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COUNTLESS FREE-STANDING TREES:
NON-LABOR BOYCOTTS AFTER
NAACP v. CLAIBORNE HARDWARE CO.

The right of an individual or group of individuals to protest in
a peaceable manner against injustice or oppression, actual or
merely fancied, is one to be cherished and not to be proscribed
in any well-ordered society. It is an essential prerogative of free
men living under democratic institutions. And it is salutary for
the state, in that it serves as a safety valve in times of stress and
strain.1

INTRODUCTION

Boycotts have been used in the United States as a means of
protest since before the nation's founding. They played an impor-
tant part in American response to the Stamp, Townshend and In-
tolerable Acts during the 1765-75 era.2 However, they fell from
favor in the more conservative nineteenth century3 and were lit-
tle used4 until the Montgomery bus boycott5 of 1955-56. Since
then, there has been a sharp upsurge in protest boycott activity.
Most of these boycotts have been directed against racial discrimina-
tion, but a number have been economic boycotts by consumers
directed at particular products.6

The term "boycott," as used in this Comment, describes a con-
certed refusal to deal in a product or with a business, coupled with

4 As recently as 1953, a Note writer on the subject found only a few relevant cases
of non-labor boycotts. See Note, Tort Liability of Organizations for Intentionally Impairing
5 For a brief account of the boycott, see H. SITKOFF, THE STRUGGLE FOR BLACK
6 A short summary listing of 15 targets of consumer boycotts is in Missouri v. NOW,
efforts to induce third parties to likewise withhold their patronage. This Comment deals only with non-labor boycotts.\textsuperscript{7} The purpose of these boycotts is to protest some condition and induce action on the part of the targeted parties to correct the condition. The condition protested against may be political,\textsuperscript{8} social\textsuperscript{9} or economic\textsuperscript{10} in nature. The racial boycotts which have been the most common subjects of litigation generally combined protest against an economic condition with a political protest against discrimination.\textsuperscript{11}

\textsuperscript{7} Although labor boycotts are similar to non-labor protest boycotts in the nature of the actions involved, they are somewhat different in purpose and are governed by federal labor law. Because they involve similar activities, especially picketing, some Supreme Court labor decisions are relevant to the law regarding protest boycotts and are therefore referred to in this Comment.

\textsuperscript{8} A "political" boycott is one in which the primary goal of the protesters is to change governmental policy or to secure the enactment of new laws. This term includes antidiscrimination boycotts which are not primarily directed at economic opportunities such as jobs. One major distinction between "political" and "economic" boycotts is that the political boycott is basically secondary, with its primary focus on forcing the boycott target to use its influence to seek governmental change. Many boycotts have involved a political element. For example, see Machesky v. Bizzel, 414 F.2d 283 (5th Cir. 1969) (involving the "Greenwood Movement," a civil rights group); NAACP v. Thompson, 357 F.2d 831 (5th Cir. 1966) (involving civil rights demonstrations); Kelly v. Page, 335 F.2d 114 (5th Cir. 1964) (same). Another type of political boycott is that found in Missouri v. NOW, 620 F.2d at 1301 (involving women's rights group seeking passage of the Equal Rights Amendment).

\textsuperscript{9} Fewer cases arise from boycotts with social goals (excluding racial non-discrimination boycotts), but see, e.g., Gresham Park Community Org. v. Howell, 652 F.2d 1227 (5th Cir. 1981) (picketing of new liquor store in community); 1621, Inc. v. Wilson, 166 A.2d 271 (Pa. 1961) (boycott of "excess" taproom in neighborhood); Watch Tower Bible & Tract Soc'y v. Dougherty, 11 A.2d 147 (Pa. 1940) (Catholic boycott against radio station's religious criticism to be broadcast over airwaves). The grape and lettuce boycotts in connection with union organizing in California were perhaps, at least in the East, as much a social as a labor cause. One of several cases that arose from the latter boycotts was Almac's, Inc. v. Rhode Island Grape Boycott Comm., 290 A.2d 52 (R.I. 1972).

\textsuperscript{10} The term "economic boycott" includes those protests whose primary goal is to advance the economic well-being of the protesters by inducing economic action on the part of the target. See, e.g., Clemmons v. CORE, 201 F. Supp. 737 (E.D. La. 1962) (boycott against hiring discrimination and segregation of facilities); In re Young, 211 N.Y.S.2d 621 (Sup. Ct. 1961) (boycott seeking orders for black liquor salesmen from stores in Harlem); A.S. Beck Shoe Corp. v. Johnson, 274 N.Y.S. 946 (Sup. Ct. 1934) (boycott seeking employment of a certain percentage of blacks); Julie Baking Co. v. Graymond, 274 N.Y.S. at 250 (protest against high bread prices).

\textsuperscript{11} E.g., Machesky v. Bizzell, 414 F.2d at 283; NAACP v. Thompson, 357 F.2d at 831. A current example of a boycott having this dual character exists in Evanston, Illinois,
Boycott organizers and participants face two fundamental legal obstacles: 1) to be sustained, the boycott must withstand efforts to enjoin supporting activities, such as picketing;¹² and 2) even if the boycott is successful, boycott organizers might be liable for large damages from tort claims.¹³ Both of these concerns are tied to a common issue, the "legality" of the boycott. A finding of illegality may arise from three sources: 1) general tort principles concerned with interference with prospective advantage;¹⁴ 2) state statutes regulating picketing¹⁵ or attempting to limit interference with business activity;¹⁶ or 3) antitrust legislation, especially the Sherman Act.¹⁷

Underlying the legality issue is the fact that these boycotts create a conflict between the public interest in the goals espoused and the property interest of those boycotted, a conflict compounded by the issue of first amendment rights claimed by protesters. Attempts by courts to balance these competing interests in the numerous cases which have arisen¹⁸ have led to somewhat

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where Northwestern University students organized a boycott of merchants who refused to display signs opposing a recent tax on Northwestern students passed by the Evanston City Council. The Taxman Pounds on College Portals, NEWSWEEK, Dec. 13, 1982, at 94.

¹² Most boycott cases concern injunctions. All of the cases in notes 8-9 supra, for example, involved injunctions.


¹⁴ See notes 23-30 infra and accompanying text.

¹⁵ One type of statute, making picketing itself illegal, was struck down in Thornhill v. Alabama, 310 U.S. 88 (1940), and Kirkland v. Wallace, 403 F.2d 413 (5th Cir. 1968), and would not be a source of illegality today, although laws which allow picketing but regulate time, place and manner are valid.


contradictory and unclear results. Additionally, because these fundamental public policy and constitutional interests have not been clearly addressed by the United States Supreme Court, there has been considerable uncertainty about whether and to what extent protesters should be liable for the effects of their boycotts.

This Comment focuses on two of the three sources for finding protest boycotts illegal—tort principles and antitrust statutes. It then discusses the United States Supreme Court's recent decision in \textit{NAACP v. Claiborne Hardware Co.}, which dealt with these grounds of illegality, as well as the conflict between public and private interests and the threat to first amendment rights presented by any finding of illegality in the boycott or liability of the protesters. Finally, this Comment addresses the answers \textit{Claiborne} provides and the questions it leaves unanswered for litigation concerning legality and liability in the context of political and economic boycotts.

\section{Boycott Law Before \textit{Claiborne}}

\subsection{Concerted Refusals to Deal}

One of the sources for the idea that a concerted refusal to deal can be illegal is the tort of intentional infliction of economic harm without just or legal excuse. The \textit{Restatement (Second) of Torts}

\footnote{Note, supra note 18, at 662. See also T. Emerson, \textit{The System of Freedom of Expression} 444 \& n.49 (1970). The theories of liability are discussed at more length in the text accompanying notes 23-54 infra.}

\footnote{T. Emerson, supra note 19, at 448. This uncertainty is reflected in the continuing series of law review material dealing with the topic, including Note, \textit{Legal Responsibility for Extra-Legal Censure}, 62 Colum. L. Rev. 475 (1962) [hereinafter cited as Note, \textit{Legal Responsibility}]; Note, supra note 18, at 659; Note, supra note 4, at 467; Comment, \textit{The Common Law and Constitutional Status of Anti-Discrimination Boycotts}, 66 YALE L.J. 397 (1957).}

\footnote{102 S. Ct. at 3409.}

\footnote{For a discussion of various aspects of the first amendment connection to boycott and picketing activity, see T. Emerson, supra note 19, at 435-49; Etelson, \textit{Picketing and Freedom of Speech: Comes the Evolution}, 10 J. PRAC. & PROC. 1 (1976); Note, supra note 18, at 659; Note, \textit{The Invisible Hand and the Clenched Fist: Is There a Safe Way to Picket Under the First Amendment?}, 26 Hastings L.J. 167 (1974) [hereinafter cited as Note, \textit{The Invisible Hand}].}

\footnote{See NAACP v. Overstreet, 142 S.E.2d at 823; W. Prosser, \textit{Handbook of the Law of Torts} § 130 (4th ed. 1971). For a discussion of boycott illegality, see Comment, supra note 20, at 398-402.}
provides that "[o]ne who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability . . . for the pecuniary harm resulting from . . . inducing or otherwise causing a third person not to enter into or continue the prospective relation."  

The key phrase here is "improperly interferes," for what section 766B proscribes is unjust or unprivileged interference. In deciding the question of whether a boycott is improper, the goals of the protester are balanced against the legitimate interests of the target. Section 767 of the Restatement lists seven factors for use in this balancing, including the interests of the parties and their relationships, the actor's motives and conduct and the social interests involved. In practice, the courts have focused on the conduct of the actor, his purposes, and the legitimacy of his interest or "cause." Courts have found an unprivileged interference when they also found that violence or force was used in the boycott, the boycott's purpose violated law or public policy, or the cause or interest was considered inadequate.

24 Restatement (Second) of Torts § 766B (1977).
25 Id. § 767 comment b.
26 Id. § 767.
27 See generally Comment, The Consumer Boycott, 42 Miss. L.J. 226, 234 (1971); Comment, supra note 20, at 398-402.
28 E.g., A.S. Beck Shoe Corp. v. Johnson, 274 N.Y.S. at 949. The concept was applied to a labor boycott in Milk Wagon Drivers Local 752 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941), where the violence was held to be so pervasive as to make the whole boycott illegal, but the Court, before Claiborne, had not addressed the question in relation to a non-labor boycott.
29 E.g., Hughes v. Superior Court, 198 P.2d 885, 889 (Cal. 1948), aff'd, 339 U.S. 460 (1950); Fair Share Org. v. Mitnick, 188 N.E.2d 840, 845-46 (Ind. App. 1963); In re Young, 211 N.Y.S.2d at 624. Cf. 1621, Inc. v. Wilson, 166 A.2d at 276-77 (the court recognized the theory but upheld the boycott). The United States Supreme Court established the "unlawful purpose" doctrine in the labor case of Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).
30 Green v. Samuelson, 178 A. at 109, and A.S. Beck Shoe Corp. v. Johnson, 274 N.Y.S. at 946, are two early cases which reflect a reluctance to recognize opposition to racial discrimination as a valid goal. A contrary case from the same era is Anora Amusement Corp. v. Doe, 12 N.Y.S.2d 400 (Sup. Ct. 1939), where the court recognized the existence of a "[p]urpose . . . thought sufficient to justify the harm that may be done to others." Id. at 403 (quoting Exchange Bakery & Restaurant, Inc. v. Rifkin, 157 N.E. 130, 132 (N.Y. 1927)). Since 1940, courts have generally not found boycott causes wanting, except in southern racial boycott cases such as Young Adults for Progressive Action,
An act of violence committed during a boycott is always illegal. However, courts have split on whether such violence taints the boycott to make the boycott itself unlawful. While the Fifth Circuit Court of Appeals in *Smith v. Grady* stated that "[a]ny kind of boycott is unlawful if executed with force or violence or threats," other courts have sought to protect the non-violent aspects of boycott activity, recognizing that a finding that violence, for which there are other remedies, was involved should not be a license to suppress valid peaceful expression.

In *Hughes v. Superior Court*, the United States Supreme Court dealt with the second common ground for finding an unprivileged interference—illegal purpose of the boycott. The Court, following the principle that even peaceful picketing could be banned if used to induce an illegal act, which it had announced shortly before in *Giboney v. Empire Storage & Ice Co.*, upheld a California ruling that a boycott with the avowed purpose of compelling a merchant to hire blacks in numbers proportional to black patronage violated a state policy forbidding discrimination and was therefore unlawful. The *Hughes* decision has aroused considerable criticism, in part because it restricts speech on the basis of content, but the doctrine of the case—that an illegal goal makes the boycott illegal—is firmly entrenched.
The third ground for finding a boycott illegal under tort law—the boycotter's lack of a "just cause"—was used in the racial discrimination cases of the 1930s. During the 1962-70 era, southern state courts in three cases relied on a finding of unjust cause to hold boycotts unlawful. All three decisions seem unsound, with the courts showing a blindness to the discriminatory conditions protested against. The Supreme Court, however, dismissed certiorari in one of the cases, *NAACP v. Overstreet*, and apparently was not asked to hear appeals in the other two cases.

Two of these "no just cause" cases also involved an important new feature of boycott litigation. In earlier cases, injunctions mentioning quotas and by simply continuing to boycott until an acceptable number of blacks had been hired. This would clearly have been in accord with state policy. See 198 P.2d at 888.


40 *Young Adults for Progressive Action, Inc. v. B & B Cash Grocery Stores*, 151 So. 2d at 877; *NAACP v. Overstreet*, 142 S.E.2d at 816; *Southern Christian Leadership Conference v. A.G. Corp.*, 241 So. 2d at 619.

41 In *Overstreet*, the dispute arose from allegations that a white employer had struck a young black worker, but the court believed the case did "not involve a controversy between the races." 142 S.E.2d at 831. In *B & B Cash Grocery*, the court saw the cause of a hiring discrimination boycott as "mere non-employment of Negroes in certain capacities." 151 So. 2d at 878. In *A.G. Corp.*, the court viewed the disputes as a secondary boycott, a boycott of uninvolved third parties, and stressed the lack of prior notice to the store owner of any complaint by the boycotters. 241 So. 2d at 624. Shortly after the case was tried, Mississippi passed a secondary boycott statute (Miss. CODE ANN. § 97-23-85 (1972)) which broadened the potential for finding a boycott illegal. This statute seeks to prohibit a conspiracy to induce others not to trade with a business when a) the conspirators have a reasonable grievance over which the merchant has "no direct control or no legal authority to correct," or b) when there is a grievance against the merchant and no notice has been given the merchant or "no reasonable opportunity to correct such alleged grievance." Miss. CODE ANN. § 97-23-83 (1972) makes it a crime to "threaten with bodily harm, intimidate or coerce another person to prevent said person from lawfully trading or carrying on business." Miss. CODE ANN. § 97-1-1(f) (1972) prohibits two persons from conspiring to commit any act injurious to trade or business.

Alabama has a similar statute aimed at conspiracy to interfere with business, but the statute contains the qualifying phrase "without a just cause or legal excuse." Ala. CODE § 13A-11-122 (1982). Ga. CODE ANN. § 34-6-4 (1982) prohibits interference by "force, intimidation, violence or threats thereof" with any employer in his business. While federal courts had struck down two Alabama laws limiting picketing activity, *Thornhill v. Alabama*, 310 U.S. at 88, and *Kirkland v. Wallace*, 403 F.2d at 413, the Supreme Court, prior to *Clayborne*, had not considered these newer laws. For a discussion of the Mississippi statutes, see Madison, *supra* note 16, at 583.

against the boycott itself or against selected activities such as picketing were sought. In *Overstreet*, however, the target of the boycott sought damages and was awarded $35,793 compensatory damages and $50,000 punitive damages.\(^{43}\) In *Southern Christian Leadership Conference v. A.G. Corp.*,\(^{44}\) the original award was for more than $114,000.\(^{45}\) Finally, the recent *Claiborne* case involved a far larger award—more than $1.2 million.\(^{46}\) Thus, these three cases together represent an escalating trend of large damage assessments with the obvious potential of "chilling" protest efforts.\(^{47}\)

B. *Sherman Act and State Antitrust Regulation*

Action under state and federal antitrust statutes is a second source of peril for boycotters. Whether the Sherman Act,\(^{48}\) which bans combinations or conspiracies in restraint of trade or commerce, or similar state acts\(^{49}\) apply to these boycotts has been a matter of considerable uncertainty and conjecture.\(^{50}\) However, recent cases decided before *Claiborne* strongly suggest that the first

\(^{43}\) 142 S.E.2d at 822, 827.
\(^{44}\) 241 So. 2d at 619.
\(^{45}\) Id. at 629. This award was remanded for modification downward.
\(^{46}\) 102 S. Ct. at 3415.
\(^{47}\) Justice Douglas recognized this menace in his dissent from the dismissal of certiorari of *Overstreet*: "Juries hostile to the aims of an organization in the educational or political field, unless carefully confined by meticulous instructions and judicial supervision, can deliver crushing verdicts that may stifle organized dissent from the views and policies accepted by the majority." 384 U.S. at 123 (Douglas, J., dissenting). Douglas, speaking for three other justices, drew an apt analogy with *New York Times v. Sullivan*, 376 U.S. 254 (1964), where there had been a similar menace of a "chilling effect" on free expression from large civil damage suits. 384 U.S. at 123 (Douglas, J., dissenting).

Two subsidiary questions raised by these damage suits were the responsibility of a "parent" organization like the NAACP for a locally-run boycott and the liability of the organizers of a boycott for the acts of third parties who withheld patronage. See Note, supra note 18, at 690. For a general discussion of the damage questions, see Sandifer & Smith, supra note 13, at 575-77.

\(^{49}\) E.g., Miss. Code Ann. § 75-21-1 (1972).

Further, it would seem that almost any consumer boycott could have the effect of restraining interstate commerce, presumably improper under modern commerce clause
amendment severely restricts any application of the antitrust acts to such activities. The Noerr-Pennington doctrine developed by the Court in the 1960s clearly states that the right to petition for legislative or administrative action is not subject to antitrust controls. This doctrine was applied recently to protect a protest boycott in Missouri v. National Organization for Women, Inc. The Eighth Circuit Court of Appeals in that case held that the Sherman Act and a state antitrust statute do not apply when a non-commercial boycott involves the right of petition.

II. THE CLAIBORNE HARDWARE CASE

A. The Mississippi Courts

NAACP v. Claiborne Hardware Co. originated with a boycott of merchants in Port Gibson, Mississippi, launched by local

document. U.S. CONST. art. I § 8, cl. 3. Many cases have given a broad meaning to the term "commerce" and the scope of the commerce clause. See, e.g., Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).


52 The Court in Noerr held that even anti-competitive intent did not subject action to the antitrust laws when it represented an attempt to persuade the legislature to follow a particular course. 365 U.S. at 136. In Pennington, the same principle was applied to influence public administrative officials. 381 U.S. at 667-72.

53 620 F.2d at 1301.

54 620 F.2d at 1315-16. The Noerr doctrine has appeared in a number of recent cases brought under the Sherman Act. Some involve, in effect, a reverse consumer boycott. For example, in two cases involving shutdowns by gasoline dealers seeking to pressure the Department of Energy to raise retail prices, the courts applied the Noerr-Pennington concepts, holding that the action was protected petition expression and was therefore not subject to the antitrust laws. See Osborn v. Pennsylvania-Delaware Serv. Stations Dealers Ass'n, 499 F. Supp. 553 (D. Del. 1980); Crown Central Petroleum Corp. v. Waldman, 486 F. Supp. 759 (M.D. Pa.), rev'd on other grounds, 634 F.2d 127 (3d Cir. 1980). A similar refusal to apply the Sherman Act to political activity came in Council for Employment & Economic Energy Use v. WHDH Corp., 580 F.2d 9 (1st Cir.), cert. denied, 440 U.S. 945 (1978). A somewhat different situation arose in Allied Int'l, Inc. v. International Longshoremen's Ass'n, 492 F. Supp. 334 (D. Mass. 1980), rev'd, 640 F.2d 1368 (1st Cir. 1981), aff'd, 456 U.S. 212 (1982), where the district court applied Noerr to free from regulation a political boycott (refusal to unload Soviet wood) by a labor union. The court of appeals and the Supreme Court, however, held that the political intent did not free the union from the explicit statutory prohibitions against secondary boycotts.

55 102 S. Ct. at 3409.
black leaders on April 1, 1966, after they had submitted a list of twenty-one demands to the city and county leaders and had failed to receive any satisfaction. This protest continued into 1967 and was temporarily halted, then reinstated, after racial incidents in 1968 and 1969. Twenty-four merchants then filed suit in 1969 to enjoin the boycott and recover damages from 146 individuals, the NAACP and the Mississippi Action for Progress (MAP), a local Head Start organization.

After an eight month equity trial, the chancellor, in August 1976, held that 130 defendants (including the NAACP and MAP) were liable in damages from the boycott. The court found that the defendants had engaged in an illegal conspiracy, had committed the tort of malicious interference with a business, had conducted an illegal secondary boycott and had violated Mississippi’s restraint of trade statute. The court’s finding that the boycott had involved threats and intimidation and was laced with violent acts was a crucial factor in its judgment of illegality. The court issued an injunction against efforts to induce others to boycott and awarded compensatory damages of $950,699 and attorney’s fees of $300,000.

56 Id. at 3418-19. The extraordinary delay which led to the case arriving at the Supreme Court 16 years after the boycott started was in large part due to two related actions in federal court. These were efforts to get the federal court to enjoin the state court suit (Claiborne). In Henry v. First Nat’l Bank, 444 F.2d 1300 (5th Cir. 1971), rev’d 50 F.R.D. 251 (N.D. Miss. 1970), cert. denied, 405 U.S. 1019 (1972), the Fifth Circuit Court of Appeals held that a civil action, even if brought under two state statutes, was not “state action” and refused to issue an injunction. 444 F.2d at 1310-12. In Henry v. First Nat’l Bank, 595 F.2d 291 (5th Cir. 1979), cert. denied, 444 U.S. 1074 (1980), the Fifth Circuit indicated that there was a strong likelihood that the petitioners (the Claiborne defendants) could win an appeal from the trial court decision in Claiborne because of serious first amendment infringements, especially a broad injunction issued against the boycott, and upheld the district court’s injunction against any enforcement of the judgment, pending review by the Mississippi Supreme Court, and, if necessary, the United States Supreme Court. 595 F.2d at 294, 303.

57 NAACP v. Claiborne Hardware Co., 393 So. 2d 1290, 1295-97 (Miss. 1981), rev’d, 102 S. Ct. at 3409. All were either wholly or partly political demands except for number four—“all stores must employ Negro clerks and cashiers.” 393 So. 2d at 1295-96.

58 Id. at 1292. For a more detailed account of the boycott, see 102 S. Ct. at 3418-21.

59 For details of the Mississippi lower and appellate court trials, see 102 S. Ct. at 3413-17 and 393 So. 2d at 1290. Three findings of the trial court involved violations of Mississippi statutes: Miss. CODE ANN. §§ 97-1-1(f), 97-23-85 (1972).

60 MISS. CODE ANN. § 79-11-1 (1972).

61 393 So. 2d at 1298-1300, 1302; 102 S. Ct. at 3416.

62 393 So. 2d at 1293.
In the appeal to the Mississippi Supreme Court, the NAACP especially questioned the applicability of the relevant statutes and stressed first amendment questions. The state supreme court upheld the lower court's finding of tort liability, holding that a boycott executed with force or violence or threats, all of which it found present, is illegal regardless of its purpose. As to the statutory grounds, the court found a violation of Mississippi conspiracy and intimidation statutes, but did reverse on several grounds, holding that the restraint of trade statute did not apply and that the secondary boycott statute could not be enforced in this case because it was not enacted until after the boycott began. The court also dismissed the claims against MAP and thirty-seven individual defendants, but affirmed the liability of the national NAACP organization. In its major concession to the appellants' claims, the court did find several errors in the calculation of damages and accordingly remanded for a modification.

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63 Because of a parallel action in federal court, the appeal of the case was delayed and the Mississippi Supreme Court did not decide the case until December 1980. See 102 S. Ct. at 3414 n.5, 3416. See note 56 supra for an account of the federal litigation.

64 393 So. 2d at 1293-94.

65 Id. at 1301.

66 Id. at 1301-02. The court also suggested a lack of "just cause" based on the theory that since blacks made up three-fourths of the population of Claiborne County they could have achieved their goals at the ballot box. Id. at 1295.

67 Id. at 1301. The court noted that the statute, Miss. CODE ANN. § 75-21-1 (1972), was patterned after the Sherman Anti-Trust Act, 15 U.S.C. § 1 (1976), and interpreted the Mississippi Act similarly in that political boycotts were not violative. 393 So. 2d at 1301.

68 Miss. CODE ANN. § 97-23-85 (1972). See note 41 supra discussing this statute and the nature of secondary boycotts.

69 393 So. 2d at 1300-01. The court thereby avoided any judgment on the constitutionality of the statute, a question raised by the NAACP. This question was involved in other litigation growing out of a Vicksburg, Mississippi boycott. In Concerned Citizens v. Sills, 567 F.2d 646 (5th Cir. 1978), the circuit court of appeals refused, under the Younger doctrine of abstention, to give a declaratory judgment on the legality of § 97-23-85 and § 97-23-83, or to enjoin their enforcement in a state court proceeding. Since prosecutions of the six people indicted under the statute were terminated by the filing of a nolle prosequi, 567 F.2d at 649, the constitutionality of the two statutes has apparently not yet been ruled on by any court.

70 393 So. 2d at 1302-03.

71 The errors included improper allowance of pre-judgment interest and incorrect calculation of lost profits and loss of goodwill. Id. at 1303-07. The court did not consider the validity of the lower court's injunction; the NAACP stipulated that the point was moot.
The United States Supreme Court Decision

The United States Supreme Court noted in *Claiborne* that the Mississippi Supreme Court had rejected the two statutory theories of liability which could have applied to a non-violent, non-coercive boycott and instead had based its decision on the tort claim. This holding of tort liability rested on the concept that violence made the whole boycott illegal.

The Court rejected the Mississippi courts' reliance on the incidental presence of violence in the boycott, setting forth a strong defense of the legality of peaceful boycotts, especially those with a political purpose, and stressing that the speech, assembly, petitioning and peaceful picketing involved were clearly protected by the first and fourteenth amendments. The Court recognized that regulation which only incidentally affects first amendment rights might be justified, but emphasized that "[w]hile states may have broad powers to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case." Noting that it had previously ruled in *Noerr* that the individual's right to petition can override the government's right to regulate economic activity, the Court held that the nonviolent activities associated with the boycott were entitled to first amendment protection.

Justice Stevens, writing for the majority, acknowledged that the violence present in the boycott could be made a basis of liability, but noted that there were strict limits to this liability, and that a state "may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered." Since

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72 102 S. Ct. at 3416-17.
73 Id.
74 Id. at 3423-25.
75 Id. at 3426.
77 102 S. Ct. at 3426.
78 The opinion was joined by six other justices, with Justice Rehnquist concurring in the result. 102 S. Ct. at 3437 (Rehnquist, J., concurring). Justice Marshall took no part in the decision.
79 Id. at 3427-28. Justice Stevens further observed that "violent conduct is beyond the pale of constitutional protection." Id. at 3436.
80 Id. at 3429.
the acts of violence were limited in number, the Court concluded that state power had been used to impose liability for nonviolent activities.\(^1\)

Significantly, the Court did recognize that violence might be so pervasive as to enable a court to characterize the whole boycott effort as a "violent conspiracy" and therefore to inflict broader damages.\(^2\) But Justice Stevens noted:

Such a 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. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy.\(^3\)

Thus, while the Court acknowledged that a boycott could possibly be characterized as a violent conspiracy, it appears that the standard articulated by Justice Stevens severely limits the ability of a court of impose tort liability on an entire boycott effort. The plaintiff would need to prove a specific conspiracy to use violence and show that such violence was the cause of all of the losses suffered by the boycott targets for which damages were sought. Further, it must be shown that protected activity is not punished by the imposition of liability.

Finally, the Court dealt with certain questions about the scope of liability, holding that "civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence,"\(^4\) that mere attendance at NAACP meetings did not create liability,\(^5\) and that to find the NAACP

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\(^1\) Id. at 3431. The Court distinguished the more limited violence present in Claiborne from the situation in Milk Wagon Drivers Local 752 v. Meadowmoor Dairies, Inc., 312 U.S. at 287. In Meadowmoor, the Court upheld an injunction against both violent and non-violent activity because the violence was "pervasive." Id. at 293. In Claiborne, the Court dissolved the trial court's injunction because the violence was incidental to a generally peaceful political boycott. 102 S. Ct. at 3431-32.

\(^2\) 102 S. Ct. at 3437.

\(^3\) Id.

\(^4\) Id. at 3430.

\(^5\) Id. at 3432.
liable without proof that it ratified or authorized unlawful conduct would impermissibly burden the right of political assembly.\textsuperscript{86}

III. POLITICAL AND ECONOMIC BOYCOTT LIABILITY AFTER \textit{CLAIBORNE}

\textit{Claiborne} involved a political boycott, its purpose being political change. The following discussion examines the effects of \textit{Claiborne} on both political and economic boycotts, the latter being boycotts seeking to change economic conditions. Although some protests against racial discrimination might properly be classed as economic boycotts, the Court seems likely to give these protests a highly protected status, having virtually equated them with political boycotts.\textsuperscript{87}

A. Tort Liability

1. "Just Cause" Element Eliminated

Peaceful political boycotts seem highly protected after \textit{Claiborne}. The Court said in that case that lawful, peaceful activities may not be the basis of a damage award.\textsuperscript{88} By indicating that the activities themselves are constitutionally protected,\textsuperscript{89} the Court has rendered the "just cause" element of tort liability virtually meaningless, at least when the alleged tortfeasors were engaged in political crusades, whether against "real or fancied grievances." While the justifiability of a protest cause would not be a factor

\textsuperscript{86} Holding that the mere advocacy of force does not remove speech from the protection of the first amendment, the Court could find no constitutional basis for the liability imposed on Charles Evers, field secretary of the NAACP in Mississippi. As the NAACP liability rested on the connection of the organization to Evers, the Court held that the proof would not support liability for the organization. \textit{Id.} at 3433-36. Portions of a speech by Evers to boycotters on April 19, 1969, are printed as an appendix, \textit{id.} at 3437-40.

\textsuperscript{87} See \textit{id.} at 3426-27. See also Note, supra note 18, at 611 n.18.

\textsuperscript{88} \textit{Id.} at 3429. In Missouri v. NOW, 620 F.2d at 1301, Judge Stephenson emphasized that "the right of petition is of such importance that it is not an improper interference [under state tort law] even when exercised by way of a boycott." \textit{Id.} at 1307, (quoted in NAACP v. Claiborne Hardware Co., 102 S. Ct. at 3426-27 n.48.).

\textsuperscript{89} 102 S. Ct. at 3436.
in determining the legality of a political boycott, the reasonableness of the means of protest used could still be considered.\textsuperscript{90}

Since the activities (speech, assembly, picketing and petitioning) used in conducting an economic boycott are the same as those used for political protests, economic boycotts should receive similar protection against efforts to impose tort liability for interference with prospective advantage. The validity of the boycotter's economic protest should not be assessed in terms of "just cause." This does not mean total freedom from responsibility for the truthfulness of charges made by boycotters; untruthful assertions would be open to a claim of trade-libel under the traditional exception to first amendment protections. Although the trade-libel avenue of possible recovery should not apply to political boycotts, it should be reasonable to apply it to economic boycotts. Damages, however, should only be granted for malicious falsehood.\textsuperscript{91}

2.  \textit{Continued Viability of the "Unlawful Purpose" Doctrine}

The unlawful purpose doctrine articulated in \textit{Hughes v. Superior Court}\textsuperscript{92} and reaffirmed by the Court in \textit{Claiborne}\textsuperscript{93}

\textsuperscript{90} If, for example, a boycott of downtown stores was conducted for the purpose of pressuring city government to reduce parking fees, it would be irrelevant whether downtown parking fees were or were not unreasonably high. Such a boycott conducted against only one store, whose owner was not in a position to affect city policy (assuming no further anti-competitive purpose for the boycott), would be hard to justify as a reasonable protest worthy of protection. A concern for the unfairness of singling out one merchant would seem to call for some regulation would not be content-based and would be in step with the \textit{O'Brien} test—which defines the conditions necessary for allowable government regulation of expression—set forth in \textit{Claiborne}, 102 S. Ct. at 3425 n.47. The point is that, even with the liberal view of \textit{Claiborne}, gross abuses of the right of political protest could and should be regulated.

\textsuperscript{91} See \textit{W. Prosser, supra} note 23, at § 112; \textit{Comment, supra} note 20, at 470 n.91. The situation in a publicly conducted boycott would be analogous to speech about public figures. There is a need to protect the public's right to hear differing views, but there also is a concern for the rights of the object of the public comment. For this reason, a standard similar to the "knowing or reckless falsity" standard established in \textit{New York Times v. Sullivan}, 376 U.S. at 254, would be a fair one and would balance the two interests. In \textit{Direct Import Buyer's Ass'n v. K.S.L., Inc.}, 572 P.2d 692 (Utah 1977), the court held that where a product of a business is involved, the correct standard is actual malice. \textit{Id.} at 696. Statements about the operation of a business could logically be given the same protection as statements about a product.

\textsuperscript{92} 339 U.S. at 460. See notes 34-38 \textit{supra} and accompanying text for a critical discussion of \textit{Hughes}.

\textsuperscript{93} The Court noted that they were not "presented with a boycott designed to secure
would be a possible ground for restricting both political and economic boycotts, although such restraints on a political boycott would raise questions of content-based regulation. Under the *Hughes* facts, the most common "economic" boycott—that directed against discriminatory hiring—faces a potential threat, but this can be overcome by avoiding any mention of quotas or hiring ratios. Although logically inconsistent, it seems likely that a boycott promoting more hiring of white persons would be seen as falling within the "unlawful purpose" doctrine.

3. Violent Acts in Boycotts

*Claiborne* does not depart from the traditional view that violent boycott activities are unlawful and unprotected. The case's major contribution is that the Court sought to assure that such violence will not be used to regulate or suppress peaceful, protected activities. The standard used by the Court prohibits general liability based on the mere existence of violence incidental to a boycott. This *Claiborne* test also makes it difficult to establish that a boycott was violent as a whole.

Individuals responsible for violence are still liable for the results of their acts after the *Claiborne* decisions, but this would be a minimal deterrent to a protest movement, compared to the "chilling effect" of the damages awards originally granted in *Overstreet, A.G. Corp.* or *Claiborne*.

B. Statutory Liability

1. Antitrust Statutes

The Court's treatment of political and economic boycotts might differ significantly in the area of their susceptibility to antitrust

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94 See note 37 *supra* and accompanying text for this criticism of *Hughes*.
95 See id. at 3427-29.
96 See notes 82-83 *supra* and accompanying text for a discussion of this test.
97 See 102 S. Ct. at 3437. However, the Court's reference in Part IV to a "massive and prolonged effort to change . . . a local environment," id., could be read to mean that the principle being set forth would not be applied to a smaller, localized boycott effort.
98 See text accompanying notes 42-45, 62 *supra* for a discussion of these damage awards.
regulation. The Court in *Claiborne* reiterated the exemption from such regulation that political action derives under the *Noerr-Pennington* doctrine. But economic boycotts might be subject to regulation in this area if the acts have an anti-competitive nature and do not involve the right to petition for legislative or administrative action by the government. A boycott without a valid right of petition would likely be for some anti-competitive purpose and therefore be subject to restriction under the antitrust statutes.

Furthermore, although regulation of an economic boycott could be possible, a non-commercial and non-competitive economic boycott should not be included in such regulation. It is possible, for example, that a hiring discrimination boycott would have the incidental effect of diverting business to black-owned businesses or to those employing more black persons. Regulation because of these economic effects, however, would be unjustified, as the intent of such a boycott is not to affect competition but to change hiring practices.

2. **Secondary Boycott Statutes**

The *Claiborne* opinion did not discuss the extent to which secondary boycotts may be properly regulated, but it is difficult to see how any regulation of political boycotts as secondary boycotts could be permitted. Most political boycotts inherently have secondary effects, and the regulation of such effects would impermissibly burden protected political expression. The Mississippi secondary boycott statute, for example, is overbroad in that

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99 102 S. Ct. at 3426. For a discussion of the *Noerr-Pennington* doctrine, see notes 52-52 supra.

100 The Court stated:

"We need not decide in this case the extent to which a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct or certain types of secondary pressure may restrict protected First Amendment activity. No such statute is involved in this case. Nor are we presented with a boycott designed to secure aims that are themselves prohibited by a valid state law."

*Id.* at 3427 n.49.

its effect would be to ban almost every political boycott carried out by economic means.

An economic boycott, in contrast to a political boycott, could be reasonably regulated by a narrowly tailored secondary boycott statute, assuming that the "secondary" boycott is not in actuality a boycott narrowly directly against a particular product as in NLRB v. Fruit & Vegetable Packers & Warehousemen Local 769,102 where the Court upheld the validity of such a boycott. On the other hand, the Court's recent decision in International Longshoremen's Association v. Allied International, Inc.103 shows a willingness to accept statutory regulation of economic pressure exerted in a labor boycott on uninvolved third parties, although that decision may be limited to labor boycotts.

C. Injunctive Relief and Damages

The state supreme court in Claiborne considered the trial court's injunction as moot and did not deal with it, but the United States Supreme Court dissolved the injunction, making it clear that lawful activity must not be restrained in this fashion.104 Because economic boycott activity, especially picketing, can be just as lawful as that used to support political protest, this protection should extend to the lawful, peaceful portions of both types of boycotts.105

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102 377 U.S. 58 (1964). The Court there held that the careful picketing of a product could be considered a primary boycott against the product rather than a secondary boycott illegal under 19 U.S.C. § 158(b)(4) (Supp. IV 1983). The picketers did not urge shoppers to withhold patronage from the stores, but simply urged them not to buy the product itself. This approach was applied by the courts in the grape and lettuce boycott cases. See Jones v. Demoulas Super Markets, Inc., 308 N.E.2d 512 (Mass. 1974); C. Comella Inc. v. United Farm Workers Org. Comm., 292 N.E.2d 647 (Ohio Ct. App. 1972).
103 456 U.S. at 212. See note 54 supra for a discussion of this case. It is possible that the Court sees obedience to the secondary boycott provisions of 29 U.S.C. § 158(b)(4)(B) as a trade-off for the general labor exemption from regulation of picketing. A non-labor boycott, which has no exemption, might not be held to the same standard.
104 See 102 S. Ct. at 3432 n.67.
105 See id. at 3423-24. Economic boycotts are probably more open to state regulation than political protests, see id. at 3427, but other non-boycott decisions suggest that there would be minimal danger of such regulation of the peaceful picketing activity itself.
Whether the boycott be economic or political, *Claiborne* bolsters the protection from ruinous damages enjoyed by groups like the NAACP. It makes clear that mere membership in a group or association with persons committing violence will not bring liability to the individual or the group. Only if it is proved that the organization promoted or approved violence can liability be placed on the organization.\(^{106}\)

**CONCLUSION**

The Court in *Claiborne* has clarified the broad protection that peaceful boycotts enjoy. By stressing the protected nature of the activities, the Court has virtually eliminated some of the means which had been commonly used to hold such boycotts illegal, such as findings of "no just cause" or injunctions based on secondary boycott or antitrust statutes. The only significant limitation on boycotts remaining after *Claiborne* is the "unlawful purpose" doctrine of *Hughes*. Although economic protests are less protected, they also are largely safe from state efforts to limit peaceful boycotts by statute or tort actions.

*Claiborne*'s greatest contribution, however, is in thwarting the threat of large damages based on incidental violence, a threat that could have stifled both political and economic protests in which tensions often produce some scattered violence. The protection offered by the *Claiborne* standard for assessing damages from violence is especially broad for those organizations whose sponsorship may be the impetus needed for a successful boycott.

Recognizing that "one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means,"\(^{107}\) *Claiborne* is directed at protecting peaceful protest activity. The new standard set forth should avoid the unjustifiable judicial act of visiting all with the sins of a few. Justice Stevens states this goal in his conclusion: "A court

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\(^{107}\) See 102 S. Ct. at 3432-36. This is especially significant since such an organization, especially if it is part of a national group, will likely have the only "deep pockets" among possible defendants.
must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless free-standing trees.\textsuperscript{108}

\textit{Carl B. Boyd, Jr.}

\textsuperscript{108} \textit{Id. at 3437.}