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## The Consumer's Emerging Right To Boycott: *NAACP v. Claiborne Hardware* and Its Implications for American Labor Law

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Hard cases do not always make bad law. Sometimes, when confronted with records that will yield neither to the direct application of established legal principles nor to factual manipulation, courts articulate, or at least suggest, a new principle which should and often does refine a body of old law. The Supreme Court's decision in *NAACP v. Claiborne Hardware Co.*<sup>1</sup> should become a prominent and salutary example of such hard cases. Before *Claiborne Hardware*, the Court had indicated that legislatures, for rational economic policy reasons, could make peaceful consumer boycotts illegal.<sup>2</sup> Confronted with compelling facts in the *Claiborne Hardware* case, however, the Court asserted a new consumer right to engage in concerted refusals to patronize even if such refusals are economically disruptive.<sup>3</sup> This assertion, while necessary to the Court's decision, did not rest squarely on any First Amendment or other precedent. This Article will

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1. 102 S. Ct. 3409 (1982).

2. See *NLRB v. Retail Store Employees Union Local 1001*, 447 U.S. 607 (1980); *Hughes v. Superior Court*, 339 U.S. 460 (1950). The Supreme Court's *Claiborne Hardware* decision was presaged by several Fifth Circuit decisions. See *Henry v. First Nat'l Bank*, 595 F.2d 291, 302-04 (5th Cir. 1979) (extending First Amendment protection to picketing urging participation in civil rights boycotts), *cert. denied*, 444 U.S. 1074 (1980); *Machesky v. Bizzell*, 414 F.2d 283 (5th Cir. 1969) (same); *Kelley v. Page*, 335 F.2d 114, 119 (5th Cir. 1964) (same).

3. *Claiborne Hardware*, 102 S. Ct. at 3426-27.

argue that a consumer right to boycott is nonetheless appropriate for our society, a right in accord with our social and constitutional values. Further, the Article will argue that this right should be cast as a broad political right to influence social decisionmaking. Finally, the Article will explore the implications of the right for certain important labor law doctrines.<sup>4</sup>

## I. A CONTROVERTIBLE CONSTITUTIONAL RIGHT TO BOYCOTT

### A. *The Hard Case of Claiborne Hardware*

Delivered on the last day of the Court's 1981 Term, *Claiborne Hardware* involved a consumer boycott of the white merchants of Claiborne County, Mississippi, intended to compel them to support demands for racial justice presented to county officials. The Mississippi Supreme Court had held the entire boycott tortious and enjoined since some of the boycotters had purportedly used "force, violence, and threats" against other consumers.<sup>5</sup> The United States Supreme Court unanimously reversed the Mississippi Supreme Court, stressing that the record showed only "isolated acts of violence."<sup>6</sup> Justice Stevens' opinion concluded that liability could be imposed only on those boycotters who actually engaged in violence or in threatening violence, that any monetary liability must be limited to the direct consequences of such violence or threats, and that only the continuation of violence and threats could be enjoined.<sup>7</sup>

The Claiborne boycotters presented an appealing case. The boycotters were attacking historical injustices by demanding that county government officials desegregate public schools and other public facilities, make public improvements in black residential areas comparable to those in white areas, select blacks for public institutions such as the police force and jury panels, and generally ensure that officials grant black citizens equal respect and dignity.<sup>8</sup> Moreover, the Mississippi Supreme Court had upheld an obviously onerous judgment of \$1.2 million against dozens of individ-

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4. Cf. H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 1-6 (1966) (discussing how hard cases involving race relations have had salubrious effect on our law).

5. *NAACP v. Claiborne Hardware Co.*, 393 So. 2d 1290, 1301 (Miss. 1980). A Chancery Court had found that the boycotters not only committed the Mississippi common law tort of malicious interference with business, but also violated Mississippi's statutory prohibitions on secondary boycotts and restraining competition. *Claiborne Hardware*, 102 S. Ct. at 3414-15. The Mississippi Supreme Court, however, found both of these statutes inapplicable and relied primarily on the common law cause of action in tort. 393 So. 2d at 1300-02.

6. *Claiborne Hardware*, 102 S. Ct. at 3432.

7. *Id.* at 3432-37 & n.67. Justice Stevens wrote for seven Justices. Justice Rehnquist concurred in the judgment without opinion. Justice Marshall took no part in the consideration or decision of the case. *Id.* at 3437.

8. *See id.* at 3418-19.

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ual boycotters and against the NAACP, whose Mississippi field secretary had been the boycott's leading organizer.<sup>9</sup>

In addition, as part of their campaign, the boycotters used many forms of expression that the Court had earlier found to constitute constitutionally protected "speech." For instance, leaders urged others to join the boycott through public advocacy and personal solicitations, and they used written and oral statements to publicize the names of non-participants.<sup>10</sup> Protestors peacefully picketed targeted businesses.<sup>11</sup> The Mississippi judiciary not only had imposed liability on individuals for engaging in this expressive conduct, but also had enjoined its continuation.<sup>12</sup>

*Claiborne Hardware*, however, did more than merely apply the Supreme Court's forty-year-old declaration in *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*<sup>13</sup> that "insubstantial findings" of "trivial rough incident[s]" or "moment[s] of animal exuberance" do not invalidate generally peaceful picketing.<sup>14</sup> The First Amendment does not protect peaceful picketing, speeches at public forums, personal solicitations, or newspaper publications when these means are used to coerce, incite, or urge others to take part in a real and ongoing illegal venture.<sup>15</sup> The Mississippi Supreme Court broadened this latter line of cases by declaring illegal not only the violence associated with the boycott but also

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9. *Id.* at 3415-16; *Delegates at the NAACP Convention Celebrate Boycott Decision*, N.Y. Times, July 3, 1982, at A7, col. 2.

10. *Claiborne Hardware*, 102 S. Ct. at 3423-24.

11. *Id.* For cases extending constitutional protection to picketing, see *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dep't v. Mosley*, 408 U.S. 92 (1972); *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769 (1942); *AFL v. Swing*, 312 U.S. 321 (1941); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

12. 393 So. 2d at 1293.

13. 312 U.S. 287 (1941).

14. *Id.* at 293.

15. The leading case now seems to be *Brandenburg v. Ohio*, 395 U.S. 444 (1969), in which the Court struck down an Ohio criminal syndicalism law because it was not limited to expression "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action." *Id.* at 447. In one set of applications of this doctrine, the Court has upheld various restrictions on otherwise protected expression used to advance an unlawful scheme. See, e.g., *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679 (1978) (permitting restrictions on otherwise protected expression when used to advance monopolists' restraint on trade); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (same); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914) (same); see also *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982) ("[I]t is speech proposing an illegal transaction, which a government may regulate or ban entirely."); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) ("We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes."); *Building Serv. Employees Int'l Union Local 262 v. Gazzam*, 339 U.S. 532 (1950) (permitting restraints on picketing that urged illegal employee boycotts); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (finding no abridgment of freedom of speech or press in making conduct illegal "merely because the conduct was in part initiated, evidenced, or carried out by means of language").

the entire concerted refusal to purchase that the allegedly protected speech urged or incited.<sup>16</sup>

If the United States Supreme Court was to strike down the Mississippi court's broad injunction of the entire boycott and its broad damage remedy for all the boycott's economic consequences, it therefore had to find that Mississippi could not have constitutionally prohibited the Claiborne County boycott had it been completely peaceful.<sup>17</sup> The Court nonetheless took this necessary step. After recognizing that a "nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions" and that "[s]tates have broad power to regulate economic activity," the Court nonetheless denied Mississippi any right to prohibit "peaceful political activity such as that found in the boycott in this case" and asserted that any right of the state "to regulate economic activity could not

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16. 393 So. 2d at 1301. Other state courts have declared unlawful efforts to organize peaceful consumer civil rights boycotts. *E.g.*, *NAACP v. Webb's City, Inc.*, 152 So. 2d 179 (Fla. Dist. Ct. App. 1963) (upholding injunction of boycott intended to attack employment discrimination), *vacated on other grounds*, 376 U.S. 190 (1964); *A.S. Beck Shoe Corp. v. Johnson*, 153 Misc. 363, 274 N.Y.S. 946 (Sup. Ct. 1934) (granting injunction of picketing intended to provoke boycott of store because of employment discrimination).

A Note on the Mississippi Supreme Court decision in *Claiborne Hardware* argues that the First Amendment should protect the publicization of political boycotts, but not the actual concerted refusals to patronize that the publicity encourages. Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 659, 679-91 (1978) [hereinafter cited as Note, *Political Boycott Activity*]. This Note's willingness to permit the state to make the boycott illegal, but not the speech which incites it, seems to stem from its curious assumption that speech which is both intended and likely to generate lawless action loses its First Amendment protection only when its "target will be forced to violate a valid law." *Id.* at 680 (emphasis supplied). However, the Supreme Court's willingness to permit restrictions on speech used to advance illegal courses of action has not been limited to speech that forces, rather than merely urges, someone to break a law. See *supra* note 15 and cases cited therein; see also Note, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131, 1162 (1980) (stressing that expressive activities are not protected when an integral part of illegal boycott) [hereinafter cited as Note, *Protest Boycotts*]. Perhaps the Harvard Note assumes that the state can properly make illegal only formal agreements between consumers to refuse to patronize, not informal individual decisions to join a boycott. See Note, *Political Boycott Activity, supra*, at 683. But the Note offers no reason for the protection of individual decisions to join a boycott, unless it is the expressive content of an individual's refusal. For discussion of the Supreme Court's treatment of state regulation of expressive conduct, see *infra* pp. 413-15.

17. The Mississippi Supreme Court's finding that the boycott as a whole was tortious did seem to depend on the Chancery Court's findings of violence. 393 So. 2d at 1301. But a state with authority to declare illegal a totally peaceful boycott could certainly declare unlawful one that was spotted with isolated acts of violence.

If the Court had accepted Mississippi's power to declare illegal peaceful consumer boycotts that are disruptive of trade, the Court could not have protected individual boycotters by citing their rights to associate in political organizations. A state can punish or restrain association with an organization if the organization possesses "unlawful aims and goals" and the individual has "a specific intent to further those illegal aims." *Healy v. James*, 408 U.S. 169, 186 (1972); see also *Elfbrandt v. Russell*, 384 U.S. 11, 16 (1966) (membership must be accompanied by specific intent to further unlawful aims of organization before a statute can attach any disabilities to such membership); *Scales v. United States*, 367 U.S. 203, 229 (1961) (statute constitutional because it only punishes membership with specific intent to accomplish aims of organization by resort to violence). If Mississippi could have declared the entire Claiborne boycott illegal, these standards would have been met for each individual who participated in and intended to advance the boycott.

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justify a complete prohibition against a non-violent, politically motivated boycott.”<sup>18</sup>

### B. *Difficulties in Deriving the Right*

The *Claiborne Hardware* Court denied states the right to prohibit certain boycotts and thus upheld the right of an individual to agree not to patronize a business. Although this outcome has both a superficial appeal based on the facts of *Claiborne Hardware* and a more profound appeal discussed below, a right to boycott is difficult to place in any of the lines of First Amendment precedent the Court has developed in this century.

#### 1. *The Right To Boycott as a Right To Engage in Expressive Conduct*

Courts cannot derive a right to join with others in a decision to boycott from precedents that protect a broad range of conduct expressing to the world some view held by the actor.<sup>19</sup> It is, of course, true that a refusal to patronize a business expresses an important social view of the boycotter, especially when the boycott inconveniences the boycotter as well as the target. The Claiborne County boycotters, for example, sacrificed some of their normal economic preferences to express their unhappiness with the division of power and public services in the county. In *United States v. O'Brien*,<sup>20</sup> however, the Supreme Court held that a government may regulate or even suppress expressive conduct if the governmental interest is substantial and unrelated to the suppression of free expression, and if the restriction on that protected expression is no greater than is necessary to further the government’s interest in regulation.<sup>21</sup> The *O'Brien* standard

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18. *Claiborne Hardware*, 102 S. Ct. at 3425–26. The Court had no difficulty in finding “state action” under the Fourteenth Amendment in the application of state rules of law by the Mississippi courts, even though this was a suit between private parties. 102 S. Ct. at 3427 n.51 (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964)). *But cf.* *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (no state action where warehouse’s sale of entrusted goods was permitted, but not compelled, by state statutory provision).

19. *See, e.g.*, *Spence v. Washington*, 418 U.S. 405 (1974) (displaying flag upside down with attached peace symbol is form of protected expression); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (wearing black armband in protest of American foreign policy is protected expression).

20. 391 U.S. 367 (1968). *O'Brien* is a leading decision that was cited by Justice Stevens in *Claiborne Hardware*, 102 S. Ct. at 3425.

21. “[A] government regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” 391 U.S. at 377. Other decisions have applied a standard close to that of *O'Brien*. *See, e.g.*, *Spence v. Washington*, 418 U.S. 405, 412–14 & n.8 (1974) (approving *O'Brien*, but finding no governmental interest unrelated to expression involved in case); *Grayned v. City of Rockford*, 408 U.S. 104, 115–20 (1972) (upholding city ordinance restricting noises around school). *O'Brien* was not without precedent. *See, e.g.*, *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (city ordinance can restrict “loud and raucous” sound trucks on public streets); *Schneider v. State*, 308 U.S. 147 (1939) (applying less restrictive alternative test to constraints on distribution of handbills, though

recognizes that unless all other rights are to be drastically subordinated to expression, the state must have authority to regulate expressive conduct when the regulation protects countervailing rights and is not directed at the content of the expression.<sup>22</sup>

The *O'Brien* standard seems to validate most restrictions on organized refusals to patronize. As Justice Stevens acknowledged in *Claiborne Hardware*, state as well as federal governments have a legitimate interest in averting disruption of their economies.<sup>23</sup> Moreover, this interest is not related to the suppression of the boycotters' expression; the economic disruption of Claiborne County, for instance, would have been as great had the purpose of the boycott not been announced.

In addition, governments wishing to suppress consumer boycotts can meet the elastic *O'Brien* requirement that the incidental restriction on protected expression be no greater than necessary. *O'Brien* itself upheld a conviction for a draft card burning against the defense that it was an act of protest protected by the First Amendment. Having found a substantial governmental administrative interest in the preservation of draft cards that was unrelated to the suppression of *O'Brien's* expression, the Court seemed unwilling to make the "no greater than is essential"<sup>24</sup> test anything more than a screen of superfluous restraints.

It seems especially probable that restrictions on boycotts would meet the *O'Brien* standard. The Court's application of the standard reflects an implicit bias against less traditional forms of expressive conduct and in favor of traditional ones, such as speaking from a public podium and distributing handbills.<sup>25</sup> If so, one would expect the Court to permit restrictions on organized refusals to patronize a business without demanding that a government incur the additional costs of less restriction alternatives. Moreover, even if the Court were as solicitous of boycotts as it has been of

finding that a less restrictive alternative did exist).

22. This should generally be true for all protected speech, because all communication is conveyed by conduct, whether it be walking into a public place and opening one's mouth or walking around distributing hand-drafted pamphlets. I therefore agree with those who have argued that the distinctions drawn by some Justices, e.g., *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 776-77 (1942) (Douglas, J., concurring), and commentators, e.g., T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 80, 444-49 (1970), between speech and speech-plus and between action and expression have probably been more confusing than enlightening. See Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1494-96 (1975); Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 23. The distinction between action and expression seems to state a conclusion rather than to assist in analysis. See T. EMERSON, *supra*, at 448 (attempting to distinguish labor from non-labor picketing).

23. 102 S. Ct. at 3425.

24. *O'Brien*, 391 U.S. at 377.

25. Ely, *supra* note 22, at 1488-89. Ely also suggested that *O'Brien's* act might have been restricted with minimal state justification because it was precisely the illegality of draft card burning that made it an especially effective means of expression. *Id.* at 1489-90 & n.29. Accord L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-20, at 686 (1978).

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handbills, it would be difficult to suggest any means, apart from some sort of inordinately expensive governmental subsidy to disrupted businesses, to avoid the economic dislocation of a successful boycott.<sup>26</sup> The Claiborne boycotters, in contrast, could have communicated their views concerning racial injustice in their county in many less disruptive ways, such as petitions and marches.<sup>27</sup>

### 2. *The Right To Boycott as a Right of Autonomy*

One might characterize the right to boycott as a right to self-determination based on privacy or autonomy. Individuals frequently define themselves through the choices they exercise,<sup>28</sup> and, given the nature of our society, few sets of decisions may do more to define us to ourselves and to each other than our disposition of consumer dollars. A refusal to buy non-union lettuce may help define a consumer to himself and to others who are aware of his motivation. Restricting such decisions would detract significantly from a consumer's capability to define himself and would thus diminish his freedom; it would be akin to forcing school children to salute the flag,<sup>29</sup> or requiring motorists to display a state's ideological slogan on their license plates.<sup>30</sup> Furthermore, the ability to associate one's decisions with those of others substantially increases the capacity to control one's identity, just as it increases the capacity for political and social expression. A refusal to buy non-union lettuce gains significance as self-definition, as well as expression, when that decision is associated with the decisions of others.

Like freedom of self-expression, however, freedom of self-definition does not provide an adequate basis for a right to engage in a concerted refusal to patronize. A state could still legitimately attempt to avert the incidental economic consequences of concerted refusals grounded in a freedom of self-definition. Just as most human actions can be expressive, so

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26. In any event, boycotters surely cannot argue that their expressive conduct should be given the special protection granted to speech in public forums. When such forums are restricted, such an argument prevents governments from citing the availability of alternative forums as justification. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975); *Police Dep't v. Mosley*, 408 U.S. 92, 98-99 (1972). However, the Court's special protection of such speech is based in part on the absence of any strong state interest in regulation of fora such as public streets and parks, except for time, place, and manner restrictions.

27. Some commentators, assuming that consumer boycotts can only claim protection as expressive conduct, have argued that antitrust laws may establish rights for businessmen to be free of concerted consumer actions, including consumer boycotts that affect competition. See Kennedy, *Political Boycotts, The Sherman Act, and the First Amendment: An Accommodation of Competing Interests*, 55 S. CAL. L. REV. 983, 1009 (1982); Note, *Protest Boycotts*, *supra* note 16, at 1144-48, 1157-60.

28. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 886-990 (1978) (discussing rights of privacy and of personhood, including right to autonomy over important life choices).

29. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

30. See *Wooley v. Maynard*, 430 U.S. 705 (1977).

most can be self-defining. In order to protect rights unrelated to the stifling of self-determination, the state must have authority to regulate at least some conduct that may increase self-determination. A state, for instance, could claim that individual rights to unrestrained commerce are unrelated to the subordination of self-determination and therefore can support regulation. By contrast, a state cannot force school children to salute the flag or prevent motorists from covering ideological slogans on their license plates because the majoritarian interest in the propagation of loyalty to government or of some other ideological principle is directly related to the subordination of self-determination.

### 3. *The Right To Boycott as a Right of Association*

A right to boycott also cannot be justified as a right of association under the First Amendment. The Court, of course, has recognized that the First Amendment protects the freedom to associate for the purpose of advancing beliefs.<sup>31</sup> In *Abood v. Detroit Board of Education*,<sup>32</sup> the Court held that requiring monetary contributions to those who advance repellent beliefs abridges this freedom as much as prohibiting contributions to those who advance attractive beliefs.<sup>33</sup> Therefore, restrictions on consumer boycotts arguably abridge associational freedoms by impeding consumers' refusals to contribute money to merchants whose social philosophy they reject.<sup>34</sup> The Mississippi decision overturned in *Claiborne Hardware*, for instance, arguably restricted the freedom of the Claiborne boycotters to choose to associate exclusively with each other, rather than with those who supported the discriminatory distribution of public services.

Like recognizing boycotters' rights of expression and self-definition, however, recognizing their right of association does not invalidate the state's interest in protecting its economy from disruption. The Court has never prevented a state from restricting associational freedoms if restriction serves a substantial interest unrelated to the suppression of associational choices. For instance, while the *Abood* Court found no significant state interest in compelling employee contributions to general union politi-

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31. See *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

32. 431 U.S. 209 (1977); see also *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961) (violation of First Amendment to compel railroad employees to pay union dues which then financed political campaigns); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956) (reserving judgment on enforceability of union shop agreement if dues finance ideological concerns).

33. *Abood*, 431 U.S. at 234-35; see *Buckley v. Valeo*, 424 U.S. 1, 22-23 (1976) (per curiam) (freedom of association abridged by prohibition of monetary contribution).

34. The Court has also held that the government cannot coerce citizens into association with any particular view. See *Wooley v. Maynard*, 430 U.S. 705 (1977) (allowing citizens to disassociate from political slogan on license plate); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (rejecting coerced displays of respect for flag).

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cal causes, the Court did find that the state's interest in its own labor relations system justified mandatory contributions to the union's collective bargaining efforts.<sup>35</sup>

Furthermore, the state can frequently assert the associational freedom of a boycott's targets as an additional justification for limiting the associational freedom of boycotters. For instance, the Claiborne boycotters attempted to compel the targeted merchants to associate with the boycotters and with the cause of racial justice, and to reject their association with the discriminatory white "establishment."<sup>36</sup> The Mississippi court could have claimed that its decision protected the associational freedom of the white merchants from private coercion.<sup>37</sup>

### C. *The Right To Boycott as a Right To Petition the Government*

In fact, Justice Stevens' *Claiborne Hardware* opinion did not justify the right to boycott in any of the above three ways. Instead, Justice Stevens argued that the boycott deserved First Amendment protection because the Claiborne boycotters—through economic disruption—were petitioning the government for redress of grievances.<sup>38</sup> Justice Stevens placed primary reliance on *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,<sup>39</sup> in which the Court suggested that the "right of the people . . . to petition the Government for a redress of grievances"<sup>40</sup> shielded the railroads' campaign for anti-trucking legislation from liability under the Sherman Act.<sup>41</sup> Justice Stevens stressed that the Claiborne County boycotters, like the railroad companies in *Noerr*, undertook their concerted action to produce a response from government.<sup>42</sup> He therefore viewed the economic effects of the boycott on Claiborne County as a constitutionally

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35. *Aboud*, 431 U.S. at 223-32.

36. Even in cases where the boycott targets do not care about the cause of the boycotters, a boycott can be viewed as obstruction of the target's desire to make associational decisions on independent grounds.

37. The coercion of the white merchants in *Claiborne Hardware* might be defended because the Claiborne County officials probably would not identify the merchants with any views that the boycotters forced the merchants to advance. See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85-88 & n.9 (1980) (distinguishing California constitutional right to public expression on private shopping center property from governmental coercion in cases like *Wooley* and *Barnette*). However, unlike the *Pruneyard* owner of private property, who must let other citizens express their own views on his property, merchants who are coerced into petitioning the government become personal agents for a political position they do not hold. Moreover, the *Pruneyard* Court's distinction of *Wooley* and *Barnette* does not apply to *Aboud*, because union members forced to support a political cause would be no more identified with the cause than the Claiborne white merchants would be identified with racial justice.

38. *Claiborne Hardware*, 102 S. Ct. at 3426.

39. 365 U.S. 127 (1961).

40. U.S. CONST. amend. I.

41. 365 U.S. at 139.

42. *Claiborne Hardware*, 102 S. Ct. at 3426.

protected petition, rather than as a legitimate rationale for the boycott's suppression.

Justice Stevens' effort to provide constitutional protection to the *Claiborne Hardware* boycott should be seen as the first step in the articulation of a significant American right. His conception of a boycott as a petition of the government, unlike the other three rationales discussed above, protects the right to boycott because of its potential economic effects, not in spite of them. Thus, Justice Stevens' conception would make boycotts secure against a state's attempt to protect the economy from economic disruption.

However, neither *Noerr* nor *Claiborne Hardware* offers adequate support for the right. The *Noerr* Court may have relied on the Constitution as well as the Sherman Act, but the railroads' publicity campaign was quite distinct from the *Claiborne Hardware* boycott. The railroads attempted to influence government officials by means of clearly protected First Amendment expression, including speeches and publication of documents explaining the railroads' attacks on the truckers, while consumer boycotts were unprotected until *Claiborne Hardware*.<sup>43</sup> In fact, the Court suggested in *Noerr* that the result would have been different had the lower court found that the railroads intended to convince the truckers' customers to stop dealing with the truckers.<sup>44</sup> The *Noerr* Court further stressed that a publicity campaign ostensibly directed at government but actually intended to convince customers not to deal with competitors would not be immune from the Sherman Act.<sup>45</sup> The *Claiborne Hardware* Court suggested that the boycotters' case was stronger than the railroads' because the boycotters sought to "vindicate rights of equality and of freedom" rather than to secure the destruction of "legitimate" economic competition.<sup>46</sup> But even if lofty motivation intensifies First Amendment rights,<sup>47</sup> cases, like tables, are not on all fours when one leg is shorter and one longer.

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43. *Noerr*, 365 U.S. at 142.

44. *Id.* at 142-43. The *Claiborne Hardware* Court asserted that the railroads in *Noerr* intended "to impair the relationships between truckers and their customers." 102 S. Ct. at 3426. But the *Noerr* Court itself clearly found that any effect of the railroads' publicity on the truckers' customer relations was an incidental, albeit welcome, effect of the railroads' attempt to influence the government. 365 U.S. at 143.

45. 365 U.S. at 144.

46. 102 S. Ct. at 3426.

47. This assumption is in fact inconsistent with another holding of the *Noerr* Court:

The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.

365 U.S. at 139; see also cases cited *infra* note 134.

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Justice Stevens' reliance on *Noerr* also suggests a troublesome, inherent limitation on the right to boycott. *Noerr* arguably affords protection only to boycotts with a particular purpose: the coercion of third parties to use their influence to secure the governmental action desired by the boycotters. Boycotts that aim to secure something directly from boycotted private parties or to secure their influence on other private entities, by contrast, are not protected because these boycotts are not efforts to petition the government.

Like many limits on rights that turn on the purpose of those claiming the rights, this limit could prove difficult to apply.<sup>48</sup> For example, would this right protect boycotters who seek both direct relief from a merchant and an indirect petition of the government?<sup>49</sup> *Claiborne Hardware* suggests that it would because the Claiborne County boycotters had also asked that all the merchants "employ Negro clerks and cashiers."<sup>50</sup> If this suggestion is accepted, however, most boycotters could escape the limit suggested by *Noerr* by claiming to petition the government, even if the dominant purpose were to secure other demands.

Moreover, if applied effectively, the limitation would ultimately make the right anomalous. The limitation would have allowed Mississippi courts to declare the boycott illegal if the boycotters' sole demand had been that white businesses cease discriminating against blacks in hiring and commercial dealing. Such a limitation is significant: It would remove protection from many of the boycotts that the NAACP cited in its briefs as vitally important to the political history of this country.<sup>51</sup> Furthermore, it would dilute the meaning of the right to boycott and jeopardize present plans to use black consumer power to extract agreements from businesses

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48. Cf. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 538-40 (1981) (Brennan, J., concurring) (stressing difficulty of distinguishing commercially motivated speech).

49. Cf. *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (advertisers attempted to obtain protection of commercial speech by adding political message to advertisement).

50. 102 S. Ct. at 3419 (quoting boycotters' petition).

51. In its petition for certiorari, for instance, the NAACP argued:

Boycott campaigns have played an important role in the history of political protest in this country ever since American colonists refused to buy English-made goods in order to force repeal of the Stamp and Townshend Acts. Abolitionists refused to buy slave-made goods before the Civil War. Consumers' Leagues . . . urge[d] boycotts of . . . "sweat-shop" industries. Blacks in Montgomery . . . boycott[ed] . . . that city's [segregated] bus system. Only recently, church groups have organized a boycott campaign to *protest* the sponsorship of television programming featuring . . . sex or violence.

Appellant's Petition for Certiorari at 12, *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409 (1982). From the above list, only the boycott of English-made goods and the boycott of the Montgomery public bus system could reasonably be considered efforts to compel a petition of the government by the boycotted party.

The *Noerr* limitation, however, would not have affected NOW's campaign to encourage state legislators to pass the Equal Rights Amendment by boycotting convention sites in states that resisted passage. See *Missouri v. NOW*, 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980).

to expand employment opportunities for blacks<sup>52</sup> and to increase the representation of blacks in American films.<sup>53</sup>

The limitation is also discordant with prior judicial and legislative assumptions about boycotts, because it would offer more protection for a class of "secondary" boycotts than it would for primary boycotts. In order to limit disputes to the primary parties in conflict, courts and legislatures often have disfavored secondary boycotts—boycotts directed at coercing arguably neutral parties to support a demand on an ultimate target.<sup>54</sup>

The most significant problem with viewing the right to boycott as a right to petition the government is that this conception protects only those boycotts that infringe on an important associational freedom of their targets—the freedom to choose which political campaigns or petitions to join. While the *Abood* decision protected this associational freedom from government coercion, the *Claiborne Hardware* decision seems to expose it to private coercion. A justification for *Claiborne Hardware's* broad right to boycott must illuminate why the right should outweigh not only states' claims to protect their economies but also states' claims to protect their citizens' associational freedoms.

Ultimately, therefore, *Noerr* and the right to petition the government cannot provide a firm foundation for a right to engage in a concerted refusal to patronize. Yet it is fortunate that the hard case of *Claiborne Hardware* forced Justice Stevens and the Court to conceive of an individual's association with a consumer boycott as a political act that deserves protection as a right. The right should be elaborated and defined as a political act, albeit of a somewhat broader type than the Court had in mind.

## II. AN APPROPRIATE RIGHT TO BOYCOTT

Although a right to boycott cannot be directly derived from any First Amendment precedent, such a right does appeal directly to our constitutional as well as our social values. The analysis below, however, is not necessarily a claim that the Supreme Court should impose this right. The analysis advocates a right that our society should view as seriously and protect as consistently as any First Amendment right. It does not advocate any particular method for its adoption.<sup>55</sup>

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52. See *Boston Globe*, June 30, 1982, at 17.

53. See *Boston Globe*, July 1, 1982, at 17.

54. See, e.g., 29 U.S.C. § 158(b)(4)(ii)(B) (1976) (identifying certain secondary boycott activities as unfair labor practices); *NLRB v. Retail Store Employees Union Local 1001*, 447 U.S. 607 (1980) (*Safeco*) (holding union's secondary picketing violated NLRA).

55. Debates on constitutional rights, including this one, need not be burdened and confused from the outset by disputes over the Supreme Court's authority to develop the meaning of the Constitution. The right advocated here could become part of our constitutional law in numerous ways other than by

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### A. *The Boycott as Political Action*

Any secure basis for a right to boycott must trump a state's efforts to protect its economy from disruption. An individual's decision to join a consumer boycott must be protected precisely because it enables the individual to affect the economy, not in spite of such effects.

One justification for such a right comes from microeconomic welfare theory: Consumers' full sovereignty over their decisions will help create the particular mix of production and consumption that maximizes welfare for a given distribution of wealth and income.<sup>56</sup> One of this theory's fundamental assumptions is that consumers' reasons for preferring a product should be valued equally.<sup>57</sup> Thus, the reason for a consumer's decision not to purchase, whether a distaste for the social or political practices of the producer or an inferior product, should be irrelevant. Moreover, microeconomic welfare theory recognizes the validity of consumption decisions made with reference to the decisions of other consumers. Consumers' judgments about a product that derive from others' acceptance or rejection of that product have the same economic importance as independent preferences.<sup>58</sup>

Nevertheless, microeconomic welfare doctrine is not a sufficient source for the right to engage in a concerted refusal to patronize. First, the doctrine rests on challengeable ethical and empirical assumptions.<sup>59</sup> Moreover, the doctrine expresses a utilitarian calculus that must account for other policy considerations. The state could claim, for instance, that it can prohibit consumer boycotts resulting in unemployment, bankruptcy, or re-

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exercise of the judicial interpretive power utilized in *Claiborne Hardware*. Most obviously, the right could be added to the Constitution by amendment. An act of Congress could declare the right protected against other federal statutes or state laws. A threatened abridgment of the right might also warrant the declaration of a principle of constitutional common law. See Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 10–11, 44–45 (1975).

56. The theory, as developed by A.C. Pigou, Vilfredo Pareto, and others, is simply and rigorously presented in Bator, *The Simple Analytics of Welfare Maximization*, 47 AM. ECON. REV. 22 (1957).

57. See I. MARSHALL, *PRINCIPLES OF ECONOMICS* 16 (9th ed. 1961).

58. Economists have attempted to analyze how interdependent consumer demand can be accommodated by neoclassical microeconomic utility and welfare theory. See Libenstein, *Band Wagon, Snob, and Veblen Effects in the Theory of Consumers' Demand*, 64 Q.J. ECON. 183 (1950).

59. Cf. C. LINDBLOM, *POLITICS AND MARKETS* 76–89 (1977) (discussing limited competence of markets). One of the most important of the challengeable empirical assumptions is that of free, unrestrained competition among producers. At least one commentator has argued that organized consumer boycotts should be restricted by the antitrust laws when they may have anti-competitive effects. Kennedy, *supra* note 27, at 1009.

Many people would also challenge the theory's philosophical conceptions of the individual and of individual choice. See, e.g., Gintis, *A Radical Analysis of Welfare Economics and Individual Development*, 86 Q.J. ECON. 572, 576–78 (1972) (employing ideas of Parsons, Veblen, and Marx to argue that neoclassical theory takes narrow view of individual welfare by focusing only on what an individual has to the exclusion of what he is and does); Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769 (arguing that neoclassical welfare economists assume each consumer "is a self-contained, maximizing unit disconnected from any ongoing human life").

duction of competition<sup>60</sup> because the harm caused by such disruptions outweighs the short-run maximization of consumer welfare.<sup>61</sup>

American political and social theory provides a more secure basis for a right to engage in a concerted refusal to patronize, a right the state could not sacrifice to such fears of economic disruption. Joining a consumer boycott should be conceived as a constitutionally protected political act by which individuals can influence their society. Moreover, this conception of boycotts as protected political acts should not be limited to those aimed at affecting governmental decisionmaking. Even boycotts aimed solely at private decisionmaking should share the status of other political acts such as electoral voting, contributing money and time to an election or referendum campaign,<sup>62</sup> and litigating for social purposes.<sup>63</sup> All of these political actions can be viewed broadly as means by which citizens can influence important social decisionmaking.<sup>64</sup>

Concerted refusals to patronize can provide a means to affect decisions about society even when they are not intended to influence governmental decisions. Decisions made by targets of boycotts—who is employed, how they are employed, where capital is allocated, and what is produced—can be as important to our society and the lives of its members as decisions made by government officials.<sup>65</sup> Furthermore, the impact of a consumer's vote in the marketplace through a boycott is proportional to dollars withheld and it is unmediated by representatives sensitive to other interests. Nor is the impact lost if a majority of consumers do not join the concert; it is only lessened. Finally, concerted refusals to deal can be utilized by mi-

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60. See Kennedy, *supra* note 27.

61. A utilitarian calculus could recommend a per se rule affirming a right that should not be outweighed by particular calculations in individual cases. See Brandt, *Toward a Credible Form of Utilitarianism*, in CONTEMPORARY UTILITARIANISM (M. Bayles ed. 1968). Any rule based on consumer welfare calculations, however, is vulnerable to general calculations of the welfare lost by production dislocations or inequities.

62. Cf. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294–300 (1981) (treating consumer boycott of private landlords as political association); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (First Amendment protects political association).

63. See *In re Primus*, 436 U.S. 412 (1978); *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

64. Viewing decisions to join boycotts as political acts should appeal to a broad cross-section of the political spectrum. Conservatives argue that private rights in the marketplace should parallel private rights in the traditional political forum. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* 315–16 (1972); Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974). Progressives are interested in expanding the means by which common citizens can affect decisions that determine the nature of their society. See, e.g., P. BACHRACH, *THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE* (1967); M. CARNOY & D. SHEARER, *ECONOMIC DEMOCRACY: THE CHALLENGE OF THE 1980'S* (1980).

65. Cf. C. LINDBLOM, *supra* note 59, at 170–88, 214–21 (discussing privileged position of business and circularity of control in market system); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971) (making similar argument in favor of protection of commercial speech by First Amendment).

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norities who, because of imperfections in our political process, lack an influence over governmental policy proportionate to their numbers.<sup>66</sup>

Of course, those with more dollars at their disposal have more votes in the economic marketplace, just as they are likely to have more influence on the campaign trail and in the corridors of state power.<sup>67</sup> Because of the potential impact of marginal shifts in consumer spending, however, boycotts by even the economically poor and politically weak need not be ineffective. The fact that a consumer boycott, like a lobbying effort, is easier to organize when a group holds a view with a special intensity is also not troubling. Registration of the intensity of beliefs in the economic marketplace is no less legitimate than registration of the intensity of beliefs in the political marketplace.<sup>68</sup>

Casting the right to engage in concerted refusals to patronize as a right to attempt to affect social decisions clearly accords with the ends the Supreme Court has advanced in securing First Amendment rights. These ends include providing "participation in decisionmaking by all members of society" and "achieving a more adaptable and hence a more stable community."<sup>69</sup> Although the Court before *Claiborne Hardware* had not affirmed a right to engage in a political act unless it could be viewed as a petition to government or as participation in the traditional electoral process, there are precedents for treating a right to boycott as political action. The Court has supported the right to engage in some acts, such as concerted litigation to challenge social institutions, because some groups have been unable to assert influence effectively "through the ballot."<sup>70</sup> Moreover, the leading decision affirming First Amendment protection for commercial advertising stressed that many important decisions in our society are made through private economic decisions.<sup>71</sup> Establishing a right to

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66. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

67. The Court, however, has rejected grounding state regulation of campaign financing on the unequal financing capacity of citizens. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1, 48-49, 54-57 (1976).

68. Indeed, to explain how a minority group intensely committed to a political view can control the decision of a democratically selected legislature, some writers have invoked the model of the marketplace and have pointed out that intensely held preferences of a minority of consumers control commercial decisions. See A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 55-60 (1957); Posner, *Theories of Economic Regulation*, 5 *BELL J. ECON.* 335 (1974).

69. See T. EMERSON, *supra* note 22, at 7; see also Baker, *Scope of the First Amendment Freedom of Speech*, 25 *U.C.L.A. L. REV.* 964 (1978) (stressing that participation in societal decisionmaking, as well as individual self-fulfillment, is goal of First Amendment); Redish, *The Value of Free Speech*, 130 *U. PA. L. REV.* 591 (1982) (arguing that fundamental value served by First Amendment is individual self-realization).

70. *NAACP v. Button*, 371 U.S. 415, 429 (1963). *Button's* description of political litigation could have been invoked in *Claiborne Hardware* for consumer political boycotts: "In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment . . . Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts." *Id.*

71. "[E]ven if the First Amendment were thought to be primarily an instrument to enlighten

participate in a concerted refusal to patronize as a right to engage in political action would reinforce the best tradition of the development of rights in this nation—the tradition that, in the words of Professor Ely, has secured rights of process by “Clearing the Channels of Political Change.”<sup>72</sup> Finally, articulating such a right, and making it analogous to the right to participate in political campaigns or to litigate for social change, shows why such a right should protect persons as fully when they act in association with others as it does when they act alone.<sup>73</sup> The Supreme Court has acknowledged that effective political action requires organization.<sup>74</sup> The same is true of a refusal to patronize, which can have palpable impact only in association with others.<sup>75</sup>

This derivation of the right to boycott, unlike the other possible derivations, also makes the right secure against claims that the state can prohibit concerted refusals to patronize to avert economic dislocations or to protect some asserted individual right to be free of the effects of such concerted refusals. If citizens have a right to join in a concerted refusal to purchase a product because the refusal affords them an important means of influencing social decisions through economic pressure, the state cannot prohibit such a refusal when it succeeds in having an economic effect. Accept-

public decisionmaking in a democracy, we should not say that the free flow of [commercial] information does not serve that goal.” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976) (footnotes omitted).

72. J. ELY, *DEMOCRACY AND DISTRUST* 105 (1980).

73. See *Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (contributing to organization to disseminate political message is protected because “it enables like-minded persons to pool their resources in furtherance of common political goals”); see also *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975) (constitutional freedom to associate for advancement of political beliefs); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (freedom to associate for advancement of beliefs is protected from direct or indirect suppression); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 702 (1978) (although Court has never held right of association prevents state from making group action illegal without making comparable individual action illegal, Court has consistently protected right “to join with others to pursue goals independently protected by the First Amendment”) (emphasis omitted). Last Term, the Court, in an opinion quoted by the *Claiborne Hardware* Court, 102 S. Ct. at 3423, confirmed Professor Tribe’s assertion: “There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them.” *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981).

74. *Thomas v. Collins*, 323 U.S. 516 (1945).

75. De Tocqueville’s thoughts on “The Use Which The Americans Make of Public Associations in Civil Life” are especially apposite:

Among democratic nations, on the contrary, all the citizens are independent and feeble; they can do hardly anything by themselves, and none of them can oblige his fellow men to lend him their assistance. They all, therefore, become powerless if they do not learn voluntarily to help one another . . . .

. . . The first time I heard in the United States that a hundred thousand men had bound themselves publicly to abstain from spirituous liquors, it appeared to me more like a joke than a serious engagement, and I did not at once perceive why these temperate citizens could not content themselves with drinking water by their own firesides. I at last understood that these hundred thousand Americans, alarmed by the progress of drunkenness around them, had made up their minds to patronize temperance.

2 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 115, 118 (Bradley ed. 1945).

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ance of a right to boycott as a political act must entail the rejection of a right to be free of political consumer boycotts.<sup>76</sup>

The right to engage in consumer boycotts as a political act also necessarily entails the rejection of a right to associate free of coercive consumer boycotts. Thus decisions like *Abood v. Detroit Board of Education*<sup>77</sup> cannot justify any state restrictions on consumer boycotts. Unlike the coercive power of the state, the coercive power of a group of consumers who boycott a supporter of a particular cause or political institution is limited to the aggregation of those consumers' economic votes.<sup>78</sup> A claim that a consumer's refusal to patronize is an interdependent decision made because others are making similar decisions cannot undermine the consumer's right to make that decision.<sup>79</sup> The coercion inherent in political boycotts is simply an exercise of the influence that citizens as consumers should be encouraged to exercise.

An analogy to electoral voting is illuminating. By threatening to remove elected public officials from office, electoral voting may "coerce" those officials to reject political causes in which they might believe. Yet such "coercion" is an accepted part of governmental decisionmaking. Consumer "coercion" of businessmen who fill important public roles of significant political influence should also be acceptable.<sup>80</sup>

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76. Just as most rights entail correlative duties, so do most rights require the rejection of other rights. For instance, an individual's right to obtain service at a diner owned by a second individual perforce entails both the second individual's duty to serve the first individual, and the rejection of a right of the second individual to refuse service to the first.

77. 431 U.S. 209 (1977). *Abood* actually supports exercise of the right to boycott as a political act of refusing to support particular political or social positions. The *Abood* Court did affirm that the state could require employee contributions to the collective bargaining efforts of the employees' exclusive representatives, 431 U.S. at 223-32, but such a requirement can be justified as a tax to support the efforts of a majority of employees to protect their interests. *Abood* holds that the political system can only tax its members to maintain the system's internal operation and not to attempt to influence the wider society and polity of which the system is a part. Forcing consumers to support businesses' political and social practices of which they disapprove cannot be so justified because those businesses cannot in any way be characterized as the representatives of the consumers in any system insulated from the general society or polity. See *supra* p. 420.

78. One arguably important distinction between economic votes and political votes should be acknowledged: A political voter can easily maintain the secrecy of the ballot, while most purchases of goods and services are made in public stores. Some might argue that this distinction is significant because public economic voters are more vulnerable to psychological and social coercion than are private political voters. However, most protected political activity, such as the donation of time and money to a campaign, is not private. A citizen who is asked by a friend or employer to assist a candidate or cause may be under great social and even economic pressure. Furthermore, a state could protect the privacy of economic voters, to an extent, without denying a consumer right to boycott. For instance, although the *Claiborne Hardware* Court affirmed the right of the boycotters to publish lists of black citizens defying the boycott, 102 S. Ct. at 3424, a consumer right to boycott does not necessarily entail a right of totally unrestricted distribution of information on those who refuse to boycott. But see *infra* note 112 (arguing that First Amendment allows publication of names of boycott violators).

79. Comparisons with interdependent behavior of businesses proscribed by the antitrust laws, see Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247, 251, cannot support legal attacks on the consumer right to boycott suggested by *Claiborne Hardware*.

80. See generally G. McCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966) (ana-

This argument, of course, is more persuasive when business owners or managers have voluntarily made themselves part of a decisionmaking elite, as had some of the boycotted merchants in Claiborne County.<sup>81</sup> The argument is particularly applicable to owners and managers of large corporations. It is admittedly less applicable to owners or managers of small businesses who may not have any special potential influence over even a local government. In my judgment, however, concern about the associational freedom of boycott targets in even these cases does not warrant compromising the right to boycott. Consumer boycotts have usually targeted businessmen with special political influence, and this practice seems unlikely to change. More importantly, to expand popular participation in social decisionmaking, a democratic society can appropriately deny some citizens economic protection in order to secure all citizens a right to engage in consumer political action.

### B. *Refinement of the Right*

It is possible to refine and reasonably limit the right to join in concerted refusals to purchase once it is cast as a right to influence social decisionmaking through economic action. This section suggests several definitional principles designed to refine the right and to help explore its implications for labor law.

#### 1. *The Right Should Cover Only Consumer, Not Producer, Boycotts*

Unlike other conceptions of a right to boycott discussed above, the concept that a decision to join a boycott is a political act analogous to electoral voting clarifies why a consumer's free choice deserves more protection than a producer's free choice. Our society should be more concerned about the coercive impact of business boycotts, or even employee boycotts, than about the effects of consumer boycotts. Consumer boycotts deserve protection in our democracy in part because every consumer has roughly the same economic voting potential.<sup>82</sup> When a group of consumers of personal goods and services exerts leverage over economic, political, or social decisions, other individuals with equally intense feelings can respond roughly in proportion to their numbers. By contrast, individuals as producers and owners of capital have specialized and very unequal market power. By threatening to withhold their services or capital, some individuals can ex-

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lyzing importance of private power in American democracy).

81. Many of the *Claiborne Hardware* merchants also served in important public positions in the County. See 102 S. Ct. at 3414 n.3.

82. Cf. *Reynolds v. Sims*, 377 U.S. 533 (1964) (weight of each citizen's vote in choosing legislature must be roughly equal).

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ert disproportionate leverage over important social decisions. Consumers, who are not in special economic roles, cannot effectively counter these threats even though their feelings may be equally intense.

Thus, while the Supreme Court found illegal the longshoremen's refusal to handle cargo destined to or arriving from the Soviet Union following the Soviet invasion of Afghanistan, that decision is fully consistent with *Claiborne Hardware*.<sup>83</sup> The longshoremen, by virtue of their specialized role in the economy, have a potential influence on American foreign policy drastically disproportionate to their numbers in our society.<sup>84</sup>

A broad consumer right to boycott is similarly consistent with restrictions on refusals by American businesses to deal with a particular foreign nation, such as Israel, for political reasons.<sup>85</sup> Because economic voting by consumers expands the scope of participatory activity, a democracy should not restrict such voting—but it can restrict the use of special economic power that may undermine a foreign policy determined by democratic processes.<sup>86</sup>

One may invoke *Buckley v. Valeo*,<sup>87</sup> to argue that it is impossible to protect consumer boycotts without protecting producer boycotts. In *Buckley*, the Court struck down legislative restrictions on protected political campaign expenditures even though the legislation was meant to ensure that other protected activity would not be overwhelmed.<sup>88</sup> *Buckley*, however, is inapposite. Although the Supreme Court has found that the First Amendment does not tolerate governmental efforts to equalize the influence of individuals in campaigns, governments can and must ensure individual equality in voting.<sup>89</sup> If boycotts are analogous to electoral voting,<sup>90</sup>

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83. *International Longshoremen's Ass'n v. Allied Int'l*, 456 U.S. 212 (1982); see also *Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957) (employee boycott illegal); *Garner v. Teamsters Union Local No. 776*, 346 U.S. 485 (1953) (same); *Local Union No. 10, United Ass'n of Journeymen Plumbers v. Graham*, 345 U.S. 192 (1953) (same).

84. This is not to assert that there should be no constitutionally grounded right to strike in some circumstances; see, e.g., *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, 885 (D.D.C.) (Wright, J., concurring), *aff'd*, 404 U.S. 802 (1971); *Cox, Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 575-81 (1951). But a consumer right to boycott does not, and should not, imply a commensurate employee right.

85. See *Briggs & Stratton Corp. v. Baldrige*, 539 F. Supp. 1307, 1317-19 (denying corporation's assertion of First Amendment defense to violation of prohibition on cooperation with Arab boycott of Israel), *reconsid. denied*, 544 F. Supp. 667 (E.D. Wis. 1982); see also *Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n*, 499 F. Supp. 553 (D. Del. 1980) (First Amendment does not prevent relief against gas station retailers' refusal to sell gas in protest of Department of Energy policy on gas pricing). *But see Crown Central Petroleum Corp. v. Waldman*, 486 F. Supp. 759 (M.D. Pa.) (extending First Amendment protection to gas station boycott like that in *Osborn*), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980).

86. See *supra* p. 424. In contrast, conceiving of the right to boycott primarily as a right to expression, autonomy, association, or petition does not explain why employee or business boycotts deserve less protection than consumer boycotts.

87. 424 U.S. 1 (1976) (per curiam).

88. *Id.* at 48-49, 54, 56-57.

89. The *Buckley* Court recognized the distinction between state efforts to equalize political expres-

governmental efforts to equalize the economic voting power of citizens should be constitutional. Moreover, in cases dealing with the electronic media, the Court has held that when individuals or businesses have monopolistic control over particular powers of expression, the state can regulate their expression to an extraordinary extent.<sup>91</sup> Therefore, under our general First Amendment jurisprudence, granting consumers the right to engage in concerted refusals to purchase need not logically entail granting businesses comparable rights to refuse to deal or employees comparable rights to refuse to work.

Distinguishing the citizen as consumer from the citizen as producer should also clarify which purchasing decisions the right to boycott should encompass. Private purchasing decisions that we make as consumers of finished products should be protected; purchasing decisions that we make as parts of a chain of production should not. All of us make purchases as final consumers, albeit in different markets and at different price levels. But only some of us make purchases as part of production, and these are dictated more by specialized economic roles than by consumption preferences. For those who labor in latter-day cottage industries for pleasure as well as remuneration, the line between consumption and production may not be bright, but it is discernable. The right to boycott should not apply to the purchase of any good used to support a production effort, even if, like new factory windows or industrial cleaning fluid, the good never becomes a material element of any finally consumed product or is never even used directly to work on the product. This limit on the right would pre-

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sion and state efforts to equalize electoral action:

Cases invalidating governmentally imposed wealth restrictions on the right to vote or file as a candidate for public office rest on the conclusion that wealth "is not germane to one's ability to participate intelligently in the electoral process" and is therefore an insufficient basis on which to restrict a citizen's fundamental right to vote . . . . [V]oting cases and the reapportionment decisions serve to assure that citizens are accorded an equal right to vote for their representatives regardless of factors of wealth or geography. But the principles that underlie invalidation of governmentally imposed restrictions on the franchise do not justify governmentally imposed restrictions on political expression.

*Id.* at 49 n.55 (citations omitted).

90. See *supra* p. 425.

91. Compare *CBS v. FCC*, 453 U.S. 367 (1981) (upholding statutory requirement that grants federal candidates right of reasonable access to use of airwaves) and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 391 (1969) (First Amendment allows no monopoly of airwaves by licensees) with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding unconstitutional "right of reply" statute granting political candidates equal space to respond to criticisms by newspapers where newspaper had no formal monopoly of medium). Even newspapers, however, are not immune from legal restrictions on monopoly: "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity." *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (footnote omitted).

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vent a productive enterprise, whether or not it was incorporated or commercial, from ever claiming the right to boycott.

### 2. *The Right Should Encompass Only Boycotts Aimed at Affecting the Decisionmaking of Targets, Not the Status of Targets*

Unlike other possible conceptions of the right to boycott, conceiving of it as a right to attempt to affect social decisionmaking readily distinguishes legitimate boycotts from those that refuse to patronize a business because of the identity of its owners or managers. After the Supreme Court's decision in *Thornhill v. Alabama*<sup>92</sup> granted constitutional protection to some peaceful picketing—presumably including picketing that advocates a concerted refusal to patronize a business—Professor Jaffe worried that pickets would be used to organize boycotts of businesses because of the ethnic background of their proprietors.<sup>93</sup> The result in *Claiborne Hardware*, however, is consistent with laws prohibiting boycotts of businesses because of the identity of their owners. The right to boycott envisioned in this Article would not attach to such boycotts, since their ultimate goal is to inflict harm on particular individuals, rather than to influence social decisions.

Only a boycott that asks the targeted business to adjust its social decisions deserves protection. Those decisions may include the way the target exerts its political influence, the products it sells, the employees it hires, the manner by which it allocates its capital, or the other businesses with which it deals.<sup>94</sup> This conclusion is not trivial, however, because it denies protection to campaigns intended to direct purchases toward minority-owned businesses: Such campaigns are indistinguishable from those meant to divert purchases away from nonminority businesses without offering these nonminority businesses any alternative. If boycotts of nonminority-owned businesses are to be protected, therefore, the boycotters must permit the targets to escape the boycott by, for example, conforming to legal minority hiring policies or adopting minority investment practices.<sup>95</sup>

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92. 310 U.S. 88 (1940).

93. See Jaffe, *In Defense of the Supreme Court's Picketing Doctrine*, 41 MICH. L. REV. 1037, 1053 (1943).

94. A demand by boycotters that the owners of a business give up total or partial ownership to members of another group might be characterized as an attempt to achieve social change, rather than as an attack on the business and its owners. This characterization distorts the true nature of the boycott, however, since the social change being sought is the reduction of the social power of certain individuals because of their social status, not because of their social decisionmaking.

95. Interestingly, contemporary consumer boycotts organized by the NAACP and other civil rights groups have demanded that targeted businesses deal with more minority-controlled businesses, but they have not attempted to direct minority consumer purchasers only to minority-controlled businesses. See, e.g., Wall St. J., July 21, 1982, at 1, col. 6 (discussing campaign of Jesse Jackson and Operation PUSH to encourage large businesses, such as Coca-Cola and Kentucky Fried Chicken, to allow more black-controlled franchises); N.Y. Times, July 5, 1982, at A19, col. 1 (discussing similar

This limitation would also restrict a boycott directed at business proprietors merely because they hold particular beliefs, rather than because they make social decisions based on those beliefs. Thus, while the state could not restrict a campaign against Jaffe's grocery store that stressed only Jaffe's contribution to the Irish Republican Army, the state could restrict a campaign that also stressed Jaffe's professed belief in Catholicism or in an independent Northern Ireland. As the *Claiborne Hardware* decision itself suggests, the line between attacking beliefs and attacking social decisions may be difficult to draw, but the state should be able to insist that any boycott target only particular decisions, not general beliefs.

Because an individual's past is immutable, the state might also restrict boycotts against business proprietors for past social decisions. Jaffe's boycotters could not claim that they were attempting to affect his future social decisionmaking by continuing their boycott after Jaffe had stopped contributing to the IRA. The boycotters could not convincingly claim that they were attempting to deter other proprietors from contributing to the IRA because they could organize new campaigns against offending proprietors.

### 3. *The Right Should Not Include Boycotts Aimed at Compelling Illegal Action*

The range of social decisionmaking by private businesses that consumer boycotts may hope to influence suggests a third limit on the right to boycott. At least when the boycott is likely to have economic impact, the decision that the boycotters hope to compel must not itself be illegal. This limit should not be controversial. Even political expression loses its protection when it is both designed and likely to incite lawless action,<sup>96</sup> and there is no reason to grant consumer boycotts preferred status over traditional forms of expression. Ineffective boycotts might still be protected as expressive, self-defining, or associative, regardless of their purpose, but any effective boycott that compels action illegal under a valid state law<sup>97</sup> should not be permitted.

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efforts by NAACP).

A boycott demanding that a targeted business deal with more minority-controlled businesses may seem indistinguishable from a boycott of a business for not being minority-controlled. *See supra* note 94. The former boycott, however, offers the targeted businessmen a means of escaping the boycott without sacrificing ownership of their business. As long as dealing with more minority businesses would not itself be illegal under anti-discrimination laws, *see infra* p. 431, a boycott that demands more dealings with minority businesses should be protected.

96. *See supra* p. 411.

97. States, of course, should not be able to restrict selected boycotts by passing unconstitutional laws against particular business practices that boycotters may wish to compel. A state law against hiring black sales clerks thus would be no defense against a boycott attacking a white store for discriminatory hiring practices. *See* M. SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND*

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This limit is important for two reasons. First, many boycotts have sought goals that a state has declared illegal. While the Claiborne County boycotters demanded little more than "rights guaranteed" by the Fourteenth Amendment,<sup>98</sup> many other possible aims of boycotts such as quota hiring of a particular ethnic group or allocation of a minimum number of franchises to members of that ethnic group,<sup>99</sup> have been or could be declared illegal. Indeed, the *Claiborne Hardware* Court distinguished *Hughes v. Superior Court*,<sup>100</sup> which held that California could enjoin picketing to implement a boycott that demanded a minimum fifty percent hiring of Negro clerks, because this aim was itself "prohibited by a valid state law."<sup>101</sup> Any such law would force civil rights boycotters to adjust their demands, perhaps to ask only for non-discriminatory treatment<sup>102</sup> and some affirmative role in policing the business to ensure such treatment.<sup>103</sup>

Second, the state's authority to restrict refusals to deal by businesses and producers, coupled with the illegal purpose limitation, would permit the state to declare illegal a consumer boycott demanding that the targeted business use its special economic power illegally.<sup>104</sup> For instance, had the *Hughes* boycotters demanded that the retail stores in their community not deal with manufacturers who discriminated against blacks, California could have restricted their campaign by declaring illegal both the refusal of one business to deal with another for such reasons, and also the efforts of consumers to compel such a refusal.<sup>105</sup>

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JUDICIAL REVIEW 68-69, 146-50 (1966).

98. *Claiborne Hardware*, 102 S. Ct. at 3426.

99. See Wall St. J., July 21, 1982, p. 1, at col. 6.

100. 339 U.S. 460 (1950).

101. *Claiborne Hardware*, 102 S. Ct. at 3427 n.49. Today, such a demand, unless appropriately limited, could provoke action illegal under federal law. See *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979).

102. For instance, the pickets in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), seem to have made no greater demand. Their placards read only "Do Your Part! Buy Where You Can Work! No Negroes Employed Here!" *Id.* at 557.

103. This limitation could restrict a variety of consumer boycotts other than civil rights boycotts. For instance, the state could prohibit any tenant boycott in support of a demand by housing consumers—tenants—for violation of state housing codes.

104. The authority, however, would not permit the state to declare illegal a consumer boycott, like that in *Claiborne Hardware*, which demanded that the targeted business use its special political rather than its special economic influence, assuming the state could not, or at least did not, render illegal the business's use of its political influence.

105. This illegal objective limitation would authorize the state to prohibit any consumer boycott that demands the targeted business cajole an employee to take some action or support a particular union, so long as the state also prohibits all employer pressure on employees independent of any consumer boycott. See *infra* p. 449. The illegal objective limitation, however, should never permit the state to restrict consumer boycotts, like that in *Claiborne Hardware*, directed against the social and political decisionmaking of controlling owners of targeted businesses. The state has no conceivable interest in making illegal the pressure businesses put on their owners. Consumers should have an equal right to organize a boycott to protest the owners' political and social decisionmaking outside the business as well as inside.

A state should not, however, be able to restrict consumer boycotts having legal objectives simply because the states *could* declare the objectives illegal.<sup>106</sup> Although there is some troublesome language in Justice Frankfurter's majority opinion in *Hughes*,<sup>107</sup> the Court has never held that the state can restrict speech that incites legal action simply because that legal action is not itself constitutionally protected. The same principle should apply to consumer boycotts. As argued above, a right to refuse to patronize would promote democratic social decisionmaking. Prohibiting citizens' attempts to use marketplace votes to influence a more powerful actor's lawful decision only restricts the democratic power of the less powerful. Unless the state also makes illegal the decision that the boycotters hope to compel, a restriction cannot be justified as a prohibition of incitement to illegal action and stands directly against the democratic values supporting the right to boycott.

#### 4. *The Right Should Not Protect Tactics That the State Can Prohibit Outside of a Boycott*

The *Claiborne Hardware* case highlights a fourth limitation essential to any definition of a right to boycott: Tactics illegal outside a boycott should be illegal within a boycott. Thus, the *Claiborne Hardware* Court emphasized that Mississippi could enjoin violence and threats of violence, and could impose liability on any boycottter for the damage his threats and violence caused.<sup>108</sup> A state should also be able to impose liability for any speech or expressive conduct in a boycott that would not be protected outside of a boycott because of its defamatory content<sup>109</sup> or "fighting"

106. *But cf.* Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 34-38 (1979) (utilizing logical fallacy that the greater must include the lesser to support government regulation of commercial advertising).

107. 339 U.S. at 468 (claiming that California could enjoin peaceful picketing because state might prohibit an employer from adopting a quota system, regardless of whether California had actually done so). Several Justices seemed to disagree with this claim. *See id.* at 469 (Black & Minton, JJ., concurring); *id.* (Reed, J., concurring); *Hughes v. Superior Court*, 32 Cal. 2d 850, 867, 198 P.2d 885, 895 (1948) (Traynor, J., dissenting). In *Teamsters Union Local 309 v. Hanke*, 339 U.S. 470 (1950), Justice Frankfurter, for a majority of the Court, seemed to apply the illegal objective doctrine to prohibit picketing urging consumers to boycott an employer for not performing a legal act—setting up a union shop. Justice Frankfurter's *Hanke* analysis is therefore vulnerable to criticism similar to that directed against his *Hughes* opinion. *See Cox, supra* note 84, at 586-91. The result in *Hanke* can be squared with a consumer right to boycott, however, because the picketing there was aimed at employees.

108. 102 S. Ct. at 3426.

109. A defamation action does not generally require proof of the boycotters' reckless disregard of the truth. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Business boycott targets in most cases would not qualify as "public figures" or individuals who had voluntarily thrust themselves into a public controversy. *See Wolston v. Readers Digest Ass'n, Inc.*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

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message likely to provoke listeners to commit acts of violence.<sup>110</sup> A state could also regulate some boycott speech if boycotters made factual misrepresentations to potential consumers.<sup>111</sup> Perhaps the state might even restrict extreme public humiliation of those who refuse to join a boycott, although *Claiborne Hardware* seemed to protect the psychologically coercive tactics of the boycotters.<sup>112</sup> In any event, courts should not protect

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110. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The *Chaplinsky* doctrine has been narrowly construed by the Court and seems now to apply only when the fighting words are directed toward particular individuals likely to react violently. See *Hess v. Indiana*, 414 U.S. 105 (1973); *Cohen v. California*, 403 U.S. 15 (1971).

111. The Court has never held that the state can regulate political speech in the interest of insuring that potential voters are not misled by misrepresentations. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (state cannot require newspaper to grant political candidate space to reply to attack); *Mills v. Alabama*, 384 U.S. 214 (1966) (state cannot proscribe all campaign-related speech on election day). In recent decisions extending First Amendment protection to commercial speech, however, the Court has said it will not disturb states' power to protect consumers from "false, deceptive, and misleading" commercial representations. *Friedman v. Rogers*, 440 U.S. 1, 9 (1979); see *Bates v. State Bar*, 433 U.S. 350, 383 (1977); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976). The reasons for permitting greater government regulation of commercial advertising include its supposed durability resulting from profitability and the assumption that advertisers have a relatively easy task of verification. See *id.* at 771 n.24. These rationales may not apply to speech advocating a political consumer boycott. Yet the danger of government bias against those who seek economic votes through the use of alleged misrepresentations is much less than the danger of government bias against those who seek political votes with alleged misrepresentations. See Cooper, *The Tax Treatment of Business Grassroots Lobbying: Defining and Attaining The Public Policy Objectives*, 68 COLUM. L. REV. 801, 832 (1968). Therefore, the state should be able to restrict boycotters from inaccurate statements of fact. However, robust free speech would be sacrificed if a state could restrict boycotters' expression of their own perceptions, say, of an employer's unfairness to blacks or unions, because the state's courts view these perceptions to be inaccurate. See *State ex rel. Fair Share Org., Inc. v. Newton Circuit Court*, 244 Ind. 112, 191 N.E.2d 1 (1963) (permitting injunction against picketers claiming that store "discriminates against Negroes" because court did not agree with picketers' perception).

112. The Court summarized the matter:

[N]ames of boycott violators were read aloud at meetings at the First Baptist Church and published in a local black newspaper. Petitioners admittedly sought to persuade others to join the boycott through social pressure and the "threat" of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.

*Claiborne Hardware*, 102 S. Ct. at 3424.

The argument that the First Amendment should not protect the publication of names of boycott violators would rest on a contention that these boycotters may have considered their purchasing decisions private. The argument has several weaknesses. First, the Supreme Court has never carved out an exception to the First Amendment to accommodate private control of information. Cf. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (holding that newspaper can publish identity of rape victim that is a matter of public record); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (holding protected the distribution of leaflets to a realtor's neighbors describing the realtor's "blockbusting" tactics). Second, a Court ready to carve out such an exception would begin with information concerning citizens' intimate activities and bodily functions, not with information about citizens' general purchasing decisions in a public store. Third, a decision to join a boycott to influence social or economic decisionmaking can affect the organization of society and should be viewed as public for purposes of First Amendment protection, regardless of the subjective perceptions of some of the decisionmakers.

Of course, neither the *Claiborne Hardware* decision nor full protection of the right to boycott should restrict the state's power to protect boycott violators from coercive actions by boycott supporters. The state cannot effectively prevent disapproving gazes and social ostracism. It can, however, both regulate abusive language, see *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and prohibit

speech incident to a boycott more than they would protect the same speech outside a boycott.<sup>113</sup>

### 5. *The Right Should Include a Right To Engage in Associated Peaceful Picketing*

The previously discussed principle implies its converse: Courts should give no less protection to speech because it is used to advance a protected boycott. Clearly, speech that is otherwise protected should not be restricted because it advocates exercise of another political right. This converse principle mandates full protection for picketing on public property to urge participation in a protected consumer boycott.<sup>114</sup> In the first place, boycott organizers have no alternative means of communication, such as newspaper or radio advertising, that are as cost-effective as peaceful picketing in front of a business.<sup>115</sup> The best time to communicate with potential consumers is when a possible purchase is imminent.<sup>116</sup> Although boycott organizers could communicate through leaflets without actually patrolling a business site, off-site handbilling is more easily ignored and picketing may have a symbolic persuasiveness for some consumers that handbilling lacks.<sup>117</sup>

such punishments as fines and expulsion from an association.

113. A consumer right to boycott also obviously need not encompass any disruptive consumer conduct, albeit expressive, which entails more than the decision not to purchase. *See Ford v. Boeger*, 236 F. Supp. 831 (E.D. Mo. 1964) (sit-in), *aff'd*, 362 F.2d 999 (8th Cir. 1966), *cert. denied*, 386 U.S. 914 (1967); *Potomac Elec. Power Co. v. Washington Chapter of CORE*, 210 F. Supp. 418 (D.D.C. 1962) (defacing billing stubs to be returned with utility bills).

114. Picketing or handbilling on private property is normally not protected by the First Amendment from state trespass laws. *See Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

115. An attempt to justify a restriction on speech by citing alternatives must consider their relative cost, as well as their relative effectiveness. *See Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 93 (1977). This is especially true when the inhibited means of communication is commonly used more by the poor than the rich. *See Martin v. City of Struthers*, 319 U.S. 141, 146 (1943). The admonition of Professor Kalven should be heeded: "We would do well to avoid . . . new epigrams about the majestic equality of the law prohibiting the rich man, too, from distributing leaflets or picketing." Kalven, *supra* note 22, at 1, 30.

In any event, restricting communications on public streets and ways, unlike restricting communications on private property, should not be justified easily against a First Amendment challenge by the availability of alternative means of communication, because public streets and ways traditionally have been considered among the most important of our public forums. *See United States v. Grace*, 103 S. Ct. 1702, 1706-07 (1983); *Carey v. Brown*, 447 U.S. 455, 460 (1980); *Police Dep't. v. Mosley*, 408 U.S. 92, 98-99 (1972); *Hague v. CIO*, 307 U.S. 496, 515 (1939). *See generally* Kalven, *supra* note 22, at 30 (arguing that expression on public streets must be given special protection in an open society).

116. Not only are potential consumers more interested in information relevant to a purchasing decision when the decision is imminent, but potential purchasers are also more easily identifiable by those who would attempt to persuade them immediately prior to the purchasing decision. *See Seattle-First Nat'l Bank v. NLRB*, 651 F.2d 1272, 1276 (9th Cir. 1980) (upholding NLRB finding that employer violated NLRA by preventing picketing in a 46th floor foyer immediately in front of a struck restaurant).

117. Justice Frankfurter drew inappropriate conclusions about the emotive content of pickets, *see*

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Neither the implicit coerciveness of picketing nor its appeal to emotion is a persuasive ground for denying peaceful picketing the full protection of the First Amendment. Some Justices have suggested that the state can restrict picketing that urges participation in a boycott because such picketing coerces its intended audience.<sup>118</sup> When there are many picketers on the line, many consumers may find picketing implicitly threatening, but peaceful picketing by a limited number of amiable people may not be at all threatening. Moreover, as the *Claiborne Hardware* Court stressed, since the state can control violence directly, threats perceived by the wary in vigorous peaceful picketing should not justify restraint.<sup>119</sup>

Of course, those who cross even peaceful, nonthreatening picket lines may suffer disapproving looks and comments from their neighbors. Those who reject appeals to take a political position, however, always risk social pressures, and the Court has never restricted other political appeals because of concern about such pressures. The *Claiborne Hardware* Court, for instance, expressly protected boycotters' direct efforts to persuade others to join "through social pressure and the 'threat' of social ostracism."<sup>120</sup> Those consumers who wished to defy the Claiborne boycott had to brave not only picket lines, but also the announcement of their defiance at church meetings and in local newspapers. The *Claiborne Hardware* Court, moreover, relied on its decision in *Organization for a Better Austin v. Keefe*,<sup>121</sup> which had protected the distribution of leaflets near the home of a real estate broker to elicit the support of his neighbors against his "blockbusting" practices.<sup>122</sup> Beyond the punishments approved in *Claiborne Hardware*, the state might wish to restrict boycott organizers from imposing certain sanctions, such as fines or expulsion from organizational membership, on boycott violators, but it should not proscribe peaceful consumer pickets because of a concern for the psychological coercion of potential consumers.<sup>123</sup>

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*infra* pp. 441–42, but he was correct that the "loyalties and responses evoked and exacted by picket lines" may be "unlike those flowing from appeals by printed word." *Hughes v. Superior Court*, 339 U.S. 460, 465 (1950).

118. See, e.g., *NLRB v. Retail Store Employees Union Local 1001*, 447 U.S. 607, 617–18 (1980) (*Safeco*) (Blackmun, J., concurring); *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 776–77 (1942) (Douglas, J., concurring).

119. Although the *Claiborne Hardware* picketers were "often small children," 102 S. Ct. at 3420, the Court could not describe the picketers as especially passive, given the participation of the adult male "Black Hats" or "Deacons" who stood outside stores recording the names of boycott violators. *Id.* at 3421.

120. 102 S. Ct. at 3424. For a full quotation, see *supra* note 112.

121. 402 U.S. 415 (1971).

122. *Id.* at 416.

123. The potential abuse of associational power should be dealt with directly when abuse occurs, and not by preventing the association from engaging in legal conduct to which individuals can claim a right. Cf. *NAACP v. Button*, 371 U.S. 415, 444 (1963) (right to engage in political litigation available to NAACP as an association).

Some Justices have also argued that picketing is not mere speech because it appeals to emotional commitments or loyalties rather than reason.<sup>124</sup> This rationale is similarly unpersuasive. The Court has held repeatedly that the First Amendment protects even symbolic speech containing no substantive message and appealing only to those with preformed opinions. The Court has protected the displaying of a red flag "as a sign, symbol or emblem of opposition to organized government"<sup>125</sup> and the wearing of black armbands to symbolize opposition to the Vietnam War.<sup>126</sup> A decade ago in *Cohen v. California*, the Court vacated the conviction of a young man for wearing the slogan "Fuck the Draft" on his jacket in a public corridor of a courthouse.<sup>127</sup> Justice Harlan's majority opinion in *Cohen* explained that the Court "cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."<sup>128</sup>

#### 6. *The Right Should Not Be Limited Because of Incidental Harmful Effects on Non-Targeted Parties*

Two additional possible limits must be rejected. First, as long as boycott organizers intend to affect only those parties, whether public or private, from whom they seek social change, the right should not be restricted because of the possibility of incidental harmful effects on apparently neutral parties.<sup>129</sup>

Of course, some consumer boycotts inevitably harm innocent parties. For instance, the boycott that the National Organization for Women (NOW) organized against political convention sites in states that had not ratified the Equal Rights Amendment (ERA) probably directly injured some proprietors of hotels, restaurants, and other tourist services, as well as some employees, who were active supporters of the ERA.<sup>130</sup> The Clai-

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124. See *NLRB v. Retail Store Employees Union Local 1001*, 447 U.S. 607, 618-19 (1980) (*Safeco*) (Stevens, J., concurring); *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 93 (1964) (*Tree Fruits*) (Harlan, J., dissenting); *Hughes v. Superior Court*, 339 U.S. 460, 465 (1950) (Frankfurter, J.). See *infra* pp. 441-42.

125. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

126. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).

127. 403 U.S. 15 (1971).

128. *Id.* at 26; see also *Spence v. Washington*, 418 U.S. 405, 410 (1974) (per curiam) (protecting as a "form of symbolism" and "a short cut from mind to mind" the display of an American flag upside down with an attached peace symbol).

129. Some commentators have asserted that such impact should justify restrictions on political boycotts. See Note, *Constitutional Rights of Noncommercial Boycotters: A Delicate Balance*, 10 HOFSTRA L. REV. 773 (1982); Note, *Political Boycott Activity and the First Amendment*, *supra* note 16, at 986-87.

130. See *Missouri v. NOW*, 620 F.2d 1301, 1317 (8th Cir.) (holding NOW boycott protected

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borne County boycotters also may have injured some innocent employees and suppliers along with the white businessmen whom the boycotters had targeted.

Taking the right to boycott seriously, however, requires protecting it against claims of incidental injury to interests without comparable constitutional protection.<sup>131</sup> It is beyond dispute that no constitutional right generally protects producers from shifts in consumer preferences, and it would be inconsistent to protect producers from boycotts that cause such shifts. When a business constructs a new hotel in a particular neighborhood, the business runs a risk that factors beyond the hotel's control will someday make the neighborhood less attractive. The risk that a political controversy not of the hotel's making will result in a boycott against the state is similar. The state may wish to insure hotels and other businesses against such risk or to compensate them for unforeseeable developments, but the state should not have the authority to restrict consumers' rights to refuse to patronize because of the incidental effects of such refusals.

### 7. *The Right Should Extend to Self-Interested Consumer Boycotters*

The other important limit on the right that must be rejected is one that would deny protection to those boycotts motivated by the self-interest of the boycott leaders rather than by idealism or altruism. The *Claiborne Hardware* opinion stresses the boycotters' desire to vindicate rights of equality and of freedom.<sup>132</sup> Although this might suggest a distinction between boycotts that advance political ideals and those that advance the boycotters' self-interest, such a distinction would be difficult to apply because acts of self-interest are not easily separated from acts of ideological commitment. Moreover, even if manageable, the distinction would be inconsistent with settled First Amendment jurisprudence and with the derivation of the right to boycott advocated above.<sup>133</sup> The Court has consist-

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from state tort law claim because "right to petition is of such importance that it is not an improper interference even when exercised by way of a boycott"), *cert. denied*, 449 U.S. 842 (1980). The *NOW* decision provoked much commentary. See, e.g., Cockerill, *Application of Noerr-Pennington and the First Amendment to Politically Motivated Economic Boycotts*; Missouri v. NOW, 13 LOY. L.A.L. REV. 85 (1979); Note, *Concerted Refusals to Deal by Non-Business Groups: A Critique of Missouri v. NOW*, 49 GEO. WASH. L. REV. 143 (1980); Note, *Protest Boycotts Under the Sherman Act*, *supra* note 16.

131. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 191-92 (1977).

132. *Claiborne Hardware*, 102 S. Ct. at 3426.

133. The Court has held that commercial speech is protected by the First Amendment but should not necessarily be given protection equal to that of other forms of speech. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (permitting state restriction of attorneys' in-person solicitation of clients); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976). But this doctrine distinguishes a *type* of speech—speech advocating the sale of a product because of its merits—not the *motivation* of the speaker. The Court could develop a complementary commercial doctrine to more readily approve restrictions on speech that advocates consumer boycotts of one product because of the commercial superiority of another product. If the Court is willing to

ently accorded political acts motivated by economic self-interest as much protection as political acts motivated by visionary altruism.<sup>134</sup>

### III. THE CONSUMER'S RIGHT TO BOYCOTT AND LABOR LAW

This section applies the right to boycott developed above to consumer boycotts organized by labor unions to advance the economic interests of their members. The section explores the regulation by the National Labor Relations Act (NLRA, or Act) of two types of union-organized consumer boycotts: those with a "secondary" objective and those with a "recognition" or "organizational" objective. The section suggests that this regulation inappropriately infringes on the consumer's right to participate in concerted refusals to purchase.

#### A. *The Right Should Apply to Consumer Boycotts and Associated Picketing Designed To Affect Labor Relations Policies*

Consumer boycotts and associated picketing that are related to labor relations deserve no less protection than other political boycotts and picketing. In *Police Department of Chicago v. Mosley*<sup>135</sup> and *Carey v. Brown*,<sup>136</sup> the Court held that the equal protection clause prevents the state from defining "permissible picketing in terms of its subject matter"<sup>137</sup> when the state favors labor picketing over picketing that conveyed other messages. A state's efforts to disfavor labor picketing because of its content should meet with the same result. Communications concerning an employer's policies regarding labor unions or industrial relations deserve as much protection as communications concerning an employer's stand on civil rights or other political matters.<sup>138</sup> The resolution of labor controversies may affect as many people and be as important to the organization of

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define businesses' commercial decisions as socially unimportant, such a doctrine might be viewed as consistent with a right to boycott to influence social decisionmaking. See generally Hersbergen, *Picketing By Aggrieved Consumers—A Case Law Analysis*, 59 IOWA L. REV. 1097 (1974) (discussing cases dealing with boycotts and picketing motivated by dissatisfaction with products or commercial practices). No commercial speech exception, however, should permit greater restrictions on the advocacy of a consumer boycott based on the identity or motivation of the organizers.

134. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 138 (1961) (*Noerr*). But see Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976) (arguing that when speech is primarily motivated by search for profits, it does not express values of individuals or groups engaged in advocacy, and its regulation therefore does not trench upon First Amendment values).

135. 408 U.S. 92 (1972).

136. 447 U.S. 455 (1980).

137. *Id.* at 462 (quoting *Mosley*, 408 U.S. at 95).

138. "And the Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP." *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 8 (1964).

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our society as the outcomes of general elections.<sup>139</sup> In any event, it is too late to argue that legislatures should be able to draw content-based distinctions between speech concerning labor matters and other speech concerning the structure of our society. For the past four decades, the Court has recognized that “the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution . . . . Free discussion concerning the conditions in industry and the causes of labor disputes [is] indispensable . . . .”<sup>140</sup> Speech by laborers and employers concerning industrial relations is not simply commercial speech regarding the sale of goods; it is speech about how we should order an aspect of society.<sup>141</sup>

Any assumption that Congress can regulate publicity concerning labor disputes as part of its policy of balancing the relative power of labor and management would also neglect First Amendment jurisprudence. The Court has recognized that First Amendment values would be sacrificed if it permitted states to restrict speech because the speech might be too effective and therefore might make the speakers too influential or powerful.<sup>142</sup> Indeed, in decisions like *Buckley v. Valeo*,<sup>143</sup> the Court has disapproved legislative restrictions on protected speech even though those restrictions were designed to ensure that other protected activity not be drowned out or stifled.<sup>144</sup>

One might argue that Congress should be able to restrict union speech because it has strengthened union power by establishing a comprehensive

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139. See Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 954-57 (1982).

140. *Thomas v. Collins*, 323 U.S. 516, 532 (1945) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102-03 (1940)); see also *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477 (1941) (indicating that the First Amendment also protects employer speech to employees concerning unions); *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 478 (1937) (“Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.”).

141. See Note, *supra* note 139, at 958. But see A. COX, FREEDOM OF EXPRESSION 47-48 (1981). In *Connick v. Myers*, 103 S. Ct. 1684, 1690 (1983), the Court held that a state may discipline its employees for speech concerning the employees’ working conditions, though not for speech concerning “a matter of public concern.” The Court made clear, however, that its holding did not lessen First Amendment protection for speech concerning labor matters, but only insured that public employers could have disciplinary control over public employees comparable to their private sector counterparts. *Id.*

142. *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 775 (1942) (Douglas, J., concurring) (arguing that to permit restrictions on picketing because it is effective would directly contradict First Amendment values); cf. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981) (“A State may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information’s effect upon its disseminators and its recipients.”).

143. 424 U.S. 1 (1976) (per curiam).

144. *Id.* at 48-49 (1976); accord *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 791 n.30 (1978); cf. *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973) (refusing to compel FCC to require broadcast licenses to sell editorial time).

scheme for regulating relations between labor and management. In *Buckley v. Valeo*, for example, the Court did not question federal limitations on the campaign expenditures of those presidential candidates who accept public financing.<sup>145</sup> Yet, even if campaign finance laws provide exceptions to the general proposition that the state cannot demand the sacrifice of political rights as compensation for regulatory benefits,<sup>146</sup> federal labor law should not provide a further exception. A presidential candidate's acceptance of public funding is voluntary and thus quite distinct from a union's mandatory involvement in the federal labor-management regulatory scheme. Furthermore, the expenditure of public money is a direct substitute for that expenditure of private funds which the election laws limit, while the benefits that the federal labor laws accord labor unions are not direct substitutes for union political actions such as organizing consumer boycotts.<sup>147</sup>

Finally, one might argue that labor picketing is "conduct" rather than "expression," and therefore labor picketing associated with consumer boycotts deserves reduced protection. In an important labor decision decided just two Terms before *Claiborne Hardware, NLRB v. Retail Store Employees Union Local 1001 (Safeco)*,<sup>148</sup> Justice Stevens argued in a concurrence that "picketing is a mixture of conduct and communication" and that in "the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment."<sup>149</sup> Justice Stevens asserted that picketing, unlike "handbills containing the same message," calls for "an automatic response to a signal rather than a reasoned response to an idea."<sup>150</sup>

In light of Justice Stevens' view of labor picketing in *Safeco*, one wonders why in *Claiborne Hardware* he denied Mississippi's authority to protect its citizens from potential violence and its businesses from economic disruption. Many consumers loyal to the labor movement may ob-

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145. 424 U.S. at 88-89, 108. These particular limitations, however, do not seem to have been challenged in the case. *See id.*

146. *See Connick v. Myers*, 103 S. Ct. 1684 (1983); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Elrod v. Burns*, 427 U.S. 347 (1976); *Perry v. Sindermann*, 408 U.S. 593 (1972) (state may not terminate public employment benefits because of employee's protected First Amendment activity).

147. The consumer boycott organizational efforts of union members should not be more vulnerable to regulation because they are motivated by these members' self-interest. Civil rights boycott organizers such as those in Claiborne County may also be motivated by self-interest. As explained above, *see supra* p. 439, the motivation of boycott organizers and participants should be irrelevant to a boycott's protection. *See also* Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469, 1486 (1982) (decision to boycott is always made for political reasons whatever the economic motives).

148. 447 U.S. 607 (1980).

149. *Id.* at 619.

150. *Id.*

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serve union pickets without any reasoned analysis of the justice of the cause of the particular pickets; the automatic loyalty of many consumers to the civil rights movement is no less. It seems unlikely that Claiborne County consumers gave a more "reasoned response to an idea" expressed by the pickets than labor-sympathetic consumers would to union pickets. More importantly, the Court has often held that symbolic speech that appeals only to pre-formed opinions deserves full protection.<sup>151</sup>

Justice Stevens assumed that the Court can offer less First Amendment protection to labor pickets likely to appeal to emotional commitments and loyalties than it offers to similar speech by others. The assumption dates back forty years to Justice Douglas' often quoted characterization of labor picketing as "more than . . . speech."<sup>152</sup> It reflects the Court's continuing confusion over when regulation of labor picketing is appropriate. Professor Cox attempted to clarify the issue by contrasting picketing that "appeals only to reason, *loyalty and other emotions*" with "picketing backed by the threat of [concerted refusals to work by union employees]."<sup>153</sup> Cox argued that the former ("publicity" picketing) involved publicizing a labor dispute to potential consumers and that the latter ("signal" picketing) typically served as a signal of an agreement to strike by union employees, characteristically backed by the threat of union discipline or ostracism.<sup>154</sup> Cox's distinction, however, does not justify Justice Frankfurter's opinion in *Hughes*,<sup>155</sup> which extended to consumer picketing the presumption that picketing is more than speech.<sup>156</sup> Justice Stevens in *Safeco* similarly

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151. See *supra* p. 438. Justice Stevens made no serious effort to square his *Claiborne Hardware* opinion with his *Safeco* opinion. However, he did make a perfunctory reference to *Safeco* in *Claiborne Hardware*. 102 S. Ct. at 3425-26. A recent Note, *supra* note 139, cites this reference as establishing an illusory distinction between "public issue" picketing and labor picketing which permits the states to restrict the latter more easily than the former. *Id.* at 947-49. Fortunately for the development of our law, such specious distinctions cannot always withstand the force of a new and cogent legal principle, even when the principle is pronounced in a case that purportedly clings to the distinction.

152. "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another quite irrespective of the nature of the ideas which are being disseminated." *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 776-77 (1942) (Douglas, J., concurring). Picketing, of course, does include conduct as well as communication, and, like all conduct, see *supra* p. 414, it sometimes can be regulated for such legitimate reasons as preventing physical coercion, see *supra* p. 436. This does not justify regulation based on the content of the communication, however. See *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 76-79 (1964) (*Tree Fruits*) (Black, J., concurring). For reasons stated in the text, this is true even when the communication is symbolic.

153. Cox, *supra* note 84, at 594 (emphasis added). Professor Cox's analysis drew on Justice Traynor's dissent in *Hughes v. Superior Court*, 32 Cal. 2d 850, 867, 198 P.2d 885, 895 (1948) (Traynor, J., dissenting), *aff'd*, 339 U.S. 460 (1950). See Cox, *The Influence of Mr. Justice Murphy on Labor Law*, 48 MICH. L. REV. 767, 788-89 (1950) (drawing same contrast); see also *Fruit & Vegetable Packers Local 760 v. NLRB*, 308 F.2d 311, 316 (D.C. Cir. 1962) (citing Cox), *vacated*, 377 U.S. 58 (1964); T. EMERSON, *supra* note 22, at 445 (distinguishing "expression" from "economic coercion").

154. Cox, *supra* note 84, at 595.

155. 339 U.S. 460 (1950).

156. *Id.* at 465. Justice Douglas came to regret Justice Frankfurter's use of his *Wohl* rhetoric. See

twisted Cox's distinction by suggesting that picketing which "signals" preformed emotions and loyalties should be distinguished from picketing calling for a reasoned response to an idea, regardless of whether the audience consists of employees or consumers, and regardless of the likelihood of the audience's having any prearranged agreement to respond.<sup>157</sup>

On this point, however, Justice Stevens' opinion in *Claiborne Hardware* might instruct more successfully than did Cox's article. As discussed above,<sup>158</sup> Justice Stevens' distinction of *Hughes* rested on the assumed illegality of the goal of the *Hughes* boycotters, not on any suggestion that their pickets were more apt to "signal" loyalties or emotions than were the *Claiborne Hardware* pickets.<sup>159</sup> The distinction Professor Cox drew between pickets aimed at employees and those aimed at consumers should turn not on the different natures of the appeals to the two types of audiences, but rather on the state's greater authority to restrict employee boycotts than to control consumer boycotts. This is a simple application of the first definitional principle developed above, which recognizes the state's need to regulate citizens in their specialized economic roles as producers.<sup>160</sup>

#### B. *Secondary Consumer Boycotts and the NLRA*

An examination of section 8(b)(4)(ii)(B) of the NLRA readily highlights the sharp contrast between the right to boycott suggested by *Claiborne Hardware* and the doctrines that both Congress and the Supreme Court have developed to govern consumer boycotts organized by labor unions. Section 8(b)(4)(ii)(B) prohibits labor unions from coercing one business to cease dealing with another business; "coercion" encompasses any means beyond limited non-picketing publicity.<sup>161</sup> In

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Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284, 295-97 (1957) (Douglas, J., dissenting). Justice Frankfurter's willingness to permit restrictions on peaceful picketing because its communicative content could not be considered part of an abstract intellectual dialogue to achieve truth possibly reflected his self-conception as a defender of high reason against passion. See H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 41, 66 (1981).

157. *Safeco*, 447 U.S. at 619.

158. See *supra* p. 432.

159. *Claiborne Hardware*, 102 S. Ct. at 3427 n.49.

160. See *supra* p. 429. If the state's authority is exercised to declare illegal some type of unreasonably disruptive work stoppages, then any type of communication to spark such a work stoppage, no matter how reasoned and in what form, should be prohibited.

161. Section 8(b)(4)(ii)(B) provides:

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

A proviso to § 8(b)(4) protects certain union boycott-organizing tactics by exempting from all of the section's proscriptions "publicity . . . for the purpose of truthfully advising the public, including con-

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*Safeco*,<sup>162</sup> the Supreme Court held that this section makes certain union-organized consumer boycotts unlawful.<sup>163</sup>

There, the Retail Store Employees Union encouraged consumers not to purchase Safeco's title insurance at five independent title companies. The Court had previously held in *NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits)* that section 8(b)(4)(ii)(B) did not proscribe boycotts of products rather than of entire businesses.<sup>164</sup> The *Safeco* Court retreated from *Tree Fruits* by holding that picketing would be illegal if designed to induce a product boycott that is also likely "to induce customers not to patronize" a neutral business and to threaten that neutral business with "substantial loss."<sup>165</sup> Since the union's dispute was only with Safeco's labor policies and since the independent title companies derived almost all of their income from sales of Safeco's insurance,<sup>166</sup> the Court declared the union's picketing of the five companies unlawful.

To understand how the interpretation given section 8(b)(4)(ii)(B) in *Safeco* infringes on the consumer right to boycott developed here, one must recall two of the definitional principles elaborated above. First, the state can declare certain producer boycotts illegal, such as those of one business by another business; and second, the state can outlaw consumer boycotts designed to compel an independently illegal act. Under these principles, the state should be able to proscribe only union-organized consumer boycotts that attempt to utilize special economic power of producers that the producers themselves may not legally use in a boycott.

The *Safeco* Court's interpretation of section 8(b)(4)(ii)(B), however, permits more intrusive state action. In the first place, no laws make illegal the goal of the *Safeco* picketers—a decision by each of the five local title companies to cease doing business with Safeco. Any or all of the five companies could have decided, because of the loss of business caused by the Safeco boycott, to go out of business or to transfer their business to an-

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sumers and members of a labor organization that a product or products are produced by an employer with whom the labor organization has the primary dispute and are distributed by another employer . . . ." 29 U.S.C. § 158(b)(4) (1976). This proviso, however, expressly denies protection both to union efforts to inform customers through picketing and to any union publicity, including handbilling or newspaper publications, which have an ancillary effect of inducing any employee of the distributing employer to refuse to perform any services. *Id.* Furthermore, the proviso does not protect certain other peaceful boycott techniques, including some employed by the Claiborne County boycotters, such as publishing the names of boycott violators and threatening social pressure and ostracism.

162. 447 U.S. 607 (1980).

163. Although the *Safeco* Court dealt with a congressional restriction on picketing, while the *Claiborne Hardware* Court dealt with a state restriction, there is no reason to think the federal-state distinction should make a difference.

164. 377 U.S. 58 (1964).

165. 447 U.S. at 614, 615 n.11.

166. In fact, the five title companies were only formally independent of Safeco. Safeco owned substantial stock in each, and the Board of Directors of each included at least one Safeco officer. *Id.* at 609.

other underwriter without fear of any legal action. This is significant because no peaceful and otherwise legal consumer boycott of a supposedly neutral seller of goods should be made illegal unless the seller could not legally comply with the boycotters' demands. To prevent consumers from attempting to influence lawful decisions of sellers would obstruct the goal of equalizing the potential influence of all citizens on important decision-making in our society. Thus, section 8(b)(4)(ii)(B) should not restrict ordinary consumers from using their limited buying power to try to affect the employment relations of society unless businesses are also restricted from using their special economic power.<sup>167</sup>

Congress, of course, could eliminate this aspect of the Act's infringement of consumer power by proscribing labor-related business boycotts of other businesses.<sup>168</sup> Even were it to do so,<sup>169</sup> however, section 8(b)(4)(ii)(B) as interpreted in *Safeco* would infringe inappropriately on the right to boycott. The *Safeco* boycotters in fact were not attempting to augment their protected consumer economic power with the special economic power of the five title companies. The *Safeco* boycott was directed at the products of Safeco—not the products sold by the five local companies. The boycott's economic impact thus came totally from the aggregate impact of individual consumers' decisions not to use Safeco's underwriting services. The effect would have been the same if the individual consumers' decisions not to patronize Safeco's product were based on the intrinsic quality of the product, rather than on the labor policies of the producer. Under these circumstances, any of the five companies that ceased doing business with Safeco would have done so because of declining sales

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167. Justice Powell, writing for three other Justices, dismissed the constitutional issue in *Safeco* in one paragraph. Powell claimed that the union's picketing could be declared illegal because it coerced "a neutral party to join the fray" and therefore had "unlawful objectives." *Id.* at 616. Powell did not explain, however, why the "neutral" local businesses would have been acting illegally had they joined "the fray." Perhaps Powell intended to characterize the injury to the local companies, rather than the companies' participation in the campaign, as the "unlawful objective" of the boycotters. However, the boycotters' objective was not to injure the local businesses, and incidental injury to these businesses should not have justified restraint of the boycotters' constitutional rights. See *supra* p. 439. Powell relied on *Electrical Workers v. NLRB*, 341 U.S. 694 (1951), which upheld the constitutionality of § 8(b)(4)(ii)(B), but in a case dealing with employee boycotts rather than consumer boycotts.

Justice Stevens' concurring opinion on the First Amendment issue in *Safeco*, 447 U.S. at 618-19, is discussed *supra* p. 442. Justice Blackmun also wrote a separate concurring opinion on the constitutional issue. See 447 U.S. at 616-18 (Blackmun, J., concurring).

168. For example, Congress has prohibited "hot cargo clauses," or voluntary employer-union agreements not to deal with other employers engaged in a labor dispute, in order to close a perceived loophole in the NLRA. See 29 U.S.C. § 158(e) (1976).

169. However, even a proscription of business boycotts would not restrict a parent company's right to control its subsidiaries. Therefore, Congress should not prohibit a consumer boycott of any of the businesses of a parent company because of the labor policies of any other company which the parent has the right to control. *But see* *Pet, Inc. v. NLRB*, 641 F.2d 545 (8th Cir. 1981) (holding that the publicity proviso does not protect distribution of leaflets to consumers of products of parent company because of strike at subsidiary).

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of Safeco's insurance, not because the boycotters threatened to boycott the title company's other products.<sup>170</sup>

Full protection of the right to boycott suggested by *Claiborne Hardware* requires strict adherence to the reading given section 8(b)(4)(ii)(B) by the Supreme Court in *Tree Fruits*: The section does not cover "consumer picketing employed only to persuade customers not to buy the struck product" where "the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchase of the struck product."<sup>171</sup> The *Safeco* decision, however, eroded the *Tree Fruit*'s refinement of section 8(b)(4)(ii)(B) by approving both the "primary" or "single product" and the "merged product" exceptions.<sup>172</sup>

The "single product" exception permits restricting the boycotting of any business, like a gasoline refinery,<sup>173</sup> a restaurant franchisor,<sup>174</sup> or perhaps a housing builder,<sup>175</sup> that sells its product through independent sellers dependent on the sales of one or a few products. Any effective picketing of such independent sellers, of course, will threaten them with the "ruin or substantial loss" that *Safeco* held justifies application of the section 8(b)(4)(ii)(B) restrictions.

The merged product doctrine permits application of section 8(b)(4)(ii)(B) to boycotted products sold to consumers only as part of the sale of the "neutral" seller's other products. For instance, the doctrine invalidated picketing a bank because of the labor policies of the company providing it with janitorial services,<sup>176</sup> picketing intended to spark a consumer boycott of products whose advertising supported a radio or television station or newspaper with objectionable labor policies,<sup>177</sup> and picket-

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170. Of course, any seller who cannot replace the boycotted product with another product and maintain its pre-boycott profit levels will have good reason to press the targeted business to respond to the boycotters' demands. See Note, *Consumer Picketing and the Single-Product Secondary Employer*, 47 U. CHI. L. REV. 112, 128-29 (1979). However, similar commercially motivated pleas to suppliers from sellers can be expected whenever sellers perceive shifts in consumer demand. Such pleas only express the market power of consumers over the boycotted products; they are not threats by businesses attempting to add their special market power to that of consumers.

171. 377 U.S. 58, 72 (1964). "On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally." *Id.*

172. 447 U.S. at 612-13 & n.7.

173. See *Local 14,055, United Steelworkers*, 211 N.L.R.B. 649, 651-52 (1974) (consumer picketing of gas stations directed against gas refiners held illegal), *enforcement denied*, 524 F.2d 853 (D.C. Cir. 1975), *vacated as moot*, 429 U.S. 807 (1976), *complaint dismissed*, 229 N.L.R.B. 302 (1977).

174. See *Bennett v. Local 456, Teamsters*, 459 F. Supp. 223 (S.D.N.Y. 1978) (consumer picketing of franchised ice cream store directed against franchisor held illegal).

175. See *Hoffman v. Cement Masons Union Local 337*, 468 F.2d 1187 (9th Cir. 1972) (consumer picketing of real estate office directed against housing general contractor held unprotected), *cert. denied*, 411 U.S. 986 (1973).

176. *NLRB v. Building Serv. Employees Int'l Union Local No. 103*, 367 F.2d 227 (10th Cir. 1966).

177. *Honolulu Typographical Union v. NLRB*, 401 F.2d 952 (9th Cir. 1968); *Roywood Corp. v.*

ing designed to discourage the purchase of a targeted bakery's bread that was served as a free side dish by the restaurant the pickets patrolled.<sup>178</sup> In such instances,<sup>179</sup> a consumer's decision not to purchase the boycotted product would necessarily require the consumer also to reject other products sold by the "neutral" business as a package with the boycotted product. The only way for a consumer not to subsidize a bank's janitorial services would be to refuse to purchase any of the bank's services; the only way for a consumer to reject a broadcaster's product is to reject the goods which are advertised on the station,<sup>180</sup> and the only way for a consumer not to purchase bread served without charge by a restaurant is not to purchase the meal that accompanies the bread.<sup>181</sup>

Given the potential effectiveness of publicity picketing, both doctrines affirmed by *Safeco* significantly inhibit the right of union organizers to communicate effectively with possible consumer boycott participants.<sup>182</sup> Furthermore, the state cannot argue that eliminating incidental harm to neutral parties justifies inhibiting the communications of boycott organizers. As the sixth definitional principle stressed, if we take seriously the right to boycott and the right to publicize the boycott, sellers' interests in maintaining high sales that are not themselves protected as rights can-

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Radio Broadcast Technicians Local Union No. 1264, 290 F. Supp. 1008 (S.D. Ala. 1968).

178. *American Bread Co. v. NLRB*, 411 F.2d 147 (6th Cir. 1969).

179. See also *Kroger Co. v. NLRB*, 647 F.2d 634 (6th Cir. 1980) (application of merged product doctrine to store's use of shopping bags produced by the primary boycott target); *Maxey v. Butcher's Union Local No. 126*, 627 F.2d 912 (9th Cir. 1980) (application of doctrine to restaurant's sale of meat processed by the primary boycott target); *K & K Constr. Co. v. NLRB*, 592 F.2d 1228 (3d Cir. 1979) (application of doctrine to housing developer's use of targeted carpentry sub-contractor's work).

180. A newspaper could be boycotted directly by a concerted refusal to purchase. When a large proportion of a newspaper's revenues is derived from the sale of advertisements, however, a consumer's withdrawal of support for the newspaper would not be completely effective without a refusal to purchase the advertised products as well.

181. Actually, the pickets in the *American Bread* case only requested restaurant patrons not to order or eat the bread served with the restaurant's meals. 411 F.2d at 154. However, prospective patrons who wished both to respect the pickets and also to eat bread with their meals would have been obliged to take their business elsewhere.

182. As possible recipients of information about a boycott, potential consumers have a protected First Amendment interest in the boycott organizers' freedom to communicate effectively. See *Virginia Citizens Bd. of Pharmacy v. Virginia Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976) (First Amendment can be asserted by consumers who have an interest in receiving information about a product). Moreover, § 8(b)(4)(ii)(B) is directed only at pickets with a particular message, and the Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 n.10 (1980).

The publicity proviso to § 8(b)(4), see *supra* note 161, protects at least most handbilling that the single and merged product doctrines would otherwise restrain. See *Great Western Broadcasting Corp. v. NLRB*, 356 F.2d 434 (9th Cir. 1966) (interpreting publicity proviso broadly to cover boycotters' publicity against the products advertised by broadcasting station in labor dispute), *cert. denied*, 384 U.S. 1002 (1966). But see *Edward J. DeBartolo Corp. v. NLRB*, 103 S. Ct. 2926 (1983) (outlining use of merged product doctrine to limit proviso's protection of handbilling). In any event, picketing may have a special persuasive force for some consumers. See *supra* p. 436.

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not override the boycott right.<sup>183</sup> There is no right to continued sales that trumps political rights to refuse to purchase.<sup>184</sup>

The NLRB, and many courts, have refused to find picketing protected under the *Tree Fruits* struck-product exception to section (8)(b)(4)(ii)(B) when the picketers failed to identify clearly the struck product they did not wish consumers to buy or the targeted employer who produced this product.<sup>185</sup> If the Act outlawed a business's participation in a labor boycott against another business, this clear identification requirement would be a reasonable means to ensure that unions do not urge consumers to increase their market votes by coercing a "neutral" business to join their boycott. Assuming the law makes a union's responsibilities clear, the Board and the courts could infer that a union intends to incite a general boycott of a retail establishment by displaying placards or handbills<sup>186</sup> that do not clearly identify both the primary target and the means by which sympathetic consumers can use their market votes directly against the target.<sup>187</sup>

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183. See *supra* p. 439. The NOW boycott of convention sites in states that failed to ratify the ERA probably should be considered a merged product boycott. See *Missouri v. NOW*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980). The only way that the NOW convention planners could register economic votes against businessmen who had not supported ERA passage was to refuse to bring any convention business to the state.

184. This analysis also supports the protection of boycotts organized by groups who are morally offended by the content of certain television programs against the products whose advertising supports these programs. Whether a consumer dislikes the labor policies of a producer of a television program or the social content of the program, the consumer can refuse to support the program by refusing to purchase the products that support it. Moreover, since advertising differentiates commercial products, the program sponsoring an advertisement becomes inextricably tied to the product.

185. See *Kaynard v. Independent Routemen's Ass'n*, 479 F.2d 1070, 1073 (2d Cir. 1973); *NLRB v. Local 254, Bldg. Serv. Employees Int'l Union*, 359 F.2d 289 (1st Cir. 1966); *Anderson v. International Bhd. of Elec. Workers Local No. 712*, 422 F. Supp. 1379, 1383 (W.D. Pa. 1976); *Local 248, Meat & Allied Food Workers*, 230 N.L.R.B. 189, 189 & n.2 (1977).

186. The proviso to § 8(b)(4) protects "publicity, other than picketing," but only when it "truthfully" advises "that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." 29 U.S.C. § 158(b)(4) (1976). Courts therefore might prohibit handbilling which did not "truthfully" and adequately identify the precise employer with whom the union had a primary dispute.

The proviso also seems not to protect non-picketing publicity that attacks the "neutral" secondary employer directly in addition to identifying the primary employer disputant. See *Service Employees Local 399*, 263 N.L.R.B. 996 (1982). This limitation on the reach of the proviso also is an appropriate restriction on boycotts designed to enlist the special economic leverage of some employers against other employers. For instance, in the *Service Employees* case, the picketers were attempting to persuade consumers to express not only their rejection of a non-union janitorial service, but also their distrust of the safety of Delta Airlines' transportation services. *Id.* at 996-98. The picketers thereby attempted to utilize Delta's economic power against a non-union janitorial service.

187. See Note, *Secondary Consumer Picketing, Statutory Interpretation and the First Amendment*, 81 MICH. L. REV. 1817, 1842-43 (1983). Restricting boycotters for not clearly identifying targeted products would not require acceptance of any particular level of state power to restrict boycott communications that misrepresent reality. See *supra* note 111; *United Farm Workers v. Babbitt*, 449 F. Supp. 449, 462 (D. Ariz. 1978) (holding Arizona labor act unconstitutional because it proscribed "dishonest, untruthful, and deceptive publicity" to encourage a consumer boycott), *rev'd on other grounds*, 442 U.S. 289 (1979). If business boycotts are illegal, the state should be able to require clear identification of targeted products simply to ensure that the consumer boycotters do not supple-

Once consumer boycotts and the labor union picketing and handbilling to organize such boycotts are protected as rights, however, the NLRB and courts should limit commands to unions concerning the contents of their placards or handbills to orders with which unions can comply without losing the power to urge consumers to boycott the primary target. The Board and courts should not require a union to identify for consumers the products of the targeted primary employer with a specificity that the nature and distribution of the product does not permit. Otherwise, the tribunals would restrict sincere union attempts to organize a consumer boycott of targeted employers because of incidental effects that the union cannot control.<sup>188</sup>

### C. *Recognitional and Organizational Consumer Boycotts and the NLRA*

Section 8(b)(7) of the NLRA, which restricts recognitional and organizational picketing by labor unions, also threatens to undermine the right to use consumer dollars to support or oppose social policies.<sup>189</sup> This provision proscribes picketing in three situations, each governed by a separate subsection of 8(b)(7), if such picketing is meant to force "an employer to recognize or bargain with a labor organization as the representative of his employees" (recognitional) or to force employees "to accept or select [a]

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ment their economic power with that of businesses.

188. For instance, the NLRB inappropriately found a soft drink local's picketers in violation of § 8(b)(4)(ii)(B) for urging customers of a store that sold soft drinks not produced by the local to purchase only locally manufactured soft drinks because the union placards and handbills did not advise the consumers how they were to determine whether soft drinks were manufactured locally. *Soft Drink Workers Union Local 812, 243 N.L.R.B. 801 (1979), enforced, 657 F.2d 1252 (D.C. Cir. 1980)*. The union could not give consumers such advice because the manufacturers were not clearly identified on the cans and bottles. In effect, by not separating the locally manufactured drinks from the non-locally manufactured ones, the store owner had merged the struck product with other products. The Board could not and did not conclude that the union intended to provoke a general boycott of the retail store which sold many items other than soft drinks. *Id.* The union seems to have done all it could to focus consumers on the targeted products. For a similar case, see *Bedding, Curtain & Drapery Workers Union Local 140 v. NLRB, 390 F.2d 495 (2d Cir.)* (finding union violated § 8(b)(4)(ii)(B) by picketing to urge consumers to buy only union mattresses without identifying which mattresses were union-made), *cert. denied, 392 U.S. 905 (1968)*. *Cf. United Farm Workers v. Babbitt, 449 F. Supp. 449, 463 (D. Ariz. 1978)* (declaring unconstitutional a provision of the Arizona Farm Labor Statute prohibiting consumer pickets from referring to the trade name used by growers in a labor dispute whenever that trade name is also used by other growers), *rev'd on other grounds, 442 U.S. 289 (1979)*.

189. While §§ 8(b)(4)(ii)(B) and 8(b)(7) are the most important provisions in the Act for restricting consumer boycotts, other provisions could be so used. A consumer boycott intended to force an employer lawfully to join a labor or employer organization would apparently be proscribed by § 8(b)(4)(ii)(A), and a consumer boycott to force an employer lawfully to resolve a work assignment dispute would seemingly be proscribed by § 8(b)(4)(ii)(D). In addition, § 8(b)(4)(ii)(C) proscribes many of the union recognitional consumer boycotts restricted by § 8(b)(7)(C).

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labor organization as their collective bargaining representative” (organizational).<sup>190</sup>

The first of these subsections, section 8(b)(7)(A), restricts picketing if the employer has already lawfully recognized another union whose status at that time is not subject to challenge through a Board-conducted representation election.<sup>191</sup> The section restricts not only appeals to employees to strike, but also appeals to consumers to boycott. The subsection nonetheless appears consistent with the consumer right to boycott elaborated above, because it proscribes forcing an employer to refuse to recognize and bargain exclusively with an incumbent union, thereby acting illegally.<sup>192</sup>

The problem with section 8(b)(7)(A) arises from the distinction between organizational and recognitional picketing. However difficult to apply in practice,<sup>193</sup> that distinction is important to the right to engage in consumer boycotts. Some consumers, perhaps because of one union’s political activities, may decide not to shop at a store because they do not wish to support employees who have chosen that union.<sup>194</sup> Those consumers may wish to allocate their marketplace votes to discourage employees from choosing that union the next time they can make a choice.<sup>195</sup> The second

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190. 29 U.S.C. § 158(b)(7) (1976). Section 8(b)(7) was one of the 1959 Landrum-Griffin Amendments to the Act. The Taft-Hartley Amendments in 1947 added a section prohibiting coercion of an employer that is intended to force the recognition of a union when another union has been certified as representative by the Board. 29 U.S.C. § 158(b)(4)(ii)(C) (1976). Presumably this includes any consumer boycott whether or not implemented by picketing. Section 8(b)(4)(ii)(C) proscribes consumer picketing to impel an employer lawfully to transfer recognition from a certified union that has demonstrably lost its majority support to one that has gained such support. *See* NLRB v. Gallaro, 419 F.2d 97 (2d Cir. 1969). The union action covered by § 8(b)(7), unlike the action covered by § 8(b)(4), is limited simply to “picketing,” but includes action with an organizational as well as recognitional objective.

191. Section 8(b)(7)(A) proscribes recognitional or organizational picketing “where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title.” 29 U.S.C. § 158(b)(7)(A) (1976). Section 9(c) of the Act specifies procedures for Board-certification of bargaining agents. *See* 29 U.S.C. § 159(c) (1976).

192. Whenever the exclusive representational status of a lawfully recognized union cannot be challenged, the employer’s recognition of another union constitutes a refusal to bargain with the incumbent union and is thus a violation of § 8(a)(5) of the Act. 29 U.S.C. § 158(a)(5) (1976). Under established Board doctrine, an employer generally cannot challenge the exclusive majority status of an incumbent union during the first three years of a valid collective bargaining agreement of a fixed term. *See* General Cable Corp., 139 N.L.R.B. 1123 (1962). Nor can an employer make such a challenge during the first year of the incumbent union’s certification. *See* Brooks v. NLRB, 348 U.S. 96 (1954).

193. *See* Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 265 (1959) (calling the distinction purely verbal).

194. For instance, the United Farm Workers have apparently been able to enlist support for consumer boycotts in their organizational battle with the Teamsters Union, at least in part because of some public suspicion of the Teamsters.

195. *Cf.* Dunau, *Some Aspects of the Current Interpretation of Section 8(b)(7)*, 52 GEO. L.J. 220 (1964):

The meaning of free speech—and picketing is at least in part free speech—is that the firm and the union may both seek customer support by appealing for it. Accordingly, if the union’s propaganda wins enough adherents among consumers, the business pinch that the firm and its

and sixth definitional principles<sup>196</sup> protect consumer boycotts that protest social choice rather than social status and protect the consumer's right to boycott regardless of incidental effects on neutral parties. An organizational purpose should therefore validate any union-organized consumer boycott and the picketing that informs it, regardless of the effects on employers who cannot legally recognize the picketing union. Congress should not confer more protection upon employers affected by organizational picketing than Mississippi could give to the neutral employees and suppliers of the boycotted Claiborne County businesses.<sup>197</sup>

Of course, section 8(b)(7)(A), like the remainder of section 8(b)(7), is designed to reduce any incentive an employer might have to recognize an aggressive union against the free choice of a majority of employees. Such a broad restriction, however, should not be justified as a preventive measure unless the activity is both intended and likely to incite lawless action.<sup>198</sup> Congress and the Board could offer substantial protection to an employer caught between organizational picketing by one union and the obligation to an incumbent union without inappropriately restricting the consumer right to boycott. They could, for instance, impose disclosure requirements on union picketers. Just as unions claiming protection under *Tree Fruits* must make clear to consumers their reasons for picketing, a union claiming to picket for an organizational rather than a recognitional purpose should have to explain to consumers that its boycott is intended to put pressure only on employees and that the affected employer cannot legally transfer its recognition.<sup>199</sup> Such disclosure requirements would probably render ineffective most consumer picketing in situations now covered by section 8(b)(7)(A). Any picketing that continues to be effective, despite the disclosed dilemma of the employer, obviously concerns an issue that is important to the boycotting consumers, and therefore deserves protection.

Section 8(b)(7)(B) proscribes recognitional and organizational picketing directed at consumers as well as employee picketing "where within the preceding twelve months [the Board has held] a valid election" for a bar-

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employees may then feel may cause them to reconsider the wisdom of their nonunion preference . . . . If the employees prefer retention of their nonunion status to alleviation of the pinch, that too is their right, but it is just as much the right of the union to continue to persuade the consumers to shun the nonunion product.

*Id.* at 234.

196. See *supra* pp. 431, 439.

197. See *supra* p. 439.

198. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *supra* note 15.

199. Like a requirement that boycott organizers clearly identify the targeted products of primary employers, see *supra* note 187, a requirement that organizational picketers make clear that their goal is not to secure an employer's illegal recognition need not be justified as a regulation of misrepresentation. Such a disclosure requirement is simply a means to ensure that the picketers are organizing a legal organizational boycott, rather than an illegal recognitional one.

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gaining representative.<sup>200</sup> This provision reflects the command of section 9(c)(3) of the Act that “[n]o election shall be directed in any bargaining unit . . . within which in the preceeding twelve month period, a valid election shall have been held.”<sup>201</sup> Congress clearly intended to insulate employees and employers from boycott pressure to reconsider any recent decision of the employees about bargaining representatives.

Section 8(b)(7)(B), however, conflicts more directly than section 8(b)(7)(A) with the consumer’s right not to purchase goods for political or social reasons. Consumers loyal to the labor movement may wish to withdraw their economic support from workers who have rejected a union. These consumers may wish to accumulate their economic votes during the year before the employees can vote in another Board election. Moreover, nothing in the Act prevents a majority of the employees from presenting within the twelve-month period a statement to their employer that they now support the union they had earlier rejected. Thus a consumer boycott designed to provoke such a statement deserves protection. Finally, as long as there is no incumbent bargaining representative,<sup>202</sup> nothing in the Act prevents the employer from recognizing the union because of its newly formed majority.<sup>203</sup> Therefore, even if the union’s purpose in organizing the consumer boycott within the election year is admittedly recognitional as well as organizational, the boycotters would not be pressuring the employer to commit an illegal act.

The last of the three subsections, 8(b)(7)(C), proscribes recognitional and organizational picketing conducted for longer than thirty days if the union has not filed a petition for an election.<sup>204</sup> The subsection contains a publicity proviso that protects informational picketing directed at consumers; however, there are two limitations on its scope that potentially interfere with full protection of the consumer right to boycott. Neither of these limitations has in fact proved significant, but each illustrates the importance of reassessing labor law doctrine in light of a consumer right to boycott.

First, the proviso protects only picketing that truthfully advises consum-

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200. 29 U.S.C. § 158(b)(7)(B) (1976).

201. *Id.* § 159(c)(3).

202. *See supra* p. 450.

203. In *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974), the Court upheld a Board judgment that an employer presented with convincing evidence of a union’s majority support among its employees is under no obligation to bargain with the union until the union requests and wins a Board-conducted election. *Linden Lumber*, however, does not prevent an employer from voluntarily recognizing a union that enjoys majority support at the time.

204. More precisely, § 8(b)(7)(C) makes illegal recognitional or organizational picketing “where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing.” 29 U.S.C. § 158(b)(7)(C) (1976).

ers that the employer "does not employ members of, or have a contract with" the union.<sup>205</sup> This limitation restricts picketing by unions that wish to publicize poor working conditions rather than the union's organizational or recognitional purposes.<sup>206</sup> As long as the union accurately describes the employer's working conditions, this restriction is not justified.<sup>207</sup> Consumers may wish to boycott a business because of both its working conditions and its employees' organizational status. As the seventh definitional principle explains, consumers' ready access to information about working conditions should not depend on the motivation of those providing the information.<sup>208</sup>

Second, the proviso does not protect picketing intended to advise the public about the union status of employees if that picketing has the "effect" of inducing "any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services."<sup>209</sup> Although Congress could legally proscribe employee boycotts, the second 8(b)(7)(C) limitation is nonetheless troublesome. The Act now actually proscribes only the advocacy through picketing of employee recognitional and organizational boycotts, not the boycotts themselves. More important, although the Board and the courts generally read this "effects" qualification restrictively to limit picketing only when there are more than isolated delivery disruptions,<sup>210</sup> the limitation may permit restriction of a communication that has the *unintended* effect of encouraging employee boycotts.<sup>211</sup> Such a restriction is inconsistent with the First Amendment doctrine that the state can restrict speech

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205. *Id.*

206. The Board has taken this restriction seriously. *See, e.g.,* Local 275, Laborers Int'l Union, 209 N.L.R.B. 279 (1974) (regardless of recognitional objective, area standards picketing is not protected by informational proviso to § 8(b)(7)(C)); International Bhd. of Elec. Workers, 142 N.L.R.B. 1418 (1963) (same).

207. *Cf. Solien v. Teamsters Local No. 610*, 484 F. Supp. 1240 (E.D. Mo. 1980) (extending First Amendment protection to picketing by non-certified union to publicize that employer, through contract with another union, was not providing wages and working conditions equal to area standards).

208. Even a requirement that the organizational or recognitional picketers disclose their interest in attacking the working conditions of an employer should be suspect. The *Noerr* Court also interpreted the Sherman Act not to prohibit corporate-funded public attacks on other corporations simply because the attacks were presented as "being spontaneous declarations of independent groups." 365 U.S. at 140-41. This interpretation was partly based on a concern about governmental restrictions on "unethical business conduct" leading to the erosion of First Amendment rights. *Id.*

209. 29 U.S.C. § 158(b)(7)(C) (1976).

210. *See Barker Bros. Corp. v. NLRB*, 328 F.2d 431 (9th Cir. 1964); *Lebus v. Building & Constr. Trades Council Local 60*, 199 F. Supp. 628 (E.D. La. 1961). Many commentators have also expressed this view. *See, e.g.,* Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1107 (1960); Cox, *supra* note 193, at 267.

211. Some judges, however, have asserted that the use of the word "induce" in the "effect" qualification on the § 8(b)(7)(C) publicity proviso may demand an inquiry into whether the union intended to persuade delivery persons to observe the pickets. *See Barker Bros. Corp. v. NLRB*, 328 F.2d 431, 434 (9th Cir. 1964); *McLeod v. Chefs, Cooks & Pastry Cooks Local 89*, 280 F.2d 760, 765 (2d Cir. 1960) (Waterman, J., concurring).

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advocating political or social change only if it is “directed to inciting or producing imminent lawless action,”<sup>212</sup> not simply because it may have the effect of stimulating illegal action.<sup>213</sup> Although the Court has suggested that the state can restrict speech to avert an unintended but imminent violent reaction,<sup>214</sup> the Court has also made clear that the state has an obligation to use where possible alternatives less restrictive than the suppression of speech.<sup>215</sup> Even if violence accompanied employees’ illegal observance of peaceful recognitional picket lines that were intended only to influence consumers, the state could adequately control such observance by proscribing the employee actions rather than by restricting the picketing. The state could also require the picketing unions to inform delivery employees that they are to ignore the picket lines.<sup>216</sup> These measures would adequately serve the legitimate state interest in restricting employee boycotts without also restricting protected consumer boycotts.<sup>217</sup>

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212. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). See generally Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159, 1183–90 (1982). Redish argues that a speaker’s intent to incite unlawful conduct should not alone justify state restriction, *id.* at 1178; but he would require that the state present evidence “that a specific crime has been advocated,” *id.* at 1180.

213. See *Masses Publishing Co. v. Patten*, 244 F. 535, 539–40 (S.D.N.Y.) (“propaganda” that can lead indirectly “to a disintegration of loyalty and a disobedience of law” distinct from speech that “counsels and advises resistance to existing law”), *rev’d*, 246 F. 24 (2d Cir. 1917); Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975). Decisions striking down state efforts to protect national security are particularly persuasive. Presumably the state can more easily justify restrictions on speech as unintended threats to national security than as unintentionally disrupting the economy.

214. *E.g.*, *Feiner v. New York*, 340 U.S. 315 (1951); *Niemotko v. Maryland*, 340 U.S. 268, 289 (1951) (Frankfurter, J., concurring); *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940) (dictum).

215. See *Edwards v. South Carolina*, 372 U.S. 229, 232–33 (1963).

216. At least one court that found picketing protected as informational stressed the picketing union’s efforts to inform delivery employees that the picketing was not directed at them. *Henderson v. Local 8, Hotel, Motel & Restaurant Employees Int’l Union*, 86 Lab. Cas. (CCH) ¶ 11,444 (W.D. Wash. 1979). Another court that found picketing not protected by the publicity proviso stressed the union’s failure to try to minimize the impact of its picketing on employees. *Hirsch v. Building & Constr. Trades Council*, 530 F.2d 298, 305 (3d Cir. 1976).

217. The second proviso to § 8(b)(4), see *supra* note 161, while protecting publicity other than picketing for the purpose of advising the public that a product is produced by an employer with whom the picketing union has a primary dispute, contains an effect-on-delivery qualification similar to that in § 8(b)(7). Presumably because the § 8(b)(4) proviso does not apply to picketing, it has not generated much litigation. The effect-on-delivery qualification in the § 8(b)(4) proviso nonetheless raises the same issues as the qualification in the § 8(b)(7)(C) proviso.

Courts appropriately have refused to apply the *Tree Fruits* doctrine, see *supra* pp. 445–46, to limit the applicability of § 8(b)(4) where union picketers manifest an intent to address employees rather than consumers. See *NLRB v. Millmen & Cabinet Makers Union Local 550*, 367 F.2d 953 (9th Cir. 1966); *Penello v. Glass Bottle Blowers Ass’n*, 280 F. Supp. 643 (D. Md. 1968). The discussion in the text suggests that this limitation on the applicability of *Tree Fruits* should turn on a finding of union intent to induce employees to stop deliveries or service, and not simply on a finding of effect.

## CONCLUSION

Many readers will no doubt resist the conclusions of the last section of this Article. Statutory restrictions on consumer boycotts incidental to labor disputes have equitable appeal if considered in isolation; that appeal, however, can be misleading. It is such boycotts, rather than traditional political consumer boycotts such as the *Claiborne Hardware* boycott, that generate the hard cases that have made bad law. If all groups, regardless of the attractiveness of their cause and the conventionally perceived adequacy of their social power, have an equal claim to political power, hard cases cannot be considered in isolation. A new hard case, *Claiborne Hardware*, may induce rethinking at a sufficiently high level of abstraction to show that this equitable appeal vanishes before the fundamental principle favoring improvement of democratic decisionmaking processes.

*Claiborne Hardware* may adequately clarify the specious appeal of the NLRA restrictions on consumer boycotts. Yet our lawmakers may ignore the abstract implications of the decision and limit its holding to its concrete facts. Such reification of hard cases is not unknown and is sometimes desirable. Were the right affirmed by *Claiborne Hardware* not one our society should secure, the case would deserve reification. The consumer right to engage in concerted refusals to purchase, however, should not be weakened by anomalous distinctions. It is a right consistent with the best democratic promises of our society. Even in future hard cases, we should accept its implications.