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The Law and Metaphor of Boycott

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I. INTRODUCTION

To most Americans 'boycott' is a word of ill-omen. The pictures it calls up are of acts like those charged against striking coal miners . . . .[1]

If this is a correct picture, the thing we call a boycott originally signified violence, if not murder.[2]

When a number of persons combine together in an organized effort to withdraw and induce others to withdraw from social or business relations with another, it is sometimes called a boycott.[3] The word, steeped in mystery and clouded with ambiguity, is attributed to an infamous pariah, Captain Charles Conningham Boycott, an Englishman ostracized for evicting a group of poor Irish tenants from his estate. The tenants, along with the Irish Land League and Irish nationalists, refused to have anything to do with Captain Boycott or his family.[4] No one would work for Captain Boycott, and no one would supply him with food. Captain Boycott and his wife were thus forced to work their own fields under the "shadows of armed constabulary ever at their heels."[5] Thus, as Justice Scalia re-

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1. HARRY W. LAIDLER, BOYCOTTS AND THE LABOR STRUGGLE: ECONOMIC AND LEGAL ASPECTS 17 (1914).

2. State v. Glidden, 8 A. 890, 897 (Conn. 1887) (Carpenter, J.).

3. *See, e.g.*, RANDOM HOUSE ENCYCLOPEDIA 1988, at 2507 (3d ed. 1990); 2 THE OXFORD ENGLISH DICTIONARY 468 (2d ed. 1989); WEBSTER THIRD INTERNATIONAL DICTIONARY (UNABRIDGED) 264 (1981). I say "sometimes" because sometimes what may appear to fall within the standard dictionary definition of the word "boycott" is not found to be a boycott. Consider, for example, the Supreme Court's decision last term in Hartford Fire Insurance Co. v. California, 113 S. Ct. 2891 (1993). There, the issue was whether the term "boycott" as used in section 3(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1013(b) (1993) (which denies antitrust immunity to group boycotts by insurance companies) covered an alleged conspiracy by foreign and domestic insurance companies to force other primary insurers to change the terms of their standard liability policies. It was alleged that the goal of the conspiracy was to limit the availability of a basic insurance policy to limit the defendant's liability exposure for long-term pollution and environmental damage. Justice Scalia, for a slim five justice majority, ruled that the standard dictionary definition of the word "boycott" was limited to those refusals to deal that are "unrelated" or "collateral" to the objective sought by the refusal to deal. *Hartford Fire Insurance Co.*, 113 S. Ct. at 2912-13. Justice Souter, and three other dissenters, however, complained that the Court had adopted an "overly narrow definition" of the word boycott. *Id.* at 2903. Justice Souter argued that the majority's definition of the term boycott was arbitrarily limited to "unitary phenomenon" because the majority wanted to make it difficult for the moving party to prevail. *Id.* at 2908. In Justice Souter's view, the majority had "concoct[ed] a 'precise definition' of the term [boycott]" to reach a particular outcome. *Id.* at 2908 n.19. As the disagreement between Justices Scalia and Souter in *Hartford Fire Insurance Co.* indicates, dictionary definitions of the word "boycott" may indeed be elusive in getting at the meaning of the word boycott.

4. *See* LAIDLER, *supra* note 1, at 23-27; *see also Glidden*, 8 A. at 896-97.

5. WILLIAM L. PROSSER ET AL., TORTS: CASES AND MATERIALS 1139 n.2 (8th ed. 1988) (quoting BOVIER'S LAW DICTIONARY 387 (Francis Rawle ed., 1914)). The events which gave rise to the story of Captain Boycott were reported by the American journalist James Red-

cently observed: "[T]he verb made from the unfortunate Captain's name has had from the outset the meaning it continues to carry today. To 'boycott' means 'to combine in refusing to hold relations of any kind, social or commercial, public or private, with (a neighbor), on account of political or other differences, so as to punish him for the position he has taken up, or coerce.'"[6]

In America, boycotts have become a common place occurrence among a variety of groups (labor, business, political, and social) advancing myriad moral and social issues.[7] The increasing frequency of boycotts raging nationwide,[8] and the diversity of the causes involved (running the gamut from abortion, gay rights and nuclear weapons to dolphins, spotted owls, vulgar TV sitcoms, and Girl Scout Cookies[9]), attests to the fact that an increasing number of groups are taking action outside the normal political channels of government to

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path in his *Talks of Ireland* published in 1881. *See* LAIDLER, *supra* note 1, at 26 (citing Arthur D. Vinton, *The History of "Boycotting," in* 5 MAG. OF W. HISTORY 211 (1886)). According to Redpath, the word "boycott" was invented during a dinner conversation. As Redpath purportedly explained:

> I was dining with Father John O'Malley... and he asked me why I was not eating. I said, "I am bothered about a word." "What is it?" asked Father John. "Well," said I, "when a people ostracize a landgrabber we call it social excommunication, but we ought to have an entirely different word to signify ostracism applied to a landlord or a land agent like Boycott. Ostracism won't do. The peasantry would not know the meaning of the word, and I can't think of anything." "No," said Father John, "ostracism wouldn't do." He looked down, tapped his big forehead, and said "How would it do to call it 'to boycott him?'"

LAIDLER, *supra* note 1, at 23. Reporters from Dublin and London subsequently used Redpath's word to describe incidents involving the poor Irish tenants and Captain Boycott. The "infamies of Captain Boycott were [thus] immortalized." *Id.* at 24.

6. Hartford Fire Insurance Co. v. California, 113 S. Ct. at 2911 (Scalia, J., dissenting) (quoting 2 THE OXFORD ENGLISH DICTIONARY 468 (2d ed. 1989)). The word boycott has roots that can be traced to the ancient Greeks. What we now know as a boycott was used by the wives of Greek soldiers to end a war-the wives refused to sleep with their soldier-husbands until the fighting stopped. Lysistrata, *in* ARISTOPHANES AGAINST WAR: THE ACHARIANS, THE PEACE LYSISTRATA 111-13 (Patric Dickinson trans., 1957); *see* Ronald E. Kennedy, *Political Boycotts, The Sherman Act, and The First Amendment: An Accommodation of Competing Interests*, 55 S. CAL. L. REV. 983, 984 n.2 (1982).

7. *See, e.g.*, Dennis E. Garrett, *Consumer Boycotts: Are Targets Always the Bad Guys?*, BUS. & SOC. REV., Summer 1986, at 17; Andrew Liberman, *Salvadoran Coffee, Go Home*, PROGRESSIVE, May 1990, at 15; Kenneth Sheets, *Products Under Fire*, U. S. NEWS & WORLD REPORT, Apr. 16, 1990, at 44; Bruce Keppel, *Bargaining With Boycotts*, L.A. TIMES, Sept. 8, 1989, § 4 at 1; Jonathan Tasini, *The Beer and the Boycott*, N. Y. TIMES, Jan. 31, 1988, § 6 at 19.

8. *See* Sheets, *supra* note 7 (reporting that there are more than 200 boycotts in progress at any moment).

9. *See* Dirk Johnson, *Colorado Faces Boycott Over Its Gay-Bias Vote*, N. Y. TIMES, Dec. 3, 1992, at A16; Patrick M. Fahey, Note, *Advocacy Group Boycotting of Network Television Advertisers and Its Effects on Programming Content*, 140 U. PA. L. REV. 647 (1991); Sheets, *supra* note 7; *Stroh Reviews Funding of Series After Protest*, L.A. TIMES, Sept. 5, 1989, § 4 at 9.

promote and protect their own interests by the collective assertion of power for common cause.[10] As the Supreme Court has recognized, a "'[b]oycott' is a multifaceted 'phenomenon' that includes conditional boycotts, punitive boycotts, coercive boycotts, partial boycotts, labor boycotts, political boycotts, social boycotts, etc."[11] Boycotts have thus become an important political and social activity, and it would appear that boycotts have come to represent part of the daily routine of American culture.[12]

The response of the legal system to activities of group boycotts has been confused and inconsistent. Boycotts by labor, business and citizen groups activities have been prohibited and protected under common law doctrine,[13] federal labor legislation,[14] the Sherman

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10. One reason cited for the recent surge of boycotts is that people regard boycott as an effective vehicle for expressing and protecting their individual interests. *See* Sheets, *supra* note 7, at 44. Consumer affairs specialists claim that consumer boycotts are a citizen reaction to the policies of the Reagan Administration that brought a "dramatic diminution of support for consumer protection programs at all levels of government," thus forcing consumer groups to take self-help measures for mutual aid and self-protection. Monroe Friedman, *Consumer Boycotts in the United States, 1970-1980: Contemporary Events in Historical Perspective*, 19 J. CONSUMER AFF. 96, 97 (1985). On the other hand, political action groups with conservative ideologies, such as the National Federation for Decency, the Church of Christ, and the American Life Lobby have become more vocal and active, spurring more liberal groups to counter with their own political action measures. *Id.*

11. Hartford Fire Insurance Co. v. California, 113 S. Ct. 2891, 2913 n.3 (1993) (Scalia, J., dissenting).

12. *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 447 (1990) (Brennan, J., concurring) ("From the colonists' protest of the Stamp and Townsend Acts to the Montgomery bus boycott and the National Organization for Women's campaign to encourage ratification of the Equal Rights Amendment, boycotts have played a central role in our Nation's political discourse."). *See also* Friedman, *Consumer Boycotts*, *supra* note 10, at 110 (arguing that consumer boycotts are becoming "part of the daily routine of our democracy and its most distinctive mark" (quoting Amitai Etzioni in M. S. Handler, *Protests Found Likely to Endure*, N. Y. TIMES, Feb. 16, 1969, at A60)).

13. Under common law, boycotts of labor and business groups were prohibited as "tortious interference" with contractual or business relations. *See, e.g.*, Ertz v. Produce Exch. Co., 81 N.W. 737 (1900) (holding that boycott by suppliers against merchant is unlawful); Vegelahn v. Gunter, 44 N.E. 1077 (1896) (holding that labor boycott against employer is unlawful). Exceptions, however, were made in the case of certain boycotts, especially those involving business groups. *See* Bowen v. Matheson, 96 Mass. 499 (1867) (holding that a merchant boycott is a lawful form of business competition). At common law, courts adopted the view that business boycotts were legitimate as an economic weapon for pursuing market objectives. Labor boycotts, however, were analyzed under a view which saw worker boycotts as an unlawful conspiracy. *See* Gary Minda, *The Common Law, Labor and Antitrust*, 11 INDUS. REL. L. J. 461, 508-15 (1989) [hereinafter Minda, *Common Law*]; Haggai Hurvitz, *American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and the Juridical Reorientation of 1886-1895*, 8 INDUS. REL. L. J. 307, 313-18 (1986).

14. *See, e.g.*, Labor-Management Relations (Taft-Hartley) Act § 8(b)(4), 29 U.S.C. § 158 (b)(4) (1988) (banning secondary labor boycotts). Under common law, secondary la-

Antitrust Act,[15] and the First Amendment.[16] It would appear that the word boycott has become a judicial trope used to condemn or condone expressive activity of different groups, a figurative device used in judicial argument to conjure up different images of dissent and popular sovereignty. The diversity of boycott images has brought about deep doctrinal conflicts in the law of boycotts. Consider, for instance, the doctrinal dissonance created by three leading Supreme Court decisions dealing with labor, antitrust and civil rights boycotts.

In *NAACP v. Claiborne Hardware*[17] the Supreme Court unanimously held that the organizers of a civil rights boycott could not be subject to a state tort because their boycott was protected by the First Amendment. In the same term, however, the Court again held unanimously, in *International Longshoremen's Ass'n v. Allied International, Inc.*,[18] that a political boycott organized by a labor union to protest the Soviet invasion of Afghanistan was not protected by the First Amendment. More recently in *FTC v. Superior Court Trial Lawyers Ass'n*,[19] the Court held that a boycott staged by a group of criminal defense lawyers, who refused to serve as court-appointed defense lawyers until their hourly fees were raised, constituted a *per se* offense under the federal antitrust laws because the lawyers' boycott, alleged to be a political boycott, was found to be a price-fixing conspiracy.

This confusing trio of cases has established the curious result

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bor boycotts were generally proscribed by most judges. *See* Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 386 (1969). The secondary boycott provision of federal labor law, however, does not render so-called "primary" boycott activity unlawful. *See* Local 761, Int'l Union of Elec., Radio & Mach. Workers v. NLRB (General Electric Co.), 366 U.S. 667, 672 (1961); NLRB v. International Rice Milling Co., 341 U.S. 665 (1951).

15. Business boycotts in the past have been declared *per se* illegal under the Sherman Antitrust Act, 15 U.S.C. § 1. *See, e.g.*, Klor's Inc. v. Broadway-Hale Stores Inc., 359 U.S. 207 (1959); Fashion Originators' Guild Inc. v. FTC, 312 U.S. 457 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914). The modern view in antitrust law, however, is that boycotts are *per se* unlawful only if they involve activity that falls within the category that antitrust law has defined as having predominantly anticompetitive effects. *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986).

16. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (holding that secondary boycott by civil rights group is protected by the First Amendment); International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982) (holding that secondary labor/political boycott is not protected); FTC v. Superior Court Trial Lawyers' Ass'n, 493 U.S. 411 (1990) (holding that secondary boycott by criminal defense lawyers aimed at influencing governmental action is not protected).

17. 458 U.S. 886 (1982).

18. 456 U.S. 212 (1982).

19. 493 U.S. 411 (1990).

that secondary boycotts seeking political objectives are protected from governmental regulation unless a labor union is involved or unless the boycott is for the purpose of advancing the participants' own economic self-interest.[20] What is protected First Amendment expression for civil rights or women's rights groups[21] becomes for other groups illegal activity subject to governmental suppression. First Amendment doctrine applicable to boycotts has consequently developed in a very context-specific manner—boycotts by labor groups have been analyzed differently than boycotts of business or civil rights groups.[22]

As Justice Stevens explained in the *Claiborne Hardware* decision, group boycotts seem to have a "chameleon-like character" which can exhibit "elements of criminality and elements of majesty."[23] Indeed, from the very first time the word boycott appeared in a reported decision in America,[24] judges have used the word to signify inflammatory, as well as sublime, legal meanings and connotations.[25] Judges have compared group boycotts to "blood thirsty tigers," and they have analyzed boycott activity as if it were a "disease" infecting the internal biological system of the body.[26] Judges have compared group boycotts to "soapbox oratory," and they have concluded that boycott activity is "a special form of political

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20. Taken together, the Supreme Court's decisions in *Claiborne Hardware, Allied International* and *Trial Lawyers* suggest that the Court distinguishes between political and economic boycotts, providing a higher degree of constitutional protection to those boycotts perceived to be more political and less economic. Whether this distinction bodes well for the labor movement is debatable. *See* James G. Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 923 (1991) [hereinafter Pope, *Labor Community Boycotts*]; James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 348-52 (1990) [hereinafter Pope, *Republican Moments*]; Gary Minda, *Rediscovering Progressive Labor Politics: The Labor Law Implications of* Federal Trade Commission v. Superior Court Trial Lawyers Association, 16 VT. L. REV. 71, 118-32 (1991) [hereinafter Minda, *Progressive Labor Politics*].

21. *See* Missouri v. National Org. for Women, 620 F.2d 1301 (8th Cir.) (holding that a boycott called by NOW aimed at securing ratification of the Equal Rights Amendment is protected First Amendment activity and hence insulated from antitrust regulation), *cert. denied*, 449 U.S. 842 (1980).

22. Many other similar contradictions have complicated the judicial interpretation of federal labor and antitrust boycott legislation. *See infra* notes 130-88 and accompanying text.

23. NAACP v. Claiborne Hardware, Co., 458 U.S. 886, 888 (1982) (quoting Krulewitch v. United States, 336 U.S. 440, 447-49 (1949) (Jackson, J., concurring)).

24. State v. Glidden, 8 A. 890 (Conn. 1887); *see infra* notes 261-66 and accompanying text.

25. *See* Mills v. United States Printing Co., 91 N.Y.S. 185, 188 (Sup. Ct. 1904) ("Some courts have defined [the term boycott] as necessarily implying violence or intimidation, or the threat thereof; others as but necessarily implying abstention.").

26. *See infra* notes 250-55, 272-73, 351-58 and accompanying text.

communication."[27] In this article I will offer an explanation of how judges have been able to understand boycotts alternately as acts of violence, even murder, and as acts of legitimate political activity.

Explanations of boycott doctrine have been offered that attempt to explain the seeming indeterminacy of the case law as either the result of instrumental policy manipulation[28] or the product of a mistaken understanding about the nature and meaning of boycotts.[29] While some have attempted to construct alternative theories for rendering the law of boycotts coherent,[30] the theories offered thus far have failed to explain away the inconsistencies in the law.[31] For some, the law of boycotts is but another "black hole"[32] into which the

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27. *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 448 (Brennan, J.) (1990) ("Like soapbox oratory in the streets and parks, political boycotts are a traditional means of 'communicating thoughts between citizens' and 'discussing public questions.'" (quoting Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939)).

28. Harry Kalven, for example, has suggested that the Supreme Court's decision in *Claiborne Hardware* can only be explained in terms of the Court's historical commitment to the civil rights movement. *See* HARRY KALVEN JR., THE NEGRO AND THE FIRST AMENDMENT 123-72 (1966); *see also* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES (1985); Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4, 16-19 (1984); James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189 (1984) [hereinafter Pope, *Ladder*].

29. *See, e.g.*, TRIBE, *supra* note 28, at 200-03; Getman, *supra* note 28, at 16-19.

30. *See, e.g.*, Einer R. Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177 (1992) [hereinafter Elhauge, *Antitrust Petitioning Immunity*]; Michael C. Harper, *The Consumer's Emerging Right to Boycott*: NAACP v. Claiborne Hardware *and Its Implications for American Labor Law*, 93 YALE L.J. 409 (1984); Kay P. Kindred, *When First Amendment Values and Competition Policy Collide: Resolving the Dilemma of Mixed-Motive Boycotts*, 34 ARIZ. L. REV. 709 (1992); Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685 (1985); Pope, *Republican Moments*, *supra* note 20, at 348-52; Mark D. Schneider, Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469 (1982); Cynthia Estlund, Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938 (1982); *see also* Einer R. Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 738-46 (1991) [hereinafter Elhauge, *Antitrust Process*]. Professor Elhauge's and Pope's proposals are discussed *infra* at notes 205-45 and accompanying text.

31. *See, e.g.*, Getman, *supra* note 28, at 16-19; Pope, *Ladder*, *supra* note 28, at 224-28; *see also* TRIBE, *supra* note 28, at 200-03.

32. *See* Pope, *Ladder*, *supra* note 28, at 196. As Professor Pope explains:

> A Black Hole is a region of space . . . into which matter has fallen, and from which *nothing* . . . can escape. . . . In the vicinity of a Black Hole, and even more so inside one, conditions become so strange that to describe them in everyday language is well nigh impossible. Our common sense notions and our cherished scientific laws take a very heavy beating, and right in the center of a Black Hole they cease to have any meaning at all.

Id. at 189 (quoting I. NICOLSON & P. MOORE, BLACK HOLES IN SPACE 6-7 (1974)); *see also* TRIBE, *supra* note 28, at 198-203 (describing the incoherences posed by the Court's speech/conduct distinction applicable to expressive boycotts). Professor Pope has since attempted to elaborate a normative theory for rendering boycott law coherent. *See* Pope,

problems of legal indeterminacy and the incommensurability of modern law have seemingly fallen, a place from which *nothing* can escape.[33] One is left with the impression that the law applicable to boycotts *is* a chameleon that camouflages the exercise of contestable normative judgments about acceptable forms of group behavior based on different conceptions of political behavior.

The problem in the law of boycotts is not the result of a black hole in logic or policy, nor the consequence of instrumental manipulation run wild.[34] Rather, doctrinal indeterminacy can be understood as the logical consequence of the way judges have used a concealed form of argument based on metaphor[35] to construct and analyze their subject.[36] What appears on the surface to be indeterminacy is

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Republican Moments, supra note 20. I have argued that Pope's theory of "republican moments" is rendered incoherent by the fact that Pope's theory incorporates flawed conceptual distinctions between politics and economics and public and private. *See* Minda, *Progressive Labor Politics, supra* note 20, at 121-32.

33. For a discussion of the problem of indeterminacy and incommensurability in constitutional law, see Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990) [hereinafter Winter, *Indeterminacy*].

34. *See, e.g.*, Pope, *Ladder, supra* note 28, at 199-200 ("The results and reasoning of the [First Amendment boycott] cases are consistent either with the view that noninstrumental values do justify the protection of such speech, but that political speech has priority because it is 'more than self-expression,' or with the view that protection of all speech other than commercial and labor speech is justified primarily with reference to the political system, but that some speech is more attenuated in value and thus merits less protection." (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)).

35. Metaphor is a powerful "concealed form of argument by analogy . . . which is itself intimately connected to the growth of language and thought. . . ." Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 395 (1986). Professor Boudin illustrates how the "sway of metaphor" in antitrust opinions has influenced the development of antitrust concepts such as the "bottleneck doctrine," "price-fixing theory," and "toehold." *Id.*

Until recently, legal scholars have ignored the importance of metaphor in legal analysis. The conventional scholarship has understood metaphor as merely a colorful device used in legal descriptions to conjure up mental images. *See* David A. Anderson, *Metaphorical Scholarship*, 79 CAL. L. REV. 1205, 1214-15 (1991) (book review). Steven L. Winter, however, has persuasively demonstrated how metaphor is linked to cognitive understanding in a variety of legal contexts. *See* Steven L. Winter, *Death Is the Mother of Metaphor*, 105 HARV. L. REV. 745 (1992) (book review); Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323 (1992) [hereinafter Winter, *Under Color of Law*]; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988) [hereinafter Winter, *The Metaphor of Standing*]; Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989) [hereinafter Winter, *Transcendental Nonsense*]; Steven L. Winter, *Legal Storytelling: The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989) [hereinafter Winter, *The Cognitive Dimension*]; Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990) [hereinafter Winter, *Bull Durham*]; *see also* HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS (1992).

36. An inquiry into the process of how legal meaning is created and produced in law

in fact the intelligible practice of representing the meaning of reality in the law—a process that entails the use of metaphor to construct understandings about the real world events of boycotts.[37] Judges construct a reality of group boycotts for different contexts; that reality has generated different legal meanings for boycotts in different legal spheres.

By focusing on the relationship between the legal structure of boycott doctrine and the subjectivity of human imagination, I will explain how the seemingly indeterminate nature of boycott decisions can be understood as a coherent practice arising from different imaginative understandings about boycotts.[38] What Justice Stevens

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is often ignored in traditional legal scholarship. This article draws from the emerging critical legal studies literature that examines the way meaning is created by subjects and culture as a result of the dynamic of "social construction." *See, e.g.*, James Boyle, *Is Subjectivity Possible? The Post-Modern Subject in Legal Theory*, 62 U. COLO. L. REV. 489 (1991); William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation As a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 776-87 (1991) (discussing the social construction thesis in the new public law scholarship); Jennifer Wicke, *Postmodern Identity And The Legal Subject*, 62 U. COLO. L. REV. 455 (1991).

This social construction thesis developed from the insight that legal meaning, as well as thought, belief, and desire are the products of an actor who "creates" understandings through experientially based knowledge and whose understanding is itself constructed by social structures and by previously established social thought. The basic notion is that legal meaning about the world "comes from within" the interpreter and is constituted by an external social and cultural environment. *See* Pierre Schlag, Fish v. Zapp: *The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37 (1987); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Pierre Schlag, *"Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990); Winter, *Indeterminacy, supra* note 33; Winter, *Bull Durham, supra* note 35; *see also* Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985).

37. The reasoning process that judges use to justify their work is a good example of what Pierre Schlag has dubbed "the problem of the subject." *See* Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991). The problem of the subject refers to the many ways that we avoid focusing on the "question of who or what thinks or produces law." *Id.* at 1629. According to Schlag, it is "[t]his forgetting of the 'we' who do the 'expounding,' this bracketing of the 'I'-in short, this eclipse of the problem of the subject-[which] became a vital, pervasive, constitutive characteristic of American legal thought." *Id.* at 1628. This question of "who is the subject" is also frequently ignored in legal academic work because legal academics sometimes assume that legal scholarship is an objective, autonomous enterprise unaffected by subjective influences of the author. The subject, however, is always present and always affecting the authors construction of reality. *See* Pierre Schlag, *Legal Scholarship: Contradiction and Denial*, 87 MICH. L. REV. 1216, 1220 (1989); Pierre Schlag, *The Critique of Normativity Article: Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 834, 839 (1991).

38. In other words, the legal meanings of boycott are determined by the structures of metaphoric reasoning, much in the same way that Claude Lévi-Strauss has shown how myths of indigenous people depend upon the structure of cultural myths. *See* CLAUDE LÉVI-STRAUSS, STRUCTURAL ANTHROPOLOGY (Claire Jacobson & Brooke G. Schoepf trans., Anchor Books 1967) (1963). Thus, this article will focus on the field of social practice that other critical theorists have found to define and create law. *See generally* Rosemary

took to be the "chameleon-like character" of boycott doctrine is in fact the intelligible product of an imaginative process structured by metaphor which judges have used to support their legal analyses and conclusions about group boycotts.[39] My thesis is that the law of boycotts can best be understood by considering how language and power are mediated by a metaphoric structure of thought upon which judges have relied for attributing legal meaning to social events.

Part II will explore how the modern law of boycotts has been plagued by four paradigmatic boycott problems that have resisted resolution by scholars. Part III will then show how the law of boycotts has been molded by a language of socially constructed and highly contingent representations of real world events. Part IV will examine the implications of the current state of the law of boycotts for the constitutional right of citizens to boycott for political objectives.[40] Finally, in Part V, I will argue that an organic right of political participation, developed from an understanding of cultural practices, offers a more meaningful basis for developing a constitutional right to boycott as a political act.

II. THE CHAMELEON-LIKE NATURE OF BOYCOTT DOCTRINE

> The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid.[41]

> The boycott of white merchants in Claiborne County, Miss., that gave rise to this litigation had such a character; it included elements of criminality and elements of majesty.[42]

There are terms in law, like conspiracy and boycott, that seem to have a chameleon-like quality in the sense that their meaning depends on what Justice Jackson once described as the special *colora-*

Coombe, *Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies*, 14 LAW & SOC. INQUIRY 69, 115-17 (1989).

39. Legal concepts do matter, but metaphor provides an effective way to uncover the meaning and complexity of law. *See* Winter, *Under Color of Law*, *supra* note 35, at 332; Winter, *The Metaphor of Standing*, *supra* note 35, at 1374.

40. Several years ago Professor Michael Harper called for the recognition of a constitutional right to boycott as a political act. *See* Harper, *supra* note 30, at 409. Professor Harper argued that "[a]ny secure basis for a right to boycott must trump a state's efforts to protect its economy from disruption. An individual's decision to join a consumer boycott must be protected precisely because it enables the individual to affect the economy, not in spite of such effects." *Id.* at 421; *see also* Kupferberg, *supra* note 30, at 689 (advocating the development of protected right of workers to engage in political strikes in labor law).

41. Krulewitch v. United States, 336 U.S. 440, 449 (1949) (Jackson, J., concurring).

42. NAACP v. Claiborne Hardware Co,, 458 U.S. 886, 888 (1982) (Stevens, J.).

tion of context. Contextual coloration refers to the way which legal meaning is affected by the particular legal setting in which a legal concept is analyzed. It was Justice Jackson's notion of "contextual coloration" which led Justice Stevens to remark in *NAACP v. Claiborne Hardware* that legal concepts applicable to group boycott have a "chameleon-like character."[43] As Justice Scalia explained in 1991, because "boycotts rarely exist in a vacuum,"[44] judges must consider their contextual setting to determine the legal meaning to be attributed to the activity. Legal doctrines applicable to group boycotts *do* have a chameleon-like nature because context often plays an important, albeit submerged, role in determining how doctrine operates in litigation.

In our legal system, contextual coloration and chameleon-like doctrines represent a threat to the system's claim to legitimacy because they conflict with principles of objectivity and neutrality upon which judge-made law is thought to be justified.[45] The idea that legal decision-making should be contained and bounded by principled and consistent argument is a pervasive ethic of the legal profession. If the meaning of the law changes like the color of the chameleon, then how can it be said that law is fair, just, or legitimate?

Judges in boycott cases have responded to the problem by evading it. Judges sometimes acknowledge that boycott doctrines are chameleon-like, but when they do, they approach boycott prob-

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43. *Id.*

44. Summit Health, Ltd. v. Pinhas, 111 S. Ct. 1842, 1852 (1991) (Scalia, J., dissenting).

45. *See, e.g.*, MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 8 (1988) (arguing that "[i]n a society like ours, which is complex, impersonal, and not officially religious, courts derive their legitimacy in substantial part from [principles of] objectivity.").

I do not mean to suggest that judge-made law is or ought to be built on unitary concepts, or that judges lack discretion in resolving hard cases. By objectivity, I mean an understanding of the legal reasoning process characteristic of the objectivist position in cognitive theory. *See, e.g.*, MARK JOHNSON, THE BODY IN THE MIND: THE BODILY BASIS OF MEANING, IMAGINATION, AND REASON, xxi-xxv (1987) [hereinafter JOHNSON, BODY IN THE MIND]; *see also* GEORGE LAKOFF & MARK TURNER, MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR (1989); GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND (1987) [hereinafter LAKOFF, WOMEN, FIRE]. The objectivist position rests upon three general epistomological claims about meaning and rationality. As Steven L. Winter has explained:

> First, it treats the world as filled with determinate, mind-independent objects with inherent characteristics unrelated to human interactions. Second, it understands categorization either as about natural sets of objects in the world or, when it recognizes categorization as humanly constructed, as about objects with ascertainable properties or criteria that establish their commonality. Finally, it treats reasoning as about propositions and principles that are capable of "mirroring" those objects and accurately describing their properties and relations.

Winter, *Transcendental Nonsense, supra* note 35, at 1107-08.

lems in a surprisingly unreflective manner—they assume that they can resolve boycott disputes under legal standards that apply to all boycott cases in a similar manner. In some cases, judges ignore the fact that boycotts are characterized differently in other fields of law. In still others, judges wield the term boycott as an epithet for characterizing as illegal some group activity, without bothering to consider the fact that the word has enjoyed less disparaging meanings in other areas of the law. Inconsistency in the case law is frequently rationalized in terms of the bounded categories limiting, separating, and containing different legal subjects.[46]

Thus, in some legal contexts the word boycott is used to signify a threat or menace, or an ominous foreboding of mob violence, or blacklisting and social ostracism, or even murder. For others, boycott is a word associated with the exercise of freedom to abstain or to dissent as an expression of political protest of civil rights groups and other mass movements of popular sovereignty.[47] In other contexts, boycott is a word that is as American as apple pie; in others, boycott signifies activity that is subversive of the very fabric of the American way of life.[48] In the case law of boycotts, one can discover rich[49] but

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46. These evasion strategies work because lawyers are trained to approach their subject from the perspective of a "metaphoric container." An important metaphoric image in law is the notion of a container which marks off a bounded mental space between objects, people, events, and ideas. Legal arguments are containers for conveying ideas as objects. Legal categories distinguish by way of an "in-out" orientation. Rational legal analysis proceeds on the basis of the principle "either P or not-P." The experiential orientation of "in-out" enables judges to compare cases in applying the principles of stare decisis. What connects all of these experiences in law is the basic metaphoric image of a container. For a discussion of the metaphoric importance of the container in structuring our ideas about the reasoning process generally, see JOHNSON, BODY IN THE MIND, *supra* note 45, at 21-40.

47. *See* NAACP v. Claiborne Hardware Co., 458 U.S. at 907.

48. *Compare* American Medical Ass'n v. United States, 130 F.2d 233, 248-49 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943) (considering that the boycott called by the American Medical Association was unamerican) *with* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 447 (1990) (Brennan, J., dissenting) ("Expressive boycotts have been a principal means of political communication since the birth of the Republic."). *See also* NAACP v. Claiborne Hardware Co., 458 U.S. at 888 (advancing the notion that political boycotts can have elements of "majesty").

49. Professor Pope, for example, argues that the Supreme Court's leading boycott decisions can be seen to reflect a "three-systems ladder theory" of constitutional order:

> Order in the political system is at the transcendent end of the spectrum and requires a high level of judicial scrutiny and intervention. Order in the labor system is at the opposite, immanent end of the spectrum and can be safely left to Congress. The commercial system lies between these two extremes.

Pope, *Ladder*, *supra*, note 28 at 200; *see also* Richard D. Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 224-29 (1981) (arguing that the Court's understanding of Constitutional order has vacillated between a "transcendent" vision which derives the essence of the Constitution from the text of the document, and an "immanent" vision which develops the meaning of constitutional order from the spon-

conflicting judicial images of dissent and popular sovereignty.[50]

A. *Four Characteristic Boycott Problems.*

While the current state of boycott doctrine remains mired in indeterminacy, judges interpret boycott activity in ways that suggest that they believe their decisions to be rational, objective and consistent. Judges write boycott opinions that rationalize outcomes under an objectivist understanding of legal analysis[51] while ignoring the attention drawn by commentators to the contrasting and inconsistent result of the cases.[52] Before explaining the role which metaphor has played in this practice, it will be helpful to first review four basic legal problems that have typically troubled judges in deciding legal issues involving group boycotts.

There are many federal and state courts decisions, decided at different historical periods, that could be utilized to demonstrate why the chameleon-like nature of boycott doctrine is inconsistent with traditional judicial notions of objectivity and legal neutrality. In this part I will review four Supreme Court decisions which I believe serve to illustrate four paradigmatic boycott problems for the law—the problem of "force," "political expression," "motive," and "definition." This part will also examine the key legal distinctions that judges have relied upon in solving these four problems.

1. *The Problem of Force:* Gompers v. Bucks Stove & Range Co.[53] The Supreme Court's 1911 decision in *Gompers* highlights one meaning of boycott that has come to influence judicial understandings about labor boycotts. In *Gompers,* the Court concluded that the mere promotion of a threatened boycott could be enjoined because "verbal acts" are like the "use of any other *force* whereby property is unlawfully damaged."[54]

The labor leader Samuel Gompers and several high-ranking of-

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taneous political struggle occurring in everyday life).

50. *See generally* Pope, *Labor Community Boycotts, supra* note 20.

51. That is, judges write opinions which reflect the epistomological and linguistic assumptions that cognitive theorists have attributed to the objectivist theory of meaning. *See* Winter, *Transcendental Nonsense, supra* note 35, at 1107-08.

52. *See, e.g.,* TRIBE, *supra* note 28, at 200-03; Pope, *Republican Moments, supra* note 20, at 351-52; Getman, *supra* note 28, at 16-19; Harper, *supra* note 30, at 419, 427, 442; Kupferberg, *supra* note 30, at 706, 715, 718, 727; Pope, *Ladder, supra* note 28, at 224-28.

53. 221 U.S. 418 (1911). The Supreme Court's decision in the *Gompers* case had been largely ignored by labor law scholars until James Pope rediscovered its significance. *See* Pope, *Ladder, supra* note 28, at 217-18. For the historical background of the decision, see LAIDLER, *supra* note 1, at 134-50; HAROLD C. LIVESAY, SAMUEL GOMPERS AND ORGANIZED LABOR IN AMERICA 144-47, 162 (1978).

54. 221 U.S. at 439.

ficials of the American Federation of Labor (AFL) were convicted of civil contempt for violating a court injunction which had prohibited them from publicizing "in any manner" a boycott against the Bucks Stove & Range Co.[55] The stove polishers went on strike, ignored the injunction, and declared a boycott of Bucks Stove & Range's products. The leadership of the AFL was subsequently asked by the strikers to put the company on its "We Don't Patronize" list, published regularly in the AFL's trade union newspaper, *American Federationist*.[56] Gompers and the AFL agreed and a national boycott was called and publicized by the international union.[57]

The Bucks Stove & Range Co. responded by obtaining an injunction against the AFL and its officers proscribing any interference with the sale of Bucks Stove & Range Co. products "in any manner," including "declaring or threatening any boycott . . . or assisting such boycott."[58] The Supreme Court reversed the contempt convictions of Gompers and two other union officials on procedural grounds,[59] but the Court's approval of the use of injunction against the promotion of a boycott constituted a stinging precedent for organized labor.[60]

Justice Lamar, writing for a unanimous Court, reasoned that the publication of the boycott notice was a "force not inhering in the words themselves," but served rather as an implied "agreement to

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55. 221 U.S. at 419; *see* LIVESAY, *supra* note 53, at 146. The case arose out of a bitter labor campaign to prevent the Bucks Stove & Range Company from ordering members of the stove polishers' union to work a ten-hour day instead of the accustomed nine hours. The controversy was bitter and highly publicized because James Van Cleve, president of the Bucks Stove & Range Company, was, also, president of the National Association of Manufacturers, an organization characterized within the labor movement as "a kind of antilabor chamber of commerce and Lions Club combined." *Id.* at 145-46.

56. *See* LIVESAY, *supra* note 53, at 146. The *American Federationist* was established in 1893 by the American Federation of Labor (AFL). *Id.* at 90. Gompers served as the newspaper's editor, reporter, columnist, and proofreader. *Id.* The AFL's "Please Do Not Patronize" list was in fact compiled in response to the blacklist, one of the most insidious but effective forms of boycott practiced by employer groups. *Id.* at 39.

57. *Id.* at 146.

58. 221 U.S. at 420-21 n.1. Gompers and two other union officers defied the court's injunction and were subsequently cited for contempt of court. The conviction was upheld by the Supreme Court of the District of Columbia, and Gompers received a one-year sentence. During the appeal process, however, the president of the Bucks Stove Company died and his successor dropped the case against Gompers, allowing Gompers to avoid a term in jail. *See* LIVESAY, *supra* note 53, at 143-47.

59. 221 U.S. at 451-52. Because the union and the company settled the civil action from which the civil contempt proceedings arose, the Court concluded that the contempt convictions against Gompers and other union leaders could not stand. *Id.*

60. The *Gompers* decision, along with the Court's decision in Lowe v. Lawlor, 208 U.S. 274 (1908) [the *Danbury Hatters* case], ushered in the infamous era of the labor injunction. *See* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930).

act in concert when the signal [to boycott] was published. . . ."[61] In rejecting the union's claim that the mere act of publicizing a boycott was entitled to First Amendment protection as an expression of the "liberty of speech," the Court reasoned that the union's publicity involved "'verbal acts' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged."[62]

One weakness of the Court's decision was that only publicity was enjoined; another was that the Court upheld the injunction despite there being no lower court evidentiary finding that the union had directed its membership to coerce or threaten anyone.[63] While the Court recognized that the judges may "differ as to what constitutes a boycott that may be enjoined," Justice Lamar failed to explain the basis for concluding that the mere publication of a boycott was "a means whereby a boycott is unlawfully continued, and . . . amount[s] to a violation of the order of injunction."[64]

The Court was most concerned that the "vast power" of the "multitudes of members" of a labor organization could render an individual "helpless" in the face of a boycott threat.[65] Labor boycott slogans such as "Unfair" and "We Don't Patronize" were interpreted by Justice Lamar as signals for concerted action to be taken against a helpless individual.[66] Boycott publicity was understood to be "verbal acts" which "signal" the use of "force" by a "multitude[] of

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61. 221 U.S. at 439.

62. *Id.* at 439. Justice Lamar found two reasons why the union's "verbal acts" constituted enjoinable acts of coercion. First, the publication of slogans such as "We don't patronize" and "Unfair" were publicized by an organization of "multitudes of members," giving these expressions a "force not inhering in the words themselves, and therefore exceed[ing] any possible right of speech which a single individual might have." *Id.* Second, Justice Lamar concluded that the force of the words was coercive because the only way that the employer could comply was by "purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the preventive powers of a court of equity." *Id.* According to Justice Lamar, "[w]hen such appeal is made it is the duty of government to protect the one against the many as well as the many against the one." *Id.* As Professor Pope has noted, "the *Gompers* opinion set up an apparently neutral distinction—that between 'verbal acts' and speech—but let slip a strong hint that behind this distinction lay a visceral fear of organized working people." Pope, *Ladder, supra* note 28, at 218.

63. *Gompers* involved only the legality of the AFL's publication of the boycott notice. The injunction issued against the union forbade it to interfere "in any manner with the sale of the product" of the company or "from assisting in any such boycott, and from printing, issuing, publishing, or distributing through the mails" any paper which contained "any reference to the name of the complainant, its business or product in connection with the term 'Unfair,' or 'We don't patronize' list." 221 U.S. at 420-21 n.1.

64. *Id.* at 437. The Court cited in support of its conclusion a number of state and federal decisions that had found that publication of a boycott could be a means of continuing an unlawful object. *Id.*

65. *Id.*

66. *Id.*

members."[67] In the presence of such force the Court concluded that an individual would be helpless, because such an individual would be forced to sacrifice rights protected by the Constitution in order to avoid the likelihood of property damage caused by the force of verbal action.[68]

While Justice Lamar attempted to justify his conclusion on the basis of his belief that the AFL, a powerful union with "multitudes of members," was threatening to boycott someone, he also expressly recognized the "right of workingmen to unite and to invite others to join their ranks. . . ."[69] But if publicity is coercive merely because a group disseminates a message that causes others to act, then the ostensibly Court-affirmed legal right of workers to join and associate for a common cause would seem to be a hollow and ineffectual one.[70] Boycott slogans such as "Unfair" and "We Don't Patronize" would be a force only if the union's message was found by others to be persuasive. The reasons why the promotion of a labor boycott, in the absence of evidence of actual or potential coercion or physical force, should be seen as compulsory force have never been adequately explained.[71]

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67. *Id.*

68. *Id.*

69. *Id.*

70. The publicity could be seen as analogous to so-called signal picketing which courts have since treated as conduct involving "an automatic response to a signal rather than a reasoned response to an idea." *See* NLRB v. Retail Store Employees Union, Local 1001 (Safeco), 447 U.S. 607, 619 (1980) (Stevens, J., concurring). Other justices have made similar distinctions. *See, e.g.*, Bakery & Pastry Drivers Local 802 v. Wohl, 315 U.S. 769, 776-77 (1942) (Douglas, J., concurring) (distinguishing between speech and speech-plus activity); *see also* Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 336 (1968) (Harlan, J., dissenting); NAACP v. Buton, 371 U.S. 415, 453 (1963) (Harlan, J., dissenting); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 80, 444-49 (1970) (discussing the distinction between action and expression). This notion, however, has been criticized by both labor and First Amendment scholars. *See* Archibald Cox, *The Supreme Court 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 37-38 (1980) [hereinafter Cox, *Foreword*]; Archibald Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 594-602 (1951); John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1494-96 (1975); Harry Kalven Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 23.

The problem with the theory of signaling is that it requires judges to make subtle judgments about the motives and intentions of participants in a boycott. Because the intended signal of a boycott may be ambiguous, judges would have to inquire into the content of communication to determine motives and intentions of the parties. Such an inquiry would grant to judges the power to restrict expressive conduct because of its message, ideas or content. This would result in government censorship.

71. One explanation for the decision is that the message advanced by an organized group of workers was itself coercive and dangerous. *See* Pope, *Ladder, supra* note 28, at 218. In *Police Dep't of the City of Chicago v. Mosley*, however, the Supreme Court invalidated an ordinance which prohibited picketing near public schools unless the picketing was related to a labor dispute. 408 U.S. 92 (1972). As Justice Marshall argued for the

Gompers has never been overruled and the legal meaning of boycott upon which the decision rests is now deeply entrenched in labor law discourse despite heavy criticism arguing the contrary[72]. It is now well accepted that state or federal governments may regulate peaceful labor boycotts in order to protect society from the economic disruption of boycotts.[73] The courts have also accepted the notion that the signalling effects of boycott publicity can be regulated as "verbal acts."[74]

Judges have often concluded that boycotts involving physical force and violence, activity that the state prohibits outside of a boycott, should be enjoined and declared illegal,[75] and that violent actors associated with the group boycott may be subject to civil and criminal penalties.[76] Judges have also had little trouble declaring a boycott unlawful if it is found to pose a serious threat to the health, safety and welfare of the community.[77] What judges have had difficulty with is explaining why otherwise peaceful and non-violent boycott activity may be enjoined simply because it has an impact on targeted and non-targeted parties.

2. *The Problem of Political Expression:* NAACP v. Claiborne Hardware Co.[78] In 1990, more than seventy years after *Gompers*, the Supreme Court discovered a different legal meaning of a group boycott staged by a civil rights group protesting the racially discriminatory practices of white merchants and civic leaders in Claiborne

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majority: "[The infirmity of the ordinance is] that it describes permissible picketing in terms of its subject matter .... [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its idea, its subject matter, or its content ...." *Id.* at 95-96; *see also* Carey v. Brown, 447 U.S. 455 (1980) (holding that communications concerning an employer's labor policies deserve as much protection as communications concerning an employer's stand on civil rights or other political matters). As Kenneth Karst has argued, *Mosley* and its progeny establishes a commitment to equality of expression as a fundamental principle of freedom of speech. Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 29 (1975). Publicity concerning a labor boycott should be entitled to the same equality of expression.

72. *See* Pope, *Ladder*, *supra* note 28, at 217-18.

73. While the Supreme Court recognized in Thornhill v. Alabama, 310 U.S. 88, 104-05 (1940), that picketing is a form of speech that cannot be absolutely prohibited by government, the Court has also recognized that picketing and boycotting involve non-speech elements which can be regulated because such activity may affect a compelling governmental interest. *See, e.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 501 (1949); NLRB v. Retail Store Employees Union, Local 1001 (Safeco), 447 U.S. 607, 612-13 (1980).

74. *See* NLRB v. Retail Store Employees Union, Local 1001 (Safeco), 447 U.S. 607 (1980).

75. *See* Harper, *supra* note 30, at 432-34.

76. *Id.*

77. *Id.*

78. 458 U.S. 886 (1982).

County, Mississippi. The local branch of the NAACP, attempting to transform an entrenched cultural regime of institutional racism in Claiborne County, petitioned private merchants and governmental leaders to provide equal opportunity for African Americans.[79] When their efforts failed, several hundred citizen's churches voted unanimously to boycott white merchants. Citizen groups picketed white-owned businesses, and an organized group known as the "Deacons" or "Black Hats" enforced the boycott.[80] Violators of the boycott were characterized as "traitors" to the African-American community and were socially ostracized; in a few isolated incidents traitors were physically attacked.[81] The Court unanimously held that the courts of Mississippi could not constitutionally enforce tort judgments for recovery of economic losses attributed to the boycott. Justice Stevens, writing for the majority, concluded that the civil rights boycott involved a form of political expression seeking to influence governmental action and economic change that was constitutionally protected by the speech, assembly, association and petition clauses of the First Amendment.[82]

Justice Stevens depicted the civil rights boycott as a political act involving the assertion of collective economic power to achieve a political objective. Recognizing that the boycott involved more than peaceful assembly, Justice Stevens emphasized that the boycott relied upon protected elements of speech to further its aims, explaining:

> Nonparticipants repeatedly were urged to join the common cause, both through public address and through personal solicitation. These elements of the boycott involve speech in its most direct form. In addition, names of boycott violators were read aloud at meetings . . . and published in a local black newspaper. Petitioners admittedly sought to persuade others to join the boycott through social pressure and the 'threat' of social ostracism.

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79. *See* 458 U.S. at 889-900.

80. *Id.* at 903-04.

81. *Id.* at 904. There were four incidents of violence attributed to the boycott, including two which involved gun shots fired into the homes of non-boycotters. *Id.* Charles Evers, the Field Secretary of the NAACP, was reported to have threatened to break the neck of any boycott violator. *Id.* at 902.

82. *Id.* at 911. The California Supreme Court, in *Environmental Planning & Info. Council v. Superior Court*, extended the *Claiborne Hardware* decision to provide protection to a nonprofit environmental organization's boycott against a newspaper publisher's editorial policies on environmental matters. 680 P.2d 1086 (Cal. 1984). In finding that the boycott could not be enjoined under state law, the California Supreme Court rejected the publisher's argument that only civil rights boycotts should be afforded constitutional protection. *Id.* at 1092 (quoting *Claiborne Hardware*, 458 U.S. at 914). The California Supreme Court emphasized that it was "precluded by the First Amendment itself from gauging the degree of Constitutional protection by the content or subject matter of the speech. . . ." *Id.* at 1092.

> Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.[83]

Justice Stevens failed to explain why the boycott did not pose the type of compulsory force that courts in labor cases like *Gompers* had found to justify the imposition of an injunction against labor groups that utilize similar elements of speech and conduct to accomplish their objectives.[84] The problem of force posed by the labor boycott in *Gompers* was unrecognized even though the Court in *Claiborne Hardware* acknowledged that the record revealed that the boycott had involved elements of compulsory force.[85]

In *Claiborne Hardware*, the Court downplayed evidence of coercion, force, and criminality and focused instead on what Justice Stevens characterized as the majestic elements of the boycott. The Court emphasized that the boycott was aimed at political objectives: "Its acknowledged purpose was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice."[86] In finding that the boycott was "a form of speech or conduct" protected by the First Amendment, Justice Stevens also emphasized that the boycotters "banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect."[87] The boycott was characterized as an attempt by a disempowered subordinate group to oppose an arbitrary and unjust legal and social regime. In *Claiborne Hardware*, the boycott was thus linked with images of legality,

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83. 458 U.S. at 909-10.

84. Justice Stevens relied upon a number of First Amendment cases dealing with other forms of expressive conduct without considering their applicability to labor boycotts. *Id.* at 910-13 (citing Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (distribution of leaflets) and United States v. O'Brien, 391 U.S. 367 (1968) (burning draft card)). *Gompers* may have been overlooked because it was a labor case, while *Claiborne Hardware* was litigated as a civil rights case.

85. While the boycott in *Claiborne Hardware* was in most respects peaceful and orderly, the trial record disclosed that the black community in Claiborne County was threatened by the "Black Hats" or the "Deacons." *Id.* at 903-04. Several incidents, some substantiated by the evidence, some of doubtful credibility, reflected a general attitude of hostility towards violators of the boycott. *Id.* at 904-05. For instance, a brick was thrown through a car windshield of a violator, in two instances shots were fired at a house, and one violator was allegedly beaten. *Id.* Justice Stevens' response to this was that "there is no evidence—apart from the speeches themselves—that... threatened acts of violence." *Id.* at 929. Applying the Court's decision in Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941), which held that "insubstantial findings" of "trivial rough incident[s]" and "moment[s] of animal exuberance" fail to invalidate otherwise peaceful picketing, Justice Stevens concluded that the findings in the record were "constitutionally inadequate to support the damages judgment against [the leader of the boycott]." *Claiborne Hardware*, 458 U.S. at 929.

86. 458 U.S. at 907.

87. *Id.*

and it was state tort law which became linked with ideas of criminality. The social context of the white Southern culture apparently enabled the Court to downplay elements of force and see only the majestic elements of this boycott.

When the Court in the same term considered the question of whether to sanction political expression associated with a secondary labor boycott, however, the image of force projected in federal labor law controlled the legal meaning of boycott. In *International Longshoremen's Ass'n v. Allied International, Inc.*[88] the Court held that a secondary boycott by longshoremen of a ship bound for Russia to protest the Soviet Union's invasion of Afghanistan was an illegal secondary boycott that could be enjoined by the courts, even though the boycott was premised upon a purely political objective. While secondary boycotts seeking economic justice for African Americans were found to be constitutionally protected, secondary boycotts by labor seeking economic justice for workers, or boycotts seeking to communicate a message about foreign trade and international justice, have not.

Allied International and *Claiborne Hardware* serve to highlight two different colors of the chameleon-like character of modern boycott doctrine. In emphasizing the constitutional and political character of the *Claiborne Hardware* boycott, the Court adopted an interpretation of the First Amendment that protects boycotts as acts of political expression even when activity of the boycott threatens those against whom it is directed. In *Allied International*, the modern day equivalent of *Gompers*, the Court refused to apply that interpretation to protect a political boycott by labor because the boycott was found to be proscribed by federal labor legislation. What makes the civil rights boycott in *Claiborne Hardware* appear majestic, and what makes the labor union boycott in *Allied International* threatening and dangerous, has since remained an enigma.

3. *The Problem of Motive:* FTC v. Superior Court Trial Lawyers Ass'n (Trial Lawyers).[89] In some instances the contextual coloration of a boycott is unclear because the boycott is the product of mixed motives. When this mixing occurs, the legal characterization of boycott becomes more difficult, as *FTC v. Superior Court Trial Lawyers Ass'n* illustrates. The *Trial Lawyers* case involved an antitrust challenge brought by the Federal Trade Commission against a boy-

88. 456 U.S. 212 (1982).

89. 493 U.S. 411 (1990). I have discussed the implications of the *Trial Lawyers* decision for labor and antitrust law in Minda, *Progressive Labor Politics, supra* note 20 at 74-135; *see also* Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905, 986-99 (1990) [hereinafter Minda, *Interest Groups*].

cott organized by a group of criminal defense lawyers practicing pursuant to the District of Columbia Criminal Justice Act. The lawyers, who represented indigent criminal defendants under the Act, conducted a boycott in an attempt to extract higher hourly fees from the District of Columbia government. The lawyers argued that their boycott was a constitutionally protected exercise of their First Amendment right to petition government, and asserted also that the boycott was necessary to advance the Sixth Amendment rights of their clients. The Court rejected their argument, holding six to three that the boycott constituted an illegal price fixing conspiracy, proscribed *per se* under the Sherman Antitrust Act.[90]

Justice Stevens' opinion for the Court distinguished his opinion in *Claiborne Hardware*, holding that First Amendment protections for civil rights boycotts are limited to instances where the boycotters seek no special economic advantage for themselves, but instead advance a constitutional principle that transcends the interests of the individual.[91] The lawyers' boycott was found to fall outside the constitutional umbrella for expressive boycotts created by the Court in *Claiborne Hardware* on a finding that that the boycott was motivated by an economic incentive to fix the price of their services, not the advancement of a transcendent constitutional value.[92] The critical factor distinguishing *Trial Lawyers* from *Claiborne Hardware* was financial motivation: those participating in the civil rights boycott did not "stand to profit financially from a lessening of competition in the boycotted market,"[93] while those participating in the lawyers' boycott were found to be financially interested.

After *Trial Lawyers*, financial motivation becomes a critical factor in determining whether antitrust immunity will protect the participants of a mixed-motive boycott.[94] Constitutional objectives may confer antitrust immunity upon a boycott if the boycotters are not financially interested in the target of their boycott. Moreover, after *Trial Lawyers*, "benign motivations, constitutional or other-

90. 493 U.S. at 425-27; *see* Stephen Calkins, *The October 1989 Supreme Court Term and Antitrust: Power, Access, and Legitimacy*, 59 ANTITRUST L.J. 339, 341-55 (1991).

91. 493 U.S. at 426.

92. In separate concurring opinions by Justices Brennan and Blackmun, three Justices disagreed about the appropriateness of applying the antitrust standard of per se illegality to the lawyers' boycott, but agreed that the boycott could be regulated under the less strict antitrust standard of the Rule of Reason. All nine Justices agreed that the lawyers' boycott was subject to antitrust regulation. 493 U.S. at 436-39 (Brennan & Marshall, JJ., concurring in part & dissenting in part); *id.* at 453-54 (Blackmun, J., concurring in part & dissenting in part).

93. 493 U.S. at 427 (quoting Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508 (1988)); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982).

94. *See* Elhauge, *Antitrust Petitioning Immunity, supra* note 30, at 1208-11.

wise, are not sufficient to confer immunity on a financially interested restraint used to seek governmental action."[95] Unfortunately, as the Court has acknowledged, "boycotts are not a unitary phenomenon"[96] that permit easy classification based on the single criterion of motive.

When collective action is involved, it is naive to think that a single motivating cause may be isolated. The *Trial Lawyers* boycott, for instance, was conducted to improve the financial interests of legal aid attorneys, but it was also conducted to obtain favorable legislation that would increase the pool of legal aid attorneys and thus benefit the legal representation of indigent defendants. The *Trial Lawyers* boycott was therefore a mixed-motive boycott. It would be naive to believe that a boycott aimed at influencing government policy decisionmaking could be a single-motive boycott; there are simply too many participants and too many motivations to expect such unity of purpose. In a mixed-motive boycott, motive becomes an unworkable standard for determining the right to boycott because judges cannot be expected to determine what goes on in a person's heart or mind to determine if the boycott was the product of legitimate or illegitimate motives.

Justice Stevens' attempt in *Trial Lawyers* to distinguish between economic and political boycotts is also inconsistent with *Allied International*,[97] where the Court rejected the argument that a secondary labor boycott seeking purely political objectives was protected by the First Amendment. Indeed, the *Allied International* boycott would seem to have been a prime candidate for First Amendment protection because of all the boycott cases decided by the Court, it was the furthest removed from the economic realm since the Union was not seeking an organizational objective against the target of its boycott; it was nevertheless found not to be constitutionally protected. Justice Stevens' decision in *Trial Lawyers* is also difficult to square with the approach he took in *Claiborne Hardware*, where he determined that political expression *may* provide a boycott with First Amendment protection. Justice Stevens' attempt to distinguish *Claiborne Hardware* on the purported factual ground that the civil

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95. Although some have argued that an objective motivation test is warranted, Elhauge, *Antitrust Petitioning Immunity*, *supra* note 30, at 1208-11, all objective tests will be constructed through the subjective perspective of judges. Motivation cannot be understood in a vacuum. The *Trial Lawyers* Court ignored this problem; the Court simply found that subjective motive was irrelevant to the question of antitrust petitioning immunity. 493 U.S. at 427 n.11.

96. St. Paul Fire & Marine, Inc. v. Barry, 438 U.S. 531, 543 (1978) (quoting PHILLIP AREEDA, ANTITRUST ANALYSIS 381 (2d ed. 1974)).

97. International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982).

rights boycotters "sought no special advantage for themselves"[98] ignores the fact that the civil rights boycotters were protesting the fact that African Americans were denied economic opportunities in Claiborne County.[99]

Apparently, when boycott activity takes place on the streets, as it did in *Allied International* and *Trial Lawyers*, the Court is less willing to find constitutional protection for the expressive components of the boycott.[100] *Claiborne Hardware* represents the rare exception to this phenomenon, but even that case is made problematic by *Trial Lawyers*, because financial motivation was a motivating factor in *Claiborne Hardware*; elimination of racially discriminatory practices would have led to greater economic opportunities for minorities. The problem is that sometimes the direct action of a financially interested economic boycott, as illustrated by the *Claiborne Hardware* boycott, is necessary to further the political interests of those unrepresented in the political process. Boycotts may be the only vehicle for some groups to engage in a democratic process for the advancement of their economic interests.[101]

Unfortunately, the *Trial Lawyers* Court failed to instruct lower court judges on how they should make choices about characterizing other types of boycotts conducted for political and economic purposes. The legal status of economic boycotts brought for such objectives thus remains uncertain.

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98. 493 U.S. at 426.

99. *Claiborne Hardware Co.*, 458 U.S. at 899, 900; *see also* Kindred, *supra* note 30, at 730 n.147.

100. When traditional forms of governmental petitioning have been involved, the Supreme Court has had little trouble in recognizing that the right to petition government is protected absolutely by the First Amendment. In *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, for example, the Court held that an association of railroads was protected under the First Amendment and allowed to engage in an anti-trucking publicity campaign aimed at securing a governmentally imposed boycott of truckers through legislatively created restrictions applicable to the trucking industry. 365 U.S. 127 (1961). In *Noerr*, the Court emphasized that the defendant's financial motivation in petitioning government was irrelevant. *Id.* at 139-40. In *Trial Lawyers*, however, the Court distinguished *Noerr* on the ground that the objective of the boycott (a concerted effort to fix lawyers' fees) would be brought about by private rather than governmental action. The immunity afforded to petitioning activity under the First Amendment was thus limited to traditional lobbying campaigns and other political action activities seeking to influence governmental decision-making. 493 U.S. at 425; *see also* Minda, *Interest Groups*, *supra* note 89, at 990-91. Hence, where a boycott is sought by a special interest group in the politics-as-usual sense, the Court has recognized that such activity is comparable to constitutionally protected petitioning. The *Trial Lawyers* Court creates a new exception: when those making decisions are not politically accountable then motivation is irrelevant and antitrust immunity will not be justified. 493 U.S. at 412, 421.

101. Economic boycotts may be the only effective vehicle through which labor groups can express their social and political views and influence governmental and corporate policy. *See* Minda, *Progressive Labor Politics*, *supra* note 20, at 124.

4. *The Problem of Definition:* Summit Health, Ltd. v. Pinhas.[102] In *Summit Health,* the Supreme Court considered the question of the interstate commerce consequences of an alleged conspiracy to boycott a single doctor who had complained about the loss of hospital medical staff privileges. At issue was whether the interstate commerce requirement is a substantive or a jurisdictional basis for determining a court's power to decide the Sherman Antitrust Act issues raised by a commercial boycott.[103]

Dr. Simon J. Pinhas, a nationally respected corneal eye surgeon, requested that Midway Hospital Medical Center (Midway), the hospital in which he practiced, eliminate a rule that required a second surgeon to be in attendance at most eye surgeries. The requirement significantly increased the cost of eye surgery, but Medicare determined the additional services to be unnecessary and refused reimbursement.[104] Midway refused to abolish its practice, but instead offered Dr. Pinhas a "sham" contract that provided for monetary payments for services not performed as an apparent effort to compensate him for the loss in Medicare reimbursements.[105] When Dr. Pinhas refused the contract and pressed his demand, Midway initiated a peer review proceeding that resulted in Dr. Pinhas's suspension.[106] The Hospital's Peer Review Committee also prepared an

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102. 111 S. Ct. 1842 (1991). Another example of the "problem of definition" is Hartford Fire Insurance Co. v. California, 113 S. Ct. 2891 (1993). There, Justice Scalia, for the majority, and Justice Souter, for the dissent, were unable to agree on how to define the term 'boycott' in section 3(b) of the McCarran-Ferguson Act. Justice Scalia limited the definition of the term boycott as used in section 3(b) to those refusals to deal that are "unrelated" or "collateral" to the objective sought by those refusing to deal. *Hartford Fire Insurance Co.*, 113 S. Ct. at 2911-16. Justice Souter, on the other hand, argued that the term should be defined to include all concerted refusals to deal, even those that are related collaterally to the objective sought by those refusing to deal. *Id.* at 2903. The debate between Justice Scalia and Souter over dictionary definitions of the meaning of the term 'boycott' serves to underscore how the problem of definition in the law of boycotts has plagued legal decision-making. *See also supra* note 3.

103. *See generally* Stephen Calkins, *The 1990-91 Supreme Court Term And Antitrust: Toward Greater Certainty*, 60 ANTITRUST L.J. 603, 618-37 (1992). In a commercial boycott, boycotters utilize concerted action of the group to protect themselves from the competition of nonmembers, or they use such action to eliminate an actual or potential competitor from the market. *See* United States v. General Motors Corp., 384 U.S. 127 (1966) (concerted action by automobile manufacturers and dealers to eliminate discount dealers from the market).

104. 111 S. Ct. at 1845.

105. The hospital offered Pinhas a contract for $36,000 per year (later increased by an oral offer to $60,000) for services he would never be asked to perform. *Id.*

106. *Id.* at 1845. Midway's peer-review process of physicians was subject to federal regulation under the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101, 11111-15, 11131-37, 11151-52 (1988). The Act provides antitrust immunity if the hospital's peer-review process provides for adequate notice and fair procedures, allows for attorney representation and access to transcripts of proceedings, and recognizes the right of

unfavorable report regarding Pinhas for distribution to all hospitals to which he might apply for employment, for the alleged purpose of "preclud[ing] him from continued competition in the market place, not only at defendant Midway Hospital [but also] . . . in California, if not the United States."[107] Dr. Pinhas claimed that the hospital had illegally conspired to prevent him from practicing medicine, in violation of the Sherman Antitrust Act. A major issue in the case concerned the question of whether a conspiracy to boycott a single person, in this instance Dr. Pinhas, affected interstate commerce so as to establish jurisdiction under the Sherman Antitrust Act.

The Ninth Circuit held that "jurisdiction under the Sherman Act" had been established because Dr. Pinhas satisfied his requirement of showing that "the peer review process in general [had a] 'not insubstantial' [effect on interstate commerce]"—a point which, the court said, "can hardly be disputed."[108] The court's analysis of the jurisdictional standard followed the commerce requirement test set out in *McLain v. Real Estate Board of New Orleans*.[109] In *McLain*, the Supreme Court concluded that the interstate commerce requirements of the Sherman Act required a showing that "'respondents' activities which allegedly have been infected by a price-fixing conspiracy be shown 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved. . . ."[110] While it has never been clear what the Court meant by "infected" activities, it had been assumed that the breadth of the Commerce Clause gave the Sherman Act a sufficiently broad reach to cover most illegal conspiracies, although a minority of appellate courts have disagreed.[111] The Ninth Circuit in *Pinhas* concluded that

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cross-examination of witnesses. *Id.* § 11112. Dr. Pinhas argued that Midway's peer-review proceedings leading to his termination failed to conform with the Act's requirements. 111 S. Ct. at 1843.

107. 111 S. Ct. at 1846.

108. Pinhas v. Summit Health, Ltd., 894 F.2d 1024, 1031-32 (9th Cir. 1989). Professor Calkins has noted that the pleadings failed to satisfy this point since "the complaint made no [jurisdictional] allegation but merely alleged that the plaintiff and the defendants, and one defendant hospital's medical staff, were engaged in commerce." Calkins, *supra* note 103, at 625.

109. 444 U.S. 232 (1980). *McLain* involved an alleged conspiracy to fix real estate brokerage commissions. The Court established that Sherman Act litigants need not make a "particularized showing of an effect on interstate commerce caused by [an] alleged conspiracy to fix commission rates," in order to satisfy the interstate commerce requirement for federal court jurisdiction. *Id.* at 242-43. As the *McLain* Court explained: "To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity." *Id.* at 242.

110. *Id.* at 246 (citing Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 745 (1976)).

111. The phrase "infected activities" in the *McLain* decision has created confusion.

the boycott against Dr. Pinhas had a sufficient nexus with interstate commerce to confer jurisdiction.

The Supreme Court agreed that the boycott satisfied interstate commerce jurisdictional requirements, holding that the competitive significance of Dr. Pinhas' exclusion from the market was to be measured "not just by a particularized evaluation of his own practice, but rather, by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which he [had] been excluded."[112] A sufficient nexus with interstate commerce existed, Justice Stevens reasoned for the majority, because the hospital's peer review committee served as the "gateway that control[led] access to the market for [Dr. Pinhas's] services."[113] The Court measured the effect or threatened effect of the boycott against Dr. Pinhas in particular by considering the potential harm that might ensue if the boycott against a single doctor were successful in closing the "gateway" to the market.

Relying upon *McLain*, the Court held that the interstate commerce requirement mandated only a showing of some actual or potential connection between the restraint and interstate commerce.[114] While Dr. Pinhas alone had been the victim of the alleged boycott, the majority relied upon the Court's earlier decision in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[115] which condemned a merchant boycott as a *per se* restraint of trade, to find that the single target boycott constituted an illegal activity. As Justice Stevens explained, "[I]f a violation of the Sherman Act occurred, the case is necessarily more significant than the fate of 'just one merchant whose business is so small that his destruction makes little difference to the economy.'"[116]

Justice Scalia in dissent complained, however, that "[t]he

See Calkins, *supra* note 103, at 624. Some courts read *McLain* as requiring proof that defendant's alleged illegal conduct substantially affected interstate commerce. *See, e.g.*, Shahawy v. Harrison, 778 F.2d 636, 640 (11th Cir. 1985); Western Waste Serv. Sys. v. Universal Waste Control, 616 F.2d 1094, 1097 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980). Others, perhaps a majority, read *McLain* as merely requiring proof establishing some nexus between defendant's challenged practices and interstate commerce. *See, e.g.*, Hayden v. Bracy, 744 F.2d 1338, 1342-43 (8th Cir. 1984); Furlong v. Long Island College Hosp., 710 F.2d 922, 925-26 (2d Cir. 1983). *Pinhas* represents a brewing controversy over the appropriateness of the antitrust jurisdictional test established by the Court in *McLain*.

112. *Pinhas*, 111 S. Ct. at 1848.

113. *Id.*

114. *Id.* at 1847-48; *see also* Calkins, *supra* note 103, at 628.

115. 359 U.S. 207 (1959). The holding in *Klor's* that group boycotts are per se antitrust offenses is seen today as controversial and of doubtful authority. *See* HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 277 (1985) ("The facts of *Klor's* are perplexing, and there is some reason to think the Court would reconsider its decision today.").

116. *Pinhas*, 111 S. Ct. at 1848 (quoting *Klor's*, 359 U.S. at 213).

Court's suggestion that competition in the entire Los Angeles market was affected by this one surgeon's exclusion from that market simply ignores the 'practical economics' of the matter."[117] According to Justice Scalia, the Peer Review Committee's actions provided "no basis for assuming that this alleged conspiracy's market power—and its consequent effect upon *competition*, as opposed to its effect upon *Dr. Pinhas*—extended throughout Los Angeles."[118] Justice Scalia went on to argue that group boycotts are *per se* violations under *Klor's* only if it has first been shown that the boycott "affect[s] competition in the relevant market,"[119] and contended that "the question before [the Court was] *whether* the Act *does* apply, and that must be answered by determining whether, in its practical economic consequences, the boycott substantially affects interstate commerce by restricting competition or, as in [the *Klor's* case], interrupts the *flow* of interstate commerce."[120] Consequently, in the dissenters' view, proper analysis of the jurisdictional issue would require the courts to focus on the actual, rather than potential, effect of the boycott on interstate commerce. As Justice Scalia explained, "boycotts rarely exist in a vacuum; they are usually the means of enforcing compliance with larger anti-competitive schemes."[121]

Commentators on antitrust law read *Pinhas* as establishing the appropriate jurisdictional test for determining the interstate commerce requirement for antitrust law.[122] *Pinhas* is a highly unstable

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117. *Id.* at 1851. Justice Scalia's dissent was joined by three other justices.

118. *Id.* at 1852.

119. *Id.* at 1851.

120. *Id.* (citing *Klor's*, 359 U.S. at 213).

121. *Id.* at 1852 (citing HOVENKAMP, *supra* note 115, at 275-76); RICHARD A. POSNER, ANTITRUST LAW 207 (1976); *cf.* Radovich v. National Football League, 352 U.S. 445, 448-49 (1957). Justice Scalia argued that the Hospital's boycott was not the same as a price-fixing scheme for interstate commerce purposes. As Justice Scalia explained:

> The economic effects of a price-fixing scheme are felt throughout the market in which the prices are fixed; the economic effects of 'black-balling' a single supplier are not felt throughout the market from which he is *theoretically* excluded, but, at most, within the subportion of that market in which he was, or could be, doing business.

Pinhas, 111 S. Ct. at 1851.

122. LOUIS B. SCHWARTZ ET AL., 1991 SUPPLEMENT: FREE ENTERPRISE AND ECONOMIC ORGANIZATION: ANTITRUST 2, 71 (6th ed. 1991); *see also* Calkins, *supra* note 103, at 619-24. The majority in *Pinhas* continues the *McLain* tradition of reading the jurisdictional scope of the Sherman Act expansively. The dissenting opinion by Justice Scalia can be seen to reflect the opinion of a number of lower federal courts that have criticized the *McLain* jurisdictional test on the ground that it confuses the per se standard for substantive violations with the jurisdictional standard for federal court intervention. As Justice Scalia explained, as a result of *McLain* and the majority decision in *Pinhas*, federal courts are now "available for routine business torts, needlessly destroying a sensible statutory allocation of federal-state responsibility and contributing to the trivialization of the federal courts." *Pinhas*, 111 S. Ct. at 1854 (Scalia, J., dissenting). The problem with relegat-

precedent, however, because the Justices relied upon two fundamentally different boycott images.[123] In the majority's view, the boycott by the hospital's Peer Review Committee was understood to be like a door shutting the gate that controlled access to the market. As Justice Stevens put it, "The gateway was closed to respondent, both at Midway and at other hospitals, because petitioners insisted upon adhering to an unnecessarily costly procedure."[124]

In the dissents' view, however, the "uncontested facts" failed to establish "that peer review process at Midway (hospital) [was] the 'gateway' to the Los Angeles Market in the sense of being the only way (or even one of the few ways) to gain entry."[125] Under the dissents' understanding of the jurisdictional issue, a boycott does not affect interstate commerce unless it obstructs the flow of commerce; a conspiracy to eliminate but one price-cutter in a local market does not obstruct.[126] As Justice Scalia argued, the Commerce Clause requirement requires allegations and a preliminary showing that "in its practical economic consequences, the boycott substantially affects interstate commerce by restricting competition or . . . interrupts the *flow* of interstate commerce."[127] Since other means were available to Dr. Pinhas as a means of gaining entry into the market, such as other hospitals and peer review programs that might grant him access, Justice Scalia rejected the notion that the peer review process at one hospital was in any sense the gateway to the Los Angeles market.[128] Moreover, because the alleged conspiracy was aimed at excluding only Dr. Pinhas, Justice Scalia and the dissent found no

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ing such problems to state courts and state tort law, is that federal anticompetitive policies under the Sherman Act may become fragmented.

123. Both the majority and dissenting opinions in *Pinhas* can be criticized. The dissent can be criticized for confusing jurisdictional requirements with the substantive requirements for determining whether conduct is per se unlawful, and the majority can be criticized for downplaying the significance of the character of the market restraint involved. SCHWARTZ ET AL., *supra* note 122, at 71; *see also* Calkins, *supra* note 103, at 634-37.

124. *Pinhas*, 111 S. Ct. at 1848. Justice Stevens also emphasized that the hospital peer-review process was Congressionally regulated. *Id.* at 1848 & n.12. However, while Congress had exercised its authority to regulate peer-review programs, that regulation does not explain why.

125. *Id.* at 1852. Justice Scalia noted that the parties acknowledged "that every hospital in Los Angeles has its own peer review process, and that the complaint itself asserts that, well before the offer of the 'sham contract,' 'nearly all' those hospitals had abolished the featherbedding practice that is the object of this conspiracy." *Id.*

126. *Id.* at 1851. Hence, in the dissent's view, what counted for jurisdictional purposes was the actual impact of the price-fixing conspiracy rather than the majority's test of the likely or potential impact of Dr. Pinhas' exclusion on other actors in the market.

127. *Id.* at 1851 (citing Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959)).

128. *Id.* at 1852.

basis for finding that interstate commerce, or the flow thereof, had been substantially affected.[129]

Pinhas can thus be read as highlighting two different ways for understanding the meaning of a group boycott. One understanding, advanced by Justice Stevens, seeks to evaluate the Interstate Commerce requirement by analogizing a boycott to a door closing the passageway through a gateway. Boycotts block freedom of access like a door, and thus have a potential restraining effect on the gateway to interstate commerce. Under this view, every boycott involves restraining market consequences affecting interstate commerce since someone's economic freedom would be actually or potentially restrained. Every boycott will have an impact on interstate commerce so long as the challenged restraint involves a line of commerce that can be shown to affect interstate commerce in a substantial way.[130]

Under Justice Scalia's view, on the other hand, boycotts should be the subject of federal regulation only if those boycotting have sufficient market power to obstruct the *flow* of commerce. Boycotts are not a door blocking a gateway; they are merely the medium for restraining trade when used by those having market power. Under Scalia's view, therefore, proof of market power is a crucial factor for determining the reach of federal antitrust regulation under the Commerce Clause. The logic of such a view suggests that the Commerce Clause requirement for jurisdiction is in reality a substantive concern—proof of market power and competitive effects would be, under Scalia's approach, a jurisdictional requirement.[131]

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129. *Id.* at 1851.

130. As Justice Stevens explained for the majority: "The competitive significance of respondent's exclusion from the market must be measured, not just by a particularized evaluation of his own practice, but rather, by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which he has been excluded." *Id.* at 1848. Or, as Justice Scalia put it for the dissent: "As I understand the Court's opinion, the test of Sherman Act jurisdiction is whether the entire line of commerce from which Dr. Pinhas has been excluded affects interstate commerce." *Id.* at 1850.

131. The oddity of this is that the Court has also concluded that proof of market power is not relevant for determining whether a group boycott constitutes a substantive antitrust violation. *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); Klors, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959). If there is no market power defense for financially interested boycotts, why require proof of market power to establish interstate commerce requirements? One answer is that, under Justice Scalia's view of the commerce requirement, jurisdiction is substantive in nature. The practical significance of this is that there would be a "shift [of] power from juries to judges" in antitrust litigation. In other words, "antitrust plaintiffs [would be required under Scalia's test] to demonstrate anticompetitive effects before courts had power to decide their cases." Calkins, *supra* note 103, at 635. In *Trial Lawyers*, the Supreme Court rejected the notion that a market power defense should be recognized to protect a symbolic lawyer boycott from an-

For Justice Stevens, group boycotts are *per se* restraints of trade that presumptively affect interstate commerce. For Justice Scalia, however, *proof* of market power is necessary to establish that boycotts do in fact affect commerce. Legal process issues in the law of boycotts have thus become infected by the chameleon-like nature of boycott doctrine.

B. *The Key Legal Distinctions of Modern Boycott Doctrine.*

In responding to the four boycott problems discussed above, judges have attempted to resolve boycott problems by relying upon a standard set of legal distinctions. These legal distinctions, drawn from various substantive legal subjects, seek to define boundaries between protected and unprotected boycott activities. Judges have thus situated themselves as objective interpreters capable of describing the meaning of social events by drawing distinctions between different forms of boycott activity. There are four *key* legal distinctions that have been utilized for resolving most boycott problems. These four distinctions have posed yet more paradoxes which have stymied the development of a coherent law of boycotts.

1. *The Speech/Conduct Distinction.* Justice Lamar's statement in *Gompers*, that the boycott publicity in that case involved "a force not inhering in the words themselves,"[132] was a product of the distinction traditionally drawn between speech and conduct.[133] Since

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titrust liability. Justice Scalia, who agreed with the majority in *Trial Lawyers*, was able to reject a market power defense because he, along with the majority, believed that the boycott involved a per se antitrust violation. *Id.* at 780-81 & n.15. The per se violation rule in antitrust law applies to cases involving particular types of market restraints, such as price-fixing agreements, that pose an obvious danger to competition and are not balanced by any plausible procompetitive virtue. *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

132. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 439 (1911). As Justice Lamar saw it, the expressive components of the workers' boycott involved a force independent of the words used, and therefore exceeded any possible free speech right.

133. For example, Justice Lamar's notion that boycott publicity involves "verbal acts" of "force not inhering in the words themselves," assumed that the "verbal act" components of concerted action of a boycott could be distinguished from the purely expressive or speech components. *Id.* In *Gompers*, the idea of "force" enabled the Court to distinguish between action and speech. Because boycott publicity involved the threat of group action against a single individual, the *Gompers* Court concluded that the words involved a "force" independent of the expression. *Id.* The speech-conduct distinction has a long history. *See, e.g.*, EMERSON, *supra* note 70, 17, 444-49 (arguing that the distinction between expression and action establishes "[t]he central idea of a system of freedom of expression"). For a critique of the speech/conduct distinction in the First Amendment context, see, *e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH, 70-73 (1989); Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech,* 83 NW. U. L. REV. 54, 109-10 (1989); Ely, *supra* note 70, at 1493-96.

boycotts involve various forms of concerted action (picketing, handbilling, patrolling, etc.) in addition to verbal expression, concerted activities of boycotts are a hybrid expressive activity; they involve more than just purely verbal speech. Judges have used this distinction to justify restraining the verbal acts of a boycott without offending the free speech guarantee of the First Amendment.[134]

The problem is that the speech/conduct distinction assumes that there is such a thing as pure speech or pure conduct, but there is not. All verbal communication can be understood as a form of action.[135] Moreover, the process of understanding words spoken can have a variety of causal effects on a hearer's actions.[136] For example,

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The leading modern precedent for the speech/conduct distinction in the First Amendment context is *United States v. O'Brien* which established the principle that a government can regulate and even suppress peaceful expressive conduct if the governmental interest is substantial and unrelated to the content of the expression suppressed, provided that the governmental restriction is no greater than is necessary to further the government's interest. 391 U.S. 367, 337 (1968). It is now accepted that state and federal governments have substantial authority to regulate expressive conduct in order to maintain community interests. For example, in *Barnes v. Glen Theatre Inc.*, the Supreme Court relied upon the *O'Brien* precedent to uphold the constitutionality of a state statute forbidding nude dancing on the ground that the statute served the state's interest in protecting "order and morality." 111 S. Ct. 2456, 2457 (1991).

134. *See* NLRB v. Retail Store Employees Union, Local 1001 (Safeco), 447 U.S. 607, 614-15, 615 n.11 (1980) (finding that product picketing would be illegal if designed to induce a product boycott that is likely "to induce customers not to patronize" a neutral business and to threaten that neutral business with "substantial loss").

135. *See* JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1984); Solum, *supra* note 133, at 110. Habermas reconstructs from anthropology and linguistics a modern theory of human communication that explains how speech can be understood as conduct or action. HABERMAS, *supra*, at 55. For Habermas, the starting point of all communication is a speaker and a hearer who are motivated to reach a mutual understanding that can be possible only if they both share and recognize certain views about comprehensibility, truth, and the normative rightness of knowledge. *See id.* at 93-94. As Lawrence Solum has explained, Habermas' notion of communicative action is a distinctive type of speech act theory—the type developed from the linguistic theorist John Searle which explains how communication coordinates individual behavior through the process of understanding. Solum, *supra* note 133, at 87-91.

Cognitive theorists have developed similar models of communication. *See* JOHNSON, BODY IN THE MIND, *supra* note 45, at 178-79 (developing a non-objectivist theory of the speech-acts theory developed from the linguistic theory attributed to John Searle). *See also* JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 16 (1970). Cognitive theorists, however, reject the objectivist assumptions of linguistic theory attributed to the work of Searle. Mark Johnson, for example, argues that Searle's theory of speech acts is flawed to the extent that it fails to recognize that meaning and rationality are embodied within linguistic meaning. JOHNSON, BODY IN THE MIND, *supra* note 45, at 182. The theory of speech acts advanced by Habermas and developed for First Amendment analysis by Lawrence Solum can be criticized for the same reason.

136. *See* Solum, *supra* note 133, at 88-90. "Communication does much more than merely convey information; knowing the full meaning of a sentence requires the hearer or reader to know more than its truth conditions." *Id.* at 88. The words spoken to communi-

the call for a boycott can result in concerted action against the target of the boycott, or it may result in action taken against the boycotter, or those requested to boycott may laugh in the boycotters face. It is difficult to see why otherwise peaceful concerted activity is coercive merely because it may induce action.[137] Because all speech signals action from the intended audience, all speech associated with a boycott involves, to use Justice Lamar's words, "a force not inhering in the words themselves."[138] The legal distinction drawn between speech and conduct is therefore false.

The Supreme Court, however, has invoked the speech/conduct distinction to justify governmental regulation of concerted activities by labor groups in ways that have sharply curtailed the development of a right to boycott.[139] In doing so, the speech/conduct distinction has contributed to persistent and serious doctrinal anomalies in labor law. In *NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*,[140] for example, the Supreme Court held that labor picketing that follows the product[141] could not be enjoined as a secondary boycott if the picketing was "only to persuade customers not to buy the struck product, [and] the union's appeal is closely confined to the

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cate a message to another frequently require action to establish the meaning of what is said. There are also "forces" within the conversational interaction itself. *Id.* at 88; JOHNSON, BODY IN THE MIND, *supra* note 45, at 60. These forces are structured by a metaphoric background that orients the listener to comprehend the message of a communication in a particular way. *See id.* at 181-82. The key point is that metaphoric reasoning structures the background assumptions we rely upon for interpreting and comprehending the speech acts of communication. *Id.* at 187.

137. *See* TRIBE, *supra* note 28, at 198-203; Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 951-54 (1982).

138. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 439 (1911). Indeed, Justice Stevens recognized this in *Claiborne Hardware* in stating that "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." NAACP v. Claiborne Hardware Co., 458 U.S. 768, 910 (1990). Justice Stevens recognized nonetheless that governmental regulation of otherwise protected expression may be justified in "certain narrowly defined instances." *Id.* at 912 (citing United States v. O'Brien, 391 U.S. 367 (1968)). He specifically noted that this might be the case when "[a] nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions." *Id.*; *see also* NLRB v. Retail Store Employees Union, Local 1001 (Safeco), 447 U.S. 607, 616 (1980).

139. The speech/conduct distinction has served the role in labor law of allowing federal officials to regulate the motives and purposes underlying the exercise of labor's collective liberties. *See* TRIBE, *supra*, note 28 at 198-99. For example, the signal theory allows judges to evaluate the subject matter of speech in the course of determining the speaker's purpose or motive. Judges must distinguish between activity intended as pure expression or that intended as a signal for conduct. *See id.* at 200.

140. 377 U.S. 58 (1964).

141. A labor picket that "follows the product" is a picket of a store that carries the product produced by the target of the picket.

primary dispute."[142] Seven years later the Court reversed course in *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*,[143] holding that "product picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss" was not protected by the *Tree Fruits* exception to federal labor regulation of secondary boycotts.[144]

More recently the Court, in *Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trade Council (Debartolo II)*,[145] refused to extend the signal theory of *Safeco* to peaceful handbilling publicizing a boycott and labor dispute.[146] In doing so, the Court recognized that peaceful leafletting, unlike peaceful picketing and boycotting, involves protected First Amendment activity that cannot lawfully be curtailed on the basis of mere speculative fears that such

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142. 377 U.S. at 71-72. The *Tree Fruits* Court thus found that consumer picketing limited to the struck product was not coercive of neutral employers even though the appeal of such picketing had the effect of signaling consumers not to buy the product from such employers. *Id. Tree Fruits* implicitly rejected the verbal acts or signaling justification used by the *Gompers* Court to enjoin boycott publicity. *See id.* at 72. On the other hand, the Court also indicated that the product boycott would violate the secondary boycott provision of federal labor law if the appeal to consumers sought to persuade them to stop doing business with a neutral employer altogether. *Id.*

143. 447 U.S. 607 (1980).

144. *Id.* at 614-15 & n.11. The approach taken in *Tree Fruits* and *Safeco* for analyzing the legality of product picketing cannot be reconciled. As Julius Getman and John Blackburn explain:

> The *Tree Fruits* opinion virtually ignored the statutory language in order to permit peaceful picketing that was, in form, related only to the primary employer. In *Safeco*, the Court stressed the statutory language. The resulting test-whether the picketing "is reasonably likely to threaten the neutral party with ruin or substantial loss" -is obviously a vague one. How much loss is substantial is bound to be the subject of considerable litigation .... The ironic result, of course, is that the closer the so-called neutral employer is tied economically to the primary employer, the greater its insulation from picketing publicizing the dispute with the source of its sole or major product.

JULIUS GETMAN & JOHN BLACKBURN, LABOR RELATIONS: LAW, PRACTICE AND POLICY 257 (1983).

As a result of *Safeco*, labor union picketing found to signal a secondary boycott is likely to be declared unlawful even though only informational expression may be involved. Professor Harper has persuasively argued that *Safeco* infringes on the right of consumers to boycott by permitting more intrusive state regulation of boycott activity and "restrict[ing] ordinary consumers from using their limited buying power to try to affect the employment relations of society." Harper, *supra* note 30, at 443-44. According to Professor Harper, *Safeco* denies consumers the right to "influence lawful decisions of sellers" by convincing the sellers to concede to the union's demands. *Id.* "[I]f we take seriously the right to boycott and the right to publicize the boycott, sellers' interests in maintaining high sales that are not themselves protected as rights cannot override the boycott right. There is no right to continued sales that trumps political rights to refuse to purchase." *Id.* at 446-47 (footnote omitted).

145. 485 U.S. 568 (1988).

146. *Id.* at 579-80.

leafletting will incite others to take action against a neutral secondary employer.[147]

As a result of the speech/conduct distinction, concerted activity is understood either as a force with the potential to sweep individuals along to commit prohibited acts or as a "signal" to others to take action. On the other hand, *Tree Fruits* and *Debartolo II* seemed to recognize that the federal regulation of product picketing and consumer handbilling calls into question the constitutionality of the current federal regulation of secondary boycotts under federal labor legislation.[148] For this reason the Supreme Court concluded in *DeBartolo II* that labor handbilling must be constitutionally insulated from secondary boycott regulation of federal labor law.

If handbilling does not become coercive merely because it effectively persuades consumers to boycott, then it follows that peaceful

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147. Hence, what is coercion in the case of peaceful economic boycotting becomes legitimate free expression in the case of handbilling. As the Court in *Debartolo II* explained:

> The loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do.

Id. at 580.

148. In 1947, secondary boycotts by labor unions were made unfair labor practices by section 8(b)(4) of the Taft-Hartley Act. 29 U.S.C. § 158(b)(4) (1982). The words secondary boycott do not appear in the statute. Section 8(b)(4) provides:

> It shall be an unfair labor practice for a labor organization or its agents . . . to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is . . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

Id. The legislative history underlying the provision indicates that Congress was concerned with the potential spreading of industrial strife through boycotts of neutral parties. The need to make a primary/secondary distinction for labor boycotts is itself recognized to be necessary to render federal labor regulation of secondary boycotts constitutional. *See* GETMAN & BLACKBURN, *supra* note 144, at 245-46.

Congress was also concerned about protecting the right of workers to engage in informational activities. Hence, a proviso protects certain union boycott-organizing tactics by exempting from all of the section's proscriptions "publicity . . . for the purpose of truthfully advising the public, including consumers and members of a labor organization that a product or products are produced by an employer with whom the labor organization has the primary dispute and are distributed by another employer . . . ." *Id.* On the other hand, this proviso denies protection to union efforts to inform customers through picketing or any union publicity, including handbilling or newspaper publications, which have a secondary effect of inducing any employee of the distributing employer to refuse to perform any services. *Id.* In *DeBartolo II*, the Supreme Court held that the proviso could not be interpreted to render handbilling unlawful even if it had a secondary effect. *Id.* at 582-83. By removing peaceful handbilling publicity from Section 8(b)(4), the Court rendered the publicity proviso to what the Seventh Circuit called "so much blather." Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494, 798 F.2d 1016, 1024 (7th Cir. 1986); *see also* Pope, *Labor-Community Boycotts*, *supra* note 20, at 937.

publicity of a boycott should be accorded similar treatment and thus be exempted from federal regulation.[149] The peaceful publicity of a boycott should not be deemed coercive merely because customers find the publicity persuasive and thereby act in ways that harm the target of the boycott.[150] The reason why the signal of a handbill should be considered more coercive or threatening than the signal of peaceful picketing and boycotting has not yet been explained by the courts.[151]

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149. Handbilling involves action that can serve as a signal to incite action in consumers to boycott a firm or its products. Handbilling can call for an economic boycott and thus lead to the same consequences that would be involved with labor picketing and boycotting. The fact that handbilling normally accompanies picketing and boycotting suggests that these forms of activity are related in a common enterprise. The attempt to distinguish handbilling from picketing and boycotting would thus seem to be doomed to failure; however, the distinction between handbilling and picketing and boycotts has become an important feature of labor law doctrine. In *Debartolo II*, for example, the Court unanimously concluded that peaceful leafletting does not constitute prohibited "coercion," because the Court found that a contrary holding would raise "serious [First Amendment] questions" about the constitutional validity of federal labor regulation of secondary boycotts. *DeBartolo II*, 485 U.S. at 575, 580. Once the Court concluded that leafletting raised important First Amendment concerns, it proceeded to find that the secondary effects attributed to the leafletting were normal First Amendment consequences. *Id.* As James Pope argued, the Court's *DeBartolo II* decision "appears to embrace the view, long advanced by critics of the picketing decisions, that the government has little or no legitimate interest in suppressing peaceful communication merely because it persuades citizens to engage in *lawful* action that harms someone." Pope, *Labor Community Boycotts*, *supra* note 20, at 937. As Professor Pope also notes, once leafletting is "[v]iewed through a first-amendment lens, what was coercion to the NLRB became nothing more than the normal operation of free speech." *Id.* at 936. The NLRB held that peaceful leafletting was coercive and hence unlawful under section 8(B)(4) because customers were persuaded to withhold their patronage. Florida Building Trades Council (DeBartolo Corp.), 273 N.L.R.B. 1431, 1432 n.6 (1985), *enforcement denied sub nom.* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council (DeBartolo II), 485 U.S. 568 (1988).

150. *Cf. DeBartolo II*, 485 U.S. at 580 (holding that peaceful handbilling is not coercive). With labor boycotts, however, the Supreme Court has appeared to accept the idea that regulation is necessary in order to permit government to protect economic relations from disruption. *See* Harper, *supra* note 30, at 413-14 (illustrating how Supreme Court First Amendment doctrine "recognizes that unless all other rights are to be drastically subordinated to expression, the state must have authority to regulate expressive conduct when the regulation protects countervailing rights and is not directed at the content of the expression."). Perhaps the long standing fear that judges have had about the economic disruption and coercion caused by successful labor boycotts may explain this distinction.

151. As James Pope has argued, the only basis for distinguishing leafletting from picketing or boycotting is Justice Stevens' theory of signaling—picketing and boycotting are seen to go beyond "mere persuasion" because "[they] call[] for an automatic response to a signal rather than a reasoned response to an idea." *See* Pope, *Labor Community Boycotts*, *supra* note 20, at 940 (quoting NLRB v. Retail Store Employees Union, Local 1001 (Safeco), 447 U.S. 607, 619 (1980) (Stevens, J., concurring)). Picketing is thought to go beyond mere persuasion because it may "signal the obedience of workers to a pre-existing agreement to boycott, perhaps backed up by the threat of union discipline," and perhaps

2. *The Primary/Secondary Distinction.* Labor union boycotts have been regulated under the federal labor laws in accordance with a basic distinction drawn between primary and secondary union boycotts.[152] Primary boycotts are those brought directly against the target of the boycott; secondary boycotts are those aimed at so-called innocent secondary parties who have a business or social relation with the target. Under the federal labor laws, primary boycotts are generally considered lawful, but secondary boycotts are not. The primary/secondary distinction in labor law has been justified as necessary in order to avoid constitutional questions that would be raised by an all-encompassing ban on labor boycotts, especially those boycotts involving the expressive conduct necessary for the exercise of labor's collective rights.

The primary/secondary distinction has led to the curious result that unions can lawfully picket and boycott an employer with whom they have a controversy, but they cannot exert the same pressure upon so-called secondary employers who have a business relation with the target, even though a successful primary boycott has precisely the same effect as an unlawful secondary boycott. In *NLRB v. International Rice Milling Co.*,[153] for example, the Court held that union picketing at the situs of the struck employers' premises was lawful even though the picketers had urged the drivers of suppliers' trucks not to cross the picket line, thereby engaging in an activity of a clearly secondary nature. The Court found that the secondary effects of the picketing were mere incidental effects of an otherwise lawful primary activity.[154] The primary/secondary distinction has

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because picketing may "trigger deeply held class or union 'loyalities' embodied in the principle that a good person simply does not cross picket lines." *Id.* at 940. As Pope has also noted, however, the assumptions underlying these distinctions have been "heavily criticized." *Id.* at 940 & n.276; *see, e.g.*, TRIBE, *supra* note 28, at 200 (arguing that the distinction between speech and conduct adds merely a "superficially neutral facade to cover the Court's consistent denial of protection to labor picketing").

152. *See* Labor-Management Reporting and Disclosure Act of 1959, Pub.L. No. 86-257, § 704, 73 Stat. 519 (codified as amended at 29 U.S.C. § 158(b)(4) (1988)). The primary/secondary distinction is fundamental to the law of secondary boycotts. Without the distinction, the statutory prohibition created to forbid secondary labor boycotts, read literally, would "ban most strikes historically considered to be lawful, so-called primary activity." Local 761, Int'l Union of Electrical, Radio & Machine Workers v. NLRB, 366 U.S. 667, 672 (1961). However, as Justice Frankfurter once observed, the primary/secondary distinction of federal labor law "does not present a glaringly bright line." *Id.* at 673.

153. 341 U.S. 665 (1951).

154. *Id.* at 670-71. Every lawful primary boycott, if successful, will bring about the secondary effects federal labor law otherwise prohibits. A primary strike called against a nationally distributed product that is assembled from components parts produced by other suppliers and distributors will have precisely the same effect as a secondary boycott.

Statutory regulation of secondary boycotts has mainly involved construction site

permitted judges to hold unlawful boycott activity necessary to protect the rights of workers to join a union and engage in peaceful concerted activity, while simultaneously proscribing the secondary effects upon third parties.

3. *The Naked/Ancillary Distinction.* The courts have created under the Sherman Act a somewhat different set of legal distinctions for regulating boycotts and concerted refusals by business to deal.[155] Modern antitrust law in some cases condemns concerted refusals to deal and group boycotts by business combinations as *per se* illegal, but courts have been inconsistent in their condemnation.[156] Indeed, antitrust boycott doctrine, like its labor law counterpart, has exhibited considerable elasticity when it comes to group boycotts.

There is little disagreement that boycotts and refusals to deal can be vehicles utilized by competitors to accomplish illegal conspiracies in restraint of trade—what antitrust experts term "naked" restraints of trade.[157] On the other hand, courts have also recognized that competitors sometimes engage in group boycotts to achieve wholly beneficial objectives such as policing against unethical and shoddy rivals, enhancing operational efficiency, and administering cooperative activities essential to sports, tournaments and similar activities.[158] Hence, concerted business boycotts are sometimes found

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cases where either the primary or the secondary employers are working on a common situs. *See, e.g.*, Denver Building & Const. Trades, 341 U.S. 675 (1951). This is because labor union activity on the premises of a single primary employer is "presumptively primary" as a result of the *Rice Milling* decision. *See* GETMAN & BLACKBURN, *supra* note 144, at 247. The Labor Board and courts have thus been more willing to find picketing at a common construction situs to violate the secondary boycott provision of federal labor law. This has led to what Julius Getman and Bertrand Pogrebin have called an "economically deceptive and ideologically confusing" law of secondary labor boycotts. *Id.* at 259.

155. In antitrust law, a group boycott by competitors is defined as "a concerted refusal to deal with others or to deal only on unfavorable terms in order directly or indirectly to discipline or exclude a target." ELEANOR M. FOX & LAWRENCE A. SULLIVAN, CASES AND MATERIALS ON ANTITRUST 383 (1989). In point of fact, however, the term boycott is used by judges as an "epithet" to characterize outcomes deemed unlawful under the Sherman Act. *See generally* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 330-46 (1978).

156. *See* BORK, *supra* note 155, at 330 ("According to conventional wisdom, boycotts . . . are illegal per se. But that proposition is easily shown to be false . . . . The categories of lawful and unlawful boycotts have never been defined, however, so that the law makes many mistakes and does much harm.").

157. *Id.* at 334 ("Since the naked boycott is a form of predatory behavior, there is little doubt that it should be a per se violation of the Sherman Act."); *see also*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 210 (1959).

158. BORK, *supra* note 155, at 332-38. An ancillary boycott, for example, "is a concerted refusal to deal that contributes to the efficiency of a cooperative economic activity . . . . The law must develop doctrine to accommodate such boycotts." *Id.* at 334-35, 337-38; *see, e.g.*, Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.,

to be lawful because they are seen to be "ancillary" to otherwise legitimate activities.[159]

While the naked/ancillary restraint distinction has been used in antitrust law mainly for analyzing substantive violations, the distinction has also influenced process issues, as it did in *Pinhas*. In *Pinhas*, the majority and dissent utilized the naked/ancillary distinction to bolster their respective jurisdictional arguments. The majority relied upon the naked restraint strand of the distinction in concluding that the alleged boycott of a single merchant substantially affected interstate commerce. The dissent relied upon the ancillary restraint analysis in arguing that a boycott is merely an instrument that may or may not substantially affect interstate commerce. In the dissent's view, the interstate commerce effects requirement, for court jurisdiction under the Sherman Act, requires proof that a boycott has the potential to restrict competition and thus substantially affect interstate commerce.

Boycotts that are seen to be based upon objectives found to be ancillary to some beneficial purpose are normally deemed to be reasonable restraints, and hence lawful. Those boycotts found to be lacking such redeeming qualities are struck down *per se* as naked restraints of trade.[160] Unlike in labor law cases, however, where the presumption is that labor boycotts are unprotected forms of conduct, judges in antitrust cases have applied the naked/ancillary restraint distinction in ways

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472 U.S. 284, 297 (1985) ("[N]ot all concerted refusals to deal should be accorded *per se* treatment . . . ."); James A. Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the* Klor's *Case*, 45 VA. L. REV. 1165, 1168-73 (1959).

159. *See* BORK, *supra* note 155, at 334, 337-38. Judge Bork's widely cited decision in Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) illustrates how in antitrust law the ancillary restraint distinction has generated the opposite result. In *Rothery Storage*, Judge Bork reviewed the current antitrust case law applicable to group boycotts and concerted refusals to deal and concluded that "it has always been clear that boycotts are not, and cannot ever be, per se illegal." *Id.* at 215. In finding that "any comprehensible per se rule for [group] boycotts . . . is out of the question," Judge Bork stated that the per se rule is too rigid, simplistic, and destructive of many common and entirely beneficial business arrangements. *Id.* (quoting Rahl, *supra* note 158, at 1173). The Supreme Court adopted Judge Bork's analysis in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.* in concluding that "not all concerted refusals to deal should be accorded per se treatment . . . ." 472 U.S. 284, 297 (1985). However, the Court held that when the boycott is found to be an illegal price fixing conspiracy, then it will be condemned per se. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 432-36 (1990); Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 48 (1990) ("We explained that '[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.'").

160. Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990) (per curiam decision finding that a market allocation agreement between competitors was per se illegal under the Sherman Act).

that favor the legality of some business boycotts.[161]

4. *The Public/Private Distinction.* In response to boycotts aimed at influencing governmental decisionmaking, the Supreme Court developed the antitrust petitioning immunity doctrine,[162] which adopts the principle that group boycotts brought to influence governmental decision-making are immune from the antitrust laws even if they are intended to restrain trade and in fact have that effect. In *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*,[163] the Court concluded that a publicity campaign conducted by a group of railroads against truckers seeking to influence governmental officials to enact pro-railroad/anti-trucking regulations was immune from antitrust liability because the attempted boycott was "incidental" to "political" activities genuinely intended to influence governmental action.[164] The *Noerr* Court emphasized that it did not matter that the purported boycott was motivated by a financial interest[165] or that the publicity campaign was unethical or deceptive;[166] the boycott was saved by its political nature.

In *FTC v. Superior Court Trial Lawyers Ass'n*,[167] however, the Court held that the direct action of a citizen boycott organized by a group of legal aid attorneys and aimed at influencing District of Columbia officials to provide the higher attorneys fees for criminal defense assignments could be enjoined as a *per se* antitrust offense because the purpose of the boycott was aimed at securing the private economic interest of those boycotting.[168] In finding that the lawyers' boycott was subject to antitrust liability, Justice Stevens distinguished *Noerr* under a public/private distinction:

> [I]n the *Noerr* case the alleged restraint of trade was the intended *conse-*

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161. *See Northwest Wholesale Stationers, Inc.*, 472 U.S. at 297 (concluding that rule of reason analysis, not per se rule, was appropriate standard for determining whether group's boycott of producers violated antitrust laws). *But see Superior Court Trial Lawyers Ass'n*, 493 U.S. at 432-36 (applying per se rule to boycott found to be a price fixing conspiracy); *Palmer*, 498 U.S. 46 (acknowledging importance of adhering to per se rule for regulating classic restraints of trade).

162. Antitrust immunity doctrine is premised upon the simple principle that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965); *see also* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

163. 365 U.S. 127 (1961).

164. *Id.* at 134-36.

165. *Id.* at 138-39.

166. *Id.* at 140-42.

167. 493 U.S. 411 (1990).

168. *Id.* at 421-25; *see also* Minda, *Progressive Labor Politics*, *supra* note 20, at 94-96; Minda, *Interest Groups*, *supra* note 89, at 989-92.

> *quence* of public action; in this case the boycott is the *means* by which [the trial lawyers] sought to obtain favorable legislation. The restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted. In *Noerr*, the desired legislation would have created the restraint on the truckers' competition; in this case the emergency legislative response to the boycott put an end to the restraint.[169]

In other words, the *Noerr* boycott was held lawful because the restraint of trade was the result of permissible political action. In *Trial Lawyers*, the boycott was held unlawful because the restraint of trade was the result of the private activity of the boycotters.[170]

Determining whether a boycott is public or private has failed to guide judges in how to adjudicate cases, and it has failed to adequately signal to parties about how to conform their activities to the law. The public/private distinction for determining antitrust petitioning immunity has instead resulted in doctrinal confusion.[171] Judges lack a method for consistently defining and distinguishing between private and public action.[172] The problem is that our understanding of what constitutes private activity is dependent upon our understanding of what is public activity.[173] The public actions of government influence private action, and the private activities of individuals and groups determine every element that is public. The public/private distinction fails to recognize that in the real world the categories and boundaries separating public and private activity are

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169. 493 U.S. at 424-25.

170. As Professor Elhauge has noted, Justice Stevens' reading of the *Noerr* case was inaccurate to the extent that he found that *Noerr* only involved restraints caused by public action. *See* Elhauge, *Antitrust Petitioning Immunity*, *supra* note 30, at 1188. The publicity campaign involved in *Noerr* also restrained trade by directly affecting economic relations between truckers and their customers. *See Noerr*, 365 U.S. at 129, 133, 142.

171. *See* Elhauge, *Antitrust Petitioning Immunity*, *supra* note 30, at 1185-93.

172. *See* Elhauge, *Antitrust Process*, *supra* note 30, at 682-96 (acknowledging the impossibility of resolving public/private questions on the basis of formal criteria). Professor Elhauge, however, has offered a functional "process-oriented" approach for distinguishing between public and private boycotts. *See* Elhauge, *Antitrust Petitioning Immunity*, *supra* note 30, at 1196-97. According to Professor Elhauge, "'[p]rivate decisionmaking' is . . . merely a shorthand for financially interested decisionmaking, and 'public decisionmaking' is a shorthand for decisionmaking that is financially disinterested and politically accountable." *Id.* at 1197. The contradiction posed by the public/private distinction is not solved by Professor Elhauge's proposal, it is merely deferred or moved to a different level of abstraction. Professor Elhauge's proposal for defining public and private decisionmaking is discussed *infra* notes 207-31 and accompanying text.

173. *See* Gerald Frug, *Property and Power: Hertog on the Legal History of New York City*, 1984 AM. B. FOUND. RES. J. 673, 681 (reviewing HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW 1730-1870 (1983)). The public/private distinction thus suffers from acute manipulability.

too ephemeral, fluid, and messy to be easily categorized.[174]

Manipulation of the public/private distinction allows judges to reach inconsistent decisions. Consider, for example, the Eighth Circuit's decision in *Missouri v. National Organization for Women (NOW)*,[175] upholding the right of the National Organization for Women to engage in a convention boycott as a means of pressuring states to ratify the Equal Rights Amendment (ERA). The Eighth Circuit held that the *NOW* boycott was immune to antitrust liability because the objective of the boycott was not a "financial," "economic," or "commercial piece of legislation," and because the objective of the parties in seeking to support or defeat the ERA was "not one of profit motivation."[176] The court thus applied the public/private distinction to find that the political activity in *NOW* did not involve the type of private restraints deemed unlawful by the Sherman Act.[177]

Circuit Judge Stephenson, who authored the court's opinion in *NOW*, was able to reach a different outcome than the *Trial Lawyers* Court because he interpreted the National Organization for Women's boycott as a political tool utilized not for a competitive or private economic purpose, but rather for the public purpose of influencing ratification of the ERA. The court characterized the boycott as a legitimate political activity even though it was shown to have a serious disruptive consequence in the market independent of any governmental action.[178] Of course, *NOW* might be decided differently today given Justice Stevens' opinion in *Trial Lawyers*.[179] On the

174. *See generally* Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982).

175. 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980); *see also* Minda, *Interest Groups*, *supra* note 89, at 983-984.

176. *NOW*, 620 F.2d at 1311-12. The Eighth Circuit concluded that a boycott called by the National Organization for Women aimed at securing ratification of the Equal Rights Amendment was immune from Sherman Act liability even though the purpose of the boycott was to inflict economic harm in the target states. *Id.* at 1315. The state of Missouri, one of the targets of the NOW boycott, argued that NOW's activities amounted to a "secondary boycott" and hence were not a *"legitimate* effort to influence the legislature . . . ." *Id.* at 1312. Missouri argued that NOW's activities represented more than a "mere attempt" to influence the passage of laws. *Id.* at 1313.

177. *Id.* at 1315; *see also* Minda, *Interest Groups*, *supra* note 89, at 983.

178. As in *Trial Lawyers*, the "restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences . . . even if no legislation had been enacted." FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 425 (1990).

179. Professors Areeda and Hovenkamp, for example, acknowledge that the Eighth Circuit's decision in *NOW* might have come out differently if evidence established that some of the participants in the boycott stood to gain financially from the boycott. As they explain: "[S]uppose that the boycott organizers [in Missouri v. National Organization for Women] included a hotel chain from a state that had already ratified the ERA. To the extent that the boycott shifted business toward ratification states, the hotelier would gain economically such that a First Amendment defense should presumptively be denied him."

other hand, the *NOW* decision appears to be well entrenched in the case law and is not likely to be ignored or rejected in the future.[180] A comparison of *Trial Laywers* and *NOW* provides an illustration of how different outcomes can be reached under the open-ended public/private distinction.

C. *Attempt of Legal Scholars to "Make Sense" of Boycott Doctrine.*

A number of scholarly attempts have been undertaken in an attempt to supplement the case law in clarifying the "fuzzy" chameleon-like character of boycott doctrine.[181] To date, these attempts have tended to focus on the development of a theory of boycotts under one or more of the many distinctions put forth by the courts to justify their decisions. Legal scholars have formulated theories that seek to defend the current state of boycott doctrine under analyses that accept the necessity of making primary/secondary,[182] naked/ancillary,[183] speech/conduct,[184] and economic/political[185] distinctions. Others have argued that inconsistency in the cases is a consequence of the Supreme Court's commitment to the underlying cause of certain groups' boycotts,[186] or an implicit commitment to a "process" view of what courts can and cannot do.[187]

PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 113.1, at 6 (Supp. 1992).

180. *Missouri v. National Organization for Women* has since been cited for the view that economic boycotts for political purposes are immune from antitrust regulation because neither "the Sherman [nor] Clayton Acts were designed to be applied to noncommercial activities." HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 280 (1985).

181. *See, e.g.*, Elhauge, *Antitrust Process*, *supra* note 30, at 738-46; Getman, *supra* note 28, at 16-19; Harper, *supra* note 30, at 409; Kupferberg, *supra* note 30; Pope, *Ladder*, *supra* note 28, at 224-28; Pope, *Republican Moments*, *supra* note 20, at 352; TRIBE, *supra* note 28, at 200-03; Estlund, *supra* note 30; Schneider, *supra* note 30, at 1489 n.132.

182. *See* Howard Lesnick, *The Gravamen Of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962).

183. *See* BORK, *supra* note 155.

184. EMERSON, *supra* note 70.

185. *See* Pope, *Republican Moments*, *supra* note 20, at 349-52 (arguing that the economics/politics distinction provides a theoretical explanation for the Court's political boycott decisions); Elhauge, *Antitrust Process*, *supra* note 30, at 738-46 (arguing a similar distinction helps to explain the Court's state action antitrust doctrine).

186. For example, Harry Kalven has suggested that the Supreme Court's decision in *Claiborne Hardware* favoring civil rights boycotts as protected First Amendment activity can be explained in light of the Court's historical treatment and commitment to the civil rights movement. *See* KALVEN, *supra* note 28, at 123-72; *see also* Pope, *Ladder*, *supra* note 28, at 223.

187. For example, the legal process idea that courts lack the institutional competence to regulate group activity in the political arena of government. *See, e.g.*, Elhauge, *Antitrust Petitioning Immunity*, *supra* note 30.

1. *Professor Harper's "Electoral Voting" Analogy.* Professor Michael C. Harper has argued that the Supreme Court's creation of a new consumers' right to boycott, in *Claiborne Hardware*, can be constitutionally justified under what Harper calls an "electoral voting" analogy. According to Harper, the consumer right to boycott is "a right in accord with our social and constitutional values" that should be judicially "cast as a broad political right to influence social decisionmaking."[188] In his view, the act of "[j]oining a consumer boycott should be conceived as a constitutionally protected political act by which individuals can influence their society."[189]

In a consumer boycott, the boycotters seek to affect the economy for the purpose of dramatizing grievances or bolstering public support for some cause. In *Claiborne Hardware*, for example, the civil rights boycotters sought to influence private and governmental decision-making that had denied African-Americans equal employment opportunities. The objective of the boycotters was thus to influence social decision-making, an objective which, according to Professor Harper, should have been recognized as "a constitutionally protected political act by which individuals can influence their society."[190] In his view, "[r]egistration of the intensity of beliefs in the economic marketplace is no less legitimate than registration of the intensity of beliefs in the political marketplace."[191] He would thus accord the same protection to boycotts aimed at influencing private decisionmaking *and* governmental decisionmaking, since both can be "viewed broadly as means by which citizens can influence important social decisionmaking."[192]

Harper's attempt to develop a constitutional right of consumer boycotts rests on the view that consumer boycotts are political acts intimately related to other legitimate forms of activity seeking to affect social decisions. Harper's approach to consumer boycotts can thus be analogized to electoral voting. According to Harper, the coercive effect of a political boycott is little different from the influence citizens may exercise, and should be encouraged to exercise, by voting out of office elected officials whose views or actions the boycotters reject.[193] Harper argues further that such public influence ought to be permitted to influence private businessmen who possess sig-

188. Harper, *supra* note 30, at 410, 420-26. Seth Kupferberg has similarly argued that political strikes by labor unions should be accorded a First Amendment protection analogous to that accorded civil rights boycotts. *See* Kupferberg, *supra* note 30, at 689.

189. Harper, *supra* note 30, at 422.

190. *Id.*

191. *Id.* at 423.

192. *Id.* at 422.

193. *Id.* at 425.

nificant political influence.[194]

Harper's "electoral voting" analogy is persuasive when, as in *Claiborne Hardware*, private entrepreneurs who are the target of the boycott are large public corporations or when the boycott is brought against individuals who hold political office.[195] As Harper admits, however, the electoral voting analogy is less persuasive where the boycott target is an undefined, diffused and mixed audience.[196] Professor Harper argues nonetheless that the Supreme Court should recognize a consumers right to boycott as a "broad political right to influence social decisionmaking."[197]

Professor Harper argues that his "electoral voting" analogy should lead judges to the position that most consumer boycotts, even those organized by labor unions, are constitutionally protected political acts.[198] As the decision in the *Trial Lawyers* case illustrates, however, consumer boycotts may be motivated by private self-interests; the desire of boycotters to affect social decisionmaking may be the result of purely selfish economic interests. Nevertheless, according to Harper, the electoral voting analogy still applies, and the boycott remains protected under the First Amendment.[199]

The problem with Professor Harper's electoral voting analogy is that the analogy works just as easily to *deny* the very constitutional protection he seeks to extend because his analogy rests upon an essentially contested image of boycott. In the early labor boycott cases, for example, boycotts were understood as coercive forces that had the effect of sweeping away individuals who might object or not support the goals of the boycotters. Boycotts were also understood in the labor cases as criminal acts, akin to murder or mugging. This alternative understanding of boycott projects a picture of the unruly mob threatening the tranquility of the community, or as a disease that spreads the detrimental economic effects of a labor dispute to inno-

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194. *Id.*

195. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 889 n.3 (1982); Harper, *supra* note 30, at 426.

196. Harper, *supra* note 30, at 426. Professor Harper argues that even in such cases he would not compromise the right of consumers to boycott. In his view, "[c]onsumer boycotts have usually targeted businessmen with special political influence" and "to expand popular participation in social decisionmaking, a democratic society can appropriately deny some citizens economic protection in order to secure all citizens a right to engage in consumer political action." *Id.*

197. *Id.* at 410.

198. *Id.* at 438-53 (arguing that statutory restrictions of federal labor law applicable to consumer boycotts incident to labor disputes infringe upon the consumers' right to boycott).

199. *Id.* at 437. Professor Harper relied upon "settled First Amendment jurisprudence" that has accorded "political acts motivated by economic self-interest as much protection as political acts motivated by visionary altruisms." *Id.* at 437-38.

cent third parties. In the business restraint-of-trade cases, boycotts were understood as vehicles for predation in the marketplace, with the objective of forcing competition from the market. These alternative judicial images of boycott conjure up mental pictures that encourage us to understand boycott phenomena as something that is different from, or even antithetical to, Professor Harper's electoral voting analogy. The point is that Harper's analogy may "cohere" only with the facts of *Claiborne Hardware*, but with few of the other boycott cases.

There is another reason to question Professor Harper's understanding of the "electoral voting" analogy. Electoral decisionmaking is typically thought to be an orderly and highly regularized activity, taking place in the privacy of the election booth. Voting seeks to influence governmental decisionmaking through a majoritarian process designed to affect governmental action. The political campaign which precedes voting, unlike a consumer boycott, does not seek to drive from the electoral market non-complying constituents. While mass demonstrations are frequently conducted in electoral campaigns, they are not directed at forcing someone to vote for a particular candidate or election measure.

In *Noerr*, for example, the Supreme Court found that a traditional lobbying campaign aimed at removing truckers from the freight transport market, in other words a boycott instituted through governmental lobbying, was constitutionally protected by the Right to Petition Clause of the First Amendment because the boycotters sought to influence governmental decisionmaking through the normal channels of representational government. In *Trial Lawyers*, however, the Court viewed a lawyers' boycott to gain higher statutory fees as an attempt to impose a restraint of trade independent of governmental action: "In *Noerr*, the desired legislation would have created the restraint on the truckers' competition; in this case the emergency response to the boycott put an end to the restraint."[200] The *Trial Lawyers* boycott fell outside the constitutional umbrella of the right to petition because the Court found that the boycotters sought to influence governmental decisionmaking outside the normal political channels of government.

The right to petition, upheld in the *Noerr* decision, has thus been limited to the traditional forms of lobbying which seek to influence policy decisions of the government. The different result reached in *Trial Lawyers* can be explained in part on the Supreme Court's recognition of the fundamental difference between the normal governmental process of voting and representation and "non-normal" electoral activities involving direct action boycotts. Professor

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

Harper's constitutional right to boycott was consequently rejected by the Supreme Court in *Trial Lawyers*.

2. *Professor Lesnick's "Difference in Kind" Test.* Professor Howard Lesnick has argued that the primary/secondary distinction of federal labor law could be best understood in light of a "difference in kind" test.[201] Under Lesnick's test the secondary boycott proscription of federal labor law would permit boycott pressure upon secondary employers only if the pressure is no *different in kind* from that generated by a successful primary strike (against an employer with whom the union has a dispute). According to Lesnick, the secondary boycott provisions of federal labor law apply only to those labor union boycotts that impose effects that are different in kind from a successful primary strike. Thus, the secondary boycott provision of federal labor law should, in Lesnick's view, prohibit only those boycotts which cause secondary affects that are different in kind from those which normally occur in an otherwise successful primary strike.

The primary/secondary distinction was, for Lesnick, the principal judicial basis for regulating secondary activity of labor unions. In Lesnick's view, federal judges understand that the legislative purpose underlying secondary boycott provision of federal labor law was containment of labor disputes, "the legislative desire to discourage what may be called the metastasis of labor disputes: the fanning out of unrest from the struck plant to those doing business with it."[202] Lesnick's "difference in kind" test, derived from his reading of the case law, sought to provide a functional standard for making the primary/secondary distinction required by federal labor law.

Whether pressure brought against a secondary employer is different in kind from that exerted by a primary action is a question not easily answered in most boycott cases. In Professor Lesnick's scheme the key question is whether the union intends to cause secondary impacts broader than would be caused by a primary strike. If the union intended to subject the secondary employer to a loss broader in impact than would be caused by a successful primary strike then the picketing is secondary; if not, it is primary.[203] The problem with Lesnick's "difference in kind" test is that it fails to demonstrate *how* the line between secondary and primary activity should be drawn when the union intends to boycott a national manufacturer that produces a product assembled from other prod-

201. Lesnick, *supra* note 182.

202. *Id.* at 1415 (citing 93 CONG. REC. 4323 (daily ed. April 29, 1947), *reprinted in* 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1107 (1985) (remarks of Senator Taft)).

203. *Id.* at 1414.

ucts. A successful primary strike of such a manufacturer will cut off the flow of the primary employer's goods just as surely as it would cause the loss of services of the primary's employees.[204] The difference in kind distinction fails, however, to explain why secondary boycotts brought against the national manufacturer's dealers and suppliers would be unlawful. It is this weakness in Lesnick's test that has raised serious difficulties when attempts are made to explain the primary/secondary distinction in the law of labor union boycotts.

Professor Lesnick's test seeks to enforce the purpose of the secondary boycott provision by limiting the proscription of secondary boycotts that broaden the effects of a primary economic dispute. The difference in kind test, however, allows the secondary boycott provision of federal labor law to mean different things to different employers, and thus allow economic disputes to spread in some industries and not others. This result is odd in light of the attempt of Congress to forbid secondary boycotts in labor union disputes. This also seems difficult to justify in cases where a weak union needs the support of secondary employees to make common cause against a much more powerful employer who enjoys the benefit of economic relations with secondary employers.

3. *Professor Elhauge's Antitrust "Process-Oriented" Approach.* Professor Elhauge has argued that the puzzles posed by the Supreme Court's antitrust petitioning immunity cases could be solved by what he calls "an objective process approach."[205] By an "objective process," Professor Elhauge means an approach that objectively sets "boundaries between the competitive and governmental processes."[206] Under Elhauge's process view, antitrust immunity would not apply to group boycotts seeking to influence governmental decisionmaking if the relevant decisionmaker is financially interested, unless the activity both does not involve market behavior and is not separable from otherwise valid input into the governmental process.[207]

Elhauge argues that his approach is "process-oriented" because it "turns on objective indicia about the incentives of the decision-

204. *See* Donald S. Engel, *Secondary Consumer Picketing—Following the Struck Product*, 52 VA. L. REV. 189, 211 (1966); *see also supra* note 154.

205. Elhauge, *Antitrust Petitioning Immunity*, *supra* note 30, at 4. Elhauge's *Antitrust Petitioning Immunity* article builds on his earlier article dealing with state action immunity. *See* Elhauge, *Antitrust Process*, *supra* note 30. Both articles attempt to advance an "objective" process approach for rationalizing antitrust doctrine.

206. Elhauge, *Antitrust Petitioning Immunity*, *supra* note 30, at 1180.

207. *Id.*

makers."[208] Financially interested decisionmaking is therefore denied antitrust immunity because such decisionmaking is not likely to be politically accountable,[209] and because "competitive markets [should] provide a mechanism for harnessing that financial interest in the public interest."[210] Elhauge's framework of analysis for antitrust petitioning immunity attempts to distinguish between private and public decisionmaking affected by a boycott. Under his analytical framework, private decisionmaking is shorthand for financially interested decisionmaking, and public decisionmaking is shorthand for decisionmaking that is financially disinterested and politically accountable.[211]

Elhauge attempts to reconcile the inconsistency in antitrust cases dealing with governmental petitioning claims by relying upon a basic precept of process theory—the idea that an objective legal process can be developed to evaluate boycott incentives on the basis of whether or not they seek to interfere with a competitive or governmental process of decisionmaking. When boycott incentives create a financial interest in restraining market competition, antitrust immunity is unwarranted because the competitive process is the better mechanism for protecting the public interest.[212] When a group boycott is directed at persons without financial interest and with public accountability, antitrust immunity is warranted even if those actors making the decisions "act [out] of financial motivation."[213] The "operative factor" in either case is "whether the objective incentives of those making decisions provide some realistic assurances that the decisions will further the public interest."[214]

According to Elhauge, "[f]rom an objective process perspective, courts adjudicating antitrust immunity issues emerge as the switchmen of democratic capitalism: guiding decisionmakers down the tracks of either the competitive or governmental process depending on which is most appropriate, but not substituting a track or judicial decisionmaking for either process."[215] Professor Elhauge's

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208. *Id.* at 1197.

209. *Id.* at 1203.

210. *Id.* at 1197.

211. *Id.*; *see also* Elhauge, *Antitrust Process*, *supra* note 30, at 682-96.

212. Elhauge, *Antitrust Petitioning Immunity*, *supra* note 30, at 1197.

213. *Id.* at 1199 ("[P]etitioners' financial interest in the government's action is irrelevant because our assurance that the restraint furthers the public interest comes not from the petitioners' decisionmaking process but from the government's.") (citation omitted).

214. *Id.*

215. *Id.* at 1250. Apparently, train metaphors have become popular among contemporary legal scholars. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE—FOUNDATIONS 98-99 (1991) (comparing the American republic to a train moving through constitutional history). Steven L. Winter argues that Ackerman's train metaphor is too quaint and European for mobile America. Winter instead places the judge in the driver's seat of a car

metaphor of courts as "switchmen" guiding "decisionmakers down the tracks" assumes that judges can objectively evaluate the "incentives of decisionmakers" and classify them as either public or private.[216]

There are a number of problems with Elhauge's approach. First, boycotts seeking to influence governmental decisions are likely to be motivated by a mix of factors; some may involve competition policy, others may not. In *Trial Lawyers*, for example, the boycotters attempted to assert the constitutional rights of their clients in addition to protecting their own financial interests. The *Trial Lawyers* boycotters were advised to do "something dramatic to attract attention" since they lacked a political constituency to lobby on their behalf.[217] From the perspective of the lawyers boycotting, the boycott was merely a means to gain public support for their cause.[218]

The lawyers' boycott was thus the only way they could effectively influence governmental action. If the public supported their boycott, District of Columbia officials would learn that voters supported the lawyers' cause. The boycott thus had political objectives, even though the boycotters also had a direct financial stake in the boycott. The point is that boycotts seeking to influence governmental action can not always be as easily characterized as Professor Elhauge seems to think.

Professor Elhauge accepts the Court's characterization of the *Trial Lawyers* boycott as anticompetitive.[219] According to Elhauge, the "record (in *Trial Lawyers*) contained clear evidence of anticom-

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driving down a modern freeway. In Winter's view, judges are in the thick of it—always on the freeway and always looking forward, backward, and side-to-side at all other drivers. Winter, *Indeterminacy, supra* note 33, at 1522.

Consider, for a moment, that Elhauge's judge is a "switchman of democratic capitalism" on Ackerman's train. Elhauge's switchman metaphor assumes that judges can objectively guide the train "down the tracks of either the competitive or governmental process depending on which is most appropriate, but not substituting a track of judicial decisionmaking for either process." Elhauge, *Antitrust Petitioning Immunity, supra* note 30, at 1250. Under Ackerman's metaphor, however, the judge sits in the caboose and constantly looks backward to see that the train remains on the right tracks. (While the passengers (citizens of the republic) choose new engineers to direct the course of the train, the Supreme Court must "remain in the caboose, looking backward.") ACKERMAN, *supra*, at 99. These metaphors do not give me confidence in Elhuage's discovery of an objective process approach for uncovering the functional operation of the judge as the "switchmen of democratic capitalism."

216. Elhauge, *Antitrust Petitioning Immunity, supra* note 30, at 1250.

217. A major obstacle to seeking higher statutory fees was the belief of governmental officials that there was limited public support for higher fees. Superior Court Trial Lawyers Ass'n v. FTC, 856 F.2d 226, 229 (D.C. Cir. 1988), *rev'd on other grounds*, 493 U.S. 411 (1990).

218. *See id.* at 229-30.

219. Elhauge, *Antitrust Petitioning Immunity, supra* note 30, at 1211.

petitive effect: severe shortages of lawyers willing to take indigent defendants."[220] The lawyer shortage during the boycott was, however, likely caused by the extremely low fees set by legislation;[221] the District of Columbia could have purchased legal services by offering lawyers the prevailing market fee to work during the boycott. The District of Columbia, not the lawyers, had the advantages of market power. The price of legal services were effectively set by a single customer, the government, making the market for court appointed attorneys essentially a buyer's market controlled by monopsony power.[222]

There is also a serious problem presented by Elhauge's belief that boycotts can be classified in terms of whether or not they affect a market or governmental process. In *Claiborne Hardware*, the boycott was ostensibly aimed at shutting down local businesses that had discriminated against minorities, but the real targets were governmental officials who had encouraged the development of negative racial attitudes. It is conceivable that official decisionmakers who were the target of the civil rights boycott also perceived that they had an economic stake in putting down the boycott, since any other action may have cost them their jobs. Moreover, since the decisionmakers included voters as well as elected state officials, decisionmakers were both public and private. One therefore cannot categorically say whether the class of decision-makers were governmental or private.

While Professor Elhauge acknowledges that the public/private distinction is troublesome,[223] he argues that judges can make this distinction by "asking why society allows financially interested pro-

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220. *Id.*

221. This was because the pre-boycott fees were substantially lower than the market price for similar legal services in the District. *See Superior Court Trial Lawyers Ass'n*, 493 U.S. at 443 (Brennan, J., concurring in part, dissenting in part).

222. *See* Kindred, *supra* note 30, at 725. The fact that the District lacked complete power to control the lawyers' fees does not mean that the government lacked market power. "While there was a *limit* to the District of Columbia government's capacity to exploit the CJA lawyers, it was, nonetheless, able to exploit them by paying a less than competitive price." *Id.* at 726.

223. Elhauge, *Antitrust Petitioning Immunity*, *supra* note 30, at 1196. Elhauge acknowledges that legal doctrines structured by the private/public distinction "have prove[n] difficult to resolve by any purely formal criteria." *Id.* In dismissing this problem as merely a "formal" technicality, however, Elhauge invokes John Wiley's "evocative phrase, 'that no difference exists between . . . Congress and 535 strangers waiting for the bus,'" as justification for ignoring the incoherence of the public/private distinction. *Id.* (quoting John S. Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 773 (1986)). The difficulty posed by the public/private distinction cannot be so easily ignored. Functional factors seeking to make "real world" distinctions will merely reproduce the difficulties of formal theory if our analysis fails to face the incoherence of public/private thinking. *See also supra* note 173.

ducers the authority (enforced by state protection of property rights) to make important resource allocations for society."[224] He concludes that "a major answer is that competitive markets provide a mechanism for harnessing that financial interest in the public interest because the *process* of competition causes producers to provide goods at the lowest cost to those that value them the most."[225]

Elhauge's framework of analysis thus incorporates the basic process filter of 1950s Legal Process ideology,[226] the dogma that the private economic world and the public political world are separate because the private world of markets is ruled by the objective invisible hand rather than by subjectively chosen policies. Elhauge believes that the invisible hand of the competitive process establishes the basic structure of antitrust law, thereby justifying an objective antitrust process approach to antitrust petitioning and boycott problems. In Elhauge's understanding, federal regulation is something added to the objective realm, in which the invisible hand operates as an objective process. Elhauge thus argues that "as with state action immunity, petitioning immunity reflects the Court's implicit functional process views about how best to set the boundaries between the competitive and governmental process."[227] The invisible hand theory of competitive markets assumes, however, that an objective baseline of property, liberty, and exchange rules exists.[228] These baselines are themselves the result of contingent policy decisions about the exercise of public, social power.[229]

The metaphor of the invisible hand is illusory; there is no such thing as an *objective* competitive process. Any regulation of boycott activity invariably requires judicial determinations to be made about the exercise of social power. Judicial acceptance of the values of the competitive process cannot be made independent of the judge's subjective understanding of private markets and governmental regulation. The notion that the competitive process has a pure, apolitical starting point ignores the contingent nature of power exercised in the day-to-day relations of social culture. There is no ob-

224. Elhauge, *Antitrust Petitioning Immunity*, *supra* note 30, at 1197.

225. *Id.* at 1197-98.

226. *See* Gary Peller, *The Politics of Reconstruction*, 98 HARV. L. REV. 863 (1985) (book review) (discussing a similar tendency within the process-oriented approach of Bruce Ackerman's constitutional law theories).

227. Elhauge, *Antitrust Petitioning Immunity*, *supra* note 30, at 1180; *see also* Elhauge, *Antitrust Process*, *supra* note 30.

228. *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and The Functional Approach*, 35 COLUM. L. REV. 809 (1935); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 8-14 (1927); Robert C. Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Robert C. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

229. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 910-11 (1987).

jective way to engage in what Elhauge calls an "objective-process oriented" approach.

Finally, Elhauge's idea of the judge as a switchman assumes that judges can identify essential natural categories that distinguish between public and private decisionmaking. But the categories upon which Elhauge relies are socially constructed; they do not exist independent of a particular social or political understanding about the proper role of federal regulation, the importance of respecting the competitive market process, and what does and does not affect the public interest. The public/private distinction essential for sustaining Elhauge's objective process approach becomes merely an excuse for allowing judges to make fundamental policy determinations about the legitimacy of different forms of governmental petitioning. Such a result is hardly a good example of an objective approach.

4. *Professor James Grey Pope's Theory of Republican Movements.* Other imaginative theories have been offered to explain the inconsistencies in the case law. Professor James Pope, for example, has developed a novel constitutional theory from the civic republican tradition of constitutional law and history as a means of defending and explaining the Court's political boycott decisions.[230] Professor Pope has argued that political boycotts have traditionally been protected by the First Amendment only when they are found by the Court to involve what he calls "republican moments"—that is, when the boycotts resemble those transitory moments of social activism that have been considered to involve purely "political" objectives aimed at securing the "virtues of popular republicanism: namely, the pursuit of interests broader than immediate pecuniary gain, and an appeal to fundamental ideals."[231]

According to Professor Pope, decisions such as *Claiborne Hardware*, *Allied International*, and *Trial Lawyers* can be understood as extending First Amendment protection only to those boycotts that represent freely chosen expressions of popular dissent and political aspiration. *Claiborne Hardware*, in his view, exemplifies what he calls a "republican movement" because the civil rights boycotters sought to achieve constitutional objectives that transcended their immediate economic interests.[232] The boycotts in *Allied Inter-*

230. *See* Pope, *Republican Moments*, *supra* note 20, at 294 (discussing general theoretical and normative arguments for justifying popular protest under a theory of civic republican thought that avoids the large size problem of modern representative democracies).

231. *Id.* at 351.

232. According to Professor Pope, the *Trial Lawyers* boycott lost its constitutional shield of protection as a republican moment because the lawyers' "immediate objective was to increase the price that they would be paid for their services." *Id.* at 349 (quoting

national and *Trial Lawyers*, on the other hand, lost First Amendment protection; in *Allied International* because workers were ordered by their union president to boycott,[233] and in *Trial Lawyers*, because the boycotters had a direct economic interest at stake.[234] The boycotts in *Allied International* and *Trial Lawyers* were denied constitutional protection because they were motivated out of private economic interests that failed to reflect the democratic and communitarian values associated with a republican moment.

Professor Pope's reliance on the distinction between political and economic activity pressed by the *Trial Lawyers* Court falls prey to the type of problems that infect Professor Elhauge's process oriented approach to these same cases. Pope's economics/politics distinction, like Elhauge's public/private distinction, is highly problematic, especially when viewed in light of the commercialization and consumerization of nearly every aspect of American life.[235] The public/private distinction in labor law has served the historical purpose of denying the perspective of most working people, who understand that labor's collective effort to gain control at the workplace is intrinsically a political as well as an economic endeavor.[236]

Professor Pope argues that the result reached in *Allied International* and *Trial Lawyers* can be justified because in each case the boycott failed to foster broader social goals. In *Allied International*, he regards the Longshoremen's boycott as the product of coercive power of the Union's leadership, which "ordered ILA members to

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

233. The rank and file union membership thus had no choice in deciding whether to join the boycott. *Id.* at 352.

234. *Id.* at 349.

235. *See generally* Alan Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1 (1981); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981); Karl Klare, *The Public/Private Distinction In Labor Law*, 130 U. PA. L. REV. 1358 (1982); Getman, *supra* note 28; Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons From Labor Law*, 1986 U. ILL. L. REV. 689. The emergence of labor-community boycotts, for example, illustrates how boycotts involving an alliance between labor unions and consumer groups attempt to displace marketplace power by utilizing boycotts by coalition groups to accomplish economic and political objectives. *See* Pope, *Labor Community Boycotts*, *supra* note 20, at 898-908. Labor-community boycotts call into question the dichotomous public/private thinking of the courts. The notion that labor and industrial issues can be limited to an economic realm, and "political" issues can be in the realm of politics through democratic processes fails to reflect the realities of labor and consumer groups who experience political and economic concerns as interrelated and dependent issues. *See* Minda, *Progressive Labor Politics*, *supra* note 20, at 125-27.

236. Professor Pope has recognized the importance of this understanding in his earlier work. *See* James G. Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1104-12 (1987) (arguing that the Supreme Court's commercial version of labor protest has worked to deny the experience of workers who understand their protest as a "right of personhood").

stop handling cargoes."[237] The boycott was not regarded as an exercise of popular republican politics "[g]iven the long history of autocracy in the ILA, the coercive power [the Union President] Gleason held over individual workers, and the workers' inability to leave the union's jurisdiction. . . ."[238] The *Trial Lawyers* boycott was found not to be a republican moment because the lawyers' immediate objective was to increase their own hourly fees, an objective that failed to transcend the "day-to-day conduct of business as usual."[239]

The problem with Pope's characterization of these cases is that he, like Elhauge, overlooks aspects of each boycott that support contrary characterizations. While it is true that the union members in *Allied International* were "ordered" by their leadership to boycott ships trading with Russia, it is also true that the "Deacons" and "Black Hats" who organized the civil rights boycott in *Claiborne Hardware* ordered their members to honor their boycott. While the Longshoremen's union in *Allied International* was autocratic, so was the civil rights leadership responsible for organizing the *Claiborne Hardware* boycott. If boycotts are to be denied constitutional protection because organizers order their members to act, or because boycott organizations are operated under a military-type structure of leadership, then nearly *every* effectively organized boycott would fail to qualify for constitutional protection under such a theory. The fact that the longshoremen were ordered to obey the ILA boycott, and the fact that the union was autocratic, fails to explain why that boycott was treated differently than the boycott in *Claiborne Hardware*.

The boycott in *Trial Lawyers* was analogous to economic labor strikes during the New Deal *era*, one of the few moments in United States history that Professor Pope understands to be the closest approximation to his "ideal type" of republican moments.[240] "If unions and workers are to enjoy the civic republican values advocated by Professor Pope, they must have the freedom to participate and affect corporate decisions that determine their economic interests."[241] Concerted activity designed to advance a common wage demand involves more than mere selfish economic interests; such activity is also aimed at advancing worker control at the workplace. Such activity is

237. Pope, *Republican Moments*, *supra* note 20, at 352 (quoting International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 214 (1982)).

238. *Id.* at 352. According to Pope, the longshoremen in *Allied* were not engaged in constitutional political activity because "[f]ar from engaging in an exercise of positive freedom, the longshoremen acted '[i]n obedience to' Gleason's order." *Id.* (quoting *Allied Int'l, Inc.*, 456 U.S. at 214).

239. *Id.* at 349.

240. *Id.* at 312.

241. *See* Minda, *Progressive Labor Politics*, *supra* note 20, at 124.

intrinsically political activity.[242]

While Professor Pope's characterization of the *Claiborne Hardware* boycott may to some seem persuasive, it is far from apparent, given the chameleon-like quality of boycott doctrine, that Pope's characterization of that case will control the way the case will be interpreted by future judges. Political and legal ideas attributed to a legal opinion can and frequently do "change their political valence over time from progressive to conservative and back again."[243] Indeed, Justice Brennan in his partial dissent in *Trial Lawyers*, stated that he was "surprised" by Justice Stevens' majority opinion finding that the lawyers' boycott was not protected speech, given what Justice Stevens had said in *Claiborne Hardware* about the importance of protecting the "[t]he established elements of speech, assembly, association, and petition" of expressive boycotts.[244]

Professor Pope, like Professor Elhauge, also assumes that judges can identify those boycotts whose objective and motive are immediately related and casually connected to political, as distinguished from economic, objectives. As Professor Pope recognizes, the economics/politics distinction is difficult in several respects.[245] Not only does Pope's distinction require judges to separate political from economic interests, a Herculean task in most mixed motive boycott cases, but more significantly his distinction fails to address how language and cognitive imagination have socially constructed the very categories that the distinction seeks to recognize. The legal categories of economic and political activity are assumed to establish an objective baseline for legal analysis, when the categories themselves reflect contingent and highly contestable and socially constructed ideas about the nature of markets and politics. *Trial Lawyers* and *Claiborne Hardware* are too chameleon-like to be tamed by either legal distinctions such as public/private or by political inspiration of civic republicanism.

Efforts to reconcile boycott cases have faltered because judges and commentators have assumed that the problem of incoherence may be solved by some chain of reasoning that can be discovered and

242. *See id.*

243. Jack M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831, 1833 (1991) (describing the phenomenon of "ideological drift" in legal thought) [hereinafter Balkin, *Legal Semiotics*]; *see also* Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383-84 (providing an example of ideological drift in legal thought); Jack M. Balkin, *Ideological Drift*, *in* ACTION & AGENCY 13 (Roberta Kevelson ed., 1991) [hereinafter Balkin, *Ideological Drift*].

244. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 449 (1990) (quoting, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982) (Stevens, J.)).

245. Pope, *Labor Community Boycotts*, *supra* note 20, at 924. ("Most [labor-community boycotts] fall between the extremes, where determining the appropriate degree of protection will involve difficult value judgements.").

articulated to correct logical mistakes in the case law. The problem in the case law is not mistakes in logic, but rather a more basic problem involving the manipulability of the language used for distinguishing the cases. Language is not a distortion-free vehicle for describing what has gone wrong in the law of boycotts; language is itself socially constructed, and is implicated in the process of producing different meanings of boycotts for the law. What is needed is an inquiry into the role of language in generating the chameleon-like meanings that judges and commentators have attributed to different group boycotts.

D. *Boycotts understood metaphorically.*

Judges and commentators have failed to consider the possibility that their tool of analysis—language—may fail to objectively capture the meaning of the events they seek to describe. In *Gompers*, for example, Justice Lamar sought to describe the legal meaning of a threatened worker boycott by describing how the vast power of a labor group could coerce an individual to take unwanted action. The idea of force provided the legal justification for the Court's conclusion, but the Court's explanation of force depended upon non-objective criteria. One could not ascertain the meaning of force without knowing something about the way Justice Lamar understood the problem of force in *Gompers*.

The problems of political expression and motive highlighted by the *Claiborne Hardware* and *Trial Lawyers* decisions illustrate a similar point. One cannot understand why Justice Stevens characterized the *Claiborne Hardware* and *Trial Lawyers* boycotts as expressive political or private market activity without first knowing something about the imaginative process he employed in depicting the civil rights boycott as involving primarily elements of majesty. Similarly, the problem of definition represented by the *Pinhas* case, and the disagreement between the majority and dissent, would seem to require an analysis that is capable of grasping how different ideas about boycotts influence judicial thinking about different legal meanings of boycott.

If we assume that reality reflects an objective image of the world like a mirror, then language may be capable of mirroring that reality. If on the other hand the words we use to mirror reality actually reflect contingent, socially constructed images of that reality, then there is reason for questioning the representative function of language used for the discovery of meaning. The different images of boycott found in the law suggest that there is a mechanism at work which has permitted judges to capture some, but not all, of the real-

ity of boycotts for different doctrinal areas of the law.[246] In Part III, I will attempt to show how a study of metaphor provides a more powerful and deeper understanding of boycott decisions, and how such a study may provide insight for resolving and clarifying the confusion and uncertainty surrounding the current doctrinal puzzles applicable to group boycotts.

III. THE METAPHORIC STRUCTURE OF BOYCOTT DOCTRINE

> To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs.[247]

In this Part, I will offer an explanation for the chameleon-like character of boycott doctrine that links the structure of legal doctrine to the forms of metaphoric reasoning utilized by judges in deciding boycott cases. My goal will be to show how the indeterminacy of boycott doctrine can be understood as an intelligent and determinant practice generated by metaphoric reasoning.[248] Boycott doctrine

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246. I do not claim that it is possible to determine the truth of the legal descriptions of boycotts found in the case law; indeed, this article makes no claims about whether the law's understanding of boycotts is true in an objective sense. The point of this article is to understand the process of truth finding as a process of discovering different legal meanings of boycotts which judges have constructed for the law. As Professor Jack M. Balkin has explained, "[t]he only truly 'authentic' discourse is the discourse of a situated subject in some form of language game. To demand more than this is to demand the impossible." Balkin, *Legal Semiotics, supra* note 243, at 1848. It is sufficient for my purposes that judges have used different metaphoric images in their opinions as a means of creating legal meaning. By exploring the nature of metaphoric reasoning in law, we can discover the key for unlocking the mystery surrounding the chameleon-like mechanism of boycott doctrine. By discovering what generates the structure of legal interpretation, we can also discover new hermeneutic lessons for resolving boycott issues in the law.

247. Robert N. Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 10 (1983) (arguing the importance of tracing the connections between the legal world and "other worlds" of cultural practices in society). Others have since focused their analysis on uncovering the missing connections between legal meaning and cultural practice. *See, e.g.*, Boyle, *supra*, note 36; William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333 (1992).

248. In cognitive theory, metaphoric reasoning refers to knowledge derived from our understanding of the experience of one kind of thing in terms of another. For example, George Lakoff and Mark Johnson have illustrated how the metaphor ARGUMENT IS WAR helps to explain how we have come to understand and talk about arguments in terms of war: "Your claims are *indefensible*. He *attacked every weak point* in my argument. I *demolished* his argument . . . ." GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 4 (1980). Lakoff & Johnson's definition of metaphor is *conceptual* in that "a metaphorical concept, namely ARGUMENT IS WAR structures, at least in part, what we do and how we understand what we are doing when we argue." *Id.* at 5. Metonymy, as distinguished from metaphor, is primarily a referential concept that allows us to use one entity to represent another. *Id.* at 36. The metonymy THE FACE FOR THE PERSON helps us to understand the meaning of the statement: "She's just a *pretty face*." *Id.* at 37;

will be interpreted *metaphorically*, as a structure of symbolic representations or socially constructed mental images about the nature and meaning of the cultural practices of groups. When viewed metaphorically, legal reasoning can be understood as an imaginative process that is both constrained and enabled by basic embodied experiences.[249]

Metaphors that are experientially based on knowledge about animals and about our own bodies have dominated the judicial imagination of the law applicable to group boycott.[250] Judges have compared boycotts to blood-thirsty tigers, to disease infecting the internal biological system of the body, and even to murder. Boycott metaphors used in written legal opinions are more than interesting analogies; metaphors have swayed judicial opinion[251] by performing a silent, but important, conceptual role in the law, through which judicial reasoning is made possible.[252] Metaphors function concep-

see also Winter, *Transcendental Nonsense*, *supra* note 35, at 1189-206. Metaphor and metonymy are central to the intellectual process in that they are utilized to construct and communicate legal meaning derived within a culture of idealized cognitive models.

249. *See* JOHNSON, BODY IN THE MIND, *supra* note 45; LAKOFF, WOMEN, FIRE, *supra* note 45.

250. Cognitive theorists have shown how we make use of patterns of prereflective thought based on our physical and cultural experiences as a means of organizing abstract understanding about the world. *See* JOHNSON, BODY IN THE MIND, *supra* note 45, at xv. For example, the metaphor CORPORATION IS A PERSON in law seeks to define the meaning of a corporate entity in terms of the personality of a person. Many metaphors used in the law, like CORPORATION IS A PERSON, are based on physical images which cross categorical boundaries for establishing the coherence of meaning on basis of nonobjectivist criteria. *Id.* at 67 ("[M]etaphors assert cross-categorical identities that do not exist objectively in reality."); *see also* Winter, *Bull Durham*, *supra* note 35, at 657-64 (illustrating how the antifoundationalist arguments of Stanley Fish are committed to an objectivist view of rationality that fails to take into account the multiplicity of meanings that are made possible through human imagination). I thus use the word *metaphor* in a special sense, understood by cognitive theorists like Lakoff and Johnson, which highlights the experiential nature of metaphoric reasoning. *See* LAKOFF & JOHNSON, *supra* note 248, at 3-32; JOHNSON, BODY IN THE MIND, *supra* note 45, at 15. Metaphor is thus the means by which we understand what we experience. We think, act, and even dream by using metaphors. A metaphor relates, or "maps," knowledge about the domain of one thing to the domain of something else.

251. As Michael Boudin has written about antitrust law: "After case citations and market share figures have faded from memory, the judge or lawyer who has read an antitrust opinion is likely to remember, if anything, a metaphor." Boudin, *supra* note 34, at 395. The same can be said of the case law of group boycotts. Metaphoric images are utilized unconsciously and automatically in the human reasoning process. Metaphors, mental images and metonymy allow us to communicate with each other and to categorize diverse physical, social and historical phenomena. "Metaphor resides in thought, not just words." LAKOFF & TURNER, *supra* note 45, at 2.

252. Metaphors perform a "*constitutive* role" in structuring our experience. As Gary Peller has posited, "our experience of the world is constructed through the adoption of particular metaphors and the exclusion of other metaphors for organizing perception and communication." Peller, *supra* note 36, at 1175; *see also* Coombe, *supra* note 38, at 91

tually by evoking *images* that become the logical determinants of comprehension and communication.[253]

It is important to emphasize at the outset that the study of metaphor seeks to reveal two basic aspects of human understanding. First, metaphor limits and constrains legal thought by relating judicial understanding about one kind of thing or experience in terms of another.[254] Metaphors are by their very nature, only partial representations of reality. The partiality of metaphoric reasoning can lead to distortion and enable misunderstanding.[255] In the case law of boycotts, metaphors have constrained the legal meaning of boycotts because judges have tended to confuse metaphors with real world events; they have used words literally in their decisions when the context implies that they should have understood the words metaphorically, and they have failed to appreciate the partiality of the imagined metaphors they use for comprehending aspects of complex events.[256]

Second, while the basic conceptual metaphors used in the case law of boycotts have the capacity to change their meaning over time,[257] a number of basic experiential metaphors derived from

("Metaphor is one way (and an incredibly powerful way) in which people socially create new meanings within restricted fields of representation . . . ."). Steven L. Winter has noted how the word "metaphor" is itself a metaphor derived from physical experience. The word metaphor is derived from the Greek words *pherein*, "to carry," and *meta*, "over." Winter, *The Metaphor of Standing*, *supra* note 35, at 1384 n.69 (citing and quoting TERRANCE HAWKES, METAPHOR 1 (1972)). Metaphors project or "carry over" meaning across different domains of experience by structuring our understanding about the world, and in doing so, metaphors can bring about paradigmatic shifts in legal theory. *See* Winter, *Transcendental Nonsense*, *supra* note 35, at 1162, 1199.

253. *See* LAKOFF & TURNER, *supra* note 45, at 6. For example, the metaphor SETTING SUN conveys knowledge about death and old age by evoking the image of twilight at day's end. The basic metaphors LIFETIME IS A DAY or DEATH IS GOING TO A FINAL DESTINATION work in conjunction with the image of "setting sun."

254. *See* LAKOFF & JOHNSON, *supra* note 248, at 5.

255. Of course, not all metaphors in the law distort legal interpretation. Some metaphors can improve judicial understanding by translating abstract legal concepts into concrete and understandable notions about real world phenomena. For example, Michael Boudin notes that the metaphor created for the antitrust concept of "tying" has worked to capture the literal language of Section 3 of the Clayton Antitrust Act. Boudin, *supra* note 35, at 403.

256. The more general point is that "[a]ll human practices . . . are the creation of people who are themselves shaped by historically specific structures of meaning that both constrain and enable practice." Coombe, *supra* note 38, at 121.

257. It is generally thought that "dead metaphors" are no longer real metaphors in that they have been widely accepted in ordinary conversational language. *See* Boudin, *supra* note 35, at 404 (illustrating how the BOTTLENECK metaphor in antitrust opinions dealing with monopolization and attempts to monopolize has exhausted itself). The Dead Metaphor Theory is based on what George Lakoff and Mark Turner see as a basic misconception of Literal Meaning Theory: the notion "that those things in our cognition that are most alive and most active are those that are conscious." LAKOFF & TURNER, *supra*

knowledge about our bodies and how our bodies interact in the physical world have been used over and over again in the law of boycotts. My claim is that the legal categories and doctrinal distinctions used in the boycott cases have developed from recurring body metaphors and image schemata[258] to make sense of real world phenomena.[259] In the following part, I will attempt to show how these elemental metaphors have operated to create different metaphoric domains or idealized cognitive models (ICMs)[260] for making sense of the economic and political practices of different groups in society.

A. *The Metaphoric Origins of Boycott Doctrine.*

The metaphoric origins of boycott doctrine in America can be traced to *State v. Glidden*,[261] the first reported decision to use the word boycott. In *Glidden*, a labor union sought to compel a non-union publishing company in Connecticut to hire only union workers. In its effort to unionize the firm, union sympathizers distributed leaflets to the public in an effort to induce the public not to patronize the firm. The leaflets carried slogans such as, "A word to the wise is

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note 45, at 129. Metaphors "that are most alive and most deeply entrenched, efficient, and powerful are those that are so automatic as to be unconscious and effortless." *Id.* at 130. This does not mean that culture and tradition are irrelevant to meaning. Metaphoric understandings of the physical and social world take on new meaning as each generation imaginatively reproduces its own culture and tradition. *See* Steven L. Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963, 998-1001 (1991) (discussing the concept of "slippage.").

258. The concept of an *image schema* has been developed by cognitive theorist to describe the imaginative devices we use to organize our thoughts in patterns and relations in order to comprehend and reason about complex data. *See* JOHNSON, BODY IN THE MIND, *supra* note 45, at 28-29. Because image schemata are linked to our experience, they give rise to what cognitive theorists call "prototypical" effects, for example, recurring or corresponding relations between the culturally shared experiences of individuals in a given society and the cognitive process. *See* Winter, *Transcendental Nonsense*, *supra* note 35, at 1137-42 (describing the neurophysiology of color perception of different cultures and languages).

259. These images and metaphors are what Gary Peller has called the "codes of 'common sense'" of cultural experience that enable legal interpreters to organize perception and engage in legal communication. *See* Peller, *supra* note 36, at 1155.

260. *Idealized cognitive model* (ICM) is a technical term used in cognitive theory to describe detailed imaginative narratives drawn from human experiences to organize complex knowledge about the world. *See, e.g.*, LAKOFF, WOMEN, FIRE, supra note 45, at 68-76. ICM's are like stock stories, folk theories, or image-schemata upon which we intuitively rely to organize and categorize our knowledge about the diverse inputs of daily life. Winter, *The Cognitive Dimension*, *supra* note 35, at 2232-34. ICM's share certain core features. All ICM's are: (1) grounded in direct physical or cultural experience; (2) highly generalized to capture some, but not all, of a covered fact situation; (3) unconscious or intuitive structures of thought that operate automatically in the thought process; and (4) neither determinant nor objective characterizations of reality. *Id.* at 2234.

261. 8 A. 890 (Conn. 1887) (Carpenter, J.).

sufficient, boycott the Journal and Courier!"[262] The leaflets were dropped on the streets by two persons who walked together on public sidewalks.[263]

In an opinion ripe with colorful mental images and rich metaphors the Connecticut Supreme Court, in an opinion written by Justice Carpenter, upheld the injunction and the criminal conspiracy charges. In considering whether the defendants had a legal right to act as they did, Justice Carpenter observed that "[t]he bare assertion of such a right is startling."[264] As he explained:

> If the defendants have the right which they claim, then all business enterprises are alike subject to their dictation. No one is safe in engaging in business, for no one knows whether his business affairs are to be directed by intelligence or ignorance,—whether law and justice will protect the business, or brute force, regardless of law, will control it.... If a large body of irresponsible men demand and receive power outside of law, over and above law, it is not to be expected that they will be satisfied with a moderate and reasonable use of it. All history proves that abuses and excesses are inevitable. The exercise of irresponsible power by men, like the taste of human blood by tigers, creates an unappeasable appetite for more.[265]

In Justice Carpenter's mind, the defendants had acted irresponsibly because they had allowed their collective desire for more (that is, higher wages) to become an animal-like passion. This passion was seen to be analogous to that of a wild tiger, thirsting for human blood. In *Glidden*, the mental image of a wild tiger thus structured the meaning the court attributed to the extralegal collective action of the defendants. It was the metaphoric image of animal passion and the brute force of a tiger which generated the court's understanding of the workers' concerted activities. This can be explained by the existence of a certain sense of the order of things developed from proverbs based on the Great Chain of Being metaphor.[266]

1. *The Great Chain of Being Metaphor.* As George Lakoff and Mark Turner have explained, the "Great Chain of Being is a cultural model that concerns kinds of beings and their properties and places them on a vertical scale with 'higher' beings and properties above 'lower' beings and properties."[267] Our common sense understanding

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262. *Id.* at 898.

263. *Id.*

264. *Id.* at 894.

265. *Id.*

266. *See* LAKOFF & TURNER, *supra* note 45, at 166-69.

267. *Id.* at 166. The "Great Chain of Being" is a cultural model utilized in proverbs and story telling since ancient times for understanding "mans place in the universe." *Id.* Great Chain of Being "[p]roverbs concern people, though they often look superficially as if

of the nature of things allows us to think of humans as "higher-order beings" than animals.[268] What makes the Great Chain of Being metaphoric is that we tend to rely upon our knowledge of the generic attributes and behavior of lower-order beings to comprehend specific attributes and behaviors of people.[269] We thus characterize our knowledge about specific people or groups by making comparisons based on our understanding of the generic attributes and behavior of other beings.

For example, in comparing the worker boycott in *Glidden* to a blood-thirsty tiger, the Court was able to associate the boycott with a lower-order being and thus place it on a level with animals known to have bestial instincts and animal drives. The lower-level attributes of a wild tiger thus became attributed to the workers' boycott and consequently helped legitimate the need for the court's injunction. What defined the boycott were the attributes and behaviors of a lower-level being.

In *Glidden*, the Great Chain of Being metaphor permitted the court to translate boycott activity into a concrete and vivid image of a tiger, thereby shaping the meaning of the activity by placing the boycott in the order of things. It was the Great Chain of Being metaphor that permitted the court to see the workers' boycott as "a combination of many [seeking] to impoverish and oppress a few."[270] The workers had utilized a "dangerous instrumentality"[271] because they had acted out in concert bestial instincts and animal drives. The workers' boycott in *Glidden* was dangerous because the court associated the defendant's contemplated activity with a beast on the lower level of the chain of being. Persuasive as rhetoric, the Great Chain of Being metaphor and the image of a blood-thirsty tiger were concealed forms of argument.

In *Glidden*, the plausibility of the Great Chain of Being metaphor depended partly upon the validity of the analogy which the court drew between boycott activities and the attributes of a wild and dangerous animal. Wild tigers are understood to be aggressive

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they concern other things-cows, frogs, peppers, knives, charcoal. We understand proverbs as offering us ways of comprehending the complex faculties of human beings in terms of these other things." *Id.* The English proverb "All bark and no bite," for example, serves to arouse our commonplace understanding about dogs to convey a specific understanding about certain people. *Id.* at 180.

268. *Id.*

269. *Id.* at 170-72. "By linking the Great Chain with the GENERIC IS SPECIFIC metaphor, [the Great Chain metaphor] allows us to comprehend general human character traits in terms of well-understood nonhuman attributes; and, conversely, it allows us to comprehend less well-understood aspects of the nature of animals and objects in terms of better-understood human characteristics." *Id.* at 172.

270. State v. Glidden, 8 A. 890, 895 (Conn. 1887).

271. *Id.* at 897.

and dangerous; we thus comprehend boycott phenomena by making an analogy to the attributes of a wild animal. When the *Glidden* court attributed the characteristics of lower-level beings to people, the court invoked the metaphoric image of the animal for understanding something about the nature of a group boycott. The mechanism by which this analogy works is the Great Chain of Being metaphor: behavior of a higher-order behavior is understood in terms of dangerous lower-level instinct. This is why it might seem plausible to understand a boycott in terms of the traits of a wild tiger.

Something more than a simple analogy which compared the properties of boycotts to the traits of wild tigers was in operation in *Glidden*. As George Lakoff and Mark Turner have argued, the "real metaphoric work" of the Great Chain of Being metaphor "concerns not the properties in the source and target schema but rather the structures of those schemas."[272] When the court understood the nature of the boycott in terms of the character of a wild tiger, the court was associating a relation between tigers and animal-like behavior; that relation was then used to map the court's understanding of the relation between the worker boycott and a propensity for violence. In other words, Justice Carpenter's image of a wild tiger focused on the instinctual propensity that tigers have for violence; that trait was then used to establish the appropriateness of relating the boycott with ideas of violence. As Justice Carpenter put it, "[t]he exercise of irresponsible power by men like the taste of human blood by tigers, creates an unappeasable appetite for more." [273]

In *Glidden*, the Great Chain of Being Metaphor concerned not

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272. LAKOFF & TURNER, *supra* note 45, at 196. Consider, for example, ancient folk tales based on the idea that "Achilles is a lion." Lakoff and Turner observe that folk tales based on the assertion that Achilles is a lion merely assert that Achilles is courageous:

> First, independent of the metaphor involving Achilles and the lion, the metaphorical schema evoked by the word "lion" makes use of a conventionalized instance of the GREAT CHAIN METAPHOR, through which we understand nonhuman attributes in terms of human character traits. We thus begin with a conventional understanding of a certain behavior of the lion in terms of the courageous behavior of a human.
>
> Second, the expression "Achilles is a lion" makes use of the GREAT CHAIN METAPHOR going in the opposite direction, inviting us to understand human behavior in terms of animal behavior .... The two processes are converses of one another, which is why they cancel each other out. This is why it seems plausible to say "Achilles is a lion" does no more than say that Achilles is courageous.

Id. at 195-96. The "real metaphoric work" of the GREAT CHAIN metaphor is created by understanding "the *steadfastness* of Achilles' courage in terms of the imagined *rigidity* of the lion's animal instinct." *Id.* at 196. The metaphor thus concerns not the properties of the source and target domains (Achilles and the lion), but rather the structures of those schemata.

273. *Glidden*, 8 A. at 894.

the traits of tigers and boycotts as such, but rather the structure of the images of irresponsible men and tigers thirsting for human blood. It is the property of bestial and instinctual behavior which structured the relation and gave meaning to tigers and boycotts, on the one hand, and murder and violence, on the other. In the court's understanding of boycott, the idea of violence and murder was highlighted as the distinguishing characteristic of boycott. The instinctual propensity for violence was marked as being a special characteristic of tigers and boycotts. The real power of the Great Chain of Being metaphor is that it invites us to conceptually understand one thing in terms of the essential attributes of another.[274]

2. *The Story of Captain Boycott.* Recognizing that the "word [boycott] is not easily defined,"[275] Justice Carpenter retold the story of Captain Boycott. His retelling of the story set the stage for the court's startling conclusion that "boycotts originally signified violence, if not murder."[276] The clues for uncovering the metaphoric sway of the court's opinion can be discovered by considering the descriptive phrases Justice Carpenter used in his telling of the story about Captain Boycott:

> Captain Boycott was an Englishman, an agent of Lord Earne, and a farmer of Lord Mark, in the *wild* and beautiful district of Connemara. In his capacity as agent he had served notices upon Lord Earne's tenants, and *the tenantry suddenly retaliated in a most unexpected way by, in the language of schools and society, sending Captain Boycott to Coventry in a very thorough manner.* The population of the region for miles round resolved not to have anything to do with hem, *and as far as they could prevent it, not to allow any one else to have anything to do with him. His life appeared to be in danger—he had to claim police protection.* His servants fled from him as servants flee from their masters in some plague-stricken Italian city. He and his wife had to work in their own fields themselves, in most unpleasant imitation of theocritan shepherds and shepherdesses, and play out their grim eclogue in their deserted fields with the shadows of the armed constabulary ever at their heels. The Orangemen of the north heard of Captain Boycott and his sufferings, and the way in which he was holding his ground, and they organized assistance and sent him down armed laborers from Ulster. *To prevent civil war the authorities had to send a force of soldiers and police to Lough Mark,* and Captain Boycott's harvests were brought in and his potatoes dug by the armed Ulster laborers, guarded always by the little army.[277]

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274. *See* LAKOFF & TURNER, *supra* note 45, at 196-99.

275. *Glidden*, 8 A. at 896.

276. *Id.* at 897.

277. *Id.* at 896-97 (quoting the story as narrated by Mr. Justin McCarthy, "an Irish gentleman of learning and ability," who, according to Judge Carpenter, was recognized as

Tigers are instinctively aggressive and violent; they live in wild jungles and they are known to act suddenly. Thus, Justice Carpenter began his telling by emphasizing that the District of Connemara was "wild and beautiful."[278] He states that the poor Irish tenants who were evicted by Captain Boycott from his estate "suddenly retaliated in a most unexpected way."[279] The tenants retaliated in the "language of schools and society, sending Captain Boycott in a very thorough manner."[280] Captain boycott and his family were depicted as helpless victims; their "[lives] appeared to be in danger" and, according to Justice Carpenter, soldiers and police had to be sent in order to "prevent civil war."[281] In the wild district of Connemara, boycotters suddenly retaliate like wild tigers, forcing helpless property owner's off their land. The picture invoked is one that stigmatizes the tenant boycott as uncivilized and animal-like.

In Justice Carpenter's mind, the instinctual animal-like nature of wild tigers was linked conceptually with boycotts, an association that made it possible to understand the story about Captain boycott and all boycotts as signifying violence and murder. Irresponsible men, hungry for power, have an "unappeasable appetite for more," just as a wild tiger, having tasted "human blood," desires more.[282] As Justice Carpenter put it, "[i]f this is a correct picture the thing we call a boycott originally signified violence, if not murder."[283] If boy-

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"good authority") (emphasis added).

278. *Id.* at 896.

279. *Id.*

280. *Id.*

281. *Id.* at 897.

282. *Id.* at 896. Had Justice Carpenter relied upon a different metaphoric image for understanding the nature of the boycott, for example, the image of a lion, a different story might have been told. Because our common folk understanding of the nature of lions is invested with different human traits (lions are normally thought to be courageous and noble, *see* LAKOFF & TURNER, *supra* note 45, at 194), the Great Chain metaphor might have led Justice Carpenter to a different understanding about the nature of boycotts. Boycotts might be seen as courageous and noble rather than wild and violent. The court could have understood the boycott as an example of worker solidarity and political struggle, a story about how the courageous effort of a group of poor farm laborers engaged in political and economic struggle for mutual aid and self-protection. The boycott against Captain Boycott, for example, may have been a justifiable response to redress a grave injustice, a transformative act aimed at changing the economic system that favored the landlord class, an event in an ongoing political struggle that was transforming fundamental social and economic institutions in England.

283. *Glidden*, 8 A. at 897. In choosing to focus on the coercive elements of the workers' boycott, the court's understanding of the meaning of boycott in *Glidden* was characteristic of the way most courts understood labor boycotts at the turn of the century. An Ohio court in 1897, for example, cited Justice Carpenter's opinion to support the view that even otherwise peaceful labor boycotting represented a coercive combination that extended beyond "the limits of law and order." Consolidated Steel & Wire Co. v. Murray, 80 F. 811, 819-20 (N.D. Ohio 1897). While it was recognized that workers had the right indi-

cotts are like a wild tiger thirsting for human blood, then boycotts are like the violence of murder.[284]

Justice Carpenter's understanding of the boycott in *Glidden* may seem strange today because he attributed to the boycott traits which may now seem wildly out of place.[285] Wild tigers and murder are no longer the images used today to describe the legal meaning of worker boycotts in the context of a legal regime that has granted labor the basic legal rights necessary for self-organization and collective bargaining. When *Glidden* is viewed within its historical and cultural context, the metaphors and mental images invoked by Justice Carpenter seem plausible. By the late 1880's, the time period in

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vidually to engage in peaceful assemblies to persuade others not to enter into a relation with the employer, it was, also, recognized that "persuasion, with the hootings of a mob and deeds of violence as auxiliaries, is not peaceable persuasion." *Id.* at 828. Labor boycotts were thus associated with images and meanings which were associated with ideas of "illegality," "disorder," "insurgency" or "hooting mobs." Hence, "[s]ome judges denounced boycotters' motives as 'wicked,' 'insolent and truculent.' Others described their behavior as 'cruel, heartless and unrelenting,' or showing 'wantonness and malice' with the 'grossest tyranny.'" Hurvitz, *supra* note 13, at 311 (quoting People v. Wilzig, 4 N.Y. Crim. 403, 426-28 (N.Y. Cty. Ct. of Oyer and Terminer 1886)). As one court boldly proclaimed: "[i]ntimidation and coercion are essential elements of a [labor] boycott." Gray v. Building Trades Council, 97 N.W. 663, 666 (Minn. 1903); *see also* Casey v. Cincinnati Typographical Union No. 3, 45 F. 135, 143 (6th Cir. 1891) (The "word 'boycott' is in itself a threat."); Toledo A. A. & N.M. Ry. Co. v. Pennsylvania Co., 54 F. 730, 738 (6th Cir. 1893) ("As usually understood, a boycott is a combination of many to cause a loss . . . by coercing others . . . ."); Oxley Stove Co. v. Coopers' Int'l Union of N. Am., 72 F. 695, 698-99 (D. Kansas 1896) (noting that the term boycott carries with it a menace, as acquired in popular vocabulary). *See generally* Dianne Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts 1894-1921*, 37 BUFF. L. REV. 1 (1989).

284. Justice Carpenter's decision in *Glidden* was thus structured by a *basic* metaphor that associated a labor boycott with murder or death. Cognitive theorists have discovered that there are a small number of basic metaphors that are part of our cultural knowledge which allow us to communicate with each other, and to engage in fundamental cognitive processes. *See* LAKOFF & TURNER, *supra* note 45, at 1-56. Basic metaphors are cognitive in nature, and are, thus, more than mere linguistic expressions in communication. *Id.* at 50. For example, LIFE IS A JOURNEY, DEATH IS A DEPARTURE, and A LIFETIME IS A DAY are some of the basic conceptual metaphors used to comprehend aging and death. *Id.* at 51-56.

285. The cognitive link between the threatened boycott and the legal meaning attributed to it by the *Glidden* court could not be proved objectively; Justice Carpenter's description of the boycott was not based on anything that could be established in objective reality. This does not mean that metaphoric reasoning in *Glidden* was completely free and unconstrained. Nor does this mean that the court's legal analysis was arbitrary, or "mushy," in the sense that it lacked a logical structure. Though wide-ranging metaphorical interpretations in law are possible, they are neither arbitrary nor groundless. The plausibility of the metaphoric reasoning depends on the degree to which such reasoning appears logical and objective. The coherence of metaphoric reasoning depends on the extent to which metaphoric reasoning is *grounded* in non-metaphoric experiential understandings, such as metaphoric reasoning grounded in understandings about basic physical and culturally defined experiences. *See* LAKOFF & TURNER, *supra* note 45, at 113-14.

which *Glidden* was decided, both labor and mob disturbances and violence had reached epidemic proportions.[286] By the end of the 1880's, "[l]abor and capital battled with a ferocity seldom equaled in the annuals of labor warfare."[287] When *Glidden* is read within its own cultural context, it may not be all that surprising that the courts of that period could find that even a peaceful union boycott presented a threat not unlike that of a blood-thirsty hungry tiger.[288]

While cultural coloration helps to explain why certain metaphors are favored in legal opinions such as *Glidden*,[289] contextual coloration does not, and can not, explain the real power of metaphor

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286. American society during this era was on the edge of civil anarchy: "Many thousands of workers lived in habitations that were filthy, badly crowded, and poorly ventilated. Tragic proof of such conditions was furnished by the high mortality rate from the dreadful epidemics that swept through the reeking slums of the large cities during the post-Civil War era." ALMONT LINDSEY, THE PULLMAN STRIKE 2 (1942) (citing ALLAN NEVINS, THE EMERGENCE OF MODERN AMERICA 1865-1878 at 319-20 (1932)); SIXTH ANNUAL REPORT OF THE BUREAU OF STATISTICS OF LABOR 503 (1875); SAMUEL P. ORTH, THE ARMIES OF LABOR 66 (1919). As John Swinton, journalist and author, wrote of the events in 1894, seven years after the Court's decision in *Glidden*:

> Do we hear cries of distress from a million idle people? The wail of hunger from men, women and children? The groans of anguish from the multitudes who suffer in many a great city? Do we see hordes of men, mingled with women, looking for work by which they may earn their daily bread? Does strife rage between the workers and the capitalists? Do we hear the tramp of a hundred thousand soldiers, bearing guns, with which they are ready to shoot their own countrymen? Do we hear Grover Cleveland ordering his generals to whet their swords for blood? Do we see dread spectacles of human degradation all over the coal area of our country? Have we seen a half million workers on the strike in a single month of the year 1894? . . . Who can tell the weird and ghastly story of the last quarter of the nineteenth century?

LINDSEY, *supra*, at 1 (quoting JOHN SWINTON, STRIKING FOR LIFE 297 (American Manufacturing and Publishing Co., 1894)).

287. LINDSEY, *supra* note 286, at 16. For example, by the end of the decade the nation had experienced the emotionally and politically wrenching events of the Haymarket riot, the Homestead strike, and the Pullman coal strike.

288. The images of violence are vividly described in many early labor picketing and boycott decisions. *See* Avery, *supra* note 283.

289. I do not mean to suggest that there is an objective or a true cultural meaning of boycott which is independent of human understanding and imagination.

The literal meaning theory of language postulates that "[i]f an expression of a language is (1) conventional and ordinary, then it is also (2) semantically autonomous and (3) capable of making reference to objective reality." LAKOFF & TURNER, *supra* note 45, at 114. The general thrust of this study is that the literal meaning theory of language is false; language is not a mirror of objective autonomous reality, because the very notion of truth and falsity is relative to conceptual frameworks which are the product of human imagination. *Id.* at 113-28 (discussing the "grounding hypothesis" of cognitive theory and criticizing the "literal meaning theory" of objective linguistic understandings of language). Cognitive theorists have shown that language does not operate as a mirror of objective reality, because many, if not all, words we use in language are "fundamentally and ineradicably metaphoric." *Id.* at 116.

in legal opinions. This is because metaphors transcend cultural contexts. For example, the Great Chain of Being metaphor employed in *Glidden*, has its counterpart in modern boycott legislation that has justified prohibitions against secondary labor boycotts by comparing such activity to lower-level organisms of a "disease" or "cancer."[290] Thus, secondary boycotts by labor groups are proscribed today because they are thought to spread the effects of a labor dispute to healthy parts of the economy.

While judges no longer invoke the same metaphoric images of boycotts in their opinions today, they do rely upon the same basic conceptual metaphors, often unconsciously, in comprehending complex phenomena of boycotts.[291] The law of boycotts therefore cannot be simply explained as the product of different cultural attitudes about the nature of boycotts. Metaphors used in legal descriptions of boycotts are affected by cultural coloration, but basic conceptual metaphors which shape judicial understandings about boycotts have remained relatively constant over time.[292]

3. *The Role of Metaphor: "The Body In the Mind."*[293] The conventional understanding of boycott in the law seeks to define the word as a term of art that has a particular technical meaning derived from cultural practices as described in the reported legal decisions. The study of the use of metaphor attempts to uncover the concealed logic that shapes legal doctrine by identifying the ruling metaphors of legal doctrine. The tiger analogy in *Glidden*, for example, relied upon the logic of the Great Chain of Being metaphor to attribute the characteristics of a wild beast to a workers' boycott. The use of metaphor in *Glidden* provided more than just a linguistic aid for describing a cultural practice; metaphor created the cognitive structure by which the court made sense of the boycott. In boycott cases, metaphors serve a basic conceptual function.

As cognitive theorists have demonstrated, the key to uncovering the meaning of cognitive metaphors is the human body, and es-

290. *See infra* notes 373-75 and accompanying text; *see also* Lesnick, *supra* note 182.

291. The basic conceptual metaphors utilized in boycott case law are based on experiential knowledge derived from an understanding of basic bodily functions. For this reason, basic boycott metaphors remain relatively constant over time.

292. Thus, while the metaphors now used to describe boycotts have changed dramatically since the early common law, the underlying *conceptual* metaphors used by judges to link their understanding and experiences of the world to gain insight and meaning of unknown events have not changed. Conceptual metaphors are cognitive in nature in the sense that they serve to structure the process of cognitive thought utilized to derive meaning about reality. Conceptual metaphors are conceptual mappings. They are a matter of thought, not merely language. *See* LAKOFF & TURNER, *supra* note 45, at 50-51, 107-09, 111, 137-38.

293. JOHNSON, BODY IN THE MIND, *supra* note 45.

pecially understandings that emerge from our embodied experience.[294] For example, by the late nineteenth century, judges advanced the idea that industrial organizations were like people, entitled to "liberties" which the law would protect under a free trade policy.[295] In talking about business entities as people, common law judges invoked ontological metaphors that personified objects as people.[296] The personification of business entities enabled judges to conclude that corporations and private business entities, like people, had legally protected liberties that were constitutionally protected by the prevailing notions of substantive due process.[297]

The metaphor CORPORATION IS A PERSON thus became a rich and thickly textured imaginative device that enabled judges to socially construct a law of business corporations based on the powerfully simple idea that the corporation is an entity, having rights like a person.[298] In talking about business entities as people, judges invoked ontological metaphors that personified corporations as enti-

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294. *Id.* at xvi. There has been a recent interest in understanding how the idea of "body" structures the law's discourse. Alan Hyde, for example, has undertaken the task of describing how a metaphoric understanding of the human body has influenced legal discourse in such diverse legal fields as property, contract, labor and criminal law. Alan Hyde, Bodies in the Eyes of The Law (unpublished manuscript, on file with author, 1993).

295. *See* Minda, *Common Law*, *supra* note 13, at 146-47.

296. Ontological metaphors enable us to view "events, activities, emotions, ideas, etc., as entities and substances." LAKOFF & JOHNSON, *supra* note 248, at 25. Ontological metaphors thus permit us to understand aspects of reality as an "entity" which "allows us to refer to it, quantify it, identify a particular aspect of it, see it as a cause .... Ontological metaphors like this are necessary for even attempting to deal rationally with our experiences." *Id.* at 26. While ontological metaphors might seem "unexceptional" in legal analysis, it is important to note that they are "quite significant both in the kind of vision law enabled as well as the kind of vision law excluded." Schlag, *supra* note 36, at 28.

297. In short, personification enabled judges to create detailed and idealized cognitive models of law. *See* Winter, *Transcendental Nonsense*, *supra* note 35, at 1207-24.

298. Morton Horwitz has shown how the conception of "corporate personality" came to dominate legal thinking at the turn of the century. *See* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 111-114 (1992); Morton Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985) [hereinafter Horwitz, *Santa Clara*]. Business combinations, organized as a single entity, were generally not perceived by judges as inherently coercive groups because they created relatively silent, less visible pressures of inducement and promise. Business conspiracies and boycotts were usually covert, involving only a handful of key individuals. Business organizations, structured as they were by charter and state law, exhibited to the world an orderly, legal appearance that could hide the reality of violent action. It may be the perception of the corporate organization as a legal person, and labor unions as potentially mob-like collectivities, explains the attitude of most common law judges about labor and business boycotts in the late nineteenth century. The image of the corporation as a person, restrained by law and reason, and the contrary image of the labor union as a political association of rowdy and passionate workers may explain why judges initially applied a double standard to labor and business boycotts.

ties having a particular location.[299] If a corporation were like a person,[300] then it would be possible to understand how such entities might have a presence in a particular location or a "will" capable of rational reason and capable of being coerced by force.[301]

In the *Gompers* case, the metaphor CORPORATION IS A PERSON worked silently to enable the court to see the workers' boycott as constituting a physical interaction between a group and a fictional person, the Buck's Stove & Range Co. The metaphor CORPORATION IS A PERSON allowed Justice Lamar to conclude that the *Gompers'* boycott constituted a power that had been "used against one." In viewing the Bucks Stove & Range Co. as a person, the court reasoned that the company was a helpless individual who had to yield to superior force of many. The multitude of members involved in the *Gompers* boycott were thus understood as a *force* being directed against the body of a single person. This enabled the court to ignore the fact that the Bucks Stove & Range Company was itself an organization with considerable power to counter the workers' boycott. For example, James Van Cleve, the president of the Bucks Stove & Range Co., was also president of the National Association of Manufacturers, an organization of small businesses that represented the interests of other businessmen devoted to the cause of defeating organized labor.[302] The Bucks Stove & Range Co. thus had access to powerful allies that might have been more than sufficient

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299. Winter, *Transcendental Nonsense*, *supra* note 35, at 1166.

300. As Steven L. Winter has noted, the word "corporate" is derived from the Latin *corporatus*, meaning "formed into a body." Winter, *The Metaphor of Standing*, *supra* note 35, at 1421.

By the turn of the century, corporations, like real persons, could sue and be sued. For federal court diversity purposes, a corporation counted as one person. Corporations were regarded as possessing and capable of exercising freedom of action. The result was the rise, by the end of the nineteenth century, of "the modern business corporation, organized to pursue private ends for individual gains." MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860 at 111 (1977) [hereinafter HORWITZ, TRANSFORMATION 1780-1860]. The spirit of individualism in the late nineteenth century encouraged the notion that a corporation was like a person. As a fictional person, the corporation was accorded the legal recognition accorded individuals but not groups. Also important, was the fact that the act of incorporation was originally a matter of royal prerogative. Since the authority of the King ultimately derived from God, only the sovereign could "create" a "legal person." Other groups and private associations could not claim to be created by the sovereign, and thus, they lacked legal recognition as a "legal person." Since the law did not recognize groups but only individuals, private associations lacked legal rights as entities.

301. HORWITZ, TRANSFORMATION, 1780-1860, *supra* note 300, at 111. The metaphoric language of the corporation as a person has come to animate the new economic theory of the firm in terms of contracting parties and transaction costs. *See* William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 407-08 (1989).

302. LIVESAY, *supra* note 53, at 145-47.

to countervail whatever power the union might have asserted with its boycott. Moreover, it was quite possible that the Bucks Stove & Range Co. could persuade its employees and customers to ignore the boycott. In treating Bucks Stove & Range Co. as if it were a single person, however, the court was able to see the boycott as a one-sided struggle of the many against one. The rhetorical sway of the metaphor was powerful because the metaphor CORPORATION IS A PERSON concealed the real power dynamic involved in the labor dispute.

4. *The Basic Image Schemata of Force.* In the early labor boycott cases, judges employed different experiential understandings of force based on what cognitive theorists know as *image schemata*.[303] An image schema is a "means of structuring particular experiences schematically, so as to give order and connectedness to our perceptions and conceptions."[304] An image schema creates the recurrent pattern and order that structures our actions, perceptions, and conceptions.[305] "Image schematas [*sic*] *are* those *recurring structures of, or in, our perceptual interactions, bodily experiences, and cognitive*

303. An image schema is an "abstract pattern[] in our experience and understanding that [is] not propositional in any of the standard senses of that term, and yet [it is] central to meaning and to the inferences we make." JOHNSON, BODY IN THE MIND, supra note 45, at 2. For example, image schemata provide us with general information for organizing our understanding of the world. Hence, our understanding of ideas such as container, path, cycle, link, balance, etc., allow us to make sense of relations among diverse experiences. *Id.* at 208. Steven L. Winter provides a helpful example of the *source-path-goal* schema basic to human cognition:

> Early in life, we discover that we can obtain desired objects by moving toward them through space. We imagine a *source-path-goal* structure to this experience. We then use this experience and its projected structure to elaborate all kinds of more abstract purposive activities. Thus, when we complete fifty percent of an intellectual task, like writing an article, for example, we say that we are *at the midpoint in our efforts* or that we are *halfway there*. As we near the end of our writing project, we see *the light at the end of the tunnel*. And, when we finish that article, we say that we have achieved our *goal*, or that we have completed what we *set out* to do.

Winter, *Transcendental Nonsense*, *supra* note 35, at 1132. The *source-path-goal* schema also motivates a "systematic set of *journey* metaphors that are elaborated to conceptualize 'life.'" *Id.*

> Thus, we give our children an education to give them *a good start in life*. If they act out, we hope that it is *just a stage* (or something they are *going through*) and that they will *get over it*. As adults, we hope they won't be *burdened* or *saddled* with financial worries or ill health. We hope that they will *go far* in life. And we know that, as mortals, they will eventually *pass away*. Another example of the *Life is a Journey* metaphor is the familiar individualist *who marches to the beat of a different drummer*.

Id.

304. JOHNSON, BODY IN THE MIND, *supra* note 45, at 75.

305. *Id.* at 29.

operations."[306] The structure of many image schemata can be traced to fundamental embodied experiences that we all share in common.[307]

Early judicial notions about boycotts, in labor cases such as *Glidden* and *Gompers*, for example, can be analyzed in light of the most common image schemata of force and force relationships.[308] We experience physical force as action through external forces as our bodies interact with gravity, light, heat, wind and bodily pressure, and other physical objects and phenomena.[309] We associate these experiences in the process of making sense of the idea of force. The idea of boycott as force originates from basic bodily experiences such as the experience of being moved by a crowd of people. As the cognitive theorist Mark Johnson has explained, "When a crowd starts pushing, you are moved along a path you may not have chosen, by a

306. *Id.* at 79. Early in life we rely upon information about how our bodies interact in the physical world for processing and making sense of our worldly experiences. The image of verticality, for example, based on the bodily experience of "standing up," allows us to employ an up-down orientation for understanding quantity in vertical terms-more is up, and less is down. The schemata of in-out and parts-whole, based on the experience of body as containment, allows us to comprehend events, actions and activities in terms of a container. Events and actions are "objects" and activities are "substances" having a discrete entity like a container. *See* LAKOFF & JOHNSON, *supra* note 248, at 30-32. The image schema of balance, derived from knowledge of body movement, structures our basic notion of justice. Justice, symbolized by a scale, is understood as the maintenance of "proper balance." JOHNSON, BODY IN THE MIND, *supra* note 45, at 90. The balance schema structures the way we understand rational legal argument: "[L]awyers want the jury to *lean* in their favor, so they employ a confusing *mass* of facts, encourage *weighty* testimony, *pile* one argument upon another, add the *force* of acknowledged authorities, and summon the *weight* of the legal tradition." *Id.*

307. The key to understanding an important legal concept, like "standing . . . lies in an appreciation that the term . . . is a metaphor . . . motivated by our experience." Winter, *Standing*, *supra* note 35, at 1383. As Winter has shown, "[t]he metaphor of 'standing' is a myth" that has been shaped by mental images about how individuals assert rights: "One stands alone; one stands up; one stands apart; one stands out; one stands head and shoulders above the crowd." *Id.* at 1387. Accordingly, the legal concept of standing has come to embody the individualistic qualities modeled by the physical experience of "standing." Thus, the images and values of "individualism" define the contours and requirements of the law of standing. What has been obscured by the metaphor of standing, however, is the reality that "individuals exist only as part of groups and larger communities of interest" and our "ability to think about how best to protect and effectuate those interests in an interdependent world." *Id.*

This is the power of metaphor. As Steven Winter explains: "The power of a metaphor is that it colors and controls our subsequent thinking about its subject." *Id.* at 1383.

308. Mark Johnson has noted that there are at least seven common force image schemata that operate constantly in structuring our experience of force. *See* JOHNSON, BODY IN THE MIND, *supra* note 45, at 45. They are: *compulsion, blockage, counterforce, diversion, removal of restraint, enablement*, and *attraction. Id.* at 45-48.

309. *Id.* at 13. Johnson notes, "[t]hough we forget it so easily, the meaning of 'physical force' depends on publicly shared meaning structures that emerge from our *bodily experience* of force." *Id.*

force you seem unable to resist."[310] We learn from what happens in a crowd that the idea of force relates to basic bodily experiences such as *compulsion*,[311] *attraction*,[312] or *blockage*.[313]

For example, the meaning of boycott force might be drawn from the bodily experience of being swept away by a crowd of people moving in a particular direction. A fatal example of this occurred at a rock concert given by *The Who* in Cincinnati, Ohio in 1979. At that concert, the crowd trampled several concert goers to death.[314] The force of the boycott might also be understood in terms of moral and ethical persuasion or peer group pressure.[315] Responsible people can be swept along by the passion of the mob. Justice Holmes in *Moore v. Dempsey*,[316] argued that a mob-dominated atmosphere at a capital murder trial had the effect that "counsel, jury and judges *were swept to the fatal end by an irresistible wave of public passion.*"[317] Peer group pressure may also be the result of *social* force—compelling conformity with the group's objectives.[318]

In *Gompers*, the Court concluded that the target of the union's boycott was helpless to resist the force of the boycott. One way to understand the Court's conclusion is to comprehend force in terms of peer group pressure forcing someone to do something they would not otherwise do. For example, Justice Lamar's conclusion in *Gompers* that labor boycott slogans constituted "a force not inhering in the words themselves" can be seen as an example of several different image schemata of force. The multitude of members of the boycott was a force that could compel an individual to move along a path defined by the boycott. This meaning of force, as a concealed form of

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310. *Id.* at 45.

311. "Sometimes the force is irresistible, such as when the crowd gets completely out of control; other times the force can be counteracted, or modified. In such cases of compulsion, the force comes from somewhere, has a given magnitude, moves along a path, and has a direction." *Id.*

312. "A magnet draws a piece of steel toward itself, a vacuum cleaner pulls dirt into itself, and the earth pulls us back down when we jump. There is a common schematic structure of attraction shared by these experiences." *Id.* at 47.

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> When a baby learns to crawl, for instance, it encounters a wall that blocks its further progress in some direction. The baby must either stop, ceasing its exertion of force in the initial direction, or it must redirect its force. It can try to go over the obstacle, around it, or even through it, where there is sufficient power to do so. In such a case the child is learning part of the *meaning* of force and of forceful resistance in the most immediate way.

Id. at 45.

314. *See* Winter, *Transcendental Nonsense*, *supra* note 35, at 1219 n.399.

315. JOHNSON, BODY IN THE MIND, *supra* note 45, at 13-14.

316. 261 U.S. 86 (1923).

317. *Id.* at 91 (emphasis added).

318. *Id.*

argument, explains why the *Gompers* court interpreted the legal consequences of boycott publicity as "any other force whereby property is damaged."[319]

According to Justice Lamar, publicity of the *Gompers'* boycott was a "verbal act" which contained "a force not inhering in the words themselves."[320] In the Court's understanding, the "multitude[] of members" associated with the boycott became the means for "acquir[ing] vast power" that transformed the mere utterance of the words "Unfair" and "We Don't Patronize" into a force.[321] Boycott utterances such as those involved in *Gompers* were understood to be moving along a one-way directional path from a particular source to a particular target.

The image schema known as the *source-path-goal*[322] schema helps to explain why judges might be motivated to understand boycotts in a particular directional sense. Thus, "[w]hen you enter an unfamiliar dark room and bump into the end of a table, you are experiencing the interactional character of force,"[323] much in the same way Justice Lamar understood the force of the threatened boycott in *Gompers*. The source of the boycott, the starting point, was the dissemination of the boycott publicity. The goal or ending point was Bucks Stove & Range Co. The boycott publicity aimed at the company was the path connecting the source with the goal.

The *source-path-goal* schema helps to explain why Justice Lamar comprehended the force of boycott publicity in a directional sense, as moving toward and threatening an impact with the Bucks Stove & Range Co.[324] The multitude of boycotters seen through the lens of the image schema of *verticality* (more is up, less is down) enabled the Court in turn to gauge the degree of force threatened as vast power. Hence, the brute force of men demanding more can be seen as an "exercise of irresponsible power by men [for whom power], like the taste of human blood by tigers, creates an unap-

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319. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 439 (1911).

320. *Id.*

321. *Id.*

322. As Lakoff and Johnson have argued, one of the chief metaphors for argument and reasoning in our culture involves motion along a path toward some destination or conclusion. *See* LAKOFF & JOHNSON, *supra* note 248, at 56-57.

323. JOHNSON, BODY IN THE MIND, *supra* note 45, at 43.

324. In *Gompers*, the Court considered only one of several possible boycott effects. The request of boycotters to cease doing business with the Bucks Stove company might have provoked other actions. Some might have grasped the boycott publicity as a command for action, but others might have responded differently. The boycott might have had the effect of causing some to laugh at or to insult the boycotters. The point is that the causal effects of the boycott expression were not limited to the ones emphasized by the *Gompers* Court. The Court emphasized particular effects because the Court was predisposed to see the force of the boycott moving in a particular direction.

peasable appetite for more."[325]

In *Gompers* and *Glidden*, the courts appear to derive meaning about labor boycotts from knowledge about physical force, as movement along a continuous path, an entity acted upon by the force, and a potential trajectory the entity will traverse to reach a particular goal or objective.[326] The collectivity and the utterances of its members was the force, the entity acted upon were the individuals boycotting, and the trajectory was the compulsion of the appeal. In this way, the mental images of a boycott as a compulsory force help to explain the legal meaning of boycott. Reasoning with the aid of boycott image schemata serves to highlight an understanding of boycotts as something that sweeps people along, to compel them to do things they might not otherwise do.

In *Gompers*, the Court was thus able to conclude that publicity of a boycott involved a moral force, and in *Glidden* the boycott was understood as a physical force. The idea of force can thus be seen to be structured by the experience of physical as well as moral compulsion. Individuals can be forced to take action through physical compulsion, the meaning of which is linked to knowledge about how our bodies interact with external and internal physical forces.[327]

B. *The Chameleon-Like Quality of Boycott Metaphors At Early Common Law.*

While the history of labor boycott discourse has been dominated by images and meanings that are quickly associated with ideas of "illegality," "disorder," "insurgency," or the "mob,"[328] the legal discourse dominating boycotts organized by business groups involved a different vocabulary, one that projected dramatically different images about the meaning of boycotts. Following the famous English

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325. State v. Glidden, 8 A. 890, 894 (Conn. 1887).

326. *See* JOHNSON, BODY IN THE MIND, *supra* note 45, at 4.

327. *Id.* at 13-14. The meaning of compulsory force can also be understood, as it was in *Glidden*, as a social or ethical schema in which action is brought about through moral persuasion or group peer pressure. *Id.* at 14-15.

328. *See generally* Avery, *supra* note 283 (documenting early common law doctrines that assumed that labor union activities encouraged violence).

The image of the mob has always served to signify illegal and lawless action by groups. As Gary Peller has noted, "[p]robably the most powerful single image in the American experience is the image of the Southern lynch mob—there, in the common understanding, the mob, ruled by irrational racism against Blacks, bypassed the orderly, rational, and judicial means of dispensing justice in favor of the 'pragmatic and the expedient.'" *See* Gary Peller, *Reason and the Mob, the Politics of Representation*, 2 TIKKUN 28, 31 (1987). In the image of the Southern lynch mob, one can imagine how judges might understand the "law" of boycotts as restraining the irrational forces of mob action by requiring the participants of such activity to conform their irrational conduct to the law of judges, guided by reason and "speaking from principles, objectivity, and dispassion." *Id.*

case *Mogul Steamship Co. v. McGregor, Gow & Co.*,[329] for example, American judges drew a distinction between boycotts that inflicted economic losses by carrying legitimate competition to the bitter end and boycotts that inflicted losses out of malice and spiteful will, to inflict harm without reference to the defendant's economic gain.[330]

In *Bowen v. Matheson*,[331] for example, the Massachusetts Supreme Judicial Court decided in 1867 that a combination of Boston shipping masters could lawfully exclude competitors from the market by refusing to deal with non-members. In finding the boycott lawful, the Massachusetts court emphasized that the intention to inflict economic injury on a competitor was an incident of lawful competition, a result the court saw as a normal and natural consequence of business competition.[332] According to the *Bowen* court, "[i]f the effect [of the boycott] was to destroy the business of shipping masters who are not members of the association, it is such a result as in the competition of business often follows from a course of proceeding that the law permits."[333]

The images of business boycotts projected in early common law decisions such as *Mogul* and *Bowen* were based on an understanding that associated boycotts with natural competitive market practices necessary for maintaining competitive equilibrium or economic

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329. 21 Q.B.D. 544 (1888), *aff'd*, 23 Q.B.D. 598 (1898); *see also* Minda, *Common Law*, *supra* note 13, at 509-10.

330. The cases are discussed in Hurvitz, *supra* note 13, at 330-32; *see also* Minda, *Common Law*, *supra* note 13, at 508-12. In determining the legitimacy of business boycotts, the courts scrutinized the motive underlying the boycott. Under the illegal motive test, judges were able to reach decisions that seemed to contradict the principle of *Mogul* and *Bowen*. For example, the courts issued injunctions against boycotts that were premised upon a host of illegitimate motives. *See, e.g.*, Doremus v. Hennessy, 52 N.E. 924 (Ill. 1898) (price-fixing); Finnegan v. Butler, 182 N.Y.S. 671 (Sup. Ct. 1920) (unlawful motive to refuse to sell defendant's newspapers to persons who may also deal with plaintiff's newspaper); Peekskill Theatre, Inc. v. Advanced Theatrical Co. of New York, 200 N.Y.S. 726 (App. Div. 1923) (illegal purpose of driving a competitor out of business). Business boycotts were declared illegal only after judges had decided that they went beyond acceptable norms of business practices.

331. 96 Mass. 499 (1867).

332. *Id.* at 503-04.

333. *Id.* Three years later in *Carew v. Rutherford*, the same court held, in an opinion by the same judge, that a workers' association's refusal to work on a project with out of state workers, unless the employer paid the union a fine of five hundred dollars, constituted an unfair method of competition. 106 Mass. 1 (1870). As in *Bowen*, the workers in *Carew* engaged in activity that could be characterized as a boycott. While the *Carew* court emphasized that the workers had attempted to extract an illegal fine, it is difficult to see why this fact should serve to distinguish the two cases. "Why should the union's refusal to deal in *Carew* be treated differently from the concerted refusal to deal in *Bowen* which had the consequences of destroying a competitor's business, an injury which might far exceed $500?" Minda, *Common Law*, *supra* note 13, at 509; *see also* CHARLES D. GREGORY & HAROLD H. KATZ, LABOR AND THE LAW 55-59 (3d ed. 1979).

"balance." Instead of regarding these boycotts as a force, judges relied instead upon image schemata derived from experiential knowledge about *equilibrium*, *balance*, and *weight*—image schemata that were in turn derived from an understanding about how our bodies interact in the physical universe.

The image schema BALANCE thus generated a different meaning about business boycotts. Business boycotts were envisioned as natural forces of movement, much like "our *experience* of systemic processes and states within our bodies."[334] By understanding the nature of these boycotts within the metaphoric image projected by balance, judges conceptualized most business boycotts as legitimate practices necessary for competition. The word boycott thus displayed a chameleon-like quality as judges used different metaphors and image schemata to structure the legal meaning of boycotts for different groups.[335]

Because judicial metaphors of boycotts were themselves only partial imaginative representations of reality,[336] common law doctrines applicable to boycotts of labor and business groups were vulnerable to the objection that judges were applying a double standard to labor and business groups. This is what Justice Holmes argued at the turn of the century in his famous dissent in *Vegelahn v. Guntner*,[337] in which he argued that American workers should have a legal privilege to picket peacefully and boycott for higher wages, even if such activity was coercive.[338]

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334. JOHNSON, BODY IN THE MIND, *supra* note 45, at 75. For example, the meaning of balance can be shown to be understood in terms of an image schema that structures our understanding of balance in terms of our experience of body balance. "Despite the different manifestations of balance, there is a single image-schema present in all such experiences: *a symmetrical arrangement of force vectors relative to an axis.*" *Id.* at 97. Our understanding of balance in various contexts (walking, standing, systemic, psychological, etc.) can be shown to be variations of this prototypical schema.

335. The word boycott could thus be understood as a *polysemy*—"the phenomenon whereby a single word has many meanings that are systematically related (e.g., *newspaper* in 'The ad's in the *newspaper*' and 'He works for the *newspaper*')." *Id.* at xii. Polysemy can best be understood metaphorically. As Mark Johnson has noted, "[p]olysemy involves the extension of a central sense of a word to other senses by devices of the human imagination, such as metaphor and metonymy, and there is no place for this kind of account in the Objectivist view." *Id.*

336. For example, a business entity is a collective entity that lacks a human persona; labor boycotts can express legitimate and lawful objectives.

337. 44 N.E. 1077 (1896).

338. In *Vegelahn*, Holmes argued that a labor dispute involving peaceful picketing and boycotting for higher wages was essentially a political struggle between two groups competing for social advantage. Holmes recognized the inherent political nature of economic boycotts because he understood that the dispute between workers and employers was a "free struggle for life." As Holmes explained in the following famous passage from his dissent in *Vegelahn*:

One of the eternal conflicts out of which life is made up is that between the ef-

In *Vegelahn*, Holmes endeavored to explain why peaceful picketing and boycotting should not be presumed to present a threat of violence, as most judges presumed in the early labor cases. As Mark Tushnet has noted, Holmes "premised his analysis on a fundamental disagreement with the majority's interpretation of social reality."[339] The majority had adopted an interpretation of boycott that presumed that any boycott entails a threat of violence. In his dissent, Holmes argued that peaceful picketing and boycotting could be justified by characterizing labor picketing as a means of competition. As Holmes argued, a combination of workers was "a necessary and desirable counterpart [to combination by employers], if the battle is to be carried out in a fair and equal way."[340] For Holmes, the majority in *Vegelahn* had adopted a debatable construction of labor picketing and boycotting, one which interpreted peaceful concerted activity as violence. Concealed within Holmes' dissent was a new metaphoric argument for understanding the legal meaning of boycotts.

In *Vegelahn*, the majority employed the image schema of *compulsory force* projected in cases like *Glidden* and *Gompers* in attributing meaning to the workers' concerted activity and body metaphors for treating CORPORATION AS A PERSON. Holmes argued the case for conceptual and metaphoric symmetry. Business and labor boycotts should, in his view, be governed by the same legal standards of competition. For Holmes, the proper conception of competition was structured by a concealed metaphor that understood labor disputes as a natural systematic response to competition between labor and capital. Holmes' idea of labor disputes as a free struggle for life had the rhetorical effect of characterizing picketing and boycotting as natural symptoms of the functional process of competition. Holmes' idea of competition could be understood in light of the basic conceptual HOMEOSTASIS metaphor.[341]

> fort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way . . . .

108 N.E. at 1081.

339. Mark Tushnet, *The Logic of Experience: Oliver Wendell Holmes On The Supreme Judicial Court*, 63 VA. L. REV. 975, 1036 (1977). This was not because Holmes sided with the cause of labor. As Tushnet has explained: "Holmes saw his opinions as erecting a structure of legal thought; that he came out on the labor side in *Vegelahn* was as irrelevant as the fact that he came out on the employer's side in most cases involving industrial accidents." *Id.* at 1040.

340. *Vegelahn*, 44 N.E. at 1081.

341. JOHNSON, BODY IN THE MIND, *supra* note 45, at 129-37. Johnson illustrates how the scientist Hans Selye's life-long research into the nature of stress reactions, which led

The HOMEOSTASIS metaphor helps to explain why Holmes in *Vegelahn* might have come to understand the process of competition between labor and capital as a system which seeks to maintain internal stability in reaction to external stimuli. The HOMEOSTASIS metaphor made it possible for Holmes to understand how economic relations involving labor and capital could be like a biological process regulated by natural laws. For Holmes, the process of competition between labor and capital was a necessary and desirable process of evolutionary development. As Holmes explained: "[I]t is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination."[342] For Holmes, combination by workers was "a necessary and desirable counterpart [to combination by capital], if the battle is to be carried on in a fair and equal way."[343] The point advanced by Holmes was that competition involved a general adaptive process that, if left free of regulation, would serve to ensure that the general problems of injury and justification were resolved in a fair manner.[344]

The HOMEOSTASIS metaphor reveals the hidden meaning of Holmes' view of competition by highlighting how embedded knowledge of bodily experience is used causally to explain complex phenomena. Holmes wanted to explain how labor and capital competition were parts of a natural process of a larger whole involving the process of market competition. The *parts-whole* schema and a biologically derived understanding of the BODY AS HOMEOSTATIC ORGANISM enabled Justice Holmes to understand business and labor boycotts as substantially analogous to the internal biological systems of the body.[345] Thus, in his dissent in *Vegelahn*, Holmes relied upon a biological understanding of the competitive process in concluding that combination of workers was as natural as combination of capital, and that free competition necessarily entails that both labor and capital be free to combine and engage in a competitive struggle.[346]

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to a new model of disease and new strategies for medical treatment of disease, could be seen as a metaphoric shift from a model of disease structured by the metaphor BODY AS MACHINE to the metaphor HOMEOSTASIS. *Id.* at 129. Steven L. Winter has recently relied upon the metaphor of HOMEOSTASIS to develop a theory of constitutional law as "the dynamic product of the relentlessly jurisgenerative processes of social and cultural construction." Winter, *Indeterminacy*, *supra* note 33, at 1506.

342. *Vegelahn*, 44 N.E. at 1081.

343. *Id.*

344. "Workers and employers, then, were competitors, and the law ought to be neutral in their struggle." Tushnet, *supra* note 339, at 1038.

345. *See generally* JOHNSON, BODY IN THE MIND, *supra* note 45, at 131.

346. *Vegelahn*, 44 N.E. at 1081 (Holmes, J., dissenting).

Holmes' HOMEOSTASIS metaphor was likely influenced by the biological ideas of Darwinian theory popular in his day—the notion of a biological process of selection where struggle within each biological species and between species leads to the natural selection of the fittest with the best adapted physical characteristics. Darwin's theory was itself based on knowledge derived from evolutionary studies of the bodies of animals. The biological laws of evolution were understood as a homeostatic system in which the survival of the fittest ensures the necessary and desirable process of development. Holmes seems to make a similar point about labor and business boycotts as forms of competition. In this important sense, Holmes sought to bring about a paradigmatic shift in the legal meaning of boycotts through metaphoric reasoning.

C. *The Metaphoric Structures of Modern Boycott Doctrine.*

Today, judges and commentators understand the meaning of boycotts in terms of a set of legal distinctions animated by different bodily experiences based on the HOMEOSTASIS metaphor. Regardless of the doctrinal field in which the courts resolve boycott issues—labor, antitrust or constitutional law—the metaphor HOMEOSTASIS lies at the heart of boycott doctrine. The legal distinctions governing the law of boycotts have thus generated different legal meanings of boycotts that are based on notions about how boycott activity serves or interferes with metaphorically based body functions.

In labor boycott cases, boycotts are typically analyzed as toxic syndromes affecting a system function; the law is understood as a general adaptive response to the toxicity. In business boycott cases, boycotts are understood to be naked restraints trade when the activity in question is viewed as infecting the central nervous system of market economy. In other cases, what may look like boycott activity is justified on the ground that the business practice serves the ancillary function of promoting the internal mechanism of market competition. In civil rights cases, boycotts are analyzed not as a disease or toxicity, but rather as a natural or healthy bodily response necessary to correct a malfunctioning bodily system. In boycott cases following the more usual *Trial Lawyers* pattern, however, boycotts are likely to be analyzed in terms of metaphors applicable to labor or business restraints, leading judges to findings of illegality. Thus, in the case law, boycotts have been understood as a response affecting an internal body system, and boycott regulation has been thought to be warranted to maintain the systems' steady state in the face of

stress.[347] The four legal distinctions in the law of boycotts can be understood as the entailments of the basic HOMEOSTASIS metaphor.

1. *The Metaphoric Structure of the Speech/Conduct Distinction.* The CONTAINMENT metaphor is a dominant metaphor that has structured much of the law's understanding of communication and speech. The metaphor is based on bodily experiences of *containment.*[348] We experience our bodies as containers having a bounded surface and an in-out orientation.[349] This understanding enables us to make sense of complex conceptual phenomena. For example, the metaphor CONTAINER is used to organize our thoughts about the idea of argument. Thus, the metaphor ARGUMENT IS A CONTAINER is used to highlight a number of different meanings about legal arguments: We assert that our opponent's "argument lacks *content,*" or that it "has *holes* in it," or "lacks *substance,*" or that his argument "won't *hold* water."[350] We intuitively understand the meaning of such statements because we have common experiential orientations that permits each of us to have a shared understanding of our bodies as a container.[351]

The bodily experiences of containment structures the CONDUIT or CONTAINER metaphor, which is a dominant conceptual metaphor that cognitive theorists have identified for understanding the way we talk and the way we comprehend the nature of human communication.[352] Human communication is imagined to be a process through which objects (ideas or thoughts) are placed in contain-

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347. *See* JOHNSON, BODY IN THE MIND, *supra* note 45, at 131 (citing WALTER B. CANNON, THE WISDOM OF THE BODY (1932) and discussing Walter B. Cannon's notion of homeostasis).

348. "Each of us is a container, with a bounded surface and an in-out orientation." LAKOFF & JOHNSON, *supra* note 248, at 29. Thus, the body is a CONTAINER for our emotions: "He was *filled* with anger. She couldn't *contain* her joy. She was *brimming* with rage. Try to get your anger *out of your system.*" LAKOFF, WOMEN, FIRE, *supra* note 45, at 383.

349. *See* JOHNSON, BODY IN THE MIND, *supra* note 45, at 21-22; *see also* LAKOFF & JOHNSON, *supra* note 248, at 28-30.

350. *See* LAKOFF & JOHNSON, *supra* note 248, at 92.

351. For example, metaphors such as ARGUMENTS ARE JOURNEYS ("where is the argument going?") or KNOWING IS SEEING ("which view do you espouse?") are different manifestations of the basic conceptual MIND-AS-BODY or CONTAINER metaphors. Familiar linguistic expressions like "where is the argument going" make sense to us because they are based on basic conceptual metaphors derived from the MIND-IN-BODY metaphor. *See generally* Winter, *Under Color of Law*, *supra* note 35, at 389, 391 (illustrating how a conceptual metaphor like "CONTROL IS UP will motivate many different metaphorical expressions such as 'he's *under* my thumb' or 'she's *on top* of the situation'").

352. JOHNSON, BODY IN THE MIND, *supra* note 45, at 58-59 (citing Michael Reddy, *The Conduit Metaphor in* METAPHOR AND THOUGHT (Andrew Ortony ed., 1979)).

ers (words and sentences) and sent along a conduit to a hearer. The receiver of the message takes the idea-object out of the word-container and comprehends what was communicated by the sender.[353] Thus, in the law, as in everyday conversations, communication is thought to "consist[] of finding the right word-container for [the] right idea-object, sending this filled container along a conduit or through space to the hearer, who must then take the idea-object out of the word-container."[354]

Action can also be metaphorically understood on the level of pure expression. The act of communicating a message motivates us to conjure up ideas about force and action. There is force at work as a result of the conduit metaphor of speech itself.[355] For example, the communication of boycott appeals is understood in labor law to have a signal effect that causes action. The force of the signal on the intended audience of the communication is sent through space to the hearer, who understands the message of the signal as an idea-object contained the word-container. The force structure of the signal effect of boycotts has been interpreted by judges as an act of *compulsion*.[356] The propositional content of boycott expression is linked to bodily experiences of what happens when a crowd starts pushing. The force of the expression moves the hearer along a path she may not otherwise have chosen.

As Justice Stevens concluded in *Safeco*, boycotts and picketing "[i]n the labor context ... call[] for an automatic response to a signal rather than a reasoned response to an idea."[357] The idea-objects of boycott publicity involve an automatic response because the force of expression causes action once the idea-objects are received and taken out of their word-container. An automatic response follows because a *compulsion* schema structures the meaning of the signal as having a causal effect on the hearer. In other words, it is the image schema of *compulsion* and the conceptual metaphor of BODY AS CONTAINER that best explains why otherwise peaceful boycott

353. *Id.* at 58.

354. *Id.* at 59.

355. There is force at work in "the sentence-container with its idea-object to change the *form* of the expression." ("John is home" has a different force than "Is John home?"). *Id.* at 59. There is also the force "that acts on the hearer to determine how the hearer understands the utterance." *Id.* There is also "the force with which the word-or utterance-container is sent through the conduit or through the space between speaker and hearer [having] a certain magnitude." *Id.* Finally, there is the "perlocutionary effects" of the force of the utterance itself. *Id.* at 59-60. "Your commanding me to spit-shine my shoes might (in addition to my grasping the meaning of your utterance as a command) force me to shine my shoes, or it might cause me to laugh in your face . . . ." *Id.* at 60.

356. *Id.* at 45, 58.

357. NLRB v. Retail Store Employees Union, Local 1001 (Safeco), 447 U.S. 607, 618-19 (1980).

publicity has been treated in labor law as coerced action.

This may also help to explain why the *Tree Fruits* exception of labor law, which has accorded First Amendment protection to so-called consumer picketing, failed to develop. In *Tree Fruits*, Justice Brennan concluded that picketing that merely requests customers of struck employers not to buy the struck product falls within a special statutory proviso to the secondary boycott provision of federal labor law that protects consumer picketing otherwise having secondary effects.[358] In *Safeco*,[359] however, the Court concluded that consumer picketing is not protected when it "is reasonably calculated to induce customers not to patronize the neutral parties at all."[360] In other words, when consumer picketing has the effects of a secondary boycott, the picketing loses its First Amendment protection because the picketing is likely to compel the same action that would arise from an otherwise unlawful secondary boycott. The inconsistency posed between *Tree Fruits* and *Safeco* can be explained by the HOMEOSTASIS metaphor: the law's purpose is directed at facilitating and maintaining a dynamic, healthy body (i.e., economic system) by regulating the compulsion of secondary effects of picketing and boycotting.

In the labor context, the *force* schema attributed to boycotts influences the meaning of labor union picketing. As Justice Stevens noted in his concurrence in *Safeco*, "[i]n the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment."[361] Consequently, in modern labor law discourse, the dominant presumption has been that picketing and boycotts are signals which inherently call for force, action, and conduct.

Handbilling and leafletting, however, have been accorded different legal treatment because judges do not perceive such activity to pose the potential toxic or coercive force attributed to economic boycotts or picketing. Judges do not view handbilling as coercive as picketing and boycotting.[362]

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358. NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits), 377 U.S. 58, 69-70 (1964).

359. 447 U.S. 607 (1980).

360. *Id.* at 614.

361. *Id.* at 619 (Stevens, J., concurring). Thus, in *Safeco*, Justice Stevens concluded that boycotts and product picketing were not protected by the *Tree Fruits* exception to federal labor regulation if such activity "can be expected to threaten neutral parties with ruin or substantial loss." *Id.* at 612-13 (Stevens, J., concurring).

362. As Justice Stevens has expressed this point: "Indeed, no doubt the principal reason why handbills containing the same message are so much less effective than labor picketing is that the former depend entirely on the persuasive force of the idea." *Id.* at 619.

In *DeBartolo II*, for example, the Court assumed that the secondary effects of leafletting are not coercive in effect because consumers can turn away after they read a handbill; they are not "intimidated by a line of picketers."[363] Of course, handbilling can involve more than one person; it can be the result of concerted activity. Handbilling by an organized group can look a lot like a picket line. The Court nonetheless assumed that handbilling, unlike peaceful picketing and boycotting, involves only the persuasive force of an idea.

The persuasive force of handbilling is thus thought to be less than the force involved in picketing or boycotting because it is a force that comes from within the receiver, rather than a force conveyed from the outside. Consumers who choose to go along with the demands of those handbilling are considered to do so freely, because the Court has assumed that there is no outside force intimidating them to take action, as in the case of picketing or calls for a boycott. The legal meaning of boycotts and picketing, structured by the *container* metaphor, conjures up an image of idea-objects moving from a group of workers to an intended audience of receivers. The receivers are then induced; i.e., compelled, to take action by the force of the message sent through space to them. The force originates outside the hearer and is thus thought to be different in kind from the internal force of the persuasion of idea.

Again, handbilling is accorded greater legal protection because handbilling is thought to be less threatening or coercive than picketing or boycotting. Following the HOMEOSTASIS metaphor, the notion of internal self-regulation is a matter of degree.[364] In understanding the body as a purposeful organism, the HOMEOSTASIS metaphor also accepts the idea that the body can at times maintain its own adaptive response to toxic substances.[365] Thus the force of persuasion internal to the hearer is something the individual may or may not act upon because the individual is thought to have autonomy of will.

It is also likely that judges analyze handbilling from the perspective of the individual rather than the group. The reason for this may be that as the number of participants increases, as it does with boycotts, the effects of verbal acts are more likely to be seen as posing a threat that the body cannot maintain an adaptive response such that legal intervention is warranted. Thus, judges are moti-

363. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trade Council (DeBartolo II), 485 U.S. 568, 580 (1988).

364. *See generally* JOHNSON, BODY IN THE MIND, *supra* note 45, at 134 (discussing the HOMEOSTASIS metaphor of disease).

365. *Id.* at 135.

vated to justify decisions that accord handbilling greater First Amendment protection than picketing or boycotting.

Indeed, the words "handbill" and "leaflet" encourage us to think in terms of individual activity. According to the *Oxford English Dictionary*, a handbill is "[a] printed notice or advertisement on a single page, intended to be delivered or circulated by hand."[366] A leaflet is defined as a "small or young foliage leaf" or a "folded printed sheet intended for free distribution."[367] The words are thus defined in terms of parts that belong to a larger whole—printed paper is distributed by hand or like leaves connected to a tree. The legal anomaly created by *DeBartolo II* can be understood in terms of an imaginary distinction used in cognitive thought for organizing information on the basis of the *parts-whole* schema.

Picketing and boycotting have been understood as collective activity since a group or whole is involved, whereas handbilling and leafletting has given rise to an understanding that focuses on the individual or part of the activity. Viewed through the *parts-whole* schema, picketing and boycotting involve group action, whereas handbilling involves individual action. In focusing on the individual activity of handbilling (the hand or the leaflet), judges are less prone to find that even group handbilling presents the same coercive dangers as picketing or boycotting. In *DeBartolo II*, the Court drew an all-or-nothing distinction between picketing and leafletting because the language judges use to describe the meaning of handbilling encourages such a distinction.

What judges have failed to consider is that expressive activity may not be a container or receptacle for conveying meaning, but rather a form of conduct or activity that is aimed at constructing new meaning for communication itself. Picketing, boycotting, and handbilling, are activities that generate through group action constructed meanings of political action as well as to convey information about a particular labor dispute. The experiential nature of group protest can create information that can be gleaned only by participating in the activity. Anyone who has experienced walking on a picket line, or demonstrating in a parade understands that the experience of doing creates lasting information about political protest and cultural identity.[368]

The communicative action of such activities is ignored by the

366. OXFORD ENGLISH DICTIONARY, vol. VI at 1070 (2d ed. 1989).

367. *Id.* at 680.

368. *See, e.g.*, BARBARA EPSTEIN, POLITICAL PROTEST & CULTURAL REVOLUTION: NONVIOLENT DIRECT ACTION IN THE 1970S AND 1980S (1991); *see also* Winter, *Indeterminacy, supra* note 33, at 1500 n.305 (describing the experience of a commentator who explained how she came to understand why her parents brought her to antiwar demonstrations during the sixties when she was but a small child).

courts, because in adopting the CONTAINER and HOMEOSTASIS metaphors judges have come to understand speech and communication as a container or receptacle for conveying information for functional purposes, rather than as a form of conduct or activity which is itself aimed at constructing meaning.

2. *The Metaphoric Structure of the Primary/Secondary Distinction.* The idea of labor boycott inducements as a force having the potential to spread labor discord is reflected within the statutory scheme which recognizes a distinction between primary and secondary boycotts. As noted,[369] the primary/secondary distinction of labor boycotts has led to the curious result that unions can picket and boycott an employer with whom they have a controversy, but they cannot bring to bear the same pressure on so-called secondary employers, who have a business relationship with the primary employer, even though a successful primary boycott can have the same effect as that of a secondary boycott.[370] Thus, in *Allied International*, a secondary boycott brought for purely political purposes was found to be illegal because the union's boycott fell within the literal provisions of the secondary boycott proscription of federal labor law.[371] The primary/secondary distinction underlying the Court's decision in *Allied International* can be interpreted metaphorically in terms of the metaphor HOMEOSTASIS and the image schema of *force*.

As Howard Lesnick's pathbreaking study of labor law's secondary boycott legislation indicates, body metaphors and the images of disease or cancer have animated judicial thinking of secondary boycott problems generally.[372] Hence, the regulation of secondary boycotts has been justified on the basis of metaphors that treat the secondary effects of boycotts as cancer cells spreading throughout healthy parts of the body, or what Professor Lesnick, describing the understanding of secondary boycotts in the Congressional materials leading up to the Taft-Hartley Amendments, called the "metastasis

369. *See supra* notes 151-54 and accompanying text.

370. As Julius Getman has explained, "[t]he core concept was that it was unfair for a union that had a dispute with employer A to attempt to cause a strike at the premises of employer B in order to cause B to stop doing business with A." The legislative history underlying the Taft-Hartley Act, as well as express language in the statute, indicated that Congress desired to distinguish between primary and secondary boycotts.

371. 456 U.S. 212 (1982); *see also supra* notes 85-99 and accompanying text.

372. *See* Lesnick, *supra* note 182, at 1415 ("A major asserted basis for restricting secondary activity was the legislative desire to discourage what may be called the metastasis of labor disputes: the fanning out of unrest from the struck plant to those doing business with it.") (citing 93 CONG. REC. 4323 (daily ed. April 29, 1947), *reprinted in* 2 LEGISLATIVE HISTORY OF LABOR MANAGEMENT RELATIONS ACT, 1947, at 1107 (1985) (remarks of Senator Taft)); *see also supra* notes 78-88, 152-54 and accompanying text.

of labor disputes."[373] The image schema of physical force, i.e., a disorderly mob, is united with the image of invisible organisms attacking the body to create a powerful appeal for legal regulation of boycotts. The drafters of the federal labor laws thus assumed that secondary boycotts should be prohibited in order to protect innocent parties and to limit the effects of otherwise lawful disputes.[374]

The image of secondary boycotts as a metastasis, however, projects a vision that sees labor disputes, even otherwise peaceful disputes as a nonspecific disease to be contained or quarantined. On the other hand, if primary picketing is to be deemed lawful in order to preserve the institution of collective bargaining, as it is now under federal labor legislation,[375] then even peaceful secondary boycotts aimed at coercing non-complying employers to bargain collectively may be a necessary and beneficial practice of federal labor policy that favors collective bargaining as the most effective means of resolving labor strife. Rather than perceiving secondary boycotts as a disease, one might perceive secondary boycotts as a "remedial practice," a "cure" or "preventive therapy" for upholding federal collective bargaining policy.[376]

The point is that secondary boycotts are neither a disease nor a metastasis. Secondary boycotts can be understood as a legitimate tactic that labor organizations rely upon to counter the superior bargaining power of their employers. If we invoke different MIND-AS-BODY metaphors, say for example, BODY-AS-MACHINE,[377] we

373. Lesnick, *supra* note 182, at 1415.

374. Section 8(b)(4)(ii)(B) of the National Labor Relations Act prohibits labor unions from coercing one business to cease dealing with another business, where *coercion* is defined to include means other than non-picketing publicity. *See* 29 U.S.C. § 158 (b)(4)(ii)(B) (1988).

Professor Lesnick's cancer metaphor is highly misleading as an explanation for justifying the federal proscription against secondary boycotts because nearly every national primary strike has consequences that spread the effects of the dispute to innocent suppliers and customers of the primary employer. The METASTASIS metaphor is also misleading because it fails to consider the nature of the appeal that a labor union actually makes in publicizing an otherwise lawful primary dispute.

375. 29 U.S.C. §§ 157, 158 (a)(i); *see* NLRB v. Local 307, Plumbers, United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Indus. of United States and Canada, 469 F.2d 403, 406 (7th Cir. 1972).

376. The metaphoric concept of boycott as a METASTASIS provides us with a useful way for understanding some aspects of secondary boycotts, but in the process of "mapping" meaning with the image of disease (associating the meaning of the source domain, metastasis, with its target concept, boycott), the metaphor provides us with useful information, but also hides other aspects of boycott activity.

377. Mark Johnson, for example, has shown how the metaphor BODY AS MACHINE was the underlying imaginative device structuring early medical theories of disease. *See* JOHNSON, BODY IN THE MIND, *supra* note 45, at 130. Thus, medical metaphors "such as those of isolated parts, functional assemblies, and repair and replacement of malfunctioning units" structured medical evidence in the nineteenth century. *Id.* As Johnson claims,

might imagine a system of labor law doctrine that provides affirmative protection for secondary labor boycotts. For example, the prevalent legislative goal of advancing industrial peace might be to conceive boycotts as a means of repairing injuries and resolving labor-management disputes, as a way of restoring the machine-like functions of the body. Boycotts might be understood as a steering mechanism for social and economic decisionmaking. Rather than viewing boycotts as a threat to the body's functional balance, judges might come to understand boycott phenomena as an important part of the democratic process. Alternatively, we might then imagine a system of labor law doctrine that provides affirmative protection for secondary boycott activity as an essential "lubricant" for bringing peace and resolution to labor disputes.[378]

3. *The Metaphoric Structure of the Naked/Ancillary Distinction.* In antitrust law, a somewhat similar imaginative process has come to influence judicial thinking about business boycotts. The image of "nakedness" has come to be used in this area to describe illegal boycotts that restrain trade, and the idea of "ancillary" has come to signify the deployment of collective effort for social progress and development.[379] Restraints of trade that are deemed to be naked represent activity that is seen to be predatory or pernicious or socially unredeeming. Just as the image of the boycott serves to evoke ideas about mob violence in labor law discourse, the image of nakedness in antitrust boycott doctrine projects ideas about primitive, animal-like passion, conduct understood to be uncivilized and socially undesirable. The concept of ancillary restraint, however, serves to justify boycotts that have been civilized by a scheme of reason that seeks instrumentally to promote the maximization of private wealth. In other words, ancillary restraints may be necessary in order for vital economic functions to work efficiently. Moreover, the effects of ancil-

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"[T]he BODY AS MACHINE metaphor was not merely an isolated belief; rather, it was a massive experiential structuring that involved values, interests, goals, practices, and theorizing." *Id.*

378. Such a result would not unduly increase the power of the labor movement. No-strike clauses in collective bargaining agreements would limit the vast majority of incumbent unions from engaging in secondary strikes and boycotts. Moreover, secondary boycott regulation is now so technical and irrational that it is rarely utilized to regulate boycotts and strikes of significant economic consequences. *See* Getman, *supra* note 28, at 20-21 ("Because of its technicality, ambiguous drafting, and confused interpretation, secondary boycott law more resembles an intellectual rubble heap piled haphazardly with conflicting rules riddled with exceptions, doctrines randomly applied, and terms given different meaning in similar cases than it does a delicate balance; anything a union might do can be justified by one doctrine and prohibited by another.").

379. *See, e.g.*, United States v. Container Corp., 393 U.S. 333, 340-41 (1968) (Marshall, J., dissenting).

lary restraints can be overcome by the general adaptive response of market competition.

In the image of a nakedness we can begin to understand how cultural and physical experiences might fuel understandings about group action that regard boycotts as inherently dangerous practices to be closely regulated, and why boycotts seen to be ancillary to legitimate objectives are deemed lawful. Ancillary boycotts are merely conduits for achieving legitimate objectives, while boycotts as naked restraints of trade cannot be redeemed by any legitimate instrumental function. The CONTAINER metaphor unites with the idea of ancillariness to structure a legal meaning of boycotts. Naked restraints of trade lack a proper container or conduit of legitimacy, and are thus condemned on a *per se* basis. Under the HOMEOSTASIS metaphor the naked/ancillary restraint analysis makes perfectly good sense as a law-generated means of maintaining balance within the economic system.

The CONTAINER metaphor also helps to explain the argumentative structure that judges have advanced in arguing various understandings about the market consequences of boycotts. In the *Pinhas* case, the two different jurisdictional tests advanced by Justice Stevens and Justice Scalia, for the majority and dissent respectively, can be seen to rest on different imaginative ideas about containers and the *parts-whole* schema. In finding that a price-fixing conspiracy which excluded a single ophthalmological surgeon from the Los Angles market affected interstate commerce, Justice Stevens and the majority advanced an argument that the boycott was to be judged "not by a particularized evaluation" of a single exclusion, but rather by "a general evaluation of the restraint's impact on other participants and potential participants in the market."[380] In other words, the boycott was a conduit that had to be judged in light of its potential impact on the whole of the market economy. Justice Scalia, however, dissented because he believed that the boycott was a conduit for putting into effect a particularized market restraint that, when judged as a part of the market economy, failed to substantially affect interstate commerce.

4. *The Metaphoric Structure of the Public/Private distinction.* The public/private distinction that underlies the Court's rationale in cases like *Noerr* and *Trial Lawyers* can be understood in terms of the parts-whole schema of the basic HOMEOSTASIS metaphor. The *parts-whole* schema helps us to comprehend how politics involves interests which are broader than the immediate pecuniary interests of economics. Expressive conduct depicted as pure politics involves

380. Summit Health, Ltd. v. Pinhas, 111 S. Ct. 1842, 1842 (1991).

matters which affect the collective whole of the body politic and are therefore accorded greater legal protection. Political expression seeking economic objectives, involving only commercial relations and activity, is seen to be a lesser part of the political process, and is accorded lesser legal protection. When pure speech is found to be uncontaminated by conduct, even expression of economic matters is protected. Moreover, when economic objectives are sought in the political channels of government, near absolute protection is accorded such activity because the whole of the political process is seen to be involved. Thus, the Court established its *Noerr* doctrine to insulate from all legitimate regulation interest group lobbying in the legislative halls of government, while allowing government to regulate direct action efforts by citizen groups seeking economic and political objectives through boycotts and picketing. The *parts-whole* schema helps to explain the doctrinal distinctions drawn by the Court in cases like *Noerr* and *Trial Lawyers*.

If the image schema of *force* dominates judicial thinking about labor group activities, and if speech is understood as a container, then a prototypical effect follows: the *parts-whole* schema operates to accord labor groups little, if any, freedom to engage in politically expressive activity. The physical, social, and ethical force schemas utilized for understanding the legal meaning of labor boycotts are not seen as a legitimate part of the democratic or political whole of the legislative system. Hence, when unions resort to picketing and economic boycotts to secure their interests, the judicial focus is shaped by images of force that direct attention to the path of the force represented by a potentially unruly crowd. What is missed and marginalized is the communicative action associated with the peaceful exercise of labor's collective liberties. The ideological effect is to deny labor a role to play in advancing its part in the whole of the political process.

D. *The Chameleon-like Quality of Modern Boycott Doctrine.*

The term boycott has thus meant different things to judges because different understandings of a common metaphoric structure have been applied to boycotts in labor, antitrust, and constitutional law. In labor boycott cases, image schemas of force, signal, and coercion have dominated legal discourse and analysis because judges have adopted a view of labor boycotts structured by a basic HOMEOSTASIS metaphor that analogizes boycott activity to a disease or toxic substance, much in the same way that early common law judges analogized early labor boycotts to wild tigers.

While judges now acknowledge that labor boycotts involve elements of expression, they have been much more concerned about

regulating the effects of such activity. Secondary boycotts are thus absolutely forbidden because they are seen as having the potential of spreading the toxic effects of labor disputes. Primary boycotts are generally protected, but even these boycotts are nearly always seen as an inherently coercive force that can justify state regulation. Labor has thus been denied a First Amendment right to engage in secondary boycotts for purely political purposes, and the First Amendment rights of primary boycotts are subject to regulation necessary to maintain equilibrium in economic affairs. The system of regulation applicable to labor boycotts is thus understood to be a necessary adaptive measure for maintaining an effective economic system.

In antitrust law, judges have come to understand that boycotts may sometimes represent legitimate and normal forms of business competition, although at other times they have acknowledged that boycotts should be condemned *per se* as an antitrust restraint. This has led to contradictory statements in legal opinions which both assert and resist the prevailing antitrust wisdom that business restraints classified as "boycotts are unlawful *per se*."[381] When courts find that a group boycott has been utilized for the purposes of restraining trade, the word boycott is used to describe the conduct of the defendants, and the *per se* rule of illegality is usually applied. When a concerted refusal to deal, or boycott, is found to be premised upon good (i.e., procompetitive) purposes, however, the word boycott is not used, and the activity of the defendants is typically upheld as justifiable and reasonable. In antitrust law, terms such as instrument, tool, naked boycott, or ancillary restraint have become the labels that judges use to justify their decisions. These labels can be shown to make perfect sense in terms of the BALANCE and HOMEOSTASIS metaphors that judges have utilized in antitrust law. In viewing competitive pricing as the central nervous system of the economy,[382] and boycott as a naked restraint, antitrust judges have reasoned on the basis of medical-biological metaphors structured by the basic idea of HOMEOSTASIS.

In cases involving consumer boycotts, judges have come to see boycotts as manifesting First Amendment freedoms when non-labor groups are boycotting for purely political purposes. Political boycotts by civil rights and women's rights groups have been understood as embodying First Amendment freedoms at least when they are perceived to be in pursuit of altruistic objectives. In finding that group

381. As Justice White has recently observed in *FTC v. Indiana Federation of Dentists*, a "boycott pigeonhole" should not be invoked in antitrust law to condemn every business restraint categorized as "unlawful *per se*." 476 U.S. 447, 458 (1986).

382. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940) (Douglas, J.); *see also* Boudin, *supra* note 35, at 408.

boycotts are to be protected as First Amendment freedoms, the Supreme Court has used terms such as majesty, dissatisfaction with a social structure, speech, assembly, association, and petition to characterize the nature of these boycotts. These words can be understood as the entailments of the *parts-whole* schema and the HOMEOSTASIS metaphor underlying the public/private distinction.

Every so often, however, the dissonance posed by these different metaphoric understandings of boycotts appears within a technical legal definition about a seemingly unrelated question, as it did in the *Pinhas* case. While *Pinhas* appears to present a technical question concerning the jurisdictional requirement of interstate commerce in the antitrust context, what animates the difference in opinion over that issue are two different perspectives, or conceptual understandings, about group boycotts. Justice Stevens' majority opinion, upholding interstate commerce jurisdiction, can be seen as advancing the market metaphors of cases like *Noerr*, *Allied*, and *Trial Lawyers* for the proposition that even the boycott of a single surgeon in Los Angles can affect interstate commerce, because price-fixing is commonly understood to be a crime that affects the central nervous system of the market economy. Justice Scalia, dissenting in *Pinhas*, can be seen on the other hand to have relied upon the idea of a container or conduit for understanding the Commerce Clause consequences of a boycott. For Justice Scalia, cases such as *Claiborne Hardware* and *NOW* become the metaphoric sources for an understanding of the way he interpreted the meaning of the jurisdictional issue in *Pinhas*.

Summit Health, Ltd. v. Pinhas is thus an interesting decision because it illustrates how justices of the Supreme Court are currently embroiled in a battle over control of the metaphors for defining the meaning of the term boycott for jurisdictional purposes. Justice Stevens, and the majority of commentators who defend the "infected activities" metaphor of the *McLain* decision, have read the interstate commerce clause in antitrust decisions as justifying court jurisdiction whenever a challenged trade restraint involves activities which infect activity having a substantial relation to interstate commerce. Trade restraints involving a group boycott of a single competitor will satisfy the commerce requirement because even the exclusion of a single eye surgeon from the market is activity infected by a conspiracy having a not insubstantial effect on interstate commerce. The metaphor of "infected activity" in this context has meaning in terms of the way disease infects a human body. A concerted refusal to deal, or a group boycott, is thus like a disease infecting the body of interstate commerce. The disease of boycott is one that affects interstate commerce by blocking the gateway to the market.

Justice Scalia's dissent in *Pinhas*, however, set forth different metaphors in criticizing the majority and their reliance on *McLain*. In Justice Scalia's understanding, the commerce clause requirement for federal court jurisdiction in *Pinhas* called into question Justice Stevens' metaphor of a gateway. In his view, the alleged boycott against Dr. Pinhas was a dispute between a single hospital and one doctor. The challenged restraint was thus seen to be of "local nature. In Justice Scalia's view, the commerce requirement for jurisdiction requires proof that the defendant's activities substantially affect commerce by restricting competition.[383] Instead of relying upon the "infected activities" or "gateway" metaphors of the majority, Justice Scalia argued in favor of a competition analysis for Commerce Clause purpose. Thus, in the dissent's view, a group boycott does not substantially affect interstate commerce unless the boycott substantially restrains competition. Boycotts are thus mere instruments or tools, and will affect interstate commerce only if they are utilized by those having market power.

IV. THE CONCEPTUAL MODELS OF BOYCOTT DOCTRINE AND THE RIGHT OF POLITICAL PARTICIPATION

Metaphors in the law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.[384]

Boycotts and concerted refusals to deal that restrain trade or spread the effects of labor disputes to innocent third parties have been declared unlawful under federal labor and antitrust law. Yet it is also true that many economic boycotts in labor and antitrust law have been found to be perfectly lawful because they are sometimes seen to involve conduct protected by the First Amendment.[385] Since

383. Summit Health, Ltd. v. Pinhas, 111 S. Ct. 1842, 1851 (1991) (Scalia, J. dissenting).

384. Berkey v. Third Avenue Ry. Co., 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.).

385. In Thornhill v. Alabama, 310 U.S. 88 (1940), the Supreme Court held that primary boycotts and picketing by labor groups involve protected forms of expression that cannot be prohibited in the absence of an overriding governmental interest. Moreover, while federal labor law proscribes secondary boycotts, *see* 29 U.S.C. § 158(b)(4)(ii)(B) (1988), the Court has held that not every boycott with a secondary effect is proscribed by federal labor legislation; boycotts involving certain forms of consumer picketing and handbilling have been judged lawful even though they involve secondary effects. *See, e.g.*, NLRB v Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits), 377 U.S. 58 (1964) (secondary boycott provision of federal labor law held not to apply to picketing of retail grocery stores in an effort to persuade customers not to purchase apples packed by non-union firms); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council (DeBartolo II), 485 U.S. 568 (1988) (secondary boycott provision of federal labor law held not to prohibit peaceful distribution of handbills at a secondary boycott site). The Supreme Court, however, has not been consistent in this area for it has also recognized limitations to otherwise lawful consumer picketing in order to prohibit the

an effort to persuade individuals to join a group seeking to influence governmental policy involves political activity and expression, it has been recognized that boycotts may be constitutionally protected under the speech and petition clauses of the First Amendment.[386]

The Supreme Court, however, has had considerable difficulty in finding a "right to boycott" in "any of the lines of First Amendment precedent the Court has developed in this century."[387] The problem is that the Court has never made up its mind about economic boycotts for political purposes. While conventional wisdom supports the view that government should refrain from regulating constitutionally protected liberties, including the rights of petition[388] and as-

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spread of strikes and boycotts to secondary employers. *See* NLRB v. Retail Store Employees Union, Local 100 (Safeco), 447 U.S. 607, 614 (1980) (modifying *Tree Fruits*, holding that consumer picketing violates the secondary boycott provision of federal labor law if it "reasonably can be expected to threaten neutral parties with ruin or substantial loss."). *See generally* Brian K. Beard, Comment, *Secondary Boycotts After DeBartolo: Has the Supreme Court Handed Unions a Powerful New Weapon?*, 75 IOWA L. REV. 217 (1989); Barbara J. Anderson, Comment, *Secondary Boycotts and the First Amendment*, 51 U. CHI. L. REV. 811 (1984).

In antitrust law, the lower federal courts have concluded that the drafters of the Sherman Antitrust Act never intended the legislation to be interpreted so as to conflict with constitutionally protected activity. *See* Missouri v. National Org. for Women, 620 F.2d 1301, 1317 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980); Protor v. General Conf. of Seventh-Day Adventists, 651 F. Supp. 1505 (N.D. Ill. 1986); *see also* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 3-9 (1989 Supplement) (discussing various antitrust decisions which found that the First Amendment provides an affirmative defense to economic boycotts for political purposes). While the Supreme Court has suggested that the First Amendment might provide a complete defense for constitutionally protected political activity, *see* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), it has never recognized such a defense in a case involving an economic boycott by competitors challenged under the antitrust laws. One can, however, find language in recent Supreme Court decisions suggesting that the First Amendment would protect political activity designed to publicize a group boycott for purposes of influencing governmental action. *See, e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 426 (1990) ("It is, of course, clear that the association's efforts to publicize the boycott, to explain the merits of its cause, and to lobby District officials to enact favorable legislation . . . were activities that were fully protected by the First Amendment.").

386. *See, e.g.*, Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 659 (1978) (discussing labor boycotts in connection with the First Amendment protection for social and political boycotts).

387. Harper, *supra* note 30, at 413. Michael C. Harper's study of the consumers' emerging right to boycott evaluates the various arguments for deriving a constitutional right to boycott and demonstrates in each case why such arguments have failed to advance a strong theory in support of a right to boycott. *Id.* at 413-17 (analyzing the arguments based on the right to engage in expressive conduct, right of autonomy, and right of association). As Harper has also illustrated, neither the Court's decision in *Claiborne Hardware*, nor the decisions it relied upon, "offers adequate support for the right." *Id.* at 418.

388. Supreme Court pronouncements suggests that the "right to petition" derives its meaning from the nature of a republican form of government. *See, e.g.*, United States v.

sembly,[389] the Supreme Court has been unable to devise a principled rationale for distinguishing commercial activity, condemned by labor or antitrust law, from so-called political activity entitled to immunity under the petitioning clause of the First Amendment.

The Supreme Court has avoided ruling directly on the petition clause,[390] and has instead developed idealized cognitive models

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Cruikshank, 92 U.S. 542, 552 (1875) (finding that the right to petition is implicit in the "[t]he very idea of a government, republican in form"). The Court has also recognized that the rights of petition and assembly are cognate rights which derive meaning from the free speech clause of the First Amendment. *See, e.g.*, DeJonge v. Oregon, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental...."); *see also* BERNARD SCHWARTZ, THE BILL OF RIGHTS—A DOCUMENTARY HISTORY 198 (1971); BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, pt. III, vol. II at 780-81 (1968) [hereinafter SCHWARTZ, CONSTITUTION]. There is, however, considerable confusion about the scope of the rights. Are the rights merely preventative rights which grant citizens the freedom to voice grievances, or do the rights extend further by establishing a governmental duty to consider the petitioners' grievances? *See* McDonald v. Smith, 472 U.S. 479 (1985) (holding that the petition right is subsumed in guarantee of freedom of speech thus suggesting that the right is merely preventative in character). *But see* California Motor Transport v. Trucking Unlimited, 404 U.S. 508 (1972) (suggesting that the right to petition extends to establish a governmental duty to consider and decide petitioners' claims); Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) (holding that the National Labor Relations Board lacked the authority to issue a cease-and-desist order to enjoin an employer's tort action brought in state court because it is otherwise protected as a form of governmental petitioning); Stephen A. Higginson, *A Short History of the Right To Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 143 (1986) (arguing that such interpretations of the right to petition clause ignore the original design of the right which "included a governmental duty to consider petitioners' grievances"). The Court has also held, not surprisingly, that the assembly and petition clauses of the First Amendment are not absolute. For example, the right to petition is subject to the limitation of overriding governmental interests. *See, e.g.*, United States v. Hariss, 347 U.S. 612, 624-26 (1954) (rejecting a constitutional challenge to the Federal Regulation of Lobbying Act, which regulates federal lobbying expenditures, on the ground that the right to petition is subject to the limitations of overriding governmental interests).

389. The right to engage in peaceful assemblies is commonly regarded as a right that is subordinate to the right to petition, but the courts have been more willing to recognize that the right of assembly, distinguished from the political right to assemble to petition government, is a much broader right that derives its meaning from the free speech guarantee of the First Amendment. *See, e.g.*, SCHWARTZ, CONSTITUTION, *supra* note 388, pt. III, vol. II at 781.

390. In *Claiborne Hardware*, Justice Stevens suggested that an economic boycott called by a civil rights group for purposes of securing racial equality was constitutionally protected as First Amendment activity pursuant to the right to petition government for redress of grievances. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982). Justice Stevens placed emphasis on the fact that the Court in Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) had concluded that the freedom to petition, guaranteed by the First Amendment, required a construction of the Sherman Act that shielded from liability a deceptive and anticompetitive lobbying campaign conducted by a railroad association seeking antitrust legislation. *Claiborne Hardware*, 458 U.S. at 913-14. Justice Stevens noted that the civil rights boycott at issue in *Claiborne*

(ICMs) for guiding judicial interpretations of federal regulation. These models seek to explain and justify different judicial understandings about concerted efforts of groups to petition government. By exploring the difference between these models we can come to understand why seemingly like cases are decided differently by the Supreme Court.[391]

Unfortunately, the Supreme Court has been unable to articulate a consistent rationale or theory for distinguishing between forms of protected and unprotected political expression. The problem is not that the Court has failed to recognize constitutional issues, for the Court has struggled hard to resolve conflicts between the First Amendment and federal regulation under labor and antitrust legislation in various contexts. Rather the problem is that the Court has failed to recognize that its own case law has embraced vastly different cognitive conceptions about the right of groups to petition government for political and economic objectives.

A. *The Idealized Cognitive Model of Interest Group Pluralism.*

That governmental regulation might have to yield to the First Amendment was first recognized by the Warren Court in its 1961 landmark decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*.[392] As a result of *Noerr*, the courts have inter-

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Hardware, like the railroad's boycott in *Noerr*, represented concerted activity aimed at influencing governmental action. *Id.* at 914. *But see* FTC v. Superior Court Trial Lawyers Ass'n, 468 U.S. 411, 776 (1990) (distinguishing *Noerr* on the grounds that in *Noerr*, the "alleged restraint of trade was the intended *consequence* of public action . . . ."); Harper, *supra* note 30, at 418-19 (arguing that *Noerr* "affords protection only to boycotts with a particular purpose: the coercion of third parties to use their influence to secure the governmental action desired by the boycotters.").

391. *See, e.g.*, Stanley D. Robinson, *Reconciling Antitrust and the First Amendment*, 48 ANTITRUST L.J. 1335, 1335 (1979) (arguing that "[f]or many years the subtleties of First Amendment jurisprudence had little relevance to the practice of antitrust law"); Getman, *supra* note 28, at 41 (arguing that "[l]abor relations is the one area of law in which the policies of the First Amendment have been consistently ignored, reduced, and held to be outweighed by other interests"). Indeed, more than a half century ago, Justice Holmes remarked that the absence of First Amendment issues in response to antitrust decrees prohibiting competitors from exchanging pricing and production information was "surprising in a country of free speech." American Column & Lumber Co. v. United States, 257 U.S. 377, 413 (1921) (Holmes, J., dissenting).

392. 365 U.S. 127 (1961); *see also* Minda, *Interest Groups*, *supra* note 89, at 914-24, 931-63. While *Noerr* is commonly understood as furthering important First Amendment freedoms, the decision had in practice the dubious result of upholding the right of special interest groups to ply governmental processes with enormous economic resources in an effort to influence governmental action to the detriment of rivals and the public interest. In *Noerr*, for example, Justice Black, writing for a unanimous Court, concluded that the Sherman Act had to be construed to permit an association of railroads to engage in a highly deceptive and unethical lobbying campaign aimed at destroying a competitive rival

preted the right to petition as establishing both a First Amendment defense and a principle of statutory construction that restrains the reach of governmental regulation and prevents the imposition of civil liability for petitioning activity as long as the petitioning is not a sham.[393]

While Justice Black offered several rationales for the Court's decision in *Noerr*, he noted that "[t]he 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."[394] In Justice Black's view, the effort to apply the antitrust laws to the lobbying activities of special interest groups "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."[395] What Justice Black was affirming in *Noerr* were the central tenets of pluralist ideology,[396] a political con-

by influencing state governments to enact antitrucking legislation. *Noerr*, 365 U.S. at 139-40.

393. *See* Missouri v. National Org. for Women, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980) (holding that *Noerr* and the First Amendment require a construction of the antitrust laws that avoids the imposition of antitrust liability for economic boycotts for political purposes); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (holding that the First Amendment establishes an affirmative defense to civil liability for consequences of an economic boycott for political purposes). *See generally* AREEDA & HOVENKAMP, *supra* note 385, at 3-9. For a discussion of the confusion spawned by such decisions, see Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Governmental Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80 (1977); Robert A. Zauzmer, Note, *The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases*, 36 STAN. L. REV. 1243, 1249-72 (1984).

394. *Noerr*, 365 U.S. at 138.

395. *Id.* at 137.

396. *See, e.g.*, ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT (1967); *see also* Minda, *Interest Groups*, *supra* note 89, at 937-42 (describing how pluralist ideology provided the Warren Court with "a conception of politics that optimistically accepted the legitimacy of interest group influence in the political process"). The underlying pluralistic perspective that explains Justice Black's view of the role of interest group petitioning can be found in the concluding paragraph of Justice Black's opinion:

> In rejecting each of the grounds relied upon by the courts below to justify application of the Sherman Act to the campaign of the railroads . . . we have restored what appears to be the true nature of the case—a "no-holds-barred fight" between two industries both of which are seeking control of a profitable source of income. Inherent in such fights, which are commonplace in the halls of legislative bodies, is the possibility, and in many instances even the probability, that one group or the other will get hurt by the arguments that are made. In this particular instance, each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted in our political system, except to the extent that each group has deliberately deceived the public and public officials. And that deception, reprehensible as it is, can be of no consequence so far as the Sherman

ception of democratic society "that denie[s] absolute truths, remain[s] intellectually flexible and critical, value[s] diversity, and [draws] strength from innumerable competing subgroups."[397] When applied to judicial review of interest group petitioning, pluralist ideology required tolerance for group conflicts because interest group competition for political favor was assumed to advance the public interest. Interest group pluralism thus advanced reasons for believing that legal neutrality or non-intervention in the political spheres of government advanced the public good, a guarantee of democracy, and the public interest.

What motivates the theory of interest group pluralism is a set of underlying images of the political process that are aimed at establishing the truth of a number of highly contestable observations about the nature of political activity. Interest group competition is seen by contemporary legal scholars as political activity even when the participants of such activity understand that their activity is designed to achieve economic or commercial objectives through political subversion or domination.[398] Interest group competition, even when driven by profit-motivated objectives, is thus understood by Professor Elhauge as public rather than private activity, because interest group struggle is thought to be essential to the political process of government.[399] Deregulation of interest group competition is encouraged because it is thought that the pursuit of private interests would, like the invisible hand of the market, lead to the greatest aggregate social welfare. Interest groups are presumed to have predetermined desires and to be able to engage in rational decisions that depend upon objectivist assumptions about reasoning and human motivation.[400]

A number of richly textured metaphors combine to provide meaning to the legal theory of interest group pluralism. The HOMEOSTASIS metaphor can help explain the particular meaning of interest group competition that Justice Black adopted in *Noerr*—a

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Act is concerned.

Noerr, 365 U.S. at 144-45.

397. EDWARD M. PURCELL JR., THE CRISIS OF DEMOCRATIC THEORY 211 (1973); *see also* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1188 (1990).

398. *See* Minda, *Interest Groups*, *supra* note 89, at 924, 934-37.

399. *See supra* notes 205-16 and accompanying text.

400. Interest groups are understood by political pluralists as having unified interests which permit the group to "engage in rational decisions similar to those of rational people buying and selling products in the market." Minda, *Interest Groups*, *supra* note 89, at 938. In this sense, pluralist and public choice theorists believe that political ordering is assimilated by market ordering. *See, e.g.*, Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542 (1988); *see also* ROBERT DAHL, DILEMMAS OF A PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL 32 (1992).

no-holds-barred fight between groups seeking to influence and control governmental action.[401] The HOMEOSTASIS metaphor and the related idea of a PURPOSEFUL ORGANISM, structured the meaning underlying Justice Black's view that interest group competition leads to the public good. These metaphors also justified Justice Black's view that deception, fraud, misrepresentation, and competitive injury resulting from predatory conduct in the legislative sphere of government were to be insulated from judicial scrutiny unless such petitioning was found to be a mere sham. Judicial meddling into the political process would only undermine the natural process of selection in the search for truth. For this reason Justice Black concluded that it was apparent that "[t]he proscriptions of the [Sherman Act], tailored as they are for the business world, are not at all appropriate for application in the political arena."[402]

The idealized cognitive model of interest group pluralism is structured by another related Holmesian metaphor—the MARKETPLACE OF IDEAS.[403] Dissenting in *Abrams v. United States*,[404] Justice Holmes asserted that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[405] As Constitutional scholars have noted, Holmes' idea of the marketplace as a truth discovering process has influenced modern constitutional principles defining the nature of free speech guaranteed by the First Amendment.[406] The metaphor of a marketplace joins with cultural metaphors such as MIND IS A MACHINE, IDEAS ARE PRODUCTS and IDEAS ARE COMMODITIES to create an idealized model for understanding how interest groups' persuasion is like selling, how legislation is like acceptance, and how truth is the test of competition, what Steven L. Winter has aptly

401. Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 140 (1961); *see also*, Minda, *Interest Groups*, *supra* note 89, at 922.

402. *Noerr*, 365 U.S. at 141.

403. This metaphor has dominated much of Supreme Court doctrine under the First Amendment. *See* BAKER, *supra* note 133, at 223. Professor Baker has shown how the MARKETPLACE OF IDEAS metaphor in free speech doctrine has prevented the Supreme Court from fully considering the individual liberties and political freedoms affected by profit-oriented expression. "[E]nterprise speech rooted in the profit-oriented requirements of the market or in instrumental attempts to use property to exercise power over others fails in principle to exhibit individually chosen allegiance to personal values and, therefore, should be subject to regulation." *Id.*

404. 250 U.S. 616 (1919).

405. *Id.* at 630 (Holmes, J., dissenting); *see also* Winter, *Transcendental Nonsense*, *supra* note 35, at 1188-89.

406. Steven L. Winter, for example, has shown how the metaphor MARKETPLACE OF IDEAS came to support an important understanding of freedom of speech that came to be associated with several conventional metaphors of the mind and ideas. Winter, *Transcendental Nonsense*, *supra* note 35, at 1189.

called "a 'folk' version of the relativist view of meaning."[407]

As Winter has argued, the MARKETPLACE OF IDEAS metaphor is structured by the cultural metaphors of mind and ideas in establishing a relativist meaning for organizing the legal categories of free speech doctrine in constitutional law.[408] Within the imaginative framework of the ICM, of free speech as a marketplace of ideas, it becomes possible to understand how at least one view of free speech could support the idea that powerful interest groups, like corporations, should be entitled to equal access to the legislative arena for making their ideas and expression known to decisionmakers.[409] We can also come to see how modern First Amendment jurisprudence has developed under the MARKETPLACE OF IDEAS metaphor.

In combining images about free political arenas and notions about marketplace behavior, the theory of interest group pluralism adopted by Justice Black in *Noerr* connects conflicting ideas and meanings to justify interest group competition. In *Noerr*, the picture of unethical conduct, normally associated with collective action of groups in labor law, is replaced with a picture that associates group activity with an orderly political process essential to a republican form of government. The image schema of *force* utilized to support findings of coercion connects with the ICM of the marketplace of ideas to support truth. Images of naked and ancillary restraints of trade, normally utilized in antitrust law to judge the collective actions of competitors are in turn replaced with images that justify collective efforts by competitors to restrain trade by appealing to the invisible hand rhetoric of the market. The distinction between the mob or naked restraints and interest group struggle is thus animated by an imaginative structure of meaning that connects group activity with different images or social visions about acceptable forms of group political activity.

B. *The Idealized Cognitive Model of Civic Republican Activism.*

Justice Black apparently understood the collective action of special interest group petitioning as a necessary and desirable com-

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407. *Id.*

408. *Id.*

409. *See, e.g.*, BAKER, *supra* note 133, at 14. Edwin Baker argues that the confidence legal decisionmakers have in the power of rationality is misplaced:

> People cannot use reason to comprehend a set reality because no set reality exists for people to discover .... Our conceptions reflect forms of life rather than reason applied in a metaphorical marketplace of ideas—although speech within this marketplace may be an important, but not necessarily an especially privileged, practice that affects our conceptions.

Id.

ponent of democratic government. A highly problematic aspect of Justice Black's opinion in *Noerr* was that while the opinion justified the railroads' freedom to petition government, from the perspective of the right to petition government, he failed to explain the contours or scope of the right to petition which he sought to affirm. For example, it was far from clear whether Justice Black was prepared to find that the principle of antitrust immunity would apply to other non-traditional forms of petitioning, especially to attempts to influence governmental action by boycotts or concerted refusals to deal.[410] What was missing in *Noerr* was an explanation that connected the ideology of interest group pluralism with a coherent legal theory of political participation.

While *Noerr* appears to have established near absolute immunity for special interest group lobbying,[411] the Supreme Court has been less willing to extend statutory immunity or First Amendment protection to economic boycotts by groups which attempt to petition government indirectly by making marketplace appeals to the electorate. Economic boycotts and concerted refusals to deal have thus been subject to legal standards that differ substantively from those that are applied to lobbying and other traditional forms of direct governmental petitioning. These cases have served to raise sharp conflicts with the right to petition government that Justice Black saw to be central to the *Noerr* immunity principle.

By far the most perplexing cases involving the tension between the right to petition and federal regulation of such activity have involved group boycotts and direct consumer actions undertaken to allegedly influence governmental action. Beginning with the civil

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410. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 136 (1961) (noting that the railroads' actions "bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by [activities including] price-fixing agreements, boycotts, market-division agreements, and other similar arrangements"); *see also id.* at 140-44 (discussing the distinction between permitted "political activity" and forbidden "trade restraints").

411. For nearly three decades, *Noerr* has served to immunize otherwise unlawful conduct in the sphere of government when the immediate purpose is to influence legislation. However, a higher standard has been imposed with regard to activity in the judicial sphere. *See* United Mine Workers v. Pennington, 381 U.S. 657 (1965); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972); *see also* Minda, *Interest Groups*, *supra* note 89, at 913-31.

Noerr's interpretation of the right to petition has thus required judges to exhibit tolerance for collective activity of groups seeking to compete in the governmental spheres. While the more recent decisions of the Supreme Court can be seen to retreat from new applications of *Noerr* in other contexts, *see, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988), the Court has remained steadfast in its commitment to the *Noerr* immunity doctrine in cases where traditional forms of petitioning activity are utilized by special interest groups "genuinely intended to influence governmental action." *See* Minda, *Interest Groups*, *supra* note 89, at 981-82, 1011-13.

rights movement of the 1950's, boycotts and concerted refusals to deal have become an increasingly important and powerful tactic for advocates of social change.[412] The proliferation of consumer boycotts undertaken by various consumer organizations protesting the practices of corporate enterprises and governmental entities are now regarded as part of an increasing effort by "the unorganized and the powerless to dramatize their problems and apply pocketbook pressure in an effort to alleviate them."[413]

In *Claiborne Hardware*, the Court had a choice to characterize the civil rights boycott in that case either in favor of the meaning attributed to it by either the boycotters or the targets. In finding that the meaning attributed to the boycott by the boycotters exhibited elements of majesty, Justice Stevens and the Court downplayed an alternative characterization that would have placed greater importance on protecting the freedom of those who were the target of that boycott, as well as the freedom of other individuals who may have been coerced by the civil rights boycott. In *Claiborne Hardware*, Justice Stevens employed the CONTAINER metaphor to understand the social reality of the events he characterized. The *force* schema was also at work in *Claiborne*, since the boycott was understood as a means of political leverage designed to move the legislature to act. Thus, the conceptual metaphors BOYCOTT IS A CONDUIT or CONTAINER and the schema of *force* can be seen to combine with the MARKETPLACE OF IDEAS metaphor to prefigure a new idealized cognitive model about political activity.

This model can be seen to be influenced by the HOMEOSTASIS metaphor that helps to explain why the political expression of boycotts is a necessary and essential function for maintaining civic republican values. In making a distinction between interest group politics and social movements, the HOMEOSTASIS metaphor of republican thought affirms the importance of extra-institutional direct action tactics.[414] As Professor Pope has explained: "The resulting picture shows the American political order not as a delicately balanced machine or a harmonious politic, but as a competition between rival modes of politics, with republican moments punctuating the operation of politics-as-normal at all levels."[415] As an ideal, the construct of republican moments in American politics is thus premised upon the idea that citizen revolts periodically occur in a healthy

412. *See, e.g.*, Friedman, *supra* note 10, at 112-14 ("While some may be inclined to view consumer boycotts . . . in the context of the various social protests of the 1950s and 1960s . . . it is believed that a more useful historical perspective . . . is gained by tracing the origins of boycotts in America further back in time.").

413. *Id.* at 113.

414. *See* Pope, *Republican Moments*, *supra* note 20, at 311 n.107.

415. *Id.* at 313.

political system to destabilize the operations of day-to-day politics that no longer serve the needs of society. These eruptions serve to establish a new balance in the dynamic development of a democratic society. Republican moments are thus visualized as a "sort of 'surrogate for revolution' that reconnects the state to civil society."[416]

In viewing the deployment of economic power in the market as a surrogate for revolution, political action boycotts serve important constitutional purposes by creating an outlet for political dissent and protest. This understanding of boycott is what James Pope characterized as a republican moment justifying First Amendment protection of the *Claiborne Hardware* boycott.[417] That boycott was found to be justified under the theory of civil republicanism because "the boycotters were pursuing a broad goal rather than narrow self-interests."[418] Here then, in a nutshell, is the chameleon-like mechanism of boycott doctrine in operation. By focusing on the aspects of boycotts that involve altruistic purposes that transcend the immediate economic interests of those boycotting a constitutional right to boycott can be discovered. This model of boycott thus serves to evoke images of civic responsibility and self-sacrifice. By sacrificing their own interests, boycotters manifest their political commitment to advancing the interests of others. The right to boycott is thus made to depend on whether the boycotters seek to advance popular republican values of the common good.

The Supreme Court, however, has not been constrained by the republican ideology of *Claiborne Hardware* in denying First Amendment protection to purely political boycotts by labor and other groups. In the same term that *Claiborne Hardware* was decided the Court decided in *Allied International* that a boycott called by the longshoremen's union to protest the Russian invasion of Afghanistan could be proscribed as an illegal secondary boycott.[419] In *Allied International*, the labor boycott was aimed at influencing the policies of a foreign government, and the boycott could thus only be described as political; the Court refused to recognize that the boycott involved constitutionally protected expression because a different set of moral, legal, and political contexts were involved. Because the boycott in *Allied International* was secondary in nature and hence

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416. *Id.* at 319.

417. *See id.* at 349-52. According to Professor Pope, the Supreme Court has adopted the principle that boycotts should be constitutionally protected when they advance republican values, i.e., when they "transcend[] the day-to-day conduct of business as usual." *Id.* at 349.

418. *Id.* at 352.

419. International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982); *see also* Florian Bartosic & Gary Minda, *Labor Law Myth In The Supreme Court, 1981 Term: A Plea For Realistic And Coherent Theory*, 30 UCLA L. REV. 271, 306-10 (1982).

arguably proscribed by federal labor law, the Court was influenced by the metastasis metaphor of labor cases, the boycott was understood to be a disease spreading throughout an otherwise healthy economic system. The cure was federal proscription of the boycott.

In *Claiborne Hardware*, the Court recognized a First Amendment defense by envisioning the civil rights boycott as a conduit for bringing a message of the protest. Even though the boycott had secondary effects,[420] the Court concluded that the boycott was not a disease, but rather a cure for curtailing discriminatory patterns in society that had been sanctioned at one time by official state actions. The problem the Court saw was that civil society, not the boycott, represented the threat to law and order.[421]

Hence, in *Claiborne Hardware* it was the social context of Southern culture, rather than the boycott, that represented to the Court the forces of illegality, disorder, and insurgency. The *Claiborne Hardware* boycott was aligned with images of "law and order," "stability," and "justice;" in contrast, it was the target of the boycott, local government, that represented the image of the "unruly mob." It was the cultural images of Southern lynch mobs and labor protests, ruled by irrational passion, bypassing the judicial process in favor of the "pragmatic and the expedient,"[422] that explains why the economic boycott against this mob in Claiborne Mississippi was protected, and why the Court's decision was distinguished from the boycotts in labor cases such as *Allied International*.[423]

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420. During the *Claiborne Hardware* boycott, third parties were asked not to do business with the targets of the boycott.

421. The civil rights boycott of *Claiborne Hardware* arose out of the historical struggles of the civil rights movement of the 1950s and 1960s which actively challenged the regime of Jim Crow discrimination in the South, discrimination that had been firmly entrenched by state law. From the cultural experience of the civil rights movement, one can come to see why the economic boycott in *Claiborne Hardware* could be perceived as a liberatory or republican moment that represented the virtues of popular republican politics. *See* Minda, *Progressive Labor Politics*, *supra* note 20, at 105.

422. *See* Peller, *Reason And The Mob*, *supra* note 328, at 31.

423. While it is true that ideas of federalism and federal supremacy also help to explain the Court's *Claiborne Hardware* decision, constitutional law and policy cannot fully account for why the Court has defined the meaning of boycotts differently in other boycott cases. Federalism or practical considerations of remedy fail to explain why the legal meaning of boycott changes like the color of a chameleon as legal analysis moves to different social and economic contexts. What is not explained is why *Claiborne Hardware* is the exceptional case. It may be that the metaphors of the Southern lynch mob that signified the need for federal intervention in *Claiborne Hardware* have become culturally irrelevant today in view of narratives that have come to characterize the "New South." *See, e.g.*, VIDIADHAR S. NAIPUL, A TURN IN THE SOUTH (1989).

C. Trial Lawyers *And The Politics of Metaphoric Representation.*

In *Trial Lawyers*,[424] the Supreme Court attempted to reconcile the doctrinal conflict created by cases like *Noerr* and *Claiborne Hardware* by distinguishing between financially interested and financially disinterested boycotts aimed at influencing governmental action.[425] Justice Stevens' emphasis on whether boycotters have a financial interest at stake in governmental decisionmaking can be explained in terms of a concealed argument favoring a competitive or market process, rather than a political or governmental process, for determining economic entitlements.

Where those boycotting have a financial interest in restraining trade, *Trial Lawyers* favors private markets for implementing and harnessing private financial interests. As Professor Elhauge has argued, the Court has apparently accepted the notion "that competitive markets provide a mechanism for harnessing that financial interest in the public interest because the process of competition causes producers to provide goods at the lowest cost to those who value them the most."[426]

In rejecting the lawyers' claim that their boycott was protected by *Claiborne Hardware*, Justice Stevens also concluded that the crucial element in *Claiborne Hardware* was that the civil rights boycotters "sought no special advantage for themselves . . . [but instead] sought only the equal respect and equal treatment to which they were constitutionally entitled."[427] While the Court acknowledged that the lawyers' boycott may have been the result of altruistic motives, "it [was] undisputed that their immediate objective was to increase the price that they would be paid for their services."[428] *Claiborne Hardware* was distinguished on the ground that First Amendment protection for political boycotts was "not applicable to a boycott conducted by business competitors who 'stand to profit fina-

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

425. *Trial Lawyers*, 493 U.S. at 427 (quoting Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508 (1988)). While Justice Stevens also noted that the *Claiborne Hardware* boycotters advanced a constitutional right, *see id.* at 776-77, it is difficult to see that fact as a key factor in Justice Stevens' decision since the *Trial Lawyers* boycotters also purported to advance the Sixth Amendment rights of their indigent clients. Moreover, as Professor Elhauge has also noted, "while such a constitutional objective may be necessary to confer immunity on a *dis*interested restraint, it is plain after *Trial Lawyers* that benign subjective motivations, whether or not they involve the vindication of constitutional rights, are not sufficient to confer immunity on a financially interested restraint used to seek governmental action." Elhauge, *Antitrust Petitioning Immunity*, *supra* note 30, at 1209-10.

426. Elhauge, *Antitrust Petitioning Immunity*, *supra* note 30, at 1197-98.

427. *Trial Lawyers*, 493 U.S. at 777.

428. *Id.* at 777; *see also* Minda, *Interest Groups*, *supra* note 89, at 991.

ncially from a lessening of competition in the boycotted market.'"[429] Since at least one objective of the trial lawyers' boycott was to secure an economic advantage for the boycotters, the Court found that the boycott fell outside the First Amendment defense recognized in *Claiborne Hardware* for politically motivated boycotts.[430]

Judicial notions about antitrust process structured the Court's *Trial Lawyers* opinion, but the rhetorical support for those notions was bolstered by a concealed argument that was metaphoric in nature. The distinctions that the Court drew between economically motivated and politically motivated boycotts made sense because the distinctions relied upon a familiar imaginative schema and a basic body metaphor. The Court's public/private distinction relied upon a *parts-whole* image schema: financially interested and financially disinterested boycotts represent different parts of a larger whole made up of public and private spheres of civil society. The basic structure ordering the relation of each part to the whole is determined by the concept of containment.

Financial motivation thus becomes the key factor for determining which container or sphere is appropriate. Antitrust review is favored when private decisionmaking, ie., self-interested decisionmaking, is involved because antitrust legislation is aimed at promoting the public interest through the private competitive process.[431] First Amendment protection thus extends only to protect public decision-

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429. 493 U.S. at 776 (quoting Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508 (1988)).

430. In rejecting the trial lawyers' antitrust immunity claim, Justice Stevens distinguished Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961), on the ground that the scope of antitrust immunity afforded by *Noerr* was limited to petitioning campaigns where the alleged restraint would flow from public action. *Trial Lawyers*, 493 U.S. at 776. As Justice Stevens explained in *Trial Lawyers*:

> [I]n the *Noerr* case the alleged restraint of trade was the intended *consequence* of public action; in this case the boycott is the *means* by which [the trial lawyers] sought to obtain favorable legislation. The restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted. In *Noerr*, the desired legislation would have created the restraint on the truckers' competition; in this case the emergency legislative response to the boycott put an end to the restraint.

Trial Lawyers, 493 U.S. at 776. Justice Stevens reasoned that *Noerr* was inapplicable to the *Trial Lawyers*' boycott because the restraint of trade sought by the boycotters, a classic price-fixing conspiracy, was itself responsible for restraining trade. Restraints of trade created by private action for financially interested reasons lose the immunity *Noerr* created for boycotts seeking to directly influence governmental decision-making. As Professor Elhauge recently explained, "*Noerr* provides immunity to input, financially interested or disinterested, into a disinterested accountable decisionmaking process because it is the decision of the latter that provides the assurance that any resulting restraint is in the public interest." Elhauge, *Antitrust Petitioning Immunity*, *supra* note 30, at 1210.

431. *See* Elhauge, *Antitrust Petitioning Immunity*, *supra* note 30, at 1196-97.

making, ie., financially disinterested and publicly accountable decisionmaking.[432] Economic boycotts for political purposes lose the protection under the *Noerr* immunity principle because they are presumed to be the result of *private* action, and the First Amendment defense of *Claiborne* applies only when those participating in the boycott are acting out of purely altruistic motives.

The *parts-whole* schema provides rhetorical images that reinforce the public/private distinction of *Trial Lawyers* because there exists a dominant metaphor that structures the bulk of legal understanding about law and politics, the BODY AS CONTAINER metaphor, which structures legal concepts in terms of bounded entities like arms, legs, and bodies. Our bodies are understood as containers with forces internal to it that are limited and constrained by the physical space of our exterior.

The experiential understanding of BODY AS CONTAINER has motivated lawyers and judges to comprehend legal notions about arguments, contracts, or obligations as bounded entities.[433] For example, Justice Stevens' notion that boycotts can be distinguished on the basis of the motives of the boycotters assumes that there are unique forces motivating boycotts. Once a boycott is classified in terms of motive, the boycott is presumed to be influenced by particular forces. Economically motivated boycotts are influenced by private market forces; and politically motivated boycotts are influenced by political forces. The law seeks to restrain market forces through antitrust regulation, but political forces are intended to go unregulated. *Trial Lawyers* is thus an important decision for identifying the boundaries between the two idealized cognitive models of interest group pluralism and civic republicanism.

It is an imaginary process of representation which defines boundaries between the idealized cognitive models. In *Trial Lawyers*, the image of the boycott as a business restraint enabled the Court to treat the lawyers' boycott as if it were merely the concerted activity of a business cartel. The lawyer's constitutional freedoms

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432. *Id.*

433. Agreements are understood as containers that convey ideas and positions; contracts establish boundaries of obligations, and obligations are understood in terms of bounded promises. As Mark Johnson has explained:

> If you enter *into* an agreement, you become subject to a (moral or legal) force that acts within the abstract space contained by the agreement. So, to *get out of* such a contract or agreement is to be no longer subject to its force, since you are no longer within the "space" where that force acts upon you. This fact is a consequence of the schema for containment .... Where there is a container, there can be forces internal to it that are limited and constrained by the boundaries of the container. Once an object is removed from (taken *out of*) the container, it is no longer influenced by those forces.

JOHNSON, BODY IN THE MIND, *supra* note 45, at 35.

were consequently seen to have the lesser constitutional status attributed to profit-maximizing activity.[434] Because profit-oriented forms of commercial expression fail to implicate constitutional values,[435] the lawyers' boycott was not accorded the First Amendment protections made applicable to political boycotts. The denial of a constitutional right to boycott in *Trial Lawyers* rested upon a characterization of the boycott as a threatening and dangerous market restraint. This characterization justified the application of the *per se* rule of antitrust as a necessary corrective device to guard against the perceived danger. The constitutional values associated with the *Claiborne Hardware* boycott were found not to be relevant because the Court's understanding of the boycott was aligned with images that gave priority to the interests and values of the market.

Legal concepts defining the bounds of acceptable group activity of different boycotts have therefore worked in practice to curtail the ability of consumer groups to engage in economic boycotts for political purposes. Special interest lobbies may engage in unethical and deceptive publicity campaigns designed to influence the government to take action that would destroy competitive market forces.[436] Relatively powerless groups, who are either not represented or underrepresented in the governmental sphere, can deploy their economic power outside of political arenas only if they lack an economic interest in the subject matter of their activity.[437]

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434. Boycotts conducted by business competitors for profit-seeking objectives have never been thought to be protected by the First Amendment, even though such boycotts involve elements of expression. *See generally* Frederick Schauer, *The Aim and the Target in Free Speech Methodology*, 83 NW. U. L. REV. 562, 563 (1989).

435. *See* BAKER, *supra* note 133.

436. The dilemma posed by the unregulated power of special interest groups might have been avoided had the Court adopted a sham petitioning exception to the *Noerr* immunity principle, one that would deny antitrust immunity when lobbying or engaging in other forms of deceptive petitioning activity which intended to perfect an anticompetitive conspiracy to mislead governmental decisionmakers. Truly powerful special interests do not need the protection of *Noerr* immunity in order to dominate the legislative process through deception and fraud. *See* Minda, *Interest Groups*, *supra* note 89, at 1011-13.

437. What is striking about the Court's decision in *Trial Lawyers* is that the decision ignores the political realities facing the group of trial lawyers and their indigent clients. While it is true that the lawyers had an economic interest in their fees, they also had an interest in participating in the political process that determined their wages, hours, and other working conditions. Justice Stevens, however, conceptualized the lawyers as mere market participants motivated by profit-making objectives, when in fact they sought to have a say in the decisionmaking process that determined their workplace interests, as well as representing the interests of indigent clients. The lawyers' interest in higher fees involved more than just profit-maximizing objectives; what was at stake was human self-determination. *See id.* at 995.

D. *Making Sense of Boycott Doctrine—Implications of the Models.*

Judicial ambivalence about the right to boycott for political purposes is thus fueled by radically different imaginative concepts or idealized models about the nature of political participation in a democratic government. One conception appears to be based on the belief that interest group representation furthers the public good. The other is based on the belief that the public good is best advanced by collective self-determination and discursive citizen participation in public debate. One view defines the right of political participation as a preventative right that grants citizens the freedom to present grievances through certain orderly procedures. The other defines the right as a discursive right that grants citizens the freedom to engage in forms of expressive conduct essential for participating in the deliberative process of government.[438]

One model of group political participation, favored in labor and antitrust litigation, has defined the right of political participation in terms of what can be described as the theory of interest group pluralism, a theory that assumes that political participation is reserved exclusively to special interest group competition within political arenas. The other theory, reflected in civil rights litigation involving economic boycotts to protest racial discrimination, has defined the right of political participation in terms of a theoretical perspective that assumes that citizen involvement in the deliberative discourses of government is essential to a republican form of government. These different conceptions of political participation have been applied by the Court in a very context-specific manner because the cognitive models upon which the Court has relied for categorizing boycott doctrine have been shaped by deeply ingrained bodily expe-

438. *Claiborne Hardware* and *Noerr* can thus be seen as representing two different conceptions about political practice. One understanding, reflected in Justice Black's decision in *Noerr*, has defined the right of political participation in terms of what can be described as the theory of interest group pluralism, a theory that assumes that political participation is reserved exclusively to special interest groups. *See id.* at 931-35, 937-42. The other, reflected in Justice Stevens' decision in *Claiborne Hardware*, has defined the right of political participation in terms of a theory of popular sovereignty or civic republicanism, a theory that assumes that citizen involvement in the deliberative process of government is essential to a republican form of government. The view reflected in *Noerr* defines the right of political participation as a "preventative right" that grants citizens the freedom to present grievances through certain orderly procedures and channels of representation. The view reflected in *Claiborne Hardware* defines the right as a discursive right that grants citizens the freedom to engage in forms of expressive conduct essential for participating in the deliberative process of government. There is evidence to support the position that the drafters of the First Amendment Petitioning Clause understood the right to petition as a discursive right, even though modern Supreme Court theory has favored interpretations that construe the right to petition as merely a preventative right. *See* Higginson, *supra* note 388.

riences that influence the Courts' understanding about the reality of group activity in different social and historical settings.

In labor law, that reality seems to reflect an understanding of boycotts drawn from bodily experiences of physical force. From the embodied experience, boycotts have been understood to be compulsory forces that coerce and exclude the liberty of other individuals, or as diseases that spread the effects of labor disputes to neutral parties. In antitrust law, boycotts have been understood from somewhat different embodied experiences that allow judges to see boycotts as instruments for advancing legitimate competitive interests. What makes civil rights boycotts appear political and familiar to judges, and what makes labor boycotts appear threatening and dangerous as "other," is an imaginative process of reasoning that places the status of certain images or experiences drawn from basic bodily experiences about the world in specific factual contexts.

The right of political participation, crucial to democratic process, has thus been defined in ways that can prevent marginalized and relatively powerless groups from utilizing an effective means of influencing governmental action. The right to boycott upheld in *Claiborne Hardware* has thus been limited to those rare instances where groups engage in pure political expression to pursue purely altruistic objectives.[439] The metaphors of white Southern culture that signified the need for federal intervention and legal order in *Claiborne Hardware* are now perceived to be culturally irrelevant in today's corporate-driven mass culture.[440]

What animates the judicial understanding of boycotts are the metaphors of the marketplace, the idea that knowledge about markets offers an objective medium for structuring and ordering political and commercial activity. In *Noerr*, it was the logic of the invisible hand mechanism that animated the view that interest group competition furthers the public good. In *Trial Lawyers*, it was the notion that private economic interests can be contained by a competitive market process which often leads to the subversion of the public good. In *Allied International*, it was the notion that secondary labor boycotts spread the effects of labor disputes throughout the economic system. In *Claiborne Hardware*, it was the notion that political boycotts are a special form of political expression regulating the competitive forces of different political interests. What unites these

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439. Even the protection granted to the boycott in *Claiborne Hardware* would perhaps now be called into question, since the participants of that boycott had an economic interest at stake in eliminating various discriminatory practices that limited their employment opportunities. Indeed, this is what the boycott against the Claiborne Hardware Company was apparently all about. *See Claiborne Hardware*, 458 U.S. at 899-900, 914-15.

440. *See generally* Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797 (1990); Minda, *Progressive Labor Politics*, *supra* note 20, at 106-07.

different legal understandings of boycotts is an implicit metaphor that equates boycott activity to the homeostatic functions of the body.

First Amendment defenses for political boycotts and antitrust immunity for governmental petitioning by boycott are consequently viewed as conduits to channel collective resource allocation decisions into either a competitive process, defined in large part by antitrust and labor law, or a political process, defined by constitutional law. The underlying assumption is that the each part will provide "some realistic assurance that the decisions will be in the public interest."[441] In other words, political activity will serve the public interest only if the individuals respect the bounded space separating markets and politics. The realms of markets and politics are understood in terms of their own competitive forces, but each is assumed to function like a homeostatic organism. In the realm of markets, the invisible hand of competition ensures that the system reaches an equilibrium state; in the realm of politics, it is the free flow of interest groups competing for the favors of government that ensures a healthy balance in government. The role of law is limited to maintaining the competitive forces of each sphere. The basic structure of labor and antitrust process and First Amendment law is thus structured by a basic body metaphor that seeks to maintain balance and equilibrium between the prevailing economic and political power of dominant groups.

What is ignored is the possibility of alternative metaphors for understanding the role of boycotts in American economic and political life. Instead of understanding boycott activity as affecting some system function, boycotts could be understood as the ongoing revision of the normative practices that make communities viable for fostering human development and self-advancement. New metaphors drawn from cultural experience of direct citizen boycotts could be employed to attribute new First Amendment meaning to boycotts generally.

Boycotts could be seen as examples of collective political dialogue that create a particular form of political meaning through action. Boycotting could be understood as a political act that is intrinsically important for extending political community to all groups in society.[442] The legal meaning of boycotts could be developed from an understanding of boycott as a dialogic practice necessary for political expression. Instead of analyzing boycott activity in terms of homeostatic functions, the legal meaning of boycotts could be re-imagined

441. Elhauge, *Antitrust Petitioning Immunity*, *supra* note 30, at 1198; *see also* Elhauge, *Antitrust Process*, *supra* note 30, at 697-708.

442. *See generally* Frank Michaelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

in terms of a deliberative politics among persons overcoming, through confrontation the moral stasis of official power and authority. Thinking of boycotts as a dialogic process of deliberative politics should encourage judges to adopt a new attitude toward boycotts: an attitude traceable to a conception of democracy based on popular will.[443]

The problem is that the legal understanding of boycotts developed in *Claiborne Hardware* is now in danger of extinction in face of the dominant boycott images of cases like *Trial Lawyers* and *Allied International*. Boycotts, like most other human activity, are the product of multiple purposes and diverse interests. The boycott upheld in *Claiborne Hardware* was brought because discrimination denied African Americans economic opportunities in employment.[444] The boycott in *Trial Lawyers* was brought because court appointed lawyers could no longer effectively advance the Sixth Amendment rights of their clients at the hourly fees fixed by local law.[445] One cannot say that these boycotts were purely financially interested or disinterested boycotts; they were both. The only basis for making these distinctions is the pull of a concealed metaphoric argumentative structure that encourages us to understand boycotts in terms of body metaphors.

V. CHANGING SOCIAL CONCEPTIONS OF THE RIGHT TO BOYCOTT: LANGUAGE AND SOCIAL ORDER

Even boycotts aimed . . . at private decisionmaking should share the status of other political acts such as electoral voting, contributing money and time to an election or referendum campaign, and litigating for social purposes. All of these political actions can be viewed broadly as means by which citizens can influence important social decisionmaking.[446]

The recent wave of consumer and political boycotts suggests that boycotts are becoming an established part of the American political scene.[447] Economic boycotts against Idaho potatoes,[448] Coors

443. *See* Frank Michaelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 293 (1989).

444. Minda, *Progressive Labor Politics*, *supra* note 20, at 99.

445. *Id.* at 77-78.

446. Harper, *supra* note 30, at 422 (footnote omitted).

447. *See, e.g.*, Don Terry, *Diplomacy Fails to End Store Boycott in Flatbush*, N.Y. TIMES, July 16, 1990, §2, at B1; M.A. Farber, *Black-Korean Who-Pushed-Whom Festers*, N.Y. TIMES, May 7, 1990 §2, at B1; Merle English & Ji-Yeon Yuh, *Black-Korean Conflict Simmers; Store Protests in Brooklyn Fan Old Flames*, NEWSDAY, Feb. 13, 1990, at 6.

448. Pro-choice activists threatened Idaho Governor Cecil Andrus with a national boycott of Idaho Potatoes if he did not veto what would have been the most restrictive state abortion law in the nation. *See, e.g.*, *Idaho Abortion Bill Is Vetoed: Legislation Was Far Too Restrictive, Governor Says*, CHI. TRIB., Mar. 31, 1990, at 1.

beer,[449] Dominos Pizza,[450] tuna fish,[451] and Salvadoran coffee,[452] to mention just a few, have all been called by special interest groups seeking to influence commercial and governmental policy. These boycotts pose a serious challenge to the way judges have come to understand the legal meaning of boycotts because the groups boycotting today do so for both economic and political objectives. The actual cultural practice of boycotts thus fails to respect the metaphoric reasoning upon which the Supreme Court has uncritically relied for distinguishing between boycott activities of different groups.

Consider, for example, the Coors beer boycott, which was brought by labor and consumer groups to change corporate policy of the Coors beer company. The boycott was fueled by the opposition of various groups to the political views of the founder of the Coors company, who was instrumental in founding the Heritage Foundation,[453] a conservative think-tank which supported and helped to shape Reagan Administration policies. The boycott was joined by feminist organizations, as well as by black, hispanic, gay, and other ethnic communities who found Coors to represent political causes that were adverse to their interests.[454] The boycott was initiated by the AFL-CIO, which had been attempting unsuccessfully to unionize

449. *See* Tasini, *supra* note 7, at 19.

450. The National Organization for Women (NOW) has organized a boycott of Domino's Pizza alleging that Domino's owner, Thomas Monaghan, has contributed, in personal and corporate funds, over $50,000 to The Michigan Committee to End Tax Funded Abortions. *See, e.g.*, Dana Fulham, *Local NOW Leader Urges Boycott of Two Firms*, BOSTON GLOBE, Apr. 27, 1989, at 7. A national boycott was called by NOW but has had little effect on Domino's sales. *See* Kara Swisher, *Backing Away From Controversy: Abortion Issue Causes AT&T to Pull Funds*, WASH. POST, Apr. 5, 1990, at E1.

451. Environmentalists called a highly successful boycott against American tuna canners to stop the canners from selling tuna fish caught in nets that also trap and kill dolphins. *Boycotting Corporate America*, ECONOMIST, May 26, 1990, at 69; *see also* Sheets, *supra* note 7, at 44.

452. A San Francisco-based peace group called for a national boycott of American coffee manufacturers who import Salvadoran coffee beans, claiming that the manufacturers were indirectly supporting El Salvador's violent right-wing government. John Greenwald, *Bitter Cup of Protest*, TIME, May 28, 1990, at 52; *see also* Liberman, *supra* note 7, at 15.

453. In 1973, Joseph Coors, patriarch of the Coors family, donated $250,000 to help start up the Heritage Foundation. Steven Greenhouse, *The Coors Boys Stick to Business*, N.Y. TIMES, Nov. 30, 1986, § 3, at 1. Joseph Coors has, at times, provided more than half of the Heritage Foundation's budget. *See* Paul Richter, *Coors' New Brew: Taking Out the Political Aftertaste*, L.A. TIMES, Sept. 27, 1987, § 4, at 1.

454. *See, e.g.*, Richter, *supra* note 453, at 1. Feminists boycotted Coors because of the Coors's family's strident opposition to the Equal Rights Amendment. *Id.* at 6. African Americans joined the boycott in response to statements by Bill Coors, Joseph Coors's brother, that "blacks lack 'intellectual capacity' and that this was one reason Africa has economic problems." Greenhouse, *supra* note 453, at 30. Women, African American, Hispanic, and homosexual groups have also boycotted Coors due to the firm's alleged discriminatory employment practices. *Id.*

Coors' breweries.[455]

The Coors boycott had both political and economic objectives. Some groups boycotted Coors because they did not want to support political causes that were perceived to be contrary to their political interests. Other groups protested because they perceived Coors as supporting governmental policies that worked to undermine their economic interests. Finally, union groups boycotted to pressure Coors to assume collective bargaining responsibilities under federal labor law. The combined effect of the boycott over several years worked substantially to diminish Coors' market share, a factor that ultimately contributed to the success of the boycott.[456]

Justice Stevens' opinion in *Trial Lawyers* suggests that the Coors boycott would not be immunized from antitrust litigation if the participants had an economic stake in the outcome of the boycott. At least some of the participants in the boycott, especially those who were members of the union, stood to secure a direct economic benefit if the boycott proved successful; it is thus far from clear that the Coors boycott would be protected by *Claiborne Hardware*. Of course, the safety net for political boycott activity created by the *Claiborne Hardware* Court may not apply in light of the of the *Trial Lawyers* decision.[457] The Coors beer boycott was not unique,[458] and many consumer boycotts today resemble that boycott. Many consumer boy-

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455. The Coors beer boycott was initiated by the AFL-CIO in response to the Coors company's anti-union attitudes and practices. Richter, *supra* note 453, at 1. Opposition to the political views of Joseph Coors led to intensifying and broadening of the boycott. *Id.*; *see also* Mark Stencel, *Boycotts a Touchy Business for Targeted Firms*, L.A. TIMES, Sept. 11, 1990, §D, at 2A ; *Helms Subject of Beer Boycott by Gays*, UPI, Jul. 22, 1990, available in LEXIS, NEXIS Library, UPI File.

456. *See* Richter, *supra* note 453. Many outside analysts, as well as company officials, believe that Coors's market share decline was attributable to the boycott as well as to the aggressive tactics of Coors's competitors. *Id.* Over the last few years, Coors's market share was substantially diminished. For example, Coors's California market share fell from above 40% in 1977 to approximately 14% in 1984. Company profits dropped from $67.7 million to $44.7 million. Tasini, *supra* note 7, at 19. The Coors boycott raises troublesome issues for policymakers concerned with federal competition policy because the boycott restrained the ability of Coors to compete in the market, a consequence which could not be seen as the result of "competition on the merits." If a group of beer competitors had engaged in the same boycott, the boycott would probably have been found to be a per se violation of the antitrust laws. *See* Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959) (holding that a group boycott is per se illegal under §1 of Sherman Act); *cf.* Catalano, Inc. v. Target Sales, Inc. 446 U.S. 643 (1980) (per curiam) (holding that an agreement between beer distributors to eliminate short term credit formerly granted to retailers is illegal per se).

457. *See* Garret G. Rasmussen & Kenneth L. Glazer, *Boycotters Beware: Changing Standards for Consumer Boycotts*, 5 ANTITRUST, Spring 1991, at 22.

458. *See* William Raspberry, PUSH v. Nike*: Serious Issues and Hocus-Pocus*, CHI. TRIB., Aug. 30, 1990, §1, at 27.

cotts may now be at risk as a result of *Trial Lawyers*.[459]

Labor-community boycotts, for example, can be seen to involve expressive activity that is itself designed to both challenge and transform the language, values, and myths of society that denigrate and delegitimize social movements. Union-initiated community boycotts, such as the one brought by grape pickers in California, represent attempts by organized labor to transform the baseline of a traditional labor dispute into a broader political one so that the underlying issues may be expressed in a language that the general consuming public can understand. In doing so, labor organizers have interjected into the political discourse new symbols and new language for valorizing labor's traditional goal of collective bargaining. Their goal appears to have been based on an attempt to recreate a "new labor institution" built on a new unionism of "decentralized, highly democratic, responsive, and communitarian" values.[460]

On the other hand, it also true that boycotts requesting consumers to withhold their patronage can be just as coercive as traditional labor and business boycotts, and in some contexts they may be even more coercive.[461] For example, a local chapter of the Girl Scouts

459. The problem with this development is that many consumer boycotts today resemble the Coors boycott, and for that reason, the Court's *Trial Lawyers* decision may work to undermine the right of consumers to boycott. We tend to think of consumer oriented boycotts as 100 percent political, thus differentiating them from traditional labor and business boycotts that are thought to be 100 percent economic. The reality is that many labor, business, and consumer boycotts can be seen to represent a common collective effort to transform legal, social, and economic structures that are perceived to be unfair or unjust. It is thus possible to imagine different metaphoric baselines for understanding similarities between these boycotts. Indeed, this is the point of the new unionism associated with labor-community boycotts that have involved consumer and union groups, corporate campaigns, and community alliances to advance a new democratic labor movement in an effort to promote and preserve traditional union organizational objectives. Labor organizers have become involved in consumer boycotts and corporate campaigns because they realize that the underlying political struggle is helpful in transforming corporate driven cultural values that seek to render the traditional values of the labor movement out of date and socially irrelevant. *See, e.g.*, Pope, *Labor Community Boycotts*, *supra* note 20, at 894-97, 901-14; *see also* HARDY GREEN, ON STRIKE AT HORMEL: THE STRUGGLE FOR A DEMOCRATIC LABOR MOVEMENT (1990); CHARLES HECKSCHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION (1988).

460. GREEN, *supra* note 459, at 300. The struggle for a new democratic labor movement is likely to be frustrated by the new legal distinctions established by the Supreme Court's developing boycott doctrine. To be successful in its effort to create a new unionism, labor must be permitted to tie the goal of the consumer campaign to the ultimate goal of winning broad support for collective bargaining. Union organizers must, if they are to succeed in saving the labor movement from extinction, transcend the economics/politics distinction by persuading others that the institutional interests of labor are consistent with the broader social and political interests of other marginalized groups in society. *See* Minda, *Progressive Labor Politics*, *supra* note 20, at 126.

461. Recent empirical evidence suggests that labor boycotts involving social issues are more effective at damaging the wealth position of the target company's shareholders.

of America was recently boycotted by a large pro-life group, claiming that one of the Girl Scouts' programs allegedly discussed the subject of abortion. Within 48 hours of the announcement of the boycott, the Girl Scouts organization dropped from its programs all references to abortion, apparently because it feared a negative effect on revenues it receives from its annual cookie sales. As a spokesperson for Girl Scouts explained: "The boycott was extremely threatening because we were very vulnerable. A lot of people would not have been sympathetic, and we could not recoup the losses. . . ."[462] A similar story could be told about the Idaho potato boycott, forcing the Governor of Idaho to effect change in state abortion laws by vetoing legislation he might have signed if the boycott had not pressured him to do otherwise.

That consumer boycotts are inherently coercive or damaging to the wealth position of their targets does not, of course, detract from their political character.[463] The boycotts against the Girl Scouts and Idaho potatoes were coercive, but so was the decision of the Girl Scouts' organization to provide instructional programs on abortion, and the political decision of a Governor to sign or veto particular legislation. In this respect one might argue that the right-to-life boycott against the Girl Scouts or the ERA potato boycott were really no

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See Pope, *Labor Community Boycotts*, *supra* note 20, at 905-08; *see also* Steven W. Pruitt & Monroe Friedman, *Determining the Effectiveness of Consumer Boycotts: A Stock Price Analysis of Their Impact on Corporate Targets*, 9 J. CONSUMER POL'Y 375, 381 (1986) (discussing long-term study of consumer and union boycotts revealing that stock prices declined by about 3.5 percent). *But see* Steven W. Pruitt et al., *The Impact of Union-Sponsored Boycotts on the Stock Prices of Target Firms*, 9 J. LAB. RES. 285, 289 (1988) (study of union boycotts suggest that the negative effect of boycotts arising immediately after the announcement of the boycott dissipated within one month).

462. Garrett, *supra* note 7, at 19.

463. One justification for consumer oriented boycotts is that these boycotts seek to provide consumers with more complete information about the product than was offered in the marketplace. The idea of consumer sovereignty suggests that consumers should have full information about the products they consume, including the political practices their purchases might support. This is an argument offered by Professor Harper in advocating a right to boycott as political action. *See* Harper, *supra* note 30, at 421 ("Any secure basis for a right to boycott must trump a state's efforts to protect its economy from disruption. Any individual's decision to join a consumer boycott must be protected precisely because it enables the individual to affect the economy, not in spite of such effects."). Professor Harper acknowledges, however, that the notion of consumer sovereignty found in the "microeconomic welfare doctrine is not a sufficient source for the right to engage in a concerted refusal to patronize," because "the doctrine rests on challengeable ethical and empirical assumptions." *Id.* A more persuasive argument, would seek to establish that the right to boycott is "a constitutionally protected political act" and that "[t]he coercion inherent in political boycotts is simply an exercise of the influence that citizens as consumers should be encouraged to exercise." *Id.* at 425. The same arguments can be made in advocating broader legal protection for consumer boycotts incident to labor disputes. *See id.* at 438-53.

different than the product boycotts brought against American corporations doing business in South Africa.[464]

One might see the boycotts against the Girl Scouts and Idaho potatoes as efforts to subvert the normal market and political channels available for consumers to make known their wishes and preferences. The Girl Scouts organization, dependent as it was on voluntary contributions and cookie sales, was vulnerable to the pressures of the right-to-life group. The economy of Idaho was similarly dependent upon potato sales through out the nation. What is troubling about these boycotts, so the argument goes, is that they have the potential of forcing political decisions without voter or consumer consensus. One could argue that these boycotts fail to serve democratic purposes.

Indeed, these boycotts may look to some as acts of political terrorism. The Girls Scouts organization and the Governor of Idaho are seen to have caved in to the demands of their respective boycott only 48 hours after their announcement. Consumers hardly had an opportunity to voice their views about the underlying issues. We don't allow people to engage in acts of political terrorism in other contexts, even if such prohibitions have an incidental impact on the communicative power of private parties. One reason for regulating boycotts is to protect innocents from being coerced into certain forms of actions.

The image of political terrorism, however, assumes that the boycott target was forced by fear and submission to accept the demands of the terrorists. The force of the argument is thus dependent upon the image schema of *compulsory force* and the CONTAINER metaphors of labor law which, as we have seen, seek to persuade that boycotts are threatening and coercive activities which should be restrained by the legal order. The metaphors of political terrorism would suggest that the Girl Scouts and the Governor of Idaho had no choice but to submit to the demands of the right-to-life or pro-choice group, but as a factual matter, they had a choice.

The Girl Scouts organization apparently decided that it was simply more expedient to stop their programs that discussed abortions than to risk a loss of revenue through cookie sales. Their decision, however, may have been wrong; there are some consumers who would see the Girl Scouts' as siding with the right-to-life group. There was also the possibility that cookie sales were lost to consumers who stopped purchasing Girl Scout cookies because the programs were eliminated. Similarly, the Governor of Idaho could have stood firm and refused to veto recently enacted legislation if he really be-

464. In either case, the goal of the boycott was designed to bring pressure on private entities that affirmatively support, through deeds or investments, political practices which some find to be morally reprehensible. *See* Harper, *supra* note 30, at 410.

lieved that it was the will of the majority to do so. The democratic and market process in either case would correct such actions if these decisions proved to lack popular support.[465]

It would be a mistake to automatically equate consumer boycotts with marginalized and powerless groups. Today, everybody feels powerless to some degree; even the right-to-life group that boycotted the Girl Scouts probably felt powerless. Citizen groups of all political persuasions engage in consumer boycotts because every segment of American society has become deeply pessimistic about the capacity of the political process to respond to the needs of various individuals. Some citizens boycott because they believe it may be the only way to gain a voice in the political process. Others boycott because they believe it to be an effective and low cost means of forcing change. Boycotts are simply a popular way to publicize a dispute and garner public support.

In the *Trial Lawyers* case, however, the Supreme Court seemed to be concerned that a boycott might prevent consumers from freely making up their minds about the issues in the boycott. The Court seemed to worry about the potential market restraint created by a boycott. But in *Trial Lawyers* there was no proof that the boycotters had sufficient market power to impose a restraint.[466] Indeed, the evidence suggested otherwise; the target of the boycott, the District of Columbia, had monopsony power over the price of the lawyers' services.[467]

Justice Stevens' decision in *Trial Lawyers* may be understood in terms of a fear that the lawyers' boycott was like the boycotts against the Girl Scouts or Idaho potatoes: an act of political terrorism that exposed the government to "extortion" by suppliers of the goods and services it needed.[468] The Supreme Court may have felt compelled to deny First Amendment protection to the lawyers' boycott to protect the vulnerable position of the District, dependent as it was on the retention of the lawyer's services.[469] On the other hand,

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465. Although an executive veto may pose obstacles that prevent the manifestation of the popular will, this is a consequence of the current governmental structure that gives executives the authority to veto legislation. Thus, the counter-majoritarian problem is structural.

466. *See* Superior Court Trial Lawyers Ass'n v. FTC, 856 F.2d 226, 250-53 (D.C. Cir. 1988), *rev'd in part*, 493 U.S. 411 (1990).

467. *See* Kindred, *supra* note 30, at 725.

468. FTC v. Superior Court Trial Lawyers Ass'n (Trial Lawyers), 493 U.S. 411, 425 (1990). As Judge Ginsburg explained, "Congress surely did not mean to leave governments so vulnerable to extortion by the suppliers of the goods and services they need." Superior Court Trial Lawyers Ass'n v. FTC, 856 F.2d at 240.

469. *See* Minda, *Interest Groups*, *supra* note 89, at 998. Of course, in *Trial Lawyers* there were alternatives available that would have enabled the District of Columbia to protect its own interest in the face of the lawyers' boycott. Justice Brennan noted that

the actual cultural practice of consumer boycotts in America today serves to challenge these judicial understandings about boycotts. Groups seeking to boycott for political and economic objectives have boycotted to change corporate and governmental policy while at the same time advancing their own interests. The act of boycotting is understood by boycotters as expressive conduct designed to advance alternative messages that are either not heard or not communicated by those who possess power to make changes in society.

Those participating in boycotts have attempted to invoke different images and metaphors to transform and shift conventional ways of talking about politics and knowledge. These images and metaphors, derived from cultural practices, seem to cohere best with Justice Brennan's understanding of boycott in his *Trial Lawyers* dissent. In Justice Brennan's understanding, boycotts have become "[l]ike soapbox oratory in the streets and parks"[470] or "traditional means of 'communicating thoughts between citizens' and 'discussing' public questions."[471] Boycott activity today seeks to alter the public's awareness, interest, and concerns regarding a protested issue or topic. Through publicity generated by the boycott, individuals attempt to further open up public debate and discourse now relegated to the formal political arenas.

The publicly shared understanding of consumer boycotts may therefore fit the understanding of boycott Justice Brennan attributed to the *Trial Lawyers* boycott. As Justice Brennan explained,

> By 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. The passive nonviolence of King and Gandhi are proof that the resolute acceptance of pain may communicate dedication and righteousness more eloquently than mere words ever could. A boycott, like a hunger strike, conveys an emotional message that is absent in a letter-to-the-editor, a conversation with the major, or even protest march. In this respect, an expressive boycott is a special form of political communication.... [A]dvice to the Trial Lawyers—that they should do 'something dramatic to attract attention'—was sage indeed.[472]

"[t]he government [had] options open to it that private parties [did] not . . . the boycott was aimed at a legislative body with the power to terminate it any time by requiring all members of the District Bar to represent defendants *pro bono*." *Trial Lawyers*, 493 U.S. at 452 (Brennan, J., concurring in part and dissenting in part). The point is that it was not necessary to sacrifice the interests of the lawyers, as well as their indigent clients, to protect governmental interests. *See* Minda, *Interest Groups*, *supra* note 89, at 998.

470. *Trial Lawyers*, 493 U.S. at 450-51 (Brennan, J., concurring in part and dissenting in part).

471. Hague v. Committee For Indus. Org., 307 U.S. 496, 515 (1939).

472. *Trial Lawyers*, 493 U.S. at 450-51 (citation omitted).

The metaphors of boycott projected by the cultural practice of those boycotting do seem to fit best with an image of boycott as a form of action aimed at constructing and transforming political discourse.[473] A culture based understanding of boycotts should support new metaphoric images that understand boycott activity as serving the creation of meaning itself, rather than serving the function for some systemic purpose. The First Amendment significance of boycotts can be discovered in light of the cultural practice boycotts have played in American politics. The idea of boycott as soapbox oratory in *Trial Lawyers*, or boycott as solidarity and self-advancement characteristic of *NOW*'s boycott to encourage ratification of the Equal Rights Amendment, or labor boycotts of grapes, tuna, or the Russian Invasion of Afghanistan in *Allied International*, serve to raise images of boycott that cohere best with idea of boycott as a political act.

An understanding of boycott as political act might enable the courts to decide boycott issues in a more enlightened manner. Where boycotters sincerely seek to publicize their boycott to the public, and when a broad audience of citizens are asked to join in support of the boycott, the courts should treat the boycott as a constitutionally protected act. Boycotts by business groups seeking predatory market objectives should continue to be regulated because these boycotts do not involve political acts. "Very few economically coercive boycotts seek notoriety both because they seek to escape detection and because they have no wider audience beyond the participants and the target."[474]

Labor boycotts should not be treated different; they should be granted a First Amendment defense for political activity. When workers boycott for economic objectives they also are seeking to gain control over what happens to them at the workplace; at stake are substantive and democratic values that transcend the desire for money. Economic boycotts by labor groups should not be subject to the same legal treatment accorded to economic boycotts by business groups motivated by purely profit-seeking objectives. A new concep-

473. *See Trial Lawyers*, 493 U.S. at 441-46 (Brennan, J., dissenting); Minda, *Interest Groups*, *supra* note 89, at 992. While consumer boycotts, like economic boycotts, can be inherently coercive, that should not be an excuse for limiting the freedom of individuals to boycott. The fact that boycotters may seek to intimidate their targets is also an insufficient reason for regulating their boycott. Antisocial behavior may simply be a way of gaining media attention, the "poor person's way to gain access to mass media." Balkin, *Ideological Drift*, *supra* note 243, at 64 n.74. If the law seeks to limit the right of consumers to boycott because such activity is likened to an act of political terrorism, then those who are now marginalized and excluded by existing social and political inequities will be further denied the opportunities to promote and protect their own interests.

474. *Trial Lawyers*, 493 U.S. at 451 (Brennan, J., concurring in part, dissenting in part).

tual metaphor, one that would encourage judges to understand boycott as a political act, would warrant greater First Amendment protection to secondary labor boycotts. Instead of relying upon bodily experience, judges might come to discover new conceptual metaphors in their attempt to better understand the way citizens participate fully in the political community. The lifeworld of American political practice of ordinary citizens may offer better metaphors for defining the legal meaning of boycott.

The courts should, of course, consider whether the conduct involved in boycotting is a legitimate political act or mere sham to achieve an anticompetitive purpose. Boycotts aimed at influencing governmental action should not be immunized under the antitrust laws if such petitioning involves misrepresentations, falsehoods, distortions of the truth, or unethical propaganda.[475]

If boycotts are condemned because they involve what judges perceive to be illegitimate objectives,[476] however, then it will be

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475. *See* Minda, *Interest Groups*, *supra* note 89, at 1013 (arguing that the sham exception to the *Noerr* immunity doctrine should be broadened to cover petitioning efforts based on misrepresentations, falsehoods, deceptions and other unethical techniques).

476. Michael C. Harper has argued that the right of consumers to boycott should be denied legal protection if the boycott is aimed at illegal action. *See* Harper, *supra* note 30, at 430. Boycotts that advocate violence and criminal conduct, of course, have never been understood to be protected as political acts. The leading case for this view appears to be Brandenburg v. Ohio, 395 U.S. 444 (1969). It is quite a different matter, however, to assume that judges have the power to determine when otherwise peaceful activity should be enjoined or regulated because they have concluded that an unlawful object or a noncriminal illegal means is involved.

Political action boycotts that are viewed as discriminating against certain groups because of race, sex, or religious preference, so-called bias-related boycotts, are especially troublesome. The Korean grocery store boycott in Brooklyn, the "Red Apple boycott," illustrates this point. The Red Apple boycott has been characterized by some as racially motivated, *see, e.g.*, UNITED STATES CIVIL RIGHTS COMMISSION, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S 34-40 (1992), and the boycott undoubtedly involved deep racial overtones involving long-standing resentment between Blacks and Koreans. *See, e.g.*, Anemona Hartocollis, *Little Support Across Races for Boycott*, NEWSDAY, June 15, 1990, at 4; Merle English, *Boycotters Plan Rally*, NEWSDAY, Jan. 18, 1991, at 38. The Red Apple boycott was generated by mixed motives, one of which constituted an illegal discriminatory motive. Furthermore, it could be said that the Red Apple boycott involved questionable discriminatory and unlawful objectives. In Hughes v. Superior Court, 339 U.S. 460 (1950), the Supreme Court held that a state could enjoin a boycott that sought to implement a racial quota, since the boycott's objective was itself prohibited by a valid state law, a result that would now (probably) be prohibited by federal law. *See* United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979). Justice Stevens took pains to distinguish *Hughes* from the civil rights boycott involved in *Claiborne*. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982).

A new legislative amendment to New York City's Human Rights act has been interpreted by some as creating a new private right of action for individuals who believe that they have been the victims of a bias-related boycott. *See* N.Y. City's Human Rights Law, § 465-A (1991); *see also* Barbara Franklin, *New Human Rights Law Seen Adding Legal*

judges who will ultimately determine which objectives are permissible and lawful. The problem is that judges may fail to realize that the law they apply is shaped by deeply ingrained values structured by partial cultural understandings of what is or is not acceptable political behavior for groups. Such a view is troubling because it would surely serve to immunize the legal images of boycotts against social forces which seek to advance different images and understandings. What better manifestation of legal hegemony than to allow judges to determine from their perspective which boycotts are legitimate and which are illegitimate.[477]

Because boycotts invariably raise ambivalent feelings about the nature of the activity involved, there will always be ways of understanding economic boycotts in different ways. What we can learn to discover is how the cognitive process in legal decisionmaking works to disguise underlying political choices by reaching conclusions that are the product of an imaginary and cognitive process that cannot be resolved by objectivist notions about legal reasoning. Objectivity in law should require rising above our personal prejudices, idiosyncratic points of view, and dogmatic claims to truth. Objectivity in law should not require taking up "God's perspective," which is after all impossible; rather, it should entail an understanding of how shared human perspectives are tied to reality through our embodied cognitive imagination.[478]

The path to the development of a political right to boycott begins with a commitment to the values of a deliberative democracy, the idea that citizen self-government is a guiding principle to be preserved by the First Amendment. Only by protecting the right of all groups to participate in the deliberative affairs of government can we hope to promote values which the Constitution and federal and

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Work, N.Y. L.J., June 13, 1991, at 5. The new framework of analysis established under the Supreme Court's *Trial Lawyers* decision would seem to support such a view, given that bias-related boycotts are like economic oriented boycotts in that they fail to pursue goals that transcend the boycotters' self-interests.

477. It is unlikely that legal intervention to restrain a protest boycott would encourage citizens to respect the law, or end the boycott. It is more likely that the social and economic tensions generated by a boycott can only be resolved by the parties themselves through mutual understanding of each side's position. Illegal activity, independent of the boycott, should not be condoned. But what if it is law that is the source of violence? The point is that violence may be necessary to preserve law. *See* Jacques Derrida, *Force of Law: The Mystical Foundation of Authority*, 11 CARDOZO L. REV. 921 (1991). As Walter Benjamin has argued, "[t]he state fears this violence simply for its lawmaking character, being obliged to acknowledge it as lawmaking whenever external powers force it to concede them the right to conduct warfare, and classes the right to strike." *See* Walter Benjamin, *Critique of Violence in* REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS 283-84 (Peter Demetz ed., 1978).

478. *See* JOHNSON, BODY IN THE MIND, *supra* note 45, at 212.

state law seeks to enshrine. This is, I believe, the inspiration to be found in Justice Stevens' decision in *Claiborne Hardware*. The only real obstacle to its attainment is the existence of an imaginative process and a politics of representation that posits distinctions between politics and economics and ignores the reality of domination and subordination in the social order.

VI. CONCLUSION

Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.[479]

Justice Stevens' metaphor of the chameleon is an apt one for the law of boycotts because the indeterminacy of boycott doctrine can best be understood as a system of symbolic representations capable of generating different idealized cognitive models and socially constructed understandings about real world events based on an embodied experience of the body. In the metaphoric world of boycott doctrine, law and metaphor are inseparably related to imagined understandings about experience.[480] Like the color of a chameleon, which fades and changes as context changes, boycott doctrine invokes different body metaphors to project different legal meanings of boycott in different contexts.

Metaphorically constructed meaning can be seen as the source of law's determinacy, but because the underlying metaphors used in the law are themselves partial and incomplete, the system of relevant legal rules continually exhibits a highly contingent and open texture. The problem is that other ways of understanding the world, other knowledges, other subjects and images that project different ideas or conceptions about the nature of human relations and behavior are never considered. These excluded understandings of reality, relegated to the borders of legal analysis, continually seek to challenge the dominant images and metaphors frozen within legal categories through the telling of counter-factual narratives that employ different metaphors, metonymies, and imaginative images appealing to the felt experiences of different groups.

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479. Cover, *supra* note 247, at 4-5.

480. *See* Winter, *Transcendental Nonsense*, *supra* note 35, at 1231 ("For us, the production and maintenance of legal meaning is dependent upon lived human experience. To *make* meaning, one must do *meaning*. . . ."); *see also* Steven L. Winter, *Without Privilege*, 139 U. PA. L. REV. 1063, 1064-65 (1991) ("All meaning is meaning in a context, and that meaning-conferring context is the field of human action."). By examining how cognitive metaphors have been used in legal decisions for grounding different understandings about the nature of reality, we can discover aspects of the various "worlds" that judges have socially constructed for the law of boycotts. An examination of those "worlds" can be the basis for constructive reflection and criticism.

By examining cultural practices we can discover different metaphors which advocates can use to persuade legal decisionmakers to see a situation in a substantively different way. Paradigm shifts can be brought about by establishing new models created from different metaphoric understandings of reality. The awareness of exclusion can sometimes become the spark that galvanizes individuals to organize and promote their own interests through collective self-action. In this way, one can come to understand how groups seeking to boycott for political *and* economic objectives might boycott to transform a legal and social system that is itself constructed out of ideas about the world that reinforce existing social practices that exclude and marginalize others.

Clarifying choices about different interpretative methods and approaches for understanding the legal meaning of boycotts can be enormously helpful for understanding the inevitable politics of legal doctrine. Understanding boycott law as the product of metaphoric reasoning may also provide clues for developing new progressive legal strategies for countering the culturally conservative premises now dominating the imagination of the new conservatism of the current Supreme Court. For Judges, lawyers, and legal scholars, such an awareness might be all that is needed.[481] Awareness of the contingent nature of legal meaning can be the basis for rethinking socially constructed understandings in the law. By invoking different images and metaphors, advocates can persuade legal decisionmakers to see a situation in a substantially different way and thus lead to a better understanding about law's indeterminacies.

Awareness of constraint or exclusion may also become the spark that galvanizes judges to see different qualities and facets of group boycotts. Paradigm shifts can be brought about by establishing new models created from different metaphoric understandings of reality. Awareness may provide an opportunity for gaining insight into the constitutive role of law in reinforcing existing social practices that exclude and marginalize others. Awareness might lead to a richer understanding of why group action in society may be a good thing that the legal system should tolerate, if not protect. Judges might then understand why some groups in society might perceive a boycott as a transformative political act necessary to change a legal and social system that is itself constructed out of partial and incomplete understandings of the world.

481. *See also* Boyle, *supra* note 36, at 524.