

REDISCOVERING PROGRESSIVE LABOR POLITICS: THE LABOR LAW IMPLICATIONS OF *FEDERAL TRADE COMMISSION v. SUPERIOR COURT TRIAL LAWYERS ASSOCIATION*

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INTRODUCTION

The American trade union movement is in serious trouble. Union membership is declining at an ever increasing rate. Labor law observers—critics and supporters alike—recognize that labor unions have lost much of their former power.¹ Labor's traditional economic weapon, the strike, may no longer be effective as an organizational or collective bargaining tool.² Today, even unions are

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1. See Atleson, *The Prospects for Labor Law Reform*, 18 POL'Y STUDIES J. 364 (1989-1990)(advocate)(hereinafter Atleson, *Labor Law Reform*); Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012 (1984) (critic). See also *Private-Sector Unions' Organizing Woes Detailed*, [1 Analysis/News and Background Information] Lab. Rel. Rep. (BNA) No. 134, at 142 (June 4, 1990); *Fundamental Changes In Labor-Management Relations Are Expected During 1990s, Expert Tells BNA*, [1 Analysis/News and Background Information] Lab. Rel. Rep. (BNA) No. 133, at 233 (Feb. 26, 1990).

2. See, e.g., P. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW*, 128-29 n.43 (1990) [hereinafter P. WEILER, *GOVERNING THE WORKPLACE*] (citing C. PERRY, A. KRAMER & T. SCHNEIDER, *OPERATING DURING STRIKES: COMPANY EXPERIENCE, NLRB POLICIES, AND GOVERNMENTAL REGULATIONS* (1982)). See also *Anti-Strike Replacement Bill Pressed By Unions*, [1 Analysis/News and Background Information] Lab. Rel. Rep. (BNA) No. 133, at 316 (Mar. 12, 1990). This is especially apparent in light of the many recent failed strike attempts by unions in both the private and public sectors. See *Experts Say Many Factors Contribute to Strike Decline*, Daily Lab. Rep. (BNA) No. 62, at A-A (April 3, 1989) (reporting that strike activity of unions in 1988 fell to its lowest level since the Bureau began collecting such data in 1947). The many unsuccessful strike efforts by labor are the result of diverse political and economic factors including capital mobility and changes in corporate structure. See Atleson, *Reflections on Labor, Power, and Society*, 44 MD. L. REV. 841, 842-43 (1985); see also *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938)(establishing the right of employers to hire permanent replacements); Atleson, *Labor Law Reform*, *supra* note 1, at 368-71 (discussing the general perception of declining union power); Gould, *The Burger Court and Labor Law: The Beat Goes On* — Marcato,

less aggressive and less committed to new organizing campaigns in the private sector.³ Union victory rates in certified National Labor Relations Board elections have fallen from seventy-four percent in 1950 to forty-eight percent in 1980.⁴ The share of the private sector work force belonging to unions, which peaked at forty percent in the mid-fifties, has fallen to below fifteen percent.⁵ As Professor Paul Weiler aptly declared, "[t]he decline of union representation within the work force presents the most important challenge facing American labor law today."⁶

24 SAN DIEGO L. REV. 51, 61 (1987)(discussing the new emphasis on concession bargaining and job security). See also M. GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* (1987) [hereinafter M. GOLDFIELD, *DECLINE OF ORGANIZED LABOR*]; Stone, Book Review, 58 U. CIN. L. REV. 477 (1989) [hereinafter Stone, Book Review] (reviewing D. COLLINS & S. ESTREICHER, *LABOR LAW AND BUSINESS CHANGE—THEORETICAL AND TRANSACTIONAL PERSPECTIVE* (1988)).

3. See M. GOLDFIELD, *DECLINE OF ORGANIZED LABOR*, *supra* note 2, at 226.

4. See Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1776 (1983) [hereinafter Weiler, *Promises to Keep*].

5. P. WEILER, *GOVERNING THE WORKPLACE*, *supra* note 2, at 9-10. And as Professor Weiler notes, "there is no reason to suppose that the 15 percent figure is a bottom point in the slide." *Id.* at 10.

6. Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 351 (1984). See also P. WEILER, *GOVERNING THE WORKPLACE*, *supra* note 2; Weiler, *Promises to Keep*, *supra* note 4.

Unions are losing their appeal because in the current legal and economic environment, they are unable to fulfill their promises. See *The Changing Situations of Workers and Their Unions*, A Report by the AFL-CIO Committee on the Evolution of Work 10-11 (1985) [hereinafter AFL-CIO Report]; See also Farber, *The Recent Decline of Unionization in the United States*, 238 SCIENCE 915, 919 (1987). Changes in the workforce have brought into existence new workers and new types of work that are outside the traditional unionized sectors of the labor force. See B. BLUESTONE & B. HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* 25-48 (1982). An increasingly conservative and anti-labor Supreme Court and National Labor Relations Board have structured a regime of labor relations law that reflects values and assumptions that favor corporate interests over those of workers and unions. See J. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983); Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73 (1988) [hereinafter Stone, *Labor and the Corporate Structure*]; Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, *supra*; Lesnick, Book Review, 32 BUFFALO L. REV. 833 (1983) (reviewing P. WEILER, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983)). See also Minda, *The Common Law, Labor and Antitrust*, 11 INDUS. REL. L.J. 461 (1989) [hereinafter Minda, *Labor and Antitrust*]. The economic and legal environment changes may also be part of a deep cultural conservatism that is generating a value system which deflates the transformative effort of social movements from achieving legislative improvements. See C. West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797, 1797 (1990) [hereinafter C. West, *Progressive Politics*] (arguing that American law and society have been shaped by the outlooks and interests of the "cultural conservatism" of a corporate-driven economy structured by a liberal legal system).

Any hope for resuscitating the labor movement now depends, in large part, on the ability of those within the movement to mobilize, and to change the popular perception of weakened labor power.⁷ Innovative political strategies for mobilizing a new labor movement are needed. In response, a new breed of labor organizers have turned to direct action political strategies for developing a "new unionism." Labor organizers have utilized consumer boycotts, corporate campaigns, and labor-community boycotts to advance both political and economic objectives.⁸ They have employed the media to exert non-workplace pressure. They have organized around particular social issues rather than around the principle of collective bargaining. These strategies can be effective organizing tools for achieving the underlying trade union objective—majority support for collective bargaining.⁹

7. See Atleson, *Labor Law Reform*, *supra* note 1, at 368-71 (arguing that "it is only when unions are perceived to be a force to be reckoned with that the legal system responds in favorable ways. *Id.* at 371).

8. This type of new unionism is discussed in Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 *TEX. L. REV.* 889, 894-97, 901-14 (1991) [hereinafter Pope, *Labor-Community Boycotts*]. See also C. HECKSCHER, *THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION* (1988).

A goal of the new unionism seeks to make traditional labor issues relevant to feminists, gay rights activists, environmentalists, civil rights activists, and other subordinated groups in society. See Pope, *Labor-Community Boycotts*, *supra*, at 894-95. The rationale for alliances is partly strategic and partly a survival response. These alliances also spring from a deeply felt, but often ignored trade union ideal: trade union support for other subordinated groups in society is essential for developing a political constituency that can ensure legislative outcomes that strengthen rather than weaken the power of organized labor. The hope is that new political forms of union organizing strategies rekindle past alliances to enable labor to regain control of the power they once had in countering the power of corporate interests. The failure of the old unionism can be attributed, at least in part, to the past failure of unions to support the interests of minorities and women. *Id.* at 912 n.127, (citing A. BLUMROSEN, *THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY 1965-1990*, § 27.3 (forthcoming 1991)).

9. See AFL-CIO Report, *supra* note 6, at 28. See Tasini, *The Beer and the Boycott*, *N.Y. Times*, Jan. 31, 1988, § 6 (Magazine) at 18 (describing the alliance between the AFL-CIO and feminist organizations, gay rights organizations, as well as African-American, Hispanic, and other ethnic organizations opposed to the political activities of the Coors Company). The AFL-CIO boycott of Coors beer, the Hormel boycott, the Mississippi workers strike, clerical workers union strike at Harvard University, the J.P. Stevens boycott and other less publicized labor-community actions, illustrate how a new breed of union leaders have come to rely on direct action consumer initiatives, boycotts, and other politically-motivated strategies to secure labor's traditional economic objectives as well as a host of other social objectives, ranging from preservation of the environment to racial equality. See, e.g., Pope, *Labor-Community Boycotts*, *supra* note 8, at 894-97 (discussing how labor-community campaigns have played a dominant role in a number of recent labor disputes); S. DOUGLAS, *LABOR'S NEW VOICE: UNIONS AND THE MASS MEDIA* (1986) (examining how labor unions have utilized the mass media to communicate their message); Perl, *Unionization Wins a Round*

Last term, however, in *Federal Trade Commission v. Superior Court Trial Lawyers Association (SCTLA)*,¹⁰ the Supreme Court handed down a novel antitrust decision that may have ominous implications for the labor movement's ability to regain access to power through new political organizing strategies. *SCTLA* involved an antitrust challenge brought by the federal government against a boycott organized by a group of criminal defense lawyers.¹¹ The lawyers represented indigent criminal defendants under the District of Columbia Criminal Justice Act,¹² and conducted the boycott to demand higher hourly fees. The Court held, six to three, that the boycott was an illegal price-fixing conspiracy, proscribed per se under the Sherman Antitrust Act.¹³ The Trial Lawyers' principal defense, rejected by the Court, was that their boycott was constitutionally protected as an exercise of their first amendment right to petition the government. The Trial Lawyers also argued, again unsuccessfully, that the boycott was necessary to advance the sixth amendment rights of their clients.¹⁴

For antitrust practitioners and scholars, *SCTLA* established an important but relatively noncontroversial antitrust principle: first amendment protection for expressive boycotts seeking to influence governmental action will not extend to those boycotts that involve illegal price-fixing objectives.¹⁵ For collective bargaining practitioners and scholars, however, *SCTLA* portends significant consequences for the trade union movement. When read together with prior opinions, the decision may mean that the Court is distinguishing between "political" and "economic" boycotts, providing a high degree of constitutional protection to labor-community

in South: Unusual Coalition at Catfish Plant Overcomes Opposition, Washington Post, Oct. 12, 1986, at A1, col. 3 (discussing how a labor-community coalition was utilized to successfully organize catfish workers in the South). See also Richter, *Coors' New Brew: Taking Out the Political Aftertaste*, L.A. Times, Sept. 27, 1987, part 4, at 1, col. 2 (examining the national consumer boycott of Coors beer).

10. *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768 (1990) [hereinafter *SCTLA*].

11. The lawyers were members of a group called the Superior Court Trial Lawyers Association [hereinafter Trial Lawyers].

12. D.C. CODE ANN. §§ 11-2601 through 11-2609 (1981); *SCTLA* 110 S. Ct. at 771.

13. *SCTLA*, 110 S. Ct. at 776-78.

14. *Id.* at 774-75. See also *In re Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 514 (1986) [hereinafter *SCTLA*]. Since the trial in *SCTLA* was before an Administrative Law Judge (Morton Needelman) [hereinafter ALJ], all references to findings of fact in the record will be to the ALJ's initial decision. The ALJ's decision is reported at *SCTLA*, 107 F.T.C. at 513-62.

15. See P. AREEDA & H. HOVENKAMP, ANTITRUST LAW 9 (Supp. 1990).

boycotts perceived to be more "political" and less "economic."¹⁶ On the other hand, the Court's decision may also mean that the new political action strategies utilized by labor organizers will be granted less protection because federal judges perceive these strategies to be primarily premised upon the traditional economic objectives of labor unions.¹⁷ The problem is that the economics/politics distinction adopted by the *SCTLA* Court fails to instruct judges on how they should make choices about characterizing labor-community boycotts brought for both political and economic purposes.

In labor law, the economics/politics dichotomy has served the historical purpose of denying the perspective of 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.¹⁸ In the past, decisions such as *SCTLA* have shaped the

16. See Pope, *Labor-Community Boycotts*, *supra* note 8, at 923 (arguing that the Court is applying a "sliding scale" test to decide the union boycott cases: "the less 'economic' and the more 'political' the boycott, the greater the first amendment protection"). See also 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*]. According to Professor Pope, the price-fixing objective underlying the *SCTLA* boycott serves to distinguish the decision from other cases in which purely political boycotts have been constitutionally protected as "republican moments" that "transcend the day-to-day conduct of business as usual." *Id.* at 349. See also *id.* nn.206-10 and accompanying text. Professor Pope argues that "*SCTLA* gives a hint that labor-community boycotts will receive a high degree of protection" to the extent that such boycotts are deemed to be more "political" and less "economic" than traditional union boycotts. Pope, *Labor-Community Boycotts*, *supra* note 8, at 923.

17. While Professor Pope believes that labor-community boycotts will continue to receive first amendment protection after *SCTLA*, he acknowledges that courts might reach a contrary position and find that labor-community boycotts are no longer protected. See Pope, *Labor-Community Boycotts*, *supra* note 8, at 924. He acknowledges, for example, that *SCTLA* "might be read broadly to deny boycotters who seek economic objectives . . . [the] heightened protection for picketing and other expressive activities even if they also seek political objectives." *Id.* at 924, (citing *SCTLA*, 110 S. Ct. at 777 (where the Court drew a sharp distinction between boycott publicity and agreements to achieve economic objectives)). He also agrees that the decision may entrench the prevailing principle recognized in antitrust law that commercial boycotts receive no constitutional protection at all. Pope, *Labor-Community Boycotts*, *supra* note 8, at 923. See also Kennedy, *Political Boycotts, The Sherman Act, and the First Amendment: An Accommodation of Competing Interests*, 55 CAL. L. REV. 983, 988-89 (1982) (explaining how antitrust judges have distinguished between commercial and politically motivated boycotts). Finally, while Professor Pope has advanced a theory of "republican moments" to "explain" the *SCTLA* decision, he also acknowledges that his theory of "republican moments," does not "support" the decision. Pope, *Republican Moments*, *supra* note 16, at 352. He admits that the "*SCTLA* language on noneconomic and constitutional objectives" may work to deny constitutional protection to the value of political protests seeking economic objectives. *Id.* at 355.

18. See, e.g., Pope, *Labor and the Constitution: From Abolition to Deindustrialization*,

popular view that labor is a commodity, that collective bargaining is transactional in nature, and that workers who organize for collective purposes can be analyzed as if they were merely profit-maximizing actors looking out for their own selfish interests. Such a view has conceptualized labor's collective liberties under a market-based legal analysis disproportionately shaped by the interests of the business community. If, however, labor unions are to survive in the current economic environment, labor's peaceful concerted activities must be recognized as involving a "process of politics in addition to economics."¹⁹

My purpose in this article is to assess the meaning of *SCTLA* for the American labor movement. I begin with the assumption that collective bargaining provides a useful structure for governing the workplace. My analysis will assess the meaning of *SCTLA*'s economics/politics distinction in light of the right of labor organizations to engage in new political action strategies. I will argue that this economics/politics dichotomy will be utilized by judges to limit the constitutional protection that others have recognized as essential for a vibrant and healthy labor movement and democratic polity.²⁰

65 TEX. L. REV. 1071, 1104-12 (1987) (arguing that the Supreme Court's commercial vision of labor protest has worked to deny the experience of workers who understand their protest as a "right of personhood") [hereinafter Pope, *Labor and the Constitution*]. For a historical account of how the tradition of legal and constitutional discourse, wedded to a market-driven analysis of rights, has served to submerge a competing language of political labor protest, see Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 111 (1989) [hereinafter Forbath, *American Labor Movement*]. For my account, from the perspective of the evolution of common law doctrine, see Minda, *Labor and Antitrust*, *supra* note 6.

19. Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1, 33 (1981). See also Hyde, *Beyond Collective Bargaining: The Politicization of Labor Relations Under Government Contract*, 1982 WISC. L. REV. 1, 36-41. Collective bargaining law needs a constitutional theory that provides a legal mechanism through which labor can advance traditional collective bargaining goals as political expression and activity.

20. See Pope, *Labor and the Constitution*, *supra* note 18; Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189 (1984); Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685 (1985); Harper, *The Consumer's Right to Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law*, 93 YALE L.J. 409 (1984); Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469 (1982); Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938 (1982).

For a somewhat similar argument advanced in the course of examining the Supreme Court's *Noerr-Pennington* antitrust doctrine, see Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HAS-

Part I will examine the factual and political context from which the *SCTLA* boycott arose. I will highlight the similarities between the social and political setting of the *SCTLA* boycott and the current position of organized labor today. Part II will then analyze Justice Stevens' majority opinion. My goal will be to examine the rhetorical meaning of Justice Stevens' characterization of the Trial Lawyers' boycott. Part III will contrast Justice Stevens' understanding of the *SCTLA* boycott with the reasoning advanced in Justice Brennan's partial dissent. Part IV will then examine the implications of *SCTLA* for American labor law. Finally, my conclusion will offer some thoughts on the role labor lawyers can play in advancing a more progressive labor movement.

I. THE FACTUAL AND POLITICAL CONTEXT OF *SCTLA*

The Trial Lawyers' (a loosely organized group of private practice attorneys) boycott arose out of a dispute that had been brewing in the District of Columbia for many years. Under the District of Columbia Criminal Justice Act (CJA),²¹ the District was required to provide court-appointed counsel in criminal cases. The burden on the District was enormous. In 1982, for example, the District was required to provide court-appointed counsel in approximately twenty-five thousand cases.²² The District's Public Defender System (PDS) provided court-appointed lawyers for serious felony cases, while the less serious felony and misdemeanor cases, representing about eighty-five percent of the total caseload, were handled by court-appointed lawyers from private practice.²³ While over twelve hundred lawyers were registered for CJA appointment, only about one hundred lawyers, known as "CJA regulars," actually applied for and handled representations under the Act.²⁴

Relatively few lawyers actually engaged in CJA representations because the hourly fees for lawyer appointments were paltry when compared to fees for lawyers in private practice or other governmental service.²⁵ The statutory rates (thirty dollars per hour for

TINGS L.J. 905, 982-99, 1001-08 (1990) [hereinafter Minda, *Interest Groups*].

21. D.C. CODE ANN. §§ 11-2601 through 11-2609 (1981).

22. *SCTLA*, 110 S. Ct. 768, 771 (1990).

23. *Id.*

24. *Id.*

25. Another reason for the small number of participating CJA attorneys is related to the peculiarities of the legal culture in the District of Columbia. A cultural dichotomy exists

court time and twenty dollars per hour for out-of-court time) were widely, and correctly, regarded as excessively low.²⁶ In contrast, the average billing rate for attorneys with eleven to twenty years experience in private practice in Washington, D.C. was approximately one hundred twenty-three dollars per hour. Those with less than two years experience earned sixty-four dollars per hour.²⁷ Even Legal Aid attorneys working under the federal Equal Access to Justice Act received more (seventy-five dollars per hour) with the possibility of increased adjustments for larger sums.²⁸ As early as 1975, bar organizations expressed public concern about the low fees paid to CJA lawyers.²⁹

A widely regarded authoritative report of the Judicial Conference of the D.C. Circuit and the D.C. Bar,³⁰ found that low attorney fees impact on all facets of the indigency representation problem. The report concluded that low fees adversely affected "the ability to attract new talent to represent the poor . . . and the quality of representation provided to indigents."³¹ As that report stated: "There are too many cases, too few attorneys, and [yet] criminal practice necessarily demands a constant honing of skills and knowledge."³² The report concluded that "the rates [adversely] reflected on the depth of the District's commitment to

in the District's legal community between "uptown" and "downtown" lawyers. *See id.* at 772. Uptown lawyers work in major law firms, primarily servicing the needs of corporate and governmental clients. Prior to the SCTL A boycott, uptown lawyers demonstrated a distaste for representing criminal clients. This was due partly to the low fees such work would generate, but also because of the uptown lawyers' general "aversion for compelled indigency representation." *Id.* Downtown lawyers, however, were primarily engaged in general practice, servicing the needs of D.C. residents. Most downtown lawyers were less averse to accepting CJA appointments. Indeed, it was from the downtown lawyers that the District drew its CJA regulars. However, because only a small number of downtown lawyers specialized in indigent criminal defense, there were relatively few lawyers actually participating in the District's CJA program. *Id.* *See also* SCTL A, 107 F.T.C. 510, 522-25 (1986).

26. The fees were established by the Federal Criminal Justice Act of 1964. These rates had not changed since 1970. SCTL A, 110 S. Ct. 768, 771 (1990). While the hourly rates of CJA lawyers remained fixed for over twelve years, the Consumer Price Index increased 147%. *Id.* at 786 (Brennan, J., concurring in part and dissenting in part).

27. SCTL A, 110 S. Ct. at 786 (Brennan, J., concurring in part and dissenting in part).

28. *Id.*

29. *Id.* at 771.

30. THE AUSTERN-REZNECK COMM., THE JUDICIAL CONFERENCE OF THE D.C. CIRCUIT & THE D.C. BAR, THE AUSTERN-REZNECK REPORT (1975), quoted in SCTL A, 107 F.T.C. 510, 530-32 (1986).

31. SCTL A, 107 F.T.C. at 530.

32. THE AUSTERN-REZNECK COMM., THE JUDICIAL CONFERENCE OF THE D.C. CIRCUIT & THE D.C. BAR, THE AUSTERN-REZNECK REPORT (1975), quoted in SCTL A, 107 F.T.C. at 530.

protection of the constitutional rights of criminal defendants."³³

The problem was that the District's Criminal Justice Act, as amended in 1974, set a cap on the fees to be paid to CJA lawyers. This cap could be raised only by an amendment either to the federal Act that created the program, or by an amendment of the District Code that incorporated the federal legislation as part of the District's governing Code.³⁴ Moreover, the Trial Lawyers had a long history of attempting to increase their fees by lobbying Congressional and District officials.³⁵ Those efforts failed because the political environment in the District as well as Congress was adverse to change.³⁶ Direct lobbying and other more traditional forms of petitioning failed to influence governmental decisions because public officials (the mayor, the city council, and ultimately the federal government itself) were unsure of the public reaction to an increase in attorney fees in the face of a fiscal crisis.³⁷

The Trial Lawyers' political problems were compounded by the fact that CJA regulars, who would benefit directly from an hourly fee increase, were few in number. Public attitudes about lawyers, especially criminal defense lawyers, have never been particularly favorable. The public has never been supportive of the

33. *SCTLA*, 107 F.T.C. at 530. The Austern-Rezneck Report was merely one of several studies that concluded that CJA lawyer fees were too low and that the fee rates were adversely affecting legal representations of indigent defendants in the District. *See id.* at 532. The ALJ found that the low lawyer fees had three adverse effects on the indigency problem. First, the low rate of compensation meant that CJA regulars were "compelled to maintain inordinately large caseloads." *Id.* at 532. Second, "low rates eventually drove experienced and capable CJA attorneys into more lucrative fields." *Id.* at 533. Finally, "low CJA rates meant that indigency practice in the District was conducted under primitive conditions. CJA lawyers were attempting to meet the constitutional requirement of 'Assistance' without offices, without secretarial assistance, without paralegals, and basically without any of the standard accouterments of a modern legal practice." *Id.*

34. *SCTLA*, 110 S. Ct. 768, 771 (1990).

35. *SCTLA*, 107 F.T.C. 510, 534-42 (1986). Prior to the boycott, the Trial Lawyers conducted a vigorous campaign to obtain higher fees. They lobbied the Chief Judge of the Superior Court at various administrative meetings, they met with representatives of the Mayor, they enlisted the support of law school deans, and they lobbied representatives of Congress to support a bill increasing their fees. *Id.* at 535-38. These efforts failed even though the record demonstrated that "they received the backing from every segment of the community concerned with the criminal justice system." *Id.* at 534.

36. In 1982, for example, the Trial Lawyers launched a lobbying campaign to pressure the District to increase their fees, but that effort failed because District officials did not support the campaign. *See SCTLA*, 110 S. Ct. at 771.

37. *SCTLA*, 110 S. Ct. at 785-87 (Brennan, J., concurring in part and dissenting in part).

interests of lawyers as a class.³⁸ Moreover, the indigent criminal defendants were unorganized and relatively powerless as a political class.³⁹ Serious organizational obstacles prevented the indigent defendants as a class from advancing their own interests. Free rider and collective action problems frustrated the indigent defendants' effort to organize themselves as a political force.⁴⁰

The presence of free rider and collective action problems in *SCTLA*, however, made the Trial Lawyers a logical representative for the indigent criminal defendants' interests. Large groups have been able to establish formidable political organizations when pre-existing institutional structures enable leaders of the larger group to solve free rider and collective action problems.⁴¹ Federal labor

38. As the ALJ in *SCTLA* noted: "The inability of lawyers for the indigent to command political support (on both the national and local levels) may also reflect the spill-over effect from the public's image of the criminal lawyer. In general, this image is not favorable." *SCTLA*, 107 F.T.C. at 541. Popular perceptions of lawyers have generally been unfavorable. See Cramton, *The Trouble With Lawyers (and Law Schools)*, 35 J. LEGAL ED. 359 (1985).

39. As the ALJ concluded: "Although there is room to speculate on the soundness of the lobbying strategy adopted by the CJA lawyers, there can be no serious question that the pre-boycott efforts of the CJA lawyers had largely failed because indigent criminals and their lawyers are not a politically significant constituency; on the contrary, there is political capital to be made if the rights of the indigent accused are denigrated." *SCTLA*, 107 F.T.C. 510, 541 (1986).

40. Since rational individuals can be expected to take a "free ride" on the efforts of others, public choice theorists argue that it is difficult to organize large groups of citizens to advance their common interests. See also M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965). As one public choice theorist has argued: "[I]f the group is large, individual members have little incentive to participate because participation is personally costly and contributes little to the group's chances for successful joint action." Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 724 (1986) (describing free rider problems in the legislative and antitrust context). On the other hand, a member who decides not to participate will still enjoy the benefits of an otherwise successful organizational effort. The possibility of free riders, however, serves as a negative incentive to organizations; individual members may decide that they would rather take a free ride on the effort and expense of others. A free rider problem may have thus prevented the class of economically disadvantaged criminal defendants from organizing to advance their own sixth amendment rights to effective legal counsel. See also Minda, *Interest Groups*, *supra* note 20, at 997.

The possibility of free rider effects also creates what Mancur Olson has called a collective action problem for interest group politics generally. See OLSON, *supra*, at 126-31. If only small groups can effectively organize and assert their interests, then legislation would likely fail to reflect the public interest because private organizations will no longer represent the needs and interests of all groups within society. Collective action problems can help to explain why the labor movement has not been effectively represented as a group in the American political system. Like the Trial Lawyers, workers have lacked a political vehicle of their own for making their presence known in the electoral system. See generally Rogers, *Divide and Conquer: Further "Reflection on the Distinctive Character of American Labor Laws"*, 1990 WISC. L. REV. 1, 80-108. See also T. FERGUSON & J. ROGERS, *RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS* (1986).

41. See, e.g., Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legis-*

legislation granting unions the exclusive right to represent workers' interests is a notable example of how legislation can solve free rider problems.⁴² In *SCTLA*, the CJA program established an analogous institutional structure that linked the interests of criminal indigent defendants to the interests of the CJA lawyers.⁴³ The CJA thus created an institutional and political structure that placed the Trial Lawyers in a representative role in relation to their clients' sixth amendment rights. This role made it possible for lawyers and clients to perceive that their interests in attorney compensation were one and the same.⁴⁴ The institutional and political structure, in turn, established a unified interest in having a common voice to affect the exogenous political factors that ultimately influenced official decision making of the CJA program. In other words, the Trial Lawyers' political activities were necessary to solve free rider and collective action problems that prevented the indigent criminal defendants from organizing and representing their own interests.⁴⁵

In sum, the Trial Lawyers experienced a wide disparity between their desired and actual working conditions. They were un-

lative Process as Illustrated by Tax Legislation in the 1980s, 139 U. PA. L. REV. 1, 101-04 (1990) (illustrating how campaign financing legislation establishes a structure of political institutions that enables effective interest group representation); Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CALIF. L. REV. 83, 89-104 (1989) (describing how five million dairy farmers and thousands of factory owners and merchants were able to utilize institutional structures in their industry to stamp out competition from oleomargarine). See also Minda, *Interest Groups*, *supra* note 20, at 947.

42. See *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *Id.* at 338.

43. Indigent criminal defendants had no choice but to accept legal representation by CJA lawyers and the lawyers were required to accept their appointment as a condition for participating in the program. Moreover, because the program was compelled by the sixth amendment, the lawyers and their clients were also compelled to work together to ensure that the minimal standards for effective legal representation were satisfied. As Justice Brennan noted in his partial dissent in *SCTLA*: "Here, the demand for lawyers' services under the Criminal Justice Act (CJA) is created by the command of the Sixth Amendment." *SCTLA*, 110 S. Ct. 768, 785 (1990) (Brennan, J., concurring in part and dissenting in part).

44. Indigent criminal defendants knew that CJA attorneys, overworked as they were, would be unable to provide the most effective legal representation available in the District. The prevailing assumption shared within every segment of society, is that the quality of legal representation is a function of lawyer compensation. Thus, while the *SCTLA* attorneys had an obvious economic interest in their fees, they also had good reasons for claiming that their boycott was in pursuit of an underlying political objective: to improve the quality of representation for their court-appointed indigent clients.

45. See also Minda, *Interest Groups*, *supra* note 20, at 997.

derpaid, overworked, and at the bottom of the social hierarchy in their profession. More importantly, the lawyers lacked an effective voice in the decision-making process that determined their wages, hours, and conditions of employment. Their clients, in turn, lacked an effective voice in the political process affecting the statutory program established to promote their constitutional right to effective legal representation. Lacking a political interest group, the indigent defendants relied upon their attorneys to advance their interest in reforming the criminal justice legal representation program.

Hence, the Trial Lawyers argued that higher attorney fees would allow them to provide their clients with better representation as each lawyer could give more time to fewer clients.⁴⁶ Higher fees would also attract better qualified counsel⁴⁷ and presumably encourage other attorneys to take part in the CJA program, thereby reducing the caseload of each CJA regular. The Trial Lawyers argued that their pre-boycott attempts to influence governmental action through traditional direct lobbying had failed, and that more immediate measures were needed to mobilize public support for the problem of low attorney fees.⁴⁸ The Trial Lawyers then decided that a boycott was the proper strategy to accomplish their organizational objectives.⁴⁹

46. As Judge Ginsburg concluded for the appellate panel: "The leaders of the SCTLA boycott quite reasonably expected that a significant rate increase would induce more attorneys to take on CJA cases." *SCTLA*, 856 F.2d 226, 238 (D.C. Cir. 1988).

47. See *SCTLA*, 107 F.T.C. 510, 582 (1986). While it may have been true that if the same small number of lawyers were paid more, they would have had more time available for the cases they were required to service, the Trial Lawyers, as private practice attorneys, also had to provide their own support services. Hence, "one of the leaders of the SCTLA boycott testified that the increased rates made it possible for him to pay for support services that, in turn, enabled him to take on more cases." *SCTLA*, 856 F.2d at 238 (footnote omitted). Moreover, it was also true that higher fees might also encourage *other* lawyers to take part in the CJA program, thereby reducing the caseload of each CJA attorney. See *SCTLA*, 107 F.T.C. at 582.

48. See *SCTLA*, 107 F.T.C. at 536-38; see also *SCTLA*, 110 S. Ct. 768, 772 (1990). As CJA attorneys, the Trial Lawyers were more like labor law attorneys who identify with the cause of their clients (either management or the union). Like labor lawyers, most legal aid attorneys see themselves as being more than a professionally hired legal technician; most legal aid attorneys are professionally motivated to be spokespersons and advocates for clients as a *class*. In seeking to defend the legal rights of their clients, legal aid attorneys understand, as labor lawyers understand, that to be effective they must identify with the interests and social plight of their clients. Thus, in seeking a voice strategy to represent their own self-interest, the Trial Lawyers were, I believe, motivated to identify their cause with the interests of their clients in obtaining effective legal representation.

49. The Trial Lawyers had an interest in representing both their own interests and their clients' sixth amendment rights, but their effort required the support of a grass roots

In this sense, the Trial Lawyers' position was similar to the historical position of workers who have been forced to engage in concerted activities for purposes of economic and social self-protection.⁵⁰ The Trial Lawyers were thus in the classic position of unorganized workers who organize to improve undesirable working conditions for themselves and other similarly situated workers. Likewise, their clients' position was similar to unorganized workers who depend upon the efforts of unionized workers to advance their interests. Faced with undesirable working conditions, the Trial Lawyers, like most workers, had available two basic strategies for improving their conditions and advancing the interests of their clients: quit or organize.⁵¹

American workers have relied upon these two basic mechanisms for dealing with adverse social and economic problems.⁵² With the "exit-and-entry" strategy, the dissatisfied worker exercises freedom of choice and quits.⁵³ The effectiveness of the "exit-and-entry" strategy depends on the economic analysis of labor markets.⁵⁴ This strategy is an effective means for avoiding intolerable working conditions if labor markets are relatively competitive, and workers have alternative job opportunities for re-entering the market. The "exit-and-entry" mechanism also provides a market-based justification for governmental control of the market power of labor unions.⁵⁵ For long term employees and certain career-path employees, "exit-and-entry" is a costly strategy.

political consensus. Any political effort to amend the Criminal Justice Act required political support, but there was no consensus in the Washington, D.C. area to support such an amendment prior to the boycott. *SCTLA*, 110 S. Ct. at 786-87 (Brennan, J., concurring in part and dissenting in part).

50. See Forbath, *American Labor Movement*, *supra* note 18, at 1121-25 (examining the class consciousness of the trade union movement during its formative era and illustrating how labor exhibited a concern for political reform).

51. See, e.g., R. FREEMAN & J. MEDOFF, *WHAT DO UNIONS DO?* (1984).

52. *Id.* at 7.

53. *Id.*

54. As Freeman & Medoff explain: "The basic theorem of neoclassical economics is that, under well-specified conditions, the exit and entry of persons (the hallmark of the free-market system) produces a situation in which no individual can be made better off without making someone worse off." *Id.* at 8.

55. Again, as Freeman & Medoff explain: "As long as the exit-entry market mechanism is viewed as the *only* adjustment mechanism, institutions like unions are invariably seen as impediments to the optimal operation of the economy." *Id.* The exit-and-entry mechanism also underlies the classic economic arguments of conservative law and economic scholars who have argued that labor unions are inefficient. See, e.g., Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988 (1984).

The second strategy is a political mechanism called "voice."⁵⁶ "Voice" has been described as:

the use of direct communication to bring actual and desired conditions closer together. It means talking about problems: complaining to the store about a poor product rather than taking business elsewhere, telling the chef that the soup had too much salt; discussing marital problems rather than going directly to the divorce court. In a political context, "voice" refers to participation in the democratic process, through voting, discussion, bargaining, and the like.⁵⁷

"Voice" is a strategy that tells workers to confront their employer and discuss the possibilities of changing job conditions, rather than quitting and moving elsewhere.⁵⁸ The "voice" mechanism legitimizes the union's collective bargaining role and becomes the justification for federal labor policy favoring collective bargaining.⁵⁹

Normally, non-union workers are limited to the "exit-and-entry" strategy for avoiding undesirable working conditions. In *SCTLA*, however, the Trial Lawyers, faced with undesirable working conditions, were restricted to the "voice" alternative.⁶⁰ As participants in the CJA program, and as members of the Bar, they were obligated to provide legal assistance to their court-appointed clients. Although they could decide not to participate in the program, the professional commitment of those who were regarded as "CJA regulars" meant that quitting was not a realistic alternative.⁶¹ From the factual and political context of their case, the Trial Lawyers could reasonably believe that the only means availa-

56. R. FREEMAN & J. MEDOFF, *supra* note 51, at 8 (citing A. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970)).

57. *Id.*

58. *Id.*

59. Freeman & Medoff go further. They argue that "[e]conomic theorists of all persuasions have increasingly recognized that unions' ability to enforce labor agreements . . . creates the possibility for improved labor contracts." *Id.* at 11 (footnote omitted).

60. As Professor Pope has argued: "In today's labor market, quitting is not a viable option for many workers. The overwhelming majority of employees work in institutions that tie benefits and advancement to longevity of employment." Pope, *Labor and the Constitution*, *supra* note 18, at 1107.

61. As Justice Blackmun noted in his concurring and dissenting opinion in *SCTLA*: "[SCTLA] attorneys are not merely participants in a competitive market for legal services; they are officers of the court. Their duty to serve the public by representing indigent defendants is not only a matter of conscience, but is also enforceable by the government's power to order such representation, either as a condition of practicing law in the District, or on pain of contempt." *SCTLA*, 110 S. Ct. 768, 791 (1990) (Blackmun, J., concurring in part and dissenting in part).

ble for transforming their working conditions were the democratic and political strategies of "voice."

The Trial Lawyers' attempt to engage in a "voice" strategy was complicated by the fact that they were also seeking to invoke the "voice" of their clients, each of whom had a sixth amendment right to effective legal representation.⁶² The Trial Lawyers, however, perceived their interests in higher fees as intimately linked with the sixth amendment interests of their clients. However, while widespread opinion existed for increasing the fees of CJA lawyers, and while authoritative opinion of the Bar saw those interests as furthering the sixth amendment interests of criminal defendants, there was a major political impediment limiting the Trial Lawyers' "voice" strategy. The Trial Lawyers could not simply approach supervisors and managers and demand that they discuss the issue of higher fees; they were private practice attorneys who were not subject to governmental supervision. Even when public officials were willing to discuss such issues, as they did,⁶³ they lacked the political power to increase CJA attorneys' fees. Finally, the attorneys, individually and as a group, could not demand collective bargaining over the issue because, as public employees, they were not covered under federal collective bargaining legislation.⁶⁴

Similar to labor unions today, and the civil rights movement of the 1960s, the Trial Lawyers decided, as a last resort measure, to adopt the political strategy of a community-action boycott to get their political message across to the electorate and to influence officials who controlled their social and economic conditions. Indeed, what is interesting about the Trial Lawyers' activities is that

62. See *id.* at 771-72 (opinion of the Court).

63. See *SCTLA*, 107 F.T.C. 510, 534-37 (1986) (discussing the pre-boycott effort of the Trial Lawyers who made appeals to the Mayor and other public officials to support their cause).

64. Section 2(2) of the National Labor Relations Act applicable to the federal law of labor relations specifically excludes federal, state, and local government from the definition of covered employer. 29 U.S.C. § 52 (1988). See also F. BARTOSIC & R. HARTLEY, *LABOR RELATIONS IN THE PRIVATE SECTOR* 28-30 (2d ed. 1986). The Superior Court Trial Lawyers Association would probably also fail to qualify as a labor organization within the meaning of § 6 of the Clayton Act which provides that "[n]othing contained in the antitrust law shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U.S.C. § 17 (1988). While the Trial Lawyers characterized their activities as a "strike" and used other labor law terminology, they made no claim to be a union for purposes of asserting rights under federal labor legislation. See *SCTLA*, 856 F.2d 226, 230 n.6 (D.C. Cir. 1988).

they utilized the symbols and language of the labor and civil rights movements to organize and characterize their boycott strategy. Apparently the Trial Lawyers thought they were acting like "ordinary" workers, who when faced with undesirable working conditions, cannot quit and are thus forced to engage in collective action for mutual aid and self-protection. Thus, the CJA regulars took it upon themselves to obtain a political consensus for their goals through the direct action of "boycotting" and "picketing" CJA appointments until the District increased their fees.

To accomplish their purpose, the Trial Lawyers voted to create a "strike committee."⁶⁵ The committee agreed that the only viable way to obtain a fee increase was to boycott new CJA appointments.⁶⁶ CJA lawyers then voted at another meeting, with nearly unanimous attendance, to adopt a petition announcing their plan to boycott. The language of the Trial Lawyers' petition provided:

We, the undersigned private criminal lawyers practicing in the Superior court of the District of Columbia, agree that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act.⁶⁷

The petition was then signed by a number of CJA regulars and placed on the blackboard in the lawyers' lounge in the Superior Court of the District.⁶⁸

The SCTL A strike committee then began a publicity program to inform the public about the issues involved in the "strike."⁶⁹ The committee handed out "press kits," organized "picket lines," and staged "rallies."⁷⁰ On the first day of the Trial Lawyers' boycott, about 90 percent of the CJA regulars refused to accept any

65. SCTL A, 110 S. Ct. at 771.

66. *Id.* The Trial Lawyers demanded an increase in fees amounting to \$45 for out-of-court representations and \$55 for in-court representations. *Id.*

67. *Id.* at 771-72 (quoting SCTL A, 856 F.2d 226, 230 (D.C. Cir. 1988)).

68. SCTL A, 856 F.2d 226, 230 (1988). The Trial Lawyers also sent a letter to all law firms engaged in *pro bono* work, urging them to respect their strike and not to accept future CJA appointments. *Id.*

69. According to the findings of the Administrative Law Judge, this activity was "all designed to educate the general public about the plight of the CJA lawyers in the expectation that this would result in additional pressure on the District government to increase fees." SCTL A 856 F.2d at 230 (quoting SCTL A, 107 F.T.C. 510, 543 (1986)).

70. SCTL A, 856 F.2d at 230.

new assignments.⁷¹ The boycott had an immediate and substantial impact on the District since there was no off-setting cessation of criminal arrests and enforcement.⁷²

Unlike the many failed strike efforts of labor involving the air traffic controllers (PATCO),⁷³ the machinists and pilots at Eastern Airlines,⁷⁴ the drivers and handlers at the Daily News in New York,⁷⁵ the meathandlers at Hormel,⁷⁶ and other lesser known examples,⁷⁷ the Trial Lawyers' boycott was a resounding success. Within ten days after the boycott began, the District agreed to raise the lawyers' fees. The boycott ended when Mayor Barry promised to support legislation increasing the Trial Lawyers' rates.⁷⁸ At its completion, the boycott received wide popular sup-

71. *SCTLA*, 110 S. Ct. 768, 772 (1990). Only about 13 CJA regulars continued to take assignments after the boycott. *SCTLA*, 107 F.T.C. 510, 542 n.173 (1986). The boycott was publicized by press kits distributed to the public, picket lines, rallies, and radio and television interviews as well as by general public interest broadcasts. See *SCTLA*, 856 F.2d 226, 230 (D.C. Cir. 1988).

72. The Trial Lawyers' boycott was obviously the product of different motives and diverse political and social circumstances. The CJA regulars had a direct and immediate economic interest in having their hourly fees increased, but they were also pursuing altruistic objectives. By relying upon the political strategy of "voice" they were seeking to advance their own social and economic position as well as the interests of their clients. The vehicle to advance their political objectives, however, relied upon a market-based strategy: an economic boycott. Yet, from the perspective of the Trial Lawyers, the market was the most effective place for advancing their "voice" strategy. Finally, the Trial Lawyers also invoked the language and symbols of the labor union movement in an attempt to make connections with traditional union values of solidarity, fraternity, and community. While the use of labor law terminology may have been partly strategic, it also served an important symbolic function in helping to identify their cause with efforts of other subordinate groups seeking the right of self-determination in the economic and political arenas of society.

73. See, e.g., *Senate Kills Resolution Urging Rehire of Some PATCO Strikers*, [24 Federal News] Gov't Empl. Rel. Rep. (BNA) No. 1159, at 495 (April 14, 1986).

74. See, e.g., Bradsher, *Pilot Strike at Eastern Faltering*, N. Y. Times, Aug. 12, 1989, at 31, col. 3; Salpukas, *Survival Is Goal in Eastern Strike*, N. Y. Times, Nov. 23, 1989, at D5, col. 4.

75. See, e.g., *Maxwell wins NY paper* [sic], Fin. Times, March 14, 1991, § 1, at 3; *News Vows Paper Will Outlast Its Striking Workers*, Newsday, Nov. 25, 1990, § News, at 8.

76. See, e.g., *The Labor Rebel Leading The Hormel Strike*, FORTUNE MAG., June 9, 1986, at 106.

77. See, e.g., *Labor Leaders Hail Pittston Agreement*, Wash. Times, Jan. 3, 1990, at A3 (discussing Pittston coal strike settlement in context of various unsuccessful strikes in other industries). Indeed, the rise of labor-community boycotts is itself a response to the waning power of labor's traditional strike weapons. See Pope, *Labor-Community Boycotts*, *supra* note 8, at 908-09.

78. *SCTLA*, 110 S. Ct. 768, 772 (1990). The massive intake of criminal cases did not abate during the brief boycott and few lawyers were willing to accept CJA assignments. Uptown lawyers with few exceptions were unwilling to accept CJA assignments. *Id.* The response of the uptown lawyers to the demands of the District was "feeble" and the small handful of downtown lawyers willing to accept CJA assignments was soon overloaded. *Id.*

port. Judge David Ginsburg of the United States Court of Appeals for the District of Columbia concluded that by the end of the boycott even the Mayor and other District officials indicated that they were "sympathetic to the boycotters' goals and may even have been supportive of the boycott itself."⁷⁹

In light of the Reagan administration's antitrust enforcement policies, what happened next was not surprising. The Federal Trade Commission (FTC) filed a complaint against the Trial Lawyers and four of its officers alleging that the lawyers' boycott constituted an illegal conspiracy to fix prices in violation of section 5 of the Federal Trade Commission Act.⁸⁰ What is disturbing about the FTC's action is that it occurred at the very time the Reagan administration had given a green light to the business community to embark on one of the greatest merger and acquisition movements in the nation's history.⁸¹ During the 1980s, the Antitrust Division of the Department of Justice embarked on an enforcement policy that was aimed at questionable targets.⁸²

The enforcement decision to file an antitrust complaint against the Trial Lawyers may have been premised on the view that an antitrust precedent had to be established to protect government from similar boycotts in the future. The FTC may have feared that future boycotts by other governmental employees might leave government vulnerable to extortion by suppliers of legal services. On the other hand, the government had within its

Many downtown lawyers, including law student volunteers, chose to honor the Trial Lawyers' boycott. *Id.* The demands of the boycott were accepted after key District political officials, including Mayor Barry, publicly announced that the District's criminal system was on "the brink of collapse." *Id.*

79. *SCTLA*, 856 F.2d 226, 251 n.35 (D.C. Cir. 1988). See also *SCTLA*, 110 S. Ct. at 787 (Brennan, J., concurring in part and dissenting in part).

80. *SCTLA*, 110 S. Ct. at 773. The Act prohibits certain "unfair methods of competition." 15 U.S.C. § 45(a)(1) (1988).

81. See W. ADAMS & J. BROCK, *DANGEROUS PURSUITS: MERGERS & ACQUISITIONS IN THE AGE OF WALL STREET* 27-28, 103-06 (1989).

82. See Pitofsky, *The Renaissance of Antitrust*, 45 *THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK* 851, 854 (1990); Kovacic, *Federal Antitrust Enforcement in the Reagan Administration: Two Cheers for the Disappearance of the Large Firm Defendant in Nonmerger Cases*, 12 *RESEARCH IN LAW AND ECONOMICS* 173 (1989). See generally Fox, *The Battle for the Soul of Antitrust*, 75 *CALIF. L. REV.* 917 (1987); Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 *N.Y.U. L. REV.* 554 (1986). The question that should be asked about *SCTLA* is: Why enforce the antitrust law to restrain the boycott of one hundred attorneys in Washington, D.C. to prevent them from getting a modest salary increase that nearly every government official agreed was warranted when other more formidable monopoly dangers in the economy go unchallenged?

power the ability to terminate the boycott without acceding to the Trial Lawyers' demands since the District could have required the lawyers to represent indigent defendants pro bono.⁸³ Moreover, it was unlikely that a group of only one hundred lawyers had market power to coerce government to concede to its demands. Finally, it was far from clear that the government officials who were the target of the boycott actually felt coerced since there was evidence suggesting they may have actually supported the boycott once it was shown to be effective.⁸⁴

Indeed, the Administrative Law Judge (ALJ) in *SCTLA* rejected the Trial Lawyers' legal defenses, but he nevertheless dismissed the complaint "on [the] pragmatic basis [that] there was no harm done."⁸⁵ In the view of the ALJ, there was no harm done because the political consensus in the District following the boycott was that the Trial Lawyers had legitimate grievances that should have been remedied long ago.⁸⁶ The FTC, however, saw things differently. The Commission reversed the decision of the ALJ, concluding that the Trial Lawyers' boycott constituted an illegal price-fixing agreement.⁸⁷

On appeal, Judge Ginsburg, while rejecting the Trial Lawyers' first amendment arguments,⁸⁸ and *Noerr's* immunity defenses,⁸⁹ vacated the FTC's decision.⁹⁰ Judge Ginsburg reasoned that the Supreme Court's decision in *United States v. O'Brien*,⁹¹ holding

83. See *SCTLA*, 110 S. Ct. 768, 791 (1990) (Blackmun, J., concurring in part and dissenting in part).

84. *Id.* at 787 (Brennan, J., concurring in part and dissenting in part). "Taken together, these facts strongly suggest that the Trial Lawyers' campaign persuaded the city to increase CJA compensation levels by creating a favorable climate in which supportive District officials could vote for a raise without public opposition . . ." *Id.*

85. *SCTLA*, 107 F.T.C. 510, 561 (1986).

86. *Id.* at 559-60.

87. *Id.* at 563. The FTC affirmed the ALJ's holding as to defenses, stating that *SCTLA's* "coercive, concerted refusal to deal" had the "purpose and effect of raising prices" and constituted a per se violation of section 1 of the Sherman Antitrust Act. *Id.* at 573. The FTC found a first amendment defense inapplicable because the boycott involved an agreement among competitors to restrain economic competition for their direct economic benefit, as distinguished from a political objective. *Id.* at 582, 583-88. The FTC also reversed the ALJ's holding with respect to the economic effects of the boycott, finding them harmful as well as substantially anti-competitive. *Id.* at 577.

88. *SCTLA*, 856 F.2d 226, 233-41 (D.C. Cir. 1988).

89. *Id.* at 241-47.

90. *Id.* at 253.

91. *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the Court was called upon to determine whether a federal law making it a crime to burn a draft card violated the first amendment. The Court held that "when 'speech' and 'nonspeech' elements are com-

that governmental regulation of expressive conduct will be constitutionally permitted only if sufficiently important governmental interests are involved, rendered the *per se* rule of antitrust inapplicable. In Judge Ginsburg's view, the first amendment would countenance antitrust regulation of expressive boycotts only if a potential competitive harm could be shown.⁹² The appellate panel thus required a showing of "significant market power" to sustain the antitrust allegations in *SCTLA*.⁹³

II. JUSTICE STEVENS' OPINION FOR THE COURT—THE METAPHYSICS OF A LEGAL DISTINCTION AND THE IDEOLOGY OF CONCEPTUAL MARKETPLACE THINKING

The Supreme Court, in an opinion by Justice Stevens, reversed the court of appeals. According to Justice Stevens, the Trial Lawyers' boycott involved a horizontal price-fixing arrangement that was "a type of conspiracy that has been consistently analyzed [under the antitrust laws] as a *per se* violation for many decades."⁹⁴ While Justice Stevens began his analysis with the caveat that "[r]easonable lawyers may differ about the wisdom of this enforcement proceeding," he had little difficulty in disposing of the Trial Lawyers' immunity and first amendment claims.⁹⁵ Indeed, in what has become vintage Justice Stevens' first amendment jurisprudence,⁹⁶ he suggested that there was an easy and manifestly

bined in the same course of conduct, [only] a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376.

92. *SCTLA*, 856 F.2d 226, 252-53 (D.C. Cir. 1988).

93. *Id.* at 252. The appellate court concluded that *SCTLA*'s boycott did contain "an element of expression warranting First Amendment protection." *Id.* at 248. Therefore, a restriction on such expression could not be justified unless it was "no greater than is essential" to the furtherance of an important governmental interest. *Id.* at 249 (quoting *O'Brien*, 391 U.S. at 377). Where the right to petition is at stake, the Court held that it would be proper to require the government to "prove rather than presume that the evil against which the Sherman Act is directed looms in the conduct it condemns." *Id.* at 250.

94. *SCTLA*, 110 S. Ct. 768, 782 n.19 (1990).

95. *Id.* at 774.

96. Justice Stevens' first amendment decisions reflect an extremely skeptical attitude concerning the value of first amendment expression occurring in the economic or market sphere. See, e.g., *United States v. Albertini*, 472 U.S. 675, 688 (1985) ("The First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important governmental interests."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932-33 (1982) ("History teaches that special dangers are associated with conspiratorial activity. . . . But violent conduct is beyond the pale of constitutional protection." (footnote omitted)); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 550 (1981) (dissenting) ("I

correct solution to resolve the conflict between first amendment freedoms and federal antitrust regulation. Justice Stevens found the solution in the wisdom of an interpretative rule which holds that the federal interest in preventing price-fixing conspiracies is sufficiently compelling to outweigh competing first amendment interests in political expression.

Justice Stevens exhibited a dismissive attitude to the Trial Lawyers' first amendment claims; one which was evident by the fact that he chose to characterize the boycott as an arrangement between competitors for the purpose of fixing the price of their services. Characterization of the boycott determined the outcome of the case. Hence, while Justice Stevens agreed that reasonable people might debate the wisdom of the FTC's enforcement decision in *SCTLA*, he thought that it was beyond question that the intent of the boycott was to force lawyer fees to increase by restricting supply, which in antitrust law is "the essence of price-fixing."⁹⁷ In his view, there was no question that "[t]he horizontal arrangement among these competitors was . . . a 'naked restraint' on price and output."⁹⁸ The Court thus concluded that the case was governed by the longstanding rule of antitrust law that renders such agreements illegal per se.⁹⁹

The per se rule of antitrust law applies to cases involving particular types of trade restraints, such as horizontal price-fixing agreements, which the Court has found to be socially unredeeming.¹⁰⁰ There has never been agreement in antitrust law, however, about how the courts should characterize novel business practices challenged as price-fixing conspiracies. This is mainly due to the

believe a community has the right to decide that its interests in protecting property from damaging trespasses and in securing beautiful surroundings outweigh the countervailing interest in uninhibited expression by means of words and pictures in public places."); *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 619 (1980) (concurring) (union boycott picketing does not deserve absolute first amendment protection because union picketing "calls for an automatic response to a signal, rather than a reasoned response to an idea").

97. *SCTLA*, 110 S. Ct. at 775.

98. *Id.*

99. *SCTLA*, 110 S. Ct. 768, 782 n.19 (1990). See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (foundation antitrust decision holding that agreement between business competitors to fix prices of their products or services is illegal per se).

100. See, e.g., *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 342-49 (1982). A continuing problem for modern antitrust enforcement, however, has been the difficult task of developing criteria for characterizing business conduct as "price-fixing." See generally Levi, *A Two-Level Anti-Monopoly Law*, 47 *Nw. U.L. Rev.* 567 (1952); Minda, *Labor and Antitrust*, *supra* note 6, at 522.

fact that antitrust judges have been unable to agree upon a single definition of "competition" for deciding particular cases.¹⁰¹ Judges vacillate between the per se rule and the rule of reason.¹⁰² Sometimes, judges find that a particular contract or combination is a naked restraint (justifying per se rules);¹⁰³ other times they find that a contract or combination is a reasonable, ancillary restraint necessary for making competition possible (justifying the rule of reason).¹⁰⁴ Hence, while it is true that price-fixing is per se illegal, it is far from apparent what should be characterized as a naked restraint of trade, subject to per se illegality.¹⁰⁵

The fact that the lawyers in *SCTLA* asserted first amendment freedoms as a justification for the boycott further complicated the case. *SCTLA* is a novel case since there had never been a settled legal position about what role, if any, the first amendment possessed in antitrust regulation.¹⁰⁶ Nor was there a settled legal position in antitrust law on the extent to which the first amendment might protect a boycott on the ground that it was aimed at securing political objectives. Most courts, following the lead of the Eighth Circuit in *Missouri v. National Organization for Women*,¹⁰⁷ have taken the position that economic boycotts seeking political objectives are immune from the antitrust law on the rationale that federal antitrust legislation is designed to apply to commercial

101. See Minda, *Labor and Antitrust*, *supra* note 6, at 523.

102. See, e.g., Handler, *The Polarities of Antitrust*, 60 Nw. U.L. Rev. 751 (1966). I have argued that the oscillation between per se rules and rules of reason in antitrust cases repeat a common law pattern of doctrinal oscillation between two ways of understanding the nature of free trade. See Minda, *Labor and Antitrust*, *supra* note 6, at 521-25. "Free trade can be seen to authorize the deconcentration or concentration of private economic power, depending on how one values the benefits and dangers of competition on the one hand or of collectivization and combination on the other." *Id.* at 462.

103. See, e.g., *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984). Like the strict scrutiny standard applied in equal protection cases, per se rules, once invoked, usually result in antitrust violations. Minda, *Labor and Antitrust*, *supra* note 6, at 522.

104. *Cf. United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) with *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918). Like the rational basis test of equal protection analysis, the rule of reason usually results in upholding the challenged restraint. See Minda, *Labor and Antitrust*, *supra* note 6, at 522.

105. See Levi, *supra* note 100, at 567.

106. See Minda, *Interest Groups*, *supra* note 20, at 982-86.

107. *Missouri v. National Org. of Women*, 620 F.2d 1301 (8th Cir. 1980) [hereinafter *NOW*], *cert. denied*, 449 U.S. 842 (1980). See also Minda, *Interest Groups*, *supra* note 20, at 983-84. In *NOW*, the Eighth Circuit held that *NOW*'s political boycott of convention sites within states that had failed to ratify the Equal Rights Amendment was immune from Sherman Act liability because the Act was not intended to apply to regulate noncommercial activity.

rather than *noncommercial* objectives.¹⁰⁸ Until *SCTLA*, the Supreme Court had not ruled on this question.

One would think that *SCTLA* would have thus raised thorny first amendment issues requiring a careful constitutional and antitrust analysis. Justice Stevens, however, had little difficulty with such questions. While Justice Stevens agreed with Judge Ginsburg that the Trial Lawyers' boycott had an "expressive component," he found that the component was not unique because communication was the "hallmark of every effective boycott."¹⁰⁹ Justice Stevens thus rejected the argument that *O'Brien* required a more sensitive antitrust analysis to protect first amendment expression. He feared that "[a] rule that requires courts to apply the antitrust law 'prudently and with sensitivity,' whenever an economic boycott has an 'expressive component' would create a gaping hole in the fabric of those laws."¹¹⁰ This conclusion is startling given that Justice Stevens failed to explain why the pro-competitive policy of antitrust should trump first amendment values implicated by the expressive components of the boycott. Further, Justice Stevens failed to explain what role, if any, balancing should play in his analysis of the first amendment claims. Justice Stevens concluded that *O'Brien* did not apply because he saw the Trial Lawyers as primarily market participants motivated by profit-making objectives. Justice Stevens' characterization of the boycott, however, left a dilemma to be resolved; his opinion failed to explain his reasons for rejecting other characterizations of the boycott which would recognize the boycotters' first amendment freedoms.

Justice Stevens also summarily disposed of the Trial Lawyers' antitrust immunity argument based on *Noerr*. The *Noerr* doctrine has become an important civil liberties exception to antitrust regulation protecting a wide range of concerted efforts of competitors to petition government.¹¹¹ Since the early 1970s, the lower courts have read the *Noerr* doctrine as a broad immunity rule that protects a wide variety of profit-oriented forms of political expression.¹¹² Justice Stevens distinguished *Noerr*, however, on the

108. See H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW*, § 10.2, at 280 (1985).

109. *SCTLA*, 110 S. Ct. 768, 779 (1990). The Court thus rejected Judge Ginsburg's decision which relied upon *O'Brien*.

110. *Id.* at 780.

111. See Minda, *Interest Groups*, *supra* note 20, at 913-31.

112. See Note, *The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases*, 36 *STAN. L. REV.* 1243 (1984) (authored by R. Zauzmer).

ground that the limited scope of antitrust immunity afforded by *Noerr* applied only to lobbying campaigns directed at influencing governmental action.¹¹³ He reasoned that *Noerr* did not apply because the restraint on trade imposed by the Trial Lawyers' boycott was the result of *private*, rather than governmental action. In other words, Justice Stevens found that the *Noerr* doctrine immunized only those trade restraints that were the result of public petitioning rather than private action. In *Noerr*, the government imposed the restraint on trade, whereas in *SCTLA* the restraint resulted from the action of the Trial Lawyers in withholding their services.

Justice Stevens also rejected the Trial Lawyers' first amendment defense.¹¹⁴ Ironically, the Trial Lawyers had based this argument on Justice Stevens' majority opinion in *NAACP v. Claiborne Hardware Co.*¹¹⁵ In *Claiborne Hardware*, the Supreme Court concluded that the State of Mississippi could not constitutionally prohibit the NAACP from boycotting white merchants who discriminated on the basis of race. Justice Stevens found that "[t]he established elements of speech, assembly, association, and petition, [implicated by the boycott] 'though not identical, are inseparable.'"¹¹⁶ In *Claiborne Hardware* the Court thus held that the NAACP's boycott was a politically-motivated boycott designed to force governmental and economic change.¹¹⁷

In *SCTLA*, Justice Stevens concluded that the holding in *Claiborne Hardware* was premised upon a narrow constitutional principle: expressive boycotts are protected by the first amendment only if they are motivated by political objectives. In *SCTLA*, Justice Stevens emphasized that the crucial element in *Claiborne Hardware* was that the boycotters "sought no special advantage for themselves They sought only the equal respect and equal treatment to which they were constitutionally entitled."¹¹⁸ Similarly, Justice Stevens rejected and dismissed in a footnote the Trial

113. *SCTLA*, 110 S. Ct. 768, 776 (1990). See also Minda, *Interest Groups*, *supra* note 20, at 990-91.

114. *SCTLA*, 110 S. Ct. at 776-78.

115. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). See also Minda, *Interest Groups*, *supra* note 20, at 984.

116. *Claiborne Hardware*, 458 U.S. at 911 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). See also *SCTLA*, 110 S. Ct. at 789 (Brennan, J., concurring in part and dissenting in part).

117. *Claiborne Hardware*, 458 U.S. at 913.

118. *SCTLA*, 110 S. Ct. 768, 777 (1990).

Lawyers' argument that the boycott was necessary to protect the sixth amendment rights of indigent clients.¹¹⁹

Hence, while the *SCTLA* boycott involved both altruistic and political objectives, Justice Stevens found that the Trial Lawyers were motivated primarily by the economic objective to fix the price of their fees. He premised his conclusion on the view that the Trial Lawyers' boycott, unlike the civil rights boycott involved in *Clai-borne Hardware*, had the "immediate objective . . . to increase the price that [the lawyers] would be paid for their services."¹²⁰ Justice Stevens thus ignored the perspective of the Trial Lawyers in characterizing their boycott. From their viewpoint, the boycott was more than just a concerted effort to fix the price of lawyer compensation.¹²¹

Rejecting Judge Ginsburg's argument which required proof of market power before the *SCTLA* boycott could be found to be an antitrust violation, Justice Stevens advanced traditional antitrust arguments for favoring a *per se* rule of illegality. In criticizing Judge Ginsburg's antitrust analysis, Justice Stevens noted that the *per se* rule as applied to price-fixing was based on a "long-standing judgment that the prohibited practices by their nature have 'a substantial potential for impact on competition.'"¹²² Justice Stevens then went on to make an analogy:

The *per se* rules in antitrust law serve purposes analogous to *per se* restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property

. . . .

In part, the justification for these *per se* rules is rooted in administrative convenience. They are also supported, how-

119. *Id.* at 777 n.11. Justice Stevens reasoned that the Trial Lawyers' argument, seeking to advance the sixth amendment claims of their clients, failed to appreciate that *Clai-borne Hardware* "does not protect every boycott having a constitutional dimension." *Id.*

120. *Id.* at 777.

121. The findings in the record, accepted by the ALJ, indicated that while the immediate objective of the *SCTLA* boycott was increased lawyer compensation, the Trial Lawyers "believed that their rate of compensation was directly related to the quality of representation provided to indigents since it almost compelled them to carry an excessive caseload and allowed for none of the essential support services identified with a professional practice." *SCTLA*, 107 F.T.C. 510, 542-43 (1986).

122. *SCTLA*, 110 S. Ct. 768, 780 (1990).

ever, by the observation that every speeder and every stunt pilot poses some threat to the community.¹²³

What is revealing about Justice Stevens' analogy to stunt flying and reckless driving is that his analogies presume that the *SCTLA* boycott posed a comparable threat to society. The problem with this analogy is that it assumes facts that were never established by the evidence in the record. Because Justice Stevens found that the Trial Lawyers' boycott was subject to a per se rule, he never considered whether the Trial Lawyers actually possessed market power to bring about a competitive harm. The evidence in the record in fact supported contrary inferences; as the ALJ concluded after his examination of the evidence of effects, "there was no harm done."¹²⁴

A. Justice Stevens' Public/Private Distinction

Justice Stevens relied upon the familiar public/private distinction of liberal legal thought in his analysis of the Trial Lawyers' first amendment claims.¹²⁵ Justice Stevens' legal distinctions in *SCTLA* presume that it is possible to distinguish between political and economic motives, and public and private consequences. For example, in finding that the *Noerr* immunity doctrine protects only governmental, as distinguished from private action, Justice Stevens presumed that a public/private distinction could mark the line separating antitrust regulation from *Noerr* immunity. Similarly, in finding that *Claiborne Hardware* was limited to purely politically-motivated boycotts, Justice Stevens presumed that a line

123. *Id.* at 781.

124. *Id.* at 773 (quoting *SCTLA*, 107 F.T.C. 510, 561 (1986)). The FTC rejected the ALJ's conclusion because, like Justice Stevens, the Commission found that the boycott was subject to the per se rule of illegality. See *SCTLA*, 107 F.T.C. at 572. With per se rules, the antitrust harm is presumed: no proof of actual harm is required.

125. The history of American legal thought since the early nineteenth century, however, has revealed over and over again the impossibility of making meaningful legal distinctions based on the public/private distinction. See Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 209-21, 258-61, 355-62 (1979). It is true that the public/private distinction "connects" basic tenets of liberal thought, namely that "individuals have rights, there are limits on the power of government vis-a-vis the individual." Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429, 1429 (1982). The distinction, however, fails to inform liberal practitioners how to decide concrete cases. As they recognize, the public/private distinction merely begs a more basic question: "to what extent should individual interests be subordinated to collective control?" *Id.* at 1440.

could be drawn intelligently to distinguish market activity subject to antitrust regulation from political activity subject to constitutional protection.

The public/private distinction both enabled the Court to see the Trial Lawyers' boycott as private market activity subject to antitrust regulation, and permitted the Court to distinguish the *Claiborne Hardware* boycott as public or political activity subject to constitutional protection. According to Justice Stevens, the distinction between the public and private marks the line between economics and politics, and determines whether a boycott is subject to antitrust law or is afforded constitutional protection.¹²⁶

The public/private distinction can also be seen as the underlying basis for Justice Stevens' motivation test in determining first amendment protection of expressive boycotts. The *Claiborne Hardware* rule protects those boycotts that are driven by public objectives, *i.e.*, political objectives. Boycotts which seek economic or commercial objectives lose their claim to first amendment protection because they do not involve the type of liberty interests normally attributed to first amendment activity. Thus, commercially-motivated boycotts are seen as involving private conduct related to commercial activity that has traditionally been accorded lower constitutional status.¹²⁷

Of course, the problem is that there is no such thing as a private sphere of activity distinct from a public sphere of activity. The public actions of the government determine every element of private activity, and private activity determines every element that is public.¹²⁸ The public/private distinction fails to recognize that in

126. See also *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 337 (1990) (arguing that Justice Stevens' analysis in *SCTLA* is "conceptually flawed . . . because it wrongly assumes that economic life and political life are hermetically sealed spheres of conduct and that courts can readily distinguish economic from political motives").

127. See *Posadas de Puerto Rico Ass'n v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986); *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). See generally Schauer, *The Aim and the Target in Free Speech Methodology*, 83 NW. U.L. REV. 562 (1989).

128. Labor law scholars have demonstrated how the public/private distinction in American labor law in fact has worked to favor private contract principles and disfavor public values of community and democratic politics. See Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1 (1981); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

the real world the categories and boundaries separating political and economic activity are too ephemeral, fluid, and messy to be easily categorized.¹²⁹ Do labor unions perform "public" or "private" functions? Are employment rights "public" or "private?" Such seemingly simple questions provoked by the public/private distinction in labor law, have never been answered satisfactorily by the courts.¹³⁰ Labor unions are both public and private, even though judges insist on making contrary distinctions.¹³¹

The manipulability of the public/private distinction has allowed judges in labor law cases to reach surprisingly inconsistent decisions. For example, in the same term in which the Supreme Court decided *Claiborne Hardware*, the Court held in *International Longshoremen's Ass'n v. Allied International, Inc.*,¹³² that the Longshoremen's Union did not have a first amendment right to engage in a secondary boycott proscribed by federal labor law, even though the boycott involved purely political objectives.¹³³ In re-

129. As Professor Gerald Frug has explained in a somewhat different context: "Every public act is, in part, a response to the desires of private individuals, while every private desire is, in part, a response to publicly created incentives, rules and institutions." Frug, Book Review, 1984 AM. B. FOUND. RES. J. 673, 681 (reviewing H. HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870 (1983)).

130. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982). In the context of labor law, Professor Klare has shown how the public/private distinction has performed an ideological function in shaping the course of doctrinal development in light of a marketplace analysis favoring private contract ordering. See also Klare, *Critical Theory and Labor Relations Law* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 61 (D. Kairys rev. ed. 1990).

131. Today, business competes in governmental spheres, see Minda, *Interest Groups*, supra note 20, at 907 n.2, and citizen consumer groups exercise political expression in the marketplace. See, e.g., *Products Under Fire: Boycotters Attack Everything From Spam to Light Bulbs*, U.S. News & World Report, April 16, 1990, vol. 108, at 44. It is simply no longer true, if it ever was, that market and political activity are undertaken in separate spheres. Economic boycotts have become an important mode used by interest groups to express their social and economic views, to influence governmental and corporate policy, and to resist or secure social, economic, and political change. The marketplace has thus become an important place for political activity. It would appear that economic boycotts for political purposes now represent part of the daily marketplace routine of American democracy.

132. *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982); see also Bartosic & 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) (My co-author and I found that *Allied* and other cases decided during the 1981 Term gave us "the distinct impression . . . that when the Justices characterize peaceful labor picketing as a speech-plus device, they perceive so much 'plus' that they see little, if any 'speech.'" *Id.* at 310.

133. *Allied*, 456 U.S. at 226-27. The Longshoremen's boycott had been called to protest the Soviet invasion of Afghanistan and was brought against an employer with whom the union had no collective bargaining relation. *Id.* at 214-16.

jecting the Union's claim that their boycott was protected by the first amendment because of its purely political objectives, the Court emphasized that the union's boycott involved primarily private "conduct designed not to communicate but to coerce . . ." ¹³⁴ Political boycotts by labor organizations have thus been accorded less consideration than other types of boycotts under the first amendment because the Court has found that labor boycotts are aimed primarily at coercing private conduct even when they are brought purely for the purpose of expressing a message of public concern.

Finally, it also is highly unrealistic to assume, as Justice Stevens assumed in *SCTLA*, that judges can attribute single motivating causes to boycotts. Boycotts are motivated by multiple purposes and diverse interests. The more realistic assumption is that every boycott that claims to be political will also involve economic objectives. The civil rights boycott upheld in *Claiborne Hardware*, for example, was brought because discrimination against African-Americans denied them economic opportunities in employment. The legal and political issues raised in *Claiborne Hardware* were premised upon arguments that political freedom and racial equality could not be achieved until African-Americans were granted equal opportunity in jobs.

Justice Stevens' analysis assumes that human beings are motivated by single or primary impulses and desires. Human beings, however, are pulled by opposing and conflicting values, desires, and motivations. We are all divided, at a very deep level, "between irreconcilable visions of humanity and society, and between radically different aspirations for our common future."¹³⁵ Human beings have deeply ambivalent feelings and desires about indepen-

134. *Id.* at 226. Indeed, the *Allied* Court cited and quoted Justice Stevens' concurring opinion in *NLRB v. Retail Store Employees*, 447 U.S. 607, 619 (1980), for the proposition that union boycott picketing "calls for an automatic response to a signal, rather than a reasoned response to an idea," justifying less first amendment protection for the expressive elements of the boycott. *Allied*, 456 U.S. at 226 n.26. The Court thus concluded that the union's political boycott could be regulated under federal labor law no matter how "understandable" or "commendable" the union's objectives might be. *Id.* at 223.

135. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976). In Kennedy's view, law reflects the irreconcilable and ambivalent views that human beings have regarding competing desires and longings for independence and security. He asserts that American legal doctrine is generated by these competing and fundamentally contradictory impulses of human motivation because judges, like all human beings, are subject to these same deeply felt human impulses. Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

dence and security: negative experiences of alienation and isolation and positive yearnings for connection and community. These contradictory impulses in our personalities influence our perception of political and economic issues.

Neither the public/private distinction, nor Justice Stevens' theory of human motivation, instructs judges on how they should characterize boycotts brought for political and economic purposes. Consequently, judges must inevitably rely upon intuition, common sense, and other ways of "knowing" the legal meaning attributable to boycotts. Deeply felt understandings, attitudes, metaphoric images, and imaginative perspectives influence the actual choices judges will make when they characterize the first amendment components of boycotts under *SCTLA's* public/private distinctions.¹³⁶

The danger presented by Justice Stevens' motivation test is that it will authorize federal judges to evaluate the legitimate objectives of labor-community boycotts under a new objectives test that permits federal judges to decide the legitimate political objectives of labor organizations. *SCTLA* thus has the potential of resurrecting the discredited "objectives test" which had been utilized by judges at early common law to condemn strikes and boycotts for higher wages as illegal criminal conspiracies.¹³⁷ *SCTLA* thus raises the specter of federal judges once again determining the legality and legitimacy of the purposes and means utilized by workers for achieving their objectives in labor-community coalitions and boycotts.¹³⁸

136. Thus, the meaning of boycotts adopted in *SCTLA* can be understood as a representation of socially constructed and highly contingent representations of political boycotts, or what Professor Peller has called the "Politics of Representation." See Peller, *Reason, and The Mob: The Politics of Representation*, 2 *TIKKUN* 28 (1987); see also Peller, *The Metaphysics of American Law*, 73 *CALIF. L. REV.* 1151 (1985).

137. See *Vegeahn v. Guntner*, 167 *Mass.* 92, 44 *N.E.* 1077 (1896); *Plant v. Woods*, 176 *Mass.* 492, 57 *N.E.* 1011 (1900). See also Minda, *Labor and Antitrust*, *supra* note 6, at 481-88.

138. See, e.g., *Commonwealth v. Hunt*, 45 *Mass.* (4 *Met.*) 111 (1842). In *Hunt*, Chief Justice Shaw of the Supreme Court of Massachusetts developed a means-ends test for evaluating the legality of union strikes and picketing. Union strikes and boycotts were deemed to be lawful only if they were found to be premised upon legitimate means and ends. Justice Shaw's means/ends test subsequently became the basis for the infamous era of the labor injunction during which federal judges relied upon the Sherman Antitrust Act and the Commerce Clause of the Constitution to issue labor injunctions to enjoin otherwise peaceful labor activities found to be based on impermissible means or ends. See also Minda, *Labor and Antitrust*, *supra* note 6, at 500-03, 512-18.

B. *Justice Stevens' Commodification Metaphor:
The Ideology of Marketplace Thinking*

In *SCTLA*, the public/private distinction served essentially a rhetorical function: it enabled Justice Stevens to avoid grappling with difficult political choices about the right of individuals to engage in political forms of expression. The distinction also obscured the reason for the choice he ultimately made when he found that the government could restrain the Trial Lawyers' political boycott. In *SCTLA*, Justice Stevens followed a particular perspective that viewed the Trial Lawyers' boycott as a cartel-like market restraint.

In Justice Stevens' view, the lawyers were merely market participants motivated by profit-making objectives. To Justice Stevens, the Trial Lawyers' activities represented a "classic" restraint of trade: the lawyers were perceived to be "business competitors who 'stand to profit financially from a lessening of competition in the boycotted market.'"¹³⁹ In this sense, Justice Stevens' opinion in *SCTLA* reads like a story drawn from Adam Smith's *Wealth of Nations* which discusses labor and business combinations within a single narrative about power and domination of market restraints and conspiracy.¹⁴⁰

139. *SCTLA*, 110 S. Ct. 768, 777 (1990) (quoting *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 508 (1988)).

140. See A. SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS*, vol. I, ch. x (R. Campbell and A. Skinner 1976). For a modern day version of Adam Smith's theory as applied to labor, see Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 *YALE L.J.* 1357, 1382 (1983) (arguing that the effort to subject unions to antitrust laws can be defended under a normative theory derived from the early common law).

The significance of "narrative" or "storytelling" for legal studies is now well established. See, e.g., *Interpretation Symposium*, 58 *S. CAL. L. REV.* 1 (1985); *Symposium: Law and Literature*, 60 *TEX. L. REV.* 373 (1982); see also Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 *MICH. L. REV.* 2225, 2227-30 (1989). For an example of the use of narrative in the Supreme Court's takings decisions, see Alexander, *Takings, Narratives, and Power*, 88 *COLUM. L. REV.* 1752 (1988).

I am also drawing from the work of legal feminist theorists who have utilized narratives and storytelling for understanding women's issues and for exposing the gender hierarchy in masculine forms of jurisprudence. See Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 *AM. U.L. REV.* 1065 (1985); West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *WIS. WOMEN'S L.J.* 81 (1987); West, *Jurisprudence and Gender*, 55 *U. CHI. L. REV.* 1 (1988). Professor Drucilla Cornell has recently illustrated how the use of narrative and metaphor can both restrict and liberate feminist legal theory. See Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 *CORNELL L. REV.* 644 (1990). Feminist legal scholarship is, of course, diverse and voluminous. I recognize that not all feminist legal theorists adopt Frug's, West's, or Cornell's methodological stance. See Minda, *The Jurisprudential Movements of*

In *SCTLA*, Justice Stevens' tells a story about how a group of CJA attorneys utilized their power over the government to extort from governmental officials a raise in their hourly fees. In Justice Stevens' mind, the lawyers' boycott was no different than a concerted refusal to deal by a group of businessmen seeking anti-competitive effects in the marketplace.¹⁴¹ What Justice Stevens failed to consider was the possibility that the Trial Lawyers' boycott constituted the very type of political struggle in which workers and other subordinated groups must engage in order to advance their political and economic interests at the workplace.

While it is true that *SCTLA* was brought as an antitrust case, the underlying factual setting was hardly the setting normally considered in antitrust litigation. Moreover, the first amendment claims asserted by the Trial Lawyers should have encouraged the Court to be skeptical of the antitrust framework of analysis advanced by the government. At the very least, the Court should have acknowledged the possible incongruity of placing the Trial Lawyers' boycott on the same analytical plane as a conspiracy between General Motors and Ford Motor Company to fix the prices of their products.

It may well be that Justice Stevens, who has authored a number of important antitrust law decisions,¹⁴² has come to favor a market perspective for evaluating the legal consequences of boycotts generally. Indeed, Justice Stevens appears to be developing the principle that the governmental interest in maintaining com-

the 1980s, 50 OHIO ST. L.J. 599, 622-32 (1989).

141. Thus, Justice Stevens characterized the boycott as an "agreement among the CJA lawyers . . . designed to obtain higher prices for their services . . . implemented by a concerted refusal to serve an important customer in the market for legal services." *SCTLA*, 110 S. Ct. 768, 774-75 (1990). He saw the *SCTLA* boycott to be a "horizontal arrangement among [the] . . . competitors [which] was unquestionably a 'naked restraint' on the price and output." *Id.* See also *id.* at 777 ("No matter how altruistic the motives of respondents may have been, it is undisputed that their immediate objective was to increase the price that they would be paid for their services."). Justice Stevens also concluded that the fact that expressive conduct and publicity was involved did not require a different result. As Justice Stevens explained: "Some activities, including the boycott here, may be newsworthy precisely for the reasons that they are prohibited: the harms they produce are matters of public concern." *Id.* at 779.

142. See, e.g., *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984); *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679 (1978); *United States Steel Corp. v. Fortner Enterprise, Inc.*, 429 U.S. 610 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

petitive markets outweighs the first amendment interest implicated by expressive conduct generally.¹⁴³ Such a rule would grant the economics/politics dichotomy of *SCTLA* important constitutional status for determining the scope of protection afforded the expressive conduct of groups. While such a rule might make sense in business boycott cases challenged under the antitrust laws,¹⁴⁴ the principle would not apply a fortiori to the Trial Lawyers' boycott since the Trial Lawyers alleged that their boycott was aimed at influencing governmental action and was undertaken in furtherance of the sixth amendment rights of their indigent criminal defendants.¹⁴⁵ Their boycott was not a garden variety business boycott seeking to restrain trade.

However, there are a number of statements in Justice Stevens' *SCTLA* opinion which indicate that he perceived the Trial Lawyers' boycott as a garden variety business boycott.¹⁴⁶ In drawing an

143. Justice Stevens appeared to affirm such a principle in *SCTLA* in declaring: "A rule that requires courts to apply the antitrust laws 'prudently and with sensitivity' whenever an economic boycott has an 'expressive component' would create a gaping hole in the fabric of . . . [the antitrust] laws." *SCTLA*, 110 S. Ct. at 780. Justice Stevens thus distinguishes his own opinion in *Claiborne Hardware* on the ground that the civil rights boycott was motivated by the desire to change social order and was not primarily seeking to accomplish economic objectives. *Id.* at 777. Thus, Justice Stevens believes that "[e]quality and freedom are preconditions of the free market, and not commodities to be haggled over within it," because he believes that political freedom is a pre-condition for economic markets. *Id.* He does not believe, however, that political expression can be raised to defend conduct that is already prohibited because it is harmful to public interest in maintaining competitive markets. *Id.* at 779 ("The most blatant, naked price-fixing agreement is a product of communication, but that is surely not a reason for viewing it with special solicitude.").

144. Boycotts and price-fixing conspiracies of business groups, while they may involve expressive elements, have never been thought to have first amendment protection. See Minda, *Interest Groups*, *supra* note 20, at 994. Profit-oriented conduct of business groups does not warrant the highest first amendment protection possible afforded expressive conduct because profit-oriented forms of commercial expression fail to implicate human values and interests central to the type of liberty interest one normally identifies with first amendment values. See C. BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 223 (1989). On the other hand, because labor expression involving economic objectives seeks to further human values of self-advancement (in addition to maximizing wages), such expression does implicate human values identified with first amendment values and thus deserves greater first amendment protection. *Id.*

145. See *SCTLA*, 107 F.T.C. 510, 514 (1986).

146. Justice Stevens found that the *SCTLA* boycott was a "horizontal arrangement among [the competing lawyers which] was unquestionably a 'naked restraint' on price and output." *SCTLA*, 110 S. Ct. 768, 775 (1990) (citing his opinion in *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 110 (1984) a price-fixing case involving the National Collegiate Athletic Association)). In characterizing the activities of the Trial Lawyers Justice Stevens stated: "The agreement among the CJA lawyers was designed to obtain higher prices for their services and was implemented by a concerted refusal to serve an important customer in the market for legal services . . ." *Id.* at

analogy between the per se rule of antitrust and reckless driving and airplane stunt-flying, Justice Stevens depicted a picture of the Trial Lawyers' boycott as an activity that "pose[d] . . . a threat to the free market."¹⁴⁷ Reckless driving, airplane stunt-flying, monopoly price-conspiracies are known to pose dangers to society, and in Justice Stevens' mind, "[s]o it is with boycotts and price fixing."¹⁴⁸ Justice Stevens' narrative in *SCTLA* thus paints a picture of both a dangerous and threatening antitrust restraint and a vulnerable and powerless government. This picture, in turn, justified the application of the per se rule of antitrust as a necessary corrective device to guard against the perceived danger.

Justice Stevens, however, failed to explain why he favored an antitrust narrative for a non-conventional antitrust case. Different images of boycott, for example, can be found in Justice Stevens' majority opinion in *Claiborne Hardware*. In *Claiborne Hardware*, for example, Justice Stevens offered a narrative which placed the civil rights boycott in a different social and cultural context. In that case, he relied upon images and narratives which favorably portrayed the historical struggle of African-Americans resisting the oppression of state law.

Hence, in *Claiborne Hardware*, Justice Stevens recounted, in detail, the events in Claiborne County, Mississippi that were responsible for the NAACP's boycott.¹⁴⁹ After considering the factual and political context from which the boycott arose, Justice Stevens emphasized that the boycott was seeking 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."¹⁵⁰ In finding that the boycott was "a form of speech or conduct" protected by the first amendment, Justice Stevens emphasized that the black citizens involved in the boycott "banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect."¹⁵¹

774-75. In stating that the "overwhelming testimony demonstrated that [the boycott] almost produced a crisis in the administration of criminal justice in the District," for instance, Justice Stevens found that the boycott was, without proof of market power, "flatly inconsistent with the clear course of our antitrust jurisprudence." *Id.* at 782.

147. *Id.* at 781.

148. *Id.*

149. See *NAACP v. Claiborne Hardware*, 458 U.S. 886, 890-906 (1982).

150. *Id.* at 907.

151. *Id.*

The dominant narrative of *Claiborne Hardware* depicted the civil rights boycott as an attempt by a disempowered subordinate group to advance, through collective direct action, opposition to an arbitrary and unjust legal and social regime. When distinguishing *Claiborne Hardware* in *SCTLA*, Justice Stevens saw the two boycotts as representing fundamentally different phenomena, involving different objectives. In *Claiborne Hardware*, Justice Stevens perceived the civil rights boycott as the assertion of *economic* power to achieve a *political* objective (civil rights enforcement); whereas, in *SCTLA* he perceived the boycott as the assertion of *political* power to achieve an *economic* objective (higher lawyer fees). Justice Stevens' legal distinction rested upon an arbitrary and highly contestable characterization of the true objectives of these boycotts. In both boycotts, the participants were employing economic and political power to achieve economic and political objectives. These boycotts were both political and economic with respect to the means utilized and the objective to be achieved. To characterize the boycotts as either purely economic or purely political would be to mischaracterize the true nature of each boycott.¹⁵²

Justice Stevens recognized that *Claiborne Hardware* involved elements of criminality, but he chose to emphasize instead the

152. Alternative characterizations of the *SCTLA* and *Claiborne Hardware* boycotts were possible. The cognitive differences between the *SCTLA* and *Claiborne Hardware* boycott can be seen as the product of socially constructed understandings based upon the *privileging* of certain felt experiences. For example, while it is true that the boycott involved in *Claiborne Hardware* consisted mainly of peaceful and orderly marches, the trial record disclosed that the black community in Claiborne County was threatened by vigilance patrols, known as the "Black Hats," or the "Deacons." See *id.* at 900-06 (1982). Several incidents, some substantiated by the evidence, some of doubtful credibility, reflected a general attitude of hostility towards violators of the boycott. A brick was thrown through a car windshield of a violator, shots were fired at a house in two instances, and one violator was allegedly beaten. *Id.* at 904-05.

The *Claiborne Hardware* Court held that the first amendment protection afforded peaceful activities of the boycott did not extend to protect those individuals who were engaged in violent acts. *Id.* at 933. The civil rights boycotters picketed white-owned businesses who refused to hire minorities. The NAACP boycott was called to secure political and economic objectives for its members by ending discrimination in employment. See *id.* at 934-40 (appendix to opinion of the Court). It was also undisputed that the targets of the boycott, white-owned businesses, suffered extensive financial losses. *Id.* at 907-12. *Claiborne Hardware* was not purely motivated by political motives, although political motives were certainly part of the reason for the boycott.

Although I believe *Claiborne Hardware* was decided correctly, my point is to illustrate how economic boycotts for political purposes can be seen to resemble dangerous forces, and how the meaning to be attributed to the activity in question depends, at least in part, on the privileging of certain experiences over others.

"elements of majesty"¹⁵³ which he found in the political components of the boycott. In *SCTLA*, Justice Stevens saw only conspiracy and market restraint; he was blind to the "majesty" of the Trial Lawyers' effort to exercise solidarity amongst themselves and with their clients.¹⁵⁴ Justice Stevens failed to explain why the civil rights boycott in *Claiborne Hardware* was more majestic than the Trial Lawyers' effort to seek solidarity at their workplace.

There is, however, a way to understand the reason for the different legal treatment accorded these boycotts. What makes the civil rights boycott in *Claiborne Hardware* appear political and emancipatory, and what makes the Trial Lawyers' boycott in *SCTLA* appear threatening and dangerous as a market restraint is an imaginative process of reasoning that privileges the status of certain images or experiences about the world in specific factual contexts, while excluding others.¹⁵⁵ The underlying legal characterization of the boycott in these cases is always a political choice which legal reason alone can not decide. The discernible meaning of the *SCTLA* decision can be gleaned by considering the decision as symbolic of the cultural values and attitudes that are now shaping judicial attitudes about popular protest.

In this way, one can see how *SCTLA* is another example of the Court's shift away from the cultural symbols and values that informed the judicial understanding of political boycotts expressed in *Claiborne Hardware*, to a culturally based understanding that is disproportionately shaped by the symbols and values of corporate America. Hence, the metaphors of white Southern culture that signified the need for federal intervention and legal order in *Clai-*

153. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 888 (1982). As Justice Stevens stated at the outset of his *Claiborne Hardware* opinion: "The boycott of white merchants in Claiborne County, Miss., that gave rise to this litigation . . . included elements of criminality and elements of majesty." *Id.*

154. As Professor Getman has argued, while the Court found "elements of majesty" in the *Claiborne Hardware* boycott, no cause "has been more often the subject of literature, meeting, song, and drama in all of history than the idea of working class solidarity." Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 *Md. L. Rev.* 4, 17-18 (1984).

155. In *Claiborne Hardware*, the civil rights boycott was thus aligned with images of "law and order," "stability," and "justice." In contrast, the target of that boycott, white Southern culture, represented a threatening "danger" that needed to be restrained by federal law. In *SCTLA* the images and metaphors were reversed: it was the boycott that represented the threatening danger, and it was the District of Columbia that was depicted as disempowered and threatened.

borne Hardware are now perceived to be culturally irrelevant.¹⁵⁶ In today's corporate-driven mass culture, the ideals of social activism relevant to the civil rights movement of the 1960s no longer seem relevant.¹⁵⁷ Indeed, *SCTLA* can be seen as illustrative of a general cultural conservatism in the Supreme Court: a conservatism that has turned away from traditional liberal conceptions of civil liberties and first amendment values and has instead turned toward a new anti-liberal jurisprudence that has stressed the overriding importance of stability and order.¹⁵⁸

Consequently, in both labor and antitrust law, constitutional narratives have been replaced by culturally conservative narratives that have transformed legal doctrine in light of the aims, interests, and values of the business community.¹⁵⁹ Today, what seems to dominate judicial notions about collective political activity are the narratives of *SCTLA*: narratives that associate appropriate behavior with the values and interests of marketplace behavior. What is limited and curtailed is the language and images of the boycott depicted in *Claiborne Hardware*.¹⁶⁰ *Claiborne Hardware* has failed

156. This is especially true today in view of the narratives that have now come to characterize the "New South." See, e.g., V. NAIPAUL, *A TURN IN THE SOUTH* (1989).

157. See C. West, *Progressive Politics*, *supra* note 6, at 1797.

158. See R. West, *Foreword: Taking Freedom Seriously*, 104 *HARV. L. REV.* 43, 45 (1990) (noting how conservative scholarship reflected in last term's decisions of the Supreme Court "stressed antiliberal themes—notably, the need to respect traditions of the past and the need for certainty and order in social relations").

159. See Minda, *Labor and Antitrust*, *supra* note 6.

160. This is not to say that other reasons cannot be asserted to explain Justice Stevens' decision in *Claiborne Hardware*. For example, if the Court had reached a different result in *Claiborne Hardware*, then it would have sustained the right of merchants to recover their tort judgments against the NAACP for the economic damage caused by the boycott. The Supreme Court was painfully aware of the political consequences of a contrary ruling. A different outcome would have bankrupted the NAACP. What is far from clear, however, is why similar practical reasons did not justify a different result in *SCTLA*. The civil remedy for antitrust violations is severe: damages are trebled to deter violators. Enforcement of antitrust sanctions against economic boycotts such as the one involving the Trial Lawyers could bankrupt other political subordinate interest groups. Why favor the NAACP organization?

One commentator has recently suggested that *Claiborne Hardware* should be limited to financially disinterested boycotts seeking to advance political objectives that are embodied in the constitution. See Elhauge, *The Scope of Antitrust Process*, 104 *HARV. L. REV.* 667, 745 (1991). This suggestion would, however, appear to run counter to the *SCTLA* decision because at least one objective of the Trial Lawyers' boycott was to advance the sixth amendment rights of their clients. Even if we ignore the sixth amendment claim in *SCTLA*, it is far from clear why the lawyers were not granted some degree of first amendment protection when advancing their own interests through a direct political action. To say that *Claiborne Hardware* is limited to boycotts involving constitutional objectives merely begs the question: why is expressive conduct involved in political boycotts not constitutionally protected?

to extend the scope of first amendment protection for political boycotts because the civil liberties perspective found in *Claiborne Hardware* has become enmeshed within a culturally conservative vision which gives priorities to the interests and values of the market. Labors' collective liberties have consequently suffered because judges now find, as judges found at early common law, that labor's peaceful political activities are threatening to a dynamic, corporate-driven economy.¹⁶¹

III. JUSTICE BRENNAN'S PARTIAL DISSENT

Before exploring the implications of Justice Stevens' *SCTLA* decision for the American labor movement, it will be helpful to consider the different judicial perspective of Justice Brennan in his partial dissent. Justice Brennan's partial dissent in *SCTLA* offers, I believe, a contrasting perspective for understanding how the constitutional perspective of *Claiborne Hardware* might be utilized for evaluating the expressive elements of the *SCTLA* boycott. On the other hand, Justice Brennan's partial dissent also serves to illustrate how the marketplace thinking has come to dominate and influence the first amendment analysis of even a liberal Justice such as Justice Brennan.

In *SCTLA*, Justice Brennan joined by Justice Marshall, agreed with the majority that the Trial Lawyers' boycott was subject to federal antitrust regulation. Justice Brennan also agreed that the boycott was neither immunized by *Noerr* nor protected absolutely by the first amendment. Justice Brennan's disagreement with the

Why should federal judges be authorized to determine which objectives of labor and non-labor groups are legitimate?

161. See, e.g., *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982) (upholding federal labor regulation of a purely political boycott); *NLRB v. Retail Store Employees, Local 1001*, 447 U.S. 607 (1980) (upholding an injunction against peaceful picketing directed at the general public). The Court has recognized that picketing involves first amendment expression generally. See *Thornhill v. Alabama*, 310 U.S. 88 (1940). The Court has also concluded that the conduct elements of picketing may warrant state regulation. *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769 (1942). The only recent exception that the Court has recognized is labor handbilling. In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988), the Court held that peaceful handbilling aimed at consumers could not be regulated as "typical commercial speech" under federal labor law, otherwise "serious questions" would be raised under the first amendment. *Id.* at 576. First amendment protection for union leafletting and handbilling seems astonishing when considered in light of the Court's prior decisions distinguishing between labor and political speech. See J. GETMAN & B. POGREBIN, *LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE*, 230-31 (1988).

majority thus centered on the appropriate antitrust standard to be applied for evaluating the legality of the boycott.¹⁶² Emphasizing the critical role that boycotts play in political speech, he rejected the approach of *per se* rules. Instead, Justice Brennan argued that *O'Brien* and the first amendment required a showing of market power before the boycott could constitute an antitrust violation. Two critical features of Justice Brennan's partial dissent distinguish his approach and perspective from that of Justice Stevens. First, Justice Brennan emphasized the political context of the boycott. Second, he developed his understanding of the boycott in light of the historical role boycotts have played in a democratic republic.¹⁶³

A. Justice Brennan's Focus on Context

Justice Brennan began his analysis of the Trial Lawyers' boycott by acknowledging that "it may be difficult to untangle" the first amendment and antitrust policies implicated by expressive

162. *SCTLA*, 110 S. Ct. 768, 782 (1990) (Brennan, J., dissenting in part and concurring in part). Justice Blackmun, in a separate dissent, agreed with the majority and Justice Brennan that the Trial Lawyers' boycott was neither immunized by *Noerr* nor absolutely protected by the first amendment. *Id.* at 791 (Blackmun, J., concurring in part and dissenting in part). Agreeing with Justice Brennan, Justice Blackmun concluded that the lawyers were "not merely participants in a competitive market for legal services" since they were officers of the court and were subject to being ordered by the courts to represent indigent clients under "pain of contempt." *Id.* In Justice Blackmun's view, the relevant factors determining the power of the boycott were thus "political, not economic." *Id.* at 792.

163. *SCTLA* should be viewed as Justice Brennan's last "labor law" dissent before his retirement. Justice Brennan's *SCTLA* dissent is important for reminding us of a judicial perspective that may now be lost, and which needs to be rediscovered and reaffirmed in labor and constitutional law scholarship. In Justice Brennan's vision, "constitutional legitimacy resides not only in the rational forms of enacted consent and doctrinal logic, but also in the passionate substance of ethical responsiveness." Michelman, *Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 23, 32 (1990). Justice Brennan's subsequent retirement may indeed serve to signal the entrenchment of a new balance of power in favor of a new conservative majority in labor law. In 1988 Anthony M. Kennedy joined the United States Supreme Court, replacing Justice Lewis Powell, the conservative/moderate appointee of Richard Nixon. One year after Justice Kennedy's appointment, a new conservative five-member majority, consisting of Justices Kennedy, O'Connor, Scalia, White, and Chief Justice Rehnquist, handed down a series of decisions that may fundamentally alter the nature of civil rights and employment discrimination law. See *Independent Fed'n of Flight Attendants v. Zipes*, 109 S. Ct. 2732 (1989); *Jett v. Dallas Independent School Dist.*, 109 S. Ct. 2702 (1989); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989); *Lorance v. AT & T Technologies, Inc.*, 109 S. Ct. 2261 (1989); *Martin v. Wilks*, 109 S. Ct. 2180 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). See also Minda, *Employment Law*, 41 SYRACUSE L. REV. 265, 295 (1990). It remains to be seen if Justice Brennan's replacement, David Souter will join the new conservative majority.

boycotts seeking to influence governmental action.¹⁶⁴ Justice Brennan instead offered a pragmatic approach to the problem at hand. In his view, "[t]he issue . . . is *not* whether boycotts may ever be punished under § 5 of the Federal Trade Commission Act consistent with the first amendment, rather, the issue is how the government may determine which boycotts are illegal."¹⁶⁵ Framing the issue in this way, Justice Brennan embraced the tension between the first amendment and antitrust law by emphasizing the simultaneous commitments to political expression and free market competition.

For Justice Brennan, the only issue was whether the boycott could be judged a *per se* restraint of trade without proof of actual anti-competitive harm. Brennan's concern was that the majority had permitted the "FTC to find an expressive boycott to violate the antitrust laws, without even requiring a showing that the participants possessed market power or that their conduct was triggered by anti-competitive effects."¹⁶⁶ In Justice Brennan's view, the Court should have affirmed Judge Ginsburg's decision requiring proof of market power.¹⁶⁷ In finding that the *O'Brien* test requires a "rule of reason" antitrust analysis, at the very least, Justice Brennan criticized the majority for analogizing that "since the government may prohibit airplane stunt-flying and reckless automobile driving as categorically harmful, it may also subject expressive political boycotts to a presumption of illegality"¹⁶⁸

164. *SCTLA*, 110 S. Ct. at 783.

165. *Id.* (emphasis in original) (citation omitted).

166. *SCTLA*, 110 S. Ct. 768, 787 (1990) (Brennan, J., dissenting in part and concurring in part).

167. *Id.* at 783. Justice Brennan, failed, however, to explain what he meant by proof of monopoly power. Justice Brennan did note that there should have been a showing "that the boycotters possessed some degree of market power—that is, the ability to raise prices profitably through economic means or, more generally the capacity to act other than as would an actor in a perfectly competitive market." *Id.* What is unclear is whether proof of market power would indicate that the boycott was due to economic force rather than its persuasiveness. Should proof of power in a political boycott case be measured by the political persuasiveness of the boycott or rather proof that the boycotters had sufficient economic clout to have a market effect regardless of its persuasiveness? In *SCTLA*, it would be difficult to establish that such a small group of attorneys had "economic" power as that term is traditionally understood in antitrust law, and yet they may have considerable "political" power in the sense that their message was found to be persuasive. Allowing courts to evaluate the power of the expressive component of boycotts would sanction judicial scrutiny of the content of expression—an outcome that would clearly be repugnant to fundamental first amendment values.

168. *Id.* at 782 (1990) (Brennan, J., concurring in part and dissenting in part).

Justice Brennan thus argued that the government must demonstrate that the Trial Lawyers' boycott would actually cause an antitrust harm before proscribing expressive conduct. Justice Brennan was troubled by the fact that the government had never considered whether "the success of the Trial Lawyers' boycott could have been attributable to the persuasiveness of its message rather than any coercive economic force."¹⁶⁹ Hence, Justice Brennan argued that an analysis of the actual political context was necessary as a condition precedent for evaluating the anti-competitive harm of the boycott.

When considering the context of the dispute, Justice Brennan suggested that the Trial Lawyers' boycott operated on a *political* rather than *economic* level—by "altering the *political* preferences of District officials."¹⁷⁰ Although the *SCTLA* campaign drew public attention to the lawyers' plight, Justice Brennan reasoned, as the appellate court had suggested, that the Trial Lawyers lacked market power to impose a trade restraint. Nevertheless, the Trial Lawyers succeeded in their effort "by changing public attitudes through the publicity attending the boycott."¹⁷¹ Justice Brennan also recounted the "long history" of the Trial Lawyers' attempts to petition the government to change their compensation fees. He also noted the near unanimous support the Trial Lawyers received for their effort from bar associations, the judiciary, and city government officials.¹⁷²

Justice Brennan's analysis of the political context rejected the distinctions based on economics and politics. In rejecting the economics/politics distinction, Justice Brennan accepts the reality that political boycotts frequently involve diverse motives and objectives that require a more sensitive analysis than the one provided by *per se* rules. Justice Brennan can be read as arguing that judges must explore the social and political context in which boycotts operate before determining if they are subject to governmental regulation.¹⁷³ Justice Brennan's jurisprudence has consistently sought to protect individual liberties while preserving what Profes-

169. *SCTLA*, 110 S. Ct. 768, 785 (1990) (Brennan, J., concurring in part and dissenting in part).

170. *Id.* (emphasis in original).

171. *Id.* (quoting *SCTLA*, 856 F.2d 226, 251 (D.C. Cir. 1988)).

172. *Id.* at 786 (1990) (Brennan, J., concurring in part and dissenting in part).

173. The problem with the Court's current boycott analysis is its failure to consider the role of social context in determining the importance of first amendment political expression.

sor Michelman has called "dialogic exchange."¹⁷⁴

B. Justice Brennan's Analysis of History

Justice Brennan thus criticized the majority for ignoring the fact that political boycotts "have been a principal means of political communication since the birth of the Republic."¹⁷⁵ He went on to recount the significant role that such boycotts have played in American politics:

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. In recent years there have been boycotts of supermarkets, meat, grapes, iced tea in cans, soft drinks, lettuce, chocolate, tuna, plastic wrap, textiles, slacks, animal skins and furs, and products of Mexico, Japan, South Africa, and the Soviet Union.¹⁷⁶ Like soapbox oratory in the streets and parks, political boycotts are a traditional means of 'communicating thoughts between citizens' and 'discussing public questions.'¹⁷⁷

Thus, Justice Brennan found that expressive boycotts may be seen "in light of their historic importance as a mode of expression."¹⁷⁸

Justice Brennan's understanding of expressive boycotts is significant because he expressly invokes the images of a collective deliberative dialogue to explain the political significance that boycotts have played in American politics. Justice Brennan's idea of boycotts drawn from the cultural experience of popular protest and civic dissent evokes the republican images of ideal political aspirations. Indeed, Justice Brennan's specific reference to the Montgomery bus boycott invites us to rediscover *Claiborne Hardware*

174. See Michelman, *Tribute to Justice William J. Brennan, Jr.*, *supra* note 163, at 25. Professor Michelman defines "dialogic exchange" as "'critically interactive' exchange thriving on difference, dissent, and disruption—in the many, varied forums of public life." *Id.* (citing Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 638 (1990)).

175. *SCTLA*, 110 S. Ct. 768, 788 (1990) (Brennan, J., concurring in part and dissenting in part).

176. *Id.* (citing *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301, 1304 n.5 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980); Note, *NOW or Never: Is There Antitrust Liability for Noncommercial Boycotts?*, 80 COLUM. L. REV. 1317, 1318, 1334 (1980)).

177. *Id.* (quoting *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939)).

178. *Id.*

and its application to an evaluation of the *SCTLA* boycott.¹⁷⁹

To Justice Brennan, *Claiborne Hardware* was not limited to boycotts seeking affirmation of specific public rights. Rather, he saw *Claiborne Hardware* as establishing the broader principle that expressive boycotts were entitled to first amendment protection even if they sought economic objectives. Justice Brennan did not distinguish such boycotts from those that may involve a particular anti-competitive effect. Instead, he argued that every economic boycott can operate on different levels. In his view, the government should be allowed to presume which level controls without first establishing a factual basis for its characterization. Indeed, Justice Brennan provided a powerful reason for rejecting an economic motivation test:

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 mayor, or even a 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.¹⁸⁰

Justice Brennan’s understanding of the *SCTLA* boycott was structured by the same metaphors republican constitutional scholars now rely on to revive ideas associated with the political tradition of civic republicanism.¹⁸¹ In rejecting the marketplace of ideas

179. Justice Brennan was surprised by Justice Stevens’ interpretation of *Claiborne Hardware*. As he explained: “[i]n *Claiborne Hardware*, Justice Stevens observed that ‘[t]he established elements of speech, assembly, association, and petition, “though not identical, are inseparable’ when combined in an expressive boycott. I am surprised that he now finds that the Trial Lawyers’ boycott was not protected speech.” *SCTLA*, 110 S. Ct. 768, 789 (1990) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (citation omitted)).

180. *SCTLA*, 110 S. Ct. at 789-90 (citation omitted).

181. See Michelman, *Law’s Republic*, 97 *YALE L.J.* 1493 (1988). As Frank Michelman has explained:

Republican constitutionalism . . . involves a kind of normative tinkering. It involves the ongoing revision of the normative histories that make political

metaphor for understanding the constitutional right of free speech, these scholars have advanced analytical metaphors that seek to attribute new meaning to first amendment values based on the idea of a collective political dialogue.¹⁸³

Indeed, at the core of Justice Brennan's dissent in *SCTLA* is the image of the boycott as a dialogic expression necessary for political discourse and dissent.¹⁸³ According to the republican understanding of politics, preferences are determined by the deliberative process of politics. Ideas are understood not as products or commodities traded in a metaphoric marketplace, but rather as the creative results of human interaction and discourse. Consequently, collective political expression should not be commodified by the discourse of antitrust law that emphasizes market interests at the expense of constitutional values and interests. For this reason, Justice Brennan's understanding of the *SCTLA* boycott is consistent with the ideals of civic republican thought.¹⁸⁴

Justice Brennan's decision in *SCTLA* is, however, subject to criticism. Indeed, the only legal difference between Justice Stevens' and Justice Brennan's approaches was that Justice Stevens believed that the boycott was per se illegal, while Justice Brennan would sustain a finding of illegality only if proof of market power

communities sources of contestable value and self-direction for their members. This tinkering entails not only the recognition but also the kind of recognition—reconception—of those histories that will always be needed to extend political community to persons in our midst who have as yet no stakes in "our" past because they had no access to it.

Id. at 1495 (footnote omitted).

182. See generally Michelman, *Law's Republic*, *supra* note 181.

183. Professor Frank Michelman is perhaps the leading advocate of the deliberative dialogue in republican conceptions politics. See Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 293 (1989) (arguing that deliberative dialogue in democratic politics refers to "a certain attitude toward social cooperation, namely, that of openness to persuasion by reasons referring to the claim of others as well as one's own"). Professor Michelman thus argues for the acceptance of a new "republican ideal conception" of politics that is a "dialogic process of persons overcoming, through confrontation with difference, the moral stasis and self-satisfaction of sameness." *Id.* See also Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 U. FLA. L. REV. 443 (1989); Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

184. Theories of civic republicanism in constitutional law are diverse and hardly representative of a universal or single theory or approach. Nevertheless, it is generally agreed that all brands of civic republican theory are critical to the marketplace of ideas theory attributed to Locke and Smith. See Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1540-41 (1988).

and restraint were factually established.¹⁸⁵ Both Justices accepted the general proposition that antitrust law set the relevant legal framework for analyzing the boycott. Justice Brennan would allow federal judges to scrutinize political boycotts under the "rule of reason" standard of antitrust. In this respect, Justice Brennan, like Justice Stevens, adopted a fundamentally flawed view that the Trial Lawyers' boycott could be analyzed as another business restraint. It is troubling that all nine Justices agreed that the concerted attempt of the Trial Lawyers to secure higher wages from the government by boycotting or withholding services might be subject to antitrust liability.

IV. IMPLICATIONS FOR AMERICAN LABOR LAW

Justice Stevens and Justice Brennan offer fundamentally different perspectives for evaluating the expressive components of boycotts. In *SCTLA*, Justice Stevens viewed the boycott through the lens of antitrust law, while Justice Brennan looked through the lens of constitutional law. It was therefore not surprising that Justice Stevens saw only a conspiracy in restraint of trade and price-fixing, while Justice Brennan saw that the boycott might raise important constitutional interests and express popular protest. Despite their different perspectives both Justices agreed that antitrust law provided the appropriate legal standards for evaluating the Trial Lawyers' boycott. The fact that all nine Justices agreed on the relevance of antitrust law, and that a majority of the Justices chose Justice Stevens' perspective over that of Justice Brennan's, raises ominous implications for the labor movement.

Although technically an antitrust decision, *SCTLA* may signal a jurisprudential trend to further limit first amendment protection applicable to labor-community coalitions and boycotts under *Clai-borne Hardware*. *SCTLA* may thus undermine the effort of collective bargaining advocates who seek greater first amendment protection for progressive forms of expressive activities necessary to secure social and economic advancement.¹⁸⁶ It appears that first

185. The difference between per se and rule of reason, however, was not trivial; these standards would be outcome determinative of the litigation. See *supra* notes 99-104 and accompanying text.

186. A growing number of labor commentators are recognizing that labor union activities should be accorded more constitutional protection than such activities now receive. See, e.g., Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 Md. L. Rev. 4 (1984); Harper, *The Consumer's Emerging Right to Boycott: NAACP v. Clai-*

amendment protection for all boycotts and collective action in the marketplace will be lost if such activity is found to be aimed at benefiting the economic interests of the participants.¹⁸⁷

One practical consequence of Justice Stevens' understanding of political boycotts is that it will limit first amendment protection for the political "voice" strategies of labor groups seeking traditional bread and butter objectives. Justice Stevens' conclusion that the Trial Lawyers lacked a first amendment right to engage in the political boycott effectively limited the lawyers to the market exit-and-entry strategy for dealing with undesirable working conditions. Since traditional lobbying petitions were found to be ineffective, the only alternative for the lawyers in dealing with future undesirable conditions was to quit. For the Trial Lawyers, however, as well as most workers, exit was not a realistic alternative. Most workers cannot simply quit.

The exit-and-entry strategy favored by the *SCTLA* majority may influence judicial attitudes toward litigation involving the new political action strategies of organized labor. The application of the market analysis of antitrust law to non-conventional market actors may signal that labor-community coalitions seeking collective bargaining objectives will no longer merit first amendment protection. As a result, labor-community boycotts will be treated like the political boycotts of organized labor. Both activities will be characterized as market interferences subject to federal regulation and ren-

borne Hardware and Its Implications for American Labor Law, 93 *YALE L.J.* 409 (1984) [hereinafter Harper, *The Consumer's Emerging Right to Boycott*]; Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of DeBartolo*, 1990 *WIS. L. REV.* 149; Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 *VA. L. REV.* 685 (1985); Pope, *Labor and the Constitution*, *supra* note 18. As Professor Pope has noted, however, there is considerable disagreement "over the strategic prospects for remedying the problem." Pope, *Labor-Community Boycotts*, *supra* note 8, at 920 n.165.

187. First amendment protection would be lost even if boycotters claim that their boycott is also aimed at legitimate political and social goals. As the Court in *SCTLA* stated: "The social justifications proffered for [the Trial Lawyers'] restraint of trade . . . do not make it any less unlawful." *SCTLA*, 110 S. Ct. 768, 775 (1990). *SCTLA* would thus appear to deny first amendment protection to consumer as well as labor boycotts seeking marketplace objectives for its participants. For lawyers committed to progressive forms of legal practice, *SCTLA* may thus confirm what Professor Cornel West has identified as one of the "sobering facts" about the role of law in American history—namely, the preservation of a deeply entrenched cultural conservatism that recasts the law within an anti-labor and pro-business image. C. West, *Progressive Politics*, *supra* note 6, at 1797, 1799 (arguing that progressive lawyers must work to counter "cultural conservatism that recasts the law in its own racist, sexist, antilabor, and homophobic image").

dered unlawful if they are found to be premised upon illegal objectives.¹⁸⁸ Labor's collective liberty to engage in political expression will be subject to the existing legal restrictions that now curtail the constitutional right to picket and strike.¹⁸⁹

The rhetoric of Justice Stevens' opinion supports the position that labor-community coalitions and boycotts should be proscribed because they perpetuate the inefficiencies and abuses of monopoly found in the marketplace.¹⁹⁰ If we paint labor-community coalitions with a monopoly face, then the case for restricting their freedom seems strong. If, however, we come to see unions and non-labor groups and their collective activities as necessary for allowing individuals to participate in the process of decision-making affecting workplace interests, then a different, more supportive image of collective action emerges. Professor Weiler, building on the work of Freedman and Medoff, for example, has argued that unionization and collective bargaining promotes efficiency in production by developing a more stable and democratic workplace governance.¹⁹¹ Professor Weiler argues the case for legislative reform to allow unions to expand the scope of collective bargaining. If the legal rhetoric of *SCTLA* dominates the current Court's thinking about labor's political activities, labor may never be able to mobilize under federal labor legislation.

Collective bargaining advocates agree that labor organizations are no longer capable of advancing their interests in the current legal and economic environment. Labor law scholars also recognize

188. See, e.g., *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982) (labor union's political boycott held unprotected by the first amendment because it was premised upon an illegal secondary objective).

189. See, e.g., *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980) (union's peaceful picketing aimed at consumers can be enjoined because it signals coercive conduct).

190. Consumer boycotts of corporate practices and products have caused some to believe that these boycotts pose a threat to the economic performance of business. See, e.g., Garrett, *Consumer Boycotts: Are Targets Always the Bad Guys?*, 1986 Bus. & Soc'y Rev. 17, 19. While surprisingly few empirical studies have been conducted, there is some empirical evidence that consumer boycotts have influenced the stock price of targeted firms. See Pruitt & Friedman, *Determining the Effectiveness of Consumer Boycotts: A Stock Price Analysis of Their Impact on Corporate Targets*, 9 J. CONSUMER POL'Y 378, 381 (1986) (target firms experienced statistically significant decreases in stock prices after boycott announcement). But see Pruitt, Wei & White, *The Impact of Union-Sponsored Boycotts on the Stock Prices of Target Firms*, 9 J. LAB. RES. 285, 289 (1988) (reporting that union sponsored boycotts resulted in short-term decreases in stock prices which lasted for only a few days).

191. P. WEILER, *GOVERNING THE WORKPLACE*, *supra* note 2, at 181.

that improving the current state of labor legislation depends on the labor movement's development of new mechanisms to enact labor law reforms. Collective bargaining advocates, however, do not agree on the means to achieve these goals. There is no consensus of opinion that defensive work within the legal system can change the dominant legal categories now utilized by judges for analyzing labor problems.

A. *Slippery Slopes, "Republican Moments," and the Inevitability of the Economics/Politics Distinction*

Professor James G. Pope, however, has recently argued that collective bargaining advocates can find within decisions such as *SCTLA* "a strong hint that [labor-community coalitions and boycotts] will receive a high degree of [constitutional] protection" in the future.¹⁹² He assumes that the Court in *SCTLA* rendered the only proper decision because a contrary decision would create "a slippery slope toward accepting all boycotts as political."¹⁹³ Despite academic criticism,¹⁹⁴ and his own advocacy of stronger constitutional protections for labor protests—including strikes and boycotts for "economic" objectives¹⁹⁵—Professor Pope argues that labor-community activists must, as "a practical matter" accept that they will be "operating on the legal terrain of this economics/politics continuum for the foreseeable future."¹⁹⁶

Professor Pope argues that *Claiborne Hardware* and *SCTLA* should be read together as establishing a "sliding scale" for analyzing whether boycotts will be afforded first amendment protection. He argues that "the less 'economic' and the more 'political' the boycott, the greater the first amendment protection."¹⁹⁷ According

192. Pope, *Labor-Community Boycotts*, *supra* note 8, at 923.

193. *Id.* at 925.

194. See, e.g., Hyde, *Beyond Collective Bargaining: The Politicization of Labor Relations under Government Contract*, 1982 Wis. L. Rev. 1, 36-41; Klare, *The Public/Private Distinction in Labor Law*, *supra* note 130; Stone, *The Post-War Paradigm in American Labor Law*, *supra* note 128.

195. Pope, *Labor and the Constitution*, *supra* note 18, at 1076-78.

196. Pope, *Labor-Community Boycotts*, *supra* note 8, at 923-24. In Professor Pope's view, the public/private distinction that structured the Court's analysis of the Trial Lawyers' boycott had to be recognized because "boycotters could almost always present a non-frivolous claim that more money for them would be good for the public. Even the routine commercial boycott designed to drive competitors from the market could be defended as an attempt to eliminate destructive competition and stabilize the market." *Id.* at 925.

197. *Id.* at 923. Hence, "[a]t one end of the scale, civil rights boycotters demanding racial equality receive protection not only for all peaceful boycott advocacy, including pick-

to Professor Pope, the fate of labor-community boycotts will rest on the issue of characterization. The question is whether labor-community coalitions and boycotts will be perceived by judges as closer to the political or the economic pole of the economics/politics continuum created by *Claiborne Hardware* and *SCTLA*.

Professor Pope believes that if the courts adopt the economics/politics distinction of *SCTLA*, they will find that most labor-community boycotts are based primarily upon political objectives and will enjoy first amendment protection. In support of his view, Professor Pope points to the campaign to keep the General Motors assembly plant at Van Nuys, California, open in September 1982.¹⁹⁸ He describes how a small group of union members at the Van Nuys plant formed an alliance with Chicanos, African-Americans, and women affected by the threatened closing of the plant, and advanced a labor-community boycott that successfully forced General Motors officials to keep the plant open.¹⁹⁹

Professor Pope argues that the Van Nuys boycott is distinguishable from the *SCTLA* boycott because the dispute was premised upon non-economic objectives that would have "immediate" impact on both the union and the community.²⁰⁰ In contrast, he finds that the Trial Lawyers had only a "causal claim" that higher fees would lead to better-quality legal representation for their clients.²⁰¹ He underscores the fact that the lawyers in *SCTLA* did not involve outsiders in their boycott; whereas, in the Van Nuys campaign, unionists "sought and obtained support from churches, religious leaders, Chicano groups, politicians, and other members of

eting, but also for the agreement to boycott itself. At the other end, purely commercial boycotters receive no protection at all." *Id.* (footnotes omitted).

198. *Id.* at 891-94. See generally E. MANN, *TAKING ON GENERAL MOTORS: A CASE STUDY OF THE UAW CAMPAIGN TO KEEP VAN NUYS OPEN* (1987).

199. Pope, *Labor-Community Boycotts*, *supra* note 8, at 891-94. In September 1982, General Motors announced that its assembly plant in Van Nuys, California, faced a possible shutdown. The UAW union adopted a community coalition campaign for keeping the plant open. *Id.* at 891. The campaign emphasized the consequences of the plant shutdown for Chicanos, African-Americans, and women. *Id.* at 892. Its leaders enlisted community and religious leaders to picket and leaflet in support of keeping the plant open. *Id.* at 892-93. Officials at GM were persuaded to keep the Van Nuys plant open. *Id.* at 893-94. Professor Pope argues that the "Campaign to Keep GM Van Nuys Open is but one example of a rapidly rising form of social movement organization." *Id.* at 894 (capitalization original).

200. *Id.* at 925.

201. *Id.* He argues that the participation of the community in the Van Nuys campaign would make it difficult for a court to "dismiss [boycotters'] concern for themselves as members of historically disadvantaged minority groups as less immediate than their concern for themselves as workers." *Id.*

the community"²⁰² He argues that the "political-economic distinction" must be maintained otherwise "groups could justify the pursuit of their narrow economic interest by making the unprovable claim that they were motivated by altruism."²⁰³ Finally, Professor Pope points to the fact that campaign workers in Van Nuys "pursued a single demand that had both a political and an economic dimension."²⁰⁴ In contrast, Professor Pope claims that "the *SCTLA* lawyers sought only higher pay; they did not directly demand that criminal defendants be given assistance by competent counsel."²⁰⁵

Professor Pope has also defended his interpretation of *SCTLA* under a novel constitutional theory that accepts the economics/politics distinction as necessary to establish a more ideal conception of first amendment expression for labor and non-labor groups.²⁰⁶ According to Professor Pope, the price-fixing objective of the boycott serves to distinguish the decision from labor-community boycotts seeking political and economic objectives. He argues that labor-community boycotts should be granted first amendment protection because they represent what he calls *republican moments* that "transcended the day-to-day conduct of business as usual."²⁰⁷ The most important feature of Professor Pope's theory of republican moments is the idea that boycotts and popular protests should be constitutionally protected expression only when they exhibit the "virtues of popular republicanism: namely, the pursuit of interests broader than immediate pecuniary gain, and an appeal to fundamental ideals."²⁰⁸

Professor Pope's theory of republican moments thus seeks to explain why decisions like *Claiborne Hardware* and *SCTLA* could be seen as promoting democratic and constitutional virtues. *SCTLA* lost its constitutional shield of protection as a republican moment because the lawyers' "immediate objective was to in-

202. Pope, *Labor-Community Boycotts*, *supra* note 8, at 925-26.

203. *Id.* at 925.

204. *Id.* at 926.

205. *Id.* at 926-27.

206. See Pope, *Republican Moments*, *supra* note 16. *Republican Moments* seeks to develop a theoretical argument for justifying popular protest under a theory of civic republicanism that avoids the large size problem of modern representative democracies. *Id.* at 294. For purposes of this article, I will focus only on those aspects of Professor Pope's theory relevant to *SCTLA*.

207. *Id.* at 349.

208. *Id.* at 351.

crease the price they would be paid for their services.'"²⁰⁹ The theory of republican moments therefore accepts the economics/politics distinction of *SCTLA* as an inevitable analytical distinction for evaluating politically expressive conduct. Professor Pope's goal is to demonstrate that the economics/politics distinction is justified by the conception of republican politics which emphasizes the importance of popular participation and protest.²¹⁰

Professor Pope thus offers legal distinctions and a republican theory for manipulating the *SCTLA* decision to the legal advantage of labor-community activists. There are, however, problems with Professor Pope's legal strategy. First, it is apparent that Professor Pope's arguments for distinguishing the Trial Lawyers' boycott from labor-community coalition boycotts are based on questionable interpretations of *SCTLA*. It is not apparent that his reading of *SCTLA* will be accepted by the courts. Professor Pope argues that *SCTLA* can be distinguished because the Trial Lawyers' boycott had a tenuous relation to non-economic or political objectives—the lawyers' clients' sixth amendment claim was not "immediate," was too "causal," or was improperly subordinated to "a single [wage] demand." Professor Pope's characterizations of the Trial Lawyers' boycott are questionable.²¹¹

In *SCTLA*, the Trial Lawyers sought to advance their own first amendment right to petition government as well as their clients' sixth amendment right to effective legal representation. The assertion that the *SCTLA* lawyers only had a "causal claim" to a

209. *Id.* at 349 (quoting *SCTLA*, 110 S. Ct. 768, 777 (1990)).

210. See Pope, *Republican Moments*, *supra* note 16, at 349-52.

211. For example, why were the political objectives asserted by the *SCTLA* lawyers less "immediate" than those of the Van Nuys workers? As the Administrative Law Judge found in *SCTLA*, authoritative studies undertaken by the Judicial Conference of the D.C. Circuit and the D.C. Bar, indicated that the "existing low rates [of the Trial Lawyers] impacted on all facets of the indigency problem." *SCTLA*, 107 F.T.C. 510, 530 (1986). Certainly reasonable persons could conclude that the *SCTLA* lawyers were "seeking an objective that would, in an immediate sense, serve both [lawyer] and [client] purposes." Pope, *Labor-Community Boycotts*, *supra* note 8, at 924. Second, why distinguish Van Nuys on the ground that community leaders actually participated in that boycott? In *SCTLA*, community leaders did voice their support for the Trial Lawyers' boycott. While it is true that they did not participate in picketing and boycotting, they probably failed to participate because they were concerned that their actual participation in the boycott might have negative political results. Moreover, in *SCTLA* only the Trial Lawyers were in the position to boycott. They were the ones that were "immediately" affected by low attorney fees. Their clients, some of whom were incarcerated, could not boycott. Citizens and other lawyers were encouraged to participate. Moreover, the Trial Lawyers were pursuing a "single demand" that had both a political and an economic dimension.

non-economic or political objective misconstrues their boycott. The Trial Lawyers' boycott may have been the only effective means for promoting the sixth amendment interests of indigent clients. The lawyers' refusal to accept court criminal assignments was itself a form of "expression." Professor Pope denies that this was a sufficient reason for protecting the Trial Lawyers' boycott because the SCTLAs did not demand that criminal defendants be given assistance by competent counsel.²¹² The problem was that SCLTA lawyers were the only lawyers willing to represent criminal defendants because both uptown and downtown lawyers were unwilling to provide their services for substandard hourly fees.

Moreover, the Trial Lawyers argued that they could provide competent representation with higher fees. As studies showed, the Trial Lawyers could afford to remain private practice CJA lawyers and thus improve their skills with time.²¹³ They also claimed that higher fees would enable them to afford support services that other private law offices could afford.²¹⁴ Professor Pope's reading of SCLTA ignores the Trial Lawyers' perception that their boycott was something more than just an effort to increase hourly fees.²¹⁵ In the midst of a market-driven legal culture, the Trial Lawyers exhibited a sense of social concern and political engagement. To ignore their perspective is to denigrate their attempt to exercise solidarity with other workers who have advanced their interests through similar forms of political engagement.

One could also question Professor Pope's characterization of the Van Nuys campaign as premised, "in an immediate sense," on political objectives.²¹⁶ It is undisputed, for example, that the goal of the Van Nuys campaign was to force General Motors to make an "immediate" economic decision to keep its plant open. Moreover, as Professor Pope acknowledges, "[t]he purpose of the political-

212. Pope, *Labor-Community Boycotts*, *supra* note 8, at 926.

213. SCLTA, 107 F.T.C. at 533.

214. *Id.*

215. The ALJ concluded that:

The immediate goal of the boycott was to increase the compensation paid to CJA lawyers. The CJA lawyers also believed that their rate of compensation was directly related to the quality of representation provided to indigents since it almost compelled them to carry an excessive caseload and allowed for none of the essential support services identified with a professional practice.

SCLTA, 107 F.T.C. 510, 542-43 (1986) (footnotes omitted).

216. Pope, *Labor-Community Boycotts*, *supra* note 8, at 925.

economic distinction is to identify and protect activity that is integral to the democratic process."²¹⁷ It is more likely that judges will find activities aimed at influencing private market behavior to always be less political and more economic, in an "immediate sense," even though popular protests seeking to counter private power have "an obviously democratizing effect." For example, in *SCTLA*, the Court rejected the argument that *Claiborne Hardware* applied because the boycott involved matters of public concern. Justice Stevens emphasized that "[n]o matter how altruistic the motives of [the Trial Lawyers] may have been, it is undisputed that their immediate objective was to increase the price that they would be paid for their services."²¹⁸ The Court's rejection of the lawyers' arguments that citizen concern for their cause rendered their boycott "political," seemingly refutes Professor Pope's argument that the Van Nuys campaign was distinguishable from the *SCTLA* boycott.

As Professor Pope admits, the case for distinguishing *SCTLA* from labor-community coalitions and boycotts, including the Van Nuys campaign against General Motors, is difficult in several respects.²¹⁹ Attempts to distinguish boycotts in this area of the law will always be difficult because the public/private distinction is so easily subject to manipulation. For lawyers and judges, the economics/politics dichotomy only generates uncertainty and confusion.

Nor is the confusion spawned by the economics/politics distinction likely to be clarified by Professor Pope's theory of republican moments. Only a theory that *both* explains and supports the necessity of distinguishing between labor and political speech as a condition precedent for affirming the ideals of democratic and constitutional freedoms will create consistency in this area of the law. Professor Pope's theory of republican moments, however, fails to do so. Boycotts for higher wages are "[a]t least one important form of boycott [that] would, however, be excluded" by his theory.²²⁰ As he notes, strikes for higher wages played a significant role in the "republican moment of the 1930s."²²¹ Labor's most important re-

217. *Id.* at 928.

218. *SCTLA*, 110 S. Ct. 768, 777 (1990).

219. Pope, *Labor-Community Boycotts*, *supra* note 8, at 924. "Most LCBs fall between the extremes when determining the appropriate degree of protection will involve difficult value judgments." *Id.*

220. Pope, *Republican Moments*, *supra* note 16, at 356 n.335.

221. *Id.*

publican moments would thus be excluded from constitutional protection under his theory even though Professor Pope acknowledges that "[w]age demands often reflect concerns of justice and self-respect rather than a simple desire for 'more.'"²²²

If unions and workers are to enjoy the civic republican values advocated by Professor Pope, they must have the freedom to participate and effect corporate decisions that affect their "immediate" economic interests. Labor must be afforded greater political freedom in order to gain greater access to the powers which determine labor's wages and working conditions.²²³ Labor, and its organizations, must be allowed to engage in political action strategies for economic purposes in order to counter the constituencies of corporate interests now dominating legislatures.²²⁴ Labor's lobbying interest, however, is no longer capable of competing on an equal plane with the enormous lobbying power wielded by corporate interest groups. For labor groups, political boycotts may be the only effective vehicle to express their social and political views, and influence governmental and corporate policy.

Labor organizations need civic republican theories that will expand the scope of collective bargaining and allow unions to mobilize a new constituency. Collective bargaining advocates need theories that challenge the conventional wisdom of the economics/politics distinction which had traditionally kept labor within its limited place in society. New theories are necessary to challenge the dogma of cases like *SCTLA* and legal interpretations of *Clai-borne Hardware* which ignore the inextricable nexus between political and economic activity, and the quasi-public and quasi-private nature of labor organizations and corporations. A theory of republican moments that fosters workplace and political democracy and advances economic and political freedoms is essential to the labor movement.²²⁵

222. *Id.*

223. See Stone, Book Review, *supra* note 2, at 488. See also Stone, *Labor and the Corporate Structure*, *supra* note 6.

224. There is now a growing consensus that American business corporations wield enormous and unhealthy influence over the legislative process of government. See, e.g., T. ED-SALL, *THE NEW POLITICS OF INEQUALITY* (1984); B. JACKSON, *HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS* (1988); C. LINDBLOM, *POLITICS AND MARKETS* (1977); D. VOGEL, *FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA* (1989). See also D. SCHLOZMAN & J. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986).

225. Republican theories of economic boycotts, premised upon liberal conceptions of rights and the public/private distinction of American law, will probably fail to engender a

Republican liberalism, as distinguished from the republican perspective advanced by Justice Brennan's partial dissent in *SCTLA*, only promises a participatory democratic constitutional order. There is, however, a danger that the appeal of republican liberalism will mask a culturally conservative definition of rights and values, "disproportionately shaped by the outlooks, interests, and aims of the business community, especially corporate America."²²⁶ Currently, the defensive work of labor lawyers must focus on the preservation of the former victories of the labor movement threatened by the current conservative offensive.²²⁷

C. What's at Stake

Assume that Professor Pope's arguments for distinguishing *SCTLA* prove successful. If the public/private distinction of *Clairborne Hardware* and *SCTLA* is accepted as the analytical standard for establishing the legal terrain for boycotts by labor-community coalitions, will such a development work to the advantage of organized labor? Given labor's past experience with the public/private distinction in labor law, it is far from clear whether trade union organizations, as distinguished from labor-community activists, would benefit from such a development. The economics/politics distinction has denied labor unions first amendment protection to engage in political boycotts and to strike and picket. A similar fate may follow if the courts adopt the *SCTLA* economics/politics dis-

truly participatory and democratic process at the workplace. As Professor Paul Brest has argued in commenting on the republican revival in constitutional law scholarship: "The condition of the labor movement and the Court's rejection of the view that corporations are quasi-public entities bound by the Constitution, make the question of participation in the workplace [raised by liberal republican scholars] seem fanciful at this time." Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 *YALE L.J.* 1623, 1631 (1988). What is needed are more radical and more transformative alternatives to the theories of republicanism now being advanced by liberal legal scholars. See C. West, *Progressive Politics*, *supra* note 6, at 1798 (arguing that cultural conservatism in American legal thought "leaves untouched the fundamental cause of social misery—the maldistribution of resources, wealth, and power in American Society" and promotes anti-labor outcomes in legal decisions); R. West, *Foreword: Taking Freedom Seriously*, 104 *HARV. L. REV.* 43 (1990) (arguing that the Supreme Court is shifting to a progressively anti-liberal position).

Hence, while I agree with Professor Pope's desire to extend greater constitutional protection to protest movements that fall within the theory of republican moments, I am concerned that his theory of republican moments will fail to protect the republican moments of labor groups. Indeed, I fear that a theory of civic republicanism committed to the public/private distinction of American law will preserve the cultural conservatism of an anti-liberal and anti-labor Court.

226. C. West, *Progressive Politics*, *supra* note 6, at 1797.

227. *Cf. Id.* at 1799.

inction to analyze labor's right to engage in new political strategies such as labor-community boycotts. The distinction may work to limit the ability of organized labor to engage in new political strategies to advance workers' economic self-interests.

Because labor-community coalitions and boycotts are local events aimed at transitory objectives, organized labor must utilize the transitory nature of these boycotts as a vehicle for establishing long-term collective bargaining relations. To be successful, labor unions must tie the goal of the consumer campaign to the ultimate goal of winning broad support for collective bargaining. Trade union organizers must therefore transcend the economics/politics distinction by persuading others that their interests in a social issue, e.g., minority discrimination, is related to the traditional concerns of all workers in seeking equal pay and fair working conditions. In Van Nuys, for example, the union demonstrated how the plant closing would have devastating effects in the African-American and Chicano community in the San Fernando Valley, reversing the affirmative action gains of the 1960s and 1970s.²²⁸ The Van Nuys campaign was successful precisely because the union was able to link the community interest in racial equality to the union's ultimate goal of collective bargaining over wages, hours, and conditions of employment.

If a union fails to establish the relevance of collective bargaining and traditional wage demands to the broader social issues involved in a consumer/corporate campaign, then the union's ultimate goal of establishing a collective bargaining relationship is likely to be frustrated. For example, one should compare the Van Nuys campaign to the corporate campaign waged by the meatpackers at Hormel in 1985-86.²²⁹ That campaign involved striking workers at Hormel's Austin, Minnesota, plant.²³⁰ Workers at that plant,

228. E. MANN, *TAKING ON GENERAL MOTORS: A CASE STUDY OF THE UAW CAMPAIGN TO KEEP VAN NUYS OPEN* 139 (1987).

229. See *Spam Birthday: Will Celebration Leave a Bad Taste?*, Chicago Tribune, July 2, 1987, zone C, at 5; *NLRB Seeks Injunction against New Packers' Union in Minnesota*, [Current Developments] Daily Lab. Rep. (BNA) No. 19, at A-2 (Jan. 30, 1987); *NLRB Issues Second Complaint Against Union Seeking to Represent Hormel Workers in Austin*, [Current Developments] Daily Lab. Rep. (BNA) No. 245, at A-3 (Dec. 22, 1986); *UFCW Negotiates Multi-plant Accord With Hormel; Settlement Could End Bitter Strike in Minnesota*, [Current Developments Daily Lab. Rep. (BNA) No. 168, at A-7 (August 29, 1986); *Despite Settlement, It's Still Not Over; Hormel Strike May Divide Town For Years To Come*, Los Angeles Times, Sept. 1, 1986, at 18, col.1.

230. See *NLRB Seeks Injunction against New Packers' Union in Minnesota*, *supra* note 229.

seeking higher wages, and unhappy with the efforts of the parent union, enlisted the support of Ray Rogers, who had organized the successful corporate campaign against J.P. Stevens.²³¹ Mr. Rogers mobilized a corporate campaign which pitted the local union, P-9, against its parent, the United Food and Commercial Workers Union.²³² The community coalition in that case eroded union solidarity, pitted union member against union member, and ultimately failed. The result was a weakening of the power of organized labor in the industry.²³³ The Hormel campaign illustrates what can happen when a corporate campaign fails to tie its ultimate goal to the interests of union solidarity and collective bargaining.

If first amendment law encourages labor-community activists to focus their campaigns exclusively on social and political goals rather than collective bargaining objectives, then union organizations will be unable to play an effective role in corporate campaigns and consumer boycotts. As the Hormel corporate campaign illustrates, consumer boycotts lacking the appeal of union solidarity may alienate the position of organized labor in the industry and community.²³⁴ For organized labor, labor-community alliances are effective only if they serve to achieve ultimate trade union objectives, including the demand for higher wages. But the *SCTLA* Court found that it was the Trial Lawyers' economic objectives which justified removing the first amendment protection over their boycott, which in turn led to the application of antitrust laws.

It is conceivable that *SCTLA* may thus set the stage for a new era of antitrust regulation of labor political action strategies involving political boycotts and non-labor coalitions. Under prevailing labor-antitrust principles, labor unions enjoy an absolute statutory exemption from federal antitrust prosecutions only as long as they do not combine with non-labor groups to restrain market

231. See *For Union Ally, It's All in the Name*, N.Y. Times, May 2, 1984, at A24, col. 4. Rogers argues that corporate campaigns will replace labor's traditional strike weapon in the future. *Id.*

232. See *Spam Birthday: Will Celebration Leave a Bad Taste?*, *supra* note 229.

233. See *supra* note 229.

234. Dissident labor members may attempt to utilize a worker-community coalition aimed at a single issue to exacerbate union relations with its own members by pitting union officials and union policy against the community. Even when community organizers seek to support the union's efforts, labor-community boycotts, focused as they are on winning a particular dispute, may fail to establish a lasting foundation for the development of a strong union movement.

competition.²³⁵ In labor-community coalitions and boycotts, however, labor organizations combine with non-labor groups in an attempt to achieve economic objectives. In such cases, labor's right to claim immunity from the antitrust laws will depend on whether labor's "non-statutory exemption" from the antitrust laws applies.²³⁶

In *Connell Construction Co. v. Plumbers & Steamfitters Local 100*,²³⁷ the Supreme Court held that labor's non-statutory exemption would not protect agreements and combinations that impose a direct restraint on market competition in ways that do not "follow naturally from elimination of competition over wages and working conditions."²³⁸ The Court thus distinguished union activity that eliminates competition over wages and working conditions from activity that restricts competition in the sale of goods and services.²³⁹ The Court found that restrictions on wage competition were protected by the non-statutory exemption, but refused to exempt union efforts to restrict competition in the business market.²⁴⁰ The non-statutory exemption thus offers no protection when a union and a non-labor group agree to restrain competition in the business market.

Applying the labor-antitrust principles of *Connell Construc-*

235. The foundation for labor's statutory exemption was established by Justice Frankfurter's famous dictum in *United States v. Hutcheson*. There he stated that a union will not violate the antitrust laws as long as it "acts in its self-interest and does not combine with non-labor groups." *United States v. Hutcheson*, 312 U.S. 219, 232 (1941). Hence, in *Allen Bradley Co. v. Local 3, IBEW*, the Court held that a union lost its statutory exemption by aiding a manufacturer group in its effort to create a business monopoly. *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797, 806-11 (1945). The legislative sources for this exemption are the Clayton Act of 1914, § 20, 29 U.S.C. § 52 (1988) and the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (1988), which removed jurisdiction from the federal courts to enjoin almost every labor dispute.

236. Labor's non-statutory exemption can be traced to Justice Stone's opinion in *Apex Hosiery Co. v. Leader*. In *Apex*, Justice Stone, construing federal antitrust policy, held that labor union activities seeking to restrain competition in labor markets, as distinguished from the product market, will be exempt from antitrust prosecution. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 501-04 (1940). *Apex's* "labor market"/"product market" distinction has since served to structure the developing principles of the labor-antitrust conflicts since most antitrust issues are raised in the collective bargaining context where the union is acting in combination with a non-labor party (an employer). See generally Leslie, *Principles of Labor Antitrust*, 66 Va. L. Rev. 1183 (1980).-

237. *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975).

238. *Id.* at 635.

239. *Id.* at 622-23.

240. *Id.*

tion to labor-community boycotts might, in light of the economics/politics distinction of *SCTLA*, enable future courts to conclude that the antitrust laws can be used to proscribe labor-community boycotts whenever the "primary" objective of the boycott is found to be aimed at restricting the target's competitive freedom in the business market. *SCTLA*'s motivation test would allow federal judges to evaluate the objective of such boycotts; first amendment protection would be lost whenever the courts find that the objective of the action is primarily commercial. Under *Connell Construction*, the courts might then reason that the union loses its protection under the limited non-statutory antitrust exemption because the goal of the boycott is to achieve a direct product market restraint and because labor has combined with a non-labor group. The economics/politics distinction of *SCTLA* may therefore create an antitrust trap for unwary labor unions who combine with non-labor groups to engage in consumer campaigns seeking to affect the commercial behavior of corporate targets.²⁴¹

Ironically, *SCTLA* may serve to resurrect the labor injunction

241. Hence, while Professor Pope argues that labor-community boycotts should "enjoy smooth sailing (or at least as smooth as traditional union activities) under . . . the antitrust laws," labor unions may discover the "smooth sailing" will lead them to a legal storm. Pope, *Labor-Community Boycotts*, *supra* note 8, at 968. Labor unions may discover that the economics/politics distinction works to both deny them first amendment protection for their activities as well as deprive them of their immunity under the non-statutory antitrust exemption. Again, this might occur if a court should find that a labor-community boycott involving a labor union was premised upon the primary objective of affecting product market competition. The dynamics of the economics/politics distinction renders such an outcome likely. To gain protection under *SCTLA*, a labor union would seek to show that its involvement in the boycott was unrelated to its interest in employment conditions; otherwise it would lose first amendment protection for its activity. If, however, the union succeeds in establishing that it is pursuing non-labor objectives, then the union may lose antitrust immunity under the non-statutory antitrust exemption. *SCTLA* thus sets a potential trap for the unwary union. If the organization establishes an alliance with a non-labor group to pursue both labor and non-labor objectives, there is a danger that a court will find that the boycott was in reality an attempt to achieve a primary commercial objective, and that the union's participation was in aid of anti-competitive conspiracy involving a non-labor group subject to antitrust proscription. First amendment protection would in turn be lost if the court finds that the boycott was based primarily on a market or economic objective. In the few cases that have considered the issue prior to *SCTLA*, the courts have refused to deny labor unions immunity under the labor exemption on the ground that the unions were seeking employment objectives. See *Bodine Produce, Inc. v. United Farm Workers Organizing Committee*, 494 F.2d 541 (9th Cir. 1974); *USS-Posco Industries v. Contra Costa Bldg. & Constr. Trade Council*, 134 L.R.R.M. (BNA) 3100 (N.D. Cal. 1984). See also Pope, *Labor-Community Boycotts*, *supra* note 8, at 970-71. What remains to be seen is whether the economics/politics distinction of *SCTLA* will justify contrary legal conclusions in motivating unions to participate in a labor-community boycott for the "primary" purpose of seeking their goals through product market pressure and restraint.

that, at the turn of the century, was issued under the antitrust laws to prosecute labor unions engaged in boycotts and strikes for collective bargaining objectives. Indeed, the economics/politics distinction of *SCTLA* is reminiscent, not of civic republicanism, but rather of the early common law images of market commodification. *SCTLA* resembles early twentieth century actions brought under the Sherman Act to bankrupt the early organizational drives of the trade union movement.²⁴² In the most famous of these cases, *Loewe v. Lawlor*—commonly known as the *Danbury Hatters* case—Chief Justice Fuller concluded that a secondary boycott by the United Hatters of America in their campaign to organize the hat manufacturing industry was an illegal restraint of trade under federal antitrust law.²⁴³ Chief Justice Fuller reasoned, much as Justice Stevens in *SCTLA*, that the boycott was no different from an obstruction caused by business restraints.²⁴⁴ In treating labor as an article of commerce, the Supreme Court decided that employers had a right to federal protection from the unwanted interferences of unions. In the *Danbury Hatters* case, labor was thus commodified under a theory of trade restraint. The interests of employees were subordinated to the entrepreneurial interests of the employer with tragic human consequences. The *Danbury Hatters* case became the focus of labor protest that human labor should not be treated as merely another commodity in the market economy.²⁴⁵

While the *Danbury Hatters* case has now been overruled by statute and decision,²⁴⁶ the values of that decision have not disappeared. As Justice Stevens' decision in *SCTLA* illustrates, judges continue to rely upon marketplace metaphors to evaluate legiti-

242. See Ernst, *The Labor Exemption, 1908-1914*, 74 IOWA L. REV. 1151 (1989); Minda, *Labor and Antitrust*, *supra* note 6, at 515-18.

243. *Loewe v. Lawlor*, 208 U.S. 274 (1908).

244. *Id.* at 294. Chief Justice Fuller concluded that "[t]he combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes . . ." *Id.* This principle was based on the following rule: "at common law every person has individually, and the public also has collectively, a right to require that the course of trade should be kept free from unreasonable obstruction." *Id.* at 295-96.

245. Hence, Professor Pope has persuasively argued that treating human labor as a commodity was the root cause for limiting constitutional images and values in labor law since the *Lochner* era. See Pope, *Labor and the Constitution*, *supra* note 18, at 1076-78.

246. Congress amended the Sherman Act with the Clayton Antitrust Act, ch. 323, 38 Stat. 730 (1914) (codified as amended in scattered sections of 15 U.S.C. and 29 U.S.C.). Section 17 provides that "[t]he labor of a human being is not a commodity or article of commerce." 15 U.S.C. § 17 (1988). See also Minda, *Labor and Antitrust*, *supra* note 6, at 529 n.337.

mate objectives of workers, and they continue to commodify constitutional values and liberties using market rhetoric. While constitutional freedoms are generally thought to be "unalienable," judges commodify constitutional freedoms and treat them as if they were merely instrumental means to commercial ends.²⁴⁷ Perhaps this attitude is the reason the Court in *SCTLA* failed to see that the Trial Lawyers' boycott involved constitutional liberties worthy of the law's protection.

In *SCTLA*, the metaphoric image of a boycott as a business restraint enabled Justice Stevens to treat the boycott as if it were merely a concerted activity of a business cartel. As a result of commodification²⁴⁸ of their interests, the Trial Lawyers' constitutional freedoms were seen to have the lesser constitutional status attributed to market activity.²⁴⁹ Strict constitutional scrutiny normally

247. See Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1859 (1987).

The term "commodification" can be construed narrowly or broadly. Narrowly construed, commodification describes actual buying and selling (or legally permitted buying and selling) of something. Broadly construed, commodification includes not only actual buying and selling, but also market rhetoric, the practice of thinking about interactions as if they were sale transactions, and market methodology, the use of monetary cost-benefit analysis to judge these interactions.

Id. (footnote omitted). See generally C. BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989).

248. The general nature of this process has been explained by Professor Radin. See Radin, *Market-Inalienability*, *supra* note 247. Professor Radin shows how the courts have conceived all rights as property rights (at least theoretically) and thus have treated them as "alienable" objects in a market economy. *Id.* at 1852-55. This way of thinking implies that all inalienabilities are problematic. Professor Radin calls this theory "commodification." *Id.* at 1855-59. She argues that commodification in legal thinking has established a bankrupt form of moral reasoning because it allows judges to commodify human values and fundamental freedoms and treat them as mere instrumental means in the market process. See generally *id.*

249. Economic 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, e.g., Schauer, *The Aim and the Target in Free Speech Methodology*, 83 NW. U.L. REV. 562, 563 (1989). See also Minda, *Interest Groups*, *supra* note 20, at 994 n.333. The fact that conduct may be described as "speech" does not mean that the expression is protected for first amendment purposes. Moreover, profit-oriented forms of commercial expression have not warranted the same constitutional protection granted other forms of expression, and for good reason. *Id.* Profit-oriented forms of commercial expression fail to implicate human values and interests essential to the liberty interests one normally identifies with first amendment freedoms. See C. BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH, *supra* note 247, at 223. "[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.* See also Minda, *Interest Groups*, *supra* note 20, at 994 n.333; Radin, *The Liberal Conception of Property: Cross Currents in*

given to content-based expression, and the sensitive analysis required by *O'Brien* for expressive conduct, became irrelevant because the boycott was seen to involve a less protected form of commercial activity. The Trial Lawyers' constitutional liberties were thus commodified by a metaphoric image structured by the market images of business restraints. The Court's decision in *SCTLA* denigrates the memory of the progressive role that concerted economic activity by workers has played in American politics. In recasting the image of the Trial Lawyer's boycott in the image of a cartel seeking to maximize the price of commodities, Justice Stevens was able to stigmatize the lawyers' boycott with anti-labor images of the common law.

Ultimately at stake in cases like *SCTLA* is the political vision of the American labor movement. By uncritically applying an anti-trust analysis to a case involving a group of workers who were withholding their services for higher wages, Justice Stevens, and to a lesser extent Justice Brennan, adopts an understanding of collective action which advances interests of antitrust law at the expense of the policy of federal collective bargaining law. If we adopt a public/private distinction for structuring first amendment interests, labor's collective liberties will surely suffer.

In labor law, as in antitrust law, the partial and incomplete lens of the public/private distinction has produced a body of collective bargaining law that is becoming increasingly hostile to labor organizations, and a law of antitrust that is becoming increasingly favorable to business combinations.²⁵⁰ While the rules and regulations governing labor and business have changed, the overall power relationship has never changed.²⁵¹ In labor and antitrust, the courts continue to favor marketplace interests of production, efficiency, and profit maximization over competing interests such as fairness, equality, and solidarity, in evaluating the legality of collective expressive activities of non-business groups. The challenge for progressive lawyers is to find ways to buffer the conservative influence of these cultural and legal forces.²⁵²

the Jurisprudence of Takings, 88 COLUM. L. REV. 1667, 1689 (1988); Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

250. See Minda, *Labor and Antitrust*, *supra* note 6, at 465.

251. *Id.*

252. See C. West, *Progressive Politics*, *supra* note 6.

V. CONCLUSION

SCTLA is an important decision for the labor law movement not only for the implications of its legal doctrine, but also for its demonstration of how the Supreme Court now interprets the values and experience of labor politics. At stake is whether the value and meaning of a particular cultural practice should be expressed solely through the eyes of federal judges, or whether the perspective of workers, unions, and citizens should play a constructive role in determining the legal meaning attributed to the function played by expressive labor boycotts.²⁵³

The significance of *SCTLA* to the American labor movement must be examined in terms of the way legal decisions shape power in society through the symbolic analysis of legal rhetoric. Consider the *SCTLA* decision in light of *Brown v. Board of Education*.²⁵⁴ Nearly every American knew Chief Justice Warren's decision in *Brown* would not mean that racism and racial discrimination would end. Indeed, the *Brown* decision, as a vehicle for implementing social change, was largely a failure. But the failure of *Brown*, in this respect, is not surprising. As Derrick Bell has observed, "[j]ubilant predictions of victory in the struggle against racism based on a favorable court decision . . . have always proved premature."²⁵⁵

It would be a huge mistake, however, to disregard the significance *Brown* played in the civil rights movement. When viewed as symbol, *Brown* was enormously effective as an organizational tool of one of the most successful mass social movements in American history. Supreme Court decisions such as *SCTLA* can have just the opposite effect for the American labor movement. As symbol, *SCTLA* devalues the inspirational efforts of individuals organizing to transform social practices and relations. *SCTLA*, as symbol, reinforces the message now advanced by federal labor law that working people who seek to band together for economic advancement merely pursue their economic self-interests. *SCTLA*, as symbol, serves to legitimate and entrench cultural attitudes which view

253. See Minow, *The Supreme Court 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) (arguing that judges must develop new contextual forms of interpretation so that they can take into account the different perspectives of marginal groups in society).

254. *Brown v. Board of Educ.*, 347 U.S. 483 (1954), modified, 349 U.S. 294 (1955).

255. Bell, *Foreword to An Issue on Race Relations*, 61 OR. L. REV. 151 (1982).

human values and interests from the perspective of money and commodities. The historic experience of American workers whose collective action established the institution of collective bargaining is thus devalued.

Hence, while I support the effort of labor lawyers to interject the ideals of civic republican thought in American labor law, I am less certain that their imaginative legal theories will help accomplish the broader reformist goal of mobilizing a new labor movement. Instead, labor lawyers should adopt a different strategy—one aimed at rediscovering civic republican ideals while exposing the ideological assumptions of decisions such as *SCTLA* that generate judicial narratives about acceptable political behavior for labor and non-labor groups. In addition to showing how the *SCTLA* boycott may be factually distinguishable from labor-community boycotts, progressive labor lawyers should also reclaim and rediscover the narratives from labor's past—the progressive labor politics of the American labor movement that has been historically ignored by the artificial legal distinctions that judges have utilized for eviscerating labor's collective liberties.

Reflection and discovery should lead to the development of new legal strategies which reject the inevitability of the economics/politics distinction for distinguishing between labor and political speech. Moving beyond the economics/politics distinction relied upon by Justice Stevens in characterizing the *SCTLA* boycott would not send the Court down a slippery slope. As Justice Brennan's partial dissent in *SCTLA* suggests, judges can create a middle position between the two contradictory policies of the first amendment and antitrust by examining each boycott within its particular economic, social, and political context. Arguments developed pragmatically from analyzing the settings of labor and business boycotts could support the development of first amendment principles which grant expressive labor boycotts more protection than those of business groups.²⁵⁶ Abstract theories based on mar-

256. See, e.g., C. BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 223 (1989) (arguing that "only the enterprise speech rooted in the profit-oriented requirements of the market . . . fails in principle to exhibit individually chosen allegiance to personal values, and, therefore, should be subject to regulation").

A more pragmatic approach is to accept the notion that the Trial Lawyers' boycott in *SCTLA* was aimed at securing more than just economic interests. In addition to advancing the sixth amendment interests of their clients, the Trial Lawyers were also seeking to assert their own collective liberties. When workers seek higher wages they also are seeking to gain control over what happens to them at the workplace; what is at stake are substantive and

ketplace logic could be better understood in terms of the meaning they project for business, as distinguished from labor combinations. In *SCTLA*, deeper contextual analysis of the political setting should have altered the Court's antitrust analysis of the Trial Lawyers' boycott. *SCTLA* viewed *in context* should have led the Court to recognize the importance of protecting the Trial Lawyers' boycott as expressive first amendment conduct.

democratic values that transcend the desire for money. The conditions of work which the lawyers were seeking to change by their demand for higher fees involved substantive human values. Their effort to gain control over their material conditions can be seen to be a manifestation of the human desire for self-determination and human development. The boycott, in turn, could be seen as a collective attempt to seek human self-advancement. Economic boycotts of labor groups should not be subject to the same legal treatment accorded business boycotts that are motivated by purely profit-seeking objectives. This is, I believe, the lesson to be gleaned from the historical experience of labor following the era of the labor injunction at the turn of the century.

