AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 10: The Reagan Era – Democratic Rights/Free Speech

**NAACP v. Claiborne Hardware Co., 458 U.S. 886** (1982)

*In 1966, a group of black citizens of Port Gibson, Mississippi, presented a list of demands for racial equality to the white elected officials. Unhappy with the response, the National Association for the Advancement of Colored People (NAACP) held a meeting at the First Baptist Church with several hundred attendees and resolved to boycott white merchants in the area. Charles Evers was the field secretary for the NAACP and a key organizer of the boycott. In the days after Martin Luther King’s assassination, Evers gave a fiery speech in which he said that those who violated the boycott would be “disciplined” and in another speech told a black audience if “we catch any of you going in any of them racist stores, we’re gonna break your damn neck.” “Store watchers” were stationed to record the names of any blacks who entered any of the boycotted stores and their names were publicized by the NAACP. The evidence showed that there was some violence surrounding the boycott, including multiple incidents of shots being fired at houses of individuals who were not abiding by the boycott, but most of those incidents occurred in the early days of the boycott and well before King’s assassination.*

*In 1969, a group of white merchants filed suit in state court seeking damages from the boycott. The suit was lodged against several organizations (including the NAACP) and a large number of individuals involved in the boycott. A chancellor in equity held a trial and collected evidence and issued an opinion in 1976 that held the organizations and individuals liable for damages for malicious interference with a business, violating a state law against secondary boycotts, and violating a state antitrust statute. The judgment was in excess of a million dollars. In 1980, the state supreme court reversed much of that judgment, but upheld the tort claim on the grounds that some individuals unlawfully used threats and violence to sustain the boycott. The U.S. Supreme Court unanimously reversed that decision finding that much of the activity surrounding the boycott was protected speech, including some of the violent rhetoric, and the facts on the record could not sustain such broad liability and damages. A finding of fear and intimidation was insufficient to remove the boycott activity from First Amendment protection.*

JUSTICE STEVENS delivered the opinion of the Court.

. . . .

The boycott of white merchants at issue in this case took many forms. The boycott was launched at a meeting of a local branch of the NAACP attended by several hundred persons. Its acknowledged purpose was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice. The boycott was supported by speeches and nonviolent picketing. Participants repeatedly encouraged others to join in its cause.

Each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments. The black citizens named as defendants in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect.

The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected. . . .

Of course, the petitioners in this case did more than assemble peaceably and discuss among themselves their grievances against governmental and business policy. Other elements of the boycott, however, also involved activities ordinarily safeguarded by the First Amendment. In *Thornhill v. Alabama* (1940), the Court held that peaceful picketing was entitled to constitutional protection, even though, in that case, the purpose of the picketing "was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer." In *Edwards v. South Carolina* (1963), we held that a peaceful march and demonstration was protected by the rights of free speech, free assembly, and freedom to petition for a redress of grievances.

. . . . Petitioners admittedly sought to persuade others to join the boycott through social pressure and the "threat" of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action. . . .

. . . .

The presence of protected activity, however, does not end the relevant constitutional inquiry. Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances. *United States v. O'Brien* (1968). A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. *Giboney v. Empire Storage & Ice Co*. (1949). The right of business entities to "associate" to suppress competition may be curtailed. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife."

While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." . . .

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* (1961), the Court considered whether the Sherman Act prohibited a publicity campaign waged by railroads against the trucking industry that was designed to foster the adoption of laws destructive of the trucking business, to create an atmosphere of distaste for truckers among the general public, and to impair the relationships existing between truckers and their customers. Noting that the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms," the Court held that the Sherman Act did not proscribe the publicity campaign. The Court stated that it could not see how an intent to influence legislation to destroy the truckers as competitors "could transform conduct otherwise lawful into a violation of the Sherman Act." . . .

It is not disputed that a major purpose of the boycott in this case was to influence governmental action. Like the railroads in *Noerr*, the petitioners certainly foresaw - and directly intended - that the merchants would sustain economic injury as a result of their campaign. Unlike the railroads in that case, however, the purpose of petitioners' campaign was not to destroy legitimate competition. Petitioners sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself. The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.

. . . .

The First Amendment does not protect violence. "Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of `advocacy.'" *Samuels v. Mackell* (1971). Although the extent and significance of the violence in this case are vigorously disputed by the parties, there is no question that acts of violence occurred. No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, "precision of regulation" is demanded. Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.

. . . .

The opinion of the Mississippi Supreme Court itself demonstrates that all business losses were not proximately caused by the violence and threats of violence found to be present. The court stated that "coercion, intimidation, and threats" formed "part of the boycott activity" and "contributed to its almost complete success." The court broadly asserted - without differentiation - that "`[i]ntimidation, threats, social ostracism, vilification, and traduction'" were devices used by the defendants to effectuate the boycott. . . .

. . . .

. . . . At the same time, the evidence does support the conclusion that some members of each of these groups engaged in violence or threats of violence. Unquestionably, these individuals may be held responsible for the injuries that they caused; a judgment tailored to the consequences of their unlawful conduct may be sustained.

. . . .

To the extent that Evers caused respondents to suffer business losses through his organization of the boycott, his emotional and persuasive appeals for unity in the joint effort, or his "threats" of vilification or social ostracism, Evers' conduct is constitutionally protected and beyond the reach of a damages award. . . . Since respondents would impose liability on the basis of a public address - which predominantly contained highly charged political rhetoric lying at the core of the First Amendment - we approach this suggested basis of liability with extreme care.

. . . .

It is clear that "fighting words" - those that provoke immediate violence - are not protected by the First Amendment. *Chaplinsky v. New Hampshire* (1942). Similarly, words that create an immediate panic are not entitled to constitutional protection. *Schenck v. United States* (1919). This Court has made clear, however, that mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment. *Brandenburg v. Ohio* (1969). . . .

The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg*. The lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language was used. If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct. In this case, however . . . the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966, speech. . . . Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open."

For these reasons, we conclude that Evers' addresses did not exceed the bounds of protected speech. If there were other evidence of his authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence. . .

. . . .

The chancellor made no finding that Charles Evers or any other NAACP member had either actual or apparent authority to commit acts of violence or to threaten violent conduct. The evidence in the record suggests the contrary. . .

To impose liability without a finding that the NAACP authorized - either actually or apparently - or ratified unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment. . . .

. . . .

At times the difference between lawful and unlawful collective action may be identified easily by reference to its purpose. In this case, however, petitioners' ultimate objectives were unquestionably legitimate. The charge of illegality - like the claim of constitutional protection - derives from the means employed by the participants to achieve those goals. The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection.

The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees. . . .

*Reversed*.

JUSTICE MARSHALL took no part in the consideration or decision of this case.

JUSTICE REHNQUIST concurs in the result.