# Political Boycotts: Protected by the Political Action Exception to Antitrust Liability or Illegal Per Se?

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## INTRODUCTION

Congress enacted the Sherman Antitrust Act[1] to promote free trade[2] and market efficiency.[3] A market is efficient when

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[1] 15 U.S.C. §§ 1-7 (1988 & Supp. V 1993). This Comment will focus on the Sherman Antitrust Act, which is the basic antitrust statute. *See* LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 3 (1977) (noting that Sherman Act is basic antitrust statute). Other antitrust statutes, such as the Clayton Act, 15 U.S.C. §§ 12-27 (1988 & Supp. V 1993), and the Federal Trade Commission Act, 15 U.S.C. §§ 41-44 (1988 & Supp. V 1993), expand upon Sherman Act concepts. *See* WERNER Z. HIRSCH, LAW AND ECONOMICS 321 (2d ed. 1988) (noting that Sherman, Clayton, and Federal Trade Commission Acts are primary antitrust statutes).

[2] "Chicago school" economists prefer a free market, one in which the government does not meddle. STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 1-2 (1993). However, a free market is not necessarily a competitive market, because businesses may agree to charge higher than competitive prices. *See* ERNEST GELLHORN, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 41-42 (1976) (discussing market and effect of "private rule" on competitive market mechanisms). Thus, the businesses may not really compete with each other. *Id.* Government may choose to regulate the market to prevent "private rule" and to encourage competition. *Id.* at 42; *see also* PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS 13-14 (4th ed. 1988) (stating that government action may be appropriate to adjust for market failure and that antitrust laws guide market forces towards goal of perfectly competitive market).

[3] When no reallocation of resources within a market would make one firm better off without making another worse off, the market exhibits allocative efficiency. AREEDA & KAPLOW, *supra* note 2, at 8. Allocative efficiency is a goal of antitrust law. *See* NCAA v. Board of Regents, 468 U.S. 85, 104 n.27 (1984) (stating that purpose of Sherman Act is to preserve "free and unfettered" competition and to achieve "best allocation of our economic resources") (quoting Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1958)); ROBERT BORK, THE ANTITRUST PARADOX 135 (1978) (stating that sole goal of antitrust laws is to protect allocative efficiency); GELLHORN, *supra* note 2, at 41 (stating that objective of antitrust law is assuring competitive, efficient economy through relying on market forces); Donald L. Beschle, *Doing Well, Doing Good and Doing Noncommercial Boycotts Under the Antitrust Laws*, 30 ST. LOUIS U. L.J. 385, 385-86 (1986) (discussing efficiency as goal of antitrust); Ronald E. Kennedy, *Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests*, 55 S. CAL. L. REV. 983, 988 n.26 (1982) (stating that "dominant goal" of Sherman Act is promoting market efficiency); Kay P. Kindred, *When First Amendment Values and Competition Policy Collide: Resolving the Dilemma of Mixed-Motive Boycotts*, 34 ARIZ. L. REV. 709, 733 (1992) (stating that Congress designed antitrust laws to preserve competition); *see also* SULLIVAN, *supra* note 1, § 1 (discussing concept of allocative efficiency as it relates to antitrust goals). Professor Sullivan claims that, based on the concept of allocative efficiency, economists prefer competitive markets over monopolistic ones. *Id.* He notes that the conditions in which a competitive market can result in perfect allocative efficiency never occur in reality. *Id.* However, he finds the concept useful when analyzing an activity involving a "close relationship" between the total cost of making the product and the product's market price. *Id.* Professor Sullivan finds social and economic justifications for valuing such allocative efficiency. *Id.* He argues that a product's price should be rationally related to what it costs to make. *Id.* He also notes that returns on investment should be no greater than necessary to induce investment. *Id.* Finally, he com-

no alternate allocation of resources results in greater social gain.[4] The Sherman Act promotes market efficiency by prohibiting restraints of trade in which commercial entities[5] act in their economic self-interest and to the detriment of competition and the consumer.[6] One such restraint of trade is a boycott.[7] A boycott[8] is a restraint in which commercial entities exert market power[9] to gain higher profits and distort market resource allocation.[10] For this reason, courts consider boycotts per se illegal[11] under the Sherman Act.

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ments that allocative efficiency, considered in such circumstances, is "one of the important goals of antitrust." *Id.*

[4] *See* STEVEN E. LANDSBURG, PRICE THEORY AND APPLICATIONS 231 (1989) (discussing market efficiency).

[5] Commercial entities, for purposes of this Comment, include any non-governmental units participating in the marketplace. This includes businesses and consumers as well as professional and trade organizations.

[6] *See* BORK, *supra* note 3, at 51 (noting that antitrust law's only legitimate goal is to maximize consumer welfare, so competition, for purposes of antitrust analysis, is "a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree").

[7] *See infra* notes 8-10 and accompanying text (discussing definition and function of boycott).

[8] This Comment defines "boycott" as an agreement between two or more entities to exert pressure on a third entity to bring about a desired end. *See* MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 58 (1992). This Comment does not address action by organized labor. Congress, in § 20 of the Clayton Act, has exempted labor "boycotts" from antitrust liability. 15 U.S.C. § 52 (1988). *See generally* HIRSCH, *supra* note 1, at 322 (discussing labor exemption from antitrust).

[9] "Market power" is the ability to affect market prices. LANDSBURG, *supra* note 4, at 289; *see also infra* note 98 and accompanying text (discussing market power). Boycotters may target businesses on the same market level or on different levels. *See* SULLIVAN, *supra* note 1, § 83 (categorizing boycotts based on targeted market level). "Market levels" refers to the various economic functions within the marketplace. *Id.* Actors who perform the same function are on the same level. *Id.* For example, manufacturers (one level) sell to distributors (another level) who sell to consumers (a third level). *Id.*

[10] LANDSBURG, *supra* note 4. Market distortions result in deadweight loss. *See id.* at 227 (discussing deadweight loss associated with one market distortion). Professor Landsburg notes that deadweight loss is a "reduction in social gain." *Id.* Synonyms for deadweight loss are "social loss, welfare loss, and efficiency loss." *Id.* Professor Landsburg notes that monopoly refers to a firm with high market power. *Id.* at 289. He discusses how a monopolist's pricing practices result in deadweight loss. *Id.* at 293-95. *See generally* HIRSCH, *supra* note 1, at 315-16 (discussing monopoly power as ability to affect market price and output); SULLIVAN, *supra* note 1, § 5 (discussing monopoly structure and noting that monopoly usually results in "socially poor performance").

[11] An action is per se illegal when courts find that it never or almost never results in net positive effects for the market. *See infra* notes 63-70 and accompanying text (discussing per se illegality).

In some cases, however, commercial entities boycott for reasons not directly related to gaining higher profits.[12] For example, sometimes commercial entities use boycotts to raise public awareness of a situation or encourage the legislature to pass laws favorable to themselves or their members.[13] Consider retailers *A*, *B*, and *C* who sell widgets[14] in the United States, shipping them by railroad. In South Africa, manufacturers inexpensively produce a close substitute for widgets, gadgets. Retailer *D* im-

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[12] *See* BORK, *supra* note 3, at 332-33 (discussing types of boycotts that should be legal). Bork suggests that courts should allow boycotts that result in enhanced efficiency. *Id.* at 333. For example, when a law firm refuses to employ an applicant, the firm members are essentially engaging in a group boycott against the applicant. *Id.* at 332-33. This restraint allows the firm to control its size and the quality of its members, both of which make the firm more efficient. *Id.* Similarly, the National Football League should be able to prevent community recreational teams from joining the league. *Id.* at 332. This restraint protects the quality of the competition, as well as the safety of community players. *Id.*

[13] *See, e.g.*, Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 131 (1961) (analyzing action by railroads in attempt to influence legislation that also harmed trade of truckers). Congress passed the Sherman Act primarily to address unfair competition by large businesses or "trusts" during a period of economic growth. *See* AREEDA & KAPLOW, *supra* note 2, at 48-50 (discussing historical reasons for enacting Sherman Act). Once government began regulating business, those that the regulation affected required the freedom to communicate with the regulating body. *See generally* GELLHORN, *supra* note 2, at 41-42 (discussing preservation of competitive economy through regulation). Communication is essential for the government to understand the nature of the economy and to allocate resources as efficiently as possible in a regulated market. *See Noerr*, 365 U.S. at 127-37 (discussing publicity campaign aimed at influencing government). In *Noerr*, the Court stated that "holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws" would harm the government's ability to act to restrain trade. *Id.* at 137. When government acts on behalf of the people, the people must be able to make their wishes known to their representatives. *Id.* Holding that the Act restrains people from communicating with the government would include in the Act a purpose to regulate political activity. *Id.* Such a purpose would have "no basis whatever" in the legislative history of the Act. *Id.*; *see also infra* notes 126-34 and accompanying text (discussing *Noerr* in greater detail).

[14] For purposes of this Comment, the term "widget" signifies a fungible product. It is a fungible product to avoid the effects of consumer preference for one similar but not identical product over another. Although Coke and Pepsi are both colas, consumers tend to prefer one over the other. They are not fungible. However, consumers are unlikely to prefer one brand of cardboard box over another. *See* United States v. Container Corp. of Am., 393 U.S. 333, 336 (1969) (noting that purchasers of corrugated containers do not prefer one manufacturer over another). This product is fungible. *See id.* at 337 (stating that corrugated containers are fungible). Although a small rise in the price of Coke is unlikely to cause large numbers of consumers to switch to Pepsi, a small increase in the price of one cardboard box will probably cause consumers to switch to the less expensive box. *See id.* at 336 (noting that sellers do not exceed competitor's price). *See generally* LANDSBURG, *supra* note 4, at 289 (noting possible consumer preference for Coke or Pepsi).

ports and sells these gadgets. Retailers *A*, *B*, and *C* and producers of widgets (gadget boycotters) want Congress to pass legislation preventing trade with South Africa. The human rights violations occurring in South Africa are part of what motivates the gadget boycotters. Through the media, the gadget boycotters encourage the public to stop buying products made in South Africa and to support the trade legislation. The boycotters also agree to stop shipping widgets by railroads that retailer *D* uses unless the railroads support the trade legislation.

The boycott organized by *A*, *B*, and *C* has a political aspect in that it expresses the gadget boycotters' disapproval with the situation in South Africa. It also has a commercial aspect in that legislation preventing trade with South Africa will remove inexpensive gadgets from the market. Boycotts motivated by both political and commercial goals are mixed-motive boycotts, and such boycotts require a judicial test addressing both antitrust and First Amendment[15] concerns.[16] Currently, courts have no clear test to determine whether a boycott involving free speech issues should be legal.[17] Courts addressing political boycotts either have used traditional antitrust boycott analysis or have struggled to define why the boycott before them is different.[18] Under the established antitrust analysis, many courts would find boycotts involving First Amendment issues illegal per se.[19] Lack of a definite test results in some courts neglecting First Amendment concerns.[20] Lack of a definite test also prevents courts from uniformly analyzing boycott cases.[21]

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[15] U.S. CONST. amend. I. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

[16] *See infra* notes 197-257 and accompanying text (discussing proposed test for mixed-motive boycotts).

[17] *See infra* notes 135-89 and accompanying text (discussing split in law).

[18] *See infra* notes 135-89 and accompanying text (discussing political boycott cases).

[19] *See infra* notes 63-70 and accompanying text (discussing use of per se rule and boycotts).

[20] *See, e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 436 (1990) (finding boycott with free speech aspects illegal per se).

[21] Without an easily applied test, courts may address situations differently, producing inconsistent results. *Compare* International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 226 (1982) (finding boycott with political motive illegal per se) *with* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (finding boycott with political motive legal).

This Comment focuses on mixed-motive boycotts,[22] which have both political and commercial motives behind them. Part I discusses the rule of reason and per se tests for antitrust liability.[23] Part I also addresses the development of antitrust liability for boycotts and the political action exception to antitrust liability.[24] Part II discusses the current conflict among courts ruling on political boycotts.[25] Finally, Part III proposes a two-tiered test to determine whether a boycott with First Amendment aspects is legal under the antitrust laws.[26]

## I. DEVELOPMENT OF ANTITRUST LIABILITY TESTS AND THE POLITICAL ACTION EXCEPTION TO LIABILITY

In 1890, Congress passed the Sherman Antitrust Act[27] to promote free trade and market efficiency by prohibiting unreasonable restraints of trade.[28] An early case interpreting the Act asserted that it outlawed every restraint of trade.[29] However, this interpretation effectively outlawed even normal commercial activity.[30] Thus, courts now interpret the Act to prohibit only

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[22] For purposes of this Comment, a mixed-motive boycott is any group boycott with at least one non-commercial motive, such as encouraging the passage of legislation, and one commercial motive. *See, e.g.*, Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 131 (1961) (addressing boycott with political motive of reducing wear on highways and economic motive of reducing railroads' competition).

[23] *See infra* notes 41-70 and accompanying text (discussing rule of reason and per se tests).

[24] *See infra* notes 71-134 and accompanying text (discussing antitrust liability for boycotts and development of political action exception).

[25] *See infra* notes 135-89 and accompanying text (discussing current split in law).

[26] *See infra* notes 190-257 and accompanying text (proposing two-tiered test).

[27] 15 U.S.C. §§ 1-7 (1988 & Supp. V 1993).

[28] 15 U.S.C. § 1 (Supp. V 1993). The Supreme Court determined that Congress intended that the Act cover only unreasonable restraints of trade. *See infra* notes 29-32 and accompanying text (discussing Court's requirement of unreasonableness to find antitrust violation).

[29] *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 328 (1897) (stating that Sherman Act covers all contracts and that courts may add "no exception or limitation" without altering what Congress intended legislation to cover).

[30] In *Trans-Missouri*, the Court tried to exempt from the Sherman Act actions occurring in the normal course of business. *Id.* at 329. The Court did not consider normal business agreements, such as covenants not to compete, to be restraints of trade. *Id.* at 331. However, since such agreements clearly do restrain trade, the Court later abandoned this unique interpretation. *See* Standard Oil Co. v. United States, 221 U.S. 1, 60, 64-65 (1911) (adopting rule of reason analysis that finds only unreasonable restraints prohibited).

Some normal business activities are reasonable restraints of trade because they are

unreasonable restraints of trade.[31] Restraints are unreasonable if they inhibit allocative efficiency, harming the economy.[32]

To determine which restraints are reasonable, courts developed two tests, rule of reason analysis and the per se test.[33] Generally, courts have applied the per se rule to boycotts.[34] However, First Amendment guarantees have prompted courts to develop the political action exception,[35] which allows flexible analysis of boycotts under the Sherman Act.[36]

### *A. Antitrust Liability Tests*

Courts have developed two tests to determine whether a trade restraint is reasonable: rule of reason analysis[37] and per se illegality.[38] Generally, courts will analyze a trade restraint

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efficient. *See* BORK, *supra* note 3, at 135-36 (noting that agreed elimination of rivalry between members of same business unit is reasonable restraint). For example, when two attorneys form a partnership, they restrain trade because they no longer compete against each other for clients. *Id.* Similarly, when a buyer signs a contract to purchase goods, the seller restrains trade because her competitors can no longer compete for that business. *Id.* at 137. Bork uses the term "efficiency exclusion" to describe an action, such as a sale, that excludes competitors from that transaction. *Id.* "Improper exclusions," on the other hand, are those restraints prohibited by the antitrust laws. *Id.*

[31] *See Standard Oil*, 221 U.S. at 60 (claiming that Congress intended courts to apply common law "standard of reason" to determine whether action in question violated Sherman Act); United States v. Addyston Pipe & Steel Co., 85 F. 271, 291 (6th Cir. 1898) (holding agreement to fix prices unreasonable and illegal under Sherman Act), *aff'd*, 175 U.S. 211 (1899).

[32] *See supra* notes 1-6 and accompanying text (discussing efficiency goal of Sherman Act and benefit to economy).

[33] *See infra* notes 41-70 and accompanying text (discussing judicial development of tests).

[34] *See infra* notes 71-108 and accompanying text (discussing past analysis of boycotts).

[35] *See infra* notes 109-34 and accompanying text (discussing foundation of political action exception).

[36] *See infra* notes 104-08 and accompanying text (discussing how courts analyze boycott-like actions to avoid using per se rule); *see also infra* notes 138-43 and accompanying text (discussing application of political action exception to boycotts).

[37] *See* Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911) (developing rule of reason). The rule of reason balances the anticompetitive effects of a restraint against its procompetitive justifications. *See infra* notes 41-44 and accompanying text (discussing rule of reason).

[38] *See, e.g.*, NCAA v. Board of Regents, 468 U.S. 85, 103-04 (1984) (noting that courts use per se rule when action is so likely anticompetitive that further inquiry would be unjustified). Courts use the per se rule when experience with a type of restraint proves that it will always or nearly always be unreasonable. *See infra* notes 63-70 and accompanying text (discussing when courts will use per se rule).

under the rule of reason.[39] However, when the negative effects of a particular trade restraint consistently outweigh the benefits, courts determine that that type of restraint is illegal per se.[40]

Rule of reason analysis balances the procompetitive justifications[41] for a restraint against its anticompetitive effects.[42] If a court finds that the anticompetitive effects outweigh the procompetitive benefits, it will hold the restraint unreasonable.[43] The rule of reason requires a case-by-case analysis to determine whether a given restraint violates the Sherman Act.[44]

In *Chicago Board of Trade v. United States*,[45] the Supreme Court applied the rule of reason.[46] The case arose when the Chicago Board of Trade (the Board) limited members' purchase price for "to arrive" grain.[47] The rule regulated the price for such grain during hours that the exchange was closed.[48] The United States sued to prohibit the Board from enforcing this

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[39] *See infra* notes 41-62 and accompanying text (discussing rule of reason analysis).

[40] *See infra* notes 63-70 and accompanying text (discussing how courts determine that restraint should be illegal per se).

[41] Procompetitive justifications are generally aspects of an action which promote efficient markets. *See supra* notes 1-6 and accompanying text (discussing efficiency and its role as goal of antitrust legislation). One example of a procompetitive justification is that the restraint promotes the exchange of information. *See, e.g.*, Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588, 604-06 (1925) (finding exchange of information helped prevent fraud); *see also infra* notes 83-91 and accompanying text (discussing cases addressing information exchange). Another procompetitive justification is that a trade or professional organization sets rational rules and standards to govern members. *See, e.g.*, Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 295-97 (1985) (finding justification for organization because it helped small businesses compete with larger ones); *see also infra* notes 92-97 and accompanying text (discussing validity of trade or professional organizations).

[42] *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238-41 (1918) (balancing procompetitive and anticompetitive effects).

[43] *See* GELLHORN, *supra* note 2, at 6-9 (discussing historical development of rule of reason); SULLIVAN, *supra* note 1, § 65 (discussing development of rule of reason).

[44] *See* AREEDA & KAPLOW, *supra* note 2, at 225 (stating rule of reason is "open-ended" and "case-by-case" analysis).

[45] 246 U.S. 231 (1918).

[46] *Id.* at 239-41.

[47] *Id.* at 237. In sales of grain "to arrive," the seller sells grain that is on its way to Chicago. *Id.* at 236. The seller agrees to deliver the grain when it arrives. *Id.*

[48] *Id.* at 237. The Chicago Board of Trade adopted the "call" rule, which was effective from the close of the market one day until the market opened the next day. *Id.* The call rule prevented members from buying or offering to buy "to arrive" grain at a price other than at the market's closing bid. *Id.*

rule, arguing that it constituted illegal price fixing.[49] The lower court agreed, enjoining enforcement of the rule,[50] and the Board appealed to the Supreme Court.[51]

In its analysis, the Court focused on three factors: the restriction's nature,[52] its scope,[53] and its effects on the market.[54] The Court determined the restriction's nature by considering who the rule affected and how.[55] The Court found that the rule affected members by encouraging them to attend the open session.[56] The rule did not prevent members from making offers while the exchange was closed.[57] The limited nature of the restriction weighed in favor of its reasonableness.[58]

The second factor, the restriction's scope, weighed in favor of the rule because the rule restricted only a small amount of grain trade.[59] Finally, the Court balanced the rule's procompetitive effect on market conditions with its minor anticompetitive effects of limiting trading during night hours.[60] The Court concluded that the efficiencies outweighed the anticompetitive effects and found the restriction reasonable.[61]

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[49] *Id.*

[50] *Id.*

[51] *Id.* at 231.

[52] *Id.* at 239.

[53] *Id.*

[54] *Id.* at 240.

[55] *Id.* at 239.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* The Court noted that members had other opportunities available if they wished to buy "to arrive" grain while the market was closed. *Id.*

This inquiry is analogous to an inquiry into market power. *See infra* note 98 and accompanying text (discussing market power). The Court found that the rule affected only a small amount of the market, leaving other options open for trading. *Chicago Bd. of Trade*, 246 U.S. at 239. Similarly, actions of a firm with little market power affect only a small part of the market. That is, competitors will offer trading opportunities that other firms have foreclosed by refusing to deal. *Cf.* LANDSBURG, *supra* note 4, at 167-68 (discussing fact that small firm's production decisions do not affect market).

[60] *Chicago Bd. of Trade*, 246 U.S. at 240-41. The Court found limited anticompetitive effects based on its analysis of the nature and scope of the rule. *Id.* at 239-40. It found significant procompetitive effects, such as increasing the "to arrive" trade during market hours, increasing the number of buyers of "to arrive" grain, and elimination of risks that "enabled country dealers to do business on a smaller margin." *Id.* at 240-41.

[61] *Id.*

The rule of reason, as used in *Chicago Board of Trade*, remains one of the principal antitrust tests.[62]

The second test courts have developed to analyze trade restraints is the per se test.[63] Unlike the rule of reason, this test determines Sherman Act liability without an extensive inquiry into market conditions and justifications for the restraint.[64] Courts have found that some types of trade restraints have no significant procompetitive justifications.[65] Therefore, an inquiry into the restraint's effects would waste judicial resources.[66] When judicial experience with a type of restraint demonstrates its anticompetitive nature, courts hold the activity per se ille-

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[62] *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499-501 (1988) (analyzing effects of product standards set by private organization); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913-14 (1982) (balancing justifications for boycott against its anticompetitive effects).

[63] *See, e.g.*, United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927) (stating that price-fixing "is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon."); *see also infra* notes 68-70 and accompanying text (discussing categories of restraints that are per se illegal).

[64] *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958) (discussing per se test); *see also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 228 (1940) (noting that courts do not consider purpose, goal, or effect on "elimination of . . . competitive evils" when addressing per se violation of price-fixing).

[65] *See infra* notes 68-70 and accompanying text (noting restraints considered illegal per se).

[66] *See* NCAA v. Board of Regents, 468 U.S. 85, 103-04 (1984) (noting that courts use per se rule when action is so likely anticompetitive that it "render[s] unjustified further examination of the challenged conduct"). In some cases, the Court employs per se analysis after a brief consideration of the restraint's effects. *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 348-54 (1982) (holding, after cursory consideration of restraint's possible benefits and anticompetitive effects, that setting maximum fees was per se illegal). Briefly considering the restraint's effects suggests that, while the Court may value the efficiency of the per se rule, it does not want to punish restraints which are economically desirable. *See* GELLHORN, *supra* note 2, at 187 (discussing efficiency justifications for applying per se rule and reasons for not applying per se rule). By considering and rejecting possible benefits of a practice falling under the per se rule, a court can reassure itself that the restraint is truly anticompetitive. *See NCAA*, 468 U.S. at 104 n.26 (stating that "per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct"). Thus, even per se analysis may involve consideration of market forces and efficiencies. *See id.*; *see also* GELLHORN, *supra* note 2, at 187-90 (discussing when courts apply per se rule and when they may consider justifications for restrictive action).

gal.[67] Some examples of restraints that are illegal per se are horizontal price fixing,[68] tying contracts,[69] and group boycotts.[70]

### *B. Antitrust Liability for Boycotts*

The typical group boycott involves competitors agreeing among themselves to exert pressure on another market level to harm or coerce a competitor.[71] For example, widget retailers *A* and *B* might decide to drive *C* out of business to punish *C* for selling at a discounted price. To eliminate *C*, retailers *A* and *B* refuse to buy from producers unless the producers stop selling to *C*.[72] Retailers *A* and *B*'s action constitutes a classic group boycott.[73] Another type of boycott, called "cartelization,"[74] occurs when competitors cooperate to exert force on another market level to obtain favorable terms for themselves.[75] For ex-

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[67] *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 9-10 (1979) (noting when courts find activity illegal per se); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-50 (1977) (addressing per se illegality); United States v. Topco Assocs., Inc. 405 U.S. 596, 607-08 (1972) (discussing how courts find activity illegal per se); *see also* GELLHORN, *supra* note 2, at 184-85 (discussing how courts determine whether a given practice should be per se illegal).

[68] *See, e.g., Socony*, 310 U.S. at 210-18 (holding informal agreement with purpose of raising gasoline prices illegal); United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927) (noting that Sherman Act prohibits price fixing).

[69] *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 7-8 (1958) (holding railway's scheme tying rail service to land purchases illegal); International Salt Co. v. United States, 332 U.S. 392, 394-96 (1947) (holding that tying salt purchases to canning machine leases was illegal).

[70] *See, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) ("Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category."); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 467-68 (1941) (holding agreement to boycott retailers selling copies of original fashion designs illegal per se).

[71] *See* SULLIVAN, *supra* note 1, § 83 (discussing types of group boycotts).

[72] *See supra* notes 14-15 and accompanying text (discussing hypothetical boycott).

[73] *See* SULLIVAN, *supra* note 1, § 83 (discussing types of group boycotts).

[74] *See* Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2912 (1993) (Scalia, J.) (defining cartelization as "'a way of obtaining and exercising market power by concertedly exacting terms like those which a monopolist might exact.'") (quoting LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 257 (1977)). Justice Scalia does not see cartelization as a traditional boycott because cartelizing parties merely use their leverage to negotiate a better deal for themselves. *Id.* However, he notes that under the Sherman Act, "concerted agreements on contract terms are as unlawful as boycotts." *Id.* at 2913.

[75] *See* SULLIVAN, *supra* note 1, § 90 (discussing concept of cartelization). For example, retailers *A*, *B*, and *C* decide that the producers they purchase their merchandise from are

ample, the widget producers might refuse to sell to retailers *A*, *B*, and *C* unless the retailers re-sell at the price the producers desire.[76]

Boycotts always or almost always unreasonably restrain competition.[77] Therefore, courts have found boycotts[78] to be per se illegal under antitrust statutes.[79] However, some actions that look like boycotts might have significant procompetitive justifications.[80] Unlike boycotts, these actions should be lawful under the Sherman Act.[81] Thus, courts must engage in a preliminary analysis to determine whether the action is a boycott.[82]

To determine whether a boycott agreement exists, courts might consider whether the parties' agreement facilitates the exchange of information among the parties.[83] In one case, the Supreme Court discussed the effects of exchanging information when determining whether an action constituted a group boycott.[84] The Court refused to find an agreement to boycott, in part because the exchange of information helped businesses

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charging too much. In response, the retailers refuse to buy from the producers until the producers lower their prices. While this arrangement is not a classic boycott, it is nevertheless illegal under the antitrust laws. *See id.* (discussing cartelization); *see also supra* notes 14-15 and accompanying text (discussing hypothetical boycott).

[76] *See supra* notes 14-15 and accompanying text (discussing hypothetical boycott).

[77] *See, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (stating that boycotts are forbidden); *see also supra* notes 63-70 and accompanying text (discussing application of per se rule).

[78] Boycotts are also known as concerted refusals to deal. *See* AREEDA & KAPLOW, *supra* note 2, at 364 (noting that concerted refusals to deal are equivalent to boycotts); SULLIVAN, *supra* note 1, § 83 (stating that group boycotts are sometimes called concerted refusals to deal).

[79] *See, e.g.*, Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 467-68 (1941) (holding agreement to boycott retailers selling copies of original fashion designs illegal per se); *see also supra* note 1 and accompanying text (noting principal antitrust statutes).

[80] *See* SULLIVAN, *supra* note 1, § 90 (noting that not all actions labelled as boycotts always or almost always harm competition).

[81] *See id.* (noting that per se doctrine should not apply to all boycotts).

[82] *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 293 (1985) (noting that boycotts are per se illegal). Before the Court can judge the action, it must first determine "what types of activity fall within the forbidden category." *Id.* at 294.

[83] *See infra* notes 83-91 and accompanying text (discussing cases in which courts considered information exchange among competitors).

[84] Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588, 602-06 (1925).

determine which customers were honest and good credit risks.[85] Unlike a boycott agreement, this exchange of information helped the market run more efficiently.[86]

Using similar reasoning, the Court found a boycott when the New York Stock Exchange (Exchange) ordered action by members that reduced the information a non-member received about events at the exchange.[87] The Court acknowledged that the Exchange could regulate its members.[88] However, the Exchange could not remove the information source from the non-member without a hearing.[89] By prohibiting the non-member access to the information, the Exchange prevented him from competing effectively.[90] Like other boycotts, the Exchange's action harmed competition.[91]

Another factor courts might consider in determining whether an action is a boycott is the purpose of the professional or trade organizations involved.[92] If the organization furthers effective competition and the action it takes rationally relates to the organization's purpose, the action may fall outside the scope of the Sherman Act.[93] For example, league rules governing professional sports teams restrain the actions of the members, but the rules relate to the league's purpose to further fair competition.[94] Some restraints, however, are anticompetitive

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[85] *Id.* at 604-06.

[86] *Id.*

[87] Silver v. New York Stock Exch., 373 U.S. 341, 347-49 (1963).

[88] *Id.* at 361.

[89] *Id.* at 361-63.

[90] *Id.* at 356.

[91] *Id.* The Court found that the action would be a per se antitrust violation. *Id.* at 347. However, since the Securities and Exchange Act applied, the Court proceeded to consider whether the Exchange's action was reasonable in light of antitrust prohibitions. *Id.* at 357-64. That is, the Court analyzed the action under the rule of reason once it determined that laws with conflicting goals applied to the situation. *Id.* at 355-64.

[92] *See* BORK, *supra* note 3, at 334 (discussing whether joint action has purpose beyond boycott). If the parties' only joint activity is the boycott-like action, they probably intend to harm competition. *Id.* However, if the parties engage in other joint activity, the boycott-like action may be just an outgrowth of that other activity. *See id.* (suggesting that boycott-like action may result from creating efficiency).

[93] *See, e.g.*, Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 296-98 (1985) (refusing to apply per se analysis when cooperative purchasing association expelled member for violating bylaws); Molinas v. National Basketball Ass'n, 190 F. Supp. 241, 243-44 (S.D.N.Y. 1961) (holding player's suspension valid disciplinary action not violating antitrust laws).

[94] *See Molinas*, 190 F. Supp. at 243-44 (addressing player suspended from playing

and are not rationally related to the organization's purpose, so they will be subject to Sherman Act analysis.[95] For example, National Collegiate Athletic Association (NCAA) limits on college football teams' television appearances did not rationally relate to its purpose of insuring the student-athletes' well-being.[96] Therefore, the Court found the restrictions to be an unreasonable restraint and struck them down.[97]

Finally, courts often consider market power[98] when determining whether a restraint, especially one implemented by an organization, constitutes an illegal boycott.[99] Market power is

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basketball for violating league rules).

[95] *See, e.g.*, National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 696 (1978) (holding canon of ethics limiting competition allegedly to maintain quality not protected from antitrust liability); Associated Press v. United States, 326 U.S. 1, 19 (1945) (allowing members to prevent competitors' membership held unreasonable restraint of trade under Sherman Act).

[96] NCAA v. Board of Regents, 468 U.S. 85, 120 (1984) (holding limits on broadcasting football games illegal restraint of trade).

[97] *Id.*

[98] In FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 439 n.2 (1990), Justice Brennan, in his dissent, defined market power as "the ability to alter prices." *See infra* notes 158-86 and accompanying text (discussing *SCTLA*). Market power is also the ability to raise prices above marginal cost. *See, e.g.*, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 13-15 (1984) (discussing use of market power towards monopoly position); United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 620 (1977) (discussing market power).

Any inquiry into market power must begin with a definition of the relevant market. GELLHORN, *supra* note 2, at 118. For example, if Pepsi and Coke organized a boycott, the court would initially define their product market. Do they sell beverages, which would include juices, milk, sports drinks, and other refreshments? Or, do they sell sodas? The soda market is a more restricted definition and would result in a finding of higher market power. Finally, the court could define the market as the cola market. In this market, the Pepsi-Coke agreement would clearly have the power to affect market conditions. *See id.* at 118-20 (giving example of difficulty courts face in defining product market).

Defining the relevant market also involves defining a geographic market. *Id.* at 126. Pepsi and Coke clearly sell throughout the world, so the court would most likely find a worldwide or a national market. However, if two local beer brewers organized a boycott, the court would have to define a narrower geographic market. The two would not have much market power on a national scale since they probably distribute only locally. However, they may have enough power in the community, or even the state, to affect those markets. *See id.* at 126-28 (giving example of difficulty courts face in defining geographic market). Thus, any finding of market power will depend on how the court has defined the relevant market.

[99] *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 296-98 (1985) (addressing legality of action by purchasing cooperative without market power). In *Northwest Wholesale Stationers*, the Court commented that a purchasing cooperative, a type of trade organization, was not the kind of concerted activity likely to always or almost always result in anticompetitive effects. *Id.* at 295. The Court stated that

essentially the ability of a commercial entity to affect market prices through its actions.[100] If the actors do not have the market power to coerce action, courts are less likely to find an illegal boycott.[101] Lack of market power suggests that a group acted for a legitimate purpose.[102] If the actors possess market power, however, courts are more likely to find an illegal use of that power to affect trade.[103]

After analyzing the restraint, courts may find that it was not a boycott agreement among the parties.[104] Alternatively, courts may find that the action is a boycott but is not the type of action that is predominantly anticompetitive.[105] These approaches

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the plaintiff must make some showing that the defendant possessed market power. *Id.* at 298. Market power suggests that the action would likely be anticompetitive and appropriate for per se condemnation. *Id.*

[100] *See* LANDSBURG, *supra* note 4, at 289 (defining market power).

[101] *See, e.g., Northwest Wholesale Stationers*, 472 U.S. at 296 (advocating use of rule of reason analysis if participants do not have market power); *cf. Jefferson Parish*, 466 U.S. at 16-18 (discussing need to find market power in tying case before finding tying arrangement illegal per se).

[102] *See* Michael L. Denger, *Horizontal Restraints of Trade, in* 1 THE CHANGING FACE(S) OF ANTITRUST 105, 130 (Mass. Continuing Legal Educ., Inc. ed., 1992) (asserting that, since *Northwest Wholesale Stationers*, courts have been less likely to apply per se test to boycotts in which boycotters lacked market power). When a court uses rule of reason analysis, it implies that the challenged action is likely to have procompetitive justifications. *See supra* notes 41-44 and accompanying text (discussing application of rule of reason analysis); *see also* Richard A. Posner, *The Economic Theory of Monopoly and the Case for Antitrust, in* ECONOMIC ANALYSIS AND ANTITRUST LAW 28, 29 (Terry Calvani & John Siegfried eds., 2d ed. 1988) (discussing small sellers' lack of market power). When a small seller reduces its output, other sellers in the market will compensate by increasing their outputs. *Id.* Thus, total market output and price remain essentially the same. *Id.* The small seller has no market power because it does not have the ability to alter market price. *See supra* note 98 (discussing market power). Because the small seller has no ability to alter the market price or use its position coercively, it is unlikely to attempt to do so.

[103] *See, e.g.*, Associated Press v. United States, 326 U.S. 1 (1945) (addressing association's rule allowing members to exclude competitors). *But see* Molinas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961) (finding that, though league has market power, its restrictions are reasonable).

[104] *Cf.* Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588, 603-04 (1925) (noting agreement to share information is not agreement to restrain trade). The action was not a boycott. However, had the Court found an agreement, it could have found an agreement to boycott purchasers who abused the bidding system. *See id.* at 603.

[105] *See, e.g., Northwest Wholesale Stationers*, 472 U.S. at 298 (stating that plaintiff must present "threshold case" that activity is probably "predominantly anticompetitive"); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961) (noting that restraint involved bore little resemblance to restraints normally violating Sherman Act); *Molinas*, 190 F. Supp. at 243-44 (noting that league must have reasonable rules and that challenged action did not amount to antitrust violation).

allow courts to avoid rigidly applying per se analysis.[106] The courts' use of these approaches suggests that the per se rule, when applied to all boycott-like actions, eliminates too many reasonable restraints.[107] Perhaps boycotts, especially political boycotts which involve First Amendment concerns, should not be per se illegal.[108]

### *C. The First Amendment and the Political Action Exception to Antitrust Liability*

The First Amendment protects the people's rights to speak, assemble, and petition the government.[109] Courts must enforce First Amendment guarantees to effect the primary goal of the Sherman Act, market efficiency.[110] Market efficiency is furthered when people may communicate economic concerns to the government, using their rights to speak and assemble.[111] Communication between commercial entities and the government is essential for the government to effectively allocate resources in a regulated market.[112] Commercial entities may communicate with the government through actions that also restrain trade.[113] For example, when the gadget boycotters encourage people to boycott South African products, they promote restraining gadget sellers' trade.[114] However, the boycott also commu-

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[106] *See* SULLIVAN, *supra* note 1, § 85 (noting that courts characterize actions to decide whether to apply per se rule).

[107] *See id.* (noting that courts' characterizations allow beneficial actions to escape per se condemnation).

[108] *See infra* notes 240-44 and accompanying text (discussing analysis of purely political boycotts).

[109] U.S. CONST. amend. I.

[110] *See supra* notes 1-6 and accompanying text (discussing efficiency as goal of Sherman Act).

[111] *See generally* GELLHORN, *supra* note 2, at 41-42 (discussing preservation of competitive economy through regulation). When people assemble for the purpose of communicating economic information to the government, the government receives information it needs to efficiently allocate resources in a regulated market. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 127-37 (1961) (discussing publicity campaign aimed at influencing government).

[112] *See Noerr*, 365 U.S. at 137 (discussing need of government to know of people's wishes); *see also supra* note 13 and accompanying text (addressing government's need for communication from regulated parties to effectively regulate market).

[113] *See, e.g., Noerr*, 365 U.S. at 127 (analyzing action by railroads which attempted to influence legislation and also harmed trade of truckers).

[114] *See supra* notes 14-15 and accompanying text (discussing hypothetical boycott).

nicates their views to the government.[115] When courts address such actions, they must balance First Amendment protections against antitrust prohibitions on restraining trade.[116]

First Amendment protections are not absolute. The government may restrict free speech in some situations to protect a substantial government interest.[117] For example, courts allow restrictions on speech for obscenity,[118] commercial speech,[119] incitement,[120] and expressive conduct.[121] In addition, courts

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[115] *See supra* notes 14-15 and accompanying text (discussing hypothetical boycott). These views are political in a broad sense because the boycotters are expressing their views to the government. However, the boycotters may be communicating either their social position on human rights violations or their economic position on gadget competition. *Cf. Noerr*, 365 U.S. at 135-40 (discussing attempts to influence legislature to pass law). The widget retailers are using a boycott to draw attention to, and support for, the legislation they seek. *See supra* notes 14-15 and accompanying text (discussing hypothetical boycott). In *Noerr*, the Court discussed a publicity campaign (not a boycott) that was used to garner support for legislation. 365 U.S. at 135-40. The Court noted that the Sherman Act does not prohibit attempts to use publicity to communicate with the government. *Id.* at 139.

[116] *See infra* notes 124 and accompanying text (noting that courts should not use per se rule analyzing boycotts with First Amendment aspects).

[117] *See* United States v. Edge Broadcasting Co., 113 S. Ct. 2696, 2709 (1993) (citing test from Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980)); United States v. O'Brien, 391 U.S. 367, 376 (1968) (stating that when action contains both speech and non-speech aspects, substantial government interest in regulating non-speech aspect may justify some restrictions on First Amendment protection); *see also* GERALD GUNTHER, CONSTITUTIONAL LAW 1069-71 (12th ed. 1991) (discussing approaches to protecting speech when "compelling" state interest supports restriction).

[118] *See, e.g.*, Alexander v. United States, 113 S. Ct. 2766 (1993) (holding that selling obscene materials serves as predicate offense for RICO prosecution); Miller v. California, 413 U.S. 15, 36-37 (1973) (stating that states may prohibit distribution of obscene material); Roth v. United States, 354 U.S. 476, 492 (1957) (stating that obscenity is not protected by First Amendment).

[119] *See, e.g., Edge Broadcasting*, 113 S. Ct. at 2707-08 (holding regulation prohibiting radio station from broadcasting lottery commercials justified as commercial speech regulation); Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557, 570 (1980) (holding that complete ban on advertising by electrical utility is overbroad and falls outside commercial speech exception); Valentine v. Chrestensen, 316 U.S. 52 (1942) (upholding ban on handbill advertisement as regulation of business activity).

[120] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (per curiam) (holding that states cannot restrain advocacy of objectionable position unless advocacy is likely to produce illegal action); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (finding "fighting words" likely to result in retaliation not protected by First Amendment); Schenck v. United States, 249 U.S. 47, 52 (1919) (allowing speech limitation when circumstances make exercise of free speech dangerous).

[121] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 420 (1989) (holding that statute prohibiting flag burning was unconstitutional); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969) (holding school policy that prohibited wearing black armbands to

have justified limiting the time, place, and manner of types of protected speech.[122] However, the per se rule against boycotts may unduly restrict free speech.[123] Courts may not lightly disregard constitutional guarantees to promote judicial efficiency.[124]

The case law applicable to political boycotts is relatively sparse, but early cases established that antitrust liability might not attach to political action.[125] In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[126] the Court addressed the railroads' actions aimed at influencing the government.[127] The case involved a railroad publicity campaign that focused on the negative aspects of trucking.[128] The public relations firm allegedly designed the campaign to generate opposition to legislation that would allow trucks to carry heavier loads on roads.[129] Under the proposed law, the railroads would have had to compete with the truckers for the heavier loads.[130] The campaign was

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protest Vietnam War was unconstitutional); United States v. O'Brien, 391 U.S. 367, 382 (1968) (upholding statute prohibiting burning of draft cards because of substantial government interest in maintaining records).

[122] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (holding that requiring use of city-provided sound system to control noise of public concerts did not violate First Amendment); Frisby v. Schultz, 487 U.S. 474, 488 (1988) (upholding ban on picketing individual residences); Martin v. Struthers, 319 U.S. 141, 149 (1943) (holding ban on door-to-door handbill distribution unconstitutional).

[123] *See* NAACP v. Button, 371 U.S. 415, 429 (1963) (holding unconstitutional state statute preventing soliciting lawsuits by those who are not parties or who have no pecuniary interest in action). In *Button*, the Court stated that a state "cannot foreclose the exercise of constitutional rights by mere labels." *Id.* If a state may not limit constitutional rights by the use of labels, then the Constitution should similarly restrict the courts.

[124] *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 439 n.2 (1990) (Brennan, J., dissenting) (noting that per se efficiency gains do not justify negative effects on First Amendment guarantees); Kindred, *supra* note 3, at 722-23 (discussing First Amendment prohibition on "efficiency-oriented shortcuts" that eliminate reasonable restraints).

[125] In Parker v. Brown, 317 U.S. 341, 351-52 (1943), the Court recognized that the antitrust laws do not apply to state action. The Court noted, however, that a state may not immunize private actors from antitrust liability. *Id.* A state may pass laws restraining trade, but it may not pass laws allowing private actors to agree to restrain trade. *Id.* at 351 (citing Northern Sec. Co. v. United States, 193 U.S. 197, 332, 344-47 (1904)). *Parker* laid the foundation for Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). The *Noerr* Court held that the Sherman Act does not prohibit action aimed at influencing the government. *Id.* at 135.

[126] 365 U.S. 127 (1961).

[127] *Id.*

[128] *Id.* at 129.

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

[130] *Id.* at 128-30.

successful, and the governor vetoed the legislation.[131] The lower courts found that the railroads' action violated the Sherman Act.[132] Although the Supreme Court found that the railroads benefitted from the limitation on their competition, it reversed the lower courts' ruling.[133] The Court found that the Sherman Act allowed association in an attempt to influence the legislature, establishing the political action exception to antitrust liability.[134]

## II. RECENT CASES CREATED CONFUSION FOR COURTS APPLYING THE POLITICAL ACTION EXCEPTION TO BOYCOTTS

Based on *Noerr*'s political action exception, courts have developed a political boycott exception for the sub-category of boycotts that have significant First Amendment aspects.[135] Courts grant such boycotts greater protection than traditional commercial boycotts.[136] Although the case law addressing political and mixed-motive boycotts is sparse, the Supreme Court has indicated that people must be free to communicate with their representatives.[137]

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[131] *Id.* at 130.

[132] *Id.*

[133] *Id.* at 145.

[134] *Id.* at 135. The Court stated that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Id.* The Court cited this passage with approval in FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 424 (1990). The *Noerr* Court noted that the Sherman Act does not prohibit political action, even when an anticompetitive purpose motivates the actors. *Noerr*, 365 U.S. at 139-40.

[135] *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982) (finding boycott implicating First Amendment considerations not prohibited by Sherman Act); Missouri v. NOW, 620 F.2d 1301, 1319 (8th Cir.) (finding political boycott legal), *cert. denied*, 449 U.S. 842 (1980). In political boycotts, organizers often communicate not only with each other, but also with the public and the government. *See infra* notes 199-211 and accompanying text (discussing communication as element of political boycott). In this type of boycott, free speech considerations may outweigh the government interest in regulating the economy. *See supra* note 108 and accompanying text (arguing that government should not restrict speech in political boycotts by per se rule).

[136] *See infra* notes 144-56 and accompanying text (discussing greater protection granted political or mixed-motive boycotts). These boycotts may be granted greater protection because experience has not shown that they are almost always unreasonable restraints of trade. *See supra* notes 66-67 and accompanying text (noting that courts apply per se rule when experience with restraint indicates it is almost always anticompetitive).

[137] *See supra* notes 109-14 and accompanying text (discussing commercial entities' com-

*Noerr* established the political action exception to antitrust liability, but few cases in the next twenty years modified or clarified the exception.[138] Although *Noerr* did not explicitly involve a boycott, the actions resembled a boycott.[139] The case involved an agreement by the railroads to act to harm competitors, the truckers.[140] Similarly, in a boycott, businesses agree to act to harm competitors.[141] However, in *Noerr*, the railroads targeted the legislature,[142] while in a boycott the boycotters target their competitor.[143]

One of the first cases to apply the political boycott exception was *Missouri v. National Organization for Women (NOW)*.[144] *NOW* was the first case in which a court directly addressed the First Amendment aspects of a noncompetitor's political boycott.[145] The case arose when NOW urged its members not to hold conventions in states that had failed to ratify the Equal Rights Amendment.[146] Missouri, professing harm to its economy, claimed that NOW's action constituted an illegal group boycott.[147] The district court found that NOW's boycott was political and not within the scope of the Sherman Act.[148] The Eighth Circuit Court of Appeals could not determine from the legislative history whether Congress had intended the Sherman

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munication with government).

[138] *See, e.g.*, United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965) (finding that Sherman Act does not prohibit combination for purpose of influencing public official); *see also* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (indicating that interfering with competitors' access to judicial tribunals may fall within sham exception and violate Sherman Act).

[139] *See supra* notes 127-31 and accompanying text (noting form of *Noerr* action).

[140] Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 129-31 (1961).

[141] *See supra* notes 71-76 and accompanying text (discussing form of boycotts).

[142] *Noerr*, 365 U.S. at 129-30.

[143] *See supra* notes 71-76 and accompanying text (discussing forms of boycotts).

[144] 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

[145] *Id.* at 1302. The court stated that "[t]he primary question with which [it] must deal is the applicability of the Sherman Act to a politically motivated but economically tooled boycott participated in and organized by noncompetitors of those who suffered as a result of the boycott." *Id.* The court further acknowledged that the "specific question this case presents has not been decided by the Supreme Court or, for that matter, by any other appellate court." *Id.* at 1304.

[146] *Id.* at 1302.

[147] *Id.*

[148] *Id.*

Act's prohibitions to apply to political boycotts.[149] However, the Eighth Circuit found that NOW's attempt to influence social legislation was further from the central focus of the Sherman Act than an economic boycott.[150] The political nature of the boycott implicated the First Amendment, which protected NOW's right to petition the government.[151] Therefore, the Eighth Circuit affirmed the district court, holding that the Sherman Act did not apply to NOW's activities.[152] The Eighth Circuit did not declare an exception to per se liability. Instead, based in part on the political action exception, it found political boycotts are outside the scope of the Sherman Act.[153]

Two years after *NOW*, in 1982, the Supreme Court had an opportunity to address the political boycott exception. In that Term, the Court addressed two politically motivated boycotts.[154] In the first case, African-Americans boycotted white-owned businesses to communicate their desire for recognition of their civil rights.[155] The Court, effectively using rule of reason analysis, found that the First Amendment protected the boycotters from

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[149] *Id.* at 1309; *see also id.* at 1304-09 (discussing legislative history of Sherman Act).

[150] *Id.* at 1312.

[151] *Id.*

[152] *Id.* at 1319. The court, in effect, used rule of reason analysis to address the boycott. The court considered the positive effect of preserving the people's right to petition the government. *Id.* at 1310. It also considered the social purpose of the legislation NOW was seeking. *Id.* at 1311-12. Balanced against these considerations was the fact that any injury Missouri incurred was incidental to NOW's attempt to influence the government. *Id.* at 1314-15.

[153] *Id.* at 1316.

[154] NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982).

[155] *Claiborne Hardware*, 458 U.S. at 915. The boycotters intended to influence government action, but they also both foresaw and intended economic injury to the boycotted businesses. *Id.* at 914. Although the case involved economic harm, the Court found the non-violent conduct engaged in was a form of protected speech, not prohibited by the Sherman Act. *Id.* at 915. The Court did consider the First Amendment implications of the boycott. *Id.* at 907-15. However, it focused on whether the boycott organizers were responsible for the violence accompanying the boycott. *Id.* at 915-32. A few acts of violence did not make the entire boycott violent, stripping it of First Amendment protection. *Id.* at 933-34. The Court commented that the "burden of demonstrating that fear, rather than protected conduct was the dominant force in the movement is heavy." *Id.* at 934; *see also* Note, *Constitutional Law — The First Amendment and Protest Boycotts:* NAACP v. Claiborne Hardware Co., 62 N.C. L. REV. 399, 403 (1984) (noting that Court focused on violence, not First Amendment).

antitrust liability.[156] However, in the second case, the Court did not grant First Amendment protection to workers who, for political reasons, refused to unload cargo shipped from the Soviet Union.[157]

Eight years later, in *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n (SCTLA)*,[158] the Court retreated from the expansive First Amendment protection it had granted political boycotts and held a boycott with political aspects illegal per se.[159] In *SCTLA*, a small group of SCTLA attorneys regularly took indigent criminal cases for a government-set fee.[160] After several unsuccessful attempts to convince the government to raise the fee, the SCTLA voted to accept no new cases until the government raised the fee.[161] The resulting shortage of attorneys willing to take the cases caused a severe litigation backlog.[162] Responding to the problem, the government passed a bill raising attorneys' fees.[163] The Federal Trade Commission (FTC)[164] then filed an action charging the SCTLA with illegal boycotting.[165] The FTC found the boycott illegal per se.[166] On

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[156] *Claiborne Hardware*, 458 U.S. at 915.

[157] *Allied*, 456 U.S. at 226. *Allied* further confused the political boycott exception. *See, e.g.*, Note, *Free Speech, Free Markets, and the Per Se Rule of Antitrust:* FTC v. Superior Court Trial Lawyers Association, 21 SW. U. L. REV. 1443, 1451 (1992) [hereafter *Free Speech, Free Markets*] (discussing *Allied* Court's refusal to create political boycott exception). The *Allied* decision confused the political boycott exception because the Court did not find a boycott engaged in for clearly political reasons to be a protected political boycott. *Allied*, 456 U.S. at 226. Instead, the Court held it to be an illegal secondary boycott. *Id.* at 224. The Court commented that drawing a line between political and labor-related motives would be too difficult. *Id.* at 225. However, the Court analyzed the boycott under the National Labor Relations Act (NLRA), which specifically prohibits secondary boycotts, not the Sherman Act. *Id.* at 217-18. The Court found no congressional intent to except political secondary boycotts from NLRA liability. *Id.* at 225. Thus, the Court did not limit Sherman Act immunity, it just refused to expand political boycott immunity to cover the NLRA.

[158] 493 U.S. 411 (1990).

[159] *Id.* at 436.

[160] *Id.* at 415.

[161] *Id.* at 416.

[162] *Id.* at 417.

[163] *Id.* at 418.

[164] The Federal Trade Commission Act (the Act) established the Federal Trade Commission (the Commission). 15 U.S.C. §§ 41-58 (1988 & Supp. V 1993). Under the Act, the Commission may directly enforce the Clayton Act, 15 U.S.C. §§ 12-27 (1988 & Supp. V 1993), and the Sherman Act, 15 U.S.C. §§ 1-7 (1988 & Supp. V 1993), as well as condemn conduct that "violates 'the spirit' of the Sherman or Clayton Acts." AREEDA & KAPLOW, *supra* note 2, at 78-79.

[165] 493 U.S. at 418.

appeal from the FTC ruling, the D.C. Circuit Court of Appeals vacated the judgment and remanded the case, instructing the FTC to determine the SCTLA's market power.[167] The FTC appealed and the Supreme Court granted certiorari.[168]

The Supreme Court reversed and held that the boycott was illegal per se.[169] An undivided Court[170] distinguished *SCTLA* from *Noerr*.[171] In *Noerr*, the Court focused on the restraint which resulted from the governor's veto of legislation.[172] In *SCTLA*, however, the Court focused on the restraint caused by the boycott.[173] The Court found that the legislature acted because of the restraint caused by the boycott.[174] The Court also seemed concerned that the boycott was in support of a horizontal price fixing arrangement,[175] another antitrust category that is illegal per se.[176] Horizontal price fixing occurs when competitors agree to set prices and to stop competing with each other.[177] The Court noted that the government may regulate boycotts, especially when the participants act for their own economic benefit.[178]

Although all Justices distinguished *Noerr*,[179] three Justices[180] disagreed with the majority's use of the per se analy-

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[166] *Id.* at 419.

[167] *Id.* at 420.

[168] *Id.* at 421.

[169] *Id.* at 436.

[170] Justices Brennan, Marshall, and Blackmun concurred in part and dissented in part. *Id.* at 436, 453.

[171] *Id.* at 424-25.

[172] Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 130 (1961).

[173] *SCTLA*, 493 U.S. at 425.

[174] *Id.*

[175] *Id.* at 436 n.19; *see also* AREEDA & KAPLOW, *supra* note 2, at 188 (discussing horizontal price fixing).

[176] *See supra* note 70 (citing cases finding horizontal price fixing illegal per se); *see also* AREEDA & KAPLOW, *supra* note 2, at 187-96 (analyzing per se rule against horizontal price fixing).

[177] *See* AREEDA & KAPLOW, *supra* note 2, at 188 (noting that horizontal price fixing raises prices and reduces output); GELLHORN, *supra* note 2, at 175 (discussing development of price fixing category); LANDSBURG, *supra* note 4, at 340-41 (discussing economic aspects of price fixing); SULLIVAN, *supra* note 1, § 61 (noting how price fixing affects market).

[178] *SCTLA*, 493 U.S. at 426-27.

[179] *See supra* notes 170-74 and accompanying text (discussing *Noerr*).

[180] Justices Brennan, Marshall, and Blackmun dissented. *SCTLA*, 493 U.S. at 436, 453.

sis in this case.[181] The three dissenters argued that, before the Court limits First Amendment rights, it must decide whether the boycott can cause the harms that the Sherman Act proscribes.[182] The dissenters stated that to analyze the harm caused by the boycott, the Court must examine the market power of the participants.[183] They asserted that the difference between political and economic power is the difference between lawfully convincing and unlawfully coercing the government.[184] Justice Blackmun, in his own dissenting opinion, stated that the SCTLA could have accomplished its goal by using political pressure to persuade the government to act.[185] Because the antitrust acts do not condemn the use of political pressure, Justice Blackmun believed that if SCTLA lacked market power, the boycott was legal.[186]

In *SCTLA*, the Court used the per se rule to analyze a boycott aimed at influencing legislation.[187] Earlier courts used the rule of reason to analyze other political boycotts.[188] Because *SCTLA* did not overrule these prior cases, *SCTLA* has left courts with no clear guidance on how to address a political boycott.[189] To promote uniformity among courts, the Supreme Court should adopt a clear test for analyzing boycotts with political motives.

## III. USING MOTIVE CLASSIFICATION TO DETERMINE THE APPROPRIATE ANTITRUST TEST

This Comment proposes a clear test for analyzing political boycotts.[190] Currently, case law is unclear as to whether courts should apply rule of reason analysis or the per se test to analyze

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[181] *Id.* at 437 (Brennan, J., dissenting); *id.* at 454 (Blackmun, J., dissenting).

[182] *Id.* at 438 (Brennan, J., dissenting).

[183] *Id.* at 438, 441-42, 454.

[184] *Id.* at 441-43 (Brennan, J., dissenting); *id.* at 454 (Blackmun, J., dissenting).

[185] *Id.* at 454.

[186] *Id.*

[187] *Id.* at 433-36.

[188] *See supra* notes 144-56 and accompanying text (discussing political boycott cases in which courts have used rule of reason analysis).

[189] *See supra* notes 144-86 and accompanying text (discussing confusion regarding political boycott sub-category).

[190] *See infra* notes 191-257 and accompanying text (discussing proposed test).

political boycotts.[191] The proposed test would require courts to determine the motives behind the boycott before determining whether to use rule of reason analysis or the per se test.[192]

Based on the motives behind the boycott, courts will be able to determine the appropriate analysis, per se or rule of reason, to apply to the boycott.[193] If the boycott is predominantly politically motivated, First Amendment concerns should outweigh anticompetitive interests and the boycott should be per se legal.[194] If the boycott is predominantly economically motivated, courts should treat it as any other boycott falling under the antitrust laws and find it illegal per se.[195] Finally, if the boycott has both economic and legitimate political motives, courts should use rule of reason analysis to determine whether it is legal.[196]

### *A. Motivation Analysis*

The first tier of the proposed test requires a determination of the motivation behind the boycott. This is the most complex inquiry because it involves inferring motivation from conduct.[197] The court should consider four factors when analyzing

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[191] *See supra* notes 144-86 and accompanying text (discussing courts' use of different tests when addressing political boycotts).

[192] *See* Kennedy, *supra* note 3, at 989 (stating that analysis of motivation behind boycott aids classification as political or economic boycott).

[193] *See* SULLIVAN, *supra* note 1, § 92 (suggesting alternate tests for commercial and non-commercial boycotts). Professor Sullivan suggests that courts should analyze boycotts involving non-commercial motives under the rule of reason. *Id.* However, he argues that courts should analyze boycotts aimed at harming competitors under the per se rule. *Id.*

[194] *See* U.S. CONST. art. VI. When there is a conflict between a statute and a constitutional provision, such as the First Amendment, the constitutional provision governs. *Id.*

[195] *See* SULLIVAN, *supra* note 1, § 93 (suggesting that courts should analyze boycotts aimed at harming competitors under per se rule). Essentially, in this case there is no conflict between the First Amendment and the antitrust laws. The communication involved is only ancillary to the illegal restraint of trade, so courts should not consider it in addressing the boycott. *See* Beschle, *supra* note 3, at 413, 418-19 (noting that commercial boycotts have only inconsequential First Amendment aspects).

[196] *See* Note, *Politically Motivated Boycotts with Commercial Benefits: A Consolidated Rule of Reason Judicial Standard*, 14 N.Y.U. REV. L. & SOC. CHANGE 873, 876-77 (1986) [hereafter *Politically Motivated Boycotts*]. One commentator noted that most lower courts and commentators support the use of rule of reason analysis unless the only purpose of the boycott is to eliminate competition. *Id.*

[197] Because of the uncertain nature of the inquiry, courts should be hesitant to find a boycott to be predominantly politically or economically motivated. *See Politically Motivated*

the boycotters' motivation: publicity, market power, goals, and harm.[198]

1. Publicity

First, the court should consider the publicity surrounding the action.[199] Publicity serves two purposes in determining motive. First, businesses with a solely predatory intent are unlikely to want to publicize their actions.[200] The public will probably have an unfavorable view of a firm that acts solely to increase its profits, which will reduce public support for the boycotters.[201] Thus, the lack of publicity surrounding a boycott indicates an economic motive.

However, in a mixed-motive or political boycott, the boycotters will want to educate the public or change public

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*Boycotts*, *supra* note 196, at 873 (noting that boycotts rarely have only one goal). That is, courts should most often find that "political" boycotts are mixed-motive boycotts. *See* GELLHORN, *supra* note 2, at 197 (most boycotts have mixed motives); *see also Politically Motivated Boycotts*, *supra* note 196, at 873 (commenting that analysis of purpose of boycott will usually not result in finding solely anticompetitive goal). A boycott motivated by more than just attempted harm to competition should be presumed reasonable. *Id.* at 886. Since the per se rule applies when the challenged conduct is presumptively unreasonable, courts should not use it for boycotts that do not have a solely anticompetitive goal. *See supra* notes 63-70 and accompanying text (discussing use of per se rule in antitrust cases).

Courts may determine motive based on conduct, which requires an inference of the mental state of an actor. However, actions may support conflicting inferences. For example, in this Comment's hypothetical, the gadget boycotters act and publicize their actions to influence the government to pass legislation. *See supra* notes 14-15 and accompanying text (presenting hypothetical boycott). From the boycotters' actions, a court could determine that their motive is political, to improve social conditions in another country. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982) (finding boycott to promote social change and ensure civil rights to be legal). However, those actions equally support an inference that the motive is commercial, to prevent competition from imported gadgets. *See supra* notes 14-15 and accompanying text (discussing hypothetical boycott).

[198] *See infra* notes 199-235 and accompanying text (discussing four motive-determining factors).

[199] *See* Missouri v. NOW, 620 F.2d 1301, 1302 (8th Cir.) (discussing publicity surrounding NOW's boycott), *cert. denied*, 449 U.S. 842 (1980). The court found that NOW aimed its actions at the legislative process in an attempt to "make a symbolic gesture" and to raise public awareness of the Equal Rights Amendment. *Id.* NOW clearly publicized its boycott attempting to gain public support for its cause. *Id.*

[200] *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 129 (1961) (noting that publicity campaign against truckers was designed to create public support for railroads and opposition to truckers).

[201] *See Politically Motivated Boycotts*, *supra* note 196, at 887 (noting that political boycotts rely on public support).

opinion.[202] Because the media is an effective tool for communicating with large numbers of people, use of the media is indicative of a political motive.[203] Furthermore, courts have allowed restraints of trade that relate to the exchange of information.[204] Consequently, boycotts using the media to communicate information are not only more likely politically motivated, but also more likely justified and reasonable.[205]

The second purpose behind considering communication through the media is to distinguish the protected speech a political boycott involves from the unprotected speech necessary to manage any boycott.[206] A purely economic boycott will involve some speech because the organizers will have to communicate with each other, both before and during the boycott.[207] However, courts should not protect a boycott based on such speech because boycott organizers use the speech solely to further an illegal economic boycott.[208] Speech used solely for an illegal purpose is often not protected.[209] Communicating with third

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[202] *See Noerr*, 365 U.S. at 129, 142-43 (noting railroads' desire to change public opinion by educating public about negative aspects of trucking).

[203] *See* Kindred, *supra* note 3, at 722 (noting SCTLA boycott was more likely political because SCTLA went to public to try to gain support for its cause). Political motives are those related to influencing the legislature. *See supra* notes 109-34 and accompanying text (discussing political action exception). Not all attempts to influence the legislature are protected. *See* GUNTHER, *supra* note 117, at 994 (noting exceptions to First Amendment protection for attempts to influence legislature). For example, attempts to bribe a legislator are not protected. *See id.* (noting that bribery is one action considered unprotected by First Amendment). However, attempts to influence government by communicating are protected by the First Amendment. *See* U.S. CONST. amend. I.

[204] *See supra* notes 83-91 and accompanying text (discussing cases addressing exchanges of information).

[205] *See Noerr*, 365 U.S. at 143-44 (finding boycott-like action justified). The Court indicated that negative publicity aimed at influencing legislation does not fall under the Sherman Act, even if it results in some direct injury to competition. *Id.*

[206] *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 431 (1990) (stating that every boycott involves communication between organizers and to target); *see also Noerr*, 365 U.S. at 140-44 (discussing how communication through media related to protected boycott).

[207] *See SCTLA*, 493 U.S. at 431 (noting that every boycott involves communication both between organizers and to target).

[208] *See Noerr*, 365 U.S. at 144 (noting that actions aimed not at securing government action but at harming competitors are not covered by political action exception to antitrust liability). Such a case should fall under the "sham" exception to political action immunity. *See id.* (discussing sham exception). That is, the action is only "ostensibly directed toward influencing governmental action." *Id.*

[209] *See SCTLA*, 493 U.S. at 431 (every boycott involves communication between organiz-

parties through the media suggests the boycott is a legitimate political boycott.[210] Thus, the fact that the gadget boycotters use the media to encourage the public to support trade legislation suggests that their motivation is at least partly political.[211]

### 2. Market Power

The second factor the court should consider in determining motive is the market power of the organizers.[212] If a firm has economic power, it may use that power to coerce action by others.[213] Boycotts in which the participants lack market power cannot coerce action, so they are more likely political.[214] The

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ers and target). Although the boycott in *SCTLA* involved communication, the Court found antitrust liability. *Id.* at 436; *see also supra* notes 117-22 and accompanying text (discussing categories of activities that government may proscribe though they involve speech).

[210] *See SCTLA*, 493 U.S. at 451 (Brennan, J., dissenting) (stating that relevant communication is to unrelated third parties).

[211] *See supra* notes 14-15 and accompanying text (discussing hypothetical boycott).

[212] *See Free Speech, Free Markets, supra* note 157, at 1462 (stating that market power is necessary to affect prices or exclude competition); *see also* Kennedy, *supra* note 3, at 992 (addressing market power as it relates to anticompetitive effect). To have an anticompetitive effect, boycotters need enough economic power "to influence the operation of the market *and* the market must contain imperfections such that the boycotter's influence produces distortions." *Id.* If the boycott has no anticompetitive effects, it does not violate the Sherman Act. *Id.*

[213] *See, e.g.*, Jews for Jesus, Inc. v. Jewish Community Relations Council, 968 F.2d 286, 297-98 (2d Cir. 1992) (finding threatened boycott unprotected because participants attempted to coerce private actor). One reason that courts have held boycotts per se illegal is because of the coercive use of market power. *See id.* (finding coercive action unprotected); *Free Speech, Free Markets, supra* note 157, at 1461 (asserting that Constitution does not protect coercive conduct); *see also* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984) (noting that coercive use of market power restrains "competition on the merits" and violates Sherman Act).

[214] *See SCTLA*, 493 U.S. at 432, 438, 441-42, 454 (discussing market power). One of the points of disagreement between the majority and the dissent in SCTLA was whether the boycotters possessed market power. *Id.* The majority found market power irrelevant and analyzed the boycott under the per se rule. *Id.* at 436. The dissent, however, felt that the boycotters did not necessarily possess market power. *Id.* at 438, 441-42, 454. Justice Blackmun believed that, absent market power, the boycott should be legal because it could only have a minimal effect on trade. *Id.* at 454. Similarly, where a boycott affects only a small piece of the market, courts have been more likely to employ rule of reason analysis. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 239 (1918) (analyzing scope of restriction). In *Chicago Board of Trade*, the Court used rule of reason analysis in part because the amount of trade affected by the restraint was minimal. *Id.*

Some commentators have suggested that the First Amendment should not protect political boycotts because of the coercive nature of boycotts. *See* Note, *The Political Boycott: An Unprivileged Form of Expression*, 1983 DUKE L.J. 1076, 1076. However, the commentator

participants are probably using the action to draw attention to the issue or to try to convince others to support their cause.[215]

For example, gadget boycotters together may have enough market power to force the railroads to support the trade legislation. In that case, the boycott resembles an economic boycott. However, if they do not have market power, then they are more likely using the agreement to focus attention on the political issue.[216]

### 3. Goal

The third motive-determining factor courts should consider is the boycott's probable goal.[217] For the boycott to be politically motivated, the boycotters should be attempting to influence government action.[218] For example, because the gadget

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ignores the fact that, without a certain degree of power, boycotters cannot coerce action because they would not have sufficient influence on the market. *See* Kennedy, *supra* note 3, at 992 (stating that to affect market, boycotters must have market power). When participants coerce others to join an action in order to gain market power, courts may see the action as an illegal secondary boycott, aimed at other market participants rather than the government. *See, e.g.*, International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 222-26 (1982) (finding that workers' refusal to unload products shipped from Soviet Union constituted illegal secondary boycott under National Labor Relations Act). *But see* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982) (finding peaceful boycott of white owned businesses to cause them to support racial equality protected by First Amendment).

[215] *See, e.g.*, *SCTLA*, 493 U.S. at 431 (noting that newsworthy events generate publicity); Missouri v. NOW, 620 F.2d 1301, 1302 (8th Cir.) (stating that firms without market power are more likely to use boycott as tool to attract attention to issue), *cert. denied*, 449 U.S. 842 (1980); *see also* Kindred, *supra* note 3, at 741. Kindred states that "collective generation of political pressure is the essence of democratic politics." *Id.* Thus, the antitrust laws should not prohibit smaller firms, those without market power, from combining to gain the power to exert political pressure. *Id.*

[216] *See supra* notes 14-15 and accompanying text (discussing hypothetical boycott).

[217] *Cf.* Beschle, *supra* note 3, at 385. Courts should use the rule of reason, not the per se rule, when analyzing a boycott whose purpose is other than to harm a competitor. *Id.* at 393-94. Use of the rule of reason suggests that these boycotts have justifications that boycotts aimed at harming competitors do not have. *Id.* Determining a boycott's goal is similar to determining the purpose behind a trade or professional organization. *See supra* notes 92-97 and accompanying text (discussing when actions of trade or professional organizations are valid under antitrust laws). In both situations, the inquiry is into the organizer's desired result.

[218] *See, e.g.*, Jews for Jesus, Inc. v. Jewish Community Relations Council, 968 F.2d 286, 297-98 (2d Cir. 1992) (holding threatened boycott illegal, in part because it was aimed at coercing private action, not at inducing legislation); United Mine Workers v. Pennington, 381 U.S. 657, 669-70 (1965) (finding that political activity is not within scope of Sherman Act); *see also NOW*, 620 F.2d 1301. The court stated "we do not rest our decision in this case

boycotters are attempting to influence the government to pass trade legislation, their boycott seems political.[219] If the participants seek to gain economically through harming or inducing action by another market participant, the focus of the boycott is probably economic.[220]

Even when boycotters aim their action at influencing the government, the court should consider whether the goal is direct economic benefit to the organizers or a change in social (political) status.[221] Courts should closely examine boycotts that directly benefit the organizers economically.[222] The political aspects of such a boycott may be a sham to cover the true goal of economic gain to the organizers and harm to competition.[223] Congress enacted the antitrust acts to prevent such harm to competition.[224] A boycott that will have such results is less like-

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upon the basis that the boycott was noncommercial and non-economic. Our decision is based upon the right to use political activities to petition the government, as was the underlying factor in *Noerr*." *Id.* at 1315 n.16.

[219] *See supra* notes 14-15 and accompanying text (discussing hypothetical boycott).

[220] *See* Beschle, *supra* note 3, at 418 (claiming that "concerted activity against competitors should be prohibited.").

[221] *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 426 (1990) (stating that in *NAACP v. Claiborne Hardware Co.*, the boycotters "sought no special advantage for themselves"). In *Claiborne Hardware*, the boycotters' goal was general social benefit. *Id.* However, hope of economic gain motivated the SCTLA boycotters. *Id.* This difference was one way that the Court distinguished the protected *Claiborne Hardware* boycott from the unprotected *SCTLA* boycott. *See NOW*, 620 F.2d at 1312 (noting that Sherman Act is less concerned with attempts to promote social legislation); GELLHORN, *supra* note 2, at 194-95 (noting that boycotts used to harm competitors or increase profits should be illegal per se, but courts should consider boycotts with "social or moral objectives" more carefully).

[222] *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, 1993 SUPPLEMENT TO ANTITRUST LAW 6-7 (1993) (stating that if boycotters are likely to receive direct economic benefit, strong presumption that boycott is economic should arise). The authors claim that First Amendment protection should be "presumptively denied" when the boycott involves direct economic gain to the participants. *Id.*; *see also* Beschle, *supra* note 3, at 413 (stating that "[b]oycotts organized by business entities and directed against competitors should be declared per se illegal regardless of any asserted non-commercial motives"). While this Comment does not propose that economic gain to boycotters should eliminate the possibility of finding a political boycott, economic gain should weigh strongly in favor of finding an economic boycott.

[223] *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961) (noting that "a publicity campaign, ostensibly directed toward influencing governmental action, [may be] a mere sham" designed to harm competitors). The Sherman Act would prohibit such actions. *Id.* Professor Ross notes that the sham exception will apply if plaintiffs can show that the challenged conduct is not a "genuine effort to influence policymakers." ROSS, *supra* note 2, at 528.

[224] *See supra* notes 1-6 and accompanying text (discussing purpose of Sherman Act).

ly to be political in nature.[225] Conversely, a boycott that will result in social legislation unlikely to bestow economic benefits directly on the organizers is most likely political.[226]

For example, because the gadget boycotters are encouraging legislation to punish a country for human rights violations, their boycott seems political.[227] They are motivated by a desire to improve the social status of certain South African residents. However, the gadget boycotters will benefit from a reduction in competition from gadget sellers if Congress passes the law. Thus, their boycott may, in reality, be motivated by a desire for economic gain.[228]

4. Harm

Finally, to determine a boycott's motivation, courts should consider who the boycott harms.[229] If the boycott results in direct harm to targeted competitors, it is more likely economic.[230] However, if the harm to competitors is merely ancillary to the goal of influencing legislation, the boycott is more likely political.[231]

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[225] *See, e.g.*, *SCTLA*, 493 U.S. at 427 (noting that government may regulate boycotts, especially when actors benefit economically).

[226] *See, e.g.*, Missouri v. NOW, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980). The goal of NOW's boycott was to influence passage of the Equal Rights Amendment. *Id.* at 1302. Desire to increase profits did not motivate the boycotters. *Id.* at 1303. For this reason and others, the court found NOW's boycott protected under the First Amendment. *Id.* at 1311-12; *see also* Kennedy, *supra* note 3, at 989 (noting that political boycotts focus on social change, not economic goals).

[227] *See supra* notes 14-15 and accompanying text (discussing hypothetical boycott).

[228] *See supra* notes 14-15 and accompanying text (discussing hypothetical boycott).

[229] This inquiry is similar to the analysis of the restriction in Chicago Bd. of Trade v. United States, 246 U.S. 231, 239 (1917). *See supra* notes 45-62 and accompanying text (discussing *Chicago Board of Trade*).

[230] *See, e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 427 (1990) (commenting that government may regulate boycotts, especially if motive is economic advantage for participants).

[231] *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 143 (1961) (discussing boycott's effects on truckers). The *Noerr* Court found that the harm the truckers suffered from negative public reaction was an "incidental effect" of the publicity campaign and not the focus of the campaign. *Id.* at 143. The Court found it "inevitable" that some boycotters attempting to influence legislation by a publicity campaign would incidentally inflict some direct injury on parties that the targeted legislation would harm. *Id.*; *see also* ROSS, *supra* note 2, at 525 (stating that "key focus for antitrust purposes" is whether competition is harmed directly by conduct or indirectly through government ac-

In addition, the court should consider whether the boycotters have tried other, less harmful, methods to achieve their goals. If parties have unsuccessfully tried to attain their goals through other methods, a boycott may be the only effective way to inform the government of the boycotters' position.[232] Thus, while boycotts may harm competitors, the harm should be balanced against a more urgent need to use a boycott to communicate with the government.[233]

For example, the gadget boycotters' action will directly harm the railroads the boycotters refuse to deal with. The railroads will have to choose whether to ship widgets but not gadgets or gadgets but not widgets.[234] In either case, the railroads lose customers. Also, if the railroads decide to ship widgets, the gadget retailer, retailer *D*, will lose her means of transporting her merchandise. Thus, retailer *D* will suffer economically. Because of these harmful effects, the gadget boycotters' action seems economic. However, if the action were the only available way to communicate with the government, the harm might be acceptable.[235]

### *B. Applying Rule of Reason or Per Se Analysis*

If, after considering the four proposed factors,[236] courts determine that a boycott is predominantly economically motivated, they should apply traditional antitrust analysis.[237] Although an economic boycott may involve some First

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[232] *See* Kindred, *supra* note 3, at 729-30 (stating that conduct is more likely political boycott when organizers tried other means of making their political views known before boycotting).

[233] *See supra* notes 199-211 and accompanying text (discussing importance of communication).

[234] If the railroads ship gadgets, the widget retailers will not use those railroads. The railroads will lose the widget business. However, to preserve the widget business, the railroads must refuse to ship gadgets. Thus, they will lose the gadget retailer's business. *See supra* notes 14-15 and accompanying text (discussing hypothetical boycott).

[235] *See supra* notes 14-15 and accompanying text (discussing hypothetical boycott).

[236] *See supra* notes 197-235 and accompanying text (discussing factors of motive analysis).

[237] Often this involves finding the boycott illegal per se. However, the court may find significant procompetitive effects and apply rule of reason analysis. *See supra* notes 41-44 and accompanying text (discussing use of rule of reason analysis when trade restraint has procompetitive effects).

Amendment issues, the government interest in protecting a competitive market economy outweighs First Amendment concerns.[238] Therefore, if a boycott is predominantly economic, the communicative aspects of the action are inconsequential enough to disregard.[239]

Conversely, in a predominantly political boycott, First Amendment concerns substantially outweigh the government interest in protecting competition.[240] The First Amendment should supersede the antitrust statutes when the danger to competition is minor and the boycott functions primarily to communicate with the public or the government.[241] The courts should not punish commercial entities for communicating their economic needs to the government.[242] If courts punish political boycotts, the chilling effect on speech could severely harm the market.[243] Therefore, political boycotts should be per se legal.[244]

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[238] *See supra* notes 117-22 and accompanying text (noting that substantial government interest might support limiting speech, and giving examples of such limits).

[239] *See* Beschle, *supra* note 3, at 413, 418-19 (noting that commercial boycotts have only minimal First Amendment aspects).

[240] *See, e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 439 n.2 (1990) (Brennan, J. dissenting) (stating that although social benefits of regular boycott are small, social benefits of protecting First Amendment are great); Beschle, *supra* note 3, at 419 (claiming that where "first amendment concerns dominate," the boycott should be legal).

[241] *See, e.g.*, Missouri v. NOW, 620 F.2d 1301, 1325 (8th Cir.) (Gibson, J., dissenting), *cert. denied*, 449 U.S. 842 (1980). The dissenting judge in *NOW* noted that the majority never balanced the disruptive effect on competition with First Amendment rights. *Id.* After a careful consideration of NOW's motivation, the majority concluded that the boycott was politically motivated. *Id.* at 1314. Thus, under the test proposed here, the court would have found dominant political motives, precluding the application of the antitrust laws. *See supra* notes 197-235 and accompanying text (discussing proposed test for determining motive).

[242] *See supra* note 13 and accompanying text (discussing need for communication between economic entities and government).

[243] *See* Kennedy, *supra* note 3, at 1024 (noting that restricting political boycotts both infringes and chills free speech). If boycott organizers did not proceed with the action because they feared antitrust liability, the government would receive less information from market participants. *See* ROSS, *supra* note 2, at 540 (discussing chilling effect of antitrust liability upon communication with government). The government would thus have less information on which to base legislation. *See id.* (discussing effects of chilling effect on information government receives).

[244] *See* Beschle, *supra* note 3, at 413 (stating that boycotts arranged by non-competitors or in which no direct economic gain accrues to organizers should be "per se legal").

However, courts should analyze mixed-motive boycotts under the rule of reason.[245] The usual rule of reason approach involves balancing anticompetitive effects against the benefits to competition.[246] This Comment proposes a modification of this approach by including First Amendment considerations as a counterweight against antitrust liability.[247] If the court finds antitrust liability, the resulting restraint on First Amendment protections should be no greater than necessary to advance the goals of the antitrust acts.[248]

In the proposed balancing analysis, courts should note that the harm to competition arising from a political or mixed-motive boycott is less than that sustained in an economic boycott.[249] In an economic boycott, the goal of the participants is to harm a competitor, either by driving it from the market or by forcing it to alter its actions to the satisfaction of the boycotters.[250] An economic boycott results in long-term harm to competition.[251] However, the goal of a political boycott is

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[245] *See id.* at 413, 418-19 (suggesting that anticompetitive boycotts should be per se illegal and that boycotts not aimed at reducing competition should be legal per se). Beschle argues that every other boycott should be addressed under rule of reason analysis. *Id.*

[246] *See* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918). The balancing suggested is the third factor the Court considered in *Chicago Board of Trade*. *Id.* at 240-41. As in *Chicago Board of Trade*, courts should consider the effects of a restraint on the relevant market. *Id.*

[247] The First Amendment, with some limits, protects communication. *See supra* notes 109-24 and accompanying text (discussing First Amendment and acceptable limits on its protection). Disallowing commercial boycotts would restrict communication by removing one method of communicating.

[248] *See* United States v. Edge Broadcasting Co., 113 S. Ct. 2696, 2716-18 (1993) (discussing whether restrictions were greater than necessary); United States v. O'Brien, 391 U.S. 367, 377 (1968) (noting that government restriction must be no greater than necessary to accomplish goal).

[249] *See Politically Motivated Boycotts*, *supra* note 196, at 887 (commenting that political boycotts are often "ad-hoc, short-lived, and limited in scope," rely on public support, and last until parties settle their problem or "the participants are given . . . a fair hearing"). A short term restraint with at least a partial political goal is less likely to harm competition than an economic boycott. *Id.* A political boycott may stop before it actually harms competition. *Id.* However, most economic boycotts will last until they achieve their anticompetitive goals or until the courts stop them. *See* Beschle, *supra* note 3, at 419 (discussing different harms arising from political and commercial boycotts).

[250] *See supra* notes 7-10, 71-76 and accompanying text (discussing form and goal of boycotts).

[251] *See* Beschle, *supra* note 3, at 419 (noting that commercial boycotters prefer to drive competitors out of business rather than force compliance with demands).

usually government action.[252] Thus, the harm caused to competition is generally ancillary[253] and not the focus of the action.[254] Boycotters use political boycotts as a tool to achieve political ends.[255] A political boycott results in only a temporary harm to competition.[256] Once the participants either achieve their goals or abandon the boycott, the market can recover from any minimal harm caused by the boycott.[257]

Some commentators may object to this proposal, arguing that, because of their unique nature, political boycotts require a new test.[258] These commentators prefer a test that rarely would allow courts to find antitrust liability for political boycotts.[259] Only when finding liability was the least speech-restrictive means to address the boycott would these commentators find an illegal boycott.[260] However, it is unnecessary to adopt a new test to analyze boycotts.[261] Courts already have experience using the

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[252] *See supra* notes 217-28 and accompanying text (discussing influencing government action as focus of political boycott).

[253] *See Politically Motivated Boycotts*, *supra* note 196, at 886 (discussing harm to competition arising indirectly from boycotts).

[254] *See* Beschle, *supra* note 3, at 419 (opining that focus of political boycott is altering conduct, not removing competitor from market).

[255] *See* Missouri v. NOW, 620 F.2d 1301, 1314 (8th Cir.) (stating that NOW used politically motivated boycott to influence ratification of Equal Rights Amendment and that boycott was a "tool, not just a competitive purpose, just as the 'publicity campaign/third-party technique' in *Noerr* was a tool"), *cert. denied*, 449 U.S. 842 (1980) .

[256] *See, e.g., Politically Motivated Boycotts*, *supra* note 196, at 887 (political boycotts are "unlikely to exert any lasting significant effects on competition"); Beschle, *supra* note 3, at 419 (noting political boycott is less likely to have "serious and lasting effects" on market).

[257] *See* Kennedy, *supra* note 3, at 1024 (stating that most political boycotts only affect individual competitors without affecting overall competition).

[258] Some commentators have suggested that the courts adopt the *O'Brien* test to determine whether a mixed-motive, often referred to as political, boycott falls under the Sherman Act. *See, e.g.*, Kennedy, *supra* note 3, at 1010-13 (proposing using *O'Brien* test in determining whether boycott is subject to Sherman Act liability). In United States v. O'Brien, 391 U.S. 367, 377 (1968), the court stated that a government regulation must be within the constitutional power of the government. The regulation must further a substantial governmental interest which is unrelated to suppressing free expression. *Id.* Finally, the restriction on First Amendment expression must be no greater than necessary to further the government's interest. *Id.*

[259] *See, e.g.*, Kennedy, *supra* note 3, at 1010-13 (discussing using *O'Brien* test, which requires using least restrictive means available).

[260] *See O'Brien*, 391 U.S. at 377 (noting that, to restrict speech, restriction must be no greater than necessary to further government interest).

[261] Courts can satisfy the first three elements in any antitrust controversy. The antitrust laws are within the power of Congress to regulate interstate commerce. *See* U.S. CONST. art.

rule of reason approach and can easily consider First Amendment considerations when applying the balancing test.[262] Therefore, courts need not adopt a new test for mixed-motive boycotts.

Some commentators may also argue that using the rule of reason for boycotts is inefficient.[263] Because the rule of reason requires analysis of a restraint's effects, it takes longer than the per se analysis.[264] However, courts already apply more than a cursory, per se analysis when addressing boycotts that might have procompetitive justifications.[265] Thus, the existing law is confusing and difficult to apply.[266] Requiring motivation analysis is no more onerous than determining whether an action constitutes a boycott.[267] Furthermore, although such an inquiry

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I, § 8. Maintaining competition in the marketplace is a substantial government interest and is unrelated to suppressing expression. *See, e.g.*, AREEDA & KAPLOW, *supra* note 2, at 13-14 (discussing using government action to promote competitive economy); GELLHORN, *supra* note 2, at 41-42 (discussing necessity of government regulation to maintain competition). The fourth element is easily absorbed into rule of reason analysis.

[262] *See supra* notes 41-62 and accompanying text (discussing rule of reason).

[263] *See* Beschle, *supra* note 3, at 423 (noting that adding First Amendment considerations to analysis makes analysis more complex).

[264] *See supra* notes 41-44, 63-67 and accompanying text (noting extent of analysis required under rule of reason and per se test).

[265] *See supra* notes 71-107 and accompanying text (discussing approach to analyzing boycott-like activities which requires inquiry into nature of action and may result in application of rule of reason).

[266] *See supra* notes 135-89 and accompanying text (noting confusion in which test to apply to political boycotts).

[267] Courts may consider whether an action involving exchange of information constitutes a boycott. *See, e.g.*, Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588, 604-06 (1925) (finding agreement to exchange information not prohibited by Sherman Act); *see also supra* notes 83-91 and accompanying text (discussing exchange of information). Courts should similarly consider information exchange when classifying the motive behind the boycott. *See supra* notes 199-211 and accompanying text (considering publicity as means to communicate information with public). Courts also already consider the purpose behind a trade or professional organization when considering whether its action is a boycott. *See, e.g.*, Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 296-98 (1985) (allowing expulsion of member from cooperative purchasing association for violating bylaws while refusing to find action per se illegal). The purpose behind a trade or professional organization is analogous to the goal behind a boycott because both are the motivations behind the agreements. *See, e.g.*, Molinas v. National Basketball Ass'n, 190 F. Supp. 241, 243-44 (S.D.N.Y. 1961) (holding player's suspension valid disciplinary action supporting purpose of organization and not violating antitrust laws). Thus, determining legitimate motives is similar to determining legitimate goals that deserve protection. *See supra* notes 217-28 and accompanying text (discussing which types of goals courts have found worthy of protection).

might require more time than current per se analysis, its results are more consistent with First Amendment guarantees.[268] Protecting First Amendment guarantees is more important than realizing an arguably minor gain in judicial efficiency.[269]

## CONCLUSION

Congress passed the Sherman Act to protect competition and to promote allocative efficiency in the market.[270] When the government or a third party challenges a practice under the antitrust acts, courts usually use a rule of reason balancing test.[271] Courts balance anticompetitive effects against procompetitive effects to determine whether the practice is legal.[272] When courts find a particular practice always or almost always results in antitrust liability, they may cease the inquiry into actual effects and find the practice illegal per se.[273]

Courts have developed a political action exception to antitrust liability for actions intended to influence the government.[274] In some cases, courts have applied this exception to boycotts.[275] In other cases, courts have not applied the exception to boycotts with arguably political motives.[276] Because of the confusion caused by this inconsistent application, courts need a clear test to guide them in analyzing boycotts with political motives.[277]

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[268] *See supra* note 124 and accompanying text (discussing giving First Amendment sufficient consideration).

[269] *See supra* notes 117-24 and accompanying text (discussing government restriction on First Amendment rights).

[270] *See supra* notes 1-6 and accompanying text (discussing reasons for adopting Sherman Act).

[271] *See supra* notes 41-44 and accompanying text (discussing rule of reason analysis).

[272] *See supra* notes 45-62 and accompanying text (discussing application of rule of reason).

[273] *See supra* notes 63-70 and accompanying text (discussing per se illegality).

[274] *See supra* notes 109-34 and accompanying text (discussing political action exception).

[275] *See supra* notes 144-56 and accompanying text (discussing cases in which political boycott found legal).

[276] *See supra* notes 157-86 and accompanying text (discussing boycotts with political motives in which courts did not apply political action exception).

[277] *See supra* notes 190-92 and accompanying text (discussing need for clear test).

Because political or mixed-motive boycotts involve First Amendment considerations, courts should never judge them illegal per se.[278] Predominantly political boycotts should be legal per se, and mixed-motive boycotts should be analyzed under a modified rule of reason analysis.[279] Thus, courts should only hold predominantly economic boycotts illegal per se.

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[278] *See supra* note 124 and accompanying text (discussing why courts should never find boycotts with First Amendment aspects illegal per se).

[279] *See supra* notes 236-57 and accompanying text (discussing application of test once courts determine boycotters' motives).