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Constitutional Law - Freedom of Association and the Political Boycott

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NOTES

CONSTITUTIONAL LAW—FREEDOM OF ASSOCIATION

INTRODUCTION

When several people with a common goal join together to achieve that goal, are their actions conspiratorial or constitutionally protected? When that concerted action leads to economic losses, is the action unfair anti-competition or merely effective political persuasion? The courts have been troubled by this dichotomy for years, switching sides with confusing regularity. Civil or criminal conspiracy has been severely punished because of the greater threat offered by the concerted actions of a group.\(^1\) On the other hand, “the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.”\(^2\)

Even when there is no question of criminal or civil conspiracy, concerted actions have been prohibited for other reasons. While the first amendment protects freedom of expression,\(^3\) when a boycott is the method of expression, there may be a violation of the Sherman Antitrust Act, which prohibits combinations in restraint of trade.\(^4\)

Commercial boycotts would seem to present the easiest restraint-of-trade question for the courts, yet even here, there have been conflicting decisions.\(^5\) Political boycotts raise still more diffi-

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3. “Congress shall make no law . . . abridging the freedom of speech, . . . or right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. 1.
4. 15 U.S.C. § 1 (1976): “Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”
5. Commercial boycotts, in which the boycotters’ objective is profit, are usu-
cult questions by bringing the first amendment into action.\(^6\) Political boycotts may cause substantial economic losses, may even have a restraining effect on trade, yet such concerted action is often the only non-violent method of affecting constructive change open to the average citizen.\(^7\)

With the present trend toward consumer activism, the legal status of boycotts becomes of paramount importance. Over the past several years, various groups have boycotted a host of products and producers including beef, eggs, wine, and infant formula, Campbell's, Libby, NBC, and Annheusar-Busch.\(^8\)

Although it offers no comprehensive solution, the Supreme Court has finally addressed some of the questions raised by the political boycott dilemma. In *NAACP v. Claiborne Hardware Co.*\(^9\) the Court held that the first amendment protected all but the few violent elements of a black boycott of white businesses, and that the state court was precluded from imposing liability for business losses on all boycott participants rather than on the violent few.

**THE CASE**

In late 1965 Charles Evers, Mississippi Field Secretary for the NAACP, helped to organize a chapter of the NAACP in Claiborne County, Mississippi.\(^10\) In March of the following year, a petition was submitted by the Claiborne County Chapter to several public officials in Port Gibson, the county seat.\(^11\) The petition contained a


6. Political or protest boycotts, employed by activist groups are motivated by non-commercial objectives and do not involve entities in commercial competition. Allegra, *Protest Boycotts as Restraints of Trade under the Sherman Act: A Proposed Standard*, 30 *CLEVE. ST. L. REV.* 221, 222 (1981); Missouri v. NOW, 620 F.2d 1301 (8th Cir. 1980); Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969); Kirkland v. Wallace, 403 F.2d 413 (5th cir. 1968).


10. *Id.* at 3418.

11. *Id.*
list of requests aimed at securing racial equality for the black citizens of Port Gibson. The list included requests for appointment of black police officers, desegregation of public schools, extension of public improvements to black residential areas, the selection of blacks to jury duty and the desegregation of the county hospital. Additional requests, added a week later, asked that blacks be employed in local stores as clerks and cashiers. These requests had little effect, and on April 1, 1966, the Claiborne County NAACP, at a meeting attended by several hundred blacks, voted unanimously to boycott white merchants in Port Gibson.

The boycott, besides the refusal of the members to deal with white merchants, included efforts to persuade other blacks to join the cause. "Storewatchers" were posed outside target stores to take the names of those blacks who continued to deal with white merchants. These people were later denounced by name at NAACP meetings.

In addition to the storewatching, peaceful pickets were conducted around the stores boycotted, and those entering the stores were urged to honor the boycott. Some members of the boycott who were "storewatchers" wore black hats and clothing and became known as the "Deacons" or the "Blackhats." Testimony at trial described these "watchers" as a "quasi-military" group organized to "patrol" the boycotted area.

During the early months of the boycott, several violent incidents occurred. In April, 1966, shots were fired into the home of a black couple who patronized a white-owned dry cleaner. In June, 1966, a brick was thrown through the windshield of the car of a man who had been patronizing white merchants (and who continued to do so after the incident). Birdshot was fired into the home
of James Gilmore on August 22, 1966. Gilmore, who had ignored the boycott, caught the three young black men whom he believed had fired the shots. These men, active supporters of the boycott, were tried and convicted, but their conviction was set aside on appeal. Another black citizen who ignored the boycott received threatening phone calls and, in November, 1966, shotgun pellets were fired into the walls of her home. She nevertheless continued to shop in white-owned stores.

Other incidents involving threats and intimidation occurred, but the evidence linking those occurrences to the boycott was less clear. The only other specific incident linked to the boycott was the decision of the Mississippi Action for Progress, Inc. (MAP) to deal only with black merchants in Claiborne County. One of MAP's programs—Head Start—involved the use of federal funds to purchase food for under-privileged children. After February, 1967, all such purchases were made from black-owned stores only. Meanwhile, the boycott continued.

In early 1967, the county's first black policeman was hired, and one of the boycotted stores hired a black cashier. The boycott ceased for some time, but was reimposed following the assassination of Dr. Martin Luther King in April, 1968. Tension in Port Gibson increased, but no violence ensued. The boycott was lifted again in May, 1968, and remained lifted for almost a year.

Then, on April 18, 1969, a black man was shot and killed in an
encounter with two Port Gibson policemen. Tension again ran high, with large crowds gathering at the local hospital and church. On the next day, April 19, Charles Evers, the NAACP Field Secretary, spoke to a large group and led a march to the courthouse where he demanded the discharge of the Port Gibson police force. The boycott was reimposed, and in one of his speeches, Evers stated that all boycot violators would be “disciplined.” Aaron Henry, president of the Mississippi NAACP, came to Port Gibson on April 20 and spoke to members of the Claiborne County chapter of the NAACP, urging moderation. Evers spoke again the next day. His speech was unrecorded, but he allegedly threatened to break the necks of boycott violators.

Despite the many speeches, the tension and the threats, no violence followed the April, 1969 incident. In October 1969, several of the boycotted merchants filed suit in state court to enjoin the boycott and to recover losses caused by the boycott. No violence occurred following the filing of this suit.

The suit was delayed by collateral proceedings in United States District Court until June, 1973, when trial finally began before a chancellor. After a lengthy trial with 144 witnesses, the chancellor issued an opinion in August, 1976, finding joint and several liability of 130 of the defendants on three counts of conspiracy. The Mississippi Supreme Court reversed in part and affirmed in part, finding the entire boycott illegal due to violence

37. Id.
38. Id.
39. Id.
40. Id.
41. Id.
42. Id.
43. Id. at 3422.
44. See supra note 14.
45. 102 S. Ct. at 3414. The Complaint named as defendants the NAACP, a New York membership corporation; Mississippi Action for Progress, Inc., a Mississippi corporation involved in the “Head Start” program; Aaron Henry, president of the Mississippi Branch of the NAACP; Charles Evers, Field Secretary of the NAACP in Mississippi; and 144 other individual participants in the boycott.
46. Id. at 3420.
47. Id. at 3414 n.5.
48. Id. at 3414.
49. Id. Sixteen of the original 148 defendants were dismissed by stipulation of counsel. One had been misidentified in the complaint. Aaron Henry was dismissed because the plaintiffs failed to meet the burden of proof as to his wrong doing.
and affirming the defendants' liability on a theory of conspiracy. The United States Supreme Court granted certiorari to consider the possible First Amendment implications.

BACKGROUND

Political boycotts have a long and illustrious history in America, beginning with the boycott of British goods which followed the revolutionary Boston Tea Party. Many of the Framers of the Constitution, including Thomas Jefferson and James Madison, supported that boycott and served on committees to enforce it. Americans continued to use boycotts to express their political beliefs—against slave-made goods prior to the Civil War and against the "sweatshops" of the Industrial Revolution. When the civil rights struggles of this century began, a boycott was used effectively to end discrimination against blacks by an Alabama bus system.

However, prior to its Claiborne decision, the Supreme Court had never dealt directly with the question of political boycotts and their first amendment protection. Instead, the Court had dealt with the individual elements of political boycotts. The freedom to associate in order to advance the first amendment freedoms of speech, assembly and petition was recognized in \textit{NAACP v. Alabama ex rel Patterson}. The Court had already upheld the use of

50. \textit{Id.} at 3416. The Mississippi Court found the state's secondary boycott statute inapplicable and held that the restraint-of-trade statute also did not apply.


52. The term "boycott" did not come into use until 1880 when outraged Irish tenant farmers refused to deal with land agent Charles Boycott. H. Toulmin, Jr., \textit{A Treatise on the Antitrust Law of the United States} 196 (1949). Even though the actions of the revolutionary colonists anticipated Boycott by over one hundred years, the classic term clearly fits those actions.


56. \textit{Id.} at 33-35.


the streets and other public places as a public forum and had protected the rights to peaceful picketing and to distribution of leaflets. By 1963 the Court was upholding the right to march and to demonstrate peacefully.

The freedom to associate and to express beliefs was not merely a protection of abstract discussions. "The First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." Such freedom to air grievances about public issues was said to "rest on the highest rung of the hierarchy of First Amendment values." Nor did a coercive effect place these expressions outside the first amendment; "so long as the means are peaceful, the communications need not meet standards of acceptability."

The Supreme Court has also spoken on the questions of individual liability for the actions of associated members. Absent specific evidence of individual responsibility, those who associated for political reasons were not responsible for their associates' illegal acts. It was not enough that the individual knew of the unlawful goals and means. To be liable, he had to know of the organization's unlawful goals and specifically intend to further those illegal aims. Even speech which advocated unlawful conduct received

60. Thornhill v. Alabama, 310 U.S. 88 (1940). In the most recent case to address the question of picketing and distributing leaflets, the Court struck down Title 40 U.S.C. § 13k, holding the statute unconstitutional as an unreasonable restriction on First Amendment rights. The statute barred "the display [of] any flag, banner, or device designed or adapted to bring into notice any party, organization, or movement" in the United States Supreme Court building or on its grounds. Since the grounds, by statute, include the sidewalks, § 13k prohibited appellees from carrying a picket sign containing the text of the First Amendment and from distributing leaflets. The Court held that the public sidewalks surrounding the Court grounds were no different from other public sidewalks. The absolute ban on the use of the sidewalks as a public forum was an unnecessarily broad restriction. United States v. Grace, 51 U.S.L.W. 444 (U.S. April 19, 1983)(No. 81-1863).
first amendment protection. 69

So long as the methods of an association were lawful, its actions were protected. Even when some of the actions were illegal, the only damages which could be recovered were those which were "the direct consequences of such [illegal] conduct and [did] not include consequences from" peaceful methods of expression. 70

Although there has been some suggestion that the freedom of association may no longer be protected by the strict scrutiny test of the past, 71 the above cases have presented the lower federal courts with a guideline for deciding cases which deal specifically with political boycotts. The courts must grant protection to political expression and hold liable only those who intentionally further illegal aims. Yet, even with this guideline, there has been some confusion.

Major confusion and differences of decisions have resulted from attempts to distinguish between purely political boycotts by noncommercial organizations and political boycotts by commercial organizations in order to answer restraint-of-trade questions. 72 Some courts have attempted to balance the governmental interest in protecting free competition in the market against the boycotters' interest in freedom of expression. 73 Others have found an unequivocal right to political persuasion unhampered by any consideration of the anti-competitive effect. 74

Many commentators have suggested different solutions for the problems. Some feel that even non-commercial boycotts may be prohibited by the Constitution. 75 One has suggested that a narrow

73. Osborn, supra note 71 at 553; Crown Century, supra note 71 at 759; Missouri v. NOW, 620 F.2d 1301, 1324 (8th Cir.) (Gibson, J., dissenting), cert. denied, 449 U.S. 842 (1980).
75. Note, Protest Boycotts Under the Sherman Act, 128 U. PA. L. REV. 1131 (1980); Note, Constitutional Rights of Non-commercial Boycotts: A Delicate Bal-
definition of conspiracy may allow for distinguishing between anti-competitive refusals to deal and the right to be politically persuasive. The suggestion has been to apply Sherman Act analysis only to those boycotts which have a sufficiently anti-competitive effect to warrant anti-trust prohibitions.

The Supreme Court itself has never offered a specific answer to the questions raised by the political boycott, anti-trust problem. However, some of the issues were raised in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. In that case, a group of trucking companies brought an anti-trust suit against several railroads and a railroad association who had combined in a campaign to foster adoption of laws destructive to the trucking industry. In addition, the railroad group hired a public relations firm to create distaste for truckers among the general public. The Court found no violation of the Sherman Act can be based on attempts to influence the passage of legislation. Such action is specifically protected by the right to petition the government, and was not the intended target of the Sherman Act. The Court considered the legislative history of the Act and decided that it excluded political activity such as that of the railroads in the Noerr case.

A narrow interpretation of Noerr would limit it to cases in which the concerted action was aimed at influencing the passage of specifically restraining legislation. However, in Missouri v. NOW, the Eighth Circuit followed the reasoning of the Noerr court and decided that a convention boycott organized by the National Association of Women in an attempt to influence Missouri's vote on the Equal Rights Amendment was not covered by the Sherman Act. The court saw the primary question to be "the applicability of the Sherman Act to a politically motivated but economically tooled boycott participated in and organized by non-competitors of those who suffered as a result of the boycott." That court found that

ance, 10 Hofstra L. Rev. 773 (1982).


79. Id. at 137.

80. Id. at 136.

81. Id. at 137.

82. 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980).

83. Id. at 1302.
"using a boycott in a non-competitive political arena for the purpose of influencing legislation is not prescribed by the Sherman Act." While claiming to base its decision squarely on the Noerr precedent, the NOW court admitted that the Sherman Act question had never been specifically addressed by the Supreme Court, which left lower courts without definite guidelines, forcing them to draw inferences and make educated guesses. Missouri appealed the Eighth Circuit's decision, but the Supreme Court denied certiorari, leaving the Sherman Act question unanswered.

As a solution to the tangle presented by these conflicting decisions and suggestions, the Claiborne decision is not entirely conclusive. It answers some questions but raises others.

ANALYSIS

The decision in NAACP v. Claiborne Hardware Co. "fostered the right to associate by removing civil liability imposed on a group that had conspired to carry out a politically motivated economic boycott." The case is the most recent in a long line of cases brought by or against the NACCP, seeking to vindicate protected associational rights.

Writing for a seven-member majority, Justice Stevens established at the outset a constitutional protection for the non-violent elements of a political boycott. The peaceful picketing, the marches and demonstrations were all protected first amendment freedoms. In addition, the speech of the boycotters, even though coercive and threatening social ostracism did not "lose its protected character . . . simply because it may embarrass others or coerce them into action."

84. Id. at 1315.
85. Id. at 1309.
86. 449 U.S. 842 (1980).
87. 102 S. Ct. 3409 (1982).
90. Justice Rehnquist concurred without opinion, and Justice Marshall took no part in the decision. 102 S. Ct. at 3437.
91. Id. at 3424; see also, notes 58-65, supra, and accompanying text.
92. 102 S. Ct. at 3424.
Once he established the constitutional protection of the boycott, Justice Stevens set out the limits on that protection. Using the test established in *United States v. O'Brien*, he recognized that "[g]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances." For example, both the federal and state governments have broad powers to regulate economic activities. However, where the State completely prohibited a non-violent boycott aimed, not at destroying economic competition, but at petitioning for governmental change, the State has gone beyond its rightful power and infringed upon constitutional guarantees.

Justice Stevens barely remarked upon the restraint-of-trade issue. In a brief paragraph, he stated that "a major purpose of the boycott in this case was to influence governmental action." The fact that the boycott was directed not at the government but at merchants was ignored. Citing *Missouri v. NOW*, Justice Stevens implied that when the right to petition is involved, there is very little that could justify the state's interference, even with a boycott which causes economic damage.

Technically, Justice Steven's brief discussion of the restraint-of-trade issue was justified by the opinion of the Mississippi Supreme Court. When considering the issue, the lower court ignored subtleties and questions and stated bluntly that "[t]he United States Supreme Court has seen fit to hold boycotts to achieve political ends are not a violation of the Sherman Act. . . ." That there has never been such a specific decision by the Supreme Court was not mentioned. To support its conclusion, the state court cited the *Noerr* and the *NOW* decisions, although neither decisions was on point.

Whether the lower court was being obtuse, or merely playing it safe, its reasoning clearly illuminated the problems involved in the Supreme Court's refusal to precisely answer the Sherman Act question. After a polite nod at the Sherman Act, the Mississippi Supreme Court simply decided that "we find that the present deci-

94. 102 S. Ct. at 3425.
95. *Id.* at 3426.
96. *Id.*
98. 102 S. Ct. at 3427, n.48.
99. 393 So. 2d at 1302.
100. *Id.*
sion [to prohibit the boycott and find the NACCP liable] may be made without application of the restraint of trade statute." 101

The court then decided the case on a variety of other factors, forcing the Supreme Court, in its reversal, to examine a myriad of sub-issues rather than the basic question of political boycotts in general. By considering the specific facts of the case, by weighing degrees of violence, and by applying a group of cases decided on other first amendment grounds, the Court managed to find that the boycott in the Claiborne case was constitutionally protected, and the action of the Mississippi Supreme Court in prohibiting it was unconstitutional.

The Court's finding directly contradicted the findings of both the Mississippi Chancery Court and the Mississippi Supreme Court.102 Both Mississippi courts relied heavily on the conclusion that the entire boycott was illegal because of the illegal violence which had been associated with it. The chancellor found that "a thread of fear and violence [was] woven throughout this case."103 The state supreme court emphasized that "evidence shows that the volition of many black persons was overcome out of sheer fear, and they were forced and compelled against their wills to withhold their trade and business intercourse from the complainants."104 That court's finding of liability was based on its conclusion that the boycotters "agreed [to] use illegal force, violence and threats" to achieve their ends.105

The Mississippi courts appeared predisposed to find the activities of the boycotters illegal, relying on earlier state decisions regarding boycotts.106 The United States Supreme Court, however, approached the question from the opposite point of view, presuming the boycott to be legal unless thoroughly tainted by violence.107 Both the state courts and the Supreme Court examined carefully the elements of violence related to the boycott but reached diametrically opposite conclusions.

101. Id.
102. Id. at 1301.
103. Id. at 1298.
104. Id. at 1300.
105. 102 S. Ct. at 3417, n.19.
107. 102 S. Ct. at 3423.
The contradictory conclusions clearly illustrated the problem with the Supreme Court's holding in *Claiborne*. As long as the lower courts are required to decide political boycott decisions on a case by case basis, examining each for degrees of violence or methods of implementation, there will always remain a conflict of decisions. As the Mississippi Supreme Court did in this case, future state courts may view the specific facts in a light entirely different from that of the U.S. Supreme Court. Without a clear first amendment protection for boycotts, the state courts may presume a legitimate state interest and reach their decisions without regard for possible constitutional overtones.

In the *Claiborne* case, the Mississippi courts began with the assumption that the threats and vilification employed by the boycotters were illegal. The state supreme court relied, in part, on a state statute which made it illegal "to threaten with bodily harm, intimidate, or coerce a person to prevent, [him] from doing business with another."[108] In fact, one of the boycotters was tried in a criminal case based on that statute, but his conviction was reversed due to a discriminatory jury list.[109]

Once it found that the threats and denunciations were illegal, the Mississippi Supreme Court had no trouble deciding that those threats were inextricably intertwined with the actual violence, thereby tainting the entire boycott. The United States Supreme Court, however, began with presumption that "[s]peech does not lose its protected character simply because it may embarrass other or coerce them into action."[110] The Court apparently considered possible first amendment violations to be more serious than the economic losses to the merchants of Port Gibson. Since the threats and denunciations, commonly made by many of the boycotters, were not, in the opinion of the Court, illegal activities, the Court had no difficulty in separating what it considered isolated incidents of violence from "essential political speech lying at the core of the first amendment."[111] The Court implied that, even though the violence may have arisen out of the atmosphere created by the boycott, the seriousness of the violence was not sufficient to override

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108. 393 So. 2d at 1301, referring to *Mississippi Code Annotated*, § 97-23-83 (1972).
110. 102 S. Ct. at 3424.
111. *Id.* at 3427, quoting *Henry v. First Nat'l Bank of Clarksdale* 595 F. 2d 291, 303 (1979), the collateral proceeding which delayed the *Claiborne* case.
the protection of the first amendment freedoms. 112

After determining that the boycott as a whole was not illegal, Justice Stevens next considered the issue of damages. While the states have the right to impose tort liabilities for business losses caused by violence, when constitutional guarantees are involved, "precision of regulation" is required. 113 To determine the grounds on which liability may be based and on whom it may be imposed, Justice Stevens looked to the Court's decision in United Mine Workers v. Gibbs. 114 That decision held that only damages directly traceable to violent, unprotected conduct could be recovered, 115 and such liability could only be imposed on those specifically proven responsible for the violence. 116

As Justice Stevens pointed out, the Mississippi Supreme Court decision failed to demonstrate that all the "business losses were proximately caused by violence and threats of violence found to be present." 117 The state court also failed to demonstrate that any of the named petitioners were specifically responsible for any of the violent incidents. Attendance at NAACP meetings and participation in protected activities such as marching and picketing were not sufficient to impose liability. 118

Up to this point, the United States Supreme Court's reasoning on the issue of damages followed traditional lines. However, in deciding there was no basis for imposing liability on Charles Evers or the NACCP, the Court strayed from the traditional analysis of first amendment protections to a more unusual interpretation.

According to Justice Stevens, Evers' speeches were within the constitutional protections established by Schneck v. United States 119 and Brandenburg v. Ohio. 120 By that test, Justice Stevens pointed out, "[t]he mere advocacy of the use of force or violence

112. The Court has found violence to outweigh first amendment freedoms in only one case. In Milkwagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941), the Court upheld an injunction against non-violent as well as violent activities related to union picketing. In that case, the violence was considered to be pervasive. Buildings were bombed, trucks wrecked, stores burned, and participants severely beaten.

113. 102 S. Ct. at 3428.
115. Id. at 729.
116. 102 S. Ct. at 3429; see also, notes 65-69, supra, and accompanying text.
117. 102 S. Ct. at 3430.
118. Id. at 3432.
does not remove speech from the protection for the First Amendment."\(^{121}\)

However, under the traditional interpretation of the "clear and present danger test" of *Brandenburg*, if Evers’ speeches were "directed to inciting or producing imminent lawless action and [were] likely to incite or produce such action,"\(^{122}\) those speeches would not be protected. Although there was no evidence that Evers’ speeches did in fact incite violence or were followed by acts of violence, the test requires only that there be a *likelihood* of "imminent lawless action." Under the circumstances, there was every likelihood that Evers’ threats of discipline and broken necks would result in violence. The fact that no such violence ensued should, under traditional analysis, be immaterial. The Court, however, was satisfied with the finding that, since no violence followed Evers’ speeches, those speeches were protected. Since the Court claimed to be applying the standard "clear and present danger" test, it is difficult to determine whether this interpretation was intended to be a new application of the old test, or merely a special interpretation for this case only. Either way this anomaly poses yet another pitfall for lower courts deciding political boycott cases.

The Court further confused the issue in its answer to the question of vicarious liability of the NAACP. Since the only ground for imposing liability on the NAACP would have been as principal to Evers’ agent, that basis for liability was also lost. Since Evers was not liable, according to the Court, neither was the NAACP.\(^ {123}\) However, in *dicta*, Justice Stevens indicated that, even had Evers been found liable, the NAACP would not have been vicariously liable unless it has authorized or ratified the unlawful conduct.\(^ {124}\) Here, the Court again claimed to be applying traditional rules—the standard rules of agency—finding that the "NAACP—like any other organization—of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority."\(^ {125}\) However, the Court found that there was no such authority here since the NAACP had demonstrated that Evers’ threats of discipline and broken necks were contrary to NAACP policy.\(^ {126}\)

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121. 102 S. Ct. at 3433.
122. 395 U.S. at 447.
123. 102 S. Ct. at 3424.
124. *Id.* at 3435.
125. *Id.* at 3435.
126. *Id.*
This is an unusual interpretation of agency doctrine. According to standard interpretation, tortious acts of an agent, even when contrary to specific directions, may be imputed to the principal if the agent's acts are of the general type authorized by the principle.\textsuperscript{127} Evers was authorized to make speeches, organize NAACP chapters, and promote boycotts in Mississippi.\textsuperscript{128} His comments concerning discipline of boycott violators could easily fall within the class of authorized actions. Since the NAACP knew about Evers' actions\textsuperscript{129} but made no attempts to inhibit him,\textsuperscript{130} it is possible to find that the NAACP acquiesced to those actions and could be held vicariously liable.

The Court's reasoning, which would not impute Evers' actions to the NAACP, implied that the test for vicarious liability may be applied differently to political associations. This conclusion is especially likely in light of the Court's decision, only a month before \textit{Claiborne}, to hold a non-profit professional organization liable for the tortious acts of its agents which were directly contrary to the organization's policies and interests.\textsuperscript{131} Had it used such reasoning in \textit{Claiborne}, with a political rather than a professional association, the NAACP would have been found vicariously liable if Evers was liable. The Court apparently felt that when agency doctrine might infringe upon the exercise of constitutional rights, the standard rules must be subjected to restrictions to prevent a chilling effect. As Justice Stevens pointed out, "[t]he rights of political association are fragile enough without adding the additional threat of destruction by lawsuit."\textsuperscript{132} However, the Court's reinterpretation of standard doctrine once again serves to increases the confusion surrounding the problem of political and social boycotts.

\textbf{CONCLUSION}

The decision in \textit{NAACP v. Claiborne Hardware Co.}\textsuperscript{133} presented the Court with an opportunity to answer the questions

\begin{itemize}
\item \textsuperscript{127} \textit{Restatement (Second) of Agency} §§ 216, 231 (1958).
\item \textsuperscript{128} Joint Appendix to Petitioners' & Respondents' Briefs at 441-42, 456-58, \textit{Claiborne Hardware} (No. 81-202).
\item \textsuperscript{129} Id.
\item \textsuperscript{130} 102 S. Ct. at 3435.
\item \textsuperscript{131} American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 102 S. Ct. 1935 (1982).
\item \textsuperscript{132} 102 S. Ct. at 3436, quoting NAACP v. Overstreet, 384 U.S. 118 (1966) (Douglas, J., dissenting).
\item \textsuperscript{133} 102 S. Ct. 3409 (1982).
\end{itemize}
concerning the issue of political boycotts. Following the Court's decision in *Claiborne*, one activist group decided to go ahead with a boycott which had previously been considered on shaky legal ground. 134

However, such reliance on the legality of boycotts may be premature. Although the popular press may think the Court's decision "clearly makes boycotts legal," 135 there are many questions still to be answered. The decision does preclude imposition of civil liability on members of political associations for the violent acts of a few, implying that there must be a more stringent test for vicarious liability of such associations. 136 However, the Court mentioned such a test only in *dicta* and chose to leave the question of its application for another time. In addition, there is still some question whether the constitutional protection afforded political boycotts extends to other types of non-commercial boycotts and whether the restriction on vicarious liability applies to social, cultural, and other non-political—but expressive—forms of association. Although it clearly awaited an opportunity to answer the questions concerning boycotts and anti-competitive conspiracies, freedom of association and vicarious liability, 137 the Supreme Court has, characteristically, refused to answer all the questions at once.

*Elaine Cohoon*

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135. *Id*.
136. 102 S. Ct. at 3435.
137. The Court had an opportunity to answer almost the same questions in Missouri v. NOW, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980).