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Claiborne Hardware: A Major Step Beyond Picketing

In *NAACP v. Claiborne Hardware*,¹ the United States Supreme Court for the first time addressed the constitutional issues which arise from a political boycott.² The dispute which led to *Claiborne Hardware* arose from a black community's frustration with the prevailing racially prejudiced social structure. Over sixteen years after the boycott began and nine years after it had been permanently enjoined, the Supreme Court gave strong support to the boycott activities by holding that they are protected under the first amendment. Justice Stevens described the boycott as possessing "elements of criminality and elements of majesty."³ That comment set the tone of the opinion. The Court's emphasis on the elements of majesty determined the outcome of the case and will no doubt have repercussions well into the future. This Note will look at the factual and legal background of the controversy, will examine the Court's analysis, and will explore the possible ramifications of the holding.

I. HISTORY OF THE BOYCOTT

The population of Claiborne County, Mississippi is over three-fourths black, yet in 1966 the business and civic power was in the hands of the white population. In late 1965 or early 1966 the Claiborne County branch of the NAACP was organized.⁴ Charles Evers, Field Secretary of the NAACP, played an instrumental role in its organization. Soon after the inception of the NAACP, the Human Relations Committee was formed, and it presented a "petition for redress of grievances"⁵ to the leaders of the white community of Port Gibson, the

1. 102 S. Ct. 3409 (1981).

2. The Supreme Court had denied review to the following political boycott cases. *Missouri v. N.O.W.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 1004 (1980), where campaign for convention boycott of states which had not ratified the equal rights amendment was upheld as protected; *Rouse Philadelphia, Inc. v. Ad Hoc '78*, 274 Pa. Super. 54, 417 A.2d 1248 (1979), *cert. denied*, 449 U.S. 1004 (1980), where boycott of stores by picketers protesting government policies and where there was no dispute with the stores was held not protected; and *NAACP v. Overstreet*, 221 Ga. 16, 142 S.E.2d 816 (1965), *cert. dismissed*, 384 U.S. 118 (1966) (*per curiam*), where boycott of store owner who allegedly had beat a black youth whom he had fired for alleged theft was held not protected.

3. *Claiborne Hardware*, 102 S. Ct. at 3413.

4. *Id.* at 3418. The pastor of the First Baptist Church was elected President; meetings were held every Tuesday night. *Id.*

5. *Id.* The petition contained nineteen demands, ranging in breadth from desegregation of schools and bus stations to a request that blacks not be addressed in an offensive manner, such as "boy" or "shine." *Id.* at 3418-19.

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county seat. After several unfruitful meetings with representatives of the white leaders, a second petition was presented and unanimously approved by the approximately five hundred members present at the NAACP meeting. The expressed purpose of the petition was to "gain equal rights and opportunities for Negro citizens."⁶ The petition also expressed the hope that it would be unnecessary to employ a selective buying campaign, an alternative if the demands were ignored. The demands were ignored. On April 1, 1966, with several hundred members in attendance, the Claiborne County NAACP voted to boycott all white merchants. Charles Evers was present and spoke on behalf of instituting the boycott.⁷

Most of the boycott's activities were indisputably peaceful. These activities included marches, pickets, and demonstrations. The marches were carefully controlled and relatively few in number. The pickets and demonstrations, which began in April, 1966, occurred sporadically into the year 1970.⁸ This activity was conducted mostly on weekends by teenagers and later on even by young children, with the picketers walking up and down the street in front of one group of stores one time, another group another time.

A device used to influence blacks to participate in the boycott was the stationing of "Deacons" or "Black Hats" (so denoted for the conspicuous black hats which made them clearly identifiable) outside the boycotted stores.⁹ The "Black Hats" kept a list of names of those who violated the boycott. These names were later read aloud at the weekly NAACP meetings and published in a local black newspaper. These named people were identified as "traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites."¹⁰

Ten acts of violence were associated with the boycott. Half of these occurred in 1966, the first year of the boycott. The other half are not dated. It is worth relating these violent acts in detail here, not only because the Court painstakingly described them, but more importantly, because the Court's characterization of them as peripheral to and not integral to the boycott was critical to its decision. There is sufficient evidence to link four incidents directly to retribution for the victim's noncompliance with the boycott. In two of these incidents shots were

6. *Id.* at 3419 (quoting Appendix to Petition for Certiorari at 12b) [hereinafter cited as App. to Pet. for Cert.].

7. *Id.* at 3420.

8. *Id.* at 3421 n.33.

9. *Id.* at 3421.

10. *Id.* at 5127 (quoting App. to Pet. for Cert. at 19b)

fired into two separate houses.¹¹ In another, someone threw a brick into a car windshield. In a fourth, a teenager destroyed an elderly woman's flower garden. There is insufficient evidence to definitely link the remaining incidents to retribution for noncompliance with the boycott. In one such incident, shots were fired into the home of a couple who had requested police escort to a white-owned dry cleaner. In another, a NAACP member grabbed whiskey purchased from a white merchant out of the hands of the black man who had purchased it. In still another incident, a man was beaten by four men. In a final incident, supported by only hearsay testimony, four black youths spanked an elderly black man after pulling down his coveralls. In the last two incidents the causal connection to the boycott is even more tenuous. In one incident someone slashed tires and in the other someone phoned a boycott violator and threatened to "whip" him.¹²

Several external events affected the boycott.¹³ An event in 1969 was of greatest impact. A young black man was shot by a white officer during a scuffle while he was being arrested by two Port Gibson policemen. Unrest caused by this event led to the imposition of a dawn to dusk curfew. The following day Charles Evers spoke to blacks gathered at the First Baptist Church and led them in a march to the courthouse. One of the several speeches which Evers made that day was recorded by the police. This highly impassioned speech, which was later scrutinized by the Court, made references to "discipline" of boycott violators. Two days later, while the emotional pitch of the black community was still very high, Evers spoke again and made the statement, "If we catch any of you going in any of them racist stores, we're gonna' break your damn neck."¹⁴

On October 31, 1969, some of the boycotted merchants filed suit to recover lost earnings and lost good will from 1966 to 1972 and to enjoin all boycott activities.¹⁵

II. HISTORY OF THE LITIGATION

Seventeen white merchants, many of whom were also civic leaders in

11. One of these incidents resulted in a conviction which was reversed on appeal. *Whitney v. State*, 205 So. 2d 284 (Miss. 1967).

12. *Claiborne Hardware*, 102 S. Ct. at 3422.

13. In 1967 a black policeman was hired. The boycott was lifted on several merchants for one month. In 1968 the boycott tightened following Martin Luther King's assassination. *Id.* at 3420.

14. *Id.* (quoting App. to Pet. for Cert. at 27b).

15. *Id.* at 3413. Lost earnings and lost good will during this seven year period allegedly amounted to \$944,699. Statutory anti-trust penalties of \$6,000 and attorney's fees of \$300,000 brought the final judgment to \$1,250,699, plus interest from the date of judgment and costs. *Id.* at 3415.

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Claiborne County,¹⁶ filed a complaint naming 148 defendants.¹⁷ The complaint alleged liability for the tort of malicious interference,¹⁸ violation of a Mississippi statute prohibiting a secondary boycott,¹⁹ and violation of a Mississippi anti-trust statute.²⁰ The action came to trial in the Chancery Court of Hinds County on June 11, 1973.²¹ The chancellor found liability based on all three theories against all defendants.²² The chancellor specifically rejected the defendants' assertion of first amendment protection. Damages were awarded for the full amount sought and a permanent injunction was ordered against all boycott activities.²³

In December 1980, after several delays,²⁴ the Mississippi Supreme Court considerably altered the chancellor's findings. Liability was upheld against most defendants with respect to only the tort of malicious interference.²⁵ Unlike the local Chancery Court,²⁶ the Mississippi Supreme Court based their holding upon "the agreed use of force, violence, and threats . . . [which] makes the present state of facts a con-

16 *Id.* at 3414 n.3

17 *Id.* at 3414. The defendants consisted of one hundred forty-four individuals who participated in the boycott in varying capacities; Charles Evers, Field Secretary of the NAACP; Henry Aaron, president of the Mississippi NAACP; the national NAACP; and the Mississippi Action for Progress. *Id.*

18 *See infra* note 44.

19 Miss Code Ann. § 97-23-85 (1972). For further discussion about secondary boycotts in a non-labor context, see *infra* text accompanying notes 33-35 and text accompanying notes 113-14.

20 Miss Code Ann. § 75-21-7 (1972).

21 *Claiborne Hardware*, 102 S. Ct. at 3414. Because the complaint requested an attachment in equity, the Chancery Court had jurisdiction. The Chancery Court had power to empanel a jury but it chose not to do so. Consequently the defendants had no jury trial with respect to the issues of liability. The trial was also considerably delayed by collateral proceedings in federal court. *See id.* at n.5.

22 Eighteen defendants were dismissed by stipulation. *Id.* at 3414 n.6. Liability under the two Mississippi statutes extended to each defendant directly even though participation in the concerted action was voluntary and intentional. The U.S. Supreme Court found the trial court's finding of tort liability "not clear" as to whether it was necessary to prove the existence of an agreement in order to conclude there was a conspiracy. As a conspiracy, liability would extend to each conspirator. The chancellor clearly did not make a fact finding that such an agreement did exist. *Id.* at 3415 n.9, 3417 n.16.

23 *Id.* at 3416.

24 *Id.* After the Chancery Court judgment, the defendants moved for relief from the Mississippi 125 percent supersedeas bonding requirement. The motion was denied, however a federal court enjoined execution of the judgment pending appeal of an instrumental Mississippi case. *Id.* at n.11.

25 *Id.* at 3416.

26 The Mississippi Supreme Court rejected a finding of liability under the Mississippi restraint of trade statute due to the recent Supreme Court finding in which they held political boycotts are not a violation of the Sherman Act. The Mississippi Supreme Court rejected a finding of liability under the Mississippi secondary boycott statute, finding it inapplicable since the statute was not enacted until the boycott had already been in effect for more than two years. The statute gave no indication of retrospective effect. Furthermore, the Mississippi Supreme Court dismissed thirty-seven defendants for lack of proof. *See id.* at 3416, 3417 & n.10.

spiracy."²⁷ The boycott was unlawful. Because it was unlawful and because unlawful activity cannot receive constitutional protection, the court reasoned that the boycott could not receive first amendment protection. In this way the whole question of first amendment protection was circumvented. The court viewed damages as excessive in light of the evidence presented and remanded for a further proceeding to recompute them. The injunction remained in effect.²⁸ The United States Supreme Court subsequently granted a writ of certiorari.

III. HISTORY OF THE APPLICABLE LAW

A political boycott is one which is motivated by non-economic concerns—usually one where aggrieved participants protest against some alleged injustice.²⁹ This method of protest, which has gained popularity since 1950,³⁰ has prompted recent litigation. This litigation has resulted in various attempts to define the conflicting interests of the boycotters and the affected businesses. Because there had been no United States Supreme Court decision regarding political boycott law before *Claiborne Hardware* and because picketing is often an integral part of a political boycott, proponents of political boycotts have relied heavily on the constitutional protection given picketing in the 1940 landmark case of *Thornhill v. Alabama*.³¹ Although *Thornhill* arose from a labor dispute, it was the first case in which the Supreme Court gave first amendment protection to picketing.³² The *Thornhill* Court based its decision upon the theory that the picket is like a pamphlet in its role to disseminate information of the dispute to the public. This view brought picketing into the category of speech-plus rather than conduct.³³ As speech-plus it acquired first amendment protection

27. *Id.* at 3416.

28. Even though the boycott was long over at this time and the injunction thereby a moot point, the court did not vacate the injunction. *Id.* at 3417 n.18.

29. See Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 659, 660 (1978).

30. *Id.* at 659.

31. 310 U.S. 88 (1940). In *Thornhill*, the United States Supreme Court invalidated a state law which forbade all union picketing on the basis of overbreadth. However, subsequent cases culminating in *Teamsters Local 695 v. Vogt*, 354 U.S. 284 (1957) upheld state law which banned peaceful picketing in the labor area. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 598 n.2 (1978).

32. 310 U.S. at 88.

33. See Note, *supra* note 29, at 669. The speech-plus category of protected activity was first established in *Cox v. Louisiana*, 379 U.S. 559 (1965), where the court described picketing as conduct (subsequently labeled "speech-plus") rather than speech and subject to regulation even though intertwined with expression and association. Speech-plus was later refined in *United States v. O'Brien*, 391 U.S. 367 (1968), where the Supreme Court held that when speech and speech-plus are combined in the same activity, only a compelling governmental interest in regulating the nonspeech element can justify incidental limitation on first amendment freedoms.

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within certain limits.³⁴

Opponents of the political boycotts have devised several strategies in an attempt to claim political boycotts violate state law. One method has been to apply secondary boycott law. Although secondary boycotts in the labor area are easily distinguishable,³⁵ some states have passed so-called secondary boycott statutes which apply outside of the labor area. These statutes are aimed at prohibiting non-labor boycotts directed against a victim who is outside the primary dispute. In other words they are aimed at preventing the "scapegoat boycott."³⁶ The objection to such boycotts is that the victim has no control over or power to affect the primary dispute.³⁷

A second approach of boycott opponents has been to invoke the Sherman Act³⁸ or a similar state anti-trust statute³⁹ in an attempt to show the boycott serves as an illegal restraint on trade. The elements of a restraint of trade are present in a political boycott situation.⁴⁰ Although on one occasion the Sherman Act was applied successfully to a non-economic boycott,⁴¹ the decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*⁴² in 1961 greatly undermined

34. These limits were described in *Thornhill* to be 1) the picket must be conducted in a peaceful manner and 2) the grievance must be truthful. 310 U.S. at 104-05.

In an effort to more meaningfully articulate when picketing is legal versus illegal, one commentator suggested categorizing picketing as "signal picketing" (picketing by those who are sufficiently powerful to coerce their audience) versus "publicity picketing" (picketing whereby sympathies are enlisted by appeals and persuasion). According to this scheme, signal picketing is unprotected conduct and publicity picketing is pure speech to which the *Brandenburg* test may be applied. See Note, *The Invisible Hand and the Clenched Fist: Is There a Safe Way to Picket Under the First Amendment*, 26 HASTINGS L.J. 167 (1974).

35. Section 8(b)(4)(ii)(B) of the National Labor Relations Act makes it an unfair labor practice to apply pressure directed at a neutral employer to induce him to take certain action. In *N.L.R.B. v. Fruit Packers Local 760*, 377 U.S. 58 (1964), the Supreme Court construed this provision outlawing secondary boycotts to not prohibit "picketing which persuaded consumers to boycott the struck product but only prohibited the union from asking customers not to patronize the secondary employer." The Court stated a broad ban against picketing might collide with the first amendment.

Last Term the Supreme Court had to determine whether a Stevedore work stoppage affecting cargo destined for the Soviet Union was an illegal secondary boycott or was a protected political activity. The court found the activity illegal under Section 8(b)(4) of the National Labor Relations Act and not protected by the first amendment. *International Longshoremen's Ass'n v. Allied Int'l. Inc.*, 102 S. Ct. 1656 (1982).

36. Note, *Scapegoat Picketing: Beyond the Pale of Constitutional Protection*, 48 FORDHAM L. REV. 794, 794-95 (1980).

37. *Id.* at 795.

38. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1982).

39. See *supra* note 20.

40. Section one of the Sherman Act prohibits any combination or conspiracy in the restraint of trade among the states. 15 U.S.C. § 1. See Sandifer & Smith, *The Tort Suit for Damages: The New Threat to Civil Rights Organizations*, 41 BROOKLYN L. REV. 559, 573 (1981).

41. In *Council of Defense of New Mexico v. International Magazine Co.*, 267 F. 390 (8th Cir 1920), state officials were found guilty of violating the Sherman Act when they urged the public not to buy publications of the magazine company to protest the printing of unpatriotic material.

42. 365 U.S. 127 (1961).

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this approach. In *Noerr Motor Freight*, truckers brought an anti-trust suit against the railroad because it had conducted a publicity campaign in the state legislature which resulted in economic harm to the truckers. Although trade was restrained, the Court refused to apply the Sherman Act. They held that the railroad activity was political, not economic, and that the purpose of the Sherman Act was to regulate only economic activity.⁴³ In short, the case turned on a consideration of the boycott's purpose. The *Noerr Motor Freight* result served to dampen prospects of anti-trust statutes as a viable means of combating political boycotts.

A third approach has been to allege the tort of interference, a common law cause of action dating back to 1893 in England.⁴⁴ Although not required as an element, most courts use the term "malice" to describe the nature of the conduct. Justification is recognized as a defense to an action for interference. Acts of violence and threats of violence are signs of an illegality. However, a person is privileged to interfere with the prospective economic advantage of another if he acts to protect a legitimate interest of his own and if the methods used are otherwise lawful and proper under the circumstances. In this case the detriment which results to the interferee is deemed incidental to the lawful effort of the interferer to promote his own welfare. It is significant that damages may be awarded for *all* losses legally caused by the interference, provided there is sufficient proof.⁴⁵

Another approach is to allege that the boycott constitutes a conspiracy.⁴⁶ In this context, the conspiracy is the agreement to pursue a lawful objective by unlawful means.⁴⁷ According to this theory, "[A]ny acts which may be called coercive methods will convert a legal boycott into a conspiracy."⁴⁸ Acts of intimidation are sometimes also dispositive of a conspiracy. Conspiracy may be advanced singly as a cause of action⁴⁹ or in conjunction with any of the other methods used to attack the legality of a boycott.⁵⁰

43 *Id.*

44 *Temperton v. Russell*, [1893] 1 Q.B. 715, 62 L.J.Q.B. 412. The elements of the tort of interference are: 1) the existence of a valid business expectancy; 2) knowledge of the expectancy by the interferer; 3) a showing of a causal effect between the interference and the loss of economic advantage; and 4) damages to the interferee. See *Restatement of Torts* § 766 (1939). Regarding the third element, some courts have held it is sufficient to show only a reasonable probability that "but for" the interference there would have been a business relationship. *Crystal Gas Co. v. Oklahoma Natural Gas Co.*, 529 P.2d 987 (Okla. 1974); *Martin v. Phillips Petroleum Co.*, 455 S.W.2d 429 (Tex. Civ. App. 1970). *Contra*, *Lewis v. Bloede*, 202 F.7 (4th Cir. 1912); *Louis Kamm, Inc. v. Flink*, 113 N.J.L. 582, 175 A. 62 (1934).

45. See generally 45 AM. JUR. 2d, *Interference* §§ 1, 3-6, 11, 12, 14, 16, 22, 27-28, 30, 57.

46. Comment, *The Consumer Boycott*, 42 Miss. L.J. 226, 236-37 (1971).

47. *Id.* at 237.

48. *Id.* at 237 citing *Root v. Anderson*, 290 Mo. App. 201, 207 S.W. 255 (1918).

49. *Id.* at 236.

50. The Mississippi Supreme Court found liability based on a common law tort in conjunction with the presence of a conspiracy. *Claiborne Hardware*, 102 S. Ct. at 3414-15 n.7.

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IV. ANALYSIS OF THE CASE

The Supreme Court considered the following three issues:⁵¹

A) whether a boycott which was accomplished by the banding together of those who sought to eradicate racial inequality and supported by organizational meetings, nonviolent picketing, and speeches to persuade others to join the cause is protected activity under the first amendment despite the harm incurred by affected merchants;⁵²

B) whether damages which follow from the violent acts connected with a political boycott are limited to the direct consequences of those violent acts, and whether damages may be imposed upon an individual due to his association with those who actually do commit violent acts;⁵³

C) whether there is a basis to sustain judgment against any of the petitioners for their involvement in the boycott.⁵⁴

A. *Nonviolent Political Boycott is Protected*

The Court used a balancing test. It first looked to the constitutional protection afforded the boycott. Then it examined the government's interests which would be served by preventing the boycott. The Court dismembered the boycott into its constituent elements: 1) the banding together for a collective effort with a political purpose, 2) pickets, demonstrations, and marches, 3) public speeches and personal solicitation of others to join the cause.⁵⁵ The main element consisted of the banding together; the other elements were seen as supporting activities.

In examining the banding together for a collective effort, the Court relied on *Citizens Against Rent Control v. Berkeley*.⁵⁶ There the Court extended freedom of association to "the practice of persons sharing common views banding together to achieve a common end."⁵⁷ Likewise the banding together of the blacks of Claiborne County should be protected by the freedom of association. The Court relied on *NAACP v. Alabama* for the proposition that group association enhances the effective advocacy of a point of view, especially a controversial one.⁵⁸

51. The anti-trust and secondary boycott issues did not need to be resolved by the Supreme Court. See *supra* note 26.

52. *Claiborne Hardware*, 102 S. Ct. at 3422-23.

53. *Id.* at 3427-30.

54. *Id.* at 3430.

55. *Id.* at 3423-24.

56. 454 U.S. 290 (1981).

57. *Claiborne Hardware*, 102 S. Ct. at 3423 (quoting *Rent Control*, 454 U.S. 290).

58. 357 U.S. 449 (1958). Over the years the Supreme Court has been particularly protective of NAACP activity. See *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963). It would seem that the racial factor is the only means by which to explain several instances where the Supreme Court has given a particularly expansive reading to various constitutional rights. Note, *supra* note 29, at 661 n.18.

The separate violent acts of a few did not alter this protection.⁵⁹ Peaceful assembly cannot be made a crime merely because some "persons assembling have committed crimes elsewhere."⁶⁰ The violent acts committed by some boycott participants did not taint the first amendment protection of those blacks who banded together to protest their long-suffered unequal treatment in their community.

The Court then examined the other activities which supported the boycott. The Court applied the rule from *Thornhill*⁶¹ to extend first amendment protection to the picketing. The picketing associated with the boycott satisfied the *Thornhill* test. It was peaceful. Its function was to inform the public of the picketers' grievance. The peaceful marches and demonstrations were protected by rights of free speech, free assembly, and freedom to petition for redress of grievances.⁶²

The Court viewed elements of public address and personal solicitation as "speech in its most direct form."⁶³ The threat of social ostracism and persuasion through social pressure achieved by reading names of boycott violators at NAACP meetings and publishing those names in a local black newspaper were characterized by the Court as methods of "persuasion." Yet the Court relied on *Organization for a Better Austin v. Keefe*.⁶⁴ In *Keefe* the Court held that offensive and coercive speech was nonetheless a form of protected communication. The defendant's use of distributing leaflets critical of the plaintiff's business practices was seen as "peaceful pamphleteering," i.e., protected communication.⁶⁵ In this way the Court approved such techniques despite the presence of coercion and intimidation, thereby rejecting previous distinctions made by some concerning the protected nature of persuasion as contrasted with the unprotected nature of coercion.⁶⁶ The Court did not consider coercion an illegal means but rather a means to convey information. The Court noted with approval that a boycott was being used to effectuate social change rather than riot or revolution.⁶⁷ Coercion is an acceptable means of effectuating such change.

In examining the countervailing state interests, the Court recognized the legitimate and strong government interest in certain forms of economic regulation. However, the Court held that the state's broad power to regulate economic activity was insufficient to prohibit peace-

59. *DeJonge v. Oregon*, 299 U.S. 353, 365 (1937).

60. *Id.*

61. 310 U.S. 88 (1940). See *supra* note 34.

62. *Edwards v. South Carolina*, 372 U.S. 229 (1963).

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

64. 402 U.S. 415 (1971).

65. *Id.* at 419.

66. See *supra* note 34.

67. *Claiborne Hardware*, 102 S. Ct. at 3425.

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ful political activity such as that found in this case due to the "profound national commitment" to wide open debate on public issues.⁶⁸

The Court reemphasized the importance of the purpose of the boycott by invoking *Eastern Railroad Presidents Conference v. Noerr Motor Freight*.⁶⁹ In *Noerr Motor Freight*, the railroad waged a publicity campaign against the truckers. Even though economic harm was foreseen and intended, the primary purpose of the campaign was to vindicate constitutional rights. In the same way, the *Claiborne Hardware* boycotters foresaw and intended to cause economic harm to the white merchants; however, the primary motivation was political. Instead the Court focused on the purpose and held that first amendment protection of activity expressive of political views outweighed the disruptive effect.

B. Damage Limitations

The Court turned its attention to those activities not constitutionally protected. "The First Amendment does not protect violence."⁷⁰ The Mississippi Supreme Court had imposed liability based on the tort of malicious interference. The United States Supreme Court did not overturn that finding but severely limited its application and the scope of recoverable damages.

Generally the standard for recovery for the tort of interference is for all reasonably ascertainable losses.⁷¹ However, the Court looked instead to the damage award in *United Mine Workers v. Gibbs*⁷² where the remedy was "strictly confined to the direct consequences . . ."⁷³ In *Gibbs*, the cause of action was a state claim of tortious interference with the employment relationship. This is analogous to the *Claiborne Hardware* state claim of tortious interference in a non-labor context. The careful limitation of damages imposed in *Gibbs* resulted from the need to accommodate state law with federal labor policy. In other words, the federal labor policy was given pre-eminence so as to affect the damage award under the state claim.⁷⁴ "That limitation is no less applicable, however, to the important First Amendment interests at issue in this case."⁷⁵ The Court considered the constitutional protections sufficiently important to again limit damages to just those direct conse-

68. *Id.* at 3426 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

69. 365 U.S. 127 (1961). It is noteworthy that in this case the Supreme Court specifically rejected the validity of a claim of violation of the Sherman Act. *Id.* at 135.

70. *Claiborne Hardware*, 102 S. Ct. at 3427.

71. See *supra* note 44.

72. 383 U.S. 715 (1966).

73. *Claiborne Hardware*, 102 S. Ct. at 3428 (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 729 (1966)).

74. 383 U.S. at 730-31.

75. *Claiborne Hardware*, 102 S. Ct. at 3429.

quences of only violent acts. "[The state] may not award compensation for the consequences of *nonviolent*, protected activity."⁷⁶

Further, the Court held liability could not be imposed merely because of group association. To attach liability to an individual because of his or her association with a group having both legal and illegal goals would impair legitimate political expression.⁷⁷ Liability cannot be imposed unless there is clear proof of specific intent to resort to the violent aims of an organization. One may not be punished for sympathy with the legitimate aims of the organization.⁷⁸

In *Healy v. James*,⁷⁹ these principles were applied in a civil case. The Court inferred from the *Scales*, *Noto*, and *Healy* holdings that "[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence."⁸⁰ Rather the test for liability posed by the Court rested upon a showing of both the experience of unlawful goals *and* specific intent to further those goals.⁸¹

Application of this test to the instant case resulted in the Supreme Court's rejection of the Mississippi Supreme Court's damage award for all business losses. Evidence showed that "threats" of violence caused "many" blacks to avoid white merchants out of fear and "contributed" to the success of the boycott.⁸² Such evidence was ambiguous and insufficient to "assure the precision of regulation demanded by the first amendment."⁸³ This evidence did not demonstrate that all losses resulted from violence or threats of violence. In fact, the record shows some losses were caused by the voluntary acts of many participants.⁸⁴

76. *Id.* (emphasis added). The exception to this rule is presented in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941). The Court specifically distinguished the present case from *Meadowmoor*. In *Meadowmoor*, the Court upheld an injunction against both violent and nonviolent activity because there the violence was "pervasive." That opinion noted "insubstantial findings of facts of violence screening reality" would defeat their holding. *Id.* at 293. Unlike *Meadowmoor*, here the facts point to only isolated acts of violence. The Court held these are indeed "insubstantial findings" and not worthy of imposing damages for all losses over seven years where many losses were the result of voluntary participation in the boycott and other activities overwhelmingly peaceful. *Claiborne Hardware*, 102 S. Ct. at 3432.

77. See *Scales v. United States*, 367 U.S. 203, 229 (1961).

78. *Noto v. United States*, 367 U.S. 290, 299-300 (1961).

79. 408 U.S. 169 (1972).

80. *Claiborne Hardware*, 102 S. Ct. at 3430.

81. *Id.* The Court distinguished between the situation where an individual is not liable for damages merely by reason of his association from the situation where an individual may be liable because he himself authorized or incited unlawful conduct. *Id.* at 3430 n.56.

82. *Id.* at 3430-31.

83. *Id.* at 3430. The Mississippi Supreme Court's findings of coercion were vaguely expressed as forming "part of the boycott" and overcame "the volition of many black persons." *Id.* at 3430.

84. The Court found it significant that even those who suffered violent recrimination for refusing to honor the boycott continued to act voluntarily by continuing to trade with white merchants. *Id.* at 3431 n.63.

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The Court held that only those losses attributable to the illegal acts could be included in any damage award.

C. Judgment

The Court reviewed the Mississippi Supreme Court's imposition of damages in light of the Court's theory of damages. The petitioners fell into the following categories:⁸⁵ 1) boycott managers (ninety petitioners who either regularly attended or served in leadership capacity at NAACP meetings); 2) boycott enforcers (twenty-two petitioners who served as store watchers or as "Black Hats;" 3) those who committed or threatened to commit violent acts (sixteen petitioners so identified by direct evidence); 4) Charles Evers; and 5) the NAACP.

The Court held that there was no basis for imposing liability against boycott managers. The NAACP espoused no unlawful aims; thus, there was no question of whether boycott managers specifically intended to further them. Nor was there evidence to show they authorized or ratified illegal conduct. The Court summarily found no basis for imposing liability against the boycott enforcers, stating that there is nothing unlawful in standing outside a store recording names or in wearing black hats.⁸⁶

The Court considered liability against Charles Evers "with extreme care."⁸⁷ The Court characterized Evers' comments concerning the possible breaking of necks and other discipline as advocacy rather than as fighting words. As advocacy of use of force, his speech had to satisfy the test of *Brandenburg v. Ohio*⁸⁸ to retain its protection. The Court

⁸⁵ *Id.* at 3417-18. The Court accepted the respondent's categorization of petitioners as identified in respondent's Supplemental Brief I. Supplemental Brief I was filed in response to a question which arose at oral argument concerning the factual basis for the judgment of the Mississippi Supreme Court where liability rested upon the fact that each petitioner had agreed to effectuate the boycott through acts of violence. Respondents contended managers and leaders had full knowledge of the tactics of the enterprise and thereby assented to those tactics. The respondents contended a court could reasonably infer an intention to frighten people from the pattern established by warnings to prospective customers and public displays of weapons and military discipline followed by acts of violence against boycott violators. These groups were not exclusive. *Id.* at 3417 nn 20-21, 3418 n.22.

⁸⁶ The Court's offhand treatment of the boycott enforcer's role is greatly contrasted to their detailed account of the acts of violence which were more isolated and spanned a shorter period of time.

⁸⁷ *Claborn Hardware*, 102 S. Ct. at 3433. In addition to considering the protected nature of his speeches, the Court also considered the protected nature of Evers' conduct. Evers participated in the boycott as a leader in the organization of the boycott and by persuading M.A.P. to buy food from only black-owned stores. The Court held Evers could not be liable for his leadership role for the same reasons none of the managers could be held liable. Evers could not be held liable for his acts of persuasion as they were constitutionally protected. Consequently, all of Evers' conduct was beyond a finding of liability. *Id.* at 3433-34.

⁸⁸ 395 U.S. 444 (1969). The *Brandenburg* test provides that speech as advocacy is protected "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

held the impassioned speeches of Evers did fall within the bounds of protected speech, that is, did satisfy the *Brandenburg* test. The Court acknowledged the purpose of the speech was to urge the "black citizens to unify, to support and respect each other, and to realize the political and economic power available to them."⁸⁹

The *Claiborne Hardware* opinion raises a question regarding the current status of the *Brandenburg* rule. In applying the rule the Court quoted the *Brandenburg* test directly.⁹⁰ But the Court continued in an unexpected manner by adding "[i]f that language had been followed by acts of violence, a substantial question would be presented whether Evers could be liable for the consequences of that unlawful conduct."⁹¹ The Court noted that no acts of violence did follow the 1969 speech, and those which followed the 1966 speech occurred "weeks or months"⁹² after that speech. In other words, the Court used hindsight before making its final determination that Evers was not liable. The *Brandenburg* test looks instead at whether the speech in question is "likely to incite . . ."⁹³ This is a foresight test. Arguably, the *Brandenburg* rule has been changed or perhaps extended in *Claiborne Hardware*. Only future cases invoking the *Brandenburg* rule will shed light on this question. The Court concluded "[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause."⁹⁴ This is consistent with the national commitment to "uninhibited, robust, and wide open debate."⁹⁵ Once again the Court was stating its especial tolerance for expression of political views.

Since the Court denied liability against Evers, there could be no vicarious liability against his principal, the NAACP. Furthermore, there was no evidence of NAACP ratification of or specific knowledge of acts of violence or threats of violence.⁹⁶ The NAACP supplied no funds nor was it connected with the boycott in any way.⁹⁷ Accordingly, the NAACP could not be held liable, directly or indirectly.

89 *Claiborne Hardware*, 102 S. Ct. at 3434.

90 *Id.* at 3433-34.

91 *Id.* at 3434.

92 *Id.*

93 *See supra* note 88.

94 *Claiborne Hardware*, 102 S. Ct. at 3434.

95. *Id.* (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). The Court stated that Evers' references to discipline in the speech could be used to corroborate other evidence of authorization of wrongful conduct. Liability for authorization of wrongful conduct failed however "for the simple reason there is no evidence—apart from the speeches themselves—that Evers authorized" acts of violence that occurred. *Id.*

96. *Id.*

97. *Id.*

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V. REFLECTIONS ON *CLAIBORNE HARDWARE*

Even though the boycotters intended to cause economic harm to the merchants of Claiborne County, the primary political motivation of the boycotters overrode a finding of liability for the resulting damages. The Supreme Court concluded that the banding together to achieve racial equality was activity protected by the freedom of association and freedom of speech and outweighed the legitimate state interest in regulating local business affairs.⁹⁸ The Mississippi Supreme Court had characterized this same activity as a conspiracy,⁹⁹ stating that the "agreed use of force, violence, and threats against the peace to achieve a goal make the present state of facts a conspiracy."¹⁰⁰ The Supreme Court endorsed activity which the Mississippi Supreme Court enjoined. Central to the different conclusions is the different ways in which the two courts handled two important aspects of the boycott.

The first difference is the manner in which the two courts characterized the group efforts. On the one hand, the Supreme Court focused on activities of individuals acting separately. At the outset of the opinion the Supreme Court created a picture of individuals voluntarily coming together to make a political statement rather than creating a picture of a group which acted as a unit. The Court pointed to the close nexus between the freedoms of speech and assembly.¹⁰¹ On the other hand, the Mississippi Supreme Court assumed an implicit agreement among the participants.¹⁰² This agreement is necessary to a conspiracy theory. A second difference is the manner in which the two courts treated the presence of coercion. The Supreme Court confronted this presence of coercion by cleverly using coercion to describe the personal solicitation of would-be boycott participants, i.e., by putting it in a speech context. Coercive speech is not unprotected.¹⁰³ However, the Mississippi Supreme Court used the coercion and threats to describe the *entire* effort and thereby placed it in a conspiracy context.¹⁰⁴ A conspiracy using methods of coercion is illegal. Simply stated, the two courts' different treatment of the issue of coercion can be stated thus: coercion renders a conspiracy illegal, but coercion in speech is acceptable.

A weakness of *Claiborne Hardware* is the lack of attention to the

98. *Id.* at 3426-27. The Court qualified its holding in a significant footnote. See *infra* text accompanying notes 113-14.

99. *Claiborne Hardware*, 102 S. Ct. at 3416. The Mississippi Supreme Court also based liability under the tort of interference. See *supra* note 44.

100. *Claiborne Hardware*, 102 S. Ct. at 3416 (quoting App. to Pet. for Cert. at 23a) (emphasis added).

101. *Id.* at 3423 (quoting from *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

102. It is noteworthy that neither the Chancery nor the Mississippi Supreme Court made a factual finding that an agreement existed. *Id.* at 3417 n. 16.

103. *Id.* at 3425.

104. *Id.* at 3416 (quoting App. to Pet. for Cert. at 23a).

content of the specific demands of the protestors. It focused only on the purpose of the demands. There are cases in which the reasonableness of the demands has been determinative.¹⁰⁵ This raises a question of how courts will treat a political boycott with a legitimate purpose, such as eradicating racial inequality, where the specific demands are absurd or even just unreasonable.

The endorsement by the Supreme Court of the NAACP boycott raises the question whether this case is a continuation of the line of picketing cases.¹⁰⁶ Undoubtedly, *Claiborne Hardware* is the next logical step. Basically the approach is the same: freedom of association and freedom of speech protect both picketing and boycotts if they are not outweighed by countervailing governmental interests. Viewed as a form of expression, picketing which passed muster was called speech-plus.¹⁰⁷ The Supreme Court did not use this language to describe the boycott. However, by concluding that the political boycott here was protected it too would qualify as speech-plus.¹⁰⁸

Claiborne Hardware represents enthusiastic approval of the political boycott as a means of redressing grievances. The Court views the political boycott as a means by which otherwise weak groups may affect social change without resort to "riot or revolution."¹⁰⁹ The holding is not confined to a narrow type of boycott, such as the antidiscrimination boycott of the instant case, but is broadly stated in terms of a political boycott. The structure of *Claiborne Hardware* is such that it can be interpreted so broadly as to grant protection to any activity which can be broken down into constituent activities, most of which are themselves protected, and which represent a banding together for the purpose of political protest.

One can expect *Claiborne Hardware* to displace *Thornhill* as the leading authority for future political boycott cases. Future court decisions no doubt will adopt the *Claiborne Hardware* balancing test; its elementizing of the activity, thereby separating protected elements from unprotected elements; and the accordant allocation of damages

105. In *Anora Amusement Corp. v. Doe*, 171 Misc. 279, 12 N.Y.S.2d 400 (Sup. Ct. 1939) boycotting to force an employer to hire blacks was deemed lawful as a matter of right, whereas in *Hughes v. Superior Court of California*, 339 U.S. 460 (1950), boycotting to secure the demands that Lucky Stores hire blacks until the proportion of black clerks to white clerks approximated the ratio of black customers to white customers was deemed unlawful.

106. See *Cox v. Louisiana*, 379 U.S. 536 (1965), *Walker v. Birmingham*, 388 U.S. 307 (1967). See also L. TRIBE, *supra* note 31, at 598.

107. The speech-plus designation was first applied to picketing in *Thornhill*. See *supra* note 29.

108. The speech-plus designation is not helpful in the process of determining whether or not a particular activity is expressive conduct worthy of first amendment protection. Once conduct has been determined to be protected it can then be described in conclusion as "speech-plus." See L. TRIBE, *supra* note 31, at 598.

109. *Claiborne Hardware*, 102 S. Ct. at 3425.

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for those unprotected activities. Future political boycotts are likely to be upheld (1) when they are motivated primarily by a legitimate political aim and (2) when any associated acts of violence are insubstantial rather than pervasive.

Methods used to attack the political boycott through litigation will certainly be affected. The boycott at hand withstood a charge of malicious interference. This tort allegation is unlikely to succeed against future political boycotts. The economic interests of the boycotted businesses are not likely to amount to the substantial state interests needed¹¹⁰ to outweigh the interest in protecting first amendment rights. A conspiracy claim is unlikely to succeed. One cannot infer the agreement required to prove a conspiracy from mere association in an organization; a characterization of violence cannot result from a relatively few violent acts.¹¹¹ After *Claiborne Hardware* such "guilt by association" is insufficient as antithetical to the freedom of association and inconsistent with a finding that some boycotters voluntarily participate. The rule that coercion is dispositive of a conspiracy is inconsistent with *Claiborne Hardware*. Coercion will not taint the effort unless the effort is first shown to be a conspiracy, that is, there is a fact finding of express agreement among the participants to use coercion. The Court obliterated the distinction between persuasion and coercion, a distinction upon which some courts and commentators had previously relied in deciding whether a conspiracy existed.¹¹²

A cause of action for violation of a state anti-trust statute or the Sherman Act is perhaps most unlikely to succeed. *Claiborne Hardware* reinforced the finding of *Noerr Motor Freight* that these statutes do not apply to a boycott motivated primarily by political concerns. Rather, the intent of these statutes is to prohibit a boycott where the primary motivation is economic concerns.

The fate of the "secondary" political boycott or scapegoat boycott is uncertain.¹¹³ A scapegoat boycott is one in which the target of the boy-

110 In a footnote, the Supreme Court suggests the level of state interest needed to outweigh the boycotters' freedom of expression. *Id.* at n.47.

111. The Court stated in order to characterize an effort to change the social, political, and economic structure of an environment as a conspiracy such characterization "must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity." *Id.* at 3437.

112. See Note, *supra* note 29. See Note, *Clenched Fist*, *supra* note 34. In *Southern Christian Leadership Council v. A.G. Corp.*, 241 So. 2d 619 (Miss. 1970), the named plaintiff and other citizens of Grenada, Mississippi were held liable for damages to the defendant, a local grocery business, because coercion was employed to force members of the black community to force them to join the boycott.

113. In *Rouse Philadelphia, Inc. v. Ad Hoc '78*, 274 Pa. Super. 54, 417 A.2d 1248 (1979), *cert. denied*, 449 U.S. 1004 (1980), the political boycott was held not protected where members of Ad

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cott is not a party to the dispute and the goal is only to pressure the boycott target to influence the one against whom the grievance is assessed. The facts in *Claiborne Hardware* do not fit the category of the scapegoat boycott—many of the merchants were also civic leaders and consequently in a position to address the protestor's demands. Furthermore, all the merchants were in a position to meet at least one of the boycotters' demands—the hiring of black employees. At present the scapegoat boycott is possibly open to attack. In a footnote, the Court specifically withheld judgment on "a narrowly tailored statute designed to prohibit . . . certain types of secondary pressure."¹¹⁴ This highly significant footnote also did not preclude prohibition of a political boycott which violated a narrowly tailored anticompetitive statute or one whose aims were prohibited by any valid state law.

In addition to the possibly forewarning footnote just mentioned, *Claiborne Hardware* offers only vague guidance as to when future political boycotts will be prohibited. Purpose will be the touchstone.¹¹⁵ The Court gave approval of the purpose of eradicating racial inequality. Means is the second most important consideration.¹¹⁶ Isolated incidents of violence will not forestall first amendment protection; pervasive violence will. By characterizing coercion as linked to persuasive protected speech, the Court implied that no amount of coercion would render a boycott unprotected so long as the boycotters did not specifically agree to use coercion. Future cases will hopefully convey clearer guidelines regarding a sufficiently legitimate political purpose and acceptable means to effectuate that purpose.

Future political boycott litigation will not focus only on whether a particular boycott is protected activity; a central concern will be the question of damages. The *Claiborne Hardware* rule allows recovery for only the direct consequences of violent conduct. No damages can be assessed for consequences of protected activity. Calculating losses directly attributable to violence or other illegal acts creates an evidentiary problem, especially when those acts are mixed with legally protected ones. The precision of regulation necessary when first amendment protection is involved will be difficult to ascertain.

Hoc '78 picketed a shopping mall to urge others to boycott those stores. The picketers admitted their activity was an attempt to publicize their disputes with the government. A temporary injunction was granted because the court deemed both the method and purpose improper in light of the mall's inability to affect the dispute between the picketers and the government.

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

115. "At times the difference between lawful and unlawful collective activity may be identified easily by reference to its purpose." *Id.* at 3436.

116. "The charge of illegality—like the claim of constitutional protection—derives from the means employed by the participants to achieve those goals." *Id.*

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VI. CONCLUSION

NAACP v. Claiborne Hardware is the first word from the United States Supreme Court on the subject of the political boycott. The political boycott is assured first amendment protection as long as its primary purpose is political, the target of the boycott is connected with the boycotters' dispute, and the means used are associated with no more than insubstantial findings of violence. Only when violence is pervasive may all losses be recovered and all aspects of the boycott be enjoined. When violence is insubstantial, damages may be assigned for only the direct consequences of the violent or illegal conduct of the boycott. No injunctions may be ordered to stop protected activity.

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