

1992

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## Repository Citation

Kindred, Kay P., "When First Amendment Values and Competition Policy Collide: Resolving the Dilemma of Mixed-Motive Boycotts" (1992). *Faculty Publications*. 961.  
<https://scholarship.law.wm.edu/facpubs/961>

# WHEN FIRST AMENDMENT VALUES AND COMPETITION POLICY COLLIDE: RESOLVING THE DILEMMA OF MIXED-MOTIVE BOYCOTTS

Kay P. Kindred\*

## I. INTRODUCTION

In a representative democracy, government must protect the rights of its citizens to express ideas, to voice grievances, and to seek to influence government. The First Amendment safeguards these fundamental political rights from government intrusion.<sup>1</sup> In a free market economy, government must protect trade and commerce from activities and influences that lead to increased concentrations of economic power or that otherwise tend to restrain competition.<sup>2</sup> The antitrust laws, specifically the Sherman Act,<sup>3</sup> seek to safeguard the competitive process from restrictive trade practices. Conflict arises when efforts to influence government threaten to undermine competition.<sup>4</sup>

Nowhere is the clash between First Amendment values and competition policy more evident than in the case of economic boycotts undertaken for political ends.<sup>5</sup> This is especially true in the case of boycotts in which the participants are motivated by both political and economic concerns, so called

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1. "Congress shall make no law ... abridging the freedom of speech, ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. See generally, PHILLIP AREEDA, ANTITRUST ANALYSIS 47-48 (3d ed. 1981); ROBERT H. BORK, THE ANTITRUST PARADOX 61-66 (1978).

3. "Every contract, combination ... or conspiracy, in restraint of trade or commerce ... is ... illegal ...." Sherman Antitrust Act, 15 U.S.C. § 1 (1988).

4. See James D. Hurwitz, *Abuse of Governmental Process, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L.J. 65 (1985).

5. The term "boycott" was coined after Captain Charles Cunningham Boycott, the target of a protest in Ireland in the late 1800's. Captain Boycott, an estate manager, refused a demand by the Irish Land League to reduce rents and initiated eviction proceedings against the tenants of the land. The tenants, on advice from Charles Parnell, the leader of the Irish Nationalists, refused further dealings with Boycott. THE RANDOM HOUSE ENCYCLOPEDIA 1988, at 2507 (3d ed. 1990); WEBSTER THIRD INTERNATIONAL DICTIONARY (UNABRIDGED) 264 (1981). See generally *St. Paul Fire & Marine, Inc. v. Barry*, 438 U.S. 531, 541 (1978). *Barry* involved a class action suit by practicing physicians and their patients against four medical malpractice insurers alleging a concerted refusal to deal, in violation of the Sherman Act, by three of the companies with the policyholders of the fourth in order to compel compliance with new coverage rules. The court stated, "The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target."; LAWRENCE A. SULLIVAN, HANDBOOK OF ANTITRUST LAW 229-56 (1977).

"mixed-motive" boycotts.<sup>6</sup> This tension was apparent in the recent case of *FTC v. Superior Court Trial Lawyers Ass'n (SCTLA)*.<sup>7</sup> In this case, the Supreme Court held a boycott of court-appointed representation by a group of private criminal defense lawyers in the District of Columbia to be a *per se* violation of section 1 of the Sherman Antitrust Act and section 5 of the Federal Trade Commission Act.

I disagree with the *SCTLA* decision and will argue that the Court erred in its threshold determination that the boycott violated the Sherman Act. I begin with the assertion that, in resorting to a *per se* analysis, the Court applied the wrong analytic method. I contend that, despite the economic aspects of the *SCTLA* boycott, there was a sufficient expressive dimension to the conduct to warrant a more in-depth analysis than that engaged in by the Court. Applying a rule of reason analysis to the *SCTLA* facts, I conclude that the boycott was protected by the First Amendment and assert that, in reaching its conclusion to the contrary, the Supreme Court failed to strike an adequate balance between constitutional values and antitrust concerns.

Finally, I propose a new method for balancing First Amendment interests and competition policy in boycott cases in which political and economic interests intersect. Determinations of the validity of First Amendment claims in such cases should be based not on appraisals of the primacy of one motive over the other, but on the expressive content and political context of the boycott activity. A "totality of the circumstances test" should be substituted for the "motivation test" applied by the *SCTLA* Court.

## II. THE COMMERCIAL BOYCOTT/POLITICAL BOYCOTT CONTINUUM

### A. *The Elusive Distinction Between Political and Commercial Boycotts*

While the boycott concept in its classic sense envisions the concerted efforts of competitors at one level to insulate themselves from other competition,<sup>8</sup> the term "boycott" encompasses a variety of activities and situations.<sup>9</sup> Nonetheless, boycotts may generally be described as concerted activities designed to influence behavior by the imposition of economic pressure.<sup>10</sup>

Although both use concerted action, there are fundamental differences between commercial boycotts and political boycotts. In a commercial boycott,

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6. This term is derived from Ronald E. Kennedy, *Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests*, 55 S. CAL. L. REV. 983, 990 (1982) to denote boycotts motivated by a mixture of political and economic concerns. See *infra* text accompanying notes 16-24.

7. 493 U.S. 411 (1990) [hereinafter cited as *SCTLA*].

8. See generally, SULLIVAN, *supra* note 5, at 229-32.

9. See *St. Paul Fire & Marine*, 438 U.S. at 543 ("[B]oycotts are not a unitary phenomenon") (quoting PHILLIP AREEDA, *ANTITRUST ANALYSIS* 381 (2nd ed. 1974)). A boycott may be the result of an explicit agreement not to deal or it may be a more implicit arrangement. For example, through the development of a set of "less than objective" industry standards a group of competitors may exclude another competitor by subtle coercion. But whether through explicit agreement or indirect coercion, when the purpose and effect is to withhold patronage or supplies from a competitor the boycott rule is invoked. See generally SULLIVAN, *supra* note 5, at 241-56.

10. Kennedy, *supra* note 6, at 988.

members of the boycotting group use concerted action to protect themselves from the competition of nonmembers.<sup>11</sup> The objective of the boycott is strictly economic: to improve the market power of the participants, and their corresponding profit margins, by forcing unwanted competition from the market.<sup>12</sup>

By contrast, the purpose of a political boycott is not to drive out competition, but to advance some noncommercial purpose.<sup>13</sup> Political boycotts are most frequently used to dramatize grievances or garner public support for a cause.<sup>14</sup> The political boycott uses concerted economic pressure to achieve social or political, rather than economic, ends.<sup>15</sup> Because political boycotts are a means of expressing the boycotting groups' political or social views, such boycotts directly implicate First Amendment free speech interests that are not raised in commercial situations.<sup>16</sup>

All successful boycotts, whether political or commercial, have economic consequences (and sometimes economic purposes) that can make distinguishing between them difficult.<sup>17</sup> Some courts and commentators have suggested that the distinction be made on the basis of the participants' motive(s) in imposing the economic pressure.<sup>18</sup> However, delineating between political and commercial boycotts on the basis of the actors' motive cannot provide a definitive solution to the problem of categorization.<sup>19</sup> Boycotters may be motivated by a mixture of both political and economic interests.<sup>20</sup> For example, a convention boycott designed to pressure states to ratify the Equal Rights Amendment was motivated by the desire of the participants, a national women's rights group, to obtain legislation protecting women's rights to eco-

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11. *Id.* at 985. *See, e.g.*, *United States v. General Motors Corp.*, 384 U.S. 127 (1966) (joint activities by automobile manufacturers and certain of its dealers to force other dealers not to engage in auto sales through discounters were considered classic conspiracies in violation of antitrust laws); *Standard Oil v. United States*, 221 U.S. 1 (1910) (Court held the combination of the stocks of various corporations trading in petroleum and related products in the hands of a holding company, with intent to exclude others from the trade, and thus to centralize control of the industry, violated §§ 1 and 2 of the Sherman Act).

12. Kennedy, *supra* note 6, at 985. *See also*, Neil G. Fishman, Note, *Commercial Entities and Political Boycotts: First Amendment Protections Versus Sherman Act Prohibitions*, 14 CONN. L. REV. 391, 397 (1982).

13. *Id.*

14. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (the Court upheld, under the First and Fourteenth Amendments, a boycott by black citizens of Port Gibson, Mississippi against white merchants); *Missouri v. National Org. for Women*, 620 F.2d 1301, 1304 n.5 (1980) (in an injunctive action brought by the State of Missouri against the National Organization for Women, the court held that NOW's campaign for convention boycotts of states which had not ratified the Equal Rights Amendment did not constitute a conspiracy in restraint of trade in violation of the antitrust laws). *See generally* Fishman, *supra* note 13, at 397.

15. *See* Kennedy, *supra* note 6, at 985; Fishman, *supra* note 12, at 397.

16. *See* Kennedy, *supra* note 6, at 985.

17. *Id.* at 989.

18. *See, e.g.*, *National Org. for Women*, 620 F.2d at 1304 n.4; *California Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508 (1972) (a civil suit alleging defendant highway carriers had conspired against plaintiff highway carriers to put plaintiff out of business by instigation of federal and state lawsuits to block plaintiff's application for operating rights and to limit plaintiff's access to agencies and courts). *See generally* Kennedy, *supra* note 6, at 989; Hurwitz, *supra* note 4.

19. Kennedy, *supra* note 6, at 990.

20. *See, e.g.*, *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 143-44 (1961) (acknowledging the presence of both political and economic motivations); *California Motor Transp.*, 404 U.S. at 508.

nomic equality, among other rights.<sup>21</sup> Similarly, the closing of gas stations by dealers to protest United States Department of Energy regulations on gasoline sales was motivated by a general opposition to the government's energy restrictions, as well as a desire to lift the price ceiling on gasoline.<sup>22</sup> Boycotts span the spectrum from the purely commercial to the purely political, with an assortment of mixed-motive variants in between.<sup>23</sup>

To balance the competing interests of competition policy and First Amendment protections, courts have attempted to distinguish between boycotts that are primarily commercial but have "ancillary" political purposes<sup>24</sup> and boycotts that are essentially political but have "ancillary" economic purposes.<sup>25</sup> This methodology tends to be highly fact-specific, and is often heavily influenced by "the presence or absence of economic gain flowing to the boycotters."<sup>26</sup>

### *B. The Choice Between Per Se and Rule of Reason Analysis*

Traditionally, antitrust law considered group boycotts and other concerted refusals to deal to be among the class of horizontal restraints<sup>27</sup> held to be illegal *per se*.<sup>28</sup> The *per se* mode of analysis, however, has begun to fall out

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21. *National Org. for Women*, 620 F.2d at 1301.

22. *Crown Cent. Petroleum Corp. v. Waldman*, 486 F. Supp. 759 (M.D. Pa. 1980), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980) (in an action by an oil company against its retailers, the court held that the concerted action of the retailers in closing gasoline stations for a three-day period was designed to express dissatisfaction with government energy policies and thus was protected speech immune from antitrust liability).

23. *Kennedy*, *supra*, note 6, at 990.

24. *Id.*; *see, e.g., California Motor Transp.*, 404 U.S. at 513-14 (rejecting characterization of conduct as political in light of dominant economic motive). *See also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 (1988) (the Court drew a distinction between commercial activity with political impact and political activity with commercial impact).

25. *Kennedy*, *supra*, note 6, at 990; *see, e.g., Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961) (potential economic gain held to be incidental to desire to petition the legislature).

26. *Kennedy*, *supra*, note 6, at 990. As will be discussed more fully *infra* part IV, the motive of the participants—whether or not their actions are derived in whole or in part from self-interests—should at best be but one element weighed in reaching a conclusion as to the nature of a particular boycott, and not the controlling factor in an assessment of antitrust liability.

27. *See, e.g., United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) ("We think that it is clear that the restraint in this case is a horizontal one, and, therefore, a *per se* violation of § 1 [of the Sherman Act].").

28. "The *per se* doctrine labels as illegal any practice to which it applies, regardless of the reasons for the practice and without extended inquiry as to its effects." SULLIVAN, *supra* note 5, at 153. *See, e.g., United States v. General Motors Corp.*, 384 U.S. 127 (1966) (joint activities by auto manufacturers and certain of its dealers to force other dealers not to engage in discounted auto sales were held to violate the Sherman Act); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (the Supreme Court held an agreement between an appliance retailer and appliance manufacturers and distributors to sell appliances to a competing retailer only at discriminatory prices or under unfavorable terms violated the Sherman Act, notwithstanding that the effect of the agreement was not to reduce appliance customers' opportunities to buy in a competitive market); *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211 (1951) (an agreement between affiliated corporations to fix maximum resale prices of their products was held violative of the Sherman Act); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941) (the Court held invalid the practice of members of a women's garment and textile manufacturers' association that conditioned sale of its members' textiles to garment manufacturers and its women's garments to retailers upon their agreement not to deal in textiles or products copied

of vogue, as courts in recent years have evidenced an increasing reluctance to expand the application of the *per se* doctrine and have, in fact, begun to narrow its scope—subjecting it to more exacting economic analysis and limiting its application primarily to cases involving “classic” anticompetitive boycott situations.<sup>29</sup> Even in cases in which the coercive nature of the activity is clear, courts are growing ever more reluctant to impose *per se* analysis when the economic impact of the restraint is not immediately obvious. Rather, they have submitted the restraint to a rule of reason inquiry, evaluating the “competitive character” of the activity.<sup>30</sup> In light of the developing momentum against invocation of the “pigeonhole jurisprudence” of *per se* analysis, any novel expansion of *per se* analysis warrants a healthy dose of skeptical scrutiny. Application of *per se* methodology is particularly unwise in situations involving political boycotts or mixed-motive boycotts in which strong constitutional values are in tension with antitrust concerns.<sup>31</sup> The rule of reason approach is far better suited for the intelligent resolution of these tensions.

Under the rule of reason, the test of legality is whether the imposed restraint regulates and, thereby, enhances competition, or whether it suppresses or destroys competition.<sup>32</sup> In one important case, a blanket licensing

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from the designs of association members); *Standard Oil Co. v. United States*, 221 U.S. 1 (1910) (the Court held the combination of the stocks of various corporations trading in petroleum and related products in the hands of a holding company, with intent to exclude others from the trade, and thus to centralize control of the industry, violated §§ 1 and 2 of the Sherman Act). *Cf. Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953) (the Court upheld as valid an arrangement by a newspaper publisher, owner of the city’s only morning newspaper and one of its two evening papers, that required purchasers of advertising space in the morning paper to also buy the same space at the same unit rate in the evening paper).

29. See, e.g., *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447 (1986). In *Indiana Fed’n of Dentists*, although not *per se* illegal, the Court upheld a Federal Trade Commission ruling that dentists’ refusal to submit x-rays to insurers violated § 1 of the Sherman Act. The Court stated:

Although this Court has in the past stated that group boycotts are unlawful *per se* ... we decline to resolve this case by forcing [this horizontal agreement] into the “boycott” pigeonhole and invoking the *per se* rule. ... [T]he category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor ....

*Id.* at 458. See also, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (holding the expulsion of a member from a cooperative buying agency not to be a *per se* violation of the antitrust laws and stating, “[T]here is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine. ... Some care is therefore necessary in defining the category of concerted refusals to deal that mandate *per se* condemnation.”); *N.C.A.A. v. Board of Regents*, 468 U.S. 85 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) (blanket licensing for use of copyrighted musical compositions held not to be *per se* illegal price fixing under the Sherman Act). The Court stated in *Broadcast Music*, “[I]n characterizing ... conduct under the *per se* rule, our inquiry must focus on ... whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market ....” 441 U.S. at 19.

30. The rule of reason approach “calls for a broad inquiry into the nature, purpose and effect of any challenged arrangement before a decision is made about its legality.” SULLIVAN, *supra* note 5, at 153; see, e.g., *Indiana Fed’n of Dentists*, 476 U.S. at 458–59; *Board of Regents*, 468 U.S. at 104 (1984).

31. See Kennedy, *supra* note 6, at 1022.

32. See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1917) (the Court found that a rule of the Chicago Board of Trade prohibiting its members from participating in

system allowed organizations to operate as clearinghouses for copyright owners and users. This organization issued licenses for use of copyrighted material that gave licensees the right, for a fee, to perform all compositions owned by the organizations' members and affiliates. The operation was so efficient that it increased output and thus was procompetitive.<sup>33</sup> Similarly, in another case, a manufacturer's agreement with its dealers restricted the locations at which the dealers could sell the manufacturer's product. This system actually stimulated interbrand competition and thereby enhanced competition in the overall market.<sup>34</sup> Therefore, the key to a determination of illegality under the rule of reason is the impact on competition.

Both the *per se* rule and the rule of reason are used by courts to judge the competitive significance of a restraint.<sup>35</sup> Restraints "whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality ... are 'illegal *per se*.'"<sup>36</sup> Restraints "whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed" are subject to the rule of reason.<sup>37</sup> A court may conclude that a restraint is unreasonable on the basis of the nature of the activity. On the other hand, the court may rely on a presumption that, given the surrounding circumstances, the activity was intended to restrain trade and increase price. Ultimately, the determination is based upon an assessment of the impact of the restraint on the competitive market.<sup>38</sup>

Of all coercive activity, none presents a more difficult mix of factors analytically than the commercial boycott undertaken to achieve political ends. While such a mixed-motive boycott may be inherently coercive and anticompetitive, it may also represent a form of political speech that deserves constitutional protection. Perhaps the best example is the NOW boycott case where the court discussed this consequence: "NOW's campaign was intended to and did in fact injure Missouri in its relationship with its convention customers ... [; h]owever, using a boycott in a ... political arena ... is not proscribed by the Sherman Act."<sup>39</sup>

Further, the constitutional issues aside, some group boycotts may simply be a form of "collective bargaining"—a joint refusal to accept a monopsonist<sup>40</sup>

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price-making for commodities for two or three hours at the end of each business day was not a restraint on trade in violation of antitrust laws).

33. See *Broadcast Music*, 441 U.S. at 1.

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

35. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1977) (the Court held an association of professional engineers' canon of ethics that prohibited its members from submitting competitive bids for their services to be a violation of § 1 of the Sherman Act).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Missouri v. National Org. for Women*, 620 F.2d 1301, 1315 (8th Cir. 1980). See also Hurwitz, *supra* note 4, at 112.

40. The term "monopsony" refers to a market situation in which buying power for a given product or service is concentrated in a single source. That single buyer is called a "monopsonist." For further discussion on this point, see *infra* text accompanying note 118.

government's proposed commercial arrangement.<sup>41</sup> Concerted action may be necessary to counter that power.<sup>42</sup>

When such a mixture of motives and interests is present in a boycott, the determination of antitrust liability must be predicated on an examination of all relevant factors. This is not to say that a commercial boycott that raises First Amendment concerns should never be found to be unlawful under the antitrust laws. Rather, a determination of the illegality of such a boycott should not be predicated upon a presumptory analytic shorthand. The proper determination entails at least a limited assessment not only of the participants' motives, but also of the history of the market and the actual harm to competition.

Numerous economic and professional regulations outside the antitrust context have been struck down by the Supreme Court on First Amendment grounds, precisely because the regulations imposed mechanical presumptions analogous to the *per se* approach in antitrust law. *In re Primus*,<sup>43</sup> for example, involved an attorney who was engaged in private practice in South Carolina and also affiliated with the South Carolina branch of the American Civil Liberties Union (ACLU). The attorney gave a speech on the legal rights of women who had been sterilized as a pre-condition to receipt of public medical assistance. He was disciplined under the State's attorney practice rules because he provided, at the request of a member of the audience, the mailing address of the ACLU as a potential source of legal representation. The Court declared that where First Amendment rights are at issue, it would not tolerate the degree of imprecision that often characterizes government regulation of purely commercial conduct. The Court held that the attorney's activity fell within the generous zone of protection afforded political expression and associational freedoms.<sup>44</sup>

Similarly, in *Riley v. National Federation of the Blind*<sup>45</sup> the Court invalidated, as an abridgement of First Amendment free speech rights, a North Carolina charitable solicitations statute that governed the solicitation of charitable contributions by professional fundraisers. The statute defined a *prima facie* "reasonable fee" that a professional fundraiser was permitted to charge as a percentage of the funds solicited. It required that professional fundraisers disclose to potential donors, prior to an appeal, the gross percentage of funds retained in prior solicitations. Professional fundraisers also had to obtain licenses before engaging in charitable solicitations.<sup>46</sup> In striking down the statute, the Court reasserted its long-standing position that the First Amendment does not permit the government to sacrifice speech for efficiency.<sup>47</sup>

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41. See Hurwitz, *supra* note 4, at 112 n.224.

42. For more discussion on this point vis-a-vis the SCTLA boycott see *infra* text accompanying notes 115-23.

43. 436 U.S. 412 (1978).

44. *Id.* at 434.

45. 487 U.S. 781 (1988).

46. *Id.*

47. *Id.* at 795. See also *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (the Court invalidated as overbroad and in violation of the First and Fourteenth Amendments an ordinance barring solicitations of contributions by charitable organizations not using 75% of their receipts for charitable purposes); *Schneider v. State*, 308 U.S. 147 (1939).



It is a long-established tenet of First Amendment jurisprudence that it is a finely drawn line between speech that is unconditionally guaranteed and speech that may legitimately be regulated or suppressed.<sup>48</sup> Only considerations of the greatest urgency can justify restrictions on speech, and the validity of such restraints depends upon a careful analysis of the facts in each case.<sup>49</sup>

### III. MIXING POLITICS AND ECONOMICS: A CASE STUDY

#### A. *The Political Background of the SCTL A Boycott*

In *SCTLA*,<sup>50</sup> the Supreme Court was called upon to consider the action of a group of lawyers that had organized and participated in a concerted refusal to represent indigent criminal defendants in the District of Columbia Superior Court until the District government increased the statutorily mandated fees paid the lawyers. The question was whether this conduct violated federal antitrust laws and, if so, whether it was nevertheless protected by the First Amendment to the Constitution.<sup>51</sup>

To appreciate the intensity of the political component of the *SCTLA* boycott, it is important to understand how the boycott strategy evolved. The *SCTLA* boycott was not the initial response to a perceived economic need, but rather a last resort, borne out of frustration with the ineffectiveness of prior political activity. The District of Columbia Criminal Justice Act<sup>52</sup> (CJA) provides for the compensation of private attorneys who are appointed to represent indigent criminal defendants pursuant to the constitutional mandate of the Sixth Amendment.<sup>53</sup> Eighty-five percent of all indigent defendants in the District of Columbia are represented by an attorney appointed under the CJA.<sup>54</sup>

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In *Schneider*, the Court struck down as an unconstitutional invasion of free speech a municipal ordinance that prohibited door-to-door solicitation and distribution of literature without a permit, where the necessary permit could be refused on the basis of an assessment, left to the discretion of the local police, of the applicant's character. The Court acknowledged that, while fraud is often perpetrated in the guise of charitable appeals, such offenses are subject to prohibition and prosecution under laws specifically designed to address those problems. Although enforcement of those laws may be less efficient or less convenient than according the police broad discretionary censorship authority, that is an insufficient basis on which to allow an abridgement of fundamental First Amendment rights. 308 U.S. at 164.

48. See *Speiser v. Randall*, 357 U.S. 513, 525 (1958) in which the Court held that a state program that required taxpayers applying for a particular tax exemption to prove they did not advocate the overthrow of the government was invalid as a denial of freedom of speech without the procedural safeguards afforded by the Fourteenth Amendment.

49. *Id.* at 521.

50. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

51. *Id.*

52. D.C. CODE ANN. §§ 11-2601 to -2609 (1981 & Supp. 1987).

53. "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence." U.S. CONST. amend. VI. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court held that the Sixth Amendment's provision that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel was made mandatory on the states by the Fourteenth Amendment.

54. *Superior Court Trial Lawyers Ass'n v. FTC*, 856 F.2d 225, 228 (D.C. Cir. 1988). Of the remaining 15%, 8-10% are represented by full-time public defenders, generally in more serious felony cases, and the rest by third-year law students (in routine misdemeanors) or by *pro bono* private attorneys.

Any member of the District of Columbia Bar in good standing may register with the CJA office of the Public Defenders Service to receive appointments.<sup>55</sup> A commissioner or a superior court judge makes appointments by comparing the list of eligible defendants with a list of lawyers who have indicated their availability for that day.<sup>56</sup> At the time of the boycott over 1200 lawyers were registered for CJA appointments. In practice, however, most appointments went to a small group of approximately one hundred "CJA regulars" who earned all or most of their income representing indigent defendants.<sup>57</sup>

From 1970 until the boycott in 1983, fees paid CJA lawyers were capped at \$30 per hour for court time and \$20 per hour for out-of-court time, subject to a maximum of \$1000 per case for felonies, \$400 for misdemeanors, and \$1000 per case for appeals.<sup>58</sup> At the time of the boycott, CJA compensation levels were set at the hourly scale established by the federal Criminal Justice Act.<sup>59</sup> The maximum compensation available to an individual lawyer under the federal Act was \$42,000 per annum; however, the average CJA lawyer made approximately \$20,000 per year before the boycott.<sup>60</sup> In 1975, as a result of a general concern among members of the bar, a joint committee of the District of Columbia Judicial Conference of the Bar and the District of Columbia Bar (Joint Committee) concluded that the CJA rates drove talented lawyers out of CJA practice or encouraged those lawyers who remained to provide less than adequate representation.<sup>61</sup> The joint committee recommended an increase in CJA rates, concluding that such an increase was a necessity in order to attract and retain good criminal lawyers and to assure their ability to render effective assistance of counsel. The District government took no action pursuant to the recommendation.<sup>62</sup> In 1982, a Report of the Court System Study Committee of the District of Columbia Bar<sup>63</sup> recommended an increase to levels proposed in the earlier joint committee report. A bill was introduced in the District of Columbia City Council to raise the hourly rate to \$50, but it died in committee without a hearing.<sup>64</sup> During this same period, members of SCTLTA began lobbying efforts aimed at increasing CJA compensation levels. Early efforts included conversations with Chief Judge Moultrie of the District of Columbia Superior Court, Herbert Reid, legal counsel to then Mayor Marion Barry, and Wiley Branton, then Dean of Howard University Law School. The chief judge indicated that he believed a rate increase was deserved, but would offer no public support of pending legislation because the superior court might be called upon to rule on its legality. The mayor's counsel advised that the mayor was sympathetic to the lawyers' position, but would not support legislation absent the urging of the chief judge.

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. 18 U.S.C. § 3006A(d)(1) (1985).

60. *Superior Court Trial Lawyers*, 856 F.2d at 228.

61. *Id.* at 229.

62. *Id.*

63. *Id.* (Reprinted as Senate Print 98-34, 98th Cong., 1st Sess., Comm. on Gov't'l Affairs (Horsky Report)).

64. *Id.*

Dean Branton recognized that no organized, influential constituency existed to lobby on the lawyers' behalf. He concluded that the prospect for passage of favorable legislation was poor unless the lawyers did "something dramatic to attract attention in order to get relief."<sup>65</sup>

In March 1983, a new bill was introduced that proposed a rate increase to \$35 per hour for CJA work. Despite favorable testimony before the council from various sources, the bill failed in committee due to a lack of available money to fund the increase. Subsequent efforts to encourage an increase in federal funding to support a raise in CJA rates also failed for lack of an initiative from either the legislative or judicial branch of the District of Columbia government.<sup>66</sup> Finally in 1983, SCTLA turned its efforts from lobbying for a legislative rate increase to organizing a boycott of further CJA appointments at the prevailing rates. The SCTLA "Strike Committee" adopted as its goal rate increases to \$55 per hour for court time and \$45 per hour for out-of-court time. In a meeting on August 11, 1983, approximately 100 CJA lawyers agreed not to accept new cases as of September 6 if the rates had not been raised by that date. The decision of the membership was memorialized in a petition signed by a number of the lawyers.<sup>67</sup>

Beginning September 6, 1983, the majority of CJA regulars stopped accepting new appointments. SCTLA also actively sought to publicize the boycott with press kits, organized picket lines, rallies, and television interviews in an effort to educate the public about the plight of CJA lawyers in the expectation that it would exert public pressure on the District government.<sup>68</sup> The impact of the boycott was severe. After only a few days, the Public Defender Service was inundated with cases. The response of the private bar was inadequate to meet the demand.<sup>69</sup> On September 15, citing the inability to provide effective assistance of counsel in light of the case overload, the Public Defender Service notified the mayor of the extreme seriousness of the situation and urged the mayor to declare immediately his support for a rate increase.<sup>70</sup> The chief judge confirmed the Public Defender Services' claim that the criminal justice system was approaching the point of crisis. In response, the mayor informed SCTLA representatives that he would support emergency legislation to immediately raise CJA rates to \$35 per hour and would support a second bill, which would go through the normal legislative process, to further increase CJA hourly rates to \$55 for court time and \$45 for out-of-court time.<sup>71</sup> On September 21, 1983 the SCTLA boycott ended.<sup>72</sup>

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65. *Id.*

66. *Id.* at 229-30.

67. *Id.* at 230.

68. *Id.*

69. *Id.*

70. *Id.* at 231.

71. *Id.*

72. *Id.* It is interesting to note that in the nine years since the 1983 rate increase, there has been no subsequent raise in CJA rates. CJA lawyers, who contend that they need around \$50 an hour to stay even with inflation in 1992, are once again pushing for additional money. Court-appointed criminal defense lawyers in Los Angeles currently receive \$55 to \$80 dollars an hour; federal public defenders receive \$75 an hour. The going rate for solo practitioners and lawyers in small firms handling criminal defense work in the District of Columbia is \$125 to \$150 an hour. As was the case in 1983, the CJA lawyers are having little success in attracting support. *See*

The Federal Trade Commission then filed its complaint and the litigation ensued.<sup>73</sup>

*B. The Supreme Court's Analysis: Succumbing to the Tyranny of Labels*

The Supreme Court took a *per se* approach in its analysis of the SCTLA facts. The Court determined the Trial Lawyers' boycott to be a horizontal arrangement among competitors that was "a naked restraint' on price and output"<sup>74</sup> subject to *per se* antitrust analysis. It is interesting that the FTC, the administrative law judge, the court of appeals and Justice Stevens in his opinion for the majority all referred to the Trial Lawyers' conduct as a price-fixing agreement.<sup>75</sup> This label is, however, a misnomer. The Trial Lawyers did not actually engage in a price-fixing agreement, but rather in a concerted refusal to deal. They did not agree upon a specific price,<sup>76</sup> and ultimately concluded the boycott after accepting the take-it-or-leave-it price presented to them by the District of Columbia government. Perhaps mislabeling the Trial Lawyers' conduct made it easier for the FTC, and later the courts, to justify application of the *per se* doctrine despite the complexity of the facts of the case.

Having characterized the boycott as a price-fixing agreement, the Court took issue with what it called "a new exception to the *per se* rules"<sup>77</sup> carved out by the court of appeals' decision. Following the Supreme Court's decision

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generally Sandra Torrey, *D.C. Court-Appointed Lawyers Want a Raise—After Nine Years*, WASHINGTON POST, Sept. 21, 1992 (Bus. Supp.), at 5.

73. *FTC v. Superior Trial Court Lawyers Ass'n*, 493 U.S. 411, 416 (1990). In its complaint, the Federal Trade Commission (FTC) alleged that the CJA lawyers entered into an agreement to restrain trade by refusing to compete for or accept new appointments under the Act until the fees offered under the CJA program were increased. The FTC complaint characterized the activity of SCTLA as a conspiracy to fix prices and to conduct a boycott in violation of section 5 of the Federal Trade Commission Act.

In response, SCTLA proffered three defenses—that the boycott was justified by the public interest in obtaining better representation for indigent defendants; that the boycott was a form of legislative petitioning protected under *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); and, that it was a form of political action protected by the First Amendment under *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982). The administrative law judge rejected all three defenses but, nevertheless, dismissed the complaint on the grounds that the District of Columbia officials who represented the target of the boycott recognized its net beneficial effect and that, from a practical standpoint, there was no harm done.

On review of the administrative law judge's decision, the FTC found SCTLA's conduct had substantial anticompetitive effects and issued a cease-and-desist order to prohibit the initiation of similar conduct in the future. The court of appeals vacated the FTC order and remanded for a determination of whether SCTLA had significant market power. The court concluded that the boycott had an element of expression warranting First Amendment protection which should not be restricted by the application of an otherwise valid *per se* rule, and instead required that violations of antitrust law be proved rather than presumed.

The Supreme Court granted the FTC's petition for certiorari and SCTLA's cross-petition. *See SCTLA*, 493 U.S. at 416-23.

74. *Id.* at 423 (citations omitted).

75. *Id.* at 420-23.

76. While the "Strike Committee" of SCTLA initially adopted as a general goal of the boycott rate increases of \$55 per hour for in court and \$45 per hour for out-of-court time, the SCTLA membership, as evidenced by the petition the lawyers signed, agreed only to boycott CJA cases until their rates were increased. *Id.* at 416.

77. *Id.* at 428.

in *United States v. O'Brien*,<sup>78</sup> the court of appeals had concluded that the expressive component of the SCTLA boycott compelled the courts to apply the antitrust laws "prudently and with sensitivity" and with "a special solicitude for the First Amendment rights" involved.<sup>79</sup> It held that "the governmental interest in prohibiting boycotts was not sufficient to justify a restriction on the communicative element of the boycott unless the FTC could prove, not merely presume, that the boycotters had market power."<sup>80</sup>

Justice Stevens, writing for the majority, declared that the appeals court's holding "exaggerates the significance of the expressive component [of the] boycott."<sup>81</sup> He was troubled that the holding "denigrated the importance of [the *per se* rule]" by implying that most economic boycotts do not have an expressive component and that the characterization of price-fixing and boycotts as illegal *per se* was merely an administrative efficiency unless the competitors had actual market power.<sup>82</sup> The Court opined that, even if the assumptions implicit in the court of appeals' holding were valid, *O'Brien* would afford the SCTLA boycott no protection because the *per se* rule in antitrust analysis satisfies the *O'Brien* test. According to the Court, the administrative efficiency interests in antitrust regulation are unusually compelling: They reflect the long-standing judgment that the prohibited practices by their nature have the potential to substantially effect competition.<sup>83</sup>

Further, according to the majority, *every* concerted refusal to deal has an expressive component, inasmuch as competitors must exchange their views about their intended goals and how to achieve them and must communicate their terms to the target. Thus, the Court found there to be nothing uniquely expressive about the SCTLA boycott and, therefore, nothing that would merit exemption from the *per se* rules of antitrust law.<sup>84</sup> Likening the *per se* rules in antitrust law to *per se* restrictions in other areas such as stunt

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78. 391 U.S. 367 (1968). The *O'Brien* Court upheld the conviction of an individual who publicly burned his Selective Service registration card in protest of the Vietnam War. The Court stated:

[W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. ... [W]e think ... a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 376-77.

79. Superior Court Trial Lawyers Ass'n v. FTC, 856 F.2d 226, 233-34 (D.C. Cir. 1988).

80. *See id.* at 250.

81. SCTLA, 490 U.S. at 430.

82. *Id.*

83. *Id.* at 430-33. "The administrative efficiency interests in antitrust regulation are unusually compelling. The *per se* rules avoid 'the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved ....'" *Id.* at 430. (citations omitted). (It is interesting to note that Justice Stevens uses the term "compelling interests" here—a term that is normally reserved for review of those classifications of rights considered to be fundamental and subject to strict scrutiny.)

84. *Id.* at 430-33.

flying in congested areas or speeding,<sup>85</sup> the Court concluded that the SCTLA boycott could legitimately be subjected to a presumption of illegality absent proof of actual harm or an inquiry into market power.<sup>86</sup>

The Court's analysis gave short shrift to the First Amendment interests implicated by the Trial Lawyers' conduct.<sup>87</sup> Admittedly, the behavior of the Trial Lawyers was not automatically immunized by the First Amendment.<sup>88</sup> But, as Justice Brennan observed in dissent: "The issue in this case is *not* whether boycotts may ever be punished under [the antitrust laws] consistent with the First Amendment; rather, the issue is *how* the government may determine *which* boycotts are illegal."<sup>89</sup> A group's concerted effort, by use of market power, to coerce government through economic means may subject the actors to antitrust liability. But when that group persuades the government to make a certain policy decision by virtue of *the force of its ideas* rather than its market power, there can be no antitrust liability even though the activity may be in part economically motivated and may potentially harm competitors.<sup>90</sup> The *per se* rule in antitrust law and classic First Amendment doctrine are on a collision course in mixed-motive boycotts. The Court in *SCTLA* failed to avert that collision.

The record in *SCTLA* contained substantial evidence indicating that District of Columbia government officials, including the mayor and the city council, the chief judge of the District of Columbia Superior Court and the District of Columbia judiciary generally, and members of the District of Columbia Bar supported an increase in CJA rates.<sup>91</sup> The obstacle to the rate increase was not a lack of official support, but a lack of available funds and a perception on the part of government officials that there would be limited public support for such an increase.<sup>92</sup> The Trial Lawyers were advised to do "something dramatic to attract attention ... to get ... relief" since they were lacking an influential constituency to lobby on their behalf.<sup>93</sup> Heeding this

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85. *Id.* at 433.

86. *Id.* at 436.

87. *See* NAACP v. Button, 371 U.S. 415 (1963). In invalidating as an infringement of First Amendment rights a Virginia statute under which the NAACP's practice of instituting legal proceedings in school desegregation cases was deemed to be criminally "improper solicitation of legal business," the Court in *Button* stated that "a state cannot foreclose the exercise of constitutional rights by mere labels." *Id.* at 429. *See also* Bigelow v. Virginia, 421 U.S. 809 (1975) (holding unconstitutional under the First Amendment a Virginia statute that, at that time, made it illegal to encourage or prompt, by sale or circulation of any publication, the procuring of an abortion). In *Bigelow* the Court stated that "'a State cannot foreclose the exercise of constitutional rights by mere labels.' ... Regardless of the particular label asserted by the State ... a court may not escape the task of assessing the First Amendment interests at stake ...." *Id.* at 826 (citation omitted).

88. *SCTLA*, 493 U.S. at 437 (Brennan, J., concurring in part, dissenting in part).

89. *Id.* at 438.

90. *See* United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965) ("Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.").

91. Superior Court Trial Lawyers Ass'n v. FTC, 856 F.2d 226, 229 (D.C. Cir. 1988). "[N]o one testified [at the D.C. Council hearing on the matter] against it except insofar as the Executive Branch of the D.C. Government raised concerns about funding it." *Id.*

92. *See generally id.* at 229-30.

93. *Id.* at 229.

advice, the CJA lawyers actively sought media coverage, distributed press releases, and organized picket lines and rallies.<sup>94</sup> Their actions resulted in a number of newspaper articles and television news stories which further publicized the lawyers' claims.<sup>95</sup>

Through the publicity generated by the boycott, the Trial Lawyers sought to gain public sympathy and support for their cause. That the SCTLA boycotters actively sought public attention lends credence to the argument that the boycott operated on a political level, as communicative conduct, rather than on an economic level. "Very few economically coercive boycotts seek notoriety both because they seek to escape detection and because they have no wider audience beyond the participants and the target."<sup>96</sup>

The sincere effort on the part of the CJA lawyers to communicate their concerns to an audience beyond that directly affected was a vital aspect of the SCTLA boycott. The court of appeals recognized this point in relying on the significance of the expressive dimension of the boycott. Noting the historical use of boycotts as a dramatic means to communicate anger, the court of appeals concluded that the circumstances surrounding the SCTLA boycott suggested that the lawyers intended to, and in fact did, communicate a message regarding the inadequacy of prevailing CJA rates.

In addition, the CJA lawyers were willing to sacrifice their income. For some it amounted to the elimination of the only outlet for the practice of their professional skills.<sup>97</sup> This hardship further attested to the strength of the expressive dimension of the SCTLA boycott. By voluntarily inflicting substantial financial hardship upon themselves, the CJA lawyers conveyed the intensity of their feelings and the depth of their commitment more clearly and forcefully than they could have through any other means. It is this aspect of an expressive boycott that makes it a special and powerful form of political speech.<sup>98</sup>

The Supreme Court has clearly established that when a course of action includes both "speech" and "nonspeech" elements, that action is entitled to substantial First Amendment protection,<sup>99</sup> which may not be overridden merely for the sake of judicial efficiency.<sup>100</sup> The *per se* rule of antitrust analysis is a presumption of illegality "[f]or the sake of business certainty and litigation efficiency" which the Court has conceded may lead to "[t]he invalidation

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94. *Id.* at 230. "[The Trial Lawyers] actively sought to publicize the boycott by handing out press kits, organizing picket lines, and staging rallies." *Id.*

95. *See id.* at 248.

96. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 451 (1990) (Brennan, J., concurring in part, dissenting in part).

97. *Superior Court Trial Lawyers*, 856 F.2d at 228.

The CJA regulars accept CJA cases for a variety of reasons. Some ... have previous experience in public interest work and 'consider representation of the poor [to be] the highest calling of the legal profession.' ... Some are motivated by an interest in criminal litigation. And some accept appointments under the CJA because there are no other legal jobs available to them.

*Id.* (citations omitted).

98. *See SCTLA*, 493 U.S. at 449-51 (Brennan, J., concurring in part, dissenting in part).

99. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

100. *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 795 (1988).

of some agreements that a full blown inquiry might [prove] to be reasonable."<sup>101</sup> These two principles clash head-on in mixed-motive boycott cases. In applying a *per se* analysis in such cases, as it did in *SCTLA*, the Court engages in the very efficiency-oriented shortcuts that the First Amendment normally forbids.

Further, the Court's suggestion that the *SCTLA* boycott was not adequately expressive to qualify for First Amendment protection—that there was nothing about the Trial Lawyers' conduct to distinguish it from any purely commercial boycott<sup>102</sup>—was at odds with established First Amendment jurisprudence. The Court has recently restated the method for determining the sufficiency of the expressive dimension of conduct with both speech and non-speech elements: "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [the Court must ask] whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'"<sup>103</sup> The *SCTLA* boycott certainly satisfied this test.

The First Amendment interests implicated by the totality of the circumstances surrounding the *SCTLA* boycott are clear. The Court's action in attaching antitrust liability on the basis of a *presumption* of illegality was inappropriate. Application of the *per se* rule to the *SCTLA* boycott restricted expression more broadly than was necessary to further the governmental interest in protecting competition and, thus, failed to satisfy the standard set forth by the Court in *O'Brien*.<sup>104</sup> Generally, as evidenced by the *SCTLA* decision, to determine questions of antitrust liability in mixed-motive boycott cases in a manner that adequately accommodates both First Amendment values and competition policy, a court should undertake the kind of broad-based factual inquiry that the rule of reason affords.

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101. *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343–44 (1982) (an agreement among competing physicians setting maximum fees for payment from participants in specified insurance plans held *per se* unlawful under § 1 of the Sherman Act).

102. See *supra* text accompanying note 90.

103. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)) (holding that the conviction of a protestor for burning the American flag as part of a political demonstration violated the First Amendment).

104. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (rejecting a First Amendment challenge to a New York City ordinance regulating the volume of amplified music at the bandstand in Central Park); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989). In considering a regulation of the State University of New York that prohibited the operation of private commercial enterprises in student dormitories, the Court in *Fox* held that in commercial speech analysis the validity of a government regulation does not require a showing that it is the least restrictive means available to accomplish the governmental interest, but only that it is a reasonable means, narrowly tailored to achieve the desired objective. *Id.* at 477–78.

In their treatise on antitrust law, Professors Areeda and Turner suggest a standard for applying the *O'Brien* test to political behavior with potential anticompetitive consequences. Under this standard, a defendant's behavior is unnecessarily detrimental to competition when it is extensively dangerous without being indispensable to the political activity. The three factors to be considered are: "(i) the severity of the danger to competition, (ii) the availability of a less dangerous alternative, and (iii) the customary political character of the challenged behavior." PHILLIP AREEDA & DONALD F. TURNER, 1 ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 205 (1978). See also FISHMAN, *supra* note 13.



### *C. The Relevance of Market Power*

The Supreme Court in *SCTLA* summarily dismissed the argument that the determination of the illegality of the boycott required an assessment of the boycotters' market power.<sup>105</sup> However, since the *SCTLA* boycott brought both political and economic power to bear on the District government, at least a limited inquiry into *SCTLA*'s market power was essential for the Court to ascertain whether the boycott succeeded through persuasion, as political activity, or through coercion, as commercial activity.<sup>106</sup>

The purpose of the Sherman Act is to protect competition, not competitors.<sup>107</sup> Thus, in order for an expressive boycott to violate the Sherman Act, it must have a net anticompetitive impact.<sup>108</sup> To determine anticompetitive impact, the Court must assess both the economic power of the boycotters and the structure of the affected market.<sup>109</sup>

But no proof of the *SCTLA* boycotters' market power was ever offered.<sup>110</sup> In place of proof of market power, the FTC offered an abbreviated market analysis that consisted largely of a conclusion drawn from a specious deduction: that since the boycott ultimately resulted in increased CJA rates, the Trial Lawyers must have had market power. Thus, success of the boycott was itself offered as sufficient proof of market power.<sup>111</sup> Unfortunately, the Supreme Court was content to accept the FTC's premise.<sup>112</sup>

105. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 436 (1990).

106. *See Superior Court Trial Lawyers Ass'n v. FTC*, 856 F.2d 226, 254 (D.C. Cir. 1988) (Silberman, J., concurring).

107. *See Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 320 (1962) (upholding an injunction prohibiting the merger of two corporations engaged in the manufacture and sale of men's, women's, and children's shoes on the ground that in the relevant market such a merger would create a monopoly in violation of the antitrust laws); *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951) (upholding a cease and desist order based upon a finding that competitors' good faith price differentials resulted in injury to competition). The Court in *Standard Oil* stated that, "Congress [in passing the Sherman Act] was dealing with competition, which it sought to protect ... ." 340 U.S. at 249.

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As applied to political boycotts, the decision of whether or not the Sherman Act proscribes the boycott depends solely on the boycott's potential anticompetitive results. To determine if anticompetitive results are likely, the courts look to the economic power of the boycotters and to the structure of the ... market. If, [under the Act, only those boycotts were proscribed] which had sufficient economic power to cause anticompetitive results, the "least restrictive alternative" test of *O'Brien* would be met. However, if [a boycott lacking economic power is proscribed], the proscription's adverse impact on speech would fail to meet the fourth part of the *O'Brien* test, since the incidental restriction on speech is greater than necessary to further the Act's purpose.

Kennedy, *supra* note 6 at 1012; *see also Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958). The Court has gone so far as to recognize a presumption of antitrust violation where specific acts create a "pernicious effect on competition and lack ... any redeeming virtue ...." *Northern Pac. Ry. Co.*, 356 U.S. at 5. *See also Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

109. *See generally Continental TV v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n.21 (1977) ("[A]n antitrust policy divorced from market considerations would lack objective benchmarks.")

110. *Superior Court Trial Lawyers*, 856 F.2d at 250-52.

111. The court of appeals found that the FTC had presented insufficient evidence of *SCTLA*'s market power and remanded for reconsideration on this issue. *See id.* at 250-53.

112. "[A]n assumption that absent proof of market power, the boycott ... was totally harmless ... when ... it almost produced a crisis in the administration of criminal justice in the

This analytic approach begged a critical question. The market power inquiry was necessary to judge whether the boycott succeeded as a result of political persuasion or economic coercion. It is conceivable that, despite a lack of any market power, the Trial Lawyers were able to secure a rate increase because the publicity attending the boycott succeeded in changing public attitudes toward the need for a pay increase for representatives of indigent criminal defendants.<sup>113</sup> To rely on the success of the boycott alone as evidence that it succeeded by virtue of economic coercion undercuts the very purpose of the inquiry.

Indeed, the far more plausible interpretation of the facts is that the Trial Lawyers did not have market power. The CJA lawyers did not compete in a traditional market where their conduct could directly affect the price paid for their services.<sup>114</sup> The fees paid the CJA lawyers were set by a political process, not by competitive forces.<sup>115</sup> The demand for CJA services was created not by traditional market impulses but by the constitutional requirement that every jurisdiction in the United States provide, at government expense, legal representation to criminal defendants who cannot otherwise afford counsel.<sup>116</sup>

Pre-boycott CJA rates were substantially lower than the market price for legal services in the District of Columbia at the time.<sup>117</sup> That the government could buy legal services at a price less than the market price suggests that the District of Columbia government itself had market power in the critical market, that is, the market consisting of legal representation of indigent criminal defendants. In other words, the CJA lawyers competed in a market in which prices were set by a single customer with power to control the market. Thus, the District of Columbia government had monopsony power.<sup>118</sup>

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District and when it achieved its economic goal ... is [inconsistent with the Court's antitrust jurisprudence]." *FTC v. Superior Court Trial Lawyers*, 493 U.S. 411, 436 (1990).

113. *Superior Court Trial Lawyers*, 856 F.2d at 251.

114. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) (suit by hosiery manufacturer against labor organization to recover, under the Sherman Act, treble the amount of damages it incurred as the result of a strike staged by the union at its factory). The Court stated in *Apex Hosiery*, "[T]he restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade ... is not enough, unless the restraint is shown to have ... an effect upon prices in the market ...." *Id.* at 500-01.

115. *See supra* text accompanying notes 52-53.

116. U.S. CONST. amend. VI; *see Gideon v. Wainwright*, 372 U.S. 335 (1963).

117. *FTC v. Superior Court Trial Lawyers*, 493 U.S. 411, 443 (1990) (Brennan, J., concurring in part, dissenting in part).

118. The term "monopsony" is used to describe a market situation in which there is a single buyer for a given product or service from a large number of sellers. That single buyer is said to have monopsonist power. By contrast, the term "monopoly" is used to describe a market in which ownership or control of a product or service by a single supplier permits domination of the commodity or service in a particular market, usually for control over or manipulation of prices. The controlling supplier is said to have monopoly power. *See WEBSTER'S THIRD INTERNATIONAL DICTIONARY (UNABRIDGED)* 1463 (1981). Just as seller concentration facilitates the ability to raise price above competitive market levels, buyer concentration makes it easier for buyers to depress price below competitive levels; in each case output will be below the competitive norm. *See PHILLIP AREEDA & DONALD F. TURNER, 4 ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION*, ¶ 964 (1980). *But see Superior Court Trial Lawyers v. FTC*, 856 F.2d 226, 235 n.10 (D.C. Cir. 1988) ("We do not read petitioners' characterization of the market for CJA services ... to suggest that the District of Columbia is a 'monopsonist' ....")

The government was not completely free to choose what may have been for it the optimum combination of price and quantity.<sup>119</sup> That fact, however, did not lessen its market power. A monopsonist generally is not *completely* free to make such a choice. It must offer a price high enough to secure the quantity it needs; were it to set its price too low, its suppliers would leave the market.<sup>120</sup> While there was a *limit* to the District of Columbia government's capacity to exploit the CJA lawyers, it was, nonetheless, able to exploit them by paying a less than competitive price.<sup>121</sup> Prior to the boycott it may be presumed that the CJA lawyers were faced with the choice to either forego their livelihood or accept appointments at a price lower than market price.<sup>122</sup> The boycott, then, could be characterized not as the exercise of market power by the lawyers, but as a collective attempt by the lawyers to offset the monopsonist power of the District of Columbia government in the purchase of CJA services.<sup>123</sup>

Further, the Court's characterization of the SCTLA boycott as a naked horizontal restraint subject to *per se* illegality, without benefit of market inquiry, completely ignored the nature of the boycott target. The SCTLA boycott was a concerted refusal by a limited segment of the District of Columbia Bar to undertake court-appointed representation of indigent criminal defendants. The target of the boycott was the District of Columbia government, specifically, the District of Columbia legislature and its courts.<sup>124</sup> At all times throughout the course of the boycott, the District of Columbia government had the indisputable power to require *all* members of the District of Columbia bar (or any sub-set of the District bar, including the criminal defense bar, generally, or the 1200 lawyers who were registered for CJA appointments,<sup>125</sup> or simply the members of SCTLA themselves) to accept court-appointed representation of indigent criminal defendants.<sup>126</sup>

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119. The FTC found that:

[T]he city's purchase of CJA legal services for indigents is based on competition. The price offered by the city is based on competition, because the city must attract a sufficient number of individual lawyers to meet its needs at that price. The city competes with other purchasers of legal services to obtain an adequate supply of lawyers, and the city's offering price is an element of that competition. ... If the offering price had not attracted a sufficient supply of qualified lawyers willing to accept CJA assignments for the city to fulfill its constitutional obligation, then presumably the city would have increased its offering price to make its offer more attractive. ... [H]owever, the city's offering price before the boycott apparently was sufficient to obtain the amount and quality of legal services that it needed.

Superior Court Trial Lawyers v. FTC, 856 F. 2d 226, 232 (D.C. Cir. 1988).

120. See generally GEORGE J. STIGLER, *THE THEORY OF PRICE* 87, 205 (3d ed. 1966).

121. In 1983 the typical billing rate for private attorneys in major cities with 11 to 20 years of experience was \$123 per hour; the rate for those with less than two years of experience was \$64 per hour. *SCTLA*, 493 U.S. at 443 (Brennan, J., concurring in part, dissenting in part).

122. See *supra* note 97. For a similar discussion of the economics of medicaid rate setting, see Mitchell D. Raup, *Medicaid Boycotts by Health Care Providers: A Noerr-Pennington Defense*, 69 IOWA L. REV. 1393, 1396 (1984).

123. See generally Hurwitz, *supra* note 4, at 112.

124. *SCTLA*, 493 U.S. at 453 (Blackmun, J., concurring in part, dissenting in part).

125. See *supra* text accompanying note 52.

126. See *Powell v. Alabama*, 287 U.S. 45 (1932). In *Powell*, the Court found that defendants convicted of rape and sentenced to death were denied due process of law and equal protection in contravention of the Fourteenth Amendment when they were denied a fair, impartial, and deliberate trial; were denied the right of counsel in pretrial preparation; and, were

This plenary power is relevant to an accurate characterization of the SCTLA boycott in two ways. First, the District of Columbia government had the authority to expand the pool of available lawyers from which court appointments could be made. Applying the traditional economic concept of cross-elasticity of demand,<sup>127</sup> there were presumably other lawyers whose services could be substituted for the boycotting CJA regulars, thus significantly limiting any market power the boycotters may have had. Second, despite the Trial Lawyers' boycott, they could not in fact relieve themselves of the obligation to accept court appointments. Thus, the SCTLA boycott was, as Justice Blackmun stated, a dramatic gesture lacking any real economic power.<sup>128</sup> The boycotters could not force the government's compliance with their demands by constricting the supply of legal services. Instead, they placed the government in the untenable position of either agreeing to the rate increase or using its political muscle to break the strike. Thus the government choice was likely the result of political, not economic pressure.<sup>129</sup>

Indeed, looking at what *actually happened*, the primary effect of the boycott on the market for CJA services was procompetitive as the pool of

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tried before juries in which members of their race were systematically excluded. The Court stated that the court's power to appoint counsel to defend one charged with a crime, "even in the absence of statute, can not be questioned. Attorneys are officers of the court, and are bound to render service when required by such an appointment." *Id.* at 73. *See also* SCTLA, 493 U.S. at 452, 453 (Brennan, J., concurring in part; Blackmun, J., dissenting in part).

Underfunded and overburdened public defender systems and a less than overwhelming pro bono response from the private bar are problems with which many, if not most, states must grapple. Individual judges have begun to exercise the plenary power of the court to institute innovative responses to the predicament. For example, in November, 1991 a Knoxville, Tennessee judge ordered all private lawyers—including the city's mayor, who had never before handled a criminal case—to take on indigent defendants without compensation. Even more recently, when faced with a comparable circumstance and a request by one overworked public defender who asked to be relieved from handling further cases until the state legislature rectified the injustice to criminal defendants posed by the lack of funding, Louisiana District Court Judge Calvin Johnson declared the entire New Orleans public defender system unconstitutional. He concluded that the tremendous per attorney case overload (more than 500 cases per attorney) prevented attorneys from providing adequate representation to their clients, and ordered the state to come up with money to fix it. The state has appealed the ruling to the Louisiana Supreme Court. *See* Ruth Marcus, *Public Defender Systems Tried by Budget Problems*, THE WASHINGTON POST, March 8, 1992, at A1. Similarly, when two criminal defendants stood before Montgomery County, Maryland Circuit Judge DeLawrence Beard without lawyers as a result of the Public Defenders Office's lack of funds to hire outside counsel, the judge took the matter into his own hands. Calling a short recess, he went into the hallway outside his courtroom, buttonholed two lawyers who were leaving the law library and brought them into the courtroom for a 30-minute hearing. Veronica T. Jennings, *Weighing Maryland's Deficit on the Scales of Justice: Budget Cuts Constrain Public Defender Office*, THE WASHINGTON POST, January 7, 1991, B1.

127. *See generally* United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377 (1956). In a suit against a cellophane manufacturer for monopolization of trade in violation of the Sherman Act, the *DuPont* Court found that cellophane's interchangeability with other materials sufficed to make it part of the flexible packaging materials market and that the cellophane manufacturer therefore lacked monopoly control over that market. The Court stated, "When a product is controlled by one interest, without substitutes available in the market, there is monopoly power." *Id.* at 396.

128. SCTLA, 493 U.S. at 454 (Blackmun, J., concurring in part, dissenting in part).

129. *Id.* *See also* Jane W. Meisel, Note, *Now or Never: Is There Antitrust Liability for Noncommercial Boycotts?*, 80 COLUM. L. REV. 1317, 1334 (1980).

attorneys seeking CJA cases increased subsequent to the boycott.<sup>130</sup> A concerted refusal to deal in which *neither the aim nor the effect* was the inhibition of competitive entry into the market by other equivalent suppliers cannot reasonably be adjudged anticompetitive in nature.<sup>131</sup> Where such concerted action succeeds, it necessarily does so by virtue of the force of political suasion, rather than economic might. In such instance, a proper assessment of the nature of the boycott can only be derived from, at the very least, a limited analysis of market power.

#### IV. BALANCING FIRST AMENDMENT INTERESTS AND COMPETITION POLICY IN MIXED-MOTIVE BOYCOTT CASES

##### A. Proposal for a New Approach

Over time, the Supreme Court has recognized exemptions from the federal antitrust laws for certain concerted conduct that would otherwise be subject to antitrust liability.<sup>132</sup> In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,<sup>133</sup> the Court carved out such an exemption for the conduct of individuals or businesses joined together in a concerted effort to petition the government. In *Noerr*, the Supreme Court concluded that the Sherman Act was intended to apply to concerted commercial activities, not concerted activities directed at influencing the legislative or executive process.<sup>134</sup> Observing that there was no suggestion in the legislative history of the

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130. After the boycott 100 to 120 lawyers called in for cases daily whereas 40 to 60 did so before the rates increased. *Superior Court Trial Lawyers Ass'n v. FTC*, 856 F.2d 226, 238 n.18 (D.C. Cir. 1988).

131. See *Crown Central Petroleum Corp. v. Waldman*, 486 F. Supp. 759 (M.D. Pa. 1980), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980). In an action by an oil company against one of its retailers the *Waldman* court held that the action of the retailer, in concert with other dealers, to close gasoline stations to express dissatisfaction with government energy policies was beyond the reach of the federal antitrust laws. The court stated that the *per se* doctrine "should only be applied to concerted refusals that are intended to drive out competitors or to keep them out, but not those in which the concerted action is designed to achieve some other goal." *Id.* at 764.

132. For example, exemptions from federal antitrust laws have long been recognized for the concerted activities of various regulated industries, for agricultural cooperatives, for labor organizations, and for governmental action. See generally, SULLIVAN, *supra* note 5, at 717-51.

133. 365 U.S. 127 (1961). *Noerr* was an action by long-distance trucking companies against twenty-four major railroads for violation of the Sherman Antitrust Act in the use of a deceptive publicity campaign directed toward obtaining legislation adverse to the trucking industry. The Court held that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take a particular action ...." *Id.* at 136. The Court reaffirmed this view four years later in *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965) in which the Court considered the validity of a union-multiemployer wage/benefit agreement that favored larger coal companies in the industry, and that allegedly was intended to drive small competitors from the market. In order to further the terms of the agreement, the union and the larger companies lobbied the Secretary of Labor to establish a minimum wage for employees of coal contractors at a level higher than that of other industries, which made it difficult for small contractors to compete. The Court declared that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of the intent or purpose." *Id.* at 670. Thus, "the *Noerr* doctrine" is sometimes also referred to as "the *Noerr-Pennington* doctrine."

134. "The proscriptions of the [Sherman Act], tailored as they are for the business world, are not at all appropriate for application in the political arena." 365 U.S. at 141.

Act of an intent by Congress to regulate political activity, the Court held that a broader construction of the Act would infringe upon the First Amendment right to petition.<sup>135</sup> Consequently, joint activities that may be unlawful in the commercial realm fall outside the scope of the Act when their purpose is to influence legislation, either directly or by rallying public support and generating political pressure.<sup>136</sup>

The *SCTLA* Court conceded that the objective of the Trial Lawyers' boycott was the enactment of favorable legislation, conduct that it had recognized in *Noerr* as being beyond the reach of the Act even when the sole purpose is the imposition of a restraint on competitors. Still, it distinguished *SCTLA* from *Noerr* by labeling the restraint in *Noerr* as "the intended consequence of public action," while the *SCTLA* boycott was "the means by which [the Trial Lawyers] sought to obtain favorable legislation."<sup>137</sup> The Court's determination that the *SCTLA* boycott was beyond the realm of *Noerr* protection, grounded as it was in a means/end distinction, is inconsistent with the holding in *Noerr* and the policy promoted there.<sup>138</sup>

The Trial Lawyers' boycott in *SCTLA* was undertaken expressly to influence the government of the District of Columbia. The Trial Lawyers' conduct was played out entirely in the public arena. Prior to the boycott, the Trial Lawyers engaged in a number of lobbying efforts to encourage the District government to increase CJA rates, including meeting with the mayor and the chief judge of the superior court, and testifying before the city council.<sup>139</sup>

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135. "We accept as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Id.* at 135. "[To impute to the Sherman Act] a purpose to regulate, not business activity, but political activity ... would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot ... lightly impute to Congress an intent to invade these freedoms." *Id.* at 137–38.

136. The *Noerr* Court took a two-faceted approach in fashioning the "petitioning defense." First, when a restraint is the result of valid governmental action, the Court recognized an absolute immunity from antitrust liability for those urging the action. The Court applied this principle to the claim that the railroads' solicitation for the passage of laws harmful to the trucking industry violated the antitrust laws. *See id.* at 136–39. Second, when an anticompetitive restraint results directly from private action, antitrust liability will not arise from that restraint if the restraint is *incidental* to a valid attempt to influence governmental action. It was this principle that the Court applied to the claim that the railroads' publicity campaign itself, which used deceptive and allegedly unethical practices, violated the Sherman Act. *See id.* at 140–41.

137. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425 (1990).

138. The *SCTLA* Court relied heavily on the decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), which held that *Noerr* immunity did not apply to a manufacturer's efforts to influence the setting of a private association's product standards, that were routinely adopted by state and local governments, as support for its denial of *Noerr* protection to the *SCTLA* boycott. *See SCTLA*, 493 U.S. at 425. This reliance was misplaced, however, because the decision in *Allied Tube* was based not on the fact that the alleged restraint was the means used to lobby for government action as opposed to the consequence of the action, but rather on the fact that the "petitioning activity" was directed toward a private, nonlegislative, nongovernmental entity. In its analysis, the *Allied Tube* Court acknowledged that the *Noerr* defense applies whether the effort to influence involves "direct" or "indirect" petitioning of government, but after examining the nature of the activity as a whole, it concluded that the activity at issue involved efforts to influence a private voluntary organization which cannot be accorded the same immunity given legislative lobbying or petitioning in the political arena. *See Allied Tube*, 486 U.S. at 502–07.

139. *See, supra* text accompanying note 61.

Pursuant to a well-publicized plan, when those efforts failed, they initiated the boycott.<sup>140</sup> Concurrent with the boycott the lawyers engaged in an extensive media campaign.<sup>141</sup> The ultimate objective of the boycott was legislation; its intermediate goal was to inflict injury on the District government in the hope of achieving that objective.<sup>142</sup> The lawyers' efforts were intended to influence the District of Columbia legislature through the mobilization of public support. In light of its holding in *Noerr*, the Court should have recognized a "legislative petitioning" defense to antitrust liability for the SCTLA boycotters.

Alternatively, the SCTLA Court could have exempted the Trial Lawyers' boycott from antitrust liability because the boycott was protected political communication, an approach it had taken in an earlier case, *NAACP v. Claiborne Hardware*.<sup>143</sup> In *Claiborne Hardware* the Court examined the factual context surrounding the boycott, including the activities that accompanied it,<sup>144</sup> and held that the boycott constituted constitutionally protected activity. The Court concluded that the "established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.'"<sup>145</sup> Instead, the SCTLA Court distinguished the *Claiborne Hardware* boycotters who, the Court said, "sought no special advantage for themselves" from the Trial Lawyers whose "undenied objective ... was an economic advantage for those who agreed to participate."<sup>146</sup> This distinction is not entirely justified by the facts of *Claiborne Hardware*,<sup>147</sup> but even if it is true, it cannot sustain the Court's denial of constitutional protection to the SCTLA boycott.<sup>148</sup> When con-

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140. SCTLA, 493 U.S. at 414.

141. *Id.* at 449 n.8.

142. The District of Columbia government played a "dual role" in this case. In its role of "government as consumer," (its capacity to compel the provision of legal services to criminal indigents notwithstanding), its relationship vis-a-vis SCTLA was like that of any customer to supplier. *See id.* at 442 n.9. But it was also cast in the role of "government as legislature." In that capacity, its relationship vis-a-vis SCTLA was like that of any lawmaking body to the people whose interests it represents. While the target of the Trial Lawyers' boycott was the "government as consumer," it was designed to influence the "government as legislature." Given the plenary power of a legislature, economic pressure exerted against it can only succeed in the context of a successful political campaign. For a related discussion of this point see *Superior Court Trial Lawyers Ass'n v. FTC*, 856 F.2d 226, 254 (D.C. Cir. 1988) (Silberman, J., concurring).

143. 458 U.S. 886 (1982). In *Claiborne Hardware* the Court upheld a boycott by black citizens of Port Gibson, Mississippi against white merchants. The boycott was undertaken to secure for the black citizens rights of political and economic equality under the Constitution.

144. "The boycott was supported by speeches and nonviolent picketing." *Id.* at 907.

145. *Id.* at 911 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

146. SCTLA, 493 U.S. at 426.

147. As the Court noted in SCTLA, the *Claiborne Hardware* boycott was a "politically motivated boycott designed to force governmental and economic change ...." *Id.* at 426 (quoting *Claiborne Hardware*, 458 U.S. at 914). Among the economic changes sought by the boycotters were "the hiring of black policemen" and "[the employment of] Negro clerks and cashiers." *Claiborne Hardware*, 458 U.S. at 899, 900. Presumably, some of the participants of the boycott would have benefited directly from the fulfillment of this demand. The *Claiborne Hardware* boycott may reasonably be characterized as a "mixed-motive" boycott since it is highly likely that the black citizens were motivated by a mixture of both political and economic interests. *See generally* George C. Covington, Note, *Constitutional Law—The First Amendment and Protest Boycotts: NAACP v. Claiborne Hardware Co.*, 62 N.C. L. REV. 399 (1983-84).

148. *See SCTLA*, 493 U.S. at 449 (Brennan, J., concurring in part, dissenting in part).

duct contains sufficient communicative elements to be deemed "speech,"<sup>149</sup> the different *purpose* of the speech cannot render that conduct any less expressive.<sup>150</sup> Moreover, divining each and every purpose or even the *primary* purpose of particular behavior can be an extremely difficult task.

Unlike its opinions in the *Noerr* and *Claiborne Hardware* cases, which rested on the nature of the concerted conduct involved, the Court's opinion in *SCTLA* turned on the motive of the *SCTLA* boycotters.<sup>151</sup> The primary objective of the boycotters was an increase in their compensation, an economic advantage for themselves. The Court therefore held that the boycott violated antitrust law, despite the First Amendment interests implicated by the conduct.<sup>152</sup> Not only was the Court's decision in *SCTLA* inconsistent with its decisions in prior mixed-motive boycott cases, its use of motive as the principal measure of antitrust liability in the *SCTLA* case cannot be reconciled with its prior decisions outside the area of antitrust law involving a combination of commercial and political speech.<sup>153</sup>

Reaching an adequate balance between First Amendment interests and competition policy in cases involving mixed-motive boycotts requires a new approach. Antitrust liability in such cases should not depend upon the application of "the motivation test," as applied in the *SCTLA* decision. Instead, we must use a "totality of the circumstances test" that would serve not only to bring mixed-motive boycott cases in line with existing First Amendment jurisprudence, but would also provide an analytic method capable of more consistent application.

### 1) The "Totality of the Circumstances" Test

The crucial issue in these cases involves an assessment of whether or not a mixed-motive boycott falls within the boundaries of First Amendment protection. The totality of the circumstances test would follow a three-tiered analysis. First, a court should evaluate the extent of expressive content in the conduct. Next, it should decide if application of the antitrust laws to the boycott was related to the suppression of expression. Finally, if regulation of the boycott was directed toward the noncommunicative aspects of the boycott activity, it should consider whether, *in light of the political and economic context in which the boycott occurred*, the government's interest in regulating the activity was sufficient to justify the incidental restriction on expression.

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149. See *supra* text accompanying notes 99-103.

150. See *SCTLA*, 493 U.S. at 449 (Brennan, J., concurring in part, dissenting in part).

151. See *supra* text accompanying notes 144-46.

152. See *SCTLA*, 493 U.S. at 424.

153. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). In *Bellotti*, a group of national banking and business corporations challenged the constitutionality of a state statute which forbade certain expenditures by banks and certain business corporations for the purpose of influencing the vote on referendum proposals that did not materially affect the property, business, or assets of the corporation. The Court held that the state statute abridged freedom of speech in violation of the First Amendment. *Id.* at 776. "[The statute] amounts to an impermissible ... prohibition of speech based on the identity of the interests that spokesmen [for the corporation] may represent in public debate over controversial issues ...." *Id.* at 784. For a more detailed discussion, see *infra* text accompanying notes 182-89.



a) Was the Boycott Sufficiently Expressive to Invoke First Amendment Protection?

To qualify for protection under the First Amendment, conduct must be sufficiently endowed with elements of communication.<sup>154</sup> Communicative conduct is conduct that intends to convey a particularized message and, given the context in which it occurs, is likely to impart that message to those who view it.<sup>155</sup> To judge the communicative nature of a boycott, a court should consider such factors as:

- (1) how atypical the boycott was relative to the normal conduct of the participants;<sup>156</sup>
- (2) whether the boycott was directed at the government;<sup>157</sup>
- (3) whether the participants took steps to ensure or could have reasonably believed that the public would be aware of the boycott;<sup>158</sup> and,
- (4) whether the boycott was the participants' only means of arousing public sentiment.<sup>159</sup>

If all factors are present in a particular case the boycott should be considered expressive. The weight given the absence of one or another factor within the overall context of the boycott would be a matter best left to the discretion of the court. If the court deems the activity expressive, it should then decide if the government regulation of the conduct was related to the suppression of free expression.<sup>160</sup>

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154. See *Spence v. Washington*, 418 U.S. 405, 409 (1974) (invalidating as an infringement of free speech the conviction of an individual under a Washington statute forbidding the exhibition of the United States flag to which any symbol, figure or other material had been attached or superimposed, for displaying a flag to which a peace symbol had been affixed).

155. Conduct is communicative when "[a]n intent to convey a particularized message [is] present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

156. See *Crown Cent. Petroleum Corp. v. Waldman*, 486 F. Supp. 759, 767-68 (M.D. Pa.), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980). The factors delineated here have been suggested by courts in other cases and have been, in some instances, applied in part within very fact-specific contexts. Here, however, the factors are pulled together to suggest that when considered as a whole they represent an analytical tool of general application for considering any mixed-motive boycott.

157. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 451-52 (1990) (Brennan, J., concurring in part, dissenting in part).

158. See *Crown Cent. Petroleum*, 486 F. Supp. at 767-68. See generally *Spence*, 418 U.S. at 409-11.

159. See *Crown Cent. Petroleum*, 486 F. Supp. at 769; *SCTLA*, 493 U.S. at 447, 450-51 (Brennan, J., concurring in part, dissenting in part).

160. See *Spence*, 418 U.S. at 414; *Texas v. Johnson*, 491 U.S. 397, 403 (1989). Cf. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2461 (1991) (holding a public indecency statute prohibiting totally nude dancing did not violate the First Amendment).

b) Was the Application of the Antitrust Laws to the Boycott Related to the Suppression of Expression?

The Supreme Court has determined that when a regulation is not related to expression—when it is content-neutral—a court may apply the less stringent standard for analyzing noncommunicative conduct controls of general application that it formulated in its opinion in *United States v. O'Brien*.<sup>161</sup> When it is related to expression, the regulation is outside *O'Brien*, and a more demanding standard would necessarily be applied.<sup>162</sup> The federal antitrust laws were designed to preserve free competition.<sup>163</sup> The enactment of the federal antitrust laws was clearly within the constitutional power of the government.<sup>164</sup> Protection of free and fair competition and promotion of trade efficiency may reasonably be deemed “important or substantial” governmental concerns. Thus, the first two elements of the *O'Brien* test are satisfied, and it might appear that the less stringent standard would apply. Such a conclusion should not, however, be hastily drawn as even content-neutral regulations have the potential to infringe upon protected expression.<sup>165</sup> Indeed, the Court has said that a governmental purpose to control or prevent certain activities that are constitutionally within the state’s power to regulate may not be achieved by means so unnecessarily broad as to invade an area of protected

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161. 391 U.S. 367 (1968). See *supra* note 78. See also *Barnes v. Glen Theatre*, 111 S. Ct. 2456, 2461 (1991).

162. Non-content regulations of speech are subject to an intermediate level of scrutiny whereby government must demonstrate that any regulation of speech is narrowly drawn to further a substantial or important interest; content-based regulation, on the other hand, is subject to strict scrutiny and government must show that a *compelling* interest is advanced by a narrowly tailored regulation of expression. See, e.g., *Johnson*, 491 U.S. at 403.

163. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940) (stating that the federal antitrust laws were enacted to prevent “restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.”). See also *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301, 1305 (1980) (“[T]he public desired ... a law to destroy the power of the trust ... and such was the purpose of the Sherman Act. ... Clearly, Congress sought to achieve the preservation of free and fair competition”); *Shapiro v. General Motors Corp.*, 472 F. Supp. 636 (D. Md. 1979), *aff’d*, 636 F.2d 1214 (4th Cir. 1980), *cert. denied*, 451 U.S. 909 (1981) (stating that the antitrust laws have as one of their primary goals the promotion of economic efficiency); *M.C. Mfg. Co., Inc. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976) (purpose of the antitrust laws is the preservation of an open, competitive market). For a detailed discussion of the legislative history of the Sherman Act, see EARL W. KINTNER, 1 *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* (1978). See also William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221 (1956).

164. The antitrust laws were enacted under the authority of the Commerce Clause of the United States Constitution, which grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States ....” U.S. CONST. art. I, § 8, cl. 3. See also *Washington Brewer Inst. v. U.S.*, 137 F.2d 964 (9th Cir. 1943), *cert. denied* 312 U.S. 776 (1943).

165. See *NAACP v. Alabama*, 377 U.S. 288, 307–09 (1964) (holding unconstitutional as an infringement of associational rights protected by the First Amendment an attempt by the state of Alabama, under its laws governing foreign corporations doing business in the state, to compel the NAACP to produce the membership lists of its association). For a comprehensive analysis of the test developed in *United States v. O'Brien* and its application to the noncontent regulation of speech, see RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 54–64 (1992).

freedoms.<sup>166</sup> Consequently, application of the remaining two elements of the *O'Brien* test to the regulation of mixed-motive boycotts requires closer examination.

The antitrust laws were enacted for reasons having nothing to do with speech.<sup>167</sup> Still, application of the laws to mixed-motive boycotts, where elements of speech and nonspeech are "inextricably intertwined,"<sup>168</sup> may lead to the suppression of protected expression.<sup>169</sup> A court must determine whether or not application of the antitrust laws to a particular mixed-motive boycott satisfies the third factor of *O'Brien*, that the governmental interest is *unrelated to suppression of free expression*. To do so, a court must ascertain whether the reasons advanced by the government to justify imposition of antitrust liability are based solely on the *noncommunicative* aspects of the boycott.<sup>170</sup> The question is whether the harm the government seeks to prevent is one that arises from the boycott itself, and not from the message the boycott seeks to convey. If it is, the harm is unrelated to free expression, and consequently, regulation of the boycott is unrelated to the suppression of expression. But if the harm the government seeks to prevent is harm that it perceives will emanate from the reaction others will have to the conduct—that is, from the message communicated—then regulation is related to the suppression of expression.<sup>171</sup> In each case, a court should require the government to show that the imposition of antitrust liability with respect to the boycott at issue is justified by a need to prevent or to compensate for demonstrable harm caused by the boycott. A court should, therefore, consider the third factor of the *O'Brien* test in *each* mixed-motive boycott case.

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166. See *NAACP v. Button*, 371 U.S. 415, 438 (1963) (invalidating as an infringement of First Amendment rights a Virginia statute under which the NAACP's practice of instituting legal proceedings in school desegregation cases was deemed to be criminally "improper solicitation" of legal business; holding "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."). See also *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946). In *Hannegan*, the Court invalidated as censorship a decision to revoke the privilege of second-class mailing rates accorded a qualifying publication because its contents, while not obscene within the meaning of the postal obscenity statutes, was considered vulgar and in poor taste by the postmaster general. *Id.* at 149-51. In assessing the intent of the postal regulations as applied to the publication at issue, the Court held that Congress may not by withdrawal of mailing privileges place limits on free speech which would be unconstitutional if attempted directly. *Id.* at 156. See also *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold*, the Court found unconstitutional a Connecticut statute that made the use of contraceptives a criminal offense. While the state could regulate the manufacture or sale of contraceptives, a law forbidding use was an invasion of the right of privacy emanating from the penumbral guarantees of the provisions of the Bill of Rights. *Id.* at 485. The Court said "the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of 'association' that are not political in the customary sense but pertain to the social, legal, and *economic* benefit of the members." *Id.* at 483 (emphasis added).

167. See cases cited *supra* note 163.

168. See cases cited *infra* note 188.

169. See *NAACP v. Alabama*, 357 U.S. 449, 461 (1958) ("In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.")

170. See *SMOLLA*, *supra* note 165, at 58.

171. *Id.*

For example, had the Court in *SCTLA* given adequate consideration to the third factor of the *O'Brien* test in its analysis of antitrust liability for the Trial Lawyers' boycott, it would have required the FTC to prove, not merely presume, that the boycotters had market power. Only by a showing of market power could the FTC establish that the boycotters *coerced* the District of Columbia government's capitulation to their demands, thus causing *actual* harm to competition in violation of the antitrust laws. Without such a showing, one may reasonably conclude that the boycott succeeded by virtue of the force of the boycotters' message. In short, it was the force of that message that the government sought to curtail by the imposition of antitrust illegality.

c) Was the Restriction on Expression Sufficiently Justified by the Governmental Interest at Stake Given the Political and Economic Context of the Boycott?

Once the court has determined that the expressive content of the boycott was sufficient to invoke the First Amendment and that the government's regulation of the boycott was directed at the harm caused by the boycott instead of the boycotters' message, it must then consider the last prong of the *O'Brien* test. The court must decide whether or not the incidental restriction on expression as a result of the regulation was no greater than necessary to further the government's avowed interest.<sup>172</sup>

The government's asserted interests in enforcing the antitrust laws are to enhance free and open competition, to promote economic efficiency, and to prevent restraint of free trade. In order for a court to decide if enforcement of those regulations in a particular case imposes a greater than necessary burden on expression, the court must determine the extent of *actual* harm caused or likely to be caused by the boycott. The concern is with the impact of antitrust enforcement on First Amendment freedoms. To resolve the question, the court should weigh the government's interest in protecting competition against the boycott's net anticompetitive effect.<sup>173</sup>

The determination of anticompetitive effect ought necessarily to take into account not only the content of the boycott but also the context, both economic and political, in which it occurred. As a gauge of anticompetitiveness, a court might examine the circumstances surrounding the boycott to ascertain whether the concerted activity displayed the economic indicia of an anticompetitive restraint. For example, the court might ask: (1) whether the boycott was designed to force government to exclude new or existing competitors

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172. See *NAACP v. Button*, 371 U.S. 415 (1963). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 438.

173.

As applied to political boycotts, the decision of whether or not the Sherman Act proscribes the boycott depends solely on the boycott's potential anticompetitive results. To determine if anticompetitive results are likely, the courts look to the economic power of the boycotters and to the structure of the ... market. [If under the Act only those boycotts were proscribed] which had sufficient economic power to cause anticompetitive results, the "least restrictive alternative" test of *O'Brien* would be met. However, if [a boycott lacking economic power were proscribed], the proscription's adverse impact on speech would fail to meet the fourth part of the *O'Brien* test, since the incidental restriction on speech is greater than necessary to further the Act's purpose.

Kennedy, *supra* note 6, at 1012.

from the market;<sup>174</sup> (2) whether the boycott exceeded in scope or duration what was reasonably necessary to convey the apparent message effectively;<sup>175</sup> (3) whether the boycotters had market power;<sup>176</sup> and, (4) whether the ultimate results of the boycott were procompetitive.<sup>177</sup> If the economic indicia of a coercive boycott were absent, the anticompetitive effect of the boycott was limited. If the boycott succeeded, it most probably did so as a result of persuasion and may be deemed a form of political communication beyond the reach of the antitrust laws.

The conduct in the SCTLA boycott lacked the economic characteristics of an anticompetitive restraint. The boycott was not designed to foreclose the market to other competitors and, in fact, could not have done so despite intent.<sup>178</sup> While the Trial Lawyers refused to take on any new CJA cases, they continued to provide effective counsel for those cases to which they had been appointed prior to the boycott. Moreover, they promptly ended the boycott upon notice from the mayor that emergency legislation mandating a rate increase (at a rate less than that requested by the lawyers) would be enacted. The boycott was reasonably limited in scope and duration to what was necessary to convey the boycotters' message,<sup>179</sup> and the SCTLA boycott was ultimately procompetitive.<sup>180</sup> From an economic perspective, the extent of *actual* harm caused by the boycott was marginal. If these factors are balanced against the government's interest in promoting economic efficiency and open competition, the government's interest appears insufficient to justify the burden on First Amendment rights caused by imposition of antitrust liability.

*2) The Irrelevancy of Motive in Balancing First Amendment Interests and Competition Policy in Mixed-Motive Boycott Cases*

In prior cases, the Court has clearly indicated that political acts motivated by economic self-interest are no less entitled to First Amendment protection than purely selfless acts of political protest.<sup>181</sup> Even when a speaker's interest in the challenged speech is purely economic, that interest alone does not disqualify the speech for protection under traditional First Amendment

174. See Kennedy, *supra* note 6, at 985; see also *Crown Cent. Petroleum Corp. v. Waldman*, 486 F. Supp. 759, 764 (M.D. Pa.), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980).

175. See Hurwitz, *supra* note 4, at 124.

176. See *supra* notes 108-09 and accompanying text.

177. See *supra* text accompanying notes 32-34. For a general discussion of the economic indicia of an anticompetitive boycott see Hurwitz, *supra* note 4, at 124.

178. See *supra* text accompanying notes 124-27.

179. See *supra* text accompanying notes 69-71.

180. See *supra* text accompanying notes 130-31.

181.

It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.... Indeed, it is quite probable people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and ... deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.

*Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961).

doctrine because the commercial nature of the speech does not negate its value in the marketplace of ideas.<sup>182</sup> While such speech qualifies for protection, in the hierarchy of First Amendment protection of expression, "purely commercial" speech has long been afforded a more limited measure of protection "commensurate with its subordinate position in the scale of First Amendment values."<sup>183</sup> A commercial expression has been held to be within the parameters of First Amendment protection if it concerns lawful activity and is not misleading.<sup>184</sup> To be valid the asserted governmental interest in regulating such speech must be substantial, the regulation must directly advance the asserted governmental interest, and the regulation must be no more restrictive than necessary to serve that interest.<sup>185</sup> Although in regulating commercial speech the government need not employ the least restrictive means available, the alternative it chooses must be narrowly tailored to achieve its desired end.<sup>186</sup> Further, it may not be presumed that speech is necessarily commercial whenever it relates to the speaker's financial motivation for speaking.<sup>187</sup>

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182. "[W]e may assume that the [speaker's] interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (defining commercial speech as that speech which proposes a commercial transaction; holding invalid as an abridgement of First Amendment rights a state statute that made advertising of prescription drug prices "unprofessional conduct," for which pharmacists would be subject to license revocation or suspension). The Court stated:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

*Id.* at 765 (citations omitted). *See also* *Board of Trustees v. Fox*, 492 U.S. 469, 482 (1989) ("Some of our most valued forms of fully protected speech are uttered for a profit."); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (holding unconstitutional under the First Amendment a Virginia statute that, at that time, made it illegal to encourage or prompt, by sale or circulation of any publication, the procuring of an abortion). In *Bigelow*, the Court stated, "Advertising is not ... stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas." *Id.* at 826.

183. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (upholding the indefinite suspension of an attorney for violating the anti-solicitation provisions of the Ohio Code of Professional Responsibility). In *Ohralik*, the Court stated:

To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to [noncommercial] speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection.

*Id.* *See also* *Virginia State Bd. of Pharmacy*, 425 U.S. at 748.

184. *See* *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980) (invalidating a regulation that, in an effort to conserve energy, prohibited promotional advertising by an electric utility except for advertisements encouraging shifts of consumption to off-peak demand times).

185. *Id.*

186. "[T]he government goal [must] be substantial, and the cost [must] be carefully calculated. ... [T]he State bears the burden of justifying its restrictions ... so it must affirmatively establish the reasonable fit." *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

187. *See* *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795 (1988) ("It is not clear that a [speaker's] speech is necessarily commercial whenever it relates to that person's financial motivation for speaking.").

When the Supreme Court has considered speech consisting of a combination of commercial and noncommercial elements, the Court has consistently treated the speech as political.<sup>188</sup> The motivation of the speaker has not been deemed relevant in the assessment of whether or not the speech is protected.<sup>189</sup>

A particular boycott may be neither purely commercial nor purely political but driven by a mixture of motives. Mixed-motive boycotts, in effect, fall halfway between commercial and political speech. Attempts to adjudge the validity of First Amendment claims in such boycotts on the basis of an appraisal of the primacy of one motive over the other is not only pointless, but also inconsistent with established First Amendment jurisprudence when combinations of political and commercial speech are at issue. In deciding whether a boycott that combines protected and unprotected activity is persuasive or coercive, and thus whether or not it is entitled to First Amendment protection, a court should examine the expressive content and political context of the conduct rather than the motivation of the speaker.<sup>190</sup>

### B. Why a "New" Approach?

The Supreme Court's approach to resolving the question of the legality of concerted commercial activity undertaken for political ends has been essentially *inconsistent*. Since its decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*,<sup>191</sup> the Court has revisited the question of the validity of such conduct four times.<sup>192</sup> In each decision, it resolved the issue via a different route. In each case, it avoided a thorough analysis of the combined political and commercial speech inherent in the conduct.

In *Noerr* the Court, through its construction of the Sherman Act, avoided addressing head-on the clash between First Amendment values and antitrust policy. Observing that the legislative history of the Sherman Act contained no suggestion of an intent by Congress to regulate concerted political activity, the *Noerr* Court determined that a more expansive construction of

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188.

But even assuming ... that [the speech at issue] in the abstract is indeed merely "commercial," we do not believe that the speech retains its commercial character when it is *inextricably intertwined with* otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply ... must be the nature of the speech taken as a whole ....

*Riley*, 487 U.S. at 796 (emphasis added). See also *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980). In *Schaumburg*, the Court invalidated a local ordinance requiring charitable solicitors to use for charitable purposes (defined to exclude administrative expenses and costs), 75% of the funds solicited. *Id.* at 622. The Court held that charitable solicitations "involve a variety of speech interests ... that are within the protection of the First Amendment" and therefore such solicitations have not been treated as "purely commercial speech." *Id.* at 632.

189. See, e.g., *Riley*, 487 U.S. at 795. Cf. *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

190. See *Superior Court Trial Lawyers Ass'n v. FTC*, 856 F.2d 226, 254 (D.C. Cir. 1988) (Silberman, J., concurring).

191. 365 U.S. 127 (1961).

192. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

the Act would infringe upon the First Amendment right to petition.<sup>193</sup> The Court considered determination of the legislative intent of the Sherman Act to be the threshold question in assessing the legality of the activity. It avoided an analysis of the conduct under the First Amendment as a combination of political and commercial speech.

Four years later, when the Court decided *United Mine Workers v. Pennington*,<sup>194</sup> it applied the reasoning of *Noerr*. It concluded that regardless of any anticompetitive purpose underlying the agreement between the employers and the union, the conduct was shielded from antitrust illegality because it was an effort to influence public officials and the Sherman Act was not intended to reach such conduct.<sup>195</sup> Once again, the Court averted the need for a First Amendment analysis.

The Court's interpretation of the statute in such a way as to circumvent the First Amendment issues implicated by the conduct was consistent with a longstanding rule of statutory construction.<sup>196</sup> Nevertheless, the Court's determination of the legality of the conduct in *Noerr* and *United Mine Workers*, resting as it did on a statutory construction of the Sherman Act, was an analytic red herring. The decision ultimately obfuscated the genuine issue in the cases and offered little guidance to future courts attempting to resolve the substantive conflict between First Amendment and antitrust jurisprudence in cases in which the conduct at issue involves both political and economic activity.

Almost twenty years later in *International Longshoremen's Ass'n v. Allied International, Inc.*,<sup>197</sup> the Court considered the boycott by an American longshoremen's union of goods and cargoes from the Soviet Union in protest of the Soviet invasion of Afghanistan. While the Court acknowledged the purely political motivation of the participants, it held the conduct to be an illegal secondary boycott under the Labor Management Relations Act<sup>198</sup> and chose not to consider *at all* the potential infringement of the boycotters' First Amendment rights, yet again eschewing a First Amendment analysis.<sup>199</sup>

Following on the heels of *International Longshoremen*, the Court decided the *Claiborne Hardware* case. In *Claiborne*, the Court found the peaceful activities of the boycott of white merchants by the black citizens of

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193. 365 U.S. at 137-38.

194. 381 U.S. 657 (1965).

195. *Id.* at 669-70.

196. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979)). See also *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The underlying presumption reflected in this rule is that Congress, like the courts, is bound to uphold the Constitution and would not lightly infringe constitutional rights; therefore, courts ought not needlessly confront constitutional issues and should employ every reasonable construction to save a statute from unconstitutionality. See generally *Grenada Supervisors v. Brogden*, 112 U.S. 261 (1884).

197. 456 U.S. 212 (1982).

198. 29 U.S.C. § 158(b)(4) (1988).

199. *International Longshoremen*, 456 U.S. at 222-26.



Port Gibson, Mississippi entitled to First Amendment protection.<sup>200</sup> Using the First Amendment protection afforded the peaceful aspects of the boycott as a backdrop for its examination of the illegal violent activities, the Court extended an aura of constitutionality to the overall boycott.<sup>201</sup> The Court categorized the *Claiborne Hardware* boycott as political rather than economic and thus not subject to governmental regulation.<sup>202</sup> Having pronounced the boycott political, the Court then merely applied the *Noerr* doctrine, likening the *Claiborne* boycott to the direct political petitioning at issue in *Noerr*. It made no effort to balance the competing First Amendment and economic interests extant in the boycott.

Finally, in *SCTLA* the Court was once again faced with deciding the legality of a boycott that operated on both a political and economic level. Here, it declared the boycott economic on the basis of what it perceived to be the primary motive of the boycotters, the desire to gain economic advantage for themselves.<sup>203</sup> It concluded that the boycotters' purpose was alone sufficient to render the boycott nonexpressive, and made no effort to balance the competing political and commercial speech elements of the conduct.<sup>204</sup>

When faced with the task of deciding a case of concerted commercial activity undertaken for political ends, the Court has employed a variety of devices. These devices have permitted it to resolve the particular case, yet avoid a definitive First Amendment analysis of the combined speech and non-speech aspects of the conduct. It has failed to strike a balance between First

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200.

The boycott ... took many forms .... [It] was launched at a meeting ... of the NAACP .... Its acknowledged purpose was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice. The boycott was supported by speeches and nonviolent picketing. Participants ... encouraged others to join. ... Each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments.

*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982). In considering the significance of *Claiborne Hardware* in First Amendment jurisprudence, it should be noted that the white merchants never argued at any level of the case that a nonviolent organized political protest boycott could create tort or antitrust liability for its organizers. As a result, the *Claiborne Hardware* decision was concerned primarily with the sufficiency of the evidence that tied the boycott organizers to the unquestionably illegal incidents of violence that occurred tangentially with the boycott. See Covington, *supra* note 147, at 403.

201. *Claiborne Hardware*, 458 U.S. at 907-10 (the Court finding the lower court's holding to have been inadequately supported by the evidence). See also Covington, *supra* note 147, at 403.

202.

[T]he boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable'. ... Through exercise of these First Amendment rights, [the *Claiborne Hardware* boycotters] sought to bring about political, social, and economic change. Through speech, assembly, and petition—rather than through riot or revolution—[the boycotters] sought to change a social order that had consistently treated them as second-class citizens.

*Claiborne Hardware*, 458 U.S. at 911-12 (citations omitted). See also Covington, *supra* note 147, at 403 ("[The Court] determined, by labeling rather than analyzing, that the boycott was political, rather than economic, activity and thus not readily subject to governmental regulation.").

203. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 427 (1990).

204. *Id.* at 428-31.

Amendment values and competition policy that will bring mixed-motive boycott cases in line with the tenets of First Amendment jurisprudence.

## V. CONCLUSION

The underlying principles of the *per se* rule in antitrust law are in direct opposition to established First Amendment doctrine in the case of mixed-motive boycotts. The Court's decision in *FTC v. Superior Court Trial Lawyers Association* ignored this conflict and expanded *per se* antitrust doctrine to group boycotts that succeed by persuasion rather than coercion. In so doing, the Court implied that determinations as to the validity of claims of First Amendment protection for collective political action depend less upon the content and context of the action than upon the presence or absence of self-interest on the part of the actors. Evaluating the legitimacy of First Amendment claims for collective action on the basis of an assessment of the motives of the claimants effectively limits an irreplaceable means of communication "essential to the poorly financed causes of little people."<sup>205</sup> The negative implications of this decision are significant and far reaching.

The collective generation of political pressure is the very essence of democratic politics.<sup>206</sup> Just as contributions to political campaigns and campaign expenditures are aspects of the right of individuals to pool their financial resources to effectively advocate their political goals,<sup>207</sup> individuals who combine their efforts in a group boycott for political purposes associate to advocate common goals. To consider such boycotts as illegal under the Sherman Act merely because the boycott may economically benefit its participants is to restrict the ability of such persons to pool together in order to disseminate their message. Such an interpretation of the antitrust laws clearly implicates First Amendment rights of free expression and association.<sup>208</sup>

The Supreme Court's decision in *FTC v. Superior Court Trial Lawyers Association* is irreconcilable with First Amendment doctrine and values. It muddles the already confusing jurisprudence pertaining to protest boycotts. Its

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205. *Martin v. Struthers*, 319 U.S. 141, 146 (1943) (holding invalid as an unconstitutional invasion of freedom of speech and press an ordinance banning door-to-door solicitation and distribution of religious literature). See also *SCTLA*, 493 U.S. at 450 (Brennan, J., concurring in part, dissenting in part).

206. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981). In *Citizens Against Rent Control*, a municipal ordinance placing a \$250 ceiling on contributions to committees formed to support or oppose ballot measures was held violative of First Amendment rights of association and speech. "[The value of collective action] is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Id.* at 294.

207. "[T]he use of [corporate] funds to support a political candidate is 'speech'; independent campaign expenditures constitute 'political expression at the core of our electoral process and of the First Amendment freedoms.'" *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990) (quoting *Buckley v. Valeo*, 424 U.S. 1, 39 (1976)) (federal statute limiting to \$1000 political contributions by individuals or groups to any single candidate for federal elective office held to violate First Amendment speech and association rights and Fifth Amendment equal protections rights). In *Austin*, the Supreme Court upheld a state statute prohibiting corporations from using corporate treasury funds for independent expenditures in support of or in opposition to candidates in elections for state office.

208. See Meisel, *supra* note 129, at 1339. See also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) ("The established elements of speech, assembly, association and petition, 'though not identical, are inseparable.'").

approach offers little direction to courts dealing with similar cases in the future and should be abandoned in favor of a new strategy.