Constitutional Rights of Noncommercial Boycotters: A Delicate Balance

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NOTES

CONSTITUTIONAL RIGHTS OF NONCOMMERCIAL BOYCOTTERS: A DELICATE BALANCE

The power to boycott has long been one of the most potent weapons in the arsenal of special interest groups seeking to achieve social or political change. Because of the economic discomfiture such boycotts inevitably cause, boycott targets have often sought legal redress by arguing that boycotts are restraints of trade in violation of the antitrust laws or that the tactics used by a particular group of boycotters gives rise to a cause of action in tort. Because

1. For the purposes of this note, “boycott” is defined as “a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target.” St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 541 (1978) (footnote omitted). The term “boycott” was derived from a method of retaliation used in 1880 against a land agent, Charles Boycott, who paid starvation wages to his tenants and evicted those who complained. The outraged tenants rallied the support of Boycott’s servants, herders, and drivers, and all agreed to cease relations with the Boycott family. Missouri v. NOW, 620 F.2d 1301, 1304 n.5 (8th Cir.), cert. denied, 449 U.S. 842 (1980).

2. The best-known illustration of the effectiveness of such boycotts was the refusal of black citizens of Montgomery, Alabama to patronize a bus company that practiced racially discriminatory policies. See M.L. King, STRIDE TOWARD FREEDOM (1958).

3. E.g., Missouri v. NOW, 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980); Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n, 499 F. Supp. 553 (D. Del. 1980). Section one of the Sherman Act states: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1 (1976). Group boycotts have been held to fall within the proscriptive language of this section as combinations in restraint of trade. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild, Inc. v. FTC, 312 U.S. 457 (1941).

4. See, e.g., Missouri v. NOW, 620 F.2d 1301, 1316 (8th Cir.) (secondary boycott giving rise to claim of tortious intentional infliction of economic harm without legal justification or excuse), cert. denied, 449 U.S. 842 (1980); NAACP v. Claiborne Hardware Co., 393 So. 2d 1290, 1301 (Miss. 1980) (tortious intentional infliction of economic harm through use of violent acts), cert. granted, 102 S. Ct. 565 (1981); Southern Christian Leadership Conference v. A.G. Corp., 241 So. 2d 619 (Miss. 1970) (tortious conspiracy to cause economic harm through
special interest group boycotts contain an expressive element⁵ that is lacking in commercial boycotts,⁶ serious questions have arisen as to whether such boycotts can be enjoined or damages assessed without infringing the participants’ first amendment rights.⁷

Some courts have dealt with this constitutional problem by attempting to balance the government’s interest in economic regulation against the boycotters’ interest in unfettered expression.⁸ Others have rejected such a balancing test and maintained that boycotters possess an unequivocal right to persuade others not to deal for political reasons.⁹ Still others have taken a more restrictive view, treating

use of violence and secondary boycott).


6. The Supreme Court has uniformly held that group boycotts undertaken for commercial purposes are per se violations of the Sherman Act. See, e.g., Klor’s Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959); Fashion Originators’ Guild, Inc. v. FTC, 312 U.S. 457, 467-68 (1941).

7. The first amendment to the United States Constitution prohibits Congress from making laws “abridging the freedom of speech.” U.S. CONST. amend. I. For a discussion of the constitutional issues raised by noncommercial boycott cases, see infra notes 123-74 and accompanying text.

8. This approach was first employed in 1980 in Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass’n, 499 F. Supp. 553 (D. Del. 1980) and in Crown Cent. Petroleum Corp. v. Waldman, 486 F. Supp. 759 (M.D. Pa.), rev’d on other grounds, 634 F.2d 127 (3d Cir. 1980), and was strongly advocated in the dissenting opinion in Missouri v. NOW, 620 F.2d 1301, 1324-26 (8th Cir. 1980) (Gibson, J., dissenting).

9. The view that there is an expansive constitutional right to boycott has been most fully developed in a group of Fifth Circuit cases. Kirkland v. Wallace, 403 F.2d 413 (5th Cir. 1968) involved a constitutional challenge to an Alabama statute that prohibited printing or circulating any notice of boycott, or declaring that a boycott existed against any person or association. Id. at 414. The circuit court, in striking down the statute, stated: “Extended discussion is hardly necessary to show the patent invalidity of a statute such as [this]. Clearly, on its face, this statute prohibits actions protected by the First Amendment, and this overbreadth of coverage is fatal.” Id. at 416 (emphasis added).

The Fifth Circuit’s view that boycotters deserve broad constitutional protection was further developed in Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969). In Machesky, a civil rights boycott had been enjoined following several acts of violence associated with the boycott effort. Id. at 285. Noting that the injunction prohibited “loitering or congregating . . . to induce, persuade, or coerce any person or persons not to trade or to do other business with . . . [c]omplainants,” the court overturned the injunction as constitutionally unsound. Id. at 291. Judge Bell wrote:

This, for aught else appearing, prohibits the distribution of leaflets or even speech directed toward the boycott effort. [Such a prohibition] is constitutionally overbroad
noncommercial boycotts\textsuperscript{10} as similar to commercial combinations in restraint of trade.\textsuperscript{11}

These approaches\textsuperscript{12} have tended to focus primarily on the boycotters’ interest in expressing themselves economically and on the public’s interest in maintaining a competitive market.\textsuperscript{13} Little attention has been paid to the target’s right to be free from economic coercion. This lack of sensitivity to the interests of the individual targets has led those jurisdictions that afford boycotters broad constitutional protection to sanction the imposition of severe economic hardship on parties only tangentially related to the dispute at hand.\textsuperscript{14}

\textit{Id.}

10. For the purposes of this note, boycotts will be considered “noncommercial” when the boycotters are not business entities and are not acting to increase their profits. See Note, NOW or Never, supra note 5, at 1319.

11. See Council of Defense v. International Magazine Co., 267 F. 390, 411-12 (8th Cir. 1920); New York v. Horsemen's Benevolent & Protective Ass'n, 55 A.D. 2d 251, 389 N.Y.S.2d 868 (1976). This approach has been taken by courts that endorse a literal application of the antitrust laws and give little weight to the proposition that actions resulting in a restraint of trade may merit constitutional protection. For example, in New York v. Horsemen's Benevolent & Protective Ass'n, 55 A.D. 2d 251, 389 N.Y.S.2d 868 (1976), an action was brought under New York's antitrust statute, N.Y. GEN. BUS. LAW § 340 (McKinney 1968), against an association of horse owners and trainers who withdrew their horses from racing to protest the state's failure to finance a pension plan for its members. The boycott's intent to communicate the group's displeasure with a legislative policy did not weigh heavily with the court, which held that “[h]is was not merely an attempt to influence legislation but a boycott” and thus enjoinable under the applicable antitrust law. 55 A.D. 2d at 254, 389 N.Y.S. 2d at 869 (citations omitted).

For commentary asserting that noncommercial boycotts may be constitutionally prohibited, see Note, Political Boycott, supra note 5, at 686-87; Note, Protest Boycotts Under the Sherman Act, 128 U. Pa. L. Rev. 1131, 1144-48 (1980) [hereinafter cited as Note, Protest Boycotts].

12. Because of the paucity of decisions dealing with this question and the divergent views of those few cases that have dealt with it, it cannot be said that any of the above enumerated approaches constitutes a majority view.


The undesirability of allowing economic action to be taken against parties who are essentially neutral has been noted in passing by several commentators. See, e.g., Coons, Non-Commercial Purpose as a Sherman Act Defense, 56 Nw. U.L. Rev. 705, 749 n.123 (1962); Note, Protest Boycotts, supra note 11, at 1159. It was also forcefully argued by the unsuccessful
These results indicate the need for a test that will balance the boycotters' constitutional interests not only against those of the government in maintaining competition in the marketplace but also against those of the individual who finds himself an economic pawn in a battle in which he has no stake. This note examines the nature of the constitutional right that adheres to noncommercial boycotters, and proposes a framework for analysis in which the primary consideration in gauging the extent of that right is the relationship between the target and the boycotters' grievance. Included in this framework is the notion that where the target's relationship to the grievance is tenuous, the governmental interest in prohibiting the boycott is far greater than where a more direct relationship exists.

THE BOYCOTT AT COMMON LAW

It has long been recognized that a merchant has a property right to conduct his business without interference by a third party, and that such interference may give rise to a cause of action in tort. One of the essential elements of this tort action, however, has

plaintiff in Missouri v. NOW, 620 F.2d at 1312.


The tort of interference with prospective economic advantage has been codified in section 766B of the Restatement:

One who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third party not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.


The primary concern underlying the development of this tort was the protection of the individual merchant's right to pursue his trade unimpeded, rather than a broad governmental concern to preserve the public's right to a competitive market. In an early case illustrating this concern, the court stated:

The common law has long recognized as a part of the boasted liberty of the citizen
been the notion that boycotters or other violators can be held liable only if their action was taken without justification. Although many of the common law cases dealing with boycotts are of ancient vintage, the standards employed by the courts in gauging "justification" are highly relevant to modern constitutional analysis since such determinations often rested on the strength of the government's interest in protecting the target.

Perhaps the clearest rule that can be gleaned from examining these cases is that noncommercial boycotts with lawful objectives executed against a primary target and unattended by violence or intimidation will not be enjoined. In Watch Tower Bible & Tract Society v. Dougherty, the defendants, leaders of a religious group, instituted a boycott against a radio station and the department store controlling the station in retaliation for broadcasts they believed attacked their faith. Rejecting the claim that the boycott gave rise to any action in tort, the court declared:

> the right of every man to freely engage in such lawful business or occupation as he himself may choose, free from hindrance or obstruction by his fellow men. . . . In a civilized community which recognizes the right of private property among its institutions . . . a man should be protected by the law in the enjoyment of property once it is acquired [and] in his efforts to acquire it.

Brennan v. United Hatters Local 17, 73 N. J. L. 729, 742, 65 A. 165, 170-71 (1906). See also Annot., 9 A.L.R.2d 228 (1950). 17. See Missouri v. NOW, 620 F.2d 1301, 1316-19 (8th Cir.), cert. denied, 449 U.S. 842 (1980); W. Prosser, supra note 16, § 129, at 942-46; Coons, supra note 14, at 713-14. Those boycotts that are found to have been taken with justification are said to be "privileged." Missouri v. NOW, 620 F.2d at 1319.


Under modern constitutional theory, expressive conduct such as a boycott cannot be regulated unless such regulation can be justified as necessary to further a "substantial" government interest. United States v. O'Brien, 391 U.S. 367, 377 (1968). Where courts have seen fit to prohibit certain boycott actions, it is probable that a substantial governmental interest has been found in restricting such conduct. Conversely, it may be said that where boycotts have not been found actionable, the boycotters' interest in expressing themselves economically was found to have vitiated (or at least counterbalanced) the plaintiffs' claims that there was a substantial governmental interest in providing them protection.

20. For the purposes of this note, a "primary target" is defined as a party that engaged in the conduct which led to the dispute at hand and that has the power to satisfy the boycotters' demands directly.


23. Id. at 287, 11 A.2d at 148.
The defendants . . . cannot be mulcted in damages for protesting against the utterances of one who they believe attacks their church and misrepresents its teachings nor for inducing their adherents to make similar protests. A right of action does not arise merely because a group withdraws its patronage or threatens to do so and induces others to do likewise where the objects sought to be obtained are legitimate. 24

The view that boycotters have a right to engage in peaceful boycotting of primary targets persists so strongly through the common law decisions that courts have felt compelled to reaffirm this principle even where they have held the boycott at issue to be unlawful. 25

Where the target hit by a noncommercial boycott is only tangentially related to the dispute, courts have been willing to provide it legal or equitable relief. 26 In Southern Christian Leadership Conference v. A.G. Corp., 27 for instance, the plaintiff was a white merchant boycotted by a black civil rights group following a violent incident between members of the group and the police. 28 The court held that injunctive relief and damages were properly awarded, and that the defendants' claim of constitutional protection was defeated by the secondary nature of their actions:

The defendants argued that they were only exercising rights vouchsafed to them by the First and Fourteenth Amendments. . . . The whole trouble in this case was that these defendants had no com-

24. Id. (citations omitted).
25. In Southern Christian Leadership Conference v. A.G. Corp., 241 So. 2d 619 (Miss. 1970), the court held the boycott unlawful because it was aimed at a secondary target and accompanied by violence. The court also noted that: "Every member of this court agrees . . . that the defendants had the right to peacefully meet, picket, march and boycott to secure redress of their grievances and complaints specifically made against particular employers or businesses." Id. at 624 (dicta). In NAACP v. Webb's City, Inc., 152 So. 2d 179 (Fla. Dist. Ct. App. 1963), vacated as moot, 376 U.S. 190 (1964), the court enjoined a picket in support of a boycott because of its attendant violence but went on to note that: "The defendants had the right to buy where they please and by concerted action to cease patronizing [plaintiff's business] when they considered it to their interest to do so." Id. at 183 (dicta).

27. Id. at 2169 (Miss. 1970).
28. Id. at 623. Following this incident, a boycott was launched against all local white merchants to protest the discriminatory treatment of blacks by the white community. Id. at 620-26. The court found, however, that the SCLC had never alleged that the plaintiff had conducted his business in a discriminatory manner. Id. at 624. Further, the court found that no officer, stockholder, or employee of the plaintiff's business had participated in any way in the violence that provided the initial impetus for the boycott. Id. at 623.
plaint or grievance or even gripe [against] the appellee . . . [who] was, in effect, an innocent bystander who ultimately became the innocent victim of this struggle for political and economic power.29

Some courts have also felt compelled to protect the target where the economic action has been accompanied by threats, violence, or intimidation.30 A leading case in this area is NAACP v. Claiborne Hardware Co.,31 a decision the Supreme Court has recently agreed to review. Plaintiffs, storeowners in Port Gibson, Mississippi, were boycotted after they failed to meet demands by civil rights groups that they end certain racially discriminatory policies.32 The Supreme Court of Mississippi found that the boycott was conducted and maintained by violent means and that many who wished to trade with the boycotted parties refrained for fear of retribution.33 The court concluded that where force, threats, or violence accompany a boycott, the boycotters may be made to answer for their actions in damages.34 The boycotters' claims of constitutional protection were found inapplicable where economic restraints were enforced through intimidation.35

These decisions are significant because their analysis focuses on the right of the target to be free of wrongful economic restraints rather than on the boycott's eventual market impact.36 If constitutional questions are to be resolved in accordance with current first amendment theory,37 the individual target's concern must be weighed in any equation that seeks to determine the strength of the boycotters' claims to constitutional protection.38

29. Id. at 624.
32. Id. at 1295-97. Most of the demands centered on policies the defendants wished the municipal government to enact. See id. at 1295-96.
33. Id. at 1297-1300.
34. Id. at 1301.
35. Id. The court noted: "We know of no instance, and our attention has been drawn to no decision, wherein it has been adjudicated that free speech guaranteed by the First Amendment includes in its protection the right to commit crime." Id.
36. See supra notes 16, 19.
37. See infra notes 123-76 and accompanying text.
38. See infra notes 135-73 and accompanying text. Any incidental restrictions on the boycotters' right to free speech may be justified if the individual target can show a substantial government interest in providing it protection. See United States v. O'Brien, 391 U.S. 367, 377 (1968); see also supra note 19.
BOYCOTTS AND THE ANTITRUST LAWS

Antitrust actions against boycotters have usually been brought under section one of the Sherman Act and under state antitrust laws. Until recently, such actions have been rare. Three cases decided under the Sherman Act in 1980, however, have squarely raised the question of the constitutional rights of noncommercial boycotters. In order to understand the context within which these cases were analyzed it is important to examine the federal courts' traditional approaches to boycotts challenged under the Sherman Act.

Although the language of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States," the Supreme Court has held that the Act applies only to those combinations that are found to result in unreasonable restraints of trade. Commercial group boy-

39. 15 U.S.C. § 1 (1976): "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

The Supreme Court has not yet ruled on whether the Sherman Act can be applied to noncommercial boycotts, and lower federal courts have reached widely differing results. Compare Missouri v. NOW, 620 F.2d 1301 (8th Cir.) (noncommercial boycotts beyond intended scope of Sherman Act), cert. denied, 449 U.S. 842 (1980) with Crown Cent. Petroleum Corp. v. Waldman, 486 F. Supp. 759 (M.D. Pa.) (unconstitutional to enjoin noncommercial boycott under Sherman Act), rev'd on other grounds, 634 F.2d 127 (3d Cir. 1980) and Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n, 499 F. Supp. 553, 555-56 (D. Del. 1980) (noncommercial boycotts may be constitutionally enjoined).

For purpose of analysis, this note will assume that all boycotts fall within the ambit of federal antitrust laws and will examine the constitutional rights of boycotters in the context of such laws. See generally Bird, Sherman Act Limitations on Noncommercial Concerted Refusals to Deal, 1970 Duke L.J. 247 (1970); Coons, supra note 14; Note, Political Boycott, supra note 5.


cotts have been identified by the Court as one of a class of violations that are presumed to be unreasonable or "illegal per se". The commercial group boycott has been placed in this category because of its general goal—to prevent competition by attempting to deprive potential competitors of needed goods or services. The boycotters may accomplish this goal through a variety of means. For example, a group of wholesalers may seek to exclude a merchant from the wholesale level by threatening to withhold their patronage from any manufacturer who deals with the targeted wholesaler. Or, where it is necessary for members of the boycotting group to deal with each other (such as in the brokerage profession), the boycotters may effectively quell competition by refusing to deal with merchants who are not members of the group. Because of their "pernicious effect on competition and lack of any redeeming virtue," such practices are "presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

Noncommercial group boycotts, while differing in form and purpose from commercial boycotts, can be said to have some anticompetitive effects. Because of their limited scope, duration, and nonanticompetitive goals, however, noncommercial boycotts do not seem to satisfy the per se doctrine's requirement of a "pernicious effect on competition." Several commentators, arguing that noncommercial boycotts may be constitutionally enjoined, have nevertheless agreed that the per se doctrine is inapplicable to such boycotts. They propose that noncommercial boycotts be examined under a rule-of-reason analysis, under which courts do not presume the trade restraint to be unreasonable, but rather analyze its nature to determine


46. See L. Sullivan, supra note 45, § 83, at 230.

47. Id.


49. Id.

50. In a boycott undertaken against a commercial enterprise by consumers, for instance, the targeted enterprise is being deprived of a needed market. The resultant loss in revenue renders the target less able to compete effectively with those in the same trade.


whether it is the kind of trade restraint that will be "significantly anticompetitive in purpose or effect." 53

Before a court can decide which method of economic analysis it should apply in examining a noncommercial boycott, it must first determine whether such boycotts may be constitutionally proscribed. 64 Judicial treatment of a constitutional challenge to an antitrust action against noncommercial boycotters first occurred in Council of Defense v. International Magazine Co. 65 In that case, defendants had promoted a boycott of a publishing company because of the alleged pro-German sentiments of stockholder William Randolph Hearst. 66 Plaintiffs brought an action under the Sherman Act, and the defendants asserted that their activities in urging the boycott were shielded by the right to free speech. 67 Unfortunately, the court did not engage in a full constitutional analysis of the issue, but rather dismissed defendants' claim on the theory that verbal communications used to achieve an unlawful result—in this case a restraint of trade—could not be constitutionally privileged. 68 Significantly, the


54. This question arises because noncommercial boycotts are often used as a means of political and social expression, thus implicating first amendment rights. See Note, NOW or Never, supra note 5, at 1330-39; Note, Political, Social, and Economic Boycotts, supra note 52, at 792-804; Note, Protest Boycotts, supra note 11, at 1144-48.

55. 267 F. 390, 412 (8th Cir. 1920).

56. Id. at 410.

57. Id. at 408.

58. Id. at 412: "Any contention that appellants were within their constitutional rights of free speech in saying, writing and publishing the objectionable matter, is answered by Gompers v. Buck Stove [& Range] Co." Gompers, 221 U.S. 418 (1911), involved a boycott called by the American Federation of Labor against Buck Stove & Range Co. after a dispute over work hours. The Supreme Court of the District of Columbia issued an injunction against the boycott leaders to prevent them from "declaring or threatening any boycott against the complainant." Id. at 421 n.1. In an opinion by Mr. Justice Lamar the Supreme Court affirmed that injunction:

The court's protective and restraining powers extend to every device whereby property is irreparably damaged or commerce is illegally restrained. To hold that the restraint of trade under the Sherman anti-trust . . . could be enjoined, but that the means through which the restraint was accomplished could not be enjoined would be to render the law impotent.

Id. at 438-39 (emphasis added).
court emphasized the publishing company’s tangential relationship to the dispute rather than the anticompetitive effect the boycott might have on the market. The court found it particularly important that the allegedly unpatriotic statements attributed to Hearst had appeared in his newspapers, and not in the periodicals published by the plaintiff:

[W]hatever may have been the derelictions of Hearst as an individual or in his newspapers, it is absolutely clear that complainant, which was engaged solely in publishing and selling magazines, had published no objectionable matter in its magazines, and it had nothing to do with the Hearst newspapers, nor any interest in them.

The Council of Defense decision stood for nearly sixty years as the only action brought under the Sherman Act against public interest group boycotters. In the next significant case, Missouri v. NOW, the State of Missouri brought suit as "'parens patriae, trustee, guardian and representative of its citizens and the economy of the State'" against a women's group that had spearheaded a convention boycott against Missouri as one of the states that had failed to ratify the proposed Equal Rights Amendment. Missouri sought injunctive relief against NOW, alleging that NOW's activities constituted a combination and conspiracy in restraint of trade in

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59. 267 F. at 411.
60. Id.
62. Id. at 296.
63. Id. at 291. For the stipulation concerning the nature of NOW’s activities, see infra note 66.
64. The proposed twenty-seventh amendment to the United States Constitution reads as follows:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

violation of section one of the Sherman Act. 66

Relying heavily on the legislative history of the Sherman Act, 67 the Eighth Circuit rejected Missouri's contention that a boycott used to further a political goal could fall within the strictures of the Act. 68 "It was the competitors in commerce that [the Sherman Act's draftsman] had in mind as the concern of his [Act]," the court concluded, "not noncompetitors motivated socially or politically." 69 Central to the court's holding that the Act could not be extended to public interest group boycotts was its recognition that the boycotters were exercising a constitutionally protected right to petition, 70 a right that was involved because the purpose of the boycott was primarily to encourage the passage of certain proposed legislation. 71 Although NOW's tactics fell technically within the proscriptive language of the Sherman Act, their use of such tactics to communicate their feelings to the state government was seen as a purpose that brought them beyond its scope. 72

The NOW decision was based partly on the Supreme Court's decision in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. 73 In Noerr, a railroad industry association hired a public relations firm to disseminate unfavorable information about the rival trucking industry. 74 Its goal was to arouse public resentment for truckers and to create a demand for legislation that would hamper

66. 15 U.S.C. § 1 (1976). The nature of NOW's activities was characterized in a stipulation made in the district court: "NOW has sought to persuade and urge those organizations that support making equal rights for women a part of the Constitution to refrain from holding conferences, conventions and meetings in unratified states." 467 F. Supp. at 291.

Missouri also framed causes of action under its antitrust statute, Mo. Ann. Stat. § 416.031(1) (Vernon 1979), and under the tort of "tortious intentional infliction of economic harm without legal justification or excuse." 467 F. Supp. at 291.


68. 620 F.2d 1301, 1304-09 (8th Cir. 1980).
69. Id. at 1309.
70. Id. at 1310.
71. Id. at 1312.
72. Id. at 1315-16. The question of whether the boycott action violated Missouri's antitrust statute, Mo. Ann. Stat. § 416.031(1) (Vernon 1979), was disposed of in an identical manner. 620 F.2d at 1316. Missouri's tort claim for intentional infliction of harm without legal excuse was rejected because of "[the] overriding First Amendment . . . right to petition." Id. at 1319. It must be observed that the failure to recognize an action in tort because of constitutional considerations does not necessarily mean that the court is asserting that a contrary result would be unconstitutional.
74. Id. at 129.
truckers' operations.\textsuperscript{75} Plaintiffs charged that the association's campaign constituted a conspiracy to restrain trade in violation of the Sherman Act.\textsuperscript{76} In dismissing the action, the Court held that the publicity campaign had been aimed primarily at influencing governmental policy and was thus a valid exercise of the right to petition.\textsuperscript{77} Mr. Justice Black, writing for the majority stated:

To hold that the government retains the power to act in [its] representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.\textsuperscript{78}

\textit{Noerr}'s relevance to the issue presented in \textit{NOW}\textsuperscript{79} is questionable, since the alleged restraint of trade complained of in \textit{Noerr} involved a publicity campaign, not a boycott. Also, the Court did not say that application of the Sherman Act to \textit{Noerr} situations would be unconstitutional, but merely that such a construction "would raise important constitutional questions."\textsuperscript{80} Although the \textit{NOW} court's recognition of a first amendment right to boycott\textsuperscript{81} would be relevant to the ultimate constitutional question in some circumstances, the court declined to decide that question, which would have required it to balance the first amendment right against the right of the plaintiffs to be free from undue economic interference. This failure to address a pivotal issue was noted by Judge Gibson in his dissent:\textsuperscript{82}

[The] factual distinctions between \textit{Noerr} and the case at bar mandate that the court in this case undertake a more comprehensive balancing of the important governmental interest in preserving the free enterprise system with the interest of people to use this particular method of influencing legislation. . . . This brings us back to

\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 135-38.
\textsuperscript{78} Id. at 137-38 (footnotes omitted).
\textsuperscript{79} See supra notes 61-66 and accompanying text.
\textsuperscript{80} 365 U.S. at 138.
\textsuperscript{81} 620 F.2d at 1310.
\textsuperscript{82} Id. at 1319-26 (Gibson, J., dissenting).
the crucial question of whether, upon balancing the first amendment interests of NOW with the substantial and important governmental interests embodied in the antitrust laws, the politically motivated boycott falls within the ambit of the antitrust laws or is constitutionally protected by the first amendment.83

The NOW majority's perfunctory evaluation of the plaintiff's claim that NOW's activities constituted a "secondary boycott"84 also merits serious attention. By advancing this claim, Missouri attempted to show that the merchants who suffered the effects of NOW's economic action were involved only tangentially in the dispute and thus merited greater protection from the court than would a more directly interested party.85 Although the court acknowledged that such boycotts "[have] been called unethical,"86 it held that the boycotters' tactics were shielded because they were "political activity aimed at persuading the legislature to take action."87

A similar result was reached by a Pennsylvania district court in Crown Central Petroleum Corp. v. Waldman,88 where an association of service station dealers executed a group boycott of sales to the public in order to protest gasoline price limits set by the Department of Energy.89 The defendant, one of the dealers, had closed his station for seven consecutive Sundays and for one entire three-day period.90 His supplier, Crown Central Petroleum Corporation, alleged that such closings violated the Sherman Act and sought an injunction prohibiting the defendant "from further participation in any conspiracy in restraint of trade in interstate commerce for gasoline or from doing any act in furtherance thereof."91 Using reasoning similar to that employed in NOW,92 the Crown Central court held that the service station dealers' actions fell within the exemption enunciated by the Supreme Court in Noerr.93

Crown Central went beyond the NOW decision, however, by undertaking to balance the governmental interest in economic regula-

83. Id. at 1324 (Gibson, J., dissenting) (emphasis added) (footnotes omitted).
84. Id. at 1312.
85. Id. at 1312, 1313 n.12.
86. Id.
87. Id. (footnote omitted).
88. 486 F. Supp. 759 (M.D. Pa.), rev'd on other grounds, 634 F.2d 127 (3d Cir. 1980).
89. Id. at 762.
90. Id. at 761.
91. Id. at 762 (citation omitted).
92. See supra notes 67-72 and accompanying text.
tion against the boycotters’ free speech interests.\textsuperscript{94} The first hurdle the court cleared was the question of whether boycotts can be considered “speech.”\textsuperscript{95} In deciding that noncommercial boycotts constitute protected expression,\textsuperscript{96} the court derived guidelines from the Supreme Court’s decision in \textit{Spence v. Washington},\textsuperscript{97} under which, according to \textit{Crown Central}, conduct is protected expression (1) if the conduct is a clear departure from the actor’s normal conduct and cannot be explained in any way other than that the actor is expressing himself; (2) if the actor has a legitimate reason to expect his audience to view his conduct as communicative; and (3) if the actor intends to and does communicate.\textsuperscript{98} Using this analysis, the \textit{Crown Central} court found that the dealers’ boycott met all three criteria.\textsuperscript{99} Having thus determined that boycotts can be viewed as expression, the court then weighed the first amendment rights adhering to boycotters against the government’s interest in proscribing anticompetitive actions.\textsuperscript{100} The court reasoned that the boycott “might reasonably be . . . the only means of effective expression” for the dealers, and concluded that the dealers’ interest in free expression outweighed economic concerns.\textsuperscript{101}

\begin{small}
\begin{enumerate}
\item \textit{Id.} at 769.
\item \textit{Id.} at 766.
\item \textit{See id.} at 768-69.
\item 418 U.S. 405 (1974) (per curiam). \textit{Spence} involved a conviction under a Washington statute forbidding improper use of an American flag. \textit{Id.} at 406-07. \textit{Spence} had affixed to the flag a large peace symbol (a circle enclosing a trident) made of removable black tape. \textit{Id.} at 406. \textit{Spence} claimed that the purpose of this display was to protest American involvement in Cambodia and the killings at Kent State and to communicate that “I thought America stood for peace.” \textit{Id.} at 408-09. The Supreme Court overturned \textit{Spence}’s conviction, finding his conduct sufficiently communicative to warrant first amendment protection, and also finding that the state had not shown a substantial interest in proscribing such conduct. \textit{Id.} at 409-15.
\item 486 F. Supp. at 767; see \textit{Spence}, 418 U.S. at 410-15.
\item 486 F. Supp. at 768:
\begin{quote}
The closings occurred simultaneously for three consecutive days. This is not the normal conduct of a service station, whether or not gas is in short supply. The independent dealers had announced to both the public and the Department of Energy well in advance of the closings that such action might be taken. In the context of the rising cost of gasoline in the summer of 1979, the dealers might reasonably believe that the public and the government (their audience) would view the closings as expressive of the dealers urgent needs and desires concerning the enforcement and enactment of energy-related regulations. Finally, the dealers intended that the closings communicate their frustration and we can reasonably believe that they did so communicate.
\end{quote}
\item \textit{Id.} at 768-69.
\item \textit{Id.} at 769. In measuring the strength of the governmental interest against that of the boycotters, the court applied the test used in \textit{United States v. O’Brien}, 391 U.S. 367 (1968). In that case, Chief Justice Warren wrote:
\end{enumerate}
\end{small}
The balance reached in *Crown Central* was clearly rejected in *Osborn v. Pennsylvania-Delaware Service Station Dealers Association.*\(^{102}\) The plaintiff was a consumer who alleged a violation of the Sherman Act on the part of Delaware service station dealers who were participating in a boycott similar to that involved in *Crown Central.*\(^{103}\) Asserting that "a boycott, along with its communicative component, has a coercive economic effect," the court held that boycotts "may be regulated without serious jeopardy to First Amendment interests."\(^{104}\) Whether a particular boycott should be enjoined, the court stated, should be decided by looking to traditional methods of antitrust analysis.\(^{105}\) "[I]f a boycott designed to influence governmental action has produced an anti-competitive effect of the kind [the Sherman and Clayton Acts] were intended to guard against," the court continued, "it seems . . . that relief can ordinarily be granted with little threat to First Amendment values."\(^{106}\) *Osborn* noted the differences between classic anticompetitive boycotts\(^{107}\) and special interest group boycotts, asserting that such distinctions militated against the application of per se liability for the latter.\(^{108}\) Thus, the court appears to have endorsed a rule of reason approach,\(^{109}\) under which boycotts will be enjoined unless the defendants can overcome what the court viewed as a highly substantial regulatory interest.\(^{110}\)

Whatever imprecision inheres in these terms, we think it is clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

103. *Id.* at 555; see *supra* text accompanying note 90.
104. 499 F. Supp. at 557.
105. *Id.* at 558.
106. *Id.*
107. *Id.*
108. 499 F. Supp. at 558. For a discussion of classic anticompetitive boycotts, see *supra* notes 46-49 and accompanying text.
109. 499 F. Supp. at 558. For a discussion of boycotts and the per se doctrine, see *supra* notes 45-53 and accompanying text.
110. *Id.*

Although the court implied that it would almost invariably enjoin boycotts as unreasonable restraints of trade, it did admit that such an approach may not be warranted where the application of the antitrust laws "would substantially impair the participants' ability to be heard." 499 F. Supp. at 558. This view is similar to that espoused by Justice Harlan in United States v. O'Brien, 391 U.S. 367, 388-89 (Harlan, J., concurring) (stating that even where substantial government interest is present symbolic conduct should not be restricted if such
Perhaps the most salient feature of the *NOW*, *Crown Central*, and *Osborn* decisions was their recognition that boycotts must be viewed as expressive conduct implying certain first amendment rights.¹¹¹ The various tests these courts employed in deciding whether noncommercial boycotts can be enjoined, however, show how widely their views differ—both on the applicable law and on the strength of the competing interests involved. Whereas the *Crown Central* court asserted that the free speech rights of boycotters outweighed the interest in economic regulation,¹¹² the *Osborn* court, addressing a similar set of facts, found that the strong governmental concern for maintaining competitive markets could seldom be counterbalanced.¹¹³ Although in each of these cases the parties boycotted were only tangentially related to the dispute, the courts largely disregarded this factor.¹¹⁴ Ordinarily, a court would carefully consider this important distinction; in these cases, however, it is clear why the primary/secondary distinction did not receive greater attention. In the *NOW* case, the court’s insistence that it was merely deciding a question of statutory interpretation¹¹⁵ precluded any serious consideration of the tactics used by the boycotters; any boycott whose purpose was political in nature was, in the court’s view, not covered by the Sherman Act.¹¹⁶ Similarly, the *Osborn* court’s willingness to subject virtually all boycotts to Sherman Act scrutiny¹¹⁷ rendered unnecessary any distinction by that court between primary and secondary action. Finally, in *Crown Central*, the plaintiff corporation

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¹¹² See 486 F. Supp. at 769.


¹¹⁴ The only mention of the secondary nature of the boycott in question occurred in *NOW*, 620 F.2d at 1312, where its significance was dismissed by the court without extensive analysis. Judge Gibson, dissenting in *NOW*, did state that a finding of secondary aspects in a particular boycott would be important to a decision, noting that the distinction between primary and secondary boycotts “has been important in drawing the line between protected and unprotected activity in other noncommercial contexts, and might be relevant to the balance to be drawn in this situation.” *Id.* at 1325 n.19 (Gibson, J., dissenting) (citations omitted).

¹¹⁵ See *id.* at 1304-16.

¹¹⁶ The court stated: *NOW* appears to have utilized its political power to bring about the ratification of the ERA. The tool it chose was a boycott, a device economic by nature. However, using a boycott in a non-competitive political arena for the purpose of influencing legislation is not proscribed by the Sherman Act.

*Id.* at 1315.

could not forcefully argue the secondary claim, since the action was aimed at cutting off supplies to consumers, and plaintiff was not a consumer.\footnote{118}

It is axiomatic that any attempt to balance conflicting interests cannot arrive at a just determination if it fails to take into account all significant factors weighing in favor of one party or the other. Classic antitrust analysis focuses almost solely on market effects\footnote{119} because until recently no cases have arisen that present serious constitutional difficulties.\footnote{120} Where such considerations exist, courts must look to current first amendment theory, which requires that a balance be reached between constitutional values and valid governmental interests.\footnote{121} That the government has a strong interest in preserving a competitive market is clear. It has also long been recognized at common law that this interest may be augmented by a strong governmental concern for protecting individual targets from unfair or unjustified economic restraint.\footnote{122} The next section of this note examines the nature of the free speech rights asserted by boycotters, and the interplay between those rights and the dual governmental interest in maintaining a competitive market and protecting targets from undue economic interference. An analytical framework is then proposed whereby the common law sensitivity to the interests of individual targets is shown to be consonant with existing standards of analysis under the antitrust laws as well as with current constitutional doctrines concerning free speech.

\footnotetext[118]{486 F. Supp. at 761.}
\footnotetext[119]{See, e.g., United States v. Arnold Schwinn & Co., 388 U.S. 365, 374 (1967) (reasonableness of trade restraint determined by gauging market impact); Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958) (analyzing adverse market effects of tying agreements); Smith v. Pro Football, Inc., 593 F.2d 1173, 1183-89 (D.C. Cir. 1979) (football league's player draft unreasonable restraint on market for player's services).}
\footnotetext[120]{See supra note 41 and accompanying text.}
\footnotetext[122]{See supra notes 16-38 and accompanying text.}
BOYCOTTS AS SPEECH

Many forms of conduct contain an expressive element. It is not unusual, therefore, for a law that ostensibly regulates only antisocial behavior to be challenged as an undue restriction of speech. In United States v. O'Brien, the Supreme Court held that governmental regulation of expressive conduct is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

State regulation of boycotts clearly satisfies the first and third prongs of the O'Brien test—valid governmental power and no purpose to suppress free expression—but must bear careful scrutiny under the second and fourth requirements. Thus, it must be discerned whether the governmental interest in proscribing noncommercial boycotts is substantial enough to justify restriction of first amendment rights.

The Right to Boycott.—In analyzing the nature of first amendment rights accruing to public interest group boycotters it is necessary to identify both the utility of economic actions for such groups and the effect on the boycotters' power to communicate of suppres-

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126. Id. at 377.
128. Justice Black described the test this way: Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so. Younger v. Harris, 401 U.S. 37, 51 (1970).
sion of the boycott right. It must be recognized at the outset that some enterprises, by their nature, do not make changes in policy unless prompted by economic concern. The most obvious example of such an enterprise is the large corporation. In an age where corporations and other business concerns make decisions that impact heavily on the lives of the average citizen, it is important that the people these decisions affect are able to communicate their displeasure. Since such targets are not accessible via the ballot box, the only way citizens' groups may be able to influence their actions may be by withdrawing their patronage.\footnote{129}

Furthermore, boycotts are useful in gaining exposure for matters of public concern. Since boycotts are often used by small, relatively weak groups who cannot afford to expend the vast sums necessary to mount an extensive publicity campaign, many important issues would never gain public attention if noncommercial boycotts were to be enjoined. Finally, to say that a group cannot peacefully band together to refuse to deal is clearly antithetical to the common sense notion that no person should be forced to subsidize an antipathetic practice. It has long been acknowledged that no action may lie against an individual who refuses to deal, even where that individual's motive is malicious.\footnote{130} It would be unjust, therefore, to impose liability merely because a group of like-minded individuals have banded together to accomplish a legitimate purpose—to protest effectively a practice they believe harmful to themselves or their community.

The Interest in Economic Regulation.—One governmental interest in proscribing boycotts may be the maintenance of a free and competitive market.\footnote{131} Boycotts run counter to this objective because they result in a restriction of trade that hinders the target's ability to compete effectively with others engaged in a similar trade.\footnote{132} Although it is evident that if such a practice were allowed to pervade the business community it would eventually result in monopoly or oligopoly, it is less clear that noncommercial boycotters' limited and sporadic attempts to assert their influence could produce such a re-

\footnotesize{\begin{itemize}
\item \footnote{129} See Note, Extrajudicial Consumer Pressure: An Effective Impediment to Unethical Business Practices, 1969 DUKE L.J. 1011, 1015.
\item \footnote{131} United States v. Topco, 405 U.S. 596, 610 (1972); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 42-43 (1930).
\item \footnote{132} See L. Sullivan, supra note 45, § 83, at 230.
\end{itemize}}
suit. The laws concerning business regulation are also predicated on the principle that businessmen have a right to conduct their business free of interference from competitors who wish to use their economic leverage to eliminate the target from the marketplace. It is questionable, however, whether a similar interest exists in protecting parties from disputes with noncompetitors. Noncommercial boycotts are usually spurred not by a group that fears the target as a competitor, but by a group that wishes to express its displeasure with a practice that may adversely affect them or their community. Thus, the economic interests in noncommercial boycott cases appear relatively weak in light both of the nonpervasiveness of the public interest group boycott and of the origin of public dispute in the operation of the target's business. Balanced against the substantial speech interests involved in noncommercial boycotts, the economic concerns do not seem overriding. This balance is predicated, however, on a situation where the target is directly involved in the dispute and where the boycott is conducted by lawful means to achieve a lawful purpose. Where such conditions do not exist, the balance of interests may shift.

Unjustifiable Boycotts

Boycotts may be considered unjustifiable when the tactics the boycotters have employed in advancing their cause go beyond the mere refusal to deal with an adversary. In such cases, the governmental interest in protecting the target increases. At the same time, the boycotters' claims that they are engaging in a protected activity are diminished in strength because of the greater harm resulting from such practices. Some examples of boycotts which may fit into this mold are examined below. These include: boycotts aimed at parties only tangentially involved in a dispute (secondary boycotts); boycotts conducted by means of intimidation, threats or violence; and boycotts aimed at persuading the target to violate the law.

Unlawful Purpose Boycotts.—Boycotts aimed at forcing the target to violate the law may constitutionally be enjoined. That noncommercial boycotters can claim no constitutional right to engage in

133. This concept is primarily embodied in the tort action for intentional interference with prospective economic advantage. See supra notes 16-38 and accompanying text.
134. See supra text accompanying notes 123-29.
135. See infra notes 159-72 and accompanying text.
136. See infra notes 142-58 and accompanying text.
137. See infra notes 138-41 and accompanying text.
such behavior is strongly suggested by *Giboney v. Empire Storage & Ice Co.*,¹³⁸ a Supreme Court case dealing with a labor dispute. In *Giboney*, the Court upheld an injunction prohibiting a union from peacefully picketing a wholesaler, because the union’s goal was to force the wholesaler to cease dealing with nonunion peddlers.¹³⁹ Such a practice, if adopted by the target, would have violated Missouri’s antitrust laws.¹⁴⁰ The Court rejected the contention that economic coercion with the goal of inducing unlawful conduct could be protected by the right to free speech:

> It is true that the agreements and course of conduct 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. . . . And it is clear that appellants were doing more than exercising a right of free speech or press. They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade.¹⁴¹

Thus, it is clear that if this situation arose in the context of a non-commercial boycott, the target would have an extremely strong claim for governmental protection; no group can ever claim the right to force a target to violate the law.

**Boycotts Conducted By Illegal Acts.**¹⁴²—The most important case concerning a boycott conducted by illegal acts is probably *NAACP v. Claiborne Hardware Co.*,¹⁴³ which is presently scheduled for review by the Supreme Court. In *Claiborne Hardware*, a civil rights group conducted a boycott against white merchants in Port Gibson, Mississippi after certain of that group’s demands were not met.¹⁴⁴ The Supreme Court of Mississippi held that since violence permeated the boycott¹⁴⁵ the boycott leaders could be held answerable.

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¹³⁹ *Id.* at 493-94.
¹⁴⁰ *Id.* at 502-03.
¹⁴¹ *Id.* (citations omitted) (footnotes omitted).
¹⁴² A boycott may be considered to have been conducted by illegal acts when the boycotters have sought to further their boycott effort by employing any course of conduct that is prohibited by law.
¹⁴⁴ *Id.* at 1297.
¹⁴⁵ The court recounted a number of violent incidents perpetrated by proponents of the boycott and directed against individuals violating the boycott, including beatings, death
The pivotal question presented by such a case is whether the target can claim protection against the illegal acts alone, or against the entire boycott effort, if the boycott was conducted primarily by illegal acts. It seems that if a group has the right to boycott peacefully, then those aspects of a boycott that are peaceful and otherwise justified should not be enjoined just because of isolated acts of violence. Courts should not hesitate, however, to enjoin conduct that might threaten, harass, or intimidate prospective patrons. It follows that any business losses directly attributable to such illegal tactics should be assessed against those responsible.

An applicable analogy is again presented in a case which involved a labor dispute. In *Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies, Inc.*, a union dispute was accompanied by more than 50 serious acts of violence, including bombings, window smashings, beatings of nonunion drivers, and arson. A preliminary injunction restraining all union conduct, violent and peaceful, was sustained by the Illinois Supreme Court and the United States Supreme Court affirmed. Justice Frankfurter wrote:

> It must never be forgotten . . . that the Bill of Rights was the child of the Enlightenment. Back of the guarantee of free speech lay faith in the power of an appeal to reason by all peaceful means for gaining access to the mind. It was in order to avert force and explosions due to restrictions on rational modes of communication that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.

The Court said, however, that free speech "cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful conduct has the taint of force." Because of the serious and pervasive acts of violence associ...
associated with this job action, the Court held that the "momentum of fear generated by past violence would survive" even though the future picketing might be wholly peaceful. Thus, in order to protect the target from such undue interference, the Court concluded that an injunction could properly be issued.

In *Claiborne Hardware*, then, if the frequency and scope of violence were so extensive as to create an aura of intimidation that prevented potential customers from dealing with the target, then the target had a very strong claim for governmental protection. Such a claim would no doubt override the free speech claims, and the boycott could be enjoined. This result accords not only with the general doctrine handed down in *Meadowmoor Dairies*, but also with the requirements of the *O'Brien* test. The boycotters in such a situation cannot well argue that their free speech rights allow them to reap the fruits of a boycott conducted by means so patently unfair. And while the target cannot ask a court to force those who dislike it to deal, it can seek protection for those persons who wish to continue their patronage. This claim by the target for protection of its market should create a sufficiently strong governmental interest to counterbalance the opposing first amendment claims.

The Secondary Boycott.—As mentioned previously, a secondary boycott is any boycott aimed at a target not directly involved in the dispute at hand. The distinction between primary and secondary activity has long been important to the law of labor disputes, and secondary activity has been declared illegal in such disputes through

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154. Id. at 294.
155. Id. at 298-99.
156. See supra notes 139-46.
157. See supra notes 148-55 and accompanying text.
158. United States v. O'Brien, 391 U.S. 367 (1968); see supra text accompanying note 126.
159. See supra notes 25-28, 114 and accompanying text.
160. See generally R. Gorman, supra note 147, at 240-43. At common law, a secondary labor boycott often gave rise to an action in tort as a wrongful interference with the business of an uninvolved party. See, e.g., Old Dominion S.S. Co. v. McKenna, 30 F. 48, 49 (C.C.S.D.N.Y. 1887); Bricklayers', Masons' & Plasterers' Int'l Union v. Seymour Ruff & Sons, Inc., 160 Md. 483, 154 A. 52 (1931); Picket v. Walsh, 192 Mass. 572, 78 N.E. 753, 760 (1906).

A secondary labor boycott is defined as "the application of economic pressure upon a person with whom the union has no dispute regarding its own terms of employment in order to induce that person to cease doing business with another employer with whom the union does have such a dispute." R. Gorman, supra note 147, at 240. The Taft-Hartley Act regards the secondary labor boycott as an "unfair labor practice." 29 U.S.C. § 158(b)(4) (1976).
the provisions of the Taft-Hartley Act.\textsuperscript{161} Although the question of the significance of the secondary aspect of noncommercial boycotts has not yet been fully adjudicated, the Supreme Court has in other situations recognized that the difference between primary and secondary action may have constitutional significance. For example, in \textit{Carpenter's \& Joiners Local 213 v. Ritter's Cafe,}\textsuperscript{162} a labor union that had been enjoined from picketing a secondary target claimed that the injunction violated, \textit{inter alia,} its right to free speech.\textsuperscript{165} The Supreme Court upheld the constitutionality of the injunction,\textsuperscript{164} distinguishing between boycotts aimed at secondary targets and those aimed at more direct adversaries:

[The State] has deemed it desirable to insulate from the dispute an establishment which industrially has no connection with the dispute. [The State] has not attempted to protect other business enterprises [of] the petitioners' real adversary. . . . [T]he constitution does not forbid [the State] to draw the line which has been drawn here.\textsuperscript{165}

\begin{itemize}
\item \textsuperscript{161} 29 U.S.C. § 158 (b)(4) (1976).
\item \textsuperscript{162} 315 U.S. 722 (1942).
\item \textsuperscript{163} \textit{Id.} at 725-28. The petitioners relied on the Court's decision in \textit{Thornhill v. Alabama}, 310 U.S. 88 (1940), which held that a statute prohibiting even peaceful labor picketing was unconstitutional on its face and that such picketing was entitled to protection under the first amendment if aimed at "the dissemination of information and opinion." \textit{Id.} at 106.
\item \textsuperscript{164} 315 U.S. at 728.
\item \textsuperscript{165} \textit{Id.} at 727-28. While this note was in press, the United States Supreme Court held in \textit{International Longshoremen's Ass'n v. Allied Int'l, Inc.}, 50 U.S.L.W. 4402 (U.S. Apr. 20, 1982) (No. 80-1663) (per curiam), \textit{aff'd} 640 F.2d 1368 (1st Cir. 1981), that a labor union, which refused to handle Soviet cargo for purely political reasons, could constitutionally be held liable for engaging in an unlawful secondary boycott. \textit{Id.} at 4406. The boycott effort began early in 1980 when \textit{International Longshoreman's Association (ILA) President Thomas Gleason ordered all union members to stop handling goods bound for and arriving from the Soviet Union as a means of protesting that nation's 1979 invasion of Afghanistan.} \textit{Id.} at 4402-03. Allied International, Inc. (Allied), an importer of Soviet wood products for distribution in the United States, filed suit for damages against the union alleging, \textit{inter alia,} that the ILA's action constituted a secondary boycott. \textit{Id.} at 4403. Secondary boycotts are proscribed under section 8(b)(4) of the Taft-Hartley Act, 29 U.S.C. § 158(b)(4) (1976). \textit{See supra} note 160. Section 303 of the Labor-Management Relations Act, 29 U.S.C. § 187 (1976), provides a private right of action for damages to those injured by secondary labor boycotts. The district court dismissed plaintiff's claim, holding that the union was engaged in "a primary boycott of Russian goods" and was thus outside the secondary boycott provision. Allied Int'l, Inc. v. \textit{International Longshoremen's Ass'n}, 492 F.Supp. 334, 336 (D. Mass. 1980), \textit{rev'd}, 640 F.2d 1368 (1st Cir. 1981), \textit{aff'd}, 50 U.S.L.W. 4402 (U.S. Apr. 20, 1982) (No. 80-1663) (per curiam). The First Circuit reversed, holding that the ILA's refusal to handle Soviet goods fell within the proscriptive language of section 8(b)(4), 640 F.2d at 1370-78, and that the boycotters "[b]y resorting to coercive tactics against neutral parties" had exceeded the bounds of constitutionally protected expression. \textit{Id.} at 1379.

In affirming the circuit court's decision, the Supreme Court also emphasized that the
boycott, while geared ultimately toward influencing the Soviet Union, had a substantial adverse effect on Allied, a party neutral to the dispute. The Court stated:

The ILA has no dispute with Allied. . . . It does not seek any labor objective from [Allied]. Its sole complaint is with the foreign and military policy of the Soviet Union. As understandable and even commendable as the ILA's ultimate objectives may be, the certain effect of its action is to impose a heavy burden on neutral employers. And it is just such a burden that the secondary boycott provisions were designed to prevent.

50 U.S.L.W. at 4405 (footnotes omitted).

The Court stressed that Congress, in enacting § 8(b)(4), had intended to provide relief to "helpless victims of quarrels that do not concern them at all." Id. (citations omitted). The Court explained that such relief extended to all secondary boycotts, regardless of scope or character. (To this effect, the Court quoted Senator Taft's response to the suggestion during hearings that there were good secondary boycotts and bad secondary boycotts: "'Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different types of secondary boycotts. So we have broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.'" 50 U.S.L.W. at 4405 n.23 (quoting 93 Cong. Rec. 4323 (1947) (remarks of Sen. Taft)).

Having thus construed the statute, the Court considered whether the application of § 8(b)(4) infringed the boycotters' first amendment rights. The Court described the ILA boycott as one designed "not to communicate but to coerce" and indicated that such a boycott merits little first amendment protection. Id. at 4406. Further, the Court dismissed as minimal any inhibiting effect on the boycotters' ability to communicate. The Court stated: "There are many ways in which a union and its individual members may express their opposition to Russian foreign policy without infringing upon the rights of others." Id. Finally, the Court cited its decision in O'Brien for the proposition that "'when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.'" Id. at 4406 n.26 (quoting 391 U.S. at 376). The Court indicated that Congress, in prohibiting all secondary boycotts had expressed a substantial interest in protecting all neutral employers. Id. at 4405-06. The Court appeared to indicate that this substantial interest, contrasted with the boycotters' relatively insignificant first amendment claims, met the standards evinced in O'Brien. See id. at 4406.

While the Court has stated in no uncertain terms that politically oriented labor secondary boycotts may be constitutionally proscribed, it remains to be seen how the Court will treat nonlabor secondary and primary boycotts. Although Allied International suggests strongly that the Court will look askance at any secondary boycott, there are some salient differences between labor and nonlabor secondary boycotts. Nonlabor boycotters usually have no motive other than advancing a political cause in initiating a boycott. But in labor union boycotts, it may be possible that the union is pursuing mixed objectives. As the Court warned, "'[t]he difference between labor and political objectives would be difficult to draw in many cases.'" Id. at 4405. Second, labor boycotters, in refusing to work for the secondary target, directly affect his ability to buy from and sell to whom he pleases. This effect creates a greater restraint on the target of a labor secondary boycott than on the target of a nonlabor secondary boycott, who loses trade only to the extent that the boycotters themselves refuse to deal. While these distinctions may play a role in future decisions, they seem of doubtful importance in light of the Court's broad language favoring the protection of neutrals.
tral party the governmental interest lies not only in protecting the free market but also in protecting a target from unfair economic restraint. Second, if it is accepted that an indispensible component in establishing a right to boycott is the boycotters’ privilege not to deal with a party they dislike, such a component is lacking where the boycotters and the target have no direct dispute. Thus, the governmental interest in protecting neutral parties and in containing the dispute is substantial enough to justify enjoining any secondary aspects of a boycott without unconstitutionally infringing the boycotters’ first amendment rights.

If a court is to enjoin boycotts based on the distinction between primary and secondary activity, it is necessary to identify what characteristics of a target would lead a court to conclude that a party is truly neutral. Basically, a target should be considered neutral when it has not engaged in the conduct that spurred the boycott and does not have the power to satisfy the boycotters’ demands. Since neutrality bestows upon a target a claim for governmental protection that outweighs opposing free speech claims, the decisions in NOW and Crown Central deserve reexamination. In NOW, the targets were primarily Missouri businessmen who operated convention facilities. These targets were not boycotted because of sexually discriminatory policies or even for any stand they had taken on the issue at

166. That such a target deserves governmental protection has long been recognized through the common law tort of interference. See supra notes 15-38, 160 and accompanying text.

167. The idea that the target must have the power to respond to the grievance has been embodied in a statute enacted for the purpose of prohibiting unfair boycotts. The Mississippi statute prohibits boycotts when:

two (2) or more persons conspire to prevent another person or other persons from trading or doing business with any merchant or other business and as a result of said conspiracy said persons induce or encourage any individual or individuals to cease doing business with any merchant or other person, and when such conspiracy is formed and effectuated because of a reasonable grievance of the conspirators over which the said merchant or place of business boycotted or against which a boycott is attempted has no direct control or no legal authority to correct, or when the conspiracy results from such alleged grievance against the merchant or other person boycotted when no notice of such grievance has been given the merchant or party boycotted and no reasonable opportunity to correct such alleged grievance has been given such merchant or other person against whom the conspiracy was formed


170. 620 F.2d at 1302.
Indeed, they may have even been staunch supporters of the Equal Rights Amendment. That they were dragged into the middle of a dispute over state policy gave them a claim for governmental protection that negated the free speech claims of the boycotters. Since free speech usually cannot legitimately be used as a shield for secondary boycott activity, the Sherman Act (as well as common law tort actions) should apply with full vigor.

This theory should apply with equal force to situations such as occurred in Crown Central—boycotts of the public by suppliers of goods and services aimed at spurring legislative action. In such a situation, consumers who have no direct control over national legislative policy and indeed may have taken no stand concerning the matter are harmed by an economic action. Not only have the consumers not taken the action that led to the dispute, but they are powerless to take any action to bring it to an end. In addition, the ultimate target in both NOW and Crown Central—governmental bodies—can be reached via the ballot box, unlike commercial bodies, which can be influenced only economically. Another factor weighing against defendants such as those in Crown Central is that boycotters who supply vital goods and services can cause far greater economic disruption than other special interest group boycotters. In fact, if boycotts such as the one in Crown Central did become pervasive, the national economy could suffer grievous losses. Thus, because of the secondary nature of such actions and because of the potential for economic disruption they entail, boycotts by suppliers of goods and services should be constitutionally enjoinable.

CONCLUSION

Where courts are asked to extend protection to targets under the common law tort of interference, they are treading on familiar ground because this tort action has always focused on the protection of individual targets from undue economic restraints. But where courts are asked to accomplish the same task under federal or state

171. NOW stipulated that it was boycotting all convention facilities located within states that had not ratified the ERA. 467 F. Supp. 289, 291 (W.D. Mo. 1979).

172. While it may be argued that the consumers could bring an end to their distress by enlisting in the boycotters’ cause, this position is untenable. First, it is questionable whether the affected consumers could always muster enough political support to bring about a change in an important federal or state legislative policy. Second, it is abhorrent to our conception of representative democracy to suggest as a viable alternative that citizens lobby for a program they believe contrary to the public interest.

173. See supra notes 16-38 and accompanying text.
antitrust laws, they find themselves dealing with a body of law that has primarily sought to safeguard the public's interest in a competitive market rather than the private individual's property right in the preservation of his business.\(^{174}\) In addition, the application of such statutes has presented novel questions of constitutional law involving the possible infringement of first amendment rights. When deciding these constitutional questions, courts should look generally to modern constitutional doctrines concerning first amendment rights and specifically to cases where analogous constitutional questions were adjudicated. Where courts have not used this approach, anomalies have occurred. Expressive conduct that would have been proscribed at common law, and that the Supreme Court has held deserves no constitutional protection in analogous circumstances, has been granted broad immunity from the antitrust laws by some courts on constitutional grounds.\(^{175}\)

At the other end of the spectrum, courts have taken positions tending to concentrate on the economic aspects of such cases while failing to assess fully the constitutional claims that have been presented.\(^{176}\) When regulatory policies clash with constitutional rights, a careful balance must be reached between them. This balance, when being drawn in antitrust actions, cannot truly reflect the competing interests involved unless there is a synthesis between the body of law concerning antitrust and the common law sensitivity to individual rights. With the target's interest in protection at the core of a constitutional analysis, a more accurate assessment of the boycotters' claims to constitutional protection can be attained.

Whether an action is brought against a group of noncommercial boycotters under common law tort or under statutory antitrust laws, the major question is the same: Can the government evince an interest in protecting the target strong enough to justify the resultant restriction on free speech? The traditional governmental interest in preserving a competitive market is not particularly compelling in these cases because of the inconsequential market affect that may result from sporadic and isolated boycott efforts. And when the boycotters are conducting their action against a primary target, in a

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174. See supra note 119 and accompanying text.
peaceful manner, and for a lawful purpose, they have a particularly strong first amendment claim.177

The constitutional balance shifts, however, when the target is only tangentially related to the dispute, when the boycott is conducted by use of violence or threats, or when the boycotters seek to force the target to take unlawful action. A target-based analysis provides an accommodation for the paramount needs of the adverse parties while fully comporting with modern constitutional doctrine. Such an analysis will not protect a target from disputes that should normally be anticipated by parties who make controversial decisions. It will protect targets from being embroiled in others’ disputes, from having their markets cut off artificially through violent conduct, and from being compelled to pursue a policy the state has declared unlawful.

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177. In a recently decided case, the Supreme Court was highly critical of the use of boycotts in a secondary context but did not pass on the question of whether boycotts may be a constitutionally protected mode of expression in other circumstances. See International Longshoremen’s Ass’n v. Allied Int’l, Inc., 50 U.S.L.W. 4402 (U.S. Apr. 20, 1982) (No. 80-1663) (holding that longshoremen’s refusal to load Soviet ships, although politically motivated, could constitutionally be proscribed as unlawful secondary boycott). The difference between boycotts such as the one in Allied International and primary boycotts engaged in wholly by consumers is significant. Primary boycotts seek to harm no neutral party, and the target is not hindered in its commerce with willing sellers and buyers. The Court’s stated disdain of the ILA’s boycott as “conduct designed not to communicate but to coerce” and its emphasis on alternative means of communication, id. at 4406, may suggest that the Court gives relatively little weight to asserted first amendment claims in boycott cases. It seems clear that the Court was addressing actions aimed at neutral parties, not boycotts of parties directly connected with the dispute. It can be safely said that the Allied International opinion, while highly relevant to secondary boycott claims, provides little guidance as to how the Court will deal with constitutional claims by primary boycotters.