UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 62 | Number 2 Article 7

1-1-1984

Constitutional Law--The First Amendment and Protest Boycotts: NAACP v. Claiborne Hardware Co.

George Carruthers Covington

NOTE

Constitutional Law—The First Amendment and Protest Boycotts: *NAACP v. Claiborne Hardware Co.*

The protest boycott[1] is a powerful weapon[2] that has helped advance the goals of various interest groups[3] throughout Colonial and American history. Although boycotts occurred even before the word itself had been coined,[4] courts' treatment of such activity is recent and varied.[5] A major problem courts experience in circumscribing protest boycott activity[6] lies in the accept-

1. Throughout this note the term "protest boycott" will signify a boycott motivated by a political, social, religious or other noncommercial purpose. *See generally,* Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal,* 1970 DUKE L.J. 247 (discussing the extent to which the Sherman Act does or should impose restraints on protest boycotts and concluding that noncommercial boycotts should be considered illegal per se, except in a few narrowly defined situations); Note, *Protest Boycotts Under the Sherman Act*, 128 U. PENN. L. REV. 1131 (1980) (extensively discussing the preferability of the term "protest boycott" over other designations used by earlier commentators).

2. Numerous examples illustrate the potential economic impact of boycott actions. A 1963 civil rights boycott of retail merchants in Birmingham, Alabama, for example, was estimated to have cost the merchants as much as $750,000 a week in lost business. *See* TIME, June 7, 1963, at 95. A nationwide boycott of table grapes in 1968 resulted in a 12% decline in sales. *See* TIME, July 4, 1969, at 16, 18.

3. *See, e.g.*, Wall St. J., Nov. 9, 1979, at 2, col. 2 (refusal of dockworkers to unload Iranian goods); N.Y. Times, Nov. 1, 1978, at 85, col. 4 (National Federation for Decency's call for boycott of ABC-TV's "sleazy sex" programming); N.Y. Times, Apr. 20, 1978, at 20, col. 6 (church-group support for consumer boycott of J.P. Stevens & Co.'s textiles in response to illegal, anti-union practices); N.Y. Times, Sept. 21, 1977, at 16, col. 6 (California Ku Klux Klan plan to "help whites" by boycotting business unfriendly to the Klan); N.Y. Times, Aug. 1, 1977, at 21, col. 4 (homosexual organization's boycott of Florida's citrus products in retaliation for anti-gay campaign of Anita Bryant); N.Y. Times, Mar. 17, 1973 at 28, col. 2 (consumer boycott to protest high meat prices).

4. The word boycott derives from the eponym Captain Charles Cunningham Boycott. As a retired British army officer serving as an estate manager in Ireland, he refused, in 1880, to reduce rents in response to demands by the Irish Land League and served writs of eviction on his tenants. When, at the urging of Charles Parnell, an Irish nationalist leader, Boycott's tenants refused to deal with him, the captain was obliged to import workers from Ulster to harvest his crops under the guard of hundreds of soldiers. II ENCYCLOPEDIA BRITTANICA 212 (15th ed. 1974).

5. Courts' attempts to restrict protest boycotts have followed several varied tacks, including imposing tort and antitrust liability. Tort liability is usually framed in terms of malicious interference with the plaintiff's business interests, as in NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409 (1982), or an unlawful conspiracy to destroy plaintiff's business. Southern Christian Leadership Conference, Inc. v. A. G. Corp., 241 So. 2d 619 (Miss. 1970). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 130 (4th ed. 1971). For a summary of the tort law as applied to various political boycotts, see Comment, *The Consumer Boycott*, 42 MISS. L.J. 226, 234-38 (1971); Note, *The Common-Law and Constitutional Status of Anti-Discrimination Boycotts*, 66 YALE L.J. 397, 398-402 (1957). Antitrust liability seems unlikely after the decision in Missouri v. NOW, Inc., 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980), in which the court plumbed the legislative history of the Sherman Act and held that a protest boycott was outside the scope and intent of the Act. Liability based on boycotts as illegal secondary pressure is assured only in the labor union context. *See* Longshoremen v. Allied Int'l, Inc., 456 U.S. 212 (1982).

6. Boycott activity includes the various types of behavior that comprise a boycott. Typically, this activity includes an agreement among two or more people to initiate the boycott and use the publicity their agreement generates to induce third parties to join in the effort. Methods used to publicize a boycott vary widely, but usually include speeches, rallies, magazine and newspaper notices, picketing, and word of mouth.

ability of its most obvious component—the decision by an individual to take his business where he pleases. Against this well-established free market bias, courts must weigh the legitimate state concern that the boycott may be accompanied by economic distortion and financial blackmail. When faced with these competing concerns in the past, the Supreme Court held that group boycotts in a business setting were illegal per se.[7]

Recently, however, in *NAACP v. Claiborne Hardware Co.*[8] the Supreme Court extended first amendment protection to political protest boycotts. Although the decision legally endorses the historical acceptance protest boycotts have enjoyed, several factors suggest that this potentially far reaching holding was not the product of a great deal of judicial scrutiny. Specifically, the social and historical backdrop to the case very nearly dictated its outcome and thus discouraged serious examination of the conflicting interests at stake.[9]

Had the Court faced the first amendment question in a different boycott case it might have felt obligated to identify and weigh more carefully the difficult, conflicting interests involved. As it was, the hard facts of *Claiborne* may have made the answer seem too clear, leading the Court to announce the kind of broad protection that ultimately will demand extensive qualification.

The *Claiborne* boycott began in March 1966, when several influential blacks in Claiborne County, Mississippi agreed to withhold their business from a group of merchants doing business in the town of Port Gibson. To encourage others in the community to join them, the organizers began picketing the boycotted businesses, distributing leaflets, giving speeches and holding rallies.[10] Scattered acts of violence accompanied this peaceful activity.[11] The violence was directed at shoppers who had ignored the boycott. No evidence, however, linked the violence to the organizers.[12]

The nature of the demands that had prompted the effort reflected the state

---

7. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). All group boycotts considered by the Supreme Court prior to NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409 (1982), had been conducted by business firms or associations of such firms. *See, e.g.*, Silver v. New York Stock Exch., 373 U.S. 341 (1963) (membership exchange of broker-dealers in securities); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (per curiam) (manufacturers of gas burners and utility companies); Associated Press v. United States, 326 U.S. 1 (1945) (cooperative association of newspaper publishers); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) (association of women's garment manufacturers). *See also* Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685. It is clear that protest boycotts' de facto immunity to legal challenge has receded as social and political activitists increasingly look to the marketplace as a forum for effective protest.

8. 102 S. Ct. 3409 (1982).

9. *Id.* at 3413-18. The detailed recitation of facts in the *Claiborne* opinion does not reveal the extent to which the boycott damaged the merchants or the degree to which the merchants could affect conditions that the boycotters wanted changed. Both considerations would be relevant if the Court had thought that the facts demanded a balanced analysis.

10. *Id.* at 3422-23.

11. Evidence at trial showed that supporters of the boycott had committed several acts of violence against those who did not go along with the effort. These forms of discipline included shooting at houses, knocking out car windows, slashing tires, as well as other forms of intimidation. *Id.* at 3421 n.37, 3422.

12. *Id.* at 3422.

of race relations throughout the South in the mid-1960's. The blacks of Claiborne County did not demand hiring quotas or job training programs. They sought the desegregation of public schools and facilities, the hiring of a black policeman, and the selection of blacks for jury duty.[13] They also requested that police officers "no longer address Negroes by such terms as 'boy,' 'girl,' 'shine,' 'uncle,' or any other offensive term, but as 'Mr.,' 'Mrs.,' or 'Miss,' as is the case with other citizens."[14] The boycott persisted because, in the words of one targeted merchant, "I thought that they were demanding too much too quickly."[15]

The effectiveness of the boycott varied throughout its long duration.[16] Some concessions led to a partial lift of the ban,[17] but the murder of Dr. Martin Luther King in 1968 and the death of a young black man during an encounter with two Port Gibson police officers in 1969 renewed the boycott's intensity. Finally, in October 1969 several targeted merchants filed suit. Many of the merchants suffered serious economic harm[18]—blacks represented just over 70% of Claiborne County's population in the mid-1960's,[19] and the boycott received strong support at its height. Many of the merchants undoubtedly complained that they had no control over the conditions that had motivated the blacks to boycott, insisting that most of the changes sought could be effected only through the political process, to which everyone had equal access. Anyone familiar with the political dynamics of a small southern town, however, might reasonably question this assertion.[20] Certainly the blacks of Port Gibson believed that economic pressure on targeted merchants would lead to political pressure on town hall. Other civil rights boycotts had confirmed this suspicion.[21] The boycotters also probably considered more traditional forms of political expression as less effective. Throughout the South, those who controlled cities and towns like Port Gibson had developed techniques of political obstruction that had postponed for generations any social change that was

13. The demands of the petition are listed in full in the opinion of the Mississippi Supreme Court, 393 So. 2d 1290, 1295-96 (Miss. 1980).

14. *Claiborne*, 102 S. Ct. at 3418-19.

15. Brief for Petitioner at 3, *Claiborne*, 102 S. Ct. 3409 (1982).

16. The boycott officially began with a voice vote in favor of the action by several hundred blacks on April 1, 1966. Most accounts cite the filing of the lawsuit on October 31, 1969 as the date the boycott ended. *Id.* at 3-8.

17. On February 1, 1967, Port Gibson employed its first black policeman. During that month, the boycott was lifted on a number of merchants. *See Claiborne*, 102 S. Ct. at 3420.

18. The chancellor found that twelve of the merchants had suffered an economic loss that totaled $944,699 over seven years. *Id.* at 3415.

19. In the 1960 Census, blacks constituted 76% of the population of Claiborne County. *See* UNITED STATES BUREA OF THE CENSUS, CENSUS OF POPULATION: 1960 GENERAL POPULATION CHARACTERISTICS: MISSISSIPPI (1963).

20. For an excellent discussion of the political dynamics of a small southern town during this period, see W. CHAFE, CIVILITIES AND CIVIL RIGHTS (1980).

21. The petition that preceded the boycott made reference to "selective buying campaigns" that had been used with success in other communities and added that the black people of Port Gibson hoped such tactics would not be necessary there. *Claiborne*, 102 S. Ct. at 3419. Perhaps the most famous example of the many civil rights boycotts was the bus boycott begun by black citizens of Montgomery, Alabama in 1955 to protest racial discrimination. *See* M. L. KING, STRIDE TOWARDS FREEDOM (1958); N.Y. Times, Dec. 6, 1955, at 31, col. 2.

viewed as "too much too quickly."[22] The blacks of Port Gibson might have recalled their fruitless attempts to use the traditional political methods and concluded that they were still part of "a social order that had consistently treated them as second class citizens."[23]

In spite of these facts, after an eight month trial delayed for three and one-half years[24] by procedural maneuvering, the Mississippi Chancery Court found the NAACP and 129 codefendants jointly and severally liable for $1,250,699 in damages and attorneys' fees.[25] The first and primary ground for liability was defendants' involvement in a civil conspiracy to commit the common law tort of interference with the business of the merchants.[26] As a second and alternative ground the chancellor found that defendants had organized an unlawful secondary boycott.[27] As another alternative ground the chancellor found that the boycott had violated Mississippi's antitrust statute.[28]

On appeal the Mississippi Supreme Court found the entire boycott unlawful but on an entirely new theory. The court held that the defendants had conspired to stage a boycott that was unlawful solely because it was violent.[29] The court, however, found errors in the proof of damages and remanded for retrial on that point alone.[30]

The Supreme Court of the United States was somewhat mystified by the paucity of evidence on which the Mississippi Supreme Court might have based its theory of liability. The Court noted that at trial the chancellor had made no factual findings that the defendants had agreed or conspired to use force and violence as a part of the boycott.[31] Respondents attempted to clarify their position by filing a supplemental brief that linked the petitioners to specific acts of violence on the basis of their membership in one of three groups that had managed and enforced the boycott.[32] Thus, the conspiracy theory disappeared and repondents instead sought to base their action against petitioners

22. *See* Brief for Petitioners at 3, *Claiborne,* 102 S. Ct. 3409.

23. *Claiborne*, 102 S. Ct. at 3425.

24. Commencement of the trial was delayed by collateral proceedings in federal court. *See* Henry v. First Nat'l Bk., 50 F.R.D. 251 (N.D. Miss. 1970), *vacated,* 444 F.2d 1300 (5th Cir. 1971), *cert. denied,* 405 U.S. 1019 (1972). The district court entered a preliminary injunction restraining the chancery court proceedings, on the theory that the merchants "[sought] to impinge upon [the boycotters'] First Amendment rights," and that "the prosecution of the State Action [would] have [had] a chilling effect upon the exercise of those rights." *Henry,* 50 F.R.D. at 268. On appeal, the Fifth Circuit vacated, holding that merely commencing a private state tort suit had not itself involved "state action" for purposes of 28 U.S.C. § 1343(3). *Henry,* 444 F.2d at 1312.

25. Claiborne Hardware Co. v. NAACP, No. 78,353 (Miss. Chancery Ct. filed Aug. 9, 1976), *reprinted in* Appendices to Petition for Writ of Certiorari at 68b, *Claiborne,* 102 S. Ct. 3409.

26. *Id., reprinted in* Appendices to Petition for Writ of Certiorai at 68b, *Claiborne,* 102 S. Ct. 3409. The elements of the tort include intentional "malicious" interference and resulting damage. *See generally*, W. PROSSER, LAW OF TORTS §130 at 953-54 (4th ed. 1971).

27. Claiborne Hardware Co. v. NAACP, No. 78,353 (Miss. Chancery Ct. filed Aug. 9, 1976), *reprinted in* Appendices to Petition for Writ of Certiorari at 44b-53b, *Claiborne,* 102 S. Ct. 3409.

28. *Id., reprinted in* Appendices to Petition for Writ of Certiorari at 53b-57b, *Claiborne,* 102 S. Ct. 3409; MISS. CODE ANN. § 75-21-9 (1972).

29. NAACP v. Claiborne Hardware Co., 393 So. 2d 1290, 1311 (Miss. 1980).

30. *Id.* at 1304-07.

31. *Claiborne*, 102 S. Ct. at 3417.

32. *Id.* at 3417-18.

on some form of vicarious liability resulting from management of and involvement in a violent boycott. In attempting to determine the first amendment significance of *Claiborne*, it is important to note that the merchants never argued before any court that a tightly organized political protest boycott without violence could create liability for its organizers. As a result, the *Claiborne* decision was primarily concerned with the adequacy of the evidence that tied the organizers of the boycott to the indisputably illegal, violent incidents that had occured.

The Court found that the respondents had failed to link the violent activity to any of the named defendants, including the NAACP, and, in addition, that no logical relation existed between the damages awarded and any economic harm that had resulted exclusively from such violent boycott activity.[33] The Court also rejected the notion that isolated violent acts by individuals involved in the boycott could taint the entire effort and thereby subject all involved to liability.[34]

The Court did extend first amendment protection to the peaceful activity that made up the boycott in *Claiborne*,[35] but the analysis it used to reach that holding was somewhat sketchy, probably because the merchants never made the issue a part of their case. The Court extended first amendment protection to the peaceful aspects of the boycott only to set the stage for a rigid examination of the evidence linking petitioners to the illegal violent activity.[36] Since the overall boycott created a backdrop of constitutionally protected behavior the Court could more easily justify its holding that the findings of the Mississippi court were not adequately supported by the evidence. This indirect significance of first amendment protection coupled with the compelling facts of the case perhaps best explain the Court's lack of analysis in deciding this constitutional issue.

The Court did offer two arguments for extending first amendment protection to the Port Gibson boycott. First, it determined, by labeling rather than analyzing, that the boycott was political, rather than economic, activity and thus not readily subject to governmental regulation.[37] Second, the Court compared the protest boycott in *Claiborne* to the direct political petitioning present in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[38] In *Noerr*, the Court had extended first amendment protection to direct political petitioning despite the anticompetitive effect of such petitioning.[39]

---

33. *Id.* at 3431.

34. *Id.* at 3432.

35. *Id.* at 3427.

36. *Claiborne,* 102 S. Ct. at 3427.

37. *Id.*

38. 365 U.S. 127 (1961). For a general discussion of the *Noerr* decision, see Fischel, *Antitrust Liability for Attempts to Influence Government Action; the Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. CHI. L. REV. 80 (1977); Note, *The Brakes Fail on the* Noerr *Doctrine*--Trucking Unlimited v. California Motor Transp. Co., 57 CALIF. L. REV. 518 (1969).

39. The so-called "doctrine" that emerged from *Noerr*, and its successor U.M.W. v. Pennington, 381 U.S. 657 (1965), is often referred to as the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine originally applied to direct petitioning for governmental action. That activity

The Court prefaced its political label of the boycott with a discussion of the traditional first amendment conduct that had permeated the entire effort.[40] Such highly protected activities as public speaking, pamphleteering, association and petitioning were conspicuous components of this boycott.[41] The Court acknowledged, however, that the presence of protected activity alone was not determinative. It alluded to a countervailing argument by noting the long-standing recognition of "strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association."[42] The Court identified union picketing, labor boycotts, and antitrust associations as examples of activities in which the governmental interest in regulating economic affairs traditionally has outweighed such regulation's "incidental" infringement on activity otherwise protected by the first amendment.[43]

The Court declined, however, to take the next step of setting out and balancing the conflicting first amendment and economic interests that were at stake in the *Claiborne* boycott. The Court instead stated flatly that the lower courts had attempted to regulate petitioners' "peaceful political activity"[44] and that the State had less authority in this context than when regulating "economic activity."[45] The problem, of course, is that protest boycotts and all the activity mentioned by the court—secondary labor boycotts, union picketing and antitrust activity—might involve conduct that could be viewed as both "peaceful political activity" and "economic activity."[46]

---

was protected even when it was part of a broader scheme that violated the Sherman Act. The doctrine has protected even unethical or illegal methods of exerting influence directly on government officials. *See, e.g.*, Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 140 (1961) (propaganda deliberately made to appear as "spontaneous declarations of independent groups"); Mark Aero, Inc. v. Trans World Airlines, Inc., 580 F.2d 288 (8th Cir. 1978) (coercion and false statements); Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696 (D. Colo. 1975) (illegal contributions and bribes). Courts have cautioned that they will scrutinze alleged petitionary activity to assure that it actually seeks government action, and is not merely an attempt to achieve a commercial advantage directly, without any governmental action. The application of the *Noerr-Pennington* doctrine to protest boycotts, which began with Missouri v. NOW, Inc., 620 F.2d 1301 (8th Cir. 1980) and is continued in *Claiborne*, marks the only application of *Noerr* to activity that sought only to influence governmental action indirectly by putting economic pressure on nongovernmental targets. For general discussion of the scope of *Noerr* prior to its application to boycotts, see Fischel, *supra* note 38; Holzer, *An Analysis for Reconciling the Antitrust Laws with the Right to Petition:* Noerr-Pennington *in Light of* Cantor v. Detroit Edison, 27 EMORY L.J. 673 (1978); Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 HARV. L. REV. 847 (1968).

40. *Claiborne*, 102 S. Ct. at 3423.

41. *Id.*

42. *Id.* at 3425.

43. *Id.*

44. *Id.* at 3426.

45. *Id.*

46. In International Longshoremen's Assoc. v. Allied Int'l, Inc., 456 U.S. 212 (1982), the Court faced such mixed activity. The boycotters in *International Longshoremen's Assoc.* were members of a labor union and, in protest of the Soviet invasion of Afghanistan, refused to handle cargo destined to or coming from the Soviet Union. The Court noted the mixed nature of the activity by holding that, although the union was involved in peaceful political activity, such activity had a ruinous economic effect on an innocent third party. The Court held that such protest boycott activity, *by a labor union*, was not protected by the first amendment. *Id.* at 224-25. The Court did at least acknowledge that the facts might call for a balancing of interests had not the

To reveal more clearly the conflicting issues, another court addressing protest boycotts will have to scrutinize and balance the degree to which attempted governmental regulation interferes with first amendment activity.[47] A court also will have to determine the true purpose of the boycott and then decide if that purpose justified the economic harm caused. No court likes to make these difficult determinations. They are usually heavily dependent on the facts and are highly resistant to an analysis that can be used with an eye to future cases.[48] The exercise, however, is not without value. Principles for future cases would emerge if a court acknowledged that both political and economic behavior are typically present in a protest boycott case, and then decided which behavior was more significant.

The Court in *Claiborne* did not take this step, because it was not addressing the *typical* protest boycott. Instead it faced a group of boycotters who had carried a great deal of emotional, legal, and historical baggage into the courtroom. The *Claiborne* Court's placement of a "political" tag on activity with both political and economic effects was one way of saying that the political goals of the Port Gibson boycott justified the resulting economic harm to the town's merchants. Other than the merchants, few would quibble with the result. The Court arrived there, however, by using a shorthand form that yielded an incomplete analysis.

The abbreviated analysis discussed above will not mislead the courts in future cases; it simply will not lead them at all. The second argument in *Claiborne* for extending first amendment protection to the boycott is more problematic. The Court cited *Noerr* to support the proposition that the Port Gibson boycott was a form of petitioning, which the states may not regulate, even though the boycott had caused the merchants economic harm.[49] Aside from granting what was earlier ignored—that boycotts include economic as well as political conduct—this analogy to *Noerr* could create problems for the courts.

In *Noerr* plaintiffs were in the trucking business and had sought to enjoin defendants, a lobbying group for the railroads, from directly petitioning the legislature for laws that would have harmed the truckers and allegedly reduced competition in the transportation industry.[50] The *Noerr* decision created a narrow first amendment exception to the antitrust laws by allowing representatives of one group within an industry to petition the legislature for regulations that would confer some economic advantage on the petitioning

---

labor laws, which governed the behavior, already reflected in statutory form the balancing of the interests of labor and management. *Id.* at 226.

47. This is the approach advocated in an often cited student note on the subject. *See* Note, *Political Boycott Activity and the First Amendment,* 91 HARV. L. REV. 659 (1978).

48. Justice Brennan warned against the hazards of such determinations in his concurring opinion in Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981). *See supra* notes 98-99 and accompanying text.

49. *Claiborne*, 102 S. Ct. at 3426.

50. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 129 (1961).

party while possibly reducing competition in that industry.[51] Courts have subsequently applied the *Noerr* doctrine to concerted publicity directed at the legislature even when the desired legislation would actually produce otherwise illegal anticompetitive results.[52] The potential end—reducing competition—does not taint the highly protected means—petitioning the government. The exception should be clear cut—if a party is engaged in direct petitioning of the legislature, there exists virtual per se protection for the efforts, regardless of the results that might follow if the legislation is passed. The *Noerr* doctrine embodies than a common sense recognition that the legislative branch must be entrusted to hear both sides and determine for itself whether to act upon or ignore a message.

In *Missouri v. NOW, Inc.*[53] the Eighth Circuit extended the *Noerr* doctrine to a less direct form of petitioning, the protest boycott. In that case the National Organization for Women (NOW) called for a convention boycott of the hotel industry in Missouri to pressure that state's legislature into passing the Equal Rights Amendment. The court held that the boycott was protected, relying primarily on the *Noerr* doctrine.[54] The dissent emphasized the inappropriateness of forcing protest boycotts into the *Noerr* line of cases simply because the boycotters ultimately hoped to effect legislative action,[55] and argued persuasively that the majority in *NOW* applied the converse of the *Noerr* holding.[56] In *NOW* the highly protected end—petitioning the legislature—was used to insulate from prosecution the means—a conspiracy to restrain trade. Or as the State argued: "The *Noerr* case was a combination to get legislation harmful to others. The *NOW* case is a combination to harm others to get legislation."[57]

The Court in *Claiborne* compared the admirable goals of the boycotters in that case to the less than admirable goals of the defendants in *Noerr* and found that the distinction made *Claiborne* an easier decision than *Noerr*.[58] This distinction misses the point. In *Noerr* the defendants were directly petitioning the government, and this activity was protected regardless of the goals.[59] Had the railroad defendants in *Noerr* organized a boycott of the trucking industry to last until the legislature passed laws advantageous to the railroaders, a comparison of the two cases would perhaps have been helpful. It is difficult to believe, however, that the Court would protect every group of boycotters that could claim as its ultimate purpose an intention to influence legislation. It is not likely, for example, that any court would have protected a boycott of Chrysler organized by General Motors with the ostensible purpose of petition-

51. *Id.* at 136-38.
52. *See* UMW v. Pennington, 381 U.S. 657 (1965).
53. 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).
54. *Id.* at 1311-16.
55. *Id.* at 1319-26 (Gibson, J., dissenting).
56. *Id.* at 1323.
57. *Id.*
58. *Claiborne*, 102 S. Ct. at 3426.
59. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139 (1961).

ing Congress to revoke the "bail-out" of that company. No matter how General Motors urged that it was simply engaged in *Noerr*-type petitioning, the effort would be tainted by the competitive advantage General Motors stood to gain. It is equally unlikely that protest boycotters without any professed intention to influence legislation are always subject to stricter regulation because they do not fit into the *Noerr* line of cases. It would be absurd, for example, to protect Jesse Jackson's boycott of Anheuser Busch[60] only if the boycott's announced goal was to procure legislation forcing that company to employ more blacks, but not to protect the activity if the goal was to pressure the company to take such action itself. If the *Noerr* exception is taken as the actual basis of the *Claiborne* decision and followed to its logical conclusion, virtually any protest boycott that claimed to seek legislative action would enjoy at least a strong presumption of legality, while other protest boycotts that do not seek legislation, either directly or indirectly, would be relegated to some separate category. Any organizers could claim *Noerr* protection by characterizing their efforts as indirect attempts to petition the legislature for a law giving the boycotters the results they sought. It is doubtful that the Court intended such a reading for *Claiborne.*

The objectives of the Port Gibson boycott significantly affected the *Claiborne* decision,[61] but casting those objectives as attempts ultimately to petition the legislature does not add much to their significance. It was the important objective of racial equality[62] that probably persuaded the Court that protecting the boycott was more important than protecting the merchants.

Given also the compelling facts and significant presence of first amendment activity in *Claiborne*,[63] the Court's decision to extend first amendment protection to the Port Gibson boycott seems obvious. Unfortunately, the decision does not offer much direction to courts in future cases that are confronted with parties and facts that do not similarly point to one answer. The opinion's reliance on the *Noerr* decision is also of little help since that decision can only be applied with any precision to situations involving direct petitioning of the government.

Undoubtedly, there will be more difficult cases. The state's interest is a strong one—a fact not adequately revealed by the facts of *Claiborne*. Frequently, a protest boycott financially destroys its targets because the political process or other factors (over which the targets may have little or no control) do not respond to the boycotters' demands. For example, it is unlikely that American businessmen supported the Soviet invasion of Afghanistan or held great sway over the Soviet Politburo, yet certain American businesses suffered great economic harm when longshoremen, protesting the invasion of Afghanistan, boycotted the handling of cargo arriving from or destined for the Soviet

60. Ross, *PUSH Collides with Busch,* FORTUNE, Nov. 15, 1982, at 90.

61. *See Claiborne*, 102 S. Ct. at 3425-26.

62. *See id.* at 3425.

63. *Id.*

Union.[64] Arab nations have attempted (largely unsuccessfully) to boycott American businesses that trade with Israel in hopes of bringing about everything from Palestinian autonomy to Israel's extinction.[65]

On the other hand, individuals from the American Revolution to the civil rights struggle of the 1960s,[66] have used the protest boycott as one of the most effective tactics to apply pressure where it hurts (the pocketbook), and thus hasten needed social change. It is doubtful that the courts can ever devise a precise, categorical formula for testing the legality of a protest boycott, no matter how desirable such precision might be. The goals, the parties, the methods, and the harm of the individual boycotts vary too much. Targets of boycotts will continue to call on the courts, however, to provide relief from what they will always view as an unjust (hence illegal) boycott.

The parties to the next protest boycott case are easily imagined. Take a hypothetical company involved in some form of activity that is legal but objectionable to some group of hypothetical defendants. The company could have, for example, extensive investments in South Africa, all perfectly legitimate. The defendants-to-be agree to withhold business from both the company and several of its highly visible major customers. In addition, they agree to mount a massive publicity campaign to bring attention to their decision and to urge all like-minded citizens to join in their refusal to deal. The targeted company then responds with a suit under common law tort theories of conspiracy to interfere with business relations and inducement of third parties not to deal.[67]

It is difficult to envision how even a strained *Noerr* analysis could apply to these facts. There is no attempt to obtain legislation, even indirectly. Still, the behavior appears quite similar to that found in *NOW* and *Claiborne*. In fact, this strong similarity suggests that a future boycott of this sort would be subject to similar treatment in spite of the absence of any form of petitioning by the boycotters.

In *United States v. O'Brien*,[68] however, the Supreme Court suggested a suitable "test" that could be applied. This test was suggested for analyzing the constitutionality of attempts to regulate conduct that combines "speech" and "nonspeech" elements, such as boycotts.[69] The Court stated the test as follows:

> [G]overnment regulation is sufficiently justified if [1] it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no

64. *See supra* note 46.

65. *See, e.g.*, Note, *The Arab Boycott: The Antitrust Challenge of* United States v. Bechtel *in Light of the Export Administration Amendments of 1977*, 92 HARV. L. REV. 1440, 1446 (1979).

66. *See supra* note 21.

67. *See generally*, W. PROSSER, *supra* note 5, at § 130.

68. 391 U.S. 367 (1968).

69. *Id.* at 376.

greater than is essential to the furtherance of that interest.[70]

In order to apply *O'Brien* to protest boycotts, it is helpful to break down the activity into the two components suggested in the hypothetical that are inherent in almost any boycott. Virtually all protest boycotts will consist of a group of persons agreeing to boycott (concerted refusals to deal).[71] That same group will also urge others to follow their lead (inducement of third parties).[72] Indeed, the lower courts in *Claiborne* found that the Port Gibson boycott contained both of these elements.[73] One student commentator, in a frequently cited note,[74] has discussed the application of the *O'Brien* test to hypothetical attempts to regulate protest boycotts, concluding that the first amendment protects the inducements of third parties but not concerted refusals to deal.[75] This conflicts with the holding in *Claiborne* that *all* nonviolent elements in the Port Gibson boycott are entitled to first amendment protection.[76] It is worthwhile, then, to explore how *O'Brien* applies to concerted refusals to deal and inducements of third parties in order to shed some light on the considerations involved in extending first amendment protection to both.

The inducement of third parties is the component of a boycott that most clearly involves the exercise of free speech.[77] Any regulation that attempts to limit methods of persuasion, such as speeches, picketing, and other publicity employed in the typical boycott, would create the greatest risk of violating the first amendment. Applying the *O'Brien* test to such a regulation would help isolate the first amendment problem despite the gratuitous nature of the test's first two criteria. Criterion one begs the question by demanding the regulation be constitutional, which is exactly what the overall test is supposed to determine. Criterion two requires that a "substantial" governmental concern prompt the regulation. This requirement has a certain self-fulfilling quality since almost any legal question exposed to judicial scrutiny tends to take on significance as a result. Moreover, the flexibility of the term "substantial" does not help advance the analysis. It is the third criterion that forces scrutiny of the challenged behavior and reveals the ultimate effect of attempts to regulate the publicity component of a protest boycott. Simply put, the question is this: Is the concern unrelated to the suppression of free expression? A relaxed application of this requirement would screen out very little—the government

70. *Id.* at 377.

71. *See, e.g.*, Ferdinand Hamm Brewing Co. v. Pelinder, 97 Mo. App. 64, 69-70, 71 S.W. 691, 692-93 (1903); Finnegan v. Butler, 112 Misc. 280, 182 N.Y.S. 671 (Sup. Ct. 1920); RESTATEMENT OF TORTS § 765 (1939).

72. *See, e.g.*, Boggs v. Duncan-Schell Furniture Co., 163 Iowa 106, 143 N.W. 482 (1913); Graham v. St. Charles R.R., 47 La. Ann. 214, 16 So. 806 (1895); Tuttle v. Burch, 107 Minn. 145, 119 N.W. 946 (1909); RESTATEMENT OF TORTS § 766 (1939).

73. Claiborne Hardware Co. v. NAACP, No. 78,353 (Miss. Chancery Ct. filed Aug. 9, 1976), *reprinted in* Appendices to Petition for Writ of Certiorari at 38b, *Claiborne,* 102 S. Ct. 3409.

74. Note, *supra* note 47. This note was cited in Missouri v. NOW, Inc., 620 F.2d 1301, 1324 n.16; Brief for Petitioner at 24, *Claiborne,* 102 S. Ct. 3409.

75. Note, *supra* note 47, at 687-91.

76. *Claiborne*, 102 S. Ct. at 3427.

77. The Court found that the inducement of third parties in *Claiborne* involved clear first amendment activity such as giving speeches, picketing, and associating. *Id.* at 3424.

would rarely justify restrictions on speech in terms that are clearly related to the suppression of that speech's message. Unless the inducement of third parties involved exceptional categories that are outside the first amendment,[78] the government could not refuse to protect boycott publicity by explaining that it did not approve of the message.[79] Instead, the government probably would refer to some other concern. Most typically, the government's concern would be to avoid the distortion of pure market decisions or, put another way, to protect pure economic competition. Of course, this concern is implicated only if the message used to induce third parties is persuasive to an individual deciding whether to purchase. Our hypothetical company is always free to counter the campaign with one of its own justifying its South African investments.[80] The public can then make up their own minds. For that matter, the company can ignore the campaign and trust that the public will not care where they invest their money as long as they have a good product.

Whatever the consumer decides, it is important to emphasize that the government's concern does not exist unless the public is receptive to and acts upon the message. By comparison, the *O'Brien* case offered an example of a governmental concern that did not depend on the widespread acceptance of the communicator's ideas. The defendant in *O'Brien* had burned his draft card.[81] The government justified the prohibition of such activity by advancing a plausible concern that the activity would prevent the government from keeping accurate selective service records. The concern was valid no matter how the communication had affected the public.[82] Even if O'Brien had burned his card in the privacy of his bedroom, the government could claim that the activity had disrupted the record keeping procedure. Such is not the case, however, with any regulation that would proscribe the publicity component of a protest boycott. For this reason, application of *O'Brien* would render any such regulation unconstitutional.

Regulation of concerted refusals to deal prompts a different analysis.[83] The governmental interest motivating any such regulation would be the same—the protection of competition. The regulation addressing concerted re-

78. *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957) (obscenity is not constitutionally protected speech); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ("fighting words"); Schenk v. United States, 249 U.S. 47 (1919); ("clear and present danger").

79. Such content based regulations regularly are held unconstitutional. *See, e.g.,* Consolidated Edison v. Public Service Comm'n, 447 U.S. 530 (1980) (a New York Public Service Commission order prohibiting Consolidated Edision from inserting leaflettes discussing controversial issues of public policy into its monthly bills was an impermissible content-based regulation of speech).

80. This "more speech" or "marketplace of ideas" approach depends on the assumption that truth and falsehood wrestle "in a free and open encounter." *See* Milton, *Areopagetica, A Speech for the Liberty of Unlicensed Printing, To the Parliament of England* (1644), in PROSE WRITINGS 23-38 (Everyman, ed. 1927). This "marketplace of ideas" justification for free speech begins to break down as those with money better utilize mass communication to assure that their ideas are marketed more successfully. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 576-77 (1978).

81. *O'Brien,* 391 U.S. at 369.

82. *See* Ely, *Flag Desecration: A Case Study in the Roles of Catagorization and Balancing in First Amendment Analysis,* 88 HARV. L. REV. 1482 (1975).

83. *See supra* text accompanying notes 71-76.

fusals to deal, however, would meet criterion three of *O'Brien.* Such conduct reduces competition regardless of its symbolic significance or expressive value. Unlike inducement of third parties, which triggers the governmental interest only if the public is receptive,[84] concerted refusals to deal, by their very nature, trigger the governmental interest. The government is concerned about concerted refusals to deal that occur in absolute secrecy as well as those that are publicized as part of a highly visible protest boycott.

Clearing the third criterion of *O'Brien* shifts consideration to the fourth: "[A] governmental regulation is sufficiently justified . . . if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[85] Professor John Hart Ely has pointed out that the Supreme Court has taken two separate approaches in applying this "least restrictive alternative" analysis.[86] One method would look to see that there is no "gratuitous inhibition of expression."[87] As long as the regulation in question actually furthered the stated governmental purpose, it is valid, regardless of the cost to first amendment freedoms.

If a general prohibition of all concerted refusals to deal serves to limit even slightly the disruptive effect of boycotts on competition, then the prohibition is constitutional under this approach. Obviously this involves no real balancing and excludes virtually nothing. The real question should be whether the increment of protection gained through a regulation justifies the corresponding loss of "incidental" first amendment freedoms.[88] A narrower regulation may be more difficult to implement, but as Professor Ely has noted, a better fit will always cost more.[89]

In the context of a boycott, this second approach would demand that a general regulation against concerted refusals to deal be so necessary to the preservation of competition that it justify the degree to which it restricts first amendment freedoms. The first half of this equation clearly indicates that a general prohibition of all concerted refusals to deal could aid competition in certain circumstances. It is well documented that such conduct, in the context of a protest boycott, can ruin a merchant who otherwise provides a healthy market force.[90] Allowing refusals to deal could also aid competition. Consumers constantly band together and refuse to deal with a merchant who overcharges them, until he makes his prices competitive with the rest of the market.[91] Thus, a general prohibition of refusals to deal would probably aid competition, but not in every instance.

---

84. *See supra* text accompanying note 80.

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

86. *See* Ely, *supra* note 82.

87. *Id.* at 1485.

88. Ely, *supra* note 82, at 1486-87.

89. *See* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 729 (1974).

90. *See supra* note 2.

91. *See, e.g.*, Julie Baking Co. v. Graymond, 152 Misc. 846, 274 N.Y.S. 250 (1934) (upheld right to picket to protest high prices); N.Y. Times, March 17, 1973, at 28, col. 2 (consumer boycott to protest high meat prices).

The companion question requires determining the degree to which such a prohibition would incidentally infringe on first amendment freedoms.[92] In the context of protest boycotts, the prohibition of concerted refusals to deal is tantamount to prohibiting the right to boycott itself. Realistically, in any protest boycott a group of true believers or organizers will make an agreement (usually provable)[93] to refuse to deal with a certain group of buyers or sellers. In *Claiborne* the Court described a rather large concerted refusal to deal—"at a local NAACP meeting at the First Baptist Church, several hundred black persons voted to place a boycott on white merchants in the area."[94] Anyone interested in breaking a boycott would have an extremely powerful means of doing so if he or she could press charges against the organizers based on their participation in the initial agreement. It is possible to imagine that a group of organizers could agree only to urge third parties to withhold their business, as opposed to the organizers' agreeing to withhold their own business. It is more probable, however, that such distinctions exist only in the minds of lawyers.

Once the organizers are liable, even if only for provable damages resulting from their agreement, the boycott is broken. "Several hundred black persons" agreed to the concerted refusal to deal in Port Gibson.[95] Potential liability for the organizers (even if only for their percentage of the total effect) could have been used effectively to discourage, or more likely, prevent, the entire effort. In practical application, then, recognizing a state's power to proscribe agreements to engage in protest boycotts would result in the elimination of such boycotts altogether.

This conclusion argues strongly against any state prohibition of concerted refusals to deal that are a part of a protest boycott. Using the analysis suggested by the fourth criterion of *O'Brien,* the increment of increased protection of competition gained by such a prohibition would not justify the degree to which the prohibition would incidentally eliminate the exercise of the first amendment activities present in a protest boycott.

Obviously, the state still must be able to prohibit concerted refusals to deal in contexts other than protest boycotts. The first amendment can give quite a lot in the face of the economic havoc that would result if any party had the unbridled freedom to engage in any kind of concerted refusal to deal.[96] The antitrust laws are the most obvious example of society's recognition that the freedom to buy and sell as one pleases is not even close to absolute.[97] There is always the danger that certain parties will attempt to gain protection for anticompetitive behavior by claiming they are involved in a legitimate pro-

92. *See supra* note 88.

93. *See Claiborne*, 102 S. Ct. at 3419.

94. *Id.* at 3413.

95. *Id.*

96. The most recent example of this accommodation is International Longshoremen's Assoc. v. Allied Int'l, Inc., 456 U.S. 212 (1982). *See supra* note 46.

97. *See, e.g.*, Council of Defense v. International Magazine Co., 267 F. 390 (8th Cir. 1920) (upholding application of Sherman Act to boycott of pro-German publisher); State v. Horsemen's Benevolent & Protective Ass'n, 55 A.D.2d 251, 389 N.Y.S.2d 868 (1976) (upholding in dictum the application of state antitrust law to boycott of horse racing).

test boycott. Parties that stand to gain economically from such a boycott could instigate the activity and then invoke the first amendment when their competitors sought aid from the courts. The court in such an instance would have to scrutinize the boycotter's real purpose. Justice Brennan recently pointed out, in his concurrence in *Metromedia, Inc. v. San Diego*,[98] the dangers of basing first amendment protection on the purpose of the defendant's speech.[99] The regulation involved in that case attempted to prohibit "commercial billboards" in San Diego while allowing "noncommercial ones."[100] Brennan warned, "I have no doubt that those who seek to convey commercial messages will engage in the most imaginative of exercises to place themselves within the safe haven of noncommercial speech, while at the same time conveying their commercial message."[101] The same opportunity obviously exists for those who may wish to place themselves within the safe haven of a protest boycott while at the same time gaining some economic advantage.

Why then should the Supreme Court be willing to enter onto such slippery ground in order to protect protest boycotts? The answer lies in the unique place such activity holds in American history. It is perhaps significant that Lloyd Cutler, counsel for the petitioners in *Claiborne,* spent the better part of his oral argument attempting to place the Port Gibson boycott in the mainstream of a venerable American political tradition.[102] As is well known, during the period between the Seven Years War and the American Revolution, British Colonials signed agreements refusing to trade with the English merchants in protest of certain British policies.[103] Those concerted refusals to deal were not the exclusive device of a Sam Adams or Tom Paine—those on the more radical fringe of the Revolution. Washington, Jefferson, Adams and numerous other "unassailables" were also party to the agreements.[104] Historian Arthur Schlesinger has concluded that "the parties to the boycott agreements thought them to be sound constitutional modes of relief."[105] It is, then, inherently implausible that individuals who used concerted refusals to deal to effectuate their political purposes would enact a constitution that failed to preserve that right for the future. More recently, Dr. Martin Luther King's use of the protest boycott during the Civil Rights movement[106] further helped to es-

98. 453 U.S. 490, 521 (1981) (Brennan, J., concurring).

99. *Id.* at 538.

100. 453 U.S. at 493 n.1.

101. *Id.* at 540 (Brennan, J., concurring).

102. *See* Brief for Petitioners at 18-23, *Claiborne*, 102 S. Ct. 3409.

103. These policies included the Stamp Act, which required affixing revenue stamps to certain documents, the Townshend Acts, which imposed duties on glass, lead, paint, paper, and tea imported into the colonies, and the Tea Act which granted the East India Company a tea monopoly in the colonies and empowered it to deal directly with colonial retailers, thus depriving many American merchant middlement of a profitable line of business. *See, e.g.*, C. ANDREWS, THE BOSTON MERCHANTS AND THE NON-IMPORTATION MOVEMENT, 40-43 (1968); A. SCHLESINGER, THE COLONIAL MERCHANTS AND THE AMERICAN REVOLUTION, 76-83 (1938).

104. J. FLEXNER, GEORGE WASHINGTON: THE FORGE OF EXPERIENCE (1732-1775) 311-14, 324-28 (1965); D. MALONE, JEFFERSON THE VIRGINIAN 137 (1948); A. SCHLESINGER, *supra* note 103, at 416.

105. A. SCHLESINGER, *supra* note 103, at 96.

106. *See supra* note 21.

tablish the special legitimacy of such activity.

As Justice Brennan predicted in *Metromedia,*[107] there will be numerous groups who may wish to cloak a commercial purpose with a noncommercial appearance. Because of the historical acceptance of protest boycotts, however, the Court seems willing to risk such imposters in order to protect this distinct and effective method for expressing social concerns.

The *Claiborne* opinion was proof of this willingness but the Court's analysis did little to resolve the strong conflicting interests that might be involved in a more typical case. The reliance on *Noerr* creates a potentially strong legal argument for imposters who might wish to advance their economic interests under the protected guise of a protest boycott. Virtually any boycott organizer could fashion an indirect, legislative petitioning purpose for a boycott that directly damaged another party. Rather then focus on the petitioning question, subsequent courts would do better to acknowledge the mixture of economic and political activity in a protest boycott and determine the degree to which each was present in the case at hand. One premise of this note is that, no mattter how strong the economic interest, the first amendment protects both concerted refusals to deal and inducements of third parties that are part of a bona fide protest boycott.[108] A court faced with exceptional circumstances may decide differently.[109] Whatever the future decisions might hold, however, the *O'Brien* test provides the suitable analytical framework for such cases.

GEORGE CARRUTHERS COVINGTON

107. *Metromedia,* 453 U.S. at 540 (Brennan, J., concurring).

108. A bona fide protest boycott is one that has clear noncommercial purposes. *See supra* note 1. This preliminary determination is crucial and might present difficult problems of proof. A plaintiff attempting to negate such a defense is not without means, however. Business records and market analysis would readily reveal significant shifts in buying habits that were beneficial to the organizers of an alleged protest boycott. Insignificant shifts, on the other hand, would not often prompt a lawsuit.

109. The most easily imaginable "exceptional" case involves a protest boycott that causes drastic economic damage while only marginally advancing its purported noneconcomic goal. The potential for such a boycott, if promoted truthfully, seems slight. Few would change well-established buying patterns in order to pressure a party that had no control over or a relation with the subject matter spurring a boycott. No matter how people responded to such truthful publicity, however, the first amendment should represent our societies confidence that the public is sufficiently intelligent to hear the message and act as it sees fit.