

economic activities having an incidental effect upon speech (*e.g.*, labor picketing or business conspiracies to restrain competition),<sup>1495</sup> but that power of government does not extend to suppression of picketing and other boycott activities involving, as this case did, speech upon matters of public affairs with the intent of affecting governmental action and motivating private actions to achieve racial equality.<sup>1496</sup>

The critical issue, however, had been the occurrence of violent acts and the lower court's conclusion that they deprived otherwise protected conduct of protection. "The First Amendment does not protect violence . . . . 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."<sup>1497</sup> In other words, the states may impose damages for the consequences of violent conduct, but they may not award compensation for the consequences of nonviolent, protected activity.<sup>1498</sup> Thus, the state courts had to compute, upon proof by the merchants, what damages had been the result of violence, and could not include losses suffered as a result of all the other activities comprising the boycott. And only those nonviolent persons who associated with others with an awareness of violence and an intent to further it could similarly be held liable.<sup>1499</sup> Because most of the acts of violence had occurred early on, in 1966, there was no way constitutionally that much if any of the later losses

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<sup>1495</sup> *See, e.g.*, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (upholding application of *per se* antitrust liability to trial lawyers association's boycott designed to force higher fees for representation of indigent defendants by court-appointed counsel).

<sup>1496</sup> In evaluating the permissibility of government regulation in this context that has an incidental effect on expression, the Court applied the standards of *United States v. O'Brien*, which permits a regulation "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 458 U.S. at 912, n.47, quoting *O'Brien*, 391 U.S. 367, 376–77 (1968) (footnotes omitted).

<sup>1497</sup> 458 U.S. at 916–17.

<sup>1498</sup> 458 U.S. at 917–18.

<sup>1499</sup> 458 U.S. at 918–29, relying on a series of labor cases and on the subversive activities association cases, *e.g.*, *Scales v. United States*, 367 U.S. 203 (1961), and *Noto v. United States*, 367 U.S. 290 (1961).