts with commercial benefits will usually lead to a presumption of reasonableness because the boycott lacks an exclusively anti-competitive goal. In addition, this type of boycott usually arises after the consistent denial by the plaintiff — the target of the boycott — of the legitimacy of the defendant's grievances or after the plaintiff fails to allow the defendant to participate in a free competition process; it is generally utilized as a last resort. The effects on competition caused by that type of boycott are thus incidental, unintended, and generally insignificant, and do not provide a basis for determining that these boycotts are unreasonable restraints of trade.

b. The Second Prong: The Anti-Competitive and Pro-Competitive Effects

Since a purpose-based rule of reason requires a court to draw inferences from circumstantial and subjective evidence, the court should also consider the more objective factor of the restraint's economic effects. Current Supreme Court antitrust precedents demand that a rule of reason inquiry consider the challenged restraint's effects on competition.[95] Thus, the initial step of the second prong is to examine the restraint's pro-competitive or anti-competitive effects.

91. *Id.*
92. *Id.* at 1181.
93. *See* National Soc'y of Professional Eng'rs, 435 U.S. at 692 (1978); Chicago Bd. of Trade, 246 U.S. at 238 (1918).
94. *Id.*
95. *Id.*

It is not enough that the plaintiff shows that she has suffered economic loss as a result of the boycott; she must also demonstrate that the boycott was anti-competitive. The greater the market power of a boycott and the longer it continues, the greater the chance that it will significantly disrupt competition. However, as a practical matter, it is unlikely that most politically motivated boycotts with commercial benefits will be considered anti-competitive. These boycotts are often ad-hoc, short-lived, and limited in scope; they rely on public support and last until either their grievances are settled or the participants are given an opportunity to have a fair hearing. For example, the lawyers' concerted refusal to represent their indigent clients in *SCTLA* lasted less than two weeks.[96] The gasoline dealers' concerted shutdown of their stations in *Crown Central* and *Osborn* lasted three days.[97] In *COMPACT*, the black architectural firms' concerted refusal to deal independently in selected public projects was limited to one project.[98] For these reasons, politically motivated boycotts with commercial benefits are unlikely to exert any lasting significant effects on competition.

The impact of the boycott on economic efficiency should also be examined in the second prong. Since an efficiency analysis is closely intertwined with a competitive effects analysis, it may be repetitious. However, there are cases where an economic efficiency analysis may prove beneficial. For example, had the court analyzed the economic efficiency of the joint venture in *COMPACT*, it would have found that COMPACT created greater efficiencies in the general architectural market. COMPACT not only expanded competition by becoming a new bidding source for major public projects, it also brought three small firms together to work on significant projects that they could not complete independently. Consumers' interest were thus shortchanged when the COMPACT court failed to perform an economic efficiency analysis.

c. The Third Prong: A Less Restrictive Alternative

The third prong of the "consolidated" rule of reason analysis is to determine whether the boycott was the least restrictive alternative in light of the reasons the participants offered for imposing the restraint. If the court finds that a less restrictive alternative was available to the defendants and that they did not utilize it before engaging in the boycott, the court may weigh this against the boycotters in its evaluation of the boycott's effect on competition. However, if the court finds that the challenged restraint was the least restrictive alternative available to the defendants, or that the defendants engaged in the challenged restraint only after exhausting other less restrictive alternatives, the court shall weigh this fact as a pro-competitive counterweight toward finding the defendant's restraint reasonable.

96. In re Super. Ct. Trial Lawyers Ass'n, No. 9171, slip op. (F.T.C. Oct. 18, 1984).
97. Crown Cent., 486 F. Supp. at 761.
98. COMPACT, 594 F. Supp. at 1570.

Indeed, the majority of politically motivated boycotts with commercial benefits arises only if the defendants have exhausted other less restrictive alternatives, or if the challenged restraint represents the least restrictive alternative. For example, in *SCTLA* the lawyers boycotted only after their previous lobbying and petitioning efforts were unsuccessful.[99] In *COMPACT*, the black-owned architectural joint venture formed after years of discrimination against black architectural firms in Tennessee in the awarding of prime contractor jobs for public projects.[100] When forced to respond to this historic and pervasive discrimination, the black architectural firms' resonable and efficient solution — the creation of a joint venture — was struck down as anti-competitive.[101]

In contrast, the gasoline dealers' shutdown of their stations in protest of DOE maximum-price gasoline regulations was not the least restrictive alternative. The gasoline dealers could have distributed leaflets, picketed, or posted signs expressing their opposition to the DOE regulations. Had the dealers undertaken these activities prior to engaging in the concerted shutdown, their behavior might have been sufficient to meet the least restrictive alternative inquiry, had such an inquiry been conducted.

IV
CONCLUSION

What distinguishes politically motivated boycotts with commercial benefits from the general exclusionary anti-competitive commercial boycotts is the purpose for which the boycott is conducted. The purpose of the general commercial boycott is first and foremost anti-competitive, involving the exclusion of competitors or the fixing of prices. In a politically motivated boycott with commercial benefits, on the other hand, the defendant feels compelled to exercise her constitutional right to protest against objectionable practices or products, or against an unresponsive government. The fact that a commercial benefit or a personal economic gain inures to the defendants as a result of a politically motivated boycott should not preclude a court from finding that the restraint is reasonable since the defendants' first and foremost purpose is to vindicate their constitutional rights. While the economic benefits of a politically motivated boycott may be important to the boycotters, the benefits generally are not the primary reason for engaging in the restraint. Rather, the boycott is usually the last means by which to protest objectionable policies, as well as to protect personal economic interests and the ideal of free competition. This is why cases involving politically motivated boycotts with commercial benefits are extremely difficult to judge: they present a conflict between fundamental first amendment protections and the strong social policy of promoting an uninhibited free enterprise system.

99. In re Super. Ct. Trial Lawyers Ass'n, No. 9171, slip op. (F.T.C. Oct. 18, 1984).
100. COMPACT, 594 F. Supp. at 1569.
101. *Id.* at 1579.

The fact that very few of these cases have been reported dispels the fear that American businesses will claim political motivation in defense of their commercially motivated boycotts. The "consolidated" rule of reason is intended to assist courts in distinguishing genuine politically motivated boycotts with commercial benefits from general anti-competitive ones. Absent any political or ideological leaning of the court, the "consolidated" rule of reason should be an extremely helpful analytical tool for handling this delicate hybrid of antitrust boycott cases.

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