

## ANTITRUST CENSORSHIP OF ECONOMIC PROTEST

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### ABSTRACT

*Antitrust law accepts the competitive marketplace, its operation, and its outcomes as an ideal. Society itself need not and does not. Although antitrust is not in the business of evaluating, for example, the “fairness” of prices, society can, and frequently does, properly concern itself with these issues. When dissatisfaction results, it may manifest itself in an expressive boycott: a form of social campaign wherein purchasers express their dissatisfaction by collectively refusing to buy. Antitrust should neither participate in nor censor such normative discourse. In this Article, I explain how antitrust law impedes this speech, argue why it should not, and provide a*

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*framework that accommodates both First Amendment and antitrust values.*

*The expressive boycotts this Article addresses are characterized by speech that is political yet also economically self-interested. The boycotts discussed involve scientists protesting research tool purveyors, doctors protesting pharmaceutical companies, and academics and librarians protesting for-profit publishers. The legal regimes that govern such undertakings, First Amendment and antitrust law, have proven inept in addressing this phenomenon, which lies at their intersection. I attribute their shortcomings to a combination of the First Amendment's excessive reliance upon categorization and antitrust's unduly narrow reliance on economic efficiency. I then craft a recommendation for handling these expressive boycotts that will help ensure that speech about the market can be as free as the market itself.*

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## INTRODUCTION

Antitrust law accepts the competitive marketplace, its operation, and its outcomes as the ideal. Society itself need not and does not. So, although antitrust is not in the business of evaluating the “fairness” of prices, for example, society can, and frequently does, properly concern itself with these issues. When dissatisfaction results, it may manifest itself in an expressive boycott, which is a form of social campaign wherein purchasers express their dissatisfaction by collectively refusing to buy. Antitrust should neither participate in nor censor such normative discourse. In this Article, I explain how antitrust law may impede this speech, argue why it should not, and provide a framework that accommodates both First Amendment and antitrust values. I examine this value conflict with particular emphasis on situations that involve intellectual property.

The expressive boycotts that this Article addresses are characterized by speech that is political yet also economically self-interested. What law governs such undertakings? Unfortunately, both the First Amendment and antitrust legal regimes have proven inept at addressing the phenomenon of expressive boycotts, which lies at their intersection. This shortcoming reflects, in the first instance, the difficulty of placing those expressive boycotts into the existing legal categories of speech. Prevailing law, for better or worse, relies heavily on categorization to determine the degree of First Amendment protection afforded to particular speech. Sometimes, however, the law may mischaracterize speech, forcing it into a box that does not

quite fit. Without sufficient First Amendment protection, expressive speech is rendered unduly vulnerable to the application of the antitrust laws. Antitrust law, with its primary emphasis on economic efficiency, accords no value to the speech at issue—in much the same manner that it largely disregards any noneconomic consideration.

Perhaps nothing more poignantly illustrates the peculiar jurisprudential straits in which society finds itself than revisiting a celebrated series of boycotts in American history armed with contemporary case law. The colonial boycotts of British merchants are often held out as examples of the noble and powerful role of boycotts. John Hancock, for example, played a key role in organizing those boycotts.<sup>1</sup> Ironically, however, Hancock's celebrated rabble-rousing conduct might have been chilled under modern antitrust law. Hancock was a wealthy merchant whose business was decimated by the import taxes imposed by the British government<sup>2</sup> as well as the lack of taxes imposed on the East India Company, which could then easily undersell merchants such as Hancock.<sup>3</sup> Whatever his more noble aspirations, Hancock had a profound economic interest in the boycotts.<sup>4</sup> Under current antitrust law, he and other merchant boycotters might have been condemned. Hancock's organization and participation in the boycott would not constitute political speech owing to the presence of economic self-interest on his part and, therefore, would not warrant First Amendment protection. Colonial history aside, one need look no further than to contemporary events to discover numerous instances of collective action that are legally dubious from an antitrust perspective yet brimming with expressive value.

In 1990, a *New York Times* article declared boycotts to be “[a] [g]rowth [i]ndustry.”<sup>5</sup> Ten years later, the newspaper observed that

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1. See HARLOW GILES UNGER, JOHN HANCOCK: MERCHANT KING AND AMERICAN PATRIOT 97–100, 106–07, 112–13, 131–32 (2000) (analyzing the roles of both politics and economic self-interest in Hancock's boycott activities).

2. *Id.* at 83.

3. *Id.* at 164.

4. *Id.* at 99; see also CLAUDE H. VAN TYNE, THE CAUSES OF THE WAR OF INDEPENDENCE 377 (1922) (“Since the public would actually profit as far as the cost of its tea was concerned, the injured merchants were careful not to confine their agitation too closely to the true issue of their own prospective losses.”).

5. Anthony Ramirez, *From Coffee to Tobacco, Boycotts Are a Growth Industry*, N.Y. TIMES, June 3, 1990, at E2.

more groups are pursuing boycotts than at any time since the 1970s.<sup>6</sup> “While people are participating less in the political process, as consumers they see that one way they can exercise power is by where they spend their money and where they don’t.”<sup>7</sup> The increase in these boycotts has been attributed to many, sometimes interrelated, factors ranging from “greater public attention to corporate social responsibility . . . and the increased vulnerability of brands and corporate reputations”<sup>8</sup> to the power of the Internet.<sup>9</sup> And it would not be surprising if, in this current climate of heightened skepticism regarding the functioning of the markets, backlash via boycotts further increases.

Within the broader jurisprudential concern of reconciling First Amendment and antitrust considerations in the context of expressive yet economically rewarding boycotts is the complicated issue of how to accomplish this task in light of the increasing centrality of intellectual property in individuals’ professional lives and society’s welfare as a whole.

Consider the following public plea: “[The publisher] is breaking an unwritten contract with the scientific community: being a publisher of our research carries the responsibility to make our contributions publicly available at reasonable rates. As an academic community, it is time that we reassert our values.”<sup>10</sup> So read the public letter of two professors who called for several collective actions including a boycott of the publisher in question.<sup>11</sup> Similarly, scientific researchers who use mice in studying illness were angered when DuPont, which had an exclusive patent license for a genetically engineered mouse (Oncomouse), charged what they deemed an excessive price for the mouse and also imposed unusually restrictive conditions for sharing among researchers. Nobel Prize-winning scientist Harold Varmus

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6. Steven Greenhouse, *A Weapon for Consumers: The Boycott Returns*, N.Y. TIMES, Mar. 26, 2000, § 4 (Week in Review), at 4.

7. *Id.*

8. Jill Gabrielle Klein, N. Craig Smith & Andrew John, *Why We Boycott: Consumer Motivations for Boycott Participation and Marketer Responses* 1 (Ctr. for Mktg., London Bus. Sch., Working Paper No. 03-702, 2003), available at <http://www.london.edu/facultyandresearch/research/docs/03-702.pdf>.

9. Behrang Rezabakhsh et al., *Consumer Power: A Comparison of the Old Economy and the Internet Economy*, 29 J. CONSUMER POL’Y 3, 15 (2006).

10. Open Letter from Peter Walter & Keith Yamamoto, Mission Bay Governance Comm., Univ. of Cal., S.F. (undated), available at [http://stlq.info/2003/10/call\\_for\\_boycott\\_of\\_cell\\_press.html](http://stlq.info/2003/10/call_for_boycott_of_cell_press.html).

11. For a discussion of the academic publishing controversy, see *infra* Part IV.C.

denounced these conditions as “abhorrent,” and he and fellow researchers “went on the warpath.”<sup>12</sup>

The view of the participants in these and many other boycott efforts is that they were merely seeking to enforce an “invisible handshake” whereby community norms of fairness and other shared values—not merely those of the marketplace—determine the terms of trade.<sup>13</sup> At the core of these boycotts was the desire to debate the market outcome as well as to potentially transform it. The source of that change could be persuasion on the merits or concern with public image, or it could result from economic coercion based on the boycotters’ collective market power. Are these boycotts exercises of free speech or examples of antitrust violations, and how should the law address them?

Albert Hirschman’s famous characterization of the options available to disenchanted market participants constitutes a useful point of reference for any examination of boycotts. Hirschman posited that such purchasers had three options: exit (“go over to the competition”), voice (“‘kick up a fuss’ and thereby force improve[ments]”),<sup>14</sup> or boycott (a hybrid of exit and voice).<sup>15</sup> Voice is interpreted as “any attempt at all to change, rather than to escape from, an objectionable state of affairs,” and it can take the form of “individual or collective petition” or “various types of actions and protests, including those that are meant to mobilize public opinion.”<sup>16</sup> Threatened and consummated boycotts lie on “the border line between voice and exit.”<sup>17</sup> In those instances, either the threat of exit or the promise of reentry are “instrument[s] of voice,” respectively.<sup>18</sup> Exit and voice are “market and nonmarket forces, that is, economic and political mechanisms.”<sup>19</sup> The academic publishing and Oncomouse examples illustrate concretely how boycotts combine these two approaches. Given the particular significance of the speech

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12. Eliot Marshall, *A Deluge of Patents Creates Legal Hassles for Research*, 288 SCIENCE 255, 256 (2000). For a discussion of the Oncomouse controversy, see *infra* Part IV.A.

13. See Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 736 (1986) (finding that transactors may avoid doing business with firms whose behavior is perceived as unfair).

14. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 30 (1970).

15. *Id.* at 86.

16. *Id.* at 30.

17. *Id.* at 86.

18. *Id.*

19. *Id.* at 19.

(voice) interest in fomenting public discourse, this Article calls these *expressive boycotts*.<sup>20</sup>

Part I of this Article briefly discusses the key First Amendment and antitrust concepts that provide the basic framework for analysis. Part II then examines four key cases involving boycotts characterized by a wide range of speech interests and potential antitrust issues. These cases underscore both the centrality of categorization within First Amendment law and the failure of the existing categories to meaningfully accommodate the speech interest in the expressive boycotts at issue. As such, the law inadequately protects the speech interests associated with expressive boycotts when those interests are inextricably intertwined with economic coercion—the concern of antitrust law. Part III argues that expressive boycotts constitute a unique form of speech that merits First Amendment protection, and Part IV provides four examples of intellectual property boycotts. Part V offers recommendations for reviewing expressive boycotts that will help ensure that speech about the market can be as free as the market itself.

## I. LEGAL BASICS

Expressive boycotts pose unique challenges because they can be vehicles for both the exchange of ideas and economic coercion. Not surprisingly, then, the First Amendment, the Sherman Antitrust Act, and a slew of judicial rulings provide the complex backdrop against which such boycotts must be considered. Part I briefly introduces the basic contours of these two legal regimes. Antitrust analysis entails frequent recourse to making tradeoffs regarding economic efficiency. Moreover, such tradeoffs lie at the core of antitrust’s primary mode of analysis—the rule of reason. First Amendment law, by contrast, eschews tradeoffs per se in favor of an intermittently acknowledged, and often contested, “balancing” process. Parts II and III demonstrate that what is most important is the extent to which each regime does or does not account for the values of the other and the viability of legal outcomes that do not entail one regime entirely trumping the other regime. Unfortunately, despite the potential for flexibility inherent in both areas of law, neither legal regime exhibits flexibility when expressive boycotts are at issue.

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20. See, e.g., *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 437 (1990) (Brennan, J., concurring in part and dissenting in part) (using the same terminology).

### A. *First Amendment*

The First Amendment commands that “Congress shall make no law . . . abridging the freedom of speech.”<sup>21</sup> Despite its uncompromising language, as Justice Oliver Wendell Holmes has stated, the First Amendment, “obviously was not[] intended to give immunity for every possible use of language.”<sup>22</sup> If society does not protect all speech absolutely, the questions become what speech is protected and what is the nature of that protection? The purpose of this Section is not to present the complexities and inconsistencies of First Amendment law,<sup>23</sup> but rather to introduce the most relevant First Amendment issues given the expressive boycotts at issue. This Section briefly delineates three general modes of First Amendment analysis and then considers two key factors within that overarching framework: the content of the speech at issue and whether conduct is also involved.

1. *Frameworks.* Professor Mark Tushnet helpfully delineates three dominant methods of First Amendment analysis used by the courts.<sup>24</sup> The “inside-outside” mode of analysis distinguishes speech that is “inside,” over which restrictions are “presumptively unconstitutional,” from speech that is “outside,” over whose restrictions receive “no special First Amendment scrutiny.”<sup>25</sup> A second analytical mode is the “‘onion-layer’ [approach], in which categories of speech receive different degrees of protection[, or] ‘standards of scrutiny.’”<sup>26</sup> The primary divergence from the inside-outside mode is the introduction of an additional, intermediate category “within the ambit of the first amendment” but “ascrib[ed] less-than-full protection.”<sup>27</sup> A third mode, through a different form of intermediate scrutiny, addresses expressive conduct and evaluates “content-neutral restrictions” by directly balancing “the impairment

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21. U.S. CONST. amend. I.

22. *Frohwerk v. United States*, 249 U.S. 204, 206 (1919).

23. For an overview of the First Amendment law’s complexities, see 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 2:64 (2009).

24. Mark Tushnet, *Heller and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 422–23 (2009).

25. *Id.* at 422.

26. *Id.* at 423.

27. Keith Werhan, *The O’Brien of Free Speech Methodology*, 19 ARIZ. ST. L.J. 635, 661 n.157, 662 n.159 (1987).



of expression against the degree to which the regulation accomplishes the government's permissible purposes."<sup>28</sup>

2. *Content.* In both the first and second modes of First Amendment analysis, the content of the particular speech at issue directly informs how it is categorized and, as a consequence, the extent of its protection. The second mode, which entails different standards of scrutiny, dominates First Amendment law today.<sup>29</sup> The lowest level of scrutiny takes the form of a "minimal rationality standard" and will typically allow the restraint of speech.<sup>30</sup> Obscenity is a category of speech receiving this meager scrutiny—hence it can be prohibited.<sup>31</sup> Intermediate scrutiny requires that the restriction on speech serve a "substantial [governmental] interest" and be "designed carefully to achieve [that end]."<sup>32</sup> This level of scrutiny applies to commercial speech which "[t]he Constitution . . . accords a lesser protection . . . than to other constitutionally guaranteed expression."<sup>33</sup> The strongest level of protection, heightened scrutiny, requires the restriction on speech to protect a "compelling state interest" and employ means "narrowly drawn to achieve that end."<sup>34</sup> Political speech traditionally receives this highest level of First Amendment protection. The Supreme Court has noted that there is "practically universal agreement that a major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs."<sup>35</sup>

Political speech is the paradigmatic example of the content that the First Amendment strives to protect. Nonetheless, that category of speech is not coterminous with the bounds of speech to which heightened scrutiny applies. The Supreme Court has expressly held that "[n]othing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional

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28. Tushnet, *supra* note 24, at 423.

29. See 1 SMOLLA, *supra* note 23, § 2:63 (describing the differing levels of scrutiny applied by the Supreme Court).

30. *Id.* § 3:2.

31. *Id.* § 2:69 (noting that obscene speech "receives *no* First Amendment protection").

32. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

33. *Id.* at 562–63 (citation omitted). Commercial speech is "expression related solely to the economic interests of the speaker and its audience" and typically applies to speech that "propos[es] a commercial transaction." *Id.* at 561–62.

34. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (quoting Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)).

35. Mills v. Alabama, 384 U.S. 214, 218 (1966).

inquiry.”<sup>36</sup> Moreover, the Supreme Court, in numerous contexts besides antitrust, has held unequivocally that the First Amendment protects speech concerning any number of nonpolitical issues. “[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political. . . . ‘And the rights of free speech and a free press are not confined to any field of human interest.’”<sup>37</sup> More specifically, the Court has held that a nonexhaustive list of topics for which expression would be entitled to “full First Amendment protection” includes “philosophical, social, artistic, economic, literary, or ethical matters.”<sup>38</sup> Protected speech need not be political either in content or in context (namely, government petitioning).

The Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable and there is no sound basis for granting greater constitutional protection to statements made in a petition . . . than other First Amendment expressions.<sup>39</sup>

3. *Conduct.* Speech can be analyzed not only by its content, but also by its form. When speech mixes with conduct, it forms a hybrid termed “expressive conduct.”<sup>40</sup> “What is ‘speech’ in the constitutional sense?”<sup>41</sup> In exploring this fundamental issue, Frederick Schauer has noted that what the Constitution actually protects is in some regards broader than the “ordinary language meaning of the word ‘speech.’”<sup>42</sup> Conduct undertaken for expressive purposes, such as flag burning, can constitute speech warranting First Amendment protection.<sup>43</sup> The conduct that this Article addresses, boycotting, is frequently a

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36. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977).

37. *United Mine Workers, Dist. 12 v. Ill. State Bar Ass’n*, 389 U.S. 217, 223 (1967) (citation omitted).

38. *Abood*, 431 U.S. at 231.

39. *McDonald v. Smith*, 472 U.S. 479, 485 (1985) (citations omitted).

40. 1 SMOLLA, *supra* note 23, § 11:7.

41. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 279 (1981).

42. *Id.* at 273 (citing *Towne v. Eisner*, 245 U.S. 418, 425 (1918)).

43. 1 SMOLLA, *supra* note 23, § 11:1 (The Supreme Court has “long recognized that First Amendment protection for speech extends to more than the use of language”); *id.* §§ 11:9, 11:18 (discussing the “quintessential symbolic speech problem” of flag desecration and observing that “[l]aws banning the desecration of flags . . . will normally fail [to pass constitutional muster]”).

multifaceted undertaking that entails agreement not to purchase a particular good.

*United States v. O'Brien*<sup>44</sup> is the seminal case regarding content-neutral restrictions on expressive conduct. *O'Brien* directs courts to evaluate whether the restriction at issue “furthers an important or substantial government interest; if the government 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.”<sup>45</sup> *O'Brien* balancing permits legitimate conduct regulations even when that conduct is intertwined with expression. Moreover, “so-called ‘*O'Brien* balancing’” contributed to the development of the aforementioned intermediate scrutiny standard applicable to commercial speech.<sup>46</sup> Within First Amendment law, and constitutional law more generally, a longstanding debate exists regarding the relationship and relative merits of balancing and categorical analysis.<sup>47</sup> Whether for better or for worse, *O'Brien*’s approach permits the Court to provide “some, but not full protection to a category of speech over which the Court feels ambivalent.”<sup>48</sup> For the expressive boycotts at issue in this Article, the source of judicial malaise is clearly the desire to protect antitrust values.

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Part II explores what First Amendment protections, if any, have been accorded to economic boycotts undertaken for political purposes as well as potential pecuniary gain. As this Article demonstrates, notwithstanding the complexity of First Amendment law generally, within the antitrust context judicial rulings regarding expressive boycotts are relatively simple and overly simplistic.

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44. *United States v. O'Brien*, 391 U.S. 367 (1968).

45. *Id.* at 377.

46. Werhan, *supra* note 27, at 637.

47. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 294–95 (1992) (“Attitudes about which is better—categorization or balancing—have fluctuated over time.... oscillat[ing] in an endless dialectic....”).

48. Werhan, *supra* note 27, at 663.

## B. Antitrust

Although “not constitutional in origin,” the significance of antitrust law should not be understated.<sup>49</sup> The Supreme Court has characterized antitrust laws as “the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”<sup>50</sup> This Section briefly delineates how antitrust law evaluates boycotts—collective actions undertaken by market participants to influence the decisions (particularly those regarding pricing) of other market participants.<sup>51</sup> Section 1 of the Sherman Act supplies the relevant antitrust stricture and prohibits any “contract, combination . . . or conspiracy, in restraint of trade.”<sup>52</sup> The primary judicial gloss on that language has been to read into it the requirement that the prohibited restraints be “unreasonable.”<sup>53</sup> This Article treats a conventional Sherman Act Section 1 antitrust case as one in which no credible speech argument can be made. Consider, for example, the proverbial smoke-filled room in which competitors fix prices or divide markets. For instant purposes, the key features of Section 1 are the conspiracy requirement, the role of per se versus rule of reason analysis, and the offense of price fixing.

1. *Conspiracy.* Section 1 addresses unreasonable restraints resulting from concerted, as opposed to unilateral, acts. As such, “the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the [conspirators] ‘had a conscious

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49. See James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L.J. 65, 120 (1985) (“Competition policy, while not constitutional in origin, has a bearing that is only slightly less eminent.”). Hurwitz attributes competition policy’s “eminence . . . [to] the fact that one of the most critical foundations of a strong democracy is a strong economy . . . and competition has been designated as the protecting and guiding force for the economy.” *Id.*

50. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (referring to the Sherman Antitrust Act).

51. See, e.g., *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 536 (1978) (“In antitrust law, a boycott is a ‘concerted refusal to deal’ with a disfavored purchaser or seller.” (quoting *Barry v. St. Paul Fire & Marine Ins. Co.*, 555 F.2d 3, 7 (1st Cir. 1977))). For an analysis of the different types of boycotts and concerted refusals to deal more generally, see LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 295–315 (2d ed. 2006).

52. 15 U.S.C. § 1 (2006).

53. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (“Although the Sherman Act, by its terms, prohibits every agreement ‘in restraint of trade,’ this Court has long recognized that Congress intended to outlaw only unreasonable restraints.”).

commitment to a common scheme.”<sup>54</sup> Stated alternatively, “[c]ircumstances must reveal ‘a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.’”<sup>55</sup>

In conventional antitrust cases, the conspirators strive to conceal their joint conduct rather than “seek notoriety” such as through press coverage “both because they seek to escape detection and because they have no wider audience beyond the participants and the target.”<sup>56</sup> By contrast, the boycotts at issue in this Article are expressive and, therefore, often typified by very public, jointly undertaken activities including petitions and statements to the press. As such, whereas establishing a conspiracy often constitutes an extremely challenging hurdle to those bringing conventional antitrust actions, this requirement is likely to be deemed self-evidently satisfied for expressive boycotts.<sup>57</sup>

2. *Unreasonable Restraints.* Assuming *arguendo* the existence of a conspiracy, the next step in the antitrust analysis is to discern the type of allegedly anticompetitive restraint at issue. One consequence that often flows from this determination is identifying whether *per se* (automatic condemnation for inherently suspect conduct) or rule of reason (balancing of pro- and anticompetitive effects) analysis is warranted. The mere designation of a boycott, also termed a concerted refusal to deal, typically provides an insufficient basis for determining the proper legal analysis.<sup>58</sup> Although “there is often no bright line separating *per se* from [r]ule of [r]eason analysis,”<sup>59</sup> the determination of which legal standard applies often has profound

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54. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)).

55. *Id.* (quoting *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)); *see also Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954) (“Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but ‘conscious parallelism’ has not yet read conspiracy out of the Sherman Act entirely.”).

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

57. For a discussion that questions the wisdom of these applications, *see infra* Part V.A.2.

58. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 542–43 (1978) (noting the “marked lack of uniformity in defining” the term “boycott” for purposes of the Sherman Act).

59. *NCAA v. Bd. of Regents*, 468 U.S. 85, 104 n.26 (1984) (“*Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct.”).

consequences on the ultimate outcome, particularly when, as in the expressive boycotts at issue in this Article, free speech concerns are implicated.

3. *Per Se*. Conduct subject to per se condemnation is that deemed both inherently pernicious in terms of its anticompetitive effects and lacking in redeeming procompetitive effects.<sup>60</sup> As such, it is “conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use.”<sup>61</sup> A boycott would be deemed per se illegal if, for example, it is among horizontal competitors meant to disadvantage a competitor<sup>62</sup> or it furthers a price-fixing scheme.<sup>63</sup> Price fixing is considered so harmful to society that it is one of the few antitrust offenses subject to criminal as well as civil sanctions. It is important to understand the rationale for this treatment, the breadth of conduct that constitutes price fixing, and the unavailability of certain defenses.

Pricing is often referred to as “the central nervous system of the economy.”<sup>64</sup> Harm to that vital system, therefore, is not narrowly confined to conspiracies geared to establish a specific price in lieu of the price determined by the market. Any agreements undertaken to interfere with the marketplace as a pricing mechanism, whether they be for “raising, depressing, fixing, pegging, or stabilizing” prices, are per se illegal.<sup>65</sup> Because price fixing is per se illegal, conspirators’ actual or likely ability to affect prices is irrelevant. It is no defense to argue that a conspiracy enjoys no market power.<sup>66</sup> Consequently, a boycott undertaken in response to price levels, but lacking market power, would be condemned under the antitrust laws. Another nondefense is the alleged reasonableness or fairness of the pricing

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60. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1939) (finding that activities are unreasonable “because of their pernicious effect on competition and lack of any redeeming virtue”).

61. *Id.*

62. *E. States Retail Lumber Dealers’ Ass’n v. United States*, 234 U.S. 600 (1914).

63. *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 434 (1990) (noting the threat posed to the free market).

64. *See, e.g., United States v. Socony-Vacuum Oil*, 310 U.S. 150, 224 n.59 (1940) (discussing the threat of price-fixing agreements).

65. *Id.* at 223.

66. *See id.* at 224 n.59 (indicating that market power is not necessary for conviction).

advocated or effectuated by the boycotters.<sup>67</sup> The principle underlying the rejection of such defenses is clear: “The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.”<sup>68</sup>

4. *Rule of Reason.* Despite the apparent frequency of arguably per se illegal acts (price fixing) among expressive boycotters, most types of conduct are analyzed under the rule of reason. This balancing test requires courts to weigh the pro- and anticompetitive effects of the restraint at issue before determining whether it is “unreasonable.” Whether a restriction is reasonable or not depends upon how it affects consumer welfare. This inquiry into consumer welfare is the lodestar of antitrust analysis; it is narrowly defined in economic terms and encompasses the price, quantity, and quality of goods offered.<sup>69</sup> The underlying substantive question concerns what pro- versus anticompetitive effects are legally cognizable under the antitrust laws. The inquiry into anticompetitive effects includes both actual and inferred harms. There is little or no recognition of noneconomic benefits.

Depending on the facts of the case, including the duration of the alleged misconduct, actual competitive effects such as a change in price in response to the conduct at issue may or may not be discernable. Consequently, society seeks to identify not only those arrangements with demonstrated “detrimental effects” but also those with “the potential for genuine adverse effects on competition.”<sup>70</sup> When actual effects are not present or cannot be discerned, courts use the market share of the alleged bad actor as a proxy for harm. Either a buyer or seller can exercise market power. With regard to sellers, the point of view from which it is usually defined, “market power is

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67. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (“It has long been settled that an agreement to fix prices is unlawful per se. It is no excuse that the prices fixed are themselves reasonable.”).

68. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978).

69. Christopher R. Leslie, *Antitrust and Patent Law as Component Parts of Innovation Policy*, 34 J. CORP. L. 1259, 1264 (2009); see also Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 4 (1982) (“[T]he overriding economic goal of antitrust laws is to maximize consumer welfare through the efficient allocation of resources.”).

70. *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 460–61 (1986).

the seller's ability to raise and sustain a price increase without losing so many sales that it must rescind the increase."<sup>71</sup> With regard to buyers, therefore, it is a buyer's ability to force a sustained price decrease. Although courts' "efforts to define market power is still a work in progress," the key feature is "power-over-price."<sup>72</sup> Market power, within an antitrust market (defined in terms of both geography and product), is a reflection of market share. The market share threshold above which market power, and therefore, competitive harm, is found varies depending on numerous factors.<sup>73</sup>

5. *Noneconomic and Other Nonconsiderations.* The law that this Article has summarized, with its emphasis on economic analysis, illustrates the trend over the last few decades whereby economic efficiency has come to thoroughly dominate antitrust analysis<sup>74</sup> while noneconomic considerations have fallen into disregard and, at times, disrepute. This Section briefly explains those dynamics and lays the groundwork for understanding their implications for the expressive boycotts at issue in this Article.

Noneconomic considerations could, in theory, encompass all factors not directly implicating economic efficiency. In practice, however, "noneconomic" typically refers to concerns such as the "prosperity of small businesses; . . . autonomy for independent business people; [and] political and economic deconcentration."<sup>75</sup> Professor Robert Pitofsky, among others, has criticized the increasing hostility of antitrust to such factors: "It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."<sup>76</sup> But this general trend, fueled by what is known as the Chicago School of antitrust, has become dominant and has largely

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71. SULLIVAN & GRIMES, *supra* note 51, at 26.

72. *Id.* at 29.

73. *Id.* at 30 (stating that the "tolerance for different levels of market power depend[s] on the nature of the violation" and, indirectly, upon the "feasibility of remedial action").

74. See Thomas L. Greaney, *Regulating for Efficiency in Health Care Through the Antitrust Laws*, 1995 UTAH L. REV. 465, 466-67.

75. Jean Wegman Burns, *Vertical Restraints, Efficiency, and the Real World*, 62 FORDHAM L. REV. 597, 598 n.6 (1993).

76. Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979); see also *id.* at 1058-60 (elaborating on the criticism). For an introduction to this general issue, see John J. Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political, and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977).



persisted even in a post-Chicago School environment.<sup>77</sup> This Article's immediate purpose is not to revisit the philosophical underpinnings of those schools of thought but rather to explore some of the more practical reasons that Chicago adherents have offered for rejecting noneconomic considerations and to apply those insights in contexts in which First Amendment and antitrust issues commingle.

With regard to noneconomic considerations, Judge Frank Easterbrook has remarked that:

Goals based on something other than efficiency (or its close proxy consumers' welfare) really call on judges to redistribute income . . . . Judges have no metric, and we ought not attribute to Congress a decision to grant judges a political power that lacks any semblance of "legal" criteria.<sup>78</sup>

Judge Richard Posner shares the sentiment that an economic efficiency objective enables judges to develop antitrust rules that are "reasonably objective."<sup>79</sup> He further argues that if courts were to rely on noneconomic considerations to develop antitrust law, "they would be completely at sea and might also shipwreck the economy."<sup>80</sup> It is, at a minimum, unclear that these Chicago School proponents are correct regarding either the precision introduced by economic analysis or the imprecision that would be introduced by noneconomic considerations.<sup>81</sup> It is important, however, to recognize this sentiment and how, over time, it has resulted in a legal regime that has become

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77. See William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 1 COLUM. BUS. L. REV. 1, 4-6 (2007) (explaining both the utility and the shortcomings of the Chicago School/post-Chicago School framework).

78. Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1704 (1986).

79. Richard A. Posner, *Legal Formalism, Legal Realism, and Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 211 (1987).

80. *Id.*

81. Pitofsky, *supra* note 76, at 1060 ("[A]n exclusively economic approach reflects an unrealistically optimistic view of the certainty introduced by that kind of analysis, and . . . the introduction of non-economic factors does not result in an undue interference with effective enforcement.").

increasingly inhospitable to either the recognition<sup>82</sup> or reintegration of noneconomic considerations.<sup>83</sup>

What these judges' arguments underscore is that, in addition to substantive qualms regarding the propriety of recognizing noneconomic factors, they view introducing such factors into balancing tests as also posing intractable practical challenges. Perhaps it is not surprising that, in the two contexts in which antitrust yields to constitutional imperatives (petitioning government and federalism), it does so by conferring immunity.

6. *Constitutional Considerations.* In addition to protecting free speech, the First Amendment also enshrines the right to "petition the Government for a redress of grievances."<sup>84</sup> And it is within this political context that noneconomic constitutional considerations typically trump the antitrust laws.<sup>85</sup>

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,<sup>86</sup> the Supreme Court rejected the plaintiff truckers' argument that the railroads' "publicity campaign against the truckers," which encouraged legislation beneficial to the railroads and harmful to the truckers, violated the antitrust laws.<sup>87</sup> It held expansively that, "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of the laws."<sup>88</sup> The Sherman Act regulates business activity, not political activity.<sup>89</sup> The questions of whether a law should

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82. See Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1332 n.451 (observing within the rule of reason context that "no courts . . . have explicitly invoked noneconomic rationales for their decisions").

83. See, e.g., Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 822–23 (2006) (noting that the economic framework within merger law is unaccommodating of noneconomic factors).

84. U.S. CONST. amend I.

85. The seminal case on this issue, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), arguably based antitrust immunity upon some combination of First Amendment considerations and statutory construction of the Sherman Act. Hurwitz, *supra* note 49, at 79 n.46. The Court's ruling in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), "clearly rest[ed] on first amendment principles." Hurwitz, *supra* note 49, at 79 n.46; see also Marina Lao, *Reforming the Noerr-Pennington Antitrust Immunity Doctrine*, 55 RUTGERS L. REV. 965, 1002 (2003) (observing that case law suggests *Noerr* is based on both "constitutional principles" and "statutory interpretation" and arguing that "the core of the doctrine is constitutional").

86. *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

87. *Id.* at 129, 144.

88. *Id.* at 135.

89. *Id.* at 140.

pass and how it should be enforced were the responsibility of the legislative and executive branches of government.<sup>90</sup> The United States' representative democracy largely "depends upon the ability of the people to make their wishes known to their representatives."<sup>91</sup>

*Noerr* and its progeny give "primacy to first amendment considerations" and subordinate competition policy considerations through a broad grant of immunity from antitrust claims regarding "efforts to influence legislative, executive, administrative, and adjudicatory conduct by government."<sup>92</sup> Notwithstanding the broad range of that protection, like the First Amendment upon which it is based, *Noerr* immunity is not absolute. Petitioners' invocation of governmental processes in order to generate competitive burdens rather than to "achieve the legitimate outcome of the process invoked" constitutes a "sham" and is not immunized.<sup>93</sup>

"[T]he boundary between antitrust enforcement and constitutionally protected activity" is marked by the state action doctrine as well as the *Noerr* doctrine.<sup>94</sup> State action immunity is a judicially created doctrine that reflects "the need to subordinate national competition policy, as embodied in the Sherman Act, to a state's right to assert regulatory autonomy."<sup>95</sup> In the seminal case *Parker v. Brown*, the Supreme Court observed:

In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority . . . [t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.<sup>96</sup>

State action immunity is only available when, among other things, the restraint at issue is "one clearly articulated and affirmatively

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90. *Id.* at 137.

91. *Id.*

92. Hurwitz, *supra* note 49, at 66; *see also* Lao, *supra* note 85, at 972–76 (delineating how *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), and *California Motor Transport Co. v. Trucking Unlimited* expanded *Noerr* immunity to petitioning of the executive and the courts/administrative agencies respectively.).

93. Hurwitz, *supra* note 49, at 93.

94. *Id.* at 76.

95. Hillary Greene, *Articulating Trade-Offs: The Political Economy of State Action Immunity*, 2006 UTAH L. REV. 827, 828.

96. *Parker v. Brown*, 317 U.S. 341, 351 (1943).

expressed as state policy.”<sup>97</sup> It is employed “when antitrust clearly could override state law and when the antitrust statutes do not in terms defer, but the court thinks state policy warrants greater deference than Congress has expressly granted.”<sup>98</sup> As such, Professors Lawrence Sullivan and Warren Grimes have observed how this doctrine “widen[s] the states’ power to impose economic norms.”<sup>99</sup> In particular, this antitrust exemption “conditions the relationship between state law and federal antitrust by factoring into the analysis a public interest other than competitive effect: namely the states’ interest in such non-competitive goals as its regulation seeks to attain.”<sup>100</sup>

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It is likely that antitrust’s largely binary approach of either ignoring or immunizing noneconomic factors contributed to a comparable application of First Amendment law in which the stark choice of strongly protected versus unprotected speech emerged, and a more balanced outcome—regarding speech within this boycott context—was not entertained.

## II. ANTITRUST MONOPOLIZATION OF THE FIRST AMENDMENT

When allegedly, or even indisputably, anticompetitive conduct arguably implicates speech concerns, should antitrust law alone be dispositive or should the First Amendment have a role to play? Unfortunately, when those with some economic interest undertake expressive boycotts, First Amendment values are likely forsaken in the name of antitrust law’s protection of free enterprise. This Part explains the origins of this troubling state of the law. It discusses the key cases within this context and highlights how they epitomize a categorical approach to the First Amendment and, more specifically,

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97. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum Inc.*, 445 U.S. 97, 105 (1980). The controversy currently surrounding state action immunity reflects the underlying disagreement regarding the “appropriate balance between federalism and federal [antitrust] policy.” Greene, *supra* note 95, at 827. Most critics of this doctrine seek to restrict its availability and rely, with varying degrees of candor, upon a strictly economic efficiency-based analysis instead of grappling openly with the question of what value should be accorded federalism when antitrust lies in the balance. *Id.* at 828.

98. SULLIVAN & GRIMES, *supra* note 51, at 799.

99. *Id.* at 800.

100. *Id.*

how the implementation of that approach within the antitrust context became skewed and inadequately protective of speech.

The four key cases discussed in this Part illustrate the extremely wide range of circumstances encompassed in the term boycott. The identities of the boycotters vary as do their goals and targets. When taken individually, each case involves a different combination of these basic characteristics and raises different First Amendment issues. Collectively, however, these cases underscore the centrality of categorization in First Amendment law and the potentially extreme consequences when antitrust is also involved. What emerges is a boycott continuum of sorts fully dominated, at the extremes, by either antitrust or First Amendment values, depending upon whether the speech is cast as purely economically motivated or purely political. When, however, a potential conflict between the legal demands of these two vital areas of law exists—meaning that speech with both characteristics is present—the Supreme Court has resorted to either ignoring the complex nature of the speech involved or engaging in an overly simplistic bifurcation of political and economic speech.

#### A. *Boycotts and Naked Price Fixing*

To fully understand when the First Amendment exempts possibly anticompetitive conduct from the antitrust laws, one must understand not only when no such exemption is found, but also the extreme circumstances under which no credible argument could even be made. Perhaps the most infamous of those circumstances concerns so-called “naked” price fixing, which has earned that moniker due to the absence of any redeeming procompetitive features.<sup>101</sup>

Assume that purchasers collectively refused to buy a particular good unless sellers decreased their prices. Further assume that the purchasers at issue were intermediate buyers who used the good in question as an input for a final good to be purchased by an end user or final consumer. This scenario of an upstream boycott used to facilitate price fixing captures the essence of *Mandeville Island Farms v. American Crystal Sugar Co.*<sup>102</sup> In that case, the Supreme Court condemned the conduct as per se illegal.<sup>103</sup> The precedential significance of the case stemmed from the application of per se

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101. For a discussion of per se illegality, see *supra* Part I.B.

102. *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 222–23 (1948).

103. *Id.* at 243.

condemnation to *buyer* as well as *seller* price fixing.<sup>104</sup> The Court's analysis was based on an economic analysis of consumer welfare and reflected a concern that buyer rigging of the marketplace would impact the economic situation of the sellers.<sup>105</sup> Most important for the purposes of this Article, however, is the complete absence of any discussion of speech or the First Amendment in the *Mandeville Island Farms* opinion. Speech among the conspirators was merely the mechanism by which price fixing among horizontal competitors, the cardinal sin in antitrust, was effectuated. There was no expressive component to the communication at issue and, therefore, it was implicitly categorized as nonspeech for First Amendment purposes. Full enforcement of the antitrust laws did not entail any tradeoff of First Amendment values. This rationale, implicit in *Mandeville Island Farms*, received its fullest articulation by the Supreme Court the following Term:

It is true that the [anticompetitive] agreements and course of conduct [involving price fixing] here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.<sup>106</sup>

Given the necessity of drawing some distinctions regarding speech, the question then becomes what characteristics render communication subject to First Amendment protection.

### B. *Boycotts and Government*

At the opposite end of the boycott spectrum from naked price fixing lies the case of *Missouri v. National Organization for Women, Inc. (NOW)*.<sup>107</sup> Here, full protection of the First Amendment, in the form of a Sherman Act exemption, does not come at the expense of any self-evident antitrust values. At issue was a convention boycott

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104. *Id.* at 235–36.

105. *Id.* at 240–42.

106. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (citation omitted).

107. *Missouri v. Nat'l Org. for Women, Inc. (NOW)*, 620 F.2d 1301, 1302 (8th Cir. 1980).

organized by NOW “against all states [including Missouri] that had not ratified the proposed Equal Rights Amendment (ERA).”<sup>108</sup> As a result, those sectors of the Missouri economy, such as motels and restaurants, that catered to convention-based business lost revenue.<sup>109</sup> Missouri’s Attorney General John Ashcroft brought a claim for injunctive relief under the antitrust law, which the district court denied.<sup>110</sup>

The Eighth Circuit cast the issue of first impression<sup>111</sup> as whether “a politically motivated but economically tooled boycott participated in and organized by noncompetitors of those who suffered as a result of the boycott” violated the antitrust laws.<sup>112</sup> The prominent role of motivation (political goal of influencing legislators) and identity (noncompetitors of targets) of the boycotters in formulating the issue is noteworthy. Many of the “most relevant” facts<sup>113</sup> of the case pertained to these same considerations: “The ERA is not a ‘financial,’ ‘economic,’ or ‘commercial’ piece of legislation.”<sup>114</sup> “The boycott is noncommercial in that its participants are not business interests and its purpose is not increased profits.”<sup>115</sup> “The boycott is ‘non-economic’ as it was not undertaken to advance the economic self-interests of the participants.”<sup>116</sup> “NOW’s target is the state legislature, the supreme policy-making body of the state.”<sup>117</sup>

What is particularly telling about this central distinction, characterized variously as commercial/noncommercial or economic/noneconomic throughout the ruling, is that the court acknowledges (albeit in a footnote at the end of the discussion) that “we *do not* rest our decision in this case upon the basis that the boycott was noncommercial and noneconomic. Our decision is based upon the right to use political activities to petition the government, as was the underlying factor in *Noerr*.”<sup>118</sup>

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108. *Id.* For a discussion of the conspiracy issue, see *supra* Part I.B.

109. *NOW*, 620 F.2d at 1302.

110. *Id.*

111. *See id.* at 1304 (“This court would be remiss if it did not acknowledge at the outset that the specific question this case presents has not been decided by the Supreme Court or, for that matter, by any other appellate court.”).

112. *Id.* at 1302.

113. *Id.*

114. *Id.* at 1311.

115. *Id.* at 1303.

116. *Id.*

117. *Id.*

118. *Id.* at 1315 n.16 (emphasis added); *see also supra* notes 86–93 and accompanying text.

The *NOW* decision, therefore, turns upon the categorization of the boycott as political speech, which, in turn, reflects the context of petitioning government. The “economic interest” discussion, although legally unnecessary, can be understood as reinforcing the propriety of what otherwise would have been a mechanical categorization of political speech based on petitioning. The speech is deemed political not only because it sought to influence government policy but also because the speakers lacked economic self-interest. It is telling that the lack of economic self-interest received such prominence given its fully acknowledged legal irrelevance. As will become apparent, this attention to boycotters’ motivations (economic interests) would reappear in future rulings in which, unlike in *NOW*, they would ultimately become outcome determinative.

### C. *Boycotts and Economic Interest*

Given the *NOW* court’s firm reliance on the *Noerr* doctrine, what role would the boycotters’ motives—whether economic or noneconomic—play in antitrust cases in the absence of a First Amendment immunity based on government petitioning? This Section focuses on the Supreme Court’s answer to that question and a related variant in two subsequent cases. The rulings reflect an overly simplistic categorization of the speech at issue and, as such, they represent missed opportunities to explore meaningfully the relationship between economically and politically motivated speech in a boycott setting.

1. *Economic Interest in Boycott Mechanism.* The first case at issue, *NAACP v. Claiborne Hardware Co.*,<sup>119</sup> involved a 1966 NAACP-organized boycott in Claiborne County, Mississippi that produced rulings from the Chancery Court of Hinds County as well as the Mississippi and United States Supreme Courts.<sup>120</sup>

The Claiborne County dispute arose when the NAACP “presented white elected officials with a list of particularized demands for racial equality and integration. The complainants did not receive a satisfactory response and . . . several hundred black persons voted to place a boycott on white merchants in the area.”<sup>121</sup> Several targeted merchants brought suit in state court on grounds of tortious

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119. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

120. *Id.* at 889–96.

121. *Id.* at 889 (footnote omitted).



interference with business relations as well as antitrust grounds, seeking both to enjoin future boycott activity and recover losses occasioned by the boycott.<sup>122</sup> The Chancery Court found in favor of the merchants on both grounds and awarded \$1,250,699 in damages.<sup>123</sup> With regard to liability, the Mississippi Supreme Court reversed in part, holding that “[t]he United States Supreme Court has seen fit to hold [that] boycotts to achieve political ends are not a violation of the Sherman Act.”<sup>124</sup> The Mississippi Supreme Court, however, affirmed the finding of liability as a matter of tort law<sup>125</sup> and remanded to the lower court for a recalculation of damages.<sup>126</sup> The Mississippi Supreme Court’s ruling was appealed on nonantitrust grounds to the U.S. Supreme Court. Nonetheless, the Court’s ruling and its discussion of the First Amendment issues at stake are relevant to, and were applied subsequently in, the antitrust context.<sup>127</sup>

The Court held that, “[w]hile States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case.”<sup>128</sup> The Court, reminiscent of the Eighth Circuit’s approach in the *NOW* case, focused on the boycotters’ political motivation, which the Court took great pains to characterize as noneconomic. The Court reasoned that, “[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, *politically motivated* boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.”<sup>129</sup> The Court further opined that, “[t]here is *no suggestion* that the NAACP . . . or the individual defendants were in competition with the white businesses or that the boycott arose from *parochial economic interests*.”<sup>130</sup> To the contrary, the Court already had noted that the trial court found an antitrust

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122. *Id.* at 889–90.

123. *NAACP v. Claiborne Hardware Co.*, 393 So.2d 1290, 1293 (Miss. 1980).

124. *Id.* at 1301.

125. *Id.* at 1301–02.

126. *Id.* at 1307.

127. For a discussion of this issue and an examination of the Supreme Court case *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990), see *infra* Part II.C.2.

128. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

129. *Id.* at 914 (emphasis added).

130. *Id.* at 915 (emphasis added) (quoting *Henry v. First Nat’l Bank of Clarksdale*, 595 F.2d 291, 303 (1979)). The Supreme Court stated that the state trial court found an antitrust violation “on the ground that the boycott had diverted black patronage from the white merchants to black merchants.” *Id.* at 893.

violation “on the ground that the boycott had diverted black patronage from the white merchants to black merchants and to other merchants located out of Claiborne County.”<sup>131</sup> More specifically,

[t]he trial court found that some of the boycott leaders were major stockholders in a grocery and clothing store called “Our Mart,” which as a result of the boycott “became an instant success.” . . . The trial court also found that similar boycotted businesses lost sales and profits during the period of Our Mart’s increase.<sup>132</sup>

An argument made by counsel for the boycotted merchants when briefing the issue regarding which individuals were part of the alleged conspiracy has relevance here:

One factor on which the state courts might have relied is that as the owner of a grocery store that competed with boycotted stores Mrs. Dee had a financial stake in the boycott. A lower level of participation in boycott activities may have been required for her and for other petitioners . . . who owned competing establishments or who owned stock in Our Mart.<sup>133</sup>

The presence of economic interest on the part of at least one prominent boycott organizer was widely discussed. A *New York Times Magazine* profile of Charles Evers, a central figure in the Claiborne County boycott, noted that “some of the most bitter criticism of Evers has stemmed from his performance as a businessman’ and the fact that ‘he opened his stores in unseemly proximity to the time when white competitors were being hit by the boycotts he had initiated.”<sup>134</sup> Many boycotters in Claiborne County “traveled to Fayette (about twenty miles away) after 1967, when Evers opened a shopping center there.”<sup>135</sup>

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131. *Id.* at 892.

132. Brief of Respondents at \*45, *Claiborne Hardware*, 458 U.S. 886 (No. 81-202), 1982 WL 608672 (citing Chancery Court opinion at 25b). Additionally, the boycotters’ petition included the following demand: “[a]ll stores must employ Negro clerks and cashiers.” *Claiborne Hardware*, 458 U.S. at 900.

133. Respondents’ Supplemental Brief at \*17, *Claiborne Hardware Co.*, 458 U.S. 886 (No. 81-202), 1982 WL 608673.

134. EMILY CROSBY, *A LITTLE TASTE OF FREEDOM: THE BLACK FREEDOM STRUGGLE IN CLAIBORNE COUNTY, MISSISSIPPI* 218 (2005) (quoting Walter Rugaber, “*We Can’t Cuss White People Anymore. It’s in Our Hands Now*,” N.Y. TIMES MAG., Aug. 4, 1968, at SM12); see also *id.* at 134 (“Many shoppers turned to local black businesses, which experienced a major boost in sales.”).

135. *Id.* at 134–35.

It is inaccurate to claim, as did the Supreme Court, that *no* economic self-interest was involved.<sup>136</sup> To what can one attribute the Supreme Court's characterization regarding the boycotters' interests? As a practical matter, after disclaiming the existence of any economic motivation on the part of the boycotters, the Court categorized the expressive conduct as political speech by allowing the boycotters the strongest First Amendment defense.<sup>137</sup> Perhaps the Court feared, and properly so, that recognizing any complexity in the boycotters' motivations would diminish their First Amendment protections. In fact, Professors Areeda and Hovenkamp have argued with respect to *Claiborne Hardware* that a First Amendment defense "should be denied . . . to a black merchant who stands to benefit directly from any decline in business to its white competitors."<sup>138</sup>

Perhaps the Court's statement, quoted previously, is more accurately understood as emphasizing that the boycott arose from a political objective, notwithstanding any economic self-interest.<sup>139</sup> Based on any reasonable measure, the Claiborne County boycott sought to affirm the constitutional rights and basic human dignities of its African-American citizens.<sup>140</sup> It is telling that even a widely celebrated political boycott still implicated economic interest on some level. This further weakens the wisdom and basic feasibility of a heavy reliance on binary categorization (political *or* economic speech) when expressive boycotts are at issue.<sup>141</sup>

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136. See *supra* note 137 and accompanying text.

137. *Claiborne Hardware*, 458 U.S. at 915.

138. 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 191–92 (3d ed. 2006); see also Transcript of Oral Argument, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (No. 88-1198), available at [http://www.oyez.com/cases/1980-1989/1989/1989\\_88\\_1198/argument](http://www.oyez.com/cases/1980-1989/1989/1989_88_1198/argument) (noting that, under the rule proposed by the FTC in *Superior Court Trial Lawyers* and adopted by the Court, the *Claiborne Hardware* boycotters would be condemned as per se illegal given that some had "opened a retail store in competition with the white merchants.").

139. See *Claiborne Hardware*, 458 U.S. at 915.

140. See generally CROSBY, *supra* note 134 (providing a detailed analysis of the civil rights objectives).

141. See, e.g., Kay P. Kindred, *When First Amendment Values and Competition Policy Collide: Resolving the Dilemma of Mixed-Motive Boycotts*, 34 ARIZ. L. REV. 709, 710–12 (1992) (discussing the "elusive distinction" between commercially and economically motivated boycotts particularly within the context of "mixed-motive" boycotts). Reliance upon categorization more generally has also been subject to criticism. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 426 (1992) (Stevens, J., concurring in the judgment) ("[T]he concept of 'categories' fits poorly with the complex reality of expression. Few dividing lines in First Amendment law are straight and unwavering, and efforts at categorization inevitably give rise only to fuzzy boundaries.").

2. *Economic Interest in Boycott Outcomes.* A decade after *Claiborne Hardware*, the Supreme Court revisited that seminal case and applied it to a boycott challenged on antitrust grounds. The case, *FTC v. Superior Court Trial Lawyers Ass'n*,<sup>142</sup> constitutes the Court's most recent pronouncement on this particular issue at the interface of First Amendment and antitrust law.

In 1983, “[p]ursuant to a well-publicized plan, a group of lawyers [from the Superior Court Trial Lawyers Association (Trial Lawyers)] agreed not to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government increased the lawyers’ compensation.”<sup>143</sup> In the years preceding the boycott, various bar associations voiced concerns “about the low fees paid to [Criminal Justice Act (CJA)] lawyers.”<sup>144</sup> In the year before the boycott, various groups, including the boycotters, had “sought to persuade the District to increase CJA rates to at least \$35 per hour. Despite what appeared to be uniform support for the bill, it did not pass.”<sup>145</sup> In mid-1983, the Mayor of Washington, D.C. met with the Trial Lawyers and, despite expressing support for their cause, did not increase the rate.<sup>146</sup> The Trial Lawyers formed a “strike committee” and proceeded to boycott providing legal services.<sup>147</sup> The impact on the court system was profound, and the D.C. government ultimately capitulated and agreed to a schedule for increasing rates to the levels sought by the boycotters.<sup>148</sup> The lawsuit in question was instituted not by the boycott targets, the most likely litigants, but rather by the Federal Trade Commission (FTC), which charged the lawyers with “conspir[ing] to fix prices and to conduct a boycott.”<sup>149</sup>

The Administrative Law Judge (ALJ) Morton Needelman conducted a three-week trial and found that the FTC had proven all the facts necessary to establish an antitrust violation.<sup>150</sup> The ALJ

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142. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). See generally Donald I. Baker, *The Superior Court Trial Lawyers Case—A Battle on the Frontier Between Politics and Antitrust*, in ANTITRUST STORIES 257 (Eleanor M. Fox & Daniel A. Crane eds., 2007) (providing a broad discussion of the case written by counsel for the boycotters).

143. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 414.

144. *Id.* at 415. Under the auspices of the Criminal Justice Act, the D.C. government hired attorneys to represent indigent criminal defendants. *Id.*

145. *Id.*

146. *Id.* at 416.

147. *Id.*

148. *Id.* at 418.

149. *In re Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 512 (1986).

150. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 419 (discussing the trial).

rejected the Trial Lawyers' defenses including the argument that it "was a form of political action protected by the First Amendment" under *Claiborne Hardware*.<sup>151</sup> Despite his own determinations on the facts and the defenses, the ALJ dismissed the complaint given that the D.C. government had been "so supportive of the boycotters' demands (or to put it somewhat differently . . . the identity of the victim was . . . so elusive)."<sup>152</sup> The ALJ concluded by stating, "I see no point in striving resolutely for an antitrust triumph in this sensitive area when this particular case can be disposed of on a more pragmatic basis—there was no harm done."<sup>153</sup>

The ALJ's "pragmatic moderation found no favor with the FTC," which condemned the conduct as per se illegal.<sup>154</sup> On appeal, the D.C. Circuit found that the conduct in question constituted "a classic restraint of trade" under the Sherman Act.<sup>155</sup> The court of appeals, however, also found that the "boycott did contain *an element of expression* warranting First Amendment protection."<sup>156</sup> Applying the legal standard of *United States v. O'Brien*, the court held that restricting the boycott could not be justified unless it was "no greater than is essential" to an important governmental interest.<sup>157</sup> In essence, per se condemnation was inappropriate and the FTC was required to "prove rather than presume that the evil against which the Sherman Act is directed looms in the conduct it condemns."<sup>158</sup> As such, the court vacated the FTC's order and remanded for a determination of whether respondents possessed "significant market power."<sup>159</sup>

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151. *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. at 551–54.

152. *Id.* at 560.

153. *Id.* at 561. Commissioner Michael Pertschuk, dissenting from the Commission's decision to institute this action, expressed a similar sentiment: "All this is not to say that conspiracies by lawyers or other professionals to raise fees are not antitrust violations, or that I would not enthusiastically support a case challenging such a conspiracy in a different set of circumstances in the future. In *this* case at *this* time, we should spend our time on more harmful conduct." *Id.* at 513 (Pertschuk, Comm'r, dissenting).

154. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 419.

155. *Superior Court Trial Lawyers Ass'n v. FTC*, 856 F.2d 226, 234 (D.C. Cir. 1988).

156. *Id.* at 248 (emphasis added).

157. *Id.* at 249; *see also* *United States v. O'Brien*, 391 U.S. 367, 377 (1968) ("[A] government regulation is sufficiently justified if it . . . furthers an important or substantial governmental interest . . . [and] is no greater than is essential to the furtherance of that interest.").

158. *Superior Court Trial Lawyers Ass'n*, 856 F.2d at 250.

159. *Id.* at 252; *see also* Paul G. Mahoney, Note, *A Market Power Test for Noncommercial Boycotts*, 93 YALE L.J. 523, 524, 537 (1984) (advocating an "economic effects test" based on

The Supreme Court rejected the “creative conclusions of the ALJ and the Court of Appeals” and condemned the lawyers in the exact same manner as it did the naked price fixers in *Mandeville Island Farms*.<sup>160</sup> Both acts were found per se illegal.<sup>161</sup> Consistent with legal precedent, discussion of the boycotters’ economic and political motivations figured prominently in the decision, albeit for different reasons.

The Court characterized the boycott as price fixing among horizontal competitors and refused to consider the “social justifications proffered for . . . [the] restraint of trade.”<sup>162</sup> The Sherman Act, observed the Court, “precludes inquiry into the question whether competition [and its outcome] is good or bad.”<sup>163</sup> As such, “[it] is no excuse that the prices fixed are themselves reasonable.”<sup>164</sup> The Court then considered, and rejected, the Trial Lawyers’ defense based on *Claiborne Hardware*.<sup>165</sup> The Court declined to find any First Amendment speech based on a decisive difference between the boycotters before the Court and those in *Claiborne Hardware*: “No matter how altruistic the motives of respondents may have been, it is undisputed that their immediate objective was to increase the price that they would be paid for their services.”<sup>166</sup> By contrast, those in *Claiborne Hardware* “sought no special advantage for themselves.”<sup>167</sup>

Upon rejecting the boycotters’ proffered defenses, the Court not only applied per se condemnation but also went much further, stating that, “*O’Brien* would offer [the boycotters] *no* protection even if their boycott were *uniquely* expressive.”<sup>168</sup> “A rule that requires courts to apply the antitrust laws ‘prudently and with sensitivity’ whenever an economic boycott has an ‘expressive component’ would create a gaping hole in the fabric of those laws.”<sup>169</sup> In sum, any speech interests

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market power as striking the appropriate balance between First Amendment and antitrust values within the context of noncommercial boycotts).

160. FTC v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411, 421 (1990).

161. *Id.* at 429–30.

162. *Id.* at 424.

163. *Id.*

164. *Id.* (quoting *Catalano, Inc. v. Target Sales, Inc.*, 466 U.S. 643, 647 (1980)).

165. *Id.* at 426 (rejecting the *Noerr* defense).

166. *Id.* at 427.

167. *Id.* at 426.

168. *Id.* at 430 (emphasis added).

169. *Id.* at 431–32.

inherent in the conduct at issue are trumped not only by the government's substantive interest in antitrust regulation but also by the government's "administrative efficiency interests in antitrust regulation."<sup>170</sup>

The *Superior Court Trial Lawyers* majority's elevation of the Sherman Act over any speech-related concerns constituted a significant departure from much First Amendment jurisprudence, notwithstanding that the distinction upon which it was based—political speech as distinct from economically motivated speech—bore a resemblance to some of the relevant precedent.<sup>171</sup> The ruling is notable for its categorization of what does and does not constitute political speech. The manner in which this distinction is drawn proves to be outcome determinative and establishes a clear hierarchy wherein protecting competition trumps free speech.

The rule articulated in *Superior Court Trial Lawyers* is very clear, and this Article argues that this clarity is deceptive and unfortunate. Within this antitrust context, First Amendment protection appears to extend only so far as an unduly circumscribed conception of the "political." To the extent that the speech at issue petitions the government, this factor is of little moment. The presence of political speech within the petitioning context reflects the ostensible target of the speech. Under *Noerr*, the First Amendment broadly protects government petitioning regardless of the petitioner's economic interest or motivation.<sup>172</sup> A protectable interest in political speech more generally, however, is reserved for a category of expression defined only in the negative as speech in which the speaker has no economic interest. As a result of this extremely crude method of categorization in cases raising competition policy issues, First Amendment concerns other than those addressed by *Noerr* will not complicate strict application of the antitrust laws. The next Part explores the numerous and weighty shortcomings of that legal regime.

### III. EXPRESSIVE BOYCOTTS AS PROTECTED SPEECH

Part I briefly delineated the basic tenets of the relevant First Amendment and antitrust law and precedent. Part II described the flawed manner the Court has developed to handle the expressive

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170. *Id.* at 430.

171. For a critique of the First Amendment analysis in *Superior Court Trial Lawyers*, see *infra* Part III.A.

172. *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961).

boycotts at issue. This Part critiques the Supreme Court's basis for disqualifying from First Amendment protection the expressive boycotts at issue in this Article.

A. *The Scope of Protected Speech*

Determining what level of protection, if any, expressive boycotts merit requires a more expansive consideration of First Amendment jurisprudence than those cases which explicitly address the antitrust intersection at issue. In fact, a central shortcoming of the majority in the *Superior Court Trial Lawyers* case was its failure to look beyond the narrow perspective of this small set of cases, which arguably skewed the framing of the legal issue.

In *Superior Court Trial Lawyers*, the Supreme Court constrained itself not only by focusing solely on political speech but also by narrowly defining "political."<sup>173</sup> In effect, the presence of an economic self-interest on the part of the boycotters disqualified their expression from treatment as political speech.<sup>174</sup> This manufactured incompatibility and its consequences are generally inconsistent with the Court's own precedent. As this Article has discussed, *Noerr* established that the mere presence, or even dominance, of a self-interested economic motivation need not diminish one's First Amendment immunity from antitrust liability.<sup>175</sup>

The Supreme Court has also recognized that political speech is often combined with nonpolitical, oftentimes commercial, speech. In such instances, the combined speech receives the level of protection accorded to the more strongly protected speech component.<sup>176</sup>

It is not clear that a professional's speech is necessarily commercial [and thereby receiving less First Amendment protection] whenever

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173. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 427–28. The dissent recognized that economic interest was not incompatible with the presence of protected political expression. *Id.* at 449 (Brennan, J., concurring in part and dissenting in part). Unfortunately, for instant purposes, the dissent's recognition of a protected speech interest was inextricably linked to its political nature. "Expressive boycotts have been a principal means of political communication since the birth of the Republic." *Id.* at 447.

174. For a discussion on the role of economic self-interest in boycotts, see *supra* Part II.C.

175. *Noerr*, 365 U.S. at 139; see also *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) ("Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability under the doctrine established by *Noerr*.").

176. See *Kindred*, *supra* note 141, at 738 (arguing that when the Supreme Court has assessed speech that is both commercial and noncommercial, it has "consistently treated the speech as political").



it relates to that person's financial motivation for speaking. But even assuming, without deciding, that such speech 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.<sup>177</sup>

This ruling in *Riley*, addressing speech within the context of charitable solicitations, recognized that care "must be undertaken with due regard for the reality that [such speech] is characteristically intertwined with informative and perhaps persuasive speech . . . and for the reality that without solicitation the flow of such information and advocacy would likely cease."<sup>178</sup>

Although instructive, charitable solicitations are not analogous to the expressive boycotts at issue for a multitude of reasons; most importantly, the boycotts at issue in this Article often entail activities that are potentially illegal (under either a per se or rule of reason analysis). The presence of a nominally per se violation poses the greater challenge for First Amendment law. As this Article discusses, within a conventional antitrust setting, the imposition of per se illegality to price fixing reflects the reasonable assumptions that the conduct may have pernicious effects and, equally important, that it will not have any salutary effects.<sup>179</sup> It is important to recognize that, in a large category of cases, such as when the price fixers do not have market power, no pernicious effect will actually occur. The presence of automatic condemnation is not questioned, however, because no beneficial effects are unnecessarily sacrificed. This extremely limited inquiry also serves administrative efficiency. The propriety of this presumed tradeoff becomes uncertain, however, when society attaches value to the expressive function of the anticompetitive conduct at issue.

### *B. Boycott as a Unique Form of Speech*

This Section considers the value—perhaps even unique value—of expressive boycotts. Expressive boycotts, in contrast to narrowly instrumental boycotts such as that in *Mandeville Island*, constitute a form of public discourse. The undertakings are public, involve issues of social policy (in addition to possible economic gain) that transcend

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177. *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 795–96 (1988) (citations omitted); see also *supra* note 33.

178. *Riley*, 487 U.S. at 796.

179. For a discussion of per se illegality, see *supra* Part I.B.

the specific transactions at issue, and take the form of normative debate.<sup>180</sup> This Section explains how expressive boycotts combine two key elements that make them effective speech: expression through sacrifice and expression as a group.

1. *Sacrifice*. Marshall McLuhan's observation that "the medium is the message"<sup>181</sup> takes on a particular relevance within the context of boycotts. By their very nature, boycotts often poignantly convey the notion of sacrifice and, as a consequence, signal an intensity of commitment. "A boycott, like a hunger strike, conveys an emotional message that is absent in a letter to the editor, a conversation with the mayor, or even a protest march."<sup>182</sup> Moreover, when sacrifice is involved, the ongoing nature of the boycott further underscores the element of commitment. As one participant in the *Claiborne* boycott observed, "Unlike voter registration, which was a one-time act, the boycott relied on a daily commitment, making it fundamental to the lives of most blacks."<sup>183</sup> It entailed a range of sacrifices including "doing without spontaneous purchases (like ice cream on a hot day), and the more fundamental problems of finding transportation and securing credit."<sup>184</sup>

Justices William J. Brennan, Jr. and Thurgood Marshall urged a similar assessment in their *Superior Court Trial Lawyers* dissent: "The refusal of the Trial Lawyers to accept appointments by itself communicated a powerful idea: CJA compensation rates had deteriorated so much, relatively speaking, that the lawyers were willing to forgo their livelihoods rather than return to work."<sup>185</sup> "By

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180. See, e.g., Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1802–03 (2004) (identifying factors that render the application of the First Amendment more likely).

181. See generally MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 23–35 (1964) (discussing the relationship between medium and message).

182. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 450 (1990) (Brennan J., concurring in part and dissenting in part).

183. CROSBY, *supra* note 134, at 130.

184. *Id.* at 135. "[M]ost blacks began to do the bulk of their shopping in Vicksburg (about thirty miles away) and Jackson (about sixty miles away)." *Id.* at 134. For a related discussion on additional shopping in Fayette, see *supra* notes 134–35 and accompanying text.

185. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 450 (Brennan, J., concurring in part and dissenting in part). Justice Brennan, joined by Justice Marshall, concurred in part and dissented in part from the Court's ruling. They concurred with the majority that the boycotters' conduct was "neither clearly outside the scope of the Sherman Act nor automatically immunized . . . by the First Amendment." *Id.* at 437. The Justices dissented with regard to the majority's condemnation of the boycott under a per se rule. *Id.* Owing to this Article's focus on

sacrificing income that they actually desired, and thus inflicting hardship on themselves as well as on the city, the lawyers demonstrated the intensity of their feelings and the depth of their commitment.”<sup>186</sup>

What is most significant about the expressive boycotts at issue in this Article is the interplay of sacrifice and self-interest. Typically, boycotters’ sacrifice involves the intentional disruption of their natural patterns of buying and selling.<sup>187</sup> When economic self-interest is implicated, it is usually reflected in the boycott’s objective. The boycotters incur the losses attendant to the undertaking even though the prospect of prevailing and, thereby, benefiting is highly uncertain. Moreover, nonparticipating competitors of the boycotters may not only acquire certain advantages over the boycotters during the protest, but the nonparticipants also typically share in the benefits should the protest be successful. Just as economic self-interest, within other contexts, has not been deemed inconsistent with protected speech, so, too, it is not inconsistent with sacrifice.

2. *Solidarity.* While in theory expressive action, such as a nonpurchase, can be undertaken by a single individual, within the context of boycotts it is invariably a joint effort. Both the high level of First Amendment protection accorded to joint speech and its underlying rationale have clear implications for joint expressive conduct. “The Court has acknowledged the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues: ‘Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . .’”<sup>188</sup> The basis for extending First Amendment protections in this manner is clear: “The right to speak is often exercised most effectively by combining one’s voice with the

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the second of these two points, it refers to Brennan and Marshall’s opinion as a dissent. Justice Blackmun agreed with Justice Brennan’s reasoning but wrote a separate statement concurring in part and dissenting in part from the Court’s opinion. *Id.* at 453 (Blackmun, J., concurring in part and dissenting in part). This Article uses “the dissent” to refer to Justice Brennan’s statement.

186. *Id.* at 450 (Brennan, J., concurring in part and dissenting in part).

187. As discussed *supra* Part II.C.2, instances may arise in which one or more boycotters may directly benefit while the effort was ongoing.

188. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981) (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

voice of others.”<sup>189</sup> Perhaps most significant about this right of “expressive association” is its unequivocal basis in protecting “effective” speech rather than in legitimate but abstract notions of personal autonomy.<sup>190</sup> Joint advocacy contributes to speech in that individuals may be more willing to undertake expressive actions, such as boycotts, as part of a group for reasons unrelated to the group’s coercive economic effect. Individuals oftentimes are induced to participate because of “the value of the collective goal of the movement, social prestige, feelings of solidarity, normative expectations, or the value of the specific identity invoked by the movement.”<sup>191</sup> In fact, the perceived value of the boycott goal, and in turn the cost potential supporters may be willing to incur, may increase when the goal is shared collectively by the community from which a prospective boycotter hails.

An individual’s self-concept derives in part from the groups to which she belongs, and a key part of group identity may be participation in group causes. Individuals may . . . perceive a higher gain from punishing the firm when others are also doing so (perhaps because they infer something about the seriousness of the firm’s behavior from the choices of others).<sup>192</sup>

These noneconomic values associated with participation in a group effort are reflected in the recollections of an activist “who began working in Claiborne County in the 1970s [and] remembered that the boycott ‘was a part of people’s identity, what they had or hadn’t done during that boycott. I remember that very clearly. It was an identifier.’”<sup>193</sup>

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189. *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 68 (2006); see also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (“[T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.”).

190. *Rumsfeld*, 547 U.S. at 68.

191. Aradhana Roy, *The Mobilization and Performance Consequences of Firms’ Participation in Social Movements: Firms in the Open Source Movement* 78 (2008) (unpublished Ph.D. dissertation, University of Michigan) (on file with the *Duke Law Journal*) (citations omitted).

192. Andrew John & Jill Klein, *The Boycott Puzzle: Consumer Motivations for Purchase Sacrifice*, 49 *MGMT. SCI.* 1196, 1204 (2003).

193. CROSBY, *supra* note 134, at 130.

3. *Mechanism Selection.* Boycotts are unique expressive undertakings combining elements of sacrifice and solidarity. These two characteristics typically lend credibility to the undertaking. One must be sensitive to not only the message a boycott sends but also the message a nonboycott transmits.

A useful starting point for the issue of mechanism selection is the sundry ways the Court addressed the issue in *Superior Court Trial Lawyers*. As part and parcel of the majority's rejection of the First Amendment's applicability to the lawyers' boycott, the Court observed that the Trial Lawyers' efforts to explain their cause and "to lobby District officials to enact favorable legislation . . . were activities that were fully protected by the First Amendment. But nothing in the FTC's order would curtail such activities, and nothing in the FTC's reasoning condemned any of those activities."<sup>194</sup> What relevance, if any, should attach to the existence of alternative mechanisms? Should it matter that the other means available are arguably less effective at conveying the message, perhaps due to their relative inability to attract press coverage, than are the contested means? All other things being equal, a comparable message conveyed without these characteristics—sacrifice and solidarity—will also attract less media attention. These insights likely informed Dean Wiley Branton's recommendation to the Trial Lawyers that they do "something dramatic to attract attention."<sup>195</sup>

It is undeniable that several constitutionally protected avenues technically exist for the boycotters to publicize their underlying grievance. The manner in which the *Superior Court Trial Lawyers* ruling discussed the existence of those protected outlets, however, seems somewhat reminiscent of a position that the Court had already emphatically rejected, namely that a given "burden [on speech] is permissible because other avenues of expression remain open."<sup>196</sup> The rationale is that merely because the speakers "remain free to employ other means to disseminate their ideas does not take their [contested] speech . . . outside the bounds of First Amendment protection."<sup>197</sup> As the Court stated previously, the First Amendment protects one's right not only "to advocate [one's] cause but also to select what [one]

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194. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 426 (1990).

195. *Id.* at 451 (Brennan, J., concurring in part and dissenting in part).

196. *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

197. *Id.*

believe[s] to be the most effective means for so doing.”<sup>198</sup> This last point takes on particular practical salience when the contested “avenues of communication” are more effective, fundamental, or economical than those uncontested.<sup>199</sup> Although the majority in *Superior Court Trial Lawyers* treated, whether intentionally or not, the different avenues for speech as somewhat fungible, the dissent argued, to the contrary, that it was legally relevant that “the Trial Lawyers enjoyed no other *effective* means of making themselves heard.”<sup>200</sup>

This Article argues that expressive boycotts are unique expressive speech worthy of protection under First Amendment law. To see this, compare a protest made through a joint petition against use restrictions on licenses with a joint boycott of the same. Although a joint petition could attract some public attention, it lacks important features that undermine the strength of its message relative to a group boycott. Signing a joint statement is a one-time event, whereas a boycott is ongoing and hence more powerful. Of course, some types of nonboycott speech could also be ongoing. The more important difference is that boycotts involve ongoing sacrifice whereas joint petitions involve little, if any, sacrifice. Thus, a joint petition makes a weaker and less credible statement.

Attracting the press is often an extremely effective, and always a legitimate, mechanism for engaging in social discourse. Consider, for example, that media attention often enables boycotters to “broaden the scope of conflict.”<sup>201</sup> The sympathy of third parties can increase the power of the boycotters relative to their target even if those third parties do not participate in the relevant market and, therefore, cannot contribute directly to the underlying economic impact of the boycott itself.<sup>202</sup> The mere fact of media coverage can serve to “validate[.]” the importance of the boycott not only to third parties but also to its participants.<sup>203</sup> In the most extreme cases, “[r]eceiving standing in the media is often a necessary condition before targets of influence will grant a [boycott] recognition and deal with its claims

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198. *Id.*

199. *Id.*

200. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 437 n.1 (Brennan, J., concurring in part and dissenting in part) (emphasis added).

201. William A. Gamson & Gadi Wolfsfeld, *Movements and Media as Interacting Systems*, 528 ANNALS AM. ACAD. POL. & SOC. SCI. 114, 116 (1993).

202. *See id.*

203. *Id.*

and demands.”<sup>204</sup> Consequently, it is reasonable to assume that some participants may not be willing to accept the ongoing cost of the boycott, in terms of sacrifice, without an external signal that their message is being heard on some level.<sup>205</sup> Of course, just as media coverage can foment public discourse, it can also facilitate attracting the critical mass of boycotters necessary to wield market power.

Finally, despite general recognition of the significance of sacrifice within a boycott context, the equally important significance of a *nonboycott* by protestors has gone unrecognized. Under many circumstances, when protestors continue business as usual with the target of their criticism, they may blunt (if not entirely undermine) the force of their objections or at least how they are perceived. One’s ability to forgo purchasing entirely reflects in part whether substitutes are available and the extent to which the good is a necessity versus a luxury. Boycotts are particularly important when permanently exiting the market is not a viable option. This circumstance will most likely arise when there are no strong substitutes or when the controversy that prompted individuals to forgo purchases would continue to matter to them even if they were not making purchases.<sup>206</sup>

#### IV. EXPRESSIVE BOYCOTTS INVOLVING INTELLECTUAL PROPERTY

Part III highlights the role of expressive boycotts in society’s ongoing and varied civil rights discourse. This Part introduces a very different series of contemporary boycotts characterized by the centrality of social debate regarding intellectual property. It is quite possible that such undertakings will become even more prevalent in the future and, therefore, will continue to raise the issues that this Article seeks to address. The discourse generated by the boycotts introduced in this Part transcends the transactions nominally involved and reflects a desire to engage in public discussion on broader issues including the relationship between patents and scientific progress, humanitarian limits on for-profit pricing of medicines, and the relationship between intellectual property (both patents and copyrights) and information sharing in academic environments.<sup>207</sup>

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204. *Id.*

205. For a description of the effects that media coverage can have on increasing participation by signaling the likelihood of success, see Roy, *supra* note 191, at 80.

206. HIRSCHMAN, *supra* note 14, at 100.

207. For ease of exposition, this Article characterizes the anecdotes as boycotts rather than as alleged or possible boycotts. The available information does not permit establishing

Dissatisfaction over pricing issues typically animates these boycotts. As discussed previously, antitrust generally adopts a zero-tolerance policy of per se illegality when manipulation of market pricing is involved.<sup>208</sup> This same general policy applies to efforts to influence intellectual property pricing. The price levels, condemned by the boycotters as exorbitant, may reflect the intellectual property owner's market power emanating from, for example, a merger among intellectual property owners or a patent. The ultimate value and subsequent pricing of that patent, or of goods that embody or otherwise depend upon the patent, reflect market forces. More specifically, the pricing will reflect the extent to which, if at all, the patent right conveys market power, which, in turn, depends upon the presence or absence of reasonable substitutes.<sup>209</sup> Antitrust permits even supracompetitive pricing if it results from lawfully acquired market power.<sup>210</sup> Market power stemming from the exclusive use rights granted to an inventor via a patent is also accepted as lawful. This exclusivity is viewed as creating innovation incentives.

#### A. *Oncomouse*

The “mouse genetics community” is a “tight-knit group of researchers who use[] mouse models to study illness.”<sup>211</sup> DuPont held an exclusive license for the patent covering the Oncomouse, a genetically engineered mouse that quickly became extremely valuable to this community. DuPont's licensing terms can be divided into three general categories: the price of the mice themselves, the restrictions on sharing among researchers, and the control that DuPont exerted over downstream inventions. DuPont, who is not alone in such licensing practices, imposed what were widely viewed by the mouse

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definitively that all four examples involved boycotts, though, even for those protests for which the least information is available, a good case can be made that a boycott was undertaken.

208. See *supra* notes 60–68 and accompanying text.

209. See U.S. DEP'T OF JUSTICE & FTC, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 2.2 (1995), available at <http://www.justice.gov/atr/public/guidelines/0558.pdf>.

210. Market power may be lawfully acquired and maintained through, for example, “growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). In such instances, “[t]he successful competitor, having been urged to compete, must not be turned upon when he wins.” *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

211. Fiona Murray, *The Oncomouse that Roared: Resistance & Accommodation to Patenting in Academic Science*, 115 AM. J. SOC. (forthcoming 2010) (manuscript at 1), available at [http://fmurray.scripts.mit.edu/docs/THE\\_ONCOMOUSE\\_THAT\\_ROARED\\_FINAL.pdf](http://fmurray.scripts.mit.edu/docs/THE_ONCOMOUSE_THAT_ROARED_FINAL.pdf).



genetics community as excessively onerous and restrictive conditions for access to this vital technology.<sup>212</sup>

DuPont's mouse-breeding arm, GenPharm, announced prices of "\$80–150 per [Onco]mouse—as much as 10 times the price charged by nonprofit mouse breeders such as the Jackson Laboratories."<sup>213</sup> In addition, GenPharm required researchers to purchase each mouse although researchers traditionally breed additional mice without further charges.<sup>214</sup> "That can quickly amount to thousands of dollars per lab—a lot of money for a resource that researchers are used to getting for free."<sup>215</sup>

In addition to the cost of the mice, DuPont imposed additional restrictions on scientists using Oncomice: scientists were no longer able to "follow their traditional practices of sharing mice," DuPont exercised a form of "[c]ontractual control of scientific disclosure" including "annual disclosure requirements," and DuPont required assignment of "[r]each through rights on future discoveries made with an Oncomouse."<sup>216</sup> Regarding the restrictions placed upon the sharing of mice, one scientist observed, "[i]t was an enormous obstacle to free and open distribution of information and materials . . . [I]t was a whole new way of doing science . . . [and] it really affected the way the mouse research community works."<sup>217</sup>

"The grumbling reached insurrection proportions after a meeting at Cold Spring Harbor Laboratory . . . when some 300 researchers stayed for an unscheduled afternoon session on GenPharm's pricing

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212. *Id.* Neither DuPont's licensing restrictions nor the subsequent reaction of the scientist consumers were unique to either the Oncomouse research tool or DuPont more generally. Another example of restrictions on the use of research tools resisted by the research community is Invitrogen's "Gateway" technology, which allows researchers to "build ORF, promoter, and other clone sets for archiving and future access." Invitrogen, Gateway Open Architecture Policy, <http://www.invitrogen.com/site/us/en/home/Products-and-Services/Applications/Cloning/Gateway-Cloning/GatewayC-Misc/Additional-Info-Inquiries.html> (last visited Jan. 26, 2010). In 2003, four years after the initial launch of its Gateway technology, Invitrogen changed its use restriction policy to an open access policy, noting that "our policies were too restrictive, and instead of enabling your research with advanced technology, we were impeding it with our interest in protecting intellectual property." *Id.*

213. Christopher Anderson, *Researchers Win Decision on Knockout Mouse Pricing*, 260 SCIENCE 23, 23 (1993).

214. *Id.*

215. *Id.*

216. Murray, *supra* note 211 (manuscript at 25).

217. *Id.* (manuscript at 26) (quoting Sam Jaffe, *Ongoing Battle over Transgenic Mice*, SCIENTIST, July 19, 2004, at 46, 46).

policy . . . .”<sup>218</sup> Many of the scientists were troubled not only by the transaction costs but also by the “normative costs” associated with DuPont’s licensing terms.<sup>219</sup> “Scientists resorted to civil disobedience. They chose to flaunt the law ‘and simply breed their own Oncomice, effectively boycotting the company.’”<sup>220</sup> Some faculty openly resisted DuPont’s restrictions, continuing their research without adhering to them, whereas other researchers, rather than complying with DuPont’s demands or “liv[ing] with a cloud of fear,” turned to different projects not requiring the use of Oncomice.<sup>221</sup>

Assuming *arguendo* the existence of an Oncomouse boycott, certain features of this matter warrant particular attention. Conventional boycotts threaten that the participants will not purchase the target’s product unless it modifies some or all of the conditions at issue. The Oncomouse boycott is unconventional to the extent that the boycotters, because of their infringement, were not deprived of the “boycotted” product. Instead, their “sacrifice” appears to be their exposure to potential infringement lawsuits. Presumably, the boycotters would be willing to buy from DuPont rather than infringe if DuPont were to alter its purchase conditions. In addition, it seems likely that the facts would support the boycott as *bona fide* speech, given the relatively public nature of the boycott and the objections of the conspirators to licensing conditions contrary to the mouse community’s norms for breeding mice and sharing information.

This Oncomouse case was at least partially resolved through National Institutes of Health (NIH) intervention. Disagreement regarding the interpretation of the NIH-brokered deal, however, led to renewed tension between DuPont and a number of universities.<sup>222</sup> Absent the deal, DuPont could have brought Oncomouse lawsuits

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218. Anderson, *supra* note 213, at 23.

219. Murray, *supra* note 211 (manuscript at 27).

220. *Id.* (citations omitted).

221. *Id.* (manuscript at 29).

222. Over time, as university researchers have become more involved with for-profit entities and as universities have begun to exploit their patents as revenue sources, the distinctions between university research and for-profit research have lessened. *Id.* (manuscript at 1–2). As was observed within the context of a scientist boycott (regarding licensing terms) of a different DuPont research tool: “DuPont is not the lone black hat on this issue. Universities, themselves, are also asking for reach-through provisions for technology they’re exporting to other institutions and companies, and those provisions are not unlike the demands DuPont is making for Cre-lox.” Naomi Freundlich, *Cre-lox Controversy Divides Institutions, Prompts NIH Panel*, SIGNALS, June 12, 1998, <http://signalsmag.com/signalsmag.nsf/657b06742b5748e888256570005cba01/a91504e7700ed9b0882566210046c958?OpenDocument>.

claiming infringement and, perhaps, an illegal boycott. This Article seeks to ensure that First Amendment values are respected when legal action in response to expressive boycotts takes the form of an antitrust suit.<sup>223</sup>

It is noteworthy that DuPont has pursued increasingly “aggressive licensing demands on academic and research institutions” regarding the Oncomouse.<sup>224</sup> In 2003, *almost* the entire University of California system rejected a license with DuPont regarding “genetically engineered mice,” owing to the university system’s dissatisfaction with DuPont’s restrictive licensing terms.<sup>225</sup> “The state university’s Davis campus did, however, agree to the company’s licensing requirements after one of its researchers bred genetically engineered mice without DuPont permission and received a warning letter . . . .”<sup>226</sup> Academics and universities, to the extent that they considered themselves somewhat removed from the threat of legal action, are quickly being disabused of any notion that for-profit entities like DuPont will not pursue them legally.

### B. *Cre-lox*

DuPont also controls access to the research tool Cre-lox, which allows researchers to “knock out” a specific gene in the DNA of a mouse, thereby enhancing researchers’ ability to determine “gene function—the holy grail of genomics.”<sup>227</sup> Despite having no commercial value, Cre-lox has the potential to unlock a stream of

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223. It is also important, particularly in the absence of the proposed changes in the law, to educate potential boycotters regarding their exposure under the antitrust laws. For example, an economist opining on the agbiotech industry has advocated a “joint boycott of research agreements [by the ‘public research sector’] with any firm with which there had been prior efforts to obtain authorization from the right holder on reasonable commercial terms and conditions, and the efforts had been unsuccessful within a reasonable period of time” with “significant coordination and organization” because “[m]oral suasion . . . is unlikely to be sufficient in itself.” William Lesser, “*Holding Up the Public Agbiotech Research Sector over Component Technologies*,” in *TRANSITIONS IN AGBIOTECH: ECONOMICS OF STRATEGY AND POLICY* 601, 613–14 (William Lesser ed., 2000), available at <http://ageconsearch.umn.edu/bitstream/26024/1/n1659932.pdf>.

224. See Sasha Blaug et al., *Managing Innovation: University-Industry Partnerships and the Licensing of the Harvard Mouse*, 22 *NATURE BIOTECHNOLOGY* 761, 761 (2004).

225. Brian Dakss, *Is Commerce Blocking Science?*, CBS NEWS, Nov. 1, 2003, <http://www.cbsnews.com/stories/2003/11/01/tech/main581313.shtml>.

226. *Id.* (quoting Larry Fox, Chief Patent Counsel, University of California, Davis).

227. Freundlich, *supra* note 222.

commercially valuable innovations.<sup>228</sup> In the mid-1990s, DuPont imposed stringent restrictions on the users of Cre-lox mice including limitations on the use and sharing of Cre-lox materials. DuPont also demanded rights over innovations developed using the Cre-lox tool.<sup>229</sup> As with the Oncomouse, the scientific community expressed concerns that DuPont's "restrictive terms could 'seriously impede further basic research and thwart development of future technologies that will benefit the public.'"<sup>230</sup>

Although dozens of universities signed agreements with DuPont, the University of California and several other institutions refused to do so.<sup>231</sup> This ostensibly uneven refusal to deal caused "resentment among universities: One university licensing officer who asked to remain anonymous says the universities who've refused to sign the Cre-lox license are furious at the signatories for 'breaking ranks' over this issue."<sup>232</sup> Ultimately, the Cre-lox protest was resolved after Harold Varmus, a leading researcher in this community who had since become Director of NIH, brokered a compromise with DuPont.<sup>233</sup> Varmus played a similar role in mediating the Oncomouse dispute.<sup>234</sup>

Assuming *arguendo* the existence of boycotts, the Cre-lox dispute differs along a significant dimension from the Oncomouse dispute. The Cre-lox boycotters were concerned solely about use restrictions, whereas the Oncomouse boycotters protested both pricing and nonpricing issues. This distinction is critical to antitrust analysis because boycotts directed toward pricing are reviewed under a *per se* standard, whereas nonprice boycotts are reviewed under the more lenient rule of reason standard which requires a negative competitive effect to establish antitrust liability. The traditional significance of this distinction would be somewhat muted within this

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228. *See id.* ("Cre-lox will likely be no more an element of any eventual products or businesses that emerge from the elucidation of those functions than a hammer is a part of the eventual table it helps build.").

229. *DuPont and NIH Reach Agreement over Genetic Mice*, PROF. ETHICS REP., Summer 1998, at 3, available at <http://www.aaas.org/spp/sf/rl/per/per14.htm>.

230. Marshall, *supra* note 12, at 257 (quoting a letter from NIH Director Varmus to DuPont regarding his refusal to sign an agreement regarding the Cre-lox mouse).

231. Meredith Wadman, *DuPont Opens Up Access to Genetics Tool*, 394 NATURE 819, 819 (1998).

232. *Id.*

233. Marshall, *supra* note 12, at 257.

234. *Id.*

context, however, if a target's capitulations to boycotters' demands constituted evidence of competitive effect.<sup>235</sup>

### C. Academic Periodicals

In recent years, many professors and librarians have grown increasingly dissatisfied with the escalating price of academic journals and its adverse effect on scholarly exchange. One pivotal moment in this ongoing debate occurred when Professors Peter Walter and Keith Yamamoto published an open letter advocating a boycott.<sup>236</sup>

Cell Press is breaking an unwritten contract with the scientific community: being a publisher of our research carries the responsibility to make our contributions publicly available at reasonable rates. As an academic community, it is time that we reassert our values. We can all think of better ways to spend our time than providing free services to support a publisher that values profit above its academic mission. . . . Our goal is to effect change, but to be effective we must stand together.<sup>237</sup>

To "effect change," Walter and Yamamoto advocated that scholars boycott providing important services to Cell Press (reviewing manuscripts, serving on editorial boards, or submitting papers) and that they widely communicate the "pricing tactics and business strategies" of Cell Press's publisher, Elsevier.<sup>238</sup> This should continue, according to Walter and Yamamoto, until "the University of California [the two authors' academic institution] and other institutions are granted electronic access to Cell Press journals."<sup>239</sup>

In many regards, this letter echoed a prior and less targeted call to boycott made by a Public Library of Science (PLOS) initiative urging researchers to boycott publication in all scientific journals that did not "grant unrestricted free distribution rights to [research] . . . within 6 months of their initial publication date."<sup>240</sup> PLOS's petition attracted a large number of signatories, though,

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235. For distinguishing concessions based on coercion versus persuasion, see *infra* Part V.A.3.

236. See generally Jeanne Lenzer, *Scientists Call for a Boycott of Cell Press*, 327 *BRI. MED. J.* 1070 (2003), available at <http://bmj.com/cgi/content/full/327/7423/1070-b> ("The boycott, says Professor Walter, is 'resonating incredibly well.'").

237. Open Letter, *supra* note 10.

238. *Id.*

239. *Id.*

240. Open Letter from Pub. Library of Sci. to scientific publishers (undated), available at <http://www.plos.org/about/letter.html>.

ultimately, PLoS's primary impact came through its activity as a nonprofit scientific and medical online publishing venture.<sup>241</sup> The intertwining of efforts to boycott a for-profit publication and to support comparable publications offered through learned societies or universities at substantially lower prices has arisen in other forms.<sup>242</sup> The following example involving the *Journal of Algorithms* illustrates one particular trend:

For several years we and many of our colleagues have become more and more concerned about the fact that libraries are increasingly unable to afford the prices being charged by commercial publishers of scientific journals. . . . [In the face of such concerns,] the entire editorial board ultimately decided to resign from the *Journal of Algorithms* in favor of launching a new journal to be called *ACM Transactions on Algorithms* . . . .<sup>243</sup>

University librarians are another group of key participants in the phenomenon of boycotting academic publishers. Perhaps not surprisingly, law school librarians have most openly acknowledged the antitrust implications of these boycotts. The American Association of Law Libraries' (AALL) website includes "How does antitrust affect AALL's activities?" among its listing of frequently

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241. Assessing these undertakings raises interesting issues regarding proof of conspiracy. Although it is true that the petitions associated with the PLoS boycott attracted thousands of faculty members as signatories, are they coconspirators for antitrust purposes? In the absence of an actual agreement (which one could argue the petition represents), key characteristics for discerning the existence of an antitrust conspiracy include whether mechanisms exist for the monitoring of compliance with the alleged agreement and for the disciplining of those who violate the agreement. By its very nature, compliance by signatories to a petition announcing the rejection of certain publishing outlets is readily monitored. One of the more interesting circumstances arising from the PLoS petition involved an article in *The Physiologist* specifically identifying a high-profile petition signatory, Dr. Patrick Brown, who, according to the article's author, had published in a journal being boycotted. Margaret Reich, *Peace, Love, and PLoS*, 46 *PHYSIOLOGIST* 137 (2003), available at <http://the-aps.org/news/PLoS.pdf>. *The Physiologist* subsequently published a retraction and apology after it discovered that Brown's article had been published while the petition was circulating "but prior to the implementation date for action." *Clarification*, 46 *PHYSIOLOGIST* 262, 262 (2003), available at <http://www.the-aps.org/publications/tphys/images/tphys10x03.pdf>.

242. See generally Letter from Donald Knuth, Co-Editor, *Journal of Algorithms*, to Editorial Bd., *Journal of Algorithms* (Oct. 25, 2003), available at <http://www-cs-faculty.stanford.edu/~knuth/joalet.pdf> (delineating options other than publication through for-profit publishers).

243. Memorandum from Donald E. Knuth, David S. Johnson & Zvi Galil, former Co-Editors, *Journal of Algorithms*, on changes at the *Journal of Algorithms* (undated), available at <http://www.cs.colorado.edu/~hal/s.pdf>.

asked questions.<sup>244</sup> AALL notes that “[s]ome decisions, which may have had the appearance of being based on concern about vendor reaction, have in fact been made on the basis of advice from AALL’s legal counsel.”<sup>245</sup> AALL cites legal concerns about “primarily the *Sherman Antitrust Act*, which prohibits collective action in restraint of trade” and concurrently acknowledges that “this concern for antitrust may seem ironic and frustrating in the face of the shrinking competition among legal information vendors [owing to mergers].”<sup>246</sup> Nonetheless, the AALL concludes that “[its] leadership feels that simply ignoring AALL legal counsel’s advice would be irresponsible and would violate their fiduciary duties to the AALL membership.”<sup>247</sup>

In an e-mail to the AALL membership, AALL President Ann Fessenden delineated the organization’s antitrust policy<sup>248</sup> and noted that “legal counsel has expressed considerable concern about . . . boycotting, refusing to sign contracts etc.”<sup>249</sup> More specifically, Fessenden stated that, “[t]wo decisions which have been based on this [legal] advice included cancellation of an SCCLL-SIS program on legal publishing (program description included ‘boycotts’ as a possible member response to price increases) and some changes that were made in [another program].”<sup>250</sup>

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244. Am. Ass’n of Law Libraries, Vendor Relations FAQ, <http://www.aallnet.org/vendorrelations/faq.asp> (last visited Jan. 31, 2010).

245. *Id.*

246. *Id.*; see also Mary M. Case, *Information Access Alliance: Challenging Anticompetitive Behavior in Academic Publishing*, COLLEGE & RES. LIBRARIES NEWS, June 2004, <http://www.ala.org/ala/mgrps/divs/acrl/publications/crlnews/2004/jun/iaa.cfm> (delineating the “general global trend” of mergers within scholarly publishing).

247. Am. Ass’n of Law Libraries, *supra* note 244.

248. The policy, posted online, reads in part: “AALL cannot sanction programming, publications, or other communications that may provide the basis for an inference that members agreed to take any action relating to prices, services, production, allocation of markets, boycotts, refusals to deal, or any other matter having a market effect. AALL is responsible for statements made by speakers at our programs and in articles in our publications.” *Id.*

249. Posting of Ann Fessenden, AALL President, [ann\\_fessenden@ca8.uscourts.gov](mailto:ann_fessenden@ca8.uscourts.gov), to [lawlibdir@lists.washlaw.edu](mailto:lawlibdir@lists.washlaw.edu) (Nov. 5, 2007) (on file with the *Duke Law Journal*).

250. *Id.* Kendall F. Svengalis, the speaker whose presentation was cancelled, has written that in conversation with lawyers from the Justice Department’s Antitrust Division [DOJ] he learned that DOJ “would only get involved if some sort of concerted organizational action, such as a boycott, was being organized.” DOJ’s attorney specifically referenced the “travel agent boycott of airlines, etc. back in the 1980s.” Posting of Kendall F. Svengalis, President, Rhode Island Law Press and Adjunct Professor, University of Rhode Island, to [Owner-Law-Lib@ucdavis.edu](mailto:Owner-Law-Lib@ucdavis.edu) (Aug. 27, 2007), available at <http://listproc.ucdavis.edu/archives/law-lib/law-lib.log0708/0267.html>. Throughout the 1980s a number of antitrust proceedings were undertaken involving the travel industry generally and travel agents in particular. The DOJ attorney appears to have referenced the slightly later proceeding (early 1990s) of *United States v.*

Concern that discussions about publisher policies including pricing may raise antitrust issues emanates not only from the leadership of organizations such as the AALL but also from individual participants on relevant listservs. Peter Banks, Acting Vice President for Publications at the nonprofit American Diabetes Organization, wrote: “I am not trying to inhibit discussion by librarians, publishers, or dog catchers, for that matter.”<sup>251</sup> He then observed that, “any discussion of pricing issues on list serves is generally recognized as potentially anticompetitive and prohibited by most moderators.”<sup>252</sup>

#### *D. Norvir*

In December 2003, Abbott Laboratories announced a 400 percent price increase on Norvir (ritonavir), which is used as a booster drug for other retrovirals used to treat AIDS.<sup>253</sup> Strong and vocal opposition to this price increase among doctors and other healthcare providers treating persons with HIV culminated in a boycott against Abbott.<sup>254</sup> In January 2004, eighty HIV healthcare providers sent a letter representing a “collective unified agreement from all the signatories” regarding their actions “until the ritonavir price is undone.”<sup>255</sup> The letter stated that the signatories “strongly believe in the importance of a profitable and healthy pharmaceutical industry market that will stimulate pharmaceutical R&D. . . . [and f]or that reason, we would be in favor of your company, and other HIV

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*Association of Retail Travel Agents*, Civ. No. 94-2305 (D.D.C. filed Oct. 24, 1994, entered March 16, 1995), which was settled without trial. Most importantly, for instant purposes, the point of comparison cited by DOJ was a boycott that was strictly economic and involved no expressive component.

251. Posting of Peter Banks, Acting Vice President, American Diabetes Organization, pbanks@diabetes.org, to liblicense-l@lists.yale.edu (Nov. 11, 2005), available at <http://www.library.yale.edu/~llicense/ListArchives/0511/msg00094.html>.

252. *Id.* Banks also cites the following language, which is often included in listserv rules: “Messages should not be posted if they encourage or facilitate members to arrive at any agreement that either expressly or implicitly leads to price fixing, [or] a boycott of another’s business . . . .” *Id.* (citing language from the National Association of Independent Schools).

253. Keith Alcorn, *Doctors Rebellion Against Ritonavir Price Increase Spreads in U.S.*, AIDS MAP NEWS, Feb. 11, 2004, <http://www.aidsmap.com/en/news/1B319D33-5F3E-4DFA-A3DD-0713A64FF0C2.asp>.

254. *Id.*

255. Letter from HIV healthcare providers to Dr. John Leonard, Vice President, Global Pharm. Dev., Abbott Labs. (Jan. 20, 2004), available at <http://www.cptech.org/ip/health/aids/docs-abbott01202004.html>.



committed companies, increasing their revenues.”<sup>256</sup> Yet they rejected the justifications Abbott had offered for this price increase and, instead, stated their belief that Abbott’s strategy constitutes “taking advantage of a monopolistic situation.”<sup>257</sup> The signatories argued that, “[a]s gatekeepers, who have been told for the last 20 years that we are responsible for keeping medical costs down, we cannot allow this to happen.”<sup>258</sup>

Until Norvir’s price was lowered, the signatories agreed, among other things, to “formally join[] a nationwide boycott” and to take the following actions: resign from Abbott advisory boards, stop participating in Abbott promotional events or in Abbott-sponsored clinical trials, prescribe non-Abbott drugs when alternatives would not affect patient care, and actively encourage other physicians and organizations to join in these actions.<sup>259</sup> In February 2004, leading doctors at the Eleventh Conference on Retroviruses and Opportunistic Infections announced that the boycott “is now supported by more than 200 leading HIV prescribers in the United States.”<sup>260</sup> One observer commented that this boycott “could signal a new brand of militancy among doctors who have been loath to use tools of protest more commonly associated with political and social activists.”<sup>261</sup> Accordingly, if the boycott proved to be an “effective mechanism,” there would have been reason to “suspect there’s going to be a move of many more physicians across the country to use this kind of mechanism to attempt to control drug prices.”<sup>262</sup>

The Norvir case, like the academic periodicals example, presents a situation in which the boycotters’ effort and influence are not restricted to forgoing purchases (writing prescriptions) but extend to withholding services from the target firm (supervision of clinical trials). Many intellectual property settings involve complex buyer and seller relationships in which each party operates, at some level, in both roles. Significantly, boycotters’ market power may vary with their role.

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256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. Alcorn, *supra* note 253.

261. Stephen Smith, *AIDS Drug’s High Cost Spurs Doctors’ Boycott*, BOSTON GLOBE, Mar. 19, 2004, at A1.

262. *Id.* (quoting Kenneth Kaitin, Dir., Tufts Univ. Ctr. for the Study of Drug Dev.).

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The activities that this Article discusses represent, on one level, the best of society: the efforts of researchers seeking to cure cancer, doctors treating persons with AIDS, and academics and librarians facilitating access to research journals. Each group arguably undertook, in differing ways and to varying degrees, an expressive boycott to promote their respective goals. To those schooled in antitrust, however, the collective actions of these boycotters also constitute potential violations of the law. Although the wisdom of these or comparable boycotts along any number of political, social, or economic dimensions may be debated, neither the existence nor the content of these debates meaningfully bears upon the antitrust implications of the boycotts, with the possible exception of a narrow economic inquiry.

#### V. OVERCOMING ANTITRUST OBSTRUCTION TO EXPRESSIVE BOYCOTTS

Part III argued that expressive boycotts combining political and economic dimensions should constitute protected speech. The judiciary's failure to accord any First Amendment value to such speech is largely attributable to the interaction of an excessively categorical approach to identifying speech interests and an economic efficiency-based approach to antitrust law that is also unduly narrow given the presence of constitutional considerations. This Part advocates changes to the current application of antitrust law to expressive boycotts that honor the First Amendment values at stake and relate them to other important values regarding competition. Part V relies upon the boycotts related to intellectual property described in Part IV as a useful point of reference.

The Supreme Court has called the Sherman Antitrust Act "a charter of freedom" not only because of the importance of the values it seeks to protect but also because it has a "generality and adaptability comparable to that found to be desirable in constitutional provisions."<sup>263</sup> In recent decades that flexibility has been directed primarily toward accommodating economics-related developments. The recommendations, in contrast, require antitrust to demonstrate greater openness with regard to noneconomic considerations.

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263. *Sugar Inst., Inc. v. United States*, 297 U.S. 553, 600 (1936).

Under this Article's proposal, courts would engage in more nuanced determinations regarding the existence of protected speech interests and, when speech interests are present, apply a modified antitrust analysis. The underlying determinations—both factual and legal—may be challenging, particularly in cases of first impression. If, however, the courts do not unduly restrict their use of general First Amendment precedent, they will find that considerable guidance is already available and that the adversarial process will produce insights on how to apply that precedent. This Article's proposal avoids direct balancing, which is tremendously difficult to implement given the ultimate incommensurability of the values underlying the First Amendment (speech) and antitrust (economic efficiency). In addition to avoiding the direct balancing thicket, this Article's proposal would provide the necessary increased protection for speech interests. After presenting its recommendations, this Part discusses the most obvious alternative not proposed: the outright immunization of expressive boycotts.

#### A. *Recommendations*

This Article proposes extending limited First Amendment protection to expressive boycotts, including those not directed toward the government, in which the boycotters' speech and economic self-interest are intertwined. When an arguably expressive boycott is at issue, the legal analysis addresses three classes of questions. First, does a bona fide speech interest exist? If such a speech interest is not present, then the boycott receives conventional antitrust analysis. Second, is there a conspiracy? Third, is there a competitive harm and, if so, what is the likely source of that harm? If such a speech interest is present, it operates as a kind of affirmative defense and influences the course of the ensuing antitrust analysis, which would deviate from more conventional applications.<sup>264</sup> The boycotters' noneconomic as well as economic interests must be considered; therefore, the threshold antitrust inquiry regarding the presence of a conspiracy becomes more complex. This more nuanced treatment of the interests at stake necessitates, in turn, a revised competitive effects analysis

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264. See Deborah A. Garza, *DOJ's New Export-Promotion Policy: Using the Sherman Act to Remedy the Exclusion of U.S. Firms from Foreign Markets*, ANTITRUST, Fall 1994, at 28, 29 (characterizing *Noerr* immunity as an antitrust defense); Joe Sims & Edith E. Scott, *Antitrust Consequences to Private Parties of Participation in and Settlement of Selected Trade Actions*, 56 ANTITRUST L.J. 561, 588 (1987) (same).

and the elimination of per se condemnation. This proposal would subject expressive boycotts, such as the three examples of intellectual property boycotts which directly implicated pricing—Oncomouse, Norvir, and academic journals—to rule of reason analysis. Moreover, the same values that necessitate the application of the rule of reason also require modification of the rule. The substance of these recommendations can be implemented in different ways and to different extents by the key actors: the courts, the antitrust agencies, and Congress. These recommendations constitute a starting point from which First Amendment values can gain greater recognition within the context of antitrust assessments of expressive boycotts and, perhaps, within antitrust analysis more generally.

1. *Speech Interest.* Under this Article's proposal, the first step is to determine whether the boycotters have a bona fide speech interest at stake. The facts instructive on this point could take any number of forms. This Section distinguishes boycott characteristics that are strongly indicative of a bona fide speech interest from those that strongly militate against such a finding.

Although expressive boycotts defy easy categorization within the First Amendment scheme, that framework provides some useful points of reference. For example, expressive boycotts are often supported by a wide range of speech activities that share important features with charitable solicitations and provide evidence regarding whether the boycott is expressive or purely coercive. Opining on the topic of charitable solicitations, the Supreme Court has recognized that they "involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment."<sup>265</sup>

The presence of a significant effort at public discourse, whether directed primarily to a specific community (for example, scientists) or to the public at large, is paramount to demonstrating a speech interest.<sup>266</sup> Thus, demonstrating that boycotters made efforts to

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265. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

266. As discussed in Part I.A, campaigns directed at the government may constitute petitioning and, therefore, receive immunity under *Noerr*. An important caveat to *Noerr* protection, however, is that it does not extend to all concerted efforts to influence the government. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425 (1990) (citing *Allied Tube & Conduit Corp. v. Indian Head, Inc.* 486 U.S. 492, 503 (1988)). The Supreme Court has rejected, for example, that competitors advocating specific governmental rates or price supports

publicly disseminate information about the boycott would be critical to establishing a cognizable speech interest. Press releases, petitions, and the like could provide this type of evidence. Conversely, efforts to maintain secrecy, which typify traditional antitrust conspiracies, would undermine finding an expressive purpose. Moreover, those involved in conventional conspiracies are unlikely, given the nature of their motives, to invite public scrutiny. In addition to the considerable legal vulnerability of participants in conventional boycotts, their profile as not particularly sympathetic defendants might also embolden boycott targets to file suit.

Examining the nature of the dialogue could provide further evidence of the importance of public discourse to the boycott. Does the boycott seek to address longstanding or broader social issues? For example, the Oncomouse and Cre-lox boycotts, in many regards, naturally grew out of the preexisting open science movement, which seeks to promote a freer exchange of information.<sup>267</sup> Preboycott activity supporting similar goals as well as contemporaneous framing of the actual boycott in these broader terms further suggests the presence of a bona fide expressive purpose.<sup>268</sup>

Another factor to consider is the significance or triviality of the boycotters' economic interest. The Court's ruling fails to address the practical matter of what level of economic self-interest is sufficient to bar a First Amendment-based defense.<sup>269</sup> Conversely, what quantum

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can commit horizontal price fixing. *See id.* FTC Commissioner William Kovacic posits that “[h]ad the containment of the per se rule been breached” in *Superior Court Trial Lawyers*, government contractors might have “felt emboldened to act together” and undertake boycotts that would then be justified as “political speech necessary to draw attention to threats to the public’s wellbeing.” William E. Kovacic, *Antitrust Stories*, 4 COMPETITION POL’Y INT’L 241, 260 (2008) (reviewing ANTITRUST STORIES, *supra* note 142). Kovacic observes that it is “uncertain” whether such boycotters would have been successful in “pulling themselves within the protection from per se condemnation that a defendants’ victory in [*Superior Court Trial Lawyers*] might have provided.” *Id.* This Article addresses expressive boycotts that are directed toward the policies of private parties rather than the government. As such, *Noerr* is unlikely to be implicated. With that said, however, those engaging in expressive boycotts directed toward the government would be able to argue why they deserve the limited First Amendment protection this Article advocates.

267. *See, e.g.*, Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77, 79 (1999) (providing “a comprehensive analysis of how law-and-norms theory applies to basic scientific research” given the increasing prevalence and relevance of patents in university settings).

268. *See, e.g.*, Hurwitz, *supra* note 49, at 116; *see also supra* note 180 and accompanying text.

269. Arguably, the Court’s failure to address this issue stemmed in part from the fact that the case at issue seemed relatively straightforward on this score. The boycotters sought a wage increase that would largely redound to their own direct benefit. *Superior Court Trial Lawyers*

of economic self-interest is necessary to interpose an antitrust challenge? Consider, for example, this Article's discussion of the medical doctors' boycott of Abbott. The doctors themselves did not directly purchase Norvir. They prescribed it to their patients who then purchased the drug with or without benefit of insurance. Yet there are arguments regarding the doctor-patient relationship and the possibility that necessary doctor visits for drug administration or for follow-up care created an economic interest on the part of the doctors. This example illustrates some of the complexities associated with assessing boycotters' economic interest.

When a significant number of boycott participants or supporters have little or no economic interest in the outcome of the boycott, the presence of a speech interest becomes especially likely. In some regards, this argument harkens back to the Supreme Court's ill-conceived bifurcation of political and economically motivated speech. One consequence of the Court's creation and application of this division is that, if one is *not* economically motivated, then any *other* motivation is deemed political in some sense—or at least worthy of First Amendment protection.<sup>270</sup> This Article rejects, as the Supreme Court has in other cases and contexts,<sup>271</sup> the argument that having an economic interest is incompatible with having a cognizable speech interest worthy of First Amendment protection. Nonetheless, this Article recognizes that considering whether expressive boycotts appeal to those without economic interests can be instructive. When boycotts garner noneconomic supporters, they must involve some noneconomic appeal. Such appeal, in turn becomes some evidence of political speech. One virtue of this inquiry is that it makes possible direct assessment of efforts to communicate with third parties (those without direct economic interests) as well as any support offered by third parties.

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Ass'n v. FTC, 856 F.2d 226, 238 (D.C. Cir. 1988). Moreover, it was of a sufficient magnitude such that not only did the protesters abandon their boycott but the number of attorneys seeking this work also increased substantially. *See id.* at 238 n.18 (noting that 100 to 200, rather than 40 to 60, attorneys call in for cases on a daily basis since the rate increase). Given the range of values at stake in expressive boycotts, lower courts would do well to construe only direct and substantial economic interests as giving rise to the presumption against any First Amendment defense.

270. The dissent recognized that economic interest was not incompatible with the presence of protected political expression. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 449 (Brennan, J., concurring in part and dissenting in part). This Article proposes a more expansive definition of protected speech that extends beyond political speech. *See supra* Part II.C.2.

271. *See supra* notes 175–78 and accompanying text.

The manner in which boycotters participate in the effort might also illuminate the role of noneconomic interests. “Boycotts, like other instances of collective action, are subject to . . . free-rider problems that limit the incentive for participation.”<sup>272</sup> If a boycott involves large numbers of participants, it is unlikely that those joining last are motivated primarily by economic self-interest and, hence, that the boycott itself is solely economic in nature. For example, consider the incentives of a prospective boycott participant, assuming that the prospective participant would bear the same costs and reap the same potential benefits as existing participants. As the number of existing boycotters increases, the economic incentive for additional individuals to participate decreases and eventually becomes quite small.<sup>273</sup> Joining the boycott would entail the same sacrifice that existing participants experience and would have a negligible effect on the outcome if there are already a large number of participants. Furthermore, because the benefits of a successful boycott would extend to nonparticipants, free-riding rather than participation makes economic sense. Though the evidence may be difficult to acquire and interpret, the participation trajectory characterizing a boycott may illuminate its expressive purpose.<sup>274</sup>

2. *Conspiracy.* The presence of a bona fide speech interest increases the complexity of the preliminary, but critical, determination regarding conspiracy. In contrast to more conventional antitrust settings, conspiracy law’s simplifying assumption of purely economic actors may be particularly unsound for the expressive boycotts at issue in this Article.<sup>275</sup>

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272. John & Klein, *supra* note 192, at 1197.

273. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 34, 45, 53 (1971) (“When the number of participants is large, the typical participant will know that his own efforts will probably not make much difference to the outcome, and that he will be affected by the meeting’s decision in much the same way no matter how much or how little effort he puts into studying the issues.”).

274. In some circumstances, a nontrivial actual benefit (or avoidance of cost) may accrue to a boycott member based on boycott participation regardless of the effectiveness of the boycott on its target. For example, participants may benefit from solidarity with the other members of the boycott. For a discussion of solidarity, see *supra* Part III.B.2. If such considerations are the dominant reasons for boycott participation, participation without economic interest would not be sufficient to establish a bona fide speech interest. Further difficult antitrust issues, beyond the scope of this Article, are raised if boycott participation is coerced by a subgroup through social or economic threats.

275. See *supra* Part I.B.1.

How would a court analyze a situation in which there was an appeal for a boycott and the boycott lacked a concrete “agreement”? The Seventh Circuit considered that issue within the context of a NOW-sponsored boycott of Missouri’s convention industry undertaken to pressure the state to support the Equal Rights Amendment.<sup>276</sup> The court found that “the invitation to act, the presence of a strong motive for concerted action, and the knowledge that others were taking similar action are sufficient to find conspiracy under the Sherman Act.”<sup>277</sup> This rather straightforward application of antitrust common law renders *de minimis* the conspiracy requirement. As a practical matter, it also means that much of the same evidence that could give rise to some claim for protected expression (such as a public appeal to boycott) could also facilitate finding that a conspiracy existed.

When the existence of an agreement is at issue, one particularly important antitrust inquiry concerns whether, but for similar actions by the alleged coconspirators, it would have been contrary to the interest of any individual participant to undertake the action in question. Within a conventional antitrust setting, this determination is relatively straightforward given that self-interest is assessed in strictly economic terms. The seminal case on this issue, *Interstate Circuit, Inc. v. United States*,<sup>278</sup> involved a film exhibitor who sent a letter to eight of its distributors requesting compliance with the exhibitor’s restrictions on certain third parties.<sup>279</sup> The letter “named on its face as addresses the eight local representatives of the distributors” so that each distributor knew that the competing distributors were considering the same proposal.<sup>280</sup> Each was aware that “without substantially unanimous action” regarding the proposal, any individual participant would risk “substantial loss,” but with “concerted action” there was the prospect of achieving increased profits.<sup>281</sup> The unanimous but technically individual responses of the distributors were deemed to constitute an agreement and, ultimately,

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276. *Missouri v. Nat’l Org. for Women, Inc.*, 620 F.2d 1301, 1302 (8th Cir. 1980). For a discussion of the case, see *supra* Part II.B.

277. *Id.* at 1303 (citing *Missouri v. Nat’l Org. for Women, Inc.*, 467 F. Supp. 289, 296 (1979)).

278. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

279. *Id.* at 216.

280. *Id.* at 222.

281. *Id.*



their conduct was condemned under the antitrust laws.<sup>282</sup> Most important for instant purposes is the Court's holding that "[i]t was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan."<sup>283</sup>

Given the expressive boycotts at issue in this Article, an alleged conspirator may have individually refused to deal with the target as a matter of principle under any circumstance.<sup>284</sup> Assessing actions against self-interest is difficult when the boycotters' interests are more complex than narrow economic gain. If an alleged conspirator would have engaged in the same conduct regardless of the alleged coconspirators' actions, it does not mean that no conspiracy exists. It does mean, however, that the inference of a conspiracy should not be conclusive.<sup>285</sup> In these boycott settings, it is also possible that peer or social pressure might act as an inducement or enforcement mechanism imposing costs on individuals who refuse to join the boycott.<sup>286</sup>

Assessment of the existence of an alleged conspiracy can occur not only on the basis of evaluating the incentives of individual participants but also through more comprehensively evaluating the overall economics underlying the conspiracy. For example, "if the hallmarks of profitable economic conspiracies" are missing, then "greater credence [should be accorded] to assertions that the boycott's purpose is political [or noneconomic]."<sup>287</sup> The "economic

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282. *Id.* at 232.

283. *Id.* at 226.

284. Boycotting as a form of "protest behavior is also in itself expressive, value-based conduct, *independent* of the pressure [the boycotters] impose. The boycotter affirms that under present conditions she considers purchases from or interactions with the boycotted party to be objectionable." C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 189 (1989).

285. See, e.g., Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 659, 689 (1978) (An individual who boycotts for political reasons "may be indifferent to whether others pursue a similar course of action" or the individual may boycott "only if he believes others will do so the same, so that the combined protest will have some practical effect.").

286. See, e.g., Posting of Scott Aaronson to Freedom to Tinker, <http://freedom-to-tinker.com/blog/felten/journal-algorithms-editorial-board-revolts> (Feb. 9, 2004, 12:38 EST) ("A few days ago I refused to referee for the Elsevier journal Theoretical Computer Science because of its price-gouging, and (call it peer pressure if you want) it makes me feel better that others are making a similar decision.").

287. Hurwitz, *supra* note 49, at 115. Hurwitz aptly notes, however, that "the converse of this reasoning does not hold true with equal force." *Id.* The presence of market conditions

indicia of a profitable boycott” include factors that “increase[e] the potential gains from the boycott, assist[] in its coordination, [and] reduce[] incentives to cheat.”<sup>288</sup>

Within conventional antitrust cases, the conspiracy requirement has been periodically applied in a “flexible” manner so that courts are not unduly prevented from “reaching the competitive merits” of the conduct at issue.<sup>289</sup> Although this flexibility has been reflected in courts’ increased willingness to find a conspiracy, this Article proposes that it should also be applied to expressive boycotts to account for the value and realities of group speech and, thereby, properly diminish a court’s willingness to so liberally find an antitrust conspiracy.<sup>290</sup>

3. *Competitive Harm.* Just as the existence of a speech interest should be discerned from the facts at issue rather than from mechanical categorization, so too should competitive harm be assessed by evaluating the facts rather than by resorting to per se rules. Expressive boycotts should *never* be condemned per se. Instead, this Article proposes that all boycotts characterized by a bona fide speech interest, whether traditionally subject to per se illegality or rule of reason analysis, should be analyzed under a *modified* rule of reason approach establishing a competitive harm and reflecting the unique circumstances and values at stake. An important component of this proposal is that proof of an actual economic harm is not sufficient for antitrust liability. There must also be evidence that economic coercion was sufficient to cause this harm. As such, boycotts whose efficacy derives primarily from persuasion rather than economic coercion do not run afoul of the antitrust laws.

The rationale underlying per se condemnation of particular conduct is that anticompetitive effects are probable and procompetitive effects are extremely unlikely.<sup>291</sup> Per se illegality’s automatic condemnation cannot, by design, result in false negatives

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conducive to effective collusion should not be interpreted to imply that the boycott constitutes “unlawful economic coercion” rather than legitimate expression. *Id.*

288. *Id.* (summarizing the conditions Posner and Easterbrook associate with effective collusion).

289. SULLIVAN & GRIMES, *supra* note 51, at 456.

290. Note, *supra* note 285, at 691 (advocating, within the political boycott context, that “courts define conspiracy narrowly and insist that it be proven by more direct means than are often used in antitrust prosecutions in the commercial area”).

291. See *supra* Part I.B.

and is unlikely to result in true false positives (meaning the procompetitive effects would outweigh the anticompetitive effects). If antitrust law is to account for the social benefit of the speech involved, something more akin to a rule of reason analysis becomes necessary.<sup>292</sup> Without more nuanced inquiry than per se analysis provides, antitrust law would condemn expressive boycotts that contribute to public discourse but do not inflict competitive harm.

Valuing speech in a manner consistent with the Constitution increases the possibility of false positives within this context, and this possibility should be avoided. Of course, in the absence of a per se rule, false negatives are possible. Two factors, however, militate against the latter prospect being unduly concerning. First, this Article advocates a modified rule of reason treatment for expressive boycotts as opposed to per se legality.<sup>293</sup> As such, antitrust scrutiny will be brought to bear and anticompetitive restraints will be condemned. Second, on the margin, allowing anticompetitive conduct with an intertwined speech interest to persist reflects a social value judgment regarding the respective weights of society's interests in eliminating anticompetitive conduct and protecting free speech.

The existence of a speech interest would not only affect per se actions but would also necessitate modifying the rule of reason. Changes to the rule of reason should include reforming the way that competitive harm is identified and crafting a safety zone. As this Article has discussed, anticompetitive effects can be established directly through evidence of actual harm or indirectly through market power.<sup>294</sup> In a traditional antitrust setting, a target's price reduction in response to boycott demands constitutes the most obvious evidence of actual harm. Under the conventional rule of reason analysis, this price change would typically constitute prima facie evidence establishing competitive harm. In such a case, if the effect on the market (such as

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292. The dissent in *Superior Court Trial Lawyers* advocated application of the rule of reason to the expressive boycott at issue in that case. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 439 (1990) (Brennan, J., concurring in part and dissenting in part). The dissent neither recognized nor contended with the unique challenges that applying the rule of reason in a conventional manner would raise.

293. Consistent with the conventional rule of reason, boycotters who have inflicted competitive harm could, in theory, also attempt to demonstrate offsetting procompetitive effects. This proposal does not eliminate the ability to make such arguments. The existence of a speech interest, however, would not factor into that balancing test.

294. See *supra* Part I.B.3–4.

a change in price or quantity of a good) is attributed to the conspiracy, it is presumed to be a function of economic coercion.<sup>295</sup>

But expressive boycotts, by design, seek to generate pressure through public shaming or reputation degradation that need not contribute to the direct coercive effects of a concerted refusal to buy. “[B]oycotts need not substantially reduce sales to be successful. Firms may comply with boycott demands in response to the moral pressure and concern for the firm’s reputation, even absent any impact on sales.”<sup>296</sup> The negative publicity attendant to a boycott can “engender a negative image that penetrates . . . [the minds of current and prospective company staff].”<sup>297</sup> As a result, companies may, for example, encounter obstacles in “recruitment of high-quality graduates” and in maintaining morale among existing employees.<sup>298</sup> “Employees don’t like working for a company that is being attacked.”<sup>299</sup> Thus, the legitimacy of the conventional antitrust presumption that market effects originate from economic coercion becomes uncertain in the case of expressive boycotts.

Expressive boycotts raise the issue of whether established boycott concessions were generated by persuasion or economic coercion, a difficult assessment that is further complicated in the context of expressive boycotts because some combination of those two forces may also be present. *Superior Court Trial Lawyers* is the only antitrust case that has directly addressed the cause of concessions by a boycott target. Over the course of its numerous proceedings, different jurists came to divergent conclusions regarding the forces at play. The ALJ found that “there is no credible evidence that the [target’s] eventual capitulation to the demands of [boycotters] was made in response to public pressure, or, for that matter, that [the] publicity campaign actually engendered any significant measure of public pressure.”<sup>300</sup> Justices Brennan and Marshall found that “the success of the boycott could have been

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295. These effects may be difficult to establish given that price and nonprice characteristics of goods and services vary with changes in the economic environment (excluding the boycott), with decisions to alter a firm’s strategy, and possibly even for reasons relating to pending or anticipated litigation.

296. Klein et al., *supra* note 8, at 7.

297. Scott Clouder & Rob Harrison, *The Effectiveness of Ethical Consumer Behaviour*, in *THE ETHICAL CONSUMER* 89, 96 (Rob Harrison et al. eds., 2005).

298. *Id.*

299. *Id.*

300. *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 416–17 (1990).

attributable to the persuasiveness of its message rather than any coercive economic force.”<sup>301</sup> Given these diverse assessments, the question becomes: To what extent can courts directly identify the impetus for the target’s price change? Relatively little legal guidance is available on this issue because neither the expressive aspect of such boycotts nor the possibility of persuasion is currently recognized.

By replacing per se condemnation with a modified rule of reason, this Article’s proposal allows for judicial recognition of a boycott’s possible expressive purpose. Alleged anticompetitive effects are treated differently depending on whether or not actual economic effects are established. Claims of actual competitive harm will frequently be relatively easy to allege if the expressive boycotts entail concessions by the target firm.<sup>302</sup> In such cases, the plaintiff would be required to demonstrate that the boycotters’ withholding of purchasing power was sufficiently coercive to generate the target firm’s response.<sup>303</sup> Confining the cognizable antitrust effect in this manner requires distinguishing between the effects attributable to economic coercion versus persuasion. This Article designates general economic effects resulting from boycotts as “actual effects” and reserves the term “actual anticompetitive effects” for those effects resulting from economic coercion.

Market share that confers market power already functions as a surrogate for anticompetitive effects when there are no directly observable actual effects. This Article proposes that a similar type of approach can also help determine, with certain limitations, whether or not the source of ostensible actual anticompetitive effects is persuasion rather than economic coercion.<sup>304</sup> Under this proposal, the following market power thresholds would guide the determination of anticompetitive effects. A market share below 10 percent would constitute a safety zone. Boycotts of this size would be deemed presumptively insufficient to result in antitrust liability even when an “actual effect,” though of unknown provenance, has been

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301. *Id.* at 441 (Brennan, J., concurring in part and dissenting in part).

302. John & Klein, *supra* note 192, at 1197.

303. A weaker version of this proposal would permit expressive boycotters to proffer a defense of insufficient market power. *See* AREEDA & HOVENKAMP, *supra* note 138, at 196 (“[P]rosecution in . . . speech-conduct case[s] could be adequately blunted by a special rule allowing the defendants to prove their de minimis market power.”).

304. *See* Superior Court Trial Lawyers Ass’n v. FTC, 856 F.2d 222, 252 (D.C. Cir. 1988) (discussing the difficulty of discerning competitive effects).

established.<sup>305</sup> If there is an “actual market effect,” again of unknown provenance, and the boycotters enjoy 20 percent or more of the relevant antitrust market, however induced, then the market effect would be presumed to result from direct coercion.

In the absence of an actual market effect, the rule of reason analysis would proceed along conventional lines. Under those circumstances, the plaintiff would need to establish a minimum market share on the order of at least 35 to 50 percent to demonstrate market power.<sup>306</sup> The safety zone would be retained, however, and particularly within this context it should be considered whether the 10 percent threshold should be increased in cases in which no actual effect is alleged.

These thresholds could be implemented in a number of ways. By case-by-case determinations, over time the courts would generate piecemeal specific baselines. When making case-specific determinations, individual judges can offer, in dicta, more general baselines. Consider, for example, Judge Learned Hand’s famous, and often cited, articulation in *United States v. Aluminum Co. of America* that a market share of “over ninety . . . is enough to constitute a monopoly; it is doubtful whether sixty . . . percent would be enough; and certainly thirty-three per cent is not.”<sup>307</sup> Another, far less likely possibility would be the promulgation of an enforcement guideline by the antitrust agencies within this area that retreats from the FTC’s hard-fought win in *Superior Court Trial Lawyers*. Although legally nonbinding, agency enforcement guidelines often exert a powerful influence over the judiciary.<sup>308</sup> Additionally, Congress could enact legislation that either excludes expressive boycotts from the reach of the Sherman Act or moderates the manner in which the Sherman Act is applied.<sup>309</sup> Though, for the same reasons that Congress opted to

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305. Alternatively, one could establish different thresholds for situations that previously would have been given per se treatment as opposed to rule of reason treatment.

306. See Andrew I. Gavil, *Copperweld 2000: The Vanishing Gap Between Sections 1 and 2 of the Sherman Act*, 68 ANTITRUST L.J. 87, 103–04 (2000). The proposed 20 percent threshold when a market effect is present, as opposed to the 35 to 50 percent in the absence of a market effect, illustrates that the “inference of market power drawn from direct evidence is given far greater weight than any circumstantial evidence based on market shares.” *Id.* at 99.

307. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945).

308. See generally Greene, *supra* note 83, at 781–809 (delineating and criticizing the impact of merger guidelines upon the judiciary).

309. The 1970 Newspaper Preservation Act, which seeks to maintain “a newspaper press editorially and reportorially independent and competitive in all parts of the United States,” constitutes an example of congressional intervention regarding antitrust. 15 U.S.C. § 1801

enact the extremely general Sherman Antitrust Act, it is also unlikely to produce highly detailed legislation within this context.<sup>310</sup>

The physician-led Abbott boycott illustrates the potential significance of market share thresholds in antitrust analysis. By most accounts, Abbott partially abandoned the 400 percent price increase that prompted the boycott.<sup>311</sup> Under this Article's proposal, even partial accommodation of boycott demands would not constitute prima facie evidence of actual anticompetitive effect. An examination of the marketplace into which Abbott sold its drugs would very likely reveal that the couple hundred doctors who signed the petition stating that they refused to prescribe Abbott drugs (when true substitutes were available) enjoyed no real power in this market.<sup>312</sup> As such, this could well represent the type of boycott that would fall within this Article's proposed safety zone. One might also attempt to cast the relevant market as that in which Abbott "purchases" physician services for clinical trials or, more specifically, clinical trials of AIDS drugs. In those circumstances, the boycotters' market power (as sellers) likely exceeds that under the prior market definition (as buyers). It would remain necessary, though, to determine whether the boycotters possessed sufficient market power to infer an anticompetitive effect. Extremely involved inquiries of this type are routinely undertaken in antitrust matters to avoid unnecessarily condemning procompetitive conduct. First Amendment rights warrant, at the least, comparable solicitude.<sup>313</sup>

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(1970). The act, which was "passed in response to the Supreme Court's decision in *Citizen Publishing Co. v. United States*," provides an exemption to the antitrust laws. Denise W. DeFranco, *Administrative Law: Chevron and Canons of Statutory Construction*, 58 GEO. WASH. L. REV. 829, 832 (1990) (footnote omitted).

310. William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 663 (1982) ("The antitrust laws were written with awareness of the diversity of business conduct and with the knowledge that the detailed statutes which would prohibit socially undesirable conduct would lack the flexibility needed to encourage (and at times even permit) desirable conduct. To provide this flexibility, Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions.").

311. See Alcorn, *supra* note 253 (describing Abbott's concessions, including selective price reductions to levels prior to the controversial price hike).

312. See Francine Knowles, *Doctors Boycott Abbott over Price Hike for AIDS Drug*, CHI. SUN-TIMES, Feb. 11, 2004, at 75 (noting that boycotters "represent fewer than 2 percent of physicians who treat AIDS patients").

313. See Kindred, *supra* note 141, at 723 (advocating "the kind of broad-based factual inquiry that the rule of reason affords" within this boycott context).

Predictability in the law is always an important value. This is even more true when “the inevitable caution that unpredictability yields will induce self-censorship (‘chilling’) of that which may very well be important.”<sup>314</sup> Although the current legal regime, as a practical matter, arguably offers greater First Amendment predictability regarding expressive boycotts than this Article’s proposal, that is only because “predictability” in this context also encompasses the certainty of little or no protection. The recommendations in this Article provide significant guidance regarding First Amendment protections of expressive boycotts and, given their heavy reliance upon antitrust policy and precedent, provide vital consistency from a competition perspective.

### B. *Nonrecommendations*

The approach advocated by this Article, consistent with the *Superior Court Trial Lawyers* dissent, takes the form of an unconventional accommodation. Rather than recommend either wide-ranging or zero immunity, this Article recommends antitrust immunity for a range of boycotts when two conditions are met: the presence of more than a bona fide speech interest and the absence of market power.<sup>315</sup> If those two conditions do not hold, then conventional antitrust analysis, including possible per se condemnation, applies. This final Section considers, and rejects, modifying the two prongs of the proposed standard in a manner that would further expand First Amendment protection.

Should speech protection be further enhanced by eliminating the market power exception to immunity?<sup>316</sup> Consider an immunization

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314. Schauer, *supra* note 41, at 299.

315. For all of their differences, the majority and dissent in *Superior Court Trial Lawyers* agreed that the expressive boycott was not entitled to immunity under the First Amendment. The dissent clearly deemed the boycott to be a “political communication.” Given the boycott’s potential for economic coercion, however, the dissent refused to render the boycott “immune from scrutiny.” *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 448 (1990) (Brennan, J., concurring in part and dissenting in part). In so doing, the dissent transcended the majority’s unsuccessful efforts to deny the expressive component of the boycott. By relying on *O’Brien*, the dissent demonstrated a willingness to “balance First Amendment interests implicated by the facts of [the] case.” Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer’s New Balancing Approach*, 31 U. MICH. J.L. REF. 817, 819 n.12 (1998) (emphasis added).

316. *Noerr* is generally referred to interchangeably as a defense or as an immunity. See Russell Wofford, *Considering the “Pattern Litigation” Exception to the Noerr-Pennington Antitrust Defense*, 49 WAYNE L. REV. 95, 98 n.10 (2003). This Part has proposed a First Amendment-based defense/immunity which operates to modify the applicable antitrust



approach that requires only a minimal showing of a speech interest. Given such a powerful defense, potential boycotters lacking any underlying speech interest might be induced to undertake a public boycott incorporating a speech component. If such “feigned” speech were readily identified and excluded from First Amendment protection, this prospect would not be troubling.<sup>317</sup> It is more likely, however, that distinguishing sham from bona fide speech interests will prove exceedingly difficult. Within the *Noerr* context where, for example, similar determinations regarding litigation must be made, the courts have adopted an extremely low threshold, comparable to Rule 11 analysis under the Federal Rules of Civil Procedure, for what constitutes bona fide litigation.<sup>318</sup> An alternative mechanism for making this assessment would inquire into the litigant’s motivations, but the Supreme Court has affirmatively rejected the relevance of motivation unless the action is objectively baseless.<sup>319</sup>

Despite the Court’s reluctance to engage in the analysis of motivation in the related *Noerr* context, analysis of motivation has been used elsewhere in antitrust law—for example, through the use of a “but for” analysis to assess the existence of a conspiracy. Here, a “but for” approach could possibly be used to help determine whether boycott speech is feigned or real. As this Article has argued, the level of engagement in public discourse is a possible indicator that the boycott was expressive. In theory, then, to determine whether the boycott speech was feigned, one could examine whether such public discourse would have been undertaken absent the prospect of immunity. Given the *Superior Court Trial Lawyers* ruling, however, this “but for” immunity argument sweeps far too broadly. Presently, many potential boycotters with an economic interest who fear antitrust actions would be reluctant to undertake boycotts and risk antitrust condemnation. In practice, therefore, all such boycotters, even those with bona fide speech interests, would be more likely to engage in such expressive conduct if antitrust immunity were

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analysis. This Section considers alternative standards that are so protective of speech that they are referred to loosely in terms of immunity for emphasis.

317. The Supreme Court has long held that “First Amendment rights may not be used as the means or the pretext for achieving ‘substantive evils’ which the legislature has the power to control.” *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972) (citation omitted).

318. See, e.g., Lisa Wood, *In Praise of the Noerr-Pennington Doctrine*, ANTITRUST, Fall 2003, at 72, 73 (noting the similarity between *Noerr*’s exception for sham litigation and Rule 11).

319. *Prof’l Real Estate Investors v. Columbia Pictures*, 508 U.S. 49, 59–60 (1993) (stating that motivation is irrelevant if the litigation is objectively reasonable).

available.<sup>320</sup> If all, or nearly all, boycotts involved speech induced on some level by the prospect of antitrust immunity, then a “but for” approach would constitute a poor screen.

A somewhat less aggressive alternative to full immunization when a boycott involves a bona fide speech interest would be to grant immunity (without considering market power) when a boycott’s speech interest is deemed “significant,” however defined. Relative to the bona fide speech standard advocated, which merely requires more than a *de minimis* interest, a more aggressive partitioning of expressive boycotts seems much more difficult to implement, more prone to chilling speech, and open to criticism as arbitrary absent some clear principle justifying a further subcategorization of which speech warrants protection. While it is possible that such a principle might be developed and applied to this context, the history of attempts to make principled distinctions of this type in the First Amendment area underscores the difficulty of such an enterprise.

Under this Article’s proposal, which advocates application of a modified rule of reason, the problem of feigned expressive boycotts that seems particularly troubling under full immunization is significantly mitigated. By focusing on the economic consequences of market conduct, rule of reason analysis protects the speech interests of boycotters who lack market power and cause no antitrust harm. The risk of feigning speech to limit antitrust liability is potentially very high to conspirators because exposing the existence of a conspiracy increases the probability of an antitrust action. For those whose underlying speech interest is most tenuous, this increased probability is also relatively more risky as, in the case of price fixing, a prosecuted conspiracy still risks *per se* treatment. Furthermore,

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320. It is possible to develop a different baseline than current law for the “but for” immunity comparison. One natural candidate for such a baseline is that in which identified group boycotts are vulnerable to antitrust sanction only if they adversely affect competition. Without immunity being available, a group boycott with sufficient market power to force target concessions would not likely engage in (unneeded) public discourse, which would greatly increase the risk associated with discovery and prosecution. With immunity, however, those boycotters would likely engage in public discourse and shield their boycott. On the other hand, a boycott that lacks market power but includes a bona fide speech interest would engage in public discourse, even without immunity, since the boycott would not be vulnerable to an antitrust sanction given this alternative baseline for the “but for” assessment. Immunity would also be attractive to this class of boycotters (no market power), but the speech activities would have been undertaken without the possibility of immunity. This approach effectively recreates a market power–based categorization similar to this Article’s proposal, but with additional complications associated with assessing motivation and dealing with conspirators that have heterogeneous preferences.

disingenuous boycotters risk a public backlash should their subterfuge be exposed. In sum, even when antitrust leniency immunizes feigned boycotts, the costs of such errors are cabined under this proposal. Only boycotters without market power will avoid liability, but they are precisely the group that does not threaten antitrust harm.

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Expressive boycotts by politically motivated and economically interested parties constitute the type of undertaking that can be meaningfully assessed under both the First Amendment and the Sherman Act so long as neither regime resorts to overly simplistic analysis. The First Amendment (with the introduction of intermediate scrutiny and *O'Brien* balancing) and the Sherman Act (with an increasing reliance upon the rule of reason) are well equipped to provide the more nuanced analysis required. As *Superior Court Trial Lawyers* illustrated with regard to the First Amendment, once a court unnecessarily restricts itself to an all-or-nothing type of analysis, “the difficulties of ‘all’ [immunizing speech] may lead courts to choose ‘nothing.’”<sup>321</sup> As this Article has demonstrated, however, the courts need not restrict themselves in that manner. A vital form of intermediate First Amendment protection is available through *O'Brien* and can be meaningfully accommodated through antitrust law’s adoption of a modified rule of reason. Stated alternatively, antitrust law need not adopt an all-or-nothing perspective regarding its own ability to accommodate noneconomic factors such as speech. Through recommendations as well as nonrecommendations, this Article demonstrates how the law could strike a superior balance between First Amendment and competition values despite their inherent incommensurability.

#### CONCLUSION

Expressive boycotts combine speech with economic coercion or, more specifically, the potential for such coercion, and present a difficult challenge to current antitrust and First Amendment law. The Supreme Court’s response in *Superior Court Trial Lawyers*, the controlling precedent on this issue, effectively rejects the argument

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321. Schauer, *supra* note 41, at 286. Schauer argues that in the absence of some form of intermediate First Amendment protection both commercial speech and defamation were deemed “outside first amendment protection.” *Id.*

that economically self-interested boycotters have speech interests worthy of First Amendment protection. Ironically, it is oftentimes precisely these parties who are most knowledgeable about and committed to the social and community issues at stake. The unique features of a boycott in engendering social discourse coupled with the frequent absence of any underlying market power renders antitrust condemnation, or even discouragement, of these efforts dubious from an economic perspective as well as unconstitutional. After closely examining the precursors to *Superior Court Trial Lawyers* to underscore the longstanding biases of both First Amendment and antitrust law made manifest in that ruling, this Article concludes that ensuring adequate protection of expressive boycotts requires reforms in both areas of law.

Whatever one's ultimate assessment regarding the merits of the intellectual property-related boycotts discussed, they were expressive undertakings and not merely conventional concerted refusals to deal. This Article recommends more lenient antitrust treatment of boycotts involving a speech interest. Under this proposal, all expressive boycotts would receive a modified rule of reason treatment, and cognizable market effects would be limited to those directly resulting from the boycotters' economic power. Additionally, market power thresholds, particularly a safety zone, would assist the courts in accommodating these incommensurate values. This balanced approach would be more difficult to implement than either per se condemnation or complete immunity, but it would end antitrust law's unwarranted censorship of expressive boycotts.