Notes

The State Power to Boycott a Boycott: The Thorny Constitutionality of State Anti-BDS Laws

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The Boycott, Divestment, Sanctions ("BDS") Movement, a global effort to oppose the State of Israel in its actions toward Palestine, is one of the most divisive topics in global politics. Since it began in 2005, BDS has also been legally divisive in the United States. U.S. states began passing anti-BDS laws in 2015, and twenty-seven states have since passed legislation or executive orders restricting the state governments' commercial dealings with entities that participate in BDS activities against Israel. Though the specific provisions of anti-BDS laws vary widely, they have taken two primary forms: (1) contract-focused laws that condition the receipt of government contracts on an entity certifying that it is not boycotting and will not boycott Israel; and (2) investment-focused laws that mandate public investment funds to divest from entities involved in boycotts of Israel.

This Note aims to remedy the relative dearth of thorough analysis on this issue through a comprehensive study of the constitutional stakes of state anti-BDS laws. BDS activities are protected by the First Amendment under a broad interpretation of NAACP v. Claiborne Hardware. *However, there are at least*

five distinct arguments that the anti-BDS laws merely pose "incidental infringements" on these rights, thereby rendering them constitutionally justified in light of state interests. Two of the arguments can be dismissed through appeal to Claiborne *itself or related lines of case law. The three other arguments have not been adequately addressed by federal courts, such that their strength is less certain. Ultimately, many of the anti-BDS laws likely run afoul of the First Amendment by imposing unconstitutional conditions on government contractors and/or beneficiaries of public funding, though courts should take account of the full range of legal issues in disposing of suits challenging anti-BDS laws.*

INTRODUCTION

In October 2017, the city of Dickinson, Texas, required applicants for Hurricane Harvey-relief funds to certify that they "(1) do[] not boycott Israel; and (2) will not boycott Israel" for the duration of the agreement.[1] After a public outcry, the Dickinson city attorney claimed that the city was simply following its obligations under a Texas statute that prohibited governmental entities from "enter[ing] into a contract with a company"[2] unless the contract contained a written certification like the one included in the hurricane aid application.[3] While many debated the applicability of the Texas statute, which was seemingly targeted at businesses rather than individuals seeking aid after a natural disaster, critics gained valuable public relations fodder to oppose the increasing number of states that had enacted statutes similar to the one in Texas.

Just over a year prior, in June 2016, New York Governor An-

1. Kyle Swenson, *This Texas Town Offers Hurricane Relief—If Your Politics Are Right*, WASH. POST (Oct. 20, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/10/20/texas-town-makes-hurricane-harvey-aid-applicants-pledge-not-to-boycott-israel/ [https://perma.cc/J94C-X5QD].

2. TEX. GOV'T CODE ANN. § 2270.002 (West 2017).

3. Swenson, *supra* note 1.

drew Cuomo issued the following triumphant words after signing an executive order mandating the divestment of state funds from companies that participate in boycotts of Israel: "If you boycott Israel, New York will boycott you."[4] Cuomo's executive order received a significant amount of fanfare but was merely the latest in a movement among states to respond through statutes and executive orders to the growing Boycott, Divestment, Sanctions ("BDS") Movement—a global effort started in 2005 that aims to boycott Israeli goods and services, divest from Israeli companies, and advocate for governmental sanctions against Israel. While states began passing anti-BDS laws only as recently as 2015, twenty-seven states have already passed legislation restricting the government's contracting and/or investments with entities that participate in BDS activities against Israel.[5]

Rightly or wrongly, a politician's positions with regard to Israel have long been considered a political litmus test.[6] Many states have written their statutes and executive orders with sensational language so as to demonstrate their staunch support for Israel. New York, for example, claims to "unequivocally reject[] the BDS campaign and stand[] firmly with Israel,"[7] while both Iowa and North Carolina refer to BDS as a tool of "economic warfare that threaten[s] the sovereignty and security" of Israel.[8] Legally, meanwhile, proponents of the laws justify them as either measures to combat discrimination on the basis of ethnicity and national origin,[9] or as relatively

4. Andrew Cuomo, *Gov. Andrew Cuomo: If You Boycott Israel, New York State Will Boycott You*, WASH. POST (June 10, 2016), https://www.washingtonpost.com/opinions/gov-andrew-cuomo-if-you-boycott-israel-new-york-state-will-boycott-you/2016/06/10/1d6d3acc-2e62-11e6-9b37-42985f6a265c_story.html?utm_term=.8fe8ccc90dd6 [https://perma.cc/2M77-8WXT].

5. *See infra* notes 58–59 and accompanying text.

6. *See* Bonnie Puckett Levine, *The Israel Litmus Test Entrenches Anti-Israel Narrative*, ATLANTA JEWISH TIMES (Dec. 28, 2016), http://atlantajewishtimes.timesofisrael.com/israel-litmus-test-entrenches-anti-israel-narrative/ [https://perma.cc/3KUC-XQ6Z]; Mark Oppenheimer, *The Israel Litmus-Test and Scholarly Freedom*, L.A. TIMES (Sept. 8, 2017), http://www.latimes.com/opinion/op-ed/la-oe-oppenheimer-myers-jewish-history-20170908-story.html [https://perma.cc/6MMB-2TUC]; Jonathan Tobin, *Steve Bannon and the End of the Israel Litmus Test Myth*, MIDA (Nov. 15, 2017), http://en.mida.org.il/2017/11/15/steve-bannon-end-israel-litmus-test-myth/ [https://perma.cc/B3R9-2943].

7. N.Y. Exec. Order No. 157 (June 22, 2016), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_157_new.pdf [https://perma.cc/76CF-UN8Y].

8. IOWA CODE § 12J.1 (2016); H.B. No. 161, Gen. Assemb. First Session (N.C. 2017) (including this language in the legislation but omitting it upon codification).

9. *See, e.g.*, Cuomo, *supra* note 4; Gilad Edelman, *Cuomo and B.D.S.: Can New York State Boycott a Boycott?*, NEW YORKER (June 16, 2016), http://www.newyorker.com/news/news-desk/cuomo-and-b-d-s-can-new-york-state-boycott-a-boycott [https://perma.cc/

banal exercises of the government's authority to choose how to spend public funds.[10]

On the other side, the movement among states to "boycott the boycotters"[11] has been met with intense criticism. Prominent critics have condemned the laws for infringing on the First Amendment rights to express political ideas and to participate in political boycotts, which have a storied and successful history of achieving social and political change in the United States.[12] However, the legal issues are more complicated than most proponents and critics generally suggest. The First Amendment issues swirling around the ever-growing list of state anti-BDS statutes are "thorny," as one scholar stated.[13] Proponents and critics of the legislation have generally failed to fully wrestle with the constitutional and factual implications of anti-BDS laws. This Note aims to remedy the relative dearth of thorough analysis on the issue through a comprehensive study of the constitutional stakes of state anti-BDS laws.

Part I presents the background to the state anti-BDS statutes in two stages. First, it lays out the history of the relatively recent BDS Movement in the context of the long history of boycotts of Israel. Next, it analyzes various federal and state responses to these boycott movements in the United States. Part II addresses the applicabil-

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29P2-CJZP] (quoting proponents of the New York anti-BDS executive order as justifying it on grounds of anti-discrimination); Eugene Kontorovich, *Anti-BDS Laws Don't Perpetuate Discrimination. They Prevent It*, JEWISH TELEGRAPHIC AGENCY (June 15, 2016), https://www.jta.org/2016/06/15/news-opinion/opinion/anti-bds-laws-dont-perpetuate-discrimination-they-prevent-it [https://perma.cc/F57J-XFZ5].

10. *See* Rosie Gray, *Major Jewish Groups Won't Back Boycott Bill*, BUZZFEED NEWS (Feb. 6, 2014), https://www.buzzfeed.com/rosiegray/major-jewish-groups-wont-back-boycott-bill?utm_term=.ttqVN8BMK#.dkJN8KQYm [https://perma.cc/83QY-EJVD] (quoting Congressman Peter Roskam as saying that boycotters "are clearly free to do what they want to do under the First Amendment, but the American taxpayer doesn't have to subsidize it," referring to the federal Israel Anti-Boycott Act).

11. Travis Allen, *California Should Stand with Israel and Boycott the Boycotters*, WASH. EXAMINER (Mar. 29, 2016), https://www.washingtonexaminer.com/california-should-stand-with-israel-and-boycott-the-boycotters [https://perma.cc/9MA2-3GVV].

12. *See, e.g.*, Edelman, *supra* note 9 (quoting the New York Civil Liberties Union); Glenn Greenwald & Andrew Fishman, *Greatest Threat to Free Speech in the West: Criminalizing Activism Against Israeli Occupation*, INTERCEPT (Feb. 16, 2016), https://theintercept.com/2016/02/16/greatest-threat-to-free-speech-in-the-west-criminalizing-activism-against-israeli-occupation/ [https://perma.cc/TR4X-XQMV]. *See also* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 447–48 (1990); Theresa J. Lee, *Democratizing the Economic Sphere: The Case for the Political Boycott*, 115 W. VA. L. REV. 531, 538–44 (2012).

13. Edelman, *supra* note 9 (quoting Ronald Collins, a law professor at the University of Washington).

ity of the First Amendment to the BDS context, including a comprehensive analysis of the right to boycott within Supreme Court jurisprudence and potential limitations as applied to the BDS context. Part III then concludes the constitutional analysis, separately considering contract-focused and investment-focused anti-BDS laws under existing legal precedent and doctrine. Ultimately, this Note concludes that many of the state anti-BDS laws are likely unconstitutional, at least in part, but that the laws need to be analyzed individually, in light of both their specific provisions and the probability that they could be successfully challenged in court. The Conclusion briefly poses some of the variables that could be decisive—either in support of or in challenge to the laws—in future litigation. It then examines the stakes of such litigation for both the BDS Movement and for many other contexts, such as consumer boycotts of multinational corporations, the First Amendment rights of corporations in general, and the rights of U.S. persons to express ideas in cross-border settings.

I. BACKGROUND

A. The Boycott, Divestment, Sanctions Movement

Boycotts of Jewish goods and services originating in Palestine were proposed as early as 1922,[14] and such boycotts became more widespread and formalized following the founding of the Arab League in 1944.[15] The next year, the Arab League began an extensive boycott of goods and services originating in the British-controlled territory of Mandatory Palestine, and it then directed the boycott at Israel after the founding of the State in 1948.[16] As the Arab League Boycott waned in the early 2000s, certain sectors of the Western public, and Western academia in particular, took up the cause of the Palestinians, in opposition to the continued construction of Israeli settlements in the West Bank and Israel's perceived ill-

14. Kenneth Lasson, *Scholarly and Scientific Boycotts of Israel: Abusing the Academic Enterprise*, 21 TOURO L. REV. 989, 995 (2006).

15. The Arab League, or League of Arab States, is an umbrella organization presently comprising the following twenty-two Middle-Eastern and North African countries: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, the Palestinian Authority, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen. In November 2011, Syria's participation in League meetings was suspended. MARTIN A. WEISS, CONG. RESEARCH SERV., RL33961, ARAB LEAGUE BOYCOTT OF ISRAEL 1 (2017).

16. *Id.*

treatment of Palestinians. For example, in the spring of 2002, professors at Harvard and MIT sparked a nationwide call for American universities to divest their endowments from Israeli-based companies and U.S.-based companies that sell weapons to Israel.[17] Several religious organizations soon announced that they would divest from certain Israeli companies.[18] In July 2004, the divestment movement shifted to a boycott movement, after Palestinian academics called for an international academic boycott of Israel.[19]

Building on the growing international interest in taking action to oppose Israel's alleged violations of international law, in July 2005, more than 170 Palestinian civil society groups, led by the Palestinian BDS National Committee ("the BDS Committee"), issued a "Call for BDS," coining an acronym that stands for "Boycott, Divestment, Sanctions."[20] According to the website for the BDS Committee, the BDS Movement is committed to the principle that "Palestinians are entitled to the same rights as the rest of humanity."[21] This principle prompts action in light of BDS's core factual commitment: "Israel is occupying and colonising Palestinian land, discriminating against Palestinian citizens of Israel and denying Palestinian refugees the right to return to their homes. It is maintaining a regime of occupation, settler colonialism and apartheid over the Palestinian people."[22]

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17. David H. Gellis, *Faculty Urge Divestment From Israel*, HARV. CRIMSON (May 6, 2002), http://www.thecrimson.com/article/2002/5/6/faculty-urge-divestment-from-israel-a/ [https://perma.cc/5CP4-3XCG]. Similar calls were soon issued at Columbia, Georgetown, Berkeley, Yale, and Princeton, and the movement spread in the fall of 2002 to the Universities of Maryland and Massachusetts. Lasson, *supra* note 14, at 990.

18. *See* Alan Cooperman, *Israel Divestiture Spurs Clash*, WASH. POST (Sept. 29, 2004), http://www.washingtonpost.com/wp-dyn/articles/A58039-2004Sep28.html [https://perma.cc/DD62-A562]; *World Council of Churches Calls for Divestment From Israel*, HAARETZ (Feb. 25, 2005), https://www.haaretz.com/1.4754393 [https://perma.cc/RRG4-3TMH].

19. Lisa Taraki, *Palestinian Academics Call for International Academic Boycott of Israel*, ACTIVISM NEWS (July 7, 2004), https://web.archive.org/web/20050518033015/http://right2edu.birzeit.edu/news/article178 [https://perma.cc/FVU3-SB28]. According to law professor Kenneth Lasson, the "primary goals" of such academic boycotts against Israel included severing relations with Israeli universities and faculty, refusing to visit Israel, refusing to invite Israeli academics to conferences, preventing the publication of Israeli scholars, denying recommendation to students who wish to study in Israel, and expelling Israeli organizations from campus. Lasson, *supra* note 14, at 997. *See also id.* at 992.

20. *What Is BDS?*, BDS MOVEMENT, https://bdsmovement.net/what-is-bds [https://perma.cc/RQ5S-6F2Y] [hereinafter What Is BDS?].

21. *Id.*

22. *Id.*

Drawing inspiration from the South African anti-apartheid movement in addition to "decades of Palestinian nonviolent popular resistance . . . as a means of resisting British occupation and Zionist colonization," BDS aims to exert non-violent pressure on Israel to "comply with international law."[23] In this light, BDS has three "demands" for Israel:

> (1) Ending [Israel's] occupation and colonization of all Arab lands [including the West Bank, Gaza, and the Golan Heights] and dismantling the Wall [around Gaza;]
>
> (2) Recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality [; and]
>
> (3) Respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN Resolution 194.[24]

With the goal of pressuring Israel to fulfill these demands, BDS employs three techniques, indicated by the name of the movement: boycotts, divestment, and sanctions.[25]

It is specious to conceive of the actions of "the BDS Movement" as if it is a coherent, univocal movement with centralized decision-making and agency. BDS is self-consciously "grassroots," even as it grew out of a single "call" in 2005.[26] Attorney Marc Greendorfer, a harsh critic of the BDS Movement, has stated that BDS is "not an organization with a clear and identifiable body" and that it "presents a disembodied face to the world."[27] In spite of this, Greendorfer claimed that the BDS Movement is "nothing more than a rebranding and refocusing of the Arab League Boycott,"[28] deliberate-

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23. *Id.*

24. *Id.* One of the motivations of the U.N. General Assembly Resolution 194, passed near the end of the 1948 Arab-Israeli War, was to define principles for the return of displaced Palestinian refugees to their homes. This goal was never achieved.

25. *See id.* ("BOYCOTTS involve withdrawing support for Israel and Israeli and international companies that are involved in the violation of Palestinian human rights, as well as complicit Israeli sporting, cultural and academic institutions. DIVESTMENT campaigns urge banks, local councils, churches, pension funds and universities to withdraw investments from all Israeli companies and from international companies involved in violating Palestinian rights. SANCTIONS campaigns pressure governments to fulfil their legal obligation to hold Israel to account including by ending military trade, free-trade agreements and expelling Israel from international forums such as the UN and FIFA.").

26. *Id.*

27. Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal*, 22 ROGER WILLIAMS U. L. REV. 1, 19 (2017).

28. *Id.* at 22.

ly fashioned so as to avoid anti-boycott laws.

Whatever the case may be, the movement has had widespread influence outside of the Middle East. The boycott has cultural, academic, and commercial components. On the cultural front, hundreds of artists have pledged to refuse to deal professionally with Israel.[29] In addition, dozens of musicians, including Lorde,[30] Thurston Moore,[31] Elvis Costello,[32] and Eric Burdon,[33] have cancelled concerts in Israel in order to honor the call of BDS. Many other musicians have cancelled concerts after receiving pressure to comply with the boycott.[34] On the economic front, activists have waged consumer boycotts against Israel-based and multinational corporations—in particular those that are perceived as actively facilitating Israeli settlement-building—including Hewlett-Packard, which provided, among other things, the identification system installed at Israeli military

29. *See Artists' Pledge*, ARTISTS FOR PALESTINE UK, https://artistsforpalestine.org.uk/a-pledge/ [https://perma.cc/XB57-QD9P]; *Endorsers*, US CAMPAIGN FOR THE ACAD. & CULTURAL BOYCOTT OF ISR., http://www.usacbi.org/endorsers/#cultural [https://perma.cc/45QW-9WWW]; *Letter: Over 100 Artists Announce a Cultural Boycott of Israel*, GUARDIAN (Feb. 13, 2015), https://www.theguardian.com/world/2015/feb/13/cultural-boycott-israel-starts-tomorrow [https://perma.cc/4X22-39P3].

30. Itay Stern, *New Zealand Singer Lorde Cancels Israel Show After BDS Pressure* (Dec. 24, 2017), HAARETZ, https://www.haaretz.com/israel-news/1.830981 [https://perma.cc/647A-AJY8].

31. Daniel Kreps, *Thurston Moore Explains Nixed Tel Aviv Gig, Israel Boycott*, ROLLING STONE (June 26, 2015), https://www.rollingstone.com/music/news/thurston-moore-explains-nixed-tel-aviv-gig-israel-boycott-20150626 [https://perma.cc/BS4K-H6BF].

32. Vikram Dodd & Rory McCarthy, *Elvis Costello Cancels Concerts in Israel in Protest at Treatment of Palestinians*, GUARDIAN (May 18, 2010), https://www.theguardian.com/music/2010/may/18/elvis-costello-cancels-israel-concerts [https://perma.cc/8645-4QEG].

33. *Animals' Eric Burdon Caves to Threats, Cancels Israel Concert*, TIMES OF ISR. (July 23, 2013), https://www.timesofisrael.com/animals-eric-burdon-cancels-israel-concert-amid-threats/ [https://perma.cc/PTC3-DAW8].

34. *See, e.g.*, Or Barnea, *Snoop Dogg Cancels Israeli Gig*, YNET News (July 23, 2008), https://www.ynetnews.com/articles/0,7340,L-3572077,00.html [https://perma.cc/A8KX-QEK9] (Snoop Dogg cancelled a show in Israel in 2008, citing logistical difficulties); Joe Coscarelli, *Lauryn Hill Cancels Performance in Israel*, ARTSBEAT: N.Y. TIMES BLOG (May 4, 2015), https://artsbeat.blogs.nytimes.com/2015/05/04/lauryn-hill-cancels-performance-in-israel/?mtrref=www.google.com [https://perma.cc/S9ZX-K46P] (Lauryn Hill canceled a concert in Israel in 2015 after she could not schedule a separate concert in the Palestinian territories); *Pharrell Williams Cancels Israel Concert*, JERUSALEM POST (July 13, 2016), http://www.jpost.com/Israel-News/Culture/Pharrell-Williams-cancels-Israel-concert-460270 [https://perma.cc/J27H-P3ZV] (Pharrell Williams cancelled a concert in Israel in 2016, citing scheduling conflicts).

checkpoints;[35] Caterpillar, whose bulldozers have been used in the demolition of Palestinian homes in the West Bank;[36] G4S, a British security company that has provided equipment for Israeli military checkpoints and prisons;[37] and many other companies.[38] As one example of the economic focus of BDS, protesters conducted a prominent boycott campaign against SodaStream, which operated a factory in the Israeli-controlled West Bank.[39] Ultimately, the company closed the factory in 2015, moving production within Israeli territory. BDS took credit for the move and claimed a "clear-cut" victory, though the CEO of SodaStream claimed that BDS had only a "marginal" effect on its decision to leave the West Bank.[40]

BDS has been condemned on many fronts. In spite of BDS's claim to be "opposed on principle to all forms of discrimination, in-

35. Thomas Lee, *HP's Role in Israel Could Lead to Political Pressure*, SFGATE (June 29, 2014, 4:32PM), https://www.sfgate.com/bayarea/article/HP-s-role-in-Israel-could-lead-to-political-5588387.php [https://perma.cc/T42W-D5ND]; *Global Campaign: Boycott HP*, BDS MOVEMENT, https://bdsmovement.net/boycott-hp [https://perma.cc/CL6B-RX3T].

36. *US Bulldozer Firm in Mid-East Row*, BBC (June 15, 2005, 7:35AM), http://news.bbc.co.uk/2/hi/middle_east/3805677.stm [https://perma.cc/PRY7-VV5S]; *Results for: Caterpillar*, BDS MOVEMENT, https://bdsmovement.net/tags/caterpillar [https://perma.cc/PU9U-499Z].

37. Shane Hickey, *G4S Descends into Chaos, with Nine Activists Bundled Out*, GUARDIAN (June 4, 2015, 10:34AM), https://www.theguardian.com/business/2015/jun/04/g4s-meeting-chaos-activists-bundled-out-israel [https://perma.cc/SWG4-GLZ6]; *Global Campaign: Stop G4S*, BDS MOVEMENT, https://bdsmovement.net/stop-g4s [https://perma.cc/278H-GS5N].

38. *See Freedom and Justice for Gaza: Boycott Action Against 7 Complicit Companies*, BDS MOVEMENT (Aug. 15, 2014), https://bdsmovement.net/news/freedom-and-justice-gaza-boycott-action-against-7-complicit-companies [https://perma.cc/F7X5-464P]. Other boycotted companies include Veolia, Orange, CRH, Ahava, Assa Abloy, Cemex, Heineken, Royalife, and Unilever. *See Divestment: Resources*, UNITED METHODISTS FOR KAIROS RESPONSE, https://www.kairosresponse.org/divestmentandboycottwork_examples_jan2016.html (last visited Feb. 8, 2018) [https://perma.cc/36EV-VUDT].

39. Ashley Feinberg, *Why These People Want You to Boycott SodaStream*, GIZMODO (Jan. 24, 2014, 11:00AM), https://gizmodo.com/why-these-people-want-you-to-boycott-sodastream-1507142692 [https://perma.cc/MZG5-5C9V].

40. *SodaStream Leaves West Bank as CEO Says Boycott Antisemitic and Pointless*, GUARDIAN (Sept. 2, 2015), https://www.theguardian.com/world/2015/sep/03/sodastream-leaves-west-bank-as-ceo-says-boycott-antisemitic-and-pointless [https://perma.cc/MWJ4-QCLW]. However, the SodaStream CEO later acknowledged that the boycotts had some effect. David Brinn, *SodaStream CEO Threatens to Close Plant if Palestinian Work Permits Rescinded*, JERUSALEM POST (Feb. 19, 2016), http://www.jpost.com/Israel-News/SodaStream-CEO-threatens-to-close-plant-if-Palestinian-work-permits-rescinded-445465 [https://perma.cc/8P9K-VC3P] (quoting the company's CEO as later saying that "if it wasn't for BDS, we might have stayed there another year or two, so it did have some effect").

cluding anti-semitism,"[41] many critics of BDS have alleged that the movement is anti-semitic and racist.[42] Additionally, even though BDS claims not to advocate for either a one-state or a two-state solution to the Israel-Palestine conflict,[43] some critics claim that the movement aims to accomplish more than its three "demands"—namely, that it aims to destroy Israel itself.[44] While legal enforcement related to BDS activities in the United States has generally been restrained, Greendorfer has argued that BDS activities violate federal antitrust statutes,[45] RICO,[46] and statutes that prohibit providing material support to terrorists.[47] While prosecution on any of these bases is unlikely, concern about prosecution among activist communities sympathetic to BDS has risen with recent changes in U.S. state laws and proposals to amend U.S. federal law.[48]

B. Anti-Boycott Provisions of United States Law

1. The Federal Anti-Boycott Regime

The U.S. federal government first enacted legislation relating to the Arab League Boycott of Israel in 1959, in foreign assistance legislation.[49] In 1977, Congress passed the most comprehensive fed-

41. What Is BDS?, *supra* note 20.

42. *See, e.g.*, Alamea Deedee Bitran, *Anti-Israel, a Camouflage Platform for Antisemitism*, 29 ST. THOMAS L. REV. 1, 2 (2016) (labelling BDS "antisemitism's newest wave"); Greendorfer, *supra* note 27, at 32 (claiming that "the BDS Movement's aims are rooted in racism [and] bigotry").

43. *FAQs*, BDS MOVEMENT, https://bdsmovement.net/faqs#collapse16233 [https://perma.cc/J7XP-YL2J].

44. *See, e.g.*, Greendorfer, *supra* note 27, at 32 ("BDS Movement's aims are rooted in . . . a desire to ethnically cleanse the only non-Arab Middle Eastern state from the map.").

45. Greendorfer, *supra* note 27, at 101.

46. *Id.* at 105.

47. *Id.* at 132.

48. *See, e.g.*, *How the Israel Anti-Boycott Act Threatens First Amendment Rights*, AM. CIVIL LIBERTIES UNION (July 26, 2017, 5:00 PM), https://www.aclu.org/blog/free-speech/how-israel-anti-boycott-act-threatens-first-amendment-rights [https://perma.cc/V7BA-PP2P] (describing how even the threat of prosecution chills boycott activities).

49. WEISS, *supra* note 15, at 1. *See, e.g.*, Mutual Security Act of 1960, 22 U.S.C. § 1750 (repealed 1961) (amending the Mutual Security Act of 1954 to declare that the purposes of the law are "negated and the peace of the world is endangered when nations which receive assistance under this Act wage economic warfare against other nations assisted under this Act, including such procedures as boycotts . . ." and directing the administration of the statute to "give effect to" that principle), accessible at https://www.gpo.gov/fdsys/pkg/STATUTE-74/pdf/STATUTE-74-Pg134.pdf [https://perma.cc/R9X6-

eral regulations of boycotts against Israel in the Export Administration Act ("EAA").[50] The EAA authorized civil and criminal penalties for any U.S. person who cooperates with a foreign country's unauthorized boycott of any country friendly to the United States (which implicitly included Israel, as it does today).[51] It is highly unlikely that BDS activities fall within the scope of the EAA, though there is disagreement on this point.[52]

In 2017, two bills were introduced in Congress that would

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50. Export Administration Act of 1979, 50 U.S.C. § 4607(a)(1) (2012) (repealed 2018). Since 1983, the Export Administration Act, including the foreign boycott prohibition, has primarily persisted by way of a series of executive orders and/or presidential notices, pursuant to the President's power under the International Emergency Economic Powers Act. In this context, Reagan first declared the lapse of the EAA to be an international economic emergency, and presidents have generally subsequently extended it in the same manner by notice annually. For the most recent version of the law, *see* John S. McCain National Defense Reauthorization Act, Pub. L. 115-232 §§ 1741–81 (2018), which includes the Anti-Boycott Act of 2018, 50 U.S.C.A. § 4842 (West 2018) (containing the relevant language of the former EAA).

51. *See* Anti-Boycott Act of 2018, 50 U.S.C.A. § 4842(a)(1) (West 2018).

52. In reports produced for Congress in 2017, the Congressional Research Service twice concluded that BDS activities are outside the scope of the EAA, because the EAA only prohibits participation in boycotts initiated or fostered by foreign countries, and no foreign State has proclaimed that it participates in BDS. JIM ZANOTTI ET AL., CONG. RESEARCH SERV., R44281, ISRAEL AND THE BOYCOTT, DIVESTMENT, AND SANCTIONS (BDS) MOVEMENT 12 (2017) ("Participating in the BDS movement would not appear to place a U.S. organization in violation of existing federal antiboycott legislation."); WEISS, *supra* note 15, at 8 ("To the extent a U.S. organization may participate in the BDS movement, it would not appear to violate existing federal antiboycott legislation."). At least one extensive argument has been made that the EAA does in fact apply to BDS activities. In a 2017 article, Greendorfer argues that enforcing the EAA against BDS participants is "within the letter and spirit" of the EAA. Greendorfer, *supra* note 27, at 97. According to Greendorfer, even if BDS itself is not considered a "foreign country," it should be considered an "alter ego of the member states of the Arab League Boycott," propped up to evade the EAA and other anti-boycott laws and to "foster" the Boycott itself. *Id.* at 85. Greendorfer relies on the breadth of the word "foster," such that the EAA could apply even if the boycott were not "initiated" by the foreign country. *Id.* at 61. In this way, Greendorfer correctly recognizes that the EAA is broader than others' interpretions of it (*see, e.g.*, INT'L COMM., NAT'L LAWYERS GUILD, IMPACT OF FEDERAL ANTI-BOYCOTT AND OTHER LAWS ON BDS CAMPAIGNS 1 (Oct. 2009) ["A boycott against the State of Israel or an Israeli company or concern would be prohibited under the EAA only if the boycott is specifically intended to support or comply with boycotts initiated by foreign countries."]), but he ultimately offers an implausible analysis. While critics of BDS can present evidence that certain goals of BDS and the Arab League Boycott overlap, the two movements are distinct in several ways, including their origins, focus, and tactics. Furthermore, even if the EAA were construed to apply to BDS-related boycotts, there is no indication in the EAA itself or in Greendorfer's analysis that it would apply to divestment from Israel or campaigns to impose sanctions on Israel.

address BDS-related activities in some respects. The first, the Israel Anti-Boycott Act, would amend the EAA to prohibit boycotts against allies of the United States that are fostered by intergovernmental organizations, such as the United Nations or the European Union, rather than merely by foreign countries.[53] It is unlikely that the EAA as amended by the Israel Anti-Boycott Act could be enforced against BDS activists.[54] The second piece of proposed legislation, the Combating BDS Act of 2017, would provide that state anti-BDS statutes related to divestment or contracting are not preempted by federal law.[55] This would effectively moot one potential challenge that had doomed some previous state efforts to intervene in foreign affairs, such as Massachusetts's imposition of sanctions on entities conducting business in Myanmar.[56] Both federal anti-BDS bills have received significant support, but neither has been put to a vote as of November 2018.[57]

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53. Israel Anti-Boycott Act, S. 720, 115th Cong. (2017); Israel Anti-Boycott Act, H.R. 1697, 115th Cong. (2017).

54. The findings of the bill reveal that it is a response to the U.N. Human Rights Council (UNHRC)'s March 2016 resolution that, among other things, requested that the U.N. Office of the High Commissioner for Human Rights create a database of all business enterprises that have "directly and indirectly, enabled, facilitated and profited from the construction and growth of the Israeli settlements [in occupied territory]." Human Rights Council Res. 31/36, U.N. Doc. A/HRC/31/L.39 (Apr. 20, 2016). The resolution was denounced by Israel and its supporters as a "blacklist." *See, e.g.*, *The Perversity of the Israel-Boycott Blacklist*, N.Y. POST (Dec. 2, 2017), https://nypost.com/2017/12/02/the-perversity-of-the-israel-boycott-blacklist/ [https://perma.cc/F5U3-AZ49]; *UN Approves Blacklist of Companies Profiting from Settlements*, TIMES OF ISR. (Mar. 24, 2016), https://www.timesofisrael.com/un-approves-blacklist-of-companies-profiting-from-settlements/ [https://perma.cc/82MX-WUAP]; *UN Blacklist: Why Israel Is 'Doing Everything It Can' to Thwart the Human Rights Council*, HAARETZ (Nov. 26, 2017), https://www.haaretz.com/israel-news/why-israel-is-doing-everything-it-can-to-thwart-the-unhrc-1.5626903 [https://perma.cc/M2CF-EGBY] (quoting a U.S. State Department spokesperson as saying that the U.S. views "that type of blacklist as counterproductive"). In spite of the bill's insistence that the UNHRC's Resolution amounted to an "action[] to boycott, divest from, or sanction Israel" (Israel Anti-Boycott Act, S. 720, 115th Cong. § 3(2) (2017); H.R. 1697, 115th Cong. § 3(2) (2017))—implying that the bill, if adopted as law, would apply to BDS activities—the Resolution in question cannot reasonably be construed as initiating or fostering a boycott against Israel. However, the Act could still have an effect on BDS activities. The ACLU fears that the bill could have a chilling effect on otherwise-lawful BDS activities, because "[g]iven the severe penalties at stake, many people would undoubtedly choose to refrain rather than risk prosecution." ACLU, *supra* note 48.

55. Combating BDS Act of 2017, S. 170, 115th Cong. (2017); Combating BDS Act of 2017, H.R. 2856, 115th Cong. (2017).

56. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

57. *See* Actions, *S.720 – Israel Anti-Boycott Act*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/senate-bill/720/actions [https://perma.cc/528B-VDV2];

2. State Statutory Regimes

Perhaps due to the mismatch between existing federal anti-boycott laws and the growing BDS Movement, beginning in 2015, U.S. state legislatures began proposing and enacting anti-BDS legislation of their own. To date, twenty-three states have passed anti-BDS statutes,[58] while four additional states have issued executive orders targeting BDS activity.[59] While only slightly more than half the fifty states have formally taken action against BDS to date, condemnation of BDS at the state level appears to transcend partisan affiliation and geography. To illustrate, as of May 2017, all fifty state governors and the mayor of Washington, D.C., had signed on to an initiative sponsored by the American Jewish Committee entitled "Governors United Against BDS," condemning BDS as "incompatible with the values of our states and our country."[60]

Actions, *S.170 – Combating BDS Act of 2017*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/senate-bill/170/actions [https://perma.cc/A885-LCKH].

58. Alabama, ALA. CODE § 41-16-5 (2016); Arizona, ARIZ. REV. STAT. ANN. §§ 35-393.00 to 35-393.03 (2016); Arkansas, ARK. CODE ANN. §§ 25-1-503 to 25-1-504 (2017); California, CAL. PUB. CONT. CODE § 2010 (2017); Colorado, COLO. REV. STAT. § 24-54.8-201 (2016); Florida, FLA. STAT. §§ 215.4725, 287.135 (2016); Georgia, GA. CODE ANN. § 50-5-85 (2016); Illinois, 40 ILL. COMP. STAT. 5/1-110.16 (2016); Indiana, IND. CODE ANN. §§ 5-10.2-11-1 to 5-10.2-11-26 (2016); Iowa, IOWA CODE §§ 12J.1-.4 (2016); Kansas, KAN. STAT. ANN. §§ 75-3740e–f (2017); Michigan, MICH. COMP. LAWS ANN. §§ 18.1241c, 18.1261 (2016); Minnesota, MINN. STAT. § 3.226 (2017); Nevada, NEV. REV. STAT. §§ 332.065(2), 355.300 to 355.350 (2018); New Jersey, N.J. STAT. ANN. § 52:18A-89.14 (2016); North Carolina, N.C. GEN. STAT. §§ 147-86.80 to 147-86.84 (2017); Ohio, OHIO REV. CODE ANN. § 9.76 (2016); Pennsylvania, 62 PA. STAT. AND CONS. STAT. ANN. §§ 3601-06 (2016); Rhode Island, R.I. GEN. LAWS §§ 37-2.6-1 to 37-2.6-4 (2016); South Carolina, S.C. CODE ANN. § 11-35-5300 (2015); Tennessee, S.J. Res. 170, 109th Gen. Assemb. (Tenn. 2015); Texas, TEX. GOV'T CODE §§ 2270.001 to 2270.002, §§ 808.001–.102 (2017); Virginia, H.J. Res. 177, Reg. Sess. (Va. 2016).

59. Louisiana, La. Exec. Order No. JBE 2018-15 (May 22, 2018), accessible at https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/5b2426321ae6cf4f0653a1f2/1529095730934/JBE+18+-+15+-+Boycotts+of+Isreal+%281%29.pdf [https://perma.cc/59R9-K8HV]; Maryland, Md. Exec. Order No. 01.01.2017.25 (Oct. 23, 2017), accessible at http://mgaleg.maryland.gov/pubs/legislegal/2017-executive-orders.pdf [https://perma.cc/YZ9B-GPQ2]; New York, N.Y. Exec. Order No. 157 (June 22, 2016), accessible at https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_157_new.pdf [https://perma.cc/GL8F-K9M2]; Wisconsin, Wisc. Exec. Order No. 261 (Oct. 27, 2017), accessible at https://walker.wi.gov/sites/default/files/executive-orders/EO%20%23261_0.pdf [https://perma.cc/L54F-BXVC].

60. *See All 50 Governors Sign Anti-BDS Statement*, JEWISH TELEGRAPH AGENCY (May 17, 2017), https://www.jta.org/2017/05/17/top-headlines/all-50-governors-sign-anti-bds-statement [https://perma.cc/L5AF-JDL4]; *Governors United Against BDS*, AM. JEWISH COMM., https://www.ajc.org/governors [https://perma.cc/8YS8-L4WB]. The full text of the

There is wide variation in state anti-BDS laws, including differences in the form of the laws, the activities targeted, the geographic scope of the targeted activities, and the supplemental limitations and provisions of each law. Some of these differences are legally irrelevant, while many of them are deeply relevant to, or even determinative of, the constitutionality of the respective laws.

a. Form

> State anti-BDS laws have taken three broad forms:
>
> (1) *Symbolic resolutions* condemn BDS but have no binding effect.
>
> (2) *Investment-focused laws* require state pension funds and other public investments to divest from and/or refrain from investing in entities that participate in some specified conduct (e.g., refusing to conduct business) with regard to Israel. All of the investment-focused laws require that some state entity produce a list of entities from which the funds must divest.
>
> (3) *Contract-focused laws* prohibit public entities from conducting business with entities that participate in some specified conduct (e.g., refusing to conduct business) with regard to Israel. Contract-focused laws typically require companies to certify during the bidding process that they are not engaged in a boycott of Israel and they will not engage in a boycott of Israel for the duration of the contract.

As of November 2018, twenty states have contract-focused laws,[61]

Governors United Against BDS statement is available at https://www.ajc.org/sites/default/files/pdf/2017-09/GOVERNORS_AGAINST_BDS_STATEMENT.PDF [https://perma.cc/6NYS-QBWM].

61. Alabama, ALA. CODE § 41-16-5 (2016); Arizona, ARIZ. REV. STAT. ANN. §§ 35-393.00 to 35-393.03 (2016); Arkansas, ARK. CODE ANN. § 25-1-503 (2017); California, CAL. PUB. CONT. CODE § 2010 (2017); Florida, FLA. STAT. § 287.135 (2016); Georgia, GA. CODE ANN. § 50-5-85 (2016); Iowa, IOWA CODE §§ 12J.1 to 12J.4 (2016); Kansas, KAN. STAT. ANN. §§ 75-3740e–f (2017); Louisiana, La. Exec. Order No. JBE 2018-15 (May 22, 2018); Maryland, Md. Exec. Order No. 01.01.2017.25 (Oct. 23, 2017); Michigan, MICH. COMP. LAWS ANN. §§ 18.1241c, 18.1261 (2016); Minnesota, MINN. STAT. § 3.226 (2017); Nevada, NEV. REV. STAT § 332.065(2) (2018); North Carolina, N.C. GEN. STAT. § 147-86.80 to 147-86.84 (2017); Ohio, OHIO REV. CODE ANN. § 9.76 (2016); Pennsylvania, 62 PA. STAT. AND CONS. STAT. ANN. § 3601-06 (2016); Rhode Island, R.I. GEN. LAWS §§ 37-2.6-1 to 37-2.6-4 (2016); South Carolina, S.C. CODE ANN. § 11-35-5300 (2015); Texas, TEX. GOV'T CODE §§

and twelve states have investment-focused laws.[62] Of these, seven states have both contract- and investment-focused laws.[63] Tennessee and Virginia are currently the only states that condemn BDS with symbolic resolutions and that do not supplement their condemnations with restrictions on government contracting or investment.[64]

b. Targeted Activities

States vary widely in terms of the actions that trigger mandatory divestment and/or prohibitions on contracting. Typically, anti-BDS statutes prohibit specified contractual or investment relations with entities that engage in "boycotts" of Israel, but they define "boycott" broadly. For example, Arizona's statute defines "boycott" as "engaging in a refusal to deal, terminating business activities *or performing other actions that are intended to limit commercial relations. . . .*"[65] This provision extends far beyond the standard dictionary definition of "boycott," which would merely encompass a refusal to deal,[66] though the precise limits of the statutory prohibition are not clear.

In their definitions of the targeted activities, only nine state laws explicitly mention "divestment," or some variant thereof,[67]

2270.001 to 2270.002 (2017); and Wisconsin, Wisc. Exec. Order No. 261 (Oct. 27, 2017).

62. Arizona, ARIZ. REV. STAT. ANN. §§ 35-393.00 to 35-393.03 (2016); Arkansas, ARK. CODE ANN. § 25-1-504 (2017); Colorado, COLO. REV. STAT. §§ 24-54.8-201 to 24-54.8-204 (2016); Florida, FLA. STAT. § 215.4725 (2016); Illinois, 40 ILL. COMP. STAT. 5/1-110.16 (2016); Indiana, IND. CODE ANN. §§ 5-10.2-11-1 to 5-10.2-11-26 (2016); Iowa, IOWA CODE §§12J.1 to 12J.4(2016); Nevada, NEV. REV. STAT. §§ 355.300 to 355.350 (2018); New Jersey, N.J. STAT. ANN. § 52:18A-89.14 (2016); New York, N.Y. Exec. Order No. 157 (June 22, 2016); North Carolina, N.C. GEN. STAT. §§ 147-86.80 to 147-86.84 (2017); and Texas, TEX. GOV'T CODE §§ 808.001 to 808.102 (2017).

63. Arizona, ARIZ. REV. STAT. ANN. §§ 35-393.00 to 35-393.03 (2016); Arkansas, ARK. CODE ANN. §§ 25-1-503 to 25-1-504 (2017); Florida, FLA. STAT. § 215.4725 (2016); Iowa, IOWA CODE §§ 12J.1 to 12J.4 (2016); Nevada, NEV. REV. STAT. § 332.065(2) (2017); North Carolina, N.C. GEN. STAT. §§ 147-86.80 to 147.86.84 (2017); and Texas, TEX. GOV'T CODE §§ 2270.001 to 2270.002, §§ 808.001 to 808.102 (2017).

64. S.J. Res. 170, 109th Gen. Assemb. (Tenn. 2015); H.J. Res. 177, 2016 Sess. (Va. 2016).

65. Arizona, ARIZ. REV. STAT. ANN. § 35-393 (2016) (emphasis added).

66. For example, Merriam-Webster defines "boycott" in the following way: "to engage in a concerted refusal to have dealings with (a person, a store, an organization, etc.) usually to express disapproval or to force acceptance of certain conditions." *Boycott*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/boycott [https://perma.cc/42H4-Z2UW].

67. Alabama, ALA. CODE § 41-16-5(a)(1) (2016); Colorado, COLO. REV. STAT. § 24-

while only three state laws explicitly mention "sanctions."[68] Accordingly, many state laws do not obviously apply to two of the three techniques employed by the BDS Movement. However, divestment could fall within the broad definitions of "boycott" of many of the statutes, even if the definitions do not explicitly cover such conduct. For example, with regard to the Arizona statute quoted above, a U.S. corporation divesting itself of stock in an Israeli company could be considered "terminating business activities" or "limit[ing] commercial relations,"[69] such that the statute's definition of "boycott" could also preclude the state government from contracting with the divesting company.

In the four state laws that explicitly mention "sanctions," the specific language regarding sanctions is not written in a way that would be enforceable against a business. For example, Colorado's anti-BDS statute regulates "economic prohibitions against Israel," which it defines to mean, in relevant part, "engaging in . . . [the] imposition of sanctions on the state of Israel."[70] Insofar as it would be a government or some intergovernmental entity that would actually impose the sanctions rather than the company itself, it is unclear how a company could possibly engage in imposing sanctions on Israel without also engaging in protected speech. If states were to instead prohibit advocacy for governments to impose sanctions on Israel, then there could be a relatively straightforward First Amendment violation, as a suppression of pure political speech.[71] Furthermore, unlike the broader scope of divestment, advocating for sanctions would probably not fall within the statutory scope of "boycott," in part be-

54.8-201(3) (2016); Indiana, IND. CODE ANN. § 5-10.2-11-3 (2016); Louisiana, La. Exec. Order No. JBE 2018-15 (May 22, 2018); Michigan, MICH. COMP. LAWS ANN. § 18.1261(14)(b) (2016); New York, N.Y. Exec. Order No. 157(I)(B) (June 22, 2016); Pennsylvania, 62 PA. STAT. AND CONS. STAT. ANN. § 3603 (2016); Rhode Island, R.I. GEN. LAWS § 37-2.6-2(a)(1) (2016); South Carolina, S.C. CODE ANN. § 11-35-5300(b)(1) (2015). *Cf.* New Jersey, N.J. STAT. ANN. § 52:18A-89.14(e) (2016) (defining "divestment" but targeting only boycott actions, not divestment actions). Note that some statutes use the verb "divest" rather than the noun "divestment."

68. Colorado, COLO. REV. STAT. § 24-54.8-201(3) (2016); Indiana, IND. CODE ANN. § 5-10.2-11-3 (2016); New York, N.Y. Exec. Order No. 157(I)(B) (June 22, 2016). *Cf.* New Jersey, N.J. STAT. ANN. § 52:18A-89.14(e) (2016) (defining "sanctions" but targeting only boycott actions, not actions to promote sanctions).

69. Arizona, ARIZ. REV. STAT. ANN. § 35-393 (2016).

70. COLO. REV. STAT. § 24-54.8-201(3) (2016).

71. *See* Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

cause it does not directly limit business dealings with that country, even if it could have that effect if sanctions were actually imposed.

c. Geographic Scope

State anti-BDS laws vary in terms of the geographic scope of the conduct that triggers divestment or prohibitions on contracting. Four U.S. state laws merely apply to boycotts of "Israel," without specifying whether or not "Israel" includes the West Bank, Gaza, and the Golan Heights.[72] Fourteen states explicitly refer to boycotts of the "territories controlled by Israel," or some variant thereof, in addition to Israel itself, as conduct falling within the scope of the laws.[73] Four state laws refer to "a jurisdiction with whom this state [or the United States] can enjoy open trade," or some variant thereof, which implies both Israel and the occupied/controlled territories, both of which are eligible trading partners for the United States and all fifty states.[74] In addition, Michigan regulates boycotts of a "strategic partner," with reference to a federal law that explicitly relates to the State of Israel.[75] Lastly, California's statute refers to "any sovereign nation or peoples recognized by the government of the United States," which is ambiguous, but probably excludes the occupied/controlled territories.[76]

72. Arkansas, ARK. CODE ANN. §§ 25-1-503 to 25-1-504 (2017); Minnesota, MINN. STAT. § 3.226 (2017); New York, N.Y. Exec. Order No. 157 (June 5, 2016); Wisconsin, Wisc. Exec. Order No. 261 (Oct. 27, 2017).

73. Arizona, ARIZ. REV. STAT. ANN. §§ 35-393 (2016); Florida, FLA. STAT. ANN. § 215.4725 (2016); Georgia, GA. CODE ANN. § 50-5-85 (2016); Illinois, 40 ILL. COMP. STAT. ANN. 5/1-110.16 (2016); Indiana, IND. CODE ANN. §§ 5-10.2-11-3 (2016); Iowa, IOWA CODE §§ 12J.1 (2016); Kansas, KAN. STAT. ANN. §§ 75-3740e–f (2018); Louisiana, La. Exec. Order No. JBE 2018-15 (May 22, 2018); Maryland, Md. Exec. Order No. 01.01.2017.25 (Oct. 23, 2017); Nevada, NEV. REV. STAT. 332.065(5), 355.305 (2018); New Jersey, N.J. STAT. ANN. § 52:18A-89.14 (2016); North Carolina, N.C. GEN. STAT. §§ 147-86.80 (2017); Ohio, OHIO REV. CODE ANN. § 9.76 (2016); Texas, TEX. GOV'T CODE § 808.001 (2017).

74. Alabama, ALA. CODE § 41-16-5 (2016); Pennsylvania, 62 PA. STAT. AND CONS. STAT. ANN. § 3604 (West 2016); Rhode Island, R.I. GEN. LAWS § 37-2.6-3 (2016); South Carolina, S.C. CODE ANN. § 11-35-5300 (2015).

75. MICH. COMP. LAWS ANN. §§ 18.1241c, 18.1261 (West 2017). The state statute defines "strategic partner" as falling within the meaning of 22 U.S.C. §§ 8601–8606, which encompasses a chapter of the U.S. Code entitled "United States-Israel Cooperation."

76. CAL. PUB. CONT. CODE § 2010 (West 2016). While the United States government has often been relatively equivocal on the issue, it has been the status quo policy of the U.S. government, dating back to at least 1978, that the West Bank and Gaza are not (yet) subject to Israeli sovereignty under international law. However, there have been recent indications

d. Unique Features of State Laws

Some anti-BDS laws take measures to prevent constitutional challenges. Two state statutes carve out activities that are protected under the First Amendment—one explicitly[77] and one implicitly.[78] That is, the statutes do not apply to a particular activity if the activity is protected under the First Amendment.[79] Two state statutes make clear that they are not intended to be applied to U.S.-based companies,[80] which is a way to prevent entities from demonstrating standing to sue. Several state statutes carve out activities that would fall under the EAA or other federal anti-boycott laws, thereby bypassing charges of conflict preemption.[81]

Unlike the EAA, the state anti-BDS laws are generally only enforceable against business entities, such as corporations or partnerships. For example, Florida's contract-focused anti-BDS statute applies to any "company" that participates in a boycott of Israel, defining a company as including a list of business types, including a sole proprietorship, but not an individual person per se.[82] Many of the laws, such as Ohio's statute, require that the entity operates "to earn a profit."[83]

Several of the prohibitions on contracting are not absolute.

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of a policy shift, even as the State Department denies such a shift. Loveday Morris, *U.S. Ambassador Breaks with State Dept. Policy: 'I Think the Settlements Are Part of Israel,'* CHI. TRIB. (Sept. 29, 2017), http://www.chicagotribune.com/news/nationworld/ct-us-ambassador-israel-settlements-20170929-story.html [https://perma.cc/2UA5-LZDK].

77. Minnesota, MINN. STAT. § 3.226 (2017).

78. California's reference in its legislative findings to targeting boycotts conducted "under the *pretext* of exercising First Amendment rights" (emphasis added) implies that the company in question is not actually exercising First Amendment rights. 2016 Cal. Legis. Serv. Ch. 581 (A.B. 2844) (West). Accordingly, California's anti-BDS statute could reasonably be interpreted to implicitly exclude from its provisions boycott activities that are actually protected by the First Amendment.

79. Accordingly, insofar as any of the core substance of the statutes would infringe on protected First Amendment activities, the laws would effectively be a dead letter.

80. Colorado, COLO. REV. STAT. §§ 24-54.8-203 (2016); Illinois, 40 ILL. COMP. STAT. 5/1-110.16(k) (2016).

81. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 35-393(1)(a) (2016) (applying to boycotts "other than those boycotts to which 50 United States Code § 4607(c) applies"); Md. Exec. Order No. 01.01.2017.25, (A)(1)(v) (Oct. 23, 2017) (excepting from the definition of "Boycotts of Israel" those "that are forbidden by the United States pursuant to 50 U.S.C. § 4607"); OHIO REV. CODE ANN. § 9.76(A)(1)(a) (West 2016) (excepting from its definition of "boycott" those "[b]oycotts to which 50 U.S.C. 4607(c) applies").

82. FLA. STAT. § 215.4725(1)(b) (2016).

83. OHIO REV. CODE ANN. § 9.76(a)(2) (West 2016).

Some states set monetary thresholds—for example, Alabama's statute does not apply to contracts worth less than $15,000.[84] Additionally, certain investment-focused statutes are not absolute—Texas's investment-focused statute, for example, explicitly permits a cessation in divestment if clear and convincing evidence shows that the entity has suffered or will suffer a loss in value of its assets as a result of divestment or if there would be a deviation from the portfolio's benchmark.[85]

II. THE FIRST AMENDMENT AND BDS

A. The First Amendment in General

The First Amendment stands as a safeguard against unwarranted government regulation of speech, press, assembly, and petition.[86] Twentieth-century Supreme Court jurisprudence has extended these provisions to protect association and non-verbal actions that convey a message[87]—commonly referred to as "expressive conduct"—such as wearing a black armband to protest the Vietnam War[88] or burning an American flag.[89] In general, the government may not regulate conduct because of its expressive elements.[90] How-

84. ALA. CODE § 41-16-5(c)(2) (2016).

85. TEX. GOV'T CODE ANN. § 808.056(a) (West 2017).

86. The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. While the amendment's language explicitly applies to acts of "Congress," a series of Supreme Court cases incorporated the various elements of the First Amendment into the Fourteenth Amendment's Due Process Clause, effectively applying them to the states (freedom of speech: Gitlow v. New York, 268 U.S. 652, 666 (1925) (dicta); freedom of the press: Near v. Minnesota, 283 U.S. 697, 707 (1931); freedom of assembly: De Jonge v. Oregon, 299 U.S. 353, 364 (1937); right to petition for redress of grievances: Edwards v. South Carolina, 372 U.S. 229, 235 (1963); freedom of expressive association: NAACP v. Alabama, 357 U.S. 449, 460 (1958)).

87. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word. . . . [C]onduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'").

88. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

89. *Johnson*, 491 U.S. 397.

90. *Id.* at 406 ("[The government] may not . . . proscribe particular conduct *because* it has expressive elements.") (emphasis in original); Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) ("[T]he First Amendment [generally] means that government has no power to restrict

ever, it has more flexibility to regulate expressive conduct, such as burning a draft card, than it has to regulate pure speech, such as verbally denouncing the draft.[91]

Federal courts have not yet issued a final decision on the First Amendment implications of anti-BDS laws, but it is likely that they will soon need to decide on the constitutional merits of challenges to such laws. In 2017, the ACLU filed lawsuits in federal court challenging the contract-focused anti-BDS statutes of Kansas[92] and Arizona,[93] claiming several First Amendment violations.

In the first suit, *Koontz v. Watson*, a Kansas public school employee brought a § 1983 lawsuit against the State of Kansas after she was required to certify, pursuant to Kansas's anti-BDS law, that she was not engaged in a boycott of Israel as a condition for entering a contract with the state to become a trainer for a specialized education program.[94] Specifically, Koontz alleged that the required certification violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.[95] In January 2018, the U.S. District Court of Kansas granted a preliminary injunction, with the judge holding that Koontz was likely to succeed on the merits of her First Amendment claim.[96] The district court later dismissed Koontz's lawsuit in June 2018[97] after the Kansas state legislature amended the law so that it only applies to businesses rather than individuals and only to contracts worth at least $100,000.[98] In other words, the con-

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expression because of its message, its ideas, its subject matter, or its content," quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972)); R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (striking down a city ordinance that prohibited certain conduct—in this case, cross-burning—with the intent to intimidate others on the basis of their race, gender, or religion, because the statute impermissibly discriminated on the basis of viewpoint).

91. *Johnson*, 491 U.S. at 406 ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.").

92. Complaint for Declaratory and Injunctive Relief, Koontz v. Watson, 283 F. Supp. 3d 1007 (D. Kan. 2018) (No. 17-cv-4099). *See also* Plaintiff's Motion for Preliminary Injunction, Koontz v. Watson, 283 F. Supp. 3d 1007 (D. Kan. 2018) (No. 17-cv-4099).

93. Complaint for Declaratory and Injunctive Relief, Jordahl v. Brnovich, No. 3:17-cv-08263-DJH, 2018 WL 4732493 (D. Ariz. Dec. 6, 2017). *See also* Plaintiffs' Motion for Preliminary Injunction with Accompanying Declaration and Memorandum of Law, Jordahl v. Brnovich, No. CV-17-08263-PCT-BSB, 2018 WL 4732493 (D. Ariz. Sept. 27, 2018).

94. Koontz v. Watson, 283 F. Supp. 3d. 1007, 1013–14 (D. Kan. 2018).

95. Complaint for Declaratory and Injunctive Relief, Koontz v. Watson, 283 F. Supp. 3d 1007 (2018) (No. 17-cv-4099).

96. *Koontz*, 283 F. Supp. 3d. at 1024.

97. Agreed Order of Dismissal, Koontz v. Watson, 283 F. Supp. 3d 1007 (D. Kan. 2018) (No. 17-cv-4099).

98. KAN. STAT. ANN. §§ 75-3740e–f (2018).

troversy became moot because the statute no longer applied to Koontz, and the court found no opportunity to rule on the merits of Koontz's constitutional claim, though the judge ordered the state to pay her legal fees.[99]

In the second suit, *Jordahl v. Brnovich*, an Arizona attorney whose firm provided legal services to incarcerated individuals sued to enjoin a state statute under which he was required to certify that his law firm would not "engage in a boycott of Israel" for the duration of its contract with a county prison.[100] Jordahl's claims were substantially similar to those in *Koontz*, and the federal judge's decision was also substantially the same.[101] In September 2018, the U.S. District Court for the District of Arizona issued a preliminary injunction, preventing application of Arizona's anti-BDS statute.[102] That ruling has been appealed to the Ninth Circuit.[103]

In any case, the argument that anti-BDS statutes violate the First Amendment is not "straightforward," as some have claimed[104] and as the preliminary injunctions may seem to suggest. In the absence of existing precedent on anti-BDS statutes, judging whether such laws run afoul of First Amendment protections will require courts to work backwards through the complex First Amendment jurisprudence. To this end, a court must first determine whether BDS boycotts are protected by the First Amendment and then, assuming the activities are constitutionally protected, determine the extent of the protection in order to weigh the sufficiency of the government's interest compared to the right of BDS supporters to undertake boycotts against Israel.

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99. Sherman Smith, *Judge Dismisses Lawsuit over Israel Boycott Ban, Orders State of Kansas to Pay Legal Fees*, TOPEKA CAPITAL-JOURNAL (June 29, 2018), http://www.cjonline.com/news/20180629/judge-dismisses-lawsuit-over-israel-boycott-ban-orders-state-of-kansas-to-pay-legal-fees [https://perma.cc/C7MF-6HTA].

100. Order, Jordahl v. Brnovich, No. CV-17-08263-PCT-DJH, 2018 WL 4732493 (D. Ariz. Sept. 27, 2018).

101. *Id.*

102. *Id.* While the reasoning in the *Jordahl* order was incisive, the remainder of this Note focuses on the legal analysis contained in the *Koontz* injunction order rather than *Jordahl* primarily because the *Jordahl* injunction was issued only a short time before publication of the Note.

103. State's Notice of Preliminary Injunction Appeal, Jordahl v. Brnovich, No. CV-17-08263-PCT-DJH, 2018 WL 4732493 (D. Ariz. Oct. 1, 2018).

104. Edelman, *supra* note 9.

B. Political Boycotts and the First Amendment: Claiborne Hardware

Opponents of anti-BDS laws routinely invoke *NAACP v. Claiborne Hardware*[105] to establish the principle that political boycotts, such as those undertaken by BDS activists, are constitutionally protected.[106] Indeed, in *Claiborne*, the Supreme Court unanimously[107] held that political boycotts are a constitutionally protected form of expressive conduct, reversing a judgment against the NAACP and others for damages against local businesses and a permanent injunction arising from a boycott of white-owned businesses that had been planned at a local NAACP meeting.[108] The Court held that, even though some of the boycotters engaged in violence, the nonviolent elements of the boycott were protected by the First Amendment, because they "sought to bring about political, social, and economic change," which is precisely the type of activity that the First Amendment aims to protect.[109] The Court went on to declare that a state's right to regulate economic activity, which in another context could justify a prohibition against a local boycott, "could not justify a complete prohibition against a nonviolent, politically motivated boycott."[110]

Claiborne, then, can properly be read to stand for a categorical rule, though the scope of that rule is subject to much debate. A common interpretation of the case is that political boycotts are on par with the most protected expressive conduct, and this interpretation has been reflected in subsequent case law.[111] Some commentators

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

106. *See, e.g.*, PALESTINE LEGAL & CTR. FOR CONSTITUTIONAL RIGHTS, THE PALESTINE EXCEPTION TO FREE SPEECH (2015), https://ccrjustice.org/sites/default/files/attach/2015/09/Palestine%20Exception%20Report%20Final.pdf [https://perma.cc/NZP9-RJ6F]; Brian Hauss, *The First Amendment Protects the Right to Boycott Israel*, AM. CIVIL LIBERTIES UNION (July 20, 2017), https://www.aclu.org/blog/free-speech/first-amendment-protects-right-boycott-israel [https://perma.cc/9CU3-PLTH].

107. The vote was 8–0, with Justice Marshall not participating in the proceedings.

108. The boycotters' demands included the following: desegregation of all public schools and public facilities, hiring of black policemen, public improvements in black residential areas, selection of blacks for jury duty, integration of bus stations, end to verbal abuse by law enforcement officers, the use of respectful rather than demeaning terms used to address blacks, and the employment of black cashiers and clerks at stores. *Claiborne*, 458 U.S. at 899–900.

109. *Id.* at 911.

110. *Id.* at 912–14.

111. *See, e.g.*, McCalden v. California Library Ass'n, 955 F.2d 1214, 1229 (9th Cir. 1990) ("[*Claiborne*] held that a politically motivated boycott was protected by the First Amendment.") (Kozinski, J., dissenting); Richmond, Fredericksburg & Potomac R.R. Co. v.

have instead interpreted *Claiborne*'s holding to be much narrower, limiting the protection of political boycotts to circumstances that share the case's particular facts. For example, the fact that *Claiborne* effectively involved a complete ban on a boycott (through the state court's grant of a permanent injunction and imposition of civil liability against the boycotters) may be interpreted to undermine the case's applicability to mere regulations of boycotts that do not rise to the level of total proscription. In addition, the boycott in *Claiborne* was a direct attempt to vindicate constitutionally protected rights under the Fourteenth Amendment, and the boycott involved elements of physical association and local assembly, so the case could similarly be interpreted to protect boycotts only to the extent that they share these characteristics.[112] At the extreme, one commentator even suggested that *Claiborne*'s statements about the First Amendment's protection for political boycotts were mere dicta.[113]

As a preliminary matter, BDS boycotts clearly fall within the broadest possible holding of *Claiborne*. BDS boycotts, like the NAACP boycott, have the goal of bringing about political and social change, which the *Claiborne* Court held to be sufficiently expressive. Accordingly, some advocates and commentators have effectively argued that *Claiborne* stands for a categorical rule that protects political boycott activities (like BDS) against government regulation.[114]

Bhd. of Maint. of Way Emps, 795 F.2d 1161, 1163 (4th Cir. 1986) (citing *Claiborne* for the principle that "[a]bsent clear congressional intent to the contrary, peaceful boycotts and nonviolent picketing are a form of speech or conduct ordinarily entitled to protection under the first and fourteenth amendments to the Constitution"); Mendelsohn v. Meese, 695 F. Supp. 1474, 1481 n.7 (S.D.N.Y. 1988) (citing *Claiborne* for the principle that "a political boycott is generally protected by the First Amendment"); Memorandum in Support of Plaintiff's Motion for Preliminary Injunction at 2, Koontz v. Watson, 283 F. Supp. 3d 1007 (D. Kan. 2018) (No. 17-cv-4099) (citing *Claiborne* as holding that "political boycotts are fully protected by the First Amendment rights to free expression and free association").

112. *See, e.g.*, Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE NOVO 112, 116 (2016).

113. Gordon M. Orloff, *The Political Boycott: An Unprivileged Form of Expression*, 1983 DUKE L.J. 1076, 1085.

114. *See, e.g.*, Plaintiffs' Motion for Preliminary Injunction with Accompanying Declaration and Memorandum of Law at 8, 12, Jordahl v. Brnovich, No. CV-17-08263-PCT-BSB, 2018 WL 4732493 (D. Ariz. Sept. 27, 2018) (stating that "[s]ince [*Claiborne*] . . . it has been clear that the First Amendment protects the right to engage in politically motivated boycotts" and that *Claiborne* prohibits "the suppression of political boycotts"); *Recent Legislation, First Amendment—Political Boycotts—South Carolina Disqualifies Companies Supporting BDS from Receiving State Contracts.—S.C. Code Ann. § 11-35-5300 (2015)*, 129 HARV. L. REV. 2029, 2031 n.17 (2016) [hereinafter Recent Legislation] ("The holding of *Claiborne Hardware* categorically extends First Amendment protection to

The judge in *Koontz*, in discussing the merits of the pending case, interpreted *Claiborne* for the principle, without qualification, that "[t]he First Amendment protects the right to participate in a boycott."[115] Remarkably, the judge further expressed that "[i]n some respects, the issue here is easier than the one in *Claiborne*," because *Claiborne* involved certain "complicating facts" that are not present in the *Koontz* case.[116] Specifically, the NAACP boycott involved illegal and violent conduct as a part of the broader boycott, while there were no such allegations regarding Koontz or her fellow BDS supporters.[117]

The *Koontz* court's conclusion is too hasty, however, owing to *Claiborne*'s ambiguities and the lack of federal case law interpreting the limits of the case's holding. While a court should consult *Claiborne* for determining the constitutionality of anti-BDS laws, as the judge in *Koontz* did in enjoining the Kansas anti-BDS statute, courts can and should analyze the issue independently of *Claiborne*. In doing so, they can ensure consistency with the full scope of First Amendment jurisprudence and establish a credible judgment that could influence other courts and serve as a stable foundation for future litigation and future lawmaking.

C. "Inherently Expressive": Whether BDS Activities Should Receive First Amendment Protection at All

The relevant inquiry for whether the First Amendment protects expressive conduct is whether the conduct is sufficiently expressive to gain First Amendment protection.[118] While the standard lacks precise definition, the Supreme Court explained in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* that the government can regulate conduct under the First Amendment so long as the conduct is not "inherently expressive."[119] Conduct is inherently expressive when an observer can understand that the conduct is expressing

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political boycotts.").

115. Koontz v. Watson, 283 F. Supp. 3d 1007, 1021 (D. Kan. 2018).

116. *Id.* at 1022 n.8.

117. *Id.*

118. *See, e.g.*, Spence v. Washington, 418 U.S. 405, 409 (1974) (describing that it is necessary, when considering whether conduct qualifies for First Amendment protection, to determine "whether [the plaintiff's] activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments").

119. Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 66 (2006).

an idea without any spoken or written explanation.[120]

In the proceedings in *Koontz*, the State of Kansas cited *Rumsfeld* to support its position that the regulated BDS activities were not sufficiently expressive to warrant First Amendment protection.[121] In *Rumsfeld*, a federal statute[122] required each institution of higher education, in order to be eligible for certain federal funding, to offer military recruiters the same access to the school's campus and students that it provided to nonmilitary recruiters.[123] Law schools challenged the statute on the grounds that it compelled them to choose between expressing a particular message—that the schools support the military—and losing federal funding.[124] The Supreme Court held that any compelled speech was incidental to the law's regulation of non-expressive conduct.[125] It concluded that refusal to allow military recruiters on campus is not inherently expressive, because people could understand that the schools were expressing an idea only if the schools explicitly explained why the military recruiters were off-campus—their absence at recruiting events could be reasonably attributed to a variety of factors that have nothing to do with disapproval of military recruitment.[126] In contrast, the Court held in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* that requiring parade organizers to include a certain group in the parade would alter the organizers' speech.[127] The expressive content of the parade itself was dependent on the identities of the marching individuals.[128] The relevant question for BDS activities, then, is whether political boycotts are more similar to the recruiting events in *Rumsfeld* or to the parade in *Hurley*.

In *Koontz*, the judge effectively distinguished between *Rumsfeld*, on the one hand, and cases like *Hurley* and *Koontz* on the other. In contrast to a private parade whose very purpose was to ex-

120. *Id.*

121. *Koontz*, 283 F. Supp. 3d at 1023 (noting citation by defense counsel during oral argument).

122. 10 U.S.C. § 983(b) (2002).

123. *Rumsfeld*, 547 U.S. at 51.

124. *See id.* at 52.

125. *Id.* at 62.

126. *Id.* at 66.

127. Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 572–73 (1995).

128. *Id.* at 568. The purpose of the parade itself was to celebrate its members' identity, to show that there are gay, lesbian, and bisexual descendants of Irish immigrants, and to support similar individuals who were going to march in New York. *Id.* at 570.

press particular ideas, holding employment interviews and recruiting receptions lacks an expressive quality,[129] because the law schools were effectively providing a service for students where the speech was pragmatic rather than expressive. Like the parade in *Hurley*, in which a spectator could understand the expression of the marchers, even without a clear explanation of their motives, "[i]t is easy enough to associate [Koontz's] conduct with the message that the boycotters believe Israel should improve its treatment of Palestinians."[130] While an observer could mistake the actions of a BDS boycotter as motivated by something other than specific beliefs about Israel's treatment of Palestinians—for example, anti-semitism—the expressive quality of BDS boycotts is more palpable than the pragmatic recruitment events in *Rumsfeld*. Particularly as boycotts of Israel have become more widespread and publicized, it is increasingly reasonable to infer a boycotter's political motivations from merely observing their conduct.

This conclusion is supported by dicta in *FTC v. Superior Court Trial Lawyers Association*,[131] which is, next to *Claiborne*, the Supreme Court's clearest statement about First Amendment protection for political boycotts. In *Superior Court Trial Lawyers*, the Court held that a boycott was not immunized from an antitrust action, because it had economic (rather than primarily political) motivations, but stated the following: "Any restrictions on [politically motivated] boycotts must be scrutinized with special care in light of their historic importance as a mode of expression."[132] Taken at face value, this seems to support the conclusion, albeit in dicta, that political boycotts are expressive in nature, and restrictions on such boycotts warrant scrutiny under the First Amendment.

Even assuming that, under *Claiborne* or the supplemental First Amendment case law described above, political boycotts are protected by the First Amendment, constitutional protection is not by itself sufficient to support the conclusion that the government cannot thereby regulate the conduct. As the *Claiborne* Court itself explained, "[t]he presence of protected activity . . . 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."[133] Indeed, the Court expressly

129. Koontz v. Watson, 283 F. Supp. 3d 1007, 1024 (D. Kan. 2018).

130. *Id.*

131. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990).

132. *Id.* at 448.

133. NAACP v. Claiborne Hardware, 458 U.S. 886, 912 (1982).

narrowed its holding in *Claiborne*, recognizing that the right to boycott—even to boycott for political reasons—is not absolute.[134] That is, an activity can be protected by the First Amendment but be subject to narrowly tailored restrictions, without constitutional violation, similar to the way in which cursing is protected by the First Amendment but is still subject to a variety of "time, place, and manner" restrictions.[135]

The basic conclusion here is that, even though at least some BDS activities appear to be protected by the First Amendment under a straightforward interpretation of *Claiborne*, and probably protected under an examination of the case law independent of *Claiborne*, a state government could still regulate the activities under certain conditions. The mere fact that the Constitution protects a particular activity does not necessarily mean that the protection is sufficiently strong to defeat a narrowly tailored government regulation. Rather, a thorough inquiry into the constitutionality of regulations on BDS activities necessarily involves consideration of all of the circumstances that could limit the activity's constitutional protection or otherwise justify governmental infringement on the right to participate in that type of political boycott.

D. "Incidental Effects": Possible Limitations to the Claiborne *Holding*

1. *U.S. v. O'Brien* and the Doctrine of "Incidental Infringement"

Proponents of anti-BDS laws could argue that, even if BDS activities are protected by the First Amendment, the laws do not ultimately run afoul of the First Amendment, because they are a mere "incidental infringement" on constitutional rights. The concept of "incidental infringement" is rooted in *United States v. O'Brien*, where the Supreme Court held that the significant government interest in prohibiting the burning of draft cards outweighed the expressive interest of protesters.[136] The *O'Brien* doctrine applies when

134. *Id.*

135. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978) (holding that the FCC's censure of a radio station for its daytime broadcast of George Carlin's "Filthy Words" routine did not violate the First Amendment); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (holding that a public school's discipline of a student for using offensive language during a speech did not violate the First Amendment). *Cf.* Cohen v. California, 403 U.S. 15 (1971) (reversing a disturbing the peace conviction in favor of a defendant who had walked through a courthouse wearing a jacket bearing the words "fuck the draft").

136. United States v. O'Brien, 391 U.S. 367 (1968).

"'speech' and 'nonspeech' elements are combined in the same course of conduct" and there is a "sufficiently important governmental interest in regulating the nonspeech element."[137] Accordingly, the doctrine is rooted in a balancing of interests—quite simply, if the strength of the government's interest outweighs the strength of the right, then the government is justified in regulating the activity to the extent necessary to achieve its interest.[138]

Claiborne itself explicitly cited *O'Brien* in acknowledging the fact that otherwise-political boycotts could be subject to permissible incidental infringement under certain circumstances.[139] In *Claiborne*, the Court explicitly refused to decide whether and to what extent a narrowly tailored statute aimed at prohibiting anticompetitive conduct or forms of secondary pressure (or some other legitimate government purpose) could permissibly restrict protected First Amendment activity.[140] However, it gestured at certain types of regulations that could justify governmental restriction. For example, the Court listed boycotts that have a "disruptive effect on local economic conditions," those that "suppress competition," and those involving "unfair trade practices" as types of boycotts that could be curtailed or prohibited, consistent with the Constitution.[141] Indeed, the Supreme Court has generally upheld local and state regulations of refusals to conduct business, including boycotts that are conducted to gain an economic advantage,[142] which are generally considered to be within the government's power to regulate and even to prohibit under, for example, antitrust laws.[143]

Lastly, the Court mentioned that Congress could prohibit "[s]econdary boycotts and picketing by labor unions" in order to strike the "delicate balance" between freedom of expression and keeping neutral parties free from "coerced participation in industrial

137. *Id.* at 376.

138. *Id.*

139. NAACP v. Claiborne Hardware, 458 U.S. 886, 912 (1982).

140. *Id.* at 915 n.49 ("We need not decide in this case the extent to which a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct or certain types of secondary pressure may restrict protected First Amendment activity.").

141. *Id.* at 912.

142. *See, e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 426 (1990).

143. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508 (1988) (upholding an antitrust action by stating that the holding of *Claiborne* is not applicable to a boycott conducted by business competitors who "stand to profit financially from a lessening of competition in the boycotted market"); *Superior Court Trial Lawyers*, 493 U.S. at 426–28 (holding that a boycott involving attorneys that refused to accept cases unless the fees they were paid were raised was a violation of the antitrust laws).

strife," apparently referring to conflicts between labor unions and employers.[144] Besides *O'Brien*, the three primary cases cited in *Claiborne* for the principle that First Amendment rights could lawfully be subject to incidental infringement are all rooted in labor contexts in which commercial interests rather than political interests were paramount. Specifically, in all three cases, the boycott or protest activities involved self-interested workers or unions attempting to secure an economic advantage. *Giboney v. Empire Storage and Ice* affirmed an injunction against workers picketing an ice plant.[145] *NLRB v. Retail Store Employees* upheld an injunction against a union for conducting a secondary boycott in violation of federal labor law.[146] *National Society of Professional Engineers v. United States* upheld a Sherman antitrust action against a professional association for prohibiting competitive bidding.[147] In all three cases, the boycotting parties were advancing distinct economic interests.

While the Court's reasoning is a bit muddled, *Claiborne* distinguished these economically motivated boycotts from politically motivated boycotts, such as the NAACP's protests. States have "broad power" to regulate the former, but there is no comparable power to prohibit "peaceful political activity," such as the boycotts in question.[148] To this effect, the Court quoted the lower court's position positively: "There is no suggestion that the NAACP, MAP or the individual defendants were in competition with the white businesses or that the boycott arose from parochial economic interests."[149] Instead, the boycott arose from political efforts—in this case, to end racial discrimination in the town, which "differentiates this case from a boycott organized for economic ends," because protesting racial discrimination is "essential political speech" lying at the core of the First Amendment.[150]

Because of the facially political character of BDS activities, similar to the NAACP boycott, *Claiborne* itself does not, without fur-

144. *Superior Court Trial Lawyers*, 493 U.S. at 428 n.12 (citing NLRB v. Retail Store Emps., 447 U.S. 607, 617–18 (1980)).

145. Giboney v. Empire Storage and Ice, 336 U.S. 490 (1949).

146. *Retail Store Emps.*, 447 U.S. 607.

147. Nat'l Soc'y of Prof. Engineers v. United States, 447 U.S. 607 (1980). Importantly, the court cited a fourth case, *Int'l Longshoremen's Ass'n AFL-CIO v. Allied Int'l*, 456 U.S. 212 (1982). *Int'l Longshoremen* does not fit the mold of the other cases and will be discussed *infra* II.D.3.b, regarding the notion of coercive expression.

148. NAACP v. Claiborne Hardware, 458 U.S. 886, 912–14 (1982).

149. *Id.* at 915 (quoting Henry v. First Nat'l Bank of Clarksdale, 595 F.2d 291, 303 (5th Cir. 1979)).

150. *Id.*

ther analysis, provide an adequate sense of whether a state would be justified in regulating BDS activities. Accordingly, a court would need to interrogate the specific governmental interests at stake in regulating BDS and the strength of the individual right to participate in BDS, accounting for potential limitations to the right to participate in BDS boycotts.

2. The State Interest in Regulating BDS Activities

a. Anti-BDS Statutes as Anti-Discrimination Laws

The government interest most often cited as a justification for anti-BDS laws is anti-discrimination. Indeed, most states explicitly couch their anti-BDS laws in terms of anti-discrimination regulation. For example, the Florida statute reads, in relevant part, "'Boycott Israel' . . . means refusing to deal . . . with Israel . . . in a discriminatory manner."[151] Many of the statutes further stipulate that in order to fall within the statutory definition of "boycott," the activity must discriminate on the basis of some protected characteristic. Arizona's statute, for example, reads as follows: "'Boycott' means engaging in a refusal to deal . . . with Israel . . . if those actions are taken . . . in a manner that discriminates on the basis of nationality, national origin or religion."[152] For his part, Governor Cuomo of New York justified his anti-BDS executive order based on the "clear, well-established legal distinction between political speech . . . and blatant discriminatory conduct such as BDS activities."[153] According to Cuomo's lawyer, BDS violates pre-existing New York state law by amounting to discrimination "based on nothing more than a person's national origin or ethnicity."[154] This sentiment is echoed by other critics of BDS.[155]

On the surface, there appears to be a difference between BDS supporters refusing to purchase goods that have an origin in a particular country and white-owned businesses refusing to serve indi-

151. FLA. STAT. § 215.4725(1)(a) (2016).

152. ARIZ. REV. STAT. ANN. §§ 35-393(1) (2016).

153. Cuomo, *supra* note 4 ("If a business owner refuses to serve or hire someone based on race, religion or ethnicity, it is illegal and sanctionable. If that same person attends a political rally decrying one group of people—African Americans, Jews, the LGBT community—it is constitutionally protected speech.").

154. Edelman, *supra* note 9.

155. Greendorfer, *supra* note 112, at 124 ("There should be no question that anti-Israel boycotts are borne of discriminatory intent.").

vidual black patrons, for example. However, legal scholar Eugene Kontorovich, who helped write anti-BDS statutes for several states,[156] argued that Israel is "certainly a proxy for Jewishness" and that acting on the basis of such proxies runs afoul of anti-discrimination laws, similar to the impermissibility of using proxies like "neighborhood" for racially biased policing.[157] Effectively, the argument is that BDS boycotts of Israel violate state and federal anti-discrimination laws that are clearly constitutional.

As a general matter, according to Kontorovich, "not doing business with people is not in itself protected speech," or else there would be a "big problem with all kinds of antidiscrimination measures,"[158] including President Obama's 2014 executive order forbidding federal contractors from discriminating based on sexual orientation and gender identity.[159] In this respect, Kontorovich emphasized that the First Amendment does not make distinctions between "good" and "bad" forms of discrimination (say, discrimination against Israel and against LGBTQ persons, respectively).[160] If federal contractors can be compelled not to discriminate on the basis of sexual orientation—so the argument goes—they can be compelled not to discriminate against Israel in their business dealings. In response to such an argument, the judge in *Koontz* concisely explained that "[a] desire to prevent discrimination against Israeli businesses is an insufficient public interest to overcome the public's interest in protecting a constitutional right."[161] This explanation indicates a plausible distinction between Obama's executive order, which does not on its face implicate a constitutional right, and anti-BDS laws, which implicate the right to engage in political boycotts.

Furthermore, Kontorovich's argument appears to conflict with the basic factual circumstances of *Claiborne*, in which the NAACP and other groups specifically and deliberately targeted white-owned businesses. That is, the boycotters discriminated on the basis of race, which, according to the argument of Cuomo, Kontorovich, and others, would justify the government banning the boycott altogether. Accordingly, any justification of anti-BDS laws on anti-discrimination grounds must come to terms with the fact that the *Claiborne* Court seems to have been wholly unconcerned with the ra-

156. Edelman, *supra* note 9.

157. Kontorovich, *supra* note 9.

158. Edelman, *supra* note 9 (quoting Kontorovich).

159. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

160. *Id.*

161. Koontz v. Watson, 283 F. Supp. 3d 1007, 1027 (D. Kan. 2018).

cially discriminatory character of the boycott.

Perhaps in trying to achieve this reconciliation, Greendorfer cites two recent state cases as standing for the principle that anti-discrimination laws *can* trump First Amendment interests when applied to refusals to conduct business.[162] Greendorfer's general principle is surely correct—under certain conditions, strong state anti-discrimination interests would outweigh relatively weak First Amendment interests—but he misinterprets the two cases at issue and misapplies the principle to the BDS context. The first case, *Masterpiece Cakeshop*, decided by the Colorado Appellate Court and then-pending before the U.S. Supreme Court,[163] did not hold that state anti-discrimination laws outweigh a baker's expressive interests in baking cakes—instead, it held that decorating cakes, at least on the facts of this case, is not sufficiently expressive to raise First Amendment protection at all.[164] This is in sharp contrast to politically motivated boycotts, which *Claiborne* held to be sufficiently expressive, even if regulable by narrowly tailored statutes.

Distinguishing between the circumstances underlying a case like *Masterpiece Cakeshop* and cases arising from BDS activities demonstrates why justifying First Amendment infringement on the basis of anti-discrimination is misapplied to the BDS context. To this effect, legal scholar Michael Harper argued that the First Amendment right to boycott should encompass only boycotts aimed at affecting the decision-making of targeted entities, not those directed at the "status" of targets, such as the identities of the owners or managers of a business.[165] This appears to be consistent with anti-discrimination law, and in light of the fact that the boycott at issue in *Claiborne* was directed at white-owned businesses, Harper's argument still seems to contradict *Claiborne*'s holding. However, Harper clarified that his vision of the right to boycott—as prohibiting boycotts initiated based

162. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015), *rev'd* 138 S.Ct. 1719 (2018) (finding that state anti-discrimination law compelling a bakery to provide cakes for same-sex weddings was not a violation of the bakery owner's First Amendment rights); Elane Photography, LLC v. Willock, 309 P.3d 53, 61 (N.M. 2013) (finding a state anti-discrimination law compelling a photographer to provide services to a same sex couple was not a violation of the photographer's First Amendment rights).

163. The Supreme Court granted certiorari in 2017 and ultimately held for the petitioner baker on narrow grounds, related to the state commission's demonstrated bias against religion. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S.Ct. 1719 (2018).

164. *Craig*, 370 P.3d at 288.

165. Michael C. Harper, *The Consumer's Emerging Right to Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law*, 93 YALE L.J. 409, 429 (1984).

on the identity of targets—is consistent with *Claiborne*, insofar as the NAACP's boycott was ultimately aimed at influencing social decisions rather than inflicting harm (economic or otherwise) on the targets.[166] The determining factor for Harper was not whether there is discrimination per se, but rather whether the discrimination furthers some invidious motive or, on the other hand, is aimed at the First Amendment values of political expression, participation, petition, and social influence.[167]

Accordingly, under Harper's reasoning, certain forms of discriminatory boycotts (in the descriptive, not legal, sense) may be permissible, as long as the discrimination is aimed at influencing social decisions rather than inflicting harm. This is a clear way to distinguish, on the one hand, between U.S. businesses organizing boycotts of competitor Israeli businesses in order to suppress competition or a cakemaker's refusal to bake a cake for a same-sex couple and, on the other hand, an American business refusing to buy parts from an Israeli manufacturer in order to protest the Israeli political regime. While the cakemaker may not personally hold any animus toward a particular same-sex couple, the cakemaker's actions are not aimed at influencing the couple's or the government's decisions. In the BDS context, in contrast, the ultimate goal of boycotting a company like SodaStream is not to put SodaStream out of business—it is to affect Israeli foreign and domestic policy. And insofar as a specific BDS initiative has such aims, it would generally be beyond anti-discrimination regulation, consistent with the spirit of the First Amendment and *Claiborne*.

b. Other Possible Justifications for Anti-BDS Statutes

The judge in *Koontz* referenced several other rationales for Kansas's anti-BDS law, including some proffered by the state itself, which the judge classified according to whether they were permissible or impermissible under the First Amendment. On the impermissible front, the judge found that the legislative history of the statute reveals that the statute's goal was to "undermine the message of those participating in a boycott of Israel."[168] The judge explained that such a law constitutes either "viewpoint discrimination against the opinion that Israel mistreats Palestinians or subject matter discrimination on the topic of Israel," neither of which are permissible

166. *Id.*

167. *Id.*

168. Koontz v. Watson, 283 F. Supp. 3d 1007, 1022 (2018).

goals under the First Amendment.[169] The judge also addressed, without explanation, the goal of minimizing any discomfort that Israeli businesses may feel from BDS boycotts, which the judge also found to be an impermissible goal.[170]

Even if Kansas had a permissible goal, the judge still would have granted the preliminary injunction because the statute is not "narrowly tailored" to achieve its permissible ends. If the law is aimed at regulating boycotts intended to suppress Israeli economic competition, the statute is over-inclusive, because it also bans political boycotts. If the goal is to promote trade relations with Israel, the law is under-inclusive because it only regulates boycotts rather than other conduct that significantly affects trade.[171] Lastly, while avoiding harm to the Kansas economy is a permissible goal, Kansas presented no evidence to demonstrate that Israeli companies would restrict their business dealings in or with the state without the anti-BDS statute.[172] Neither did the state present any evidence that commerce with Israel increased as a result of, or in anticipation of, the statute.[173]

A key point to take away from the preliminary injunction decision in *Koontz* is that there are permissible government interests for anti-BDS regulation, as *Claiborne* had recognized with regard to anti-boycott regulations. Furthermore, it leaves open the possibility that a particular state statute could be narrowly tailored to fulfill the government's interest, even though the judge found the Kansas statute not to be narrowly tailored.

3. Possible Limitations to the Right to Participate in BDS

There are at least five distinct arguments that the right to participate in a politically motivated boycott of Israel is relatively limited, such that state governments have greater flexibility to regulate BDS to advance a legitimate government purpose. At least two of these arguments can be readily addressed by *Claiborne* itself or by other lines of case law, while three of the arguments are relatively more challenging and could potentially pose problems for challengers of anti-BDS statutes in court. These arguments are ordered from least to most difficult, with "difficulty" being as much a function of lack of doctrinal clarity as it is a function of unfavorable precedent.

169. *Id.*

170. *Id.*

171. *Id.* at 1023.

172. *Id.* at 1026.

173. *Id.*

a. Commercial v. Political Boycotts

Kontorovich has argued that the state anti-BDS laws fall outside the scope of *Claiborne* because they have nothing to do with consumer boycotts; instead, they relate strictly to boycotts by businesses, "which are far more conduct than expression."[174] One distinction inherent in this analysis is between expressive boycotts conducted by consumers and commercial boycotts conducted by businesses. Kontorovich's argument rests on the Commercial Speech Doctrine, which entails that commercial speech—for example, advertising or other expression aimed strictly at increasing profit[175]—is entitled to First Amendment protection,[176] but it is entitled to a lesser degree of constitutional protection than "traditional speech."[177]

This critique is ultimately misapplied to BDS, at least in general, even if the Commercial Speech Doctrine persists after *Citizens United*.[178] In order to reach this conclusion, though, courts would need to distinguish two influential cases that upheld the EAA—the federal statute prohibiting certain boycotts against Israel—against First Amendment challenges brought by corporations charged with supporting boycotts of Israeli goods by answering Arab League questionnaires regarding their business relationships with Israel.[179] The Seventh Circuit, in a decision called *Briggs & Stratton Corp. v. Baldrige*[180] (consolidating the appeals of *Briggs*[181] and *Trane v.*

174. Eugene Kontorovich, *Can States Fund BDS?*, TABLET (July 13, 2015), http://www.tabletmag.com/jewish-news-and-politics/192110/can-states-fund-bds [https://perma.cc/B5FP-67NH].

175. The Supreme Court has variously defined "commercial speech" as expression that does "no more than propose a commercial transaction," Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976), and "expression related solely to the economic interests of the speaker and its audience," Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980).

176. *Virginia Bd. of Pharmacy*, 425 U.S. 748; *Cent. Hudson*, 447 U.S. at 557.

177. *Cent. Hudson*, 447 U.S. at 557 ("[T]he Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression, nevertheless the First Amendment protects commercial speech from unwarranted governmental regulation.").

178. It has been suggested that Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010), could be used as a tool to challenge anti-BDS laws by dissolving the commercial speech doctrine. *See, e.g.*, Tamara R. Piety, Citizens United *and the Threat to the Regulatory State*, 109 MICH. L. REV. 16 (2010).

179. Following an amendment to the EAA in 1979, answering an Arab League boycott questionnaire at all—even to affirm business dealings with Israel, which would lead to being blacklisted by the Arab League—violated federal law.

180. Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915 (7th Cir. 1984) [hereinafter *Briggs*].

Baldrige[182]), determined that the EAA's statutory prohibition passed constitutional muster, because answering boycott questionnaires, motivated by an interest (though not necessarily a sole interest) in maintaining commercial relationships, is commercial speech and is thus not accorded full First-Amendment protection.[183] This is the case even though answering the questionnaires constituted "pure speech" rather than the less-protected expressive conduct.

While Greendorfer has cited *Briggs* to stand for the principle that boycotts of Israel are not protected by the First Amendment,[184] the case is readily distinguishable from a typical BDS boycott, even setting aside the fact that the Foreign Affairs and Commerce Powers (on which the government's power in *Briggs* rested) are unavailable to states. In contrast to the corporations in *Briggs*, and in contrast to the context of the Arab League Boycott in general, BDS-involved companies generally do not gain a direct commercial advantage by refusing to purchase goods or services from Israeli-based companies, in part because there are no continued commercial relationships with certain foreign countries at stake. Furthermore, BDS boycotts do not make use of questionnaires, which further distinguishes the movement from the Arab League Boycott.[185]

It is conceivable that a company would take up a boycott of an Israeli competitor in order to gain a commercial advantage, just as it was conceivable (though contrary to decided fact) that some boycotters in *Claiborne* were boycotting white-owned businesses to gain market share or some other commercial advantage. However, in the typical case, including *Koontz* and *Jordahl*, BDS boycotters attempt to influence Israeli social policy,[186] just as the typical *Claiborne* boycotter aimed to vindicate Fourteenth Amendment rights, rendering it political expression, not commercial speech. Whether a particular boycott action is political or commercial, though, is a determination that must be made on a case-by-case basis, based on the subjective motivations of the boycotters.[187] This specificity renders anti-BDS

181. Briggs & Stratton Corp. v. Baldrige, 539 F.Supp. 1307 (E.D. Wisc. 1982).

182. Trane v. Baldrige, 728 F.2d 915 (W.D. Wisc. 1983).

183. *Briggs*, 728 F.2d at 917–18.

184. Greendorfer, *supra* note 112, at 121.

185. The coercive character of the questionnaires conflicts with the voluntary spirit of BDS. Additionally, BDS boycotts are not centrally managed, and secondary boycotts are not a primary method of boycott for BDS supporters.

186. *See* Edelman, *supra* note 9 (quoting several legal scholars as concluding that BDS protests are political, not commercial, expression).

187. *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 426–27 (1990).

statutes as overbroad by encompassing politically motivated boycotts in addition to commercial boycotts, regardless of the boycotters' subjective intentions.

b. Coercive v. Communicative Expression

Another argument advanced by Governor Cuomo's counsel in favor of New York's anti-BDS law is that BDS activities are not protected speech because BDS is "advanced to inflict economic harm."[188] Besides conflicting with the express aims of the BDS Movement, as described in Part I, this argument appears to conflict with *Claiborne*, in which the Court explicitly held that "speech does not lose protected character simply because it may embarrass others or coerce them into action."[189] Indeed, the immediate goal of inflicting economic harm is present in any boycott, including the NAACP boycott, because it is the economic harm that makes the boycott effective—and it cannot be the case that no boycotts are constitutionally protected. However, Cuomo's argument regarding economic harm does resonate with a loose end of the *Claiborne* opinion. As the Court described the circumstances under which a state may regulate boycott activities, in addition to *O'Brien* and the three cases of permissible economic regulation of labor protests described above, the Court cited a fourth case that is more difficult to square with *Claiborne*'s express holding: *International Longshoremen's Association v. Allied International*.

In *International Longshoremen*,[190] an American importer of Russian wood products sued a labor union, members of which were employed to unload the importer's ships but refused to do so. The longshoremen were following the union's orders not to handle cargo arriving from or destined for the Soviet Union, in protest of the 1979 Soviet invasion of Afghanistan. The importer's lawsuit alleged that the boycott was an illegal secondary boycott under the National Labor Relations Act, because Russia, not the importer, was the primary target of the protest. The Supreme Court agreed,[191] holding that when a purely secondary boycott reasonably can be expected to

188. Edelman, *supra* note 9.

189. NAACP v. Claiborne Hardware, 458 U.S. 886, 910 (1982).

190. Int'l Longshoremen's Ass'n AFL-CIO v. Allied Int'l, 456 U.S. 212 (1982).

191. The District Court had dismissed the complaint, holding that the boycott was a purely political, primary boycott of Russian goods and thus not within the scope of the NLRA; the Appellate Court reversed the dismissal, and the Supreme Court affirmed the reversal, effectively reinstating the claim under the NLRA. *Id.* at 217–18.

threaten neutral parties (in this case, the importer of Russian wood products) with ruin or substantial loss, the pressure on those parties must be viewed as at least one of the objects of the boycott. The NLRA's prohibition on secondary boycotts in the labor context was designed to protect neutral third parties from such losses, and that statutory purpose is within the legitimate scope of congressional authority. The Court held that it was not a defense that the case did not involve a labor dispute with a primary employer, as most previous cases had, but rather a political dispute with a foreign nation.[192]

The Court highlighted the fact that the conduct was designed "not to communicate but to coerce," and such conduct merits "less consideration [than secondary boycotts per se] under the First Amendment."[193] This observation is left unexplained, except in one footnote, citing the general principle of incidental infringement from *O'Brien* and Justice Stevens's concurring opinion from *NLRB v. Retail Store Employees*, in which Stevens distinguished between viewpoints that call for only "an automatic response to a signal" and viewpoints that call for a "reasoned response to an idea," the former of which can be permissibly regulated by the government.[194] By itself, then, *International Longshoremen* seems to stand for the principle that even a politically motivated boycott can be regulated without impermissibly infringing on First Amendment rights when the boycott aims at causing harm to neutral third parties (such as companies affiliated with a foreign country) and the boycott is primarily coercive in character. In light of the parallels between the facts of *International Longshoremen* and BDS activities, this principle could be extended to permit anti-BDS laws.

However, the apparent per se distinction between fully protected communicational conduct and not-fully-protected coercive conduct seems to break down in *Claiborne*, decided just ten-and-a-half weeks after *International Longshoremen*. In *Claiborne*, as stated above, the Court explicitly held that "speech does not lose protected

192. *Id.* at 224. The Court held that the labor laws reflect a careful balancing of interests. There are many ways in which a union and its individual members may express their opposition to Russian foreign policy without infringing upon the rights of others. Also relevant is the fact that the NLRA contains no exception for politically motivated secondary boycotts, nor must it in order to sidestep the constraints of the First Amendment. The Court analogized its own precedents that consistently rejected that secondary picketing by labor unions is protected activity under the First Amendment. *Id.* at 225–27.

193. *Id.* at 226.

194. NLRB v. Retail Store Emps., 447 U.S. 607, 619 (1980) ("The statutory ban in this case affects only that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea.") (Stevens, J., concurring).

character simply because it may embarrass others or coerce them into action."[195] Rather than reversing the principle expressed by *International Longshoremen* just a few months after it was decided, *Claiborne* actually rearticulates a long-standing Supreme Court precedent. In addressing the violent and particularly coercive elements of the NAACP's boycott, *Claiborne* cited *Chauffeurs v. Newell*,[196] which reversed a Kansas Supreme Court grant of a permanent injunction against a labor union for their boycott and picketing of a dairy business. The state court in that case had held that picketing and boycotting loses legal protection when it takes on a coercive character.[197] We can reasonably infer that the Court reversed based on the substance of the state court's holding regarding coercive picketing and boycotting, though the Court's opinion was per curiam and offered no written opinion other than a citation to a single page in *Thornhill v. Alabama* (which was also referenced directly in *Claiborne*), a case in which the Supreme Court reversed a conviction for loitering and picketing in spite of the protest's relatively coercive nature.[198] By citing these cases, even without significant exposition, the Court appears to cast doubt on the expansive interpretation of *International Longshoremen*'s reasoning.

Indeed, *Claiborne* appears to cabin *International Longshoremen* in an even more direct manner. Immediately after recognizing the broad power of states to regulate commercially motivated boycotts, and just prior to distinguishing between commercial and political boycott activities, the Court quoted *Retail Store Employees* for the principle that "[s]econdary boycotts and picketing by labor unions may be prohibited" in order for Congress to strike a balance between a union's freedom of expression and the ability of neutral parties to "remain free from *coerced participation in industrial strife*."[199] The citation to *Retail Store Employees* was immediately followed by a directive to "see *Longshoremen v. Allied Internation-*

195. NAACP v. Claiborne Hardware, 458 U.S. 886, 910 (1982).

196. Chauffeurs, Teamsters & Helpers Local Union v. Newell, 356 U.S. 341 (1958).

197. Newell v. Chauffeurs, Teamsters & Helpers Local Union, 181 Kan. 898, 913 (1957), *rev'd* 356 U.S. 341 (1958) ("Though the original picketing may have been peaceful and for the lawful purpose of putting pressure on the employer by communicating the grievance of the employees to the public, where these purposes were intermixed with acts of coercion which were unlawful, the picketing in its entirety became tainted with the unlawful purpose.").

198. Thornhill v. Alabama, 310 U.S. 88, 98 (1940).

199. *Claiborne*, 458 U.S. at 912 (quoting NLRB v. Retail Store Emps., 447 U.S. 607, 617–18 (1980)) (emphasis added).

al."[200] Here, the Court implicitly clarifies the clunky holding of *International Longshoremen*, cabining it to specifically relate to "coerced participation in industrial strife," rooted in union and labor relations rather than coercion per se.[201]

The principle that arises from *International Longshoremen*, as interpreted by *Claiborne*, is that labor relations are simply treated in a different manner than other contexts for First Amendment purposes, probably because of the inherent economic interests at stake. Another way to interpret the case, to the same effect, is that labor relations are treated the same way as they are in other contexts, but that labor contexts typically present a situation that is ripe for permissible government regulation. Regardless, unless it can be shown that BDS boycotts coerce participation in industrial strife, citations to *International Longshoremen* to establish the principle that that BDS activities are not protected on the grounds that they are coercive or aimed at economic harm are inapposite.

c. Consumer v. Producer Boycotts

Inherent in Kontorovich's argument that state anti-BDS laws fall outside the scope of *Claiborne* because they relate to business boycotts rather than consumer boycotts[202] is the distinction between the corporation and the individual. Ultimately, this distinction is probably not relevant for First Amendment purposes, because *Citizens United v. Federal Election Commission* notoriously recognized that corporations have rights to political speech under the First Amendment.[203] While the scope of those corporate First Amendment rights have not been fully delimited, the sweeping language of *Citizens United* indicated no such bounds, providing sufficient reason to think that corporations would have the same rights as individual citizens to engage in a political boycott, all other things being equal.

Of course, individuals and corporations are not functionally equivalent in all respects, and there is a more charitable interpretation of Kontorovich's argument about the scope of *Claiborne*. Michael Harper explains that the Supreme Court's First Amendment jurispru-

200. *Id.*

201. This conclusion with the recent analysis of the district court judge in Order, Jordahl v. Brnovich, No. CV-17-08263-PCT-DJH, 2018 WL 4732493, at *12 (D. Ariz. Sept. 27, 2018) ("Defendants overstate the meaning of *Int'l Longshoreman* [sic], which was decided in the context of federal labor laws.").

202. Kontorovich, *supra* note 174.

203. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342–43 (2010).

dence protecting individual *consumers*' right to engage in collective refusals to purchase does not necessarily entail granting *businesses* a comparable right to refuse to deal.[204] The relevant distinction here is not the formal distinction between natural person and corporation per se (which would fall under the sweep of *Citizens United*), but rather the functional distinction between consumer and producer. Illustrating the application of this distinction, Harper argues that the right to boycott should, as a prescriptive matter, protect the former (i.e., consumers who are deciding which finished products to purchase) but not the latter (i.e., producers who are purchasing items in the chain of production). Under this principle, a defender of anti-BDS laws could argue that BDS boycotts fall outside the holding of *Claiborne*, insofar as *Claiborne* merely involved a refusal of consumers to purchase from retailers, whereas the anti-BDS laws generally target businesses in their purchasing decisions, which are necessarily not consumptive within Harper's meaning.[205]

In any case, if a court were to adopt his reasoning, Harper's argument would pose a serious hurdle for corporations who would aim to challenge anti-BDS laws. State anti-BDS laws use language broad enough to cover consumer boycotts, so a challenger could still conceivably claim that they are overly broad. However, insofar as there is no indication in any existing case law, including *Claiborne* itself, that this consumer/producer distinction holds legal weight in the First Amendment context, Harper's argument remains, for now, merely theoretical rather than legally viable.

d. Domestic v. Cross-Border Expression

Kontorovich has argued that "the First Amendment simply does not apply to the extraterritorial actions of foreign corporations, and only weakly applies to the extraterritorial conduct of U.S.-based

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204. Harper, *supra* note 165, at 428.

205. Harper's distinction between consumer and producer would extend to purchasing decisions by excluding refusals to purchase finished products and including refusals to purchase in the chain of production. This is justified, according to Harper, because chain-of-production purchasing only applies to a subset of the population and is "dictated by more specialized economic roles than consumption preferences." *Id.* at 428. The prohibition would also extend to the purchase of "any good used to support a production effort," whether or not the good actually "becomes a material element of any finally consumed product" or is "used directly to work on the product." *Id.* at 428–29. Harper himself uses the examples of new factory windows or industrial cleaning fluid, though it could conceivably apply to *any* type of good purchased by *any* manufacturer, and Harper's principle would presumably also extend to service providers. *See id.*

entities."[206] Accordingly, and in light of other possible limitations to the right to participate in political boycotts of Israel, Kontorovich concludes that any First Amendment protection for BDS activities would be "quite attenuated."[207] Greendorfer presents a substantively similar argument when he characterizes BDS as having only an "[a]ttenuated nexus to domestic concerns."[208] While Kontorovich's use of the term "extraterritorial" is imprecise, his general point indicates a complexity inherent in BDS activities that the Court did not face in *Claiborne*.

Legal scholar Timothy Zick provides a useful (and more precise) tripartite distinction between the *intraterritorial* First Amendment, the *cross-territorial* (or "cross-border") First Amendment, and the *extraterritorial* First Amendment.[209] The basic distinction between the three is the territorial context for the activity in question—purely domestic, cross-border, and purely foreign—and the corresponding degree of constitutional protection of each. While intraterritorial expression generally receives full First Amendment protection, foreign entities whose boycott activities do not touch the territory of the United States would not be subject to any First Amendment protection at all. Additionally, according to Zick, current First Amendment jurisprudence provides "no clear and unambiguous precedent holding that communications or associations that cross borders are protected in any meaningful way."[210] Several areas of U.S. law already restrict First Amendment rights in a cross-border context, including restrictions on distributing foreign materials in the United States,[211] prohibitions on foreign political contributions,[212] restrictions on personal access to foreign speakers for any "facially legitimate and bona fide" reason,[213] a mere "freedom" (rather than

206. Kontorovich, *supra* note 174.

207. *Id.*

208. Greendorfer, *supra* note 112, at 115–16.

209. TIMOTHY ZICK, THE COSMOPOLITAN FIRST AMENDMENT: PROTECTING TRANSBORDER EXPRESSIVE AND RELIGIOUS LIBERTIES 25–28 (2014).

210. Timothy Zick, *The First Amendment in Transborder Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941, 942–43 (2011).

211. Meese v. Keene, 481 U.S. 465, 480 (1987) (upholding limits on distribution of foreign political propaganda in the United States); Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965) (invalidating a prior restraint requiring a recipient of foreign propaganda to affirmatively request delivery).

212. Bluman v. Fed. Election Comm'n, 565 U.S. 1104 (2012) (simply affirming the district court's decision, effectively refusing to extend the reasoning of *Citizens United* to foreign citizens temporarily living in the United States); 2 U.S.C. § 441e (2006).

213. Kleindienst v. Mandel, 408 U.S. 753, 769 (1972).

right) under the Due Process Clause to travel abroad for the purpose of gathering information about foreign cultures,[214] a limited right to associate with aliens located abroad,[215] and no First Amendment right to access and distribute propaganda materials disseminated by a foreign government.[216] In a judgment that was later affirmed by the Supreme Court in the famous *Holder v. Humanitarian Law Project* case, the Ninth Circuit went so far as to explicitly state that "domestic political associations appear to operate at the First Amendment's core, while cross-border associations reside at its periphery."[217]

These lines of cases are significant because insofar as BDS activities are aimed at Israeli-connected entities—with the Israeli government as the ultimate target—the activities in question would probably be either purely extraterritorial (i.e., a foreign entity participating in a boycott of Israel) or cross-border (i.e., a U.S.-based entity participating in a boycott of Israel).[218] For the anti-BDS statutes that

214. Haig v. Agee, 453 U.S. 280, 306–07 (1981); Zemel v. Rusk, 381 U.S. 1, 16–17 (1965).

215. DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 292 (D.C. Cir. 1989); Palestine Info. Office v. Shultz, 853 F.2d 932, 939 (D.C. Cir. 1988).

216. Gartner v. U.S. Info. Agency, 726 F. Supp. 1183, 1189 (S.D. Iowa 1989). Furthermore, courts have never invalidated the criminal statutory ban on citizens' unauthorized communications with foreign regimes and their principals, 18 U.S.C. § 953 (2006), or the federal requirement that certain U.S. institutions obtain a license prior to sharing certain scientific and technical information with aliens working in the United States, 2 U.S.C. § 441e (2006).

217. Humanitarian Law Project v. Mukasey, 509 F.3d 1122 (9th Cir. 2007). *Mukasey* involved a challenge to the criminal enforcement of a statute (18 U.S.C. § 2339A (2006); 18 U.S.C. § 2339B (2006)) prohibiting the provision of material support to designated foreign terrorist organizations, even though the funding in question was put toward humanitarian causes. The Ninth Circuit held that while the government's interest in combatting terrorism is sufficiently urgent to justify curtailing First Amendment rights in the foreign context, a decision on the material support provisions might have been decided differently had the case involved purely domestic activities and associations. Ultimately, in *Holder v. Humanitarian Law Project*, the Supreme Court upheld the statute, stressing Congress's power over foreign affairs and the need to protect against the threat of international terrorism, and it explicitly refused to address whether Congress could extend material support statutes to domestic terrorist organizations, as it had done with foreign terrorist organizations, without running afoul of the First Amendment. Holder v. Humanitarian Law Project, 561 U.S. 1, 39 (2010) ("We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations. We simply hold that, in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, § 2339B does not violate the freedom of speech.").

218. Actions by an American citizen acting in a foreign territory would also be considered "extraterritorial," but insofar as certain state anti-BDS statutes only apply to businesses, such conduct would not be relevant.

could be applied to U.S.-based companies,[219] the extent of First Amendment protection depends on the extent to which courts would consider BDS activities to be "cross-border" and the extent to which First Amendment protections could apply in such a context. While *Claiborne* can be properly described as related to "domestic political associations"—that is, a local boycott undertaken to vindicate constitutional rights vis-à-vis the local government and local businesses—protests of Israel from within U.S. territory can more readily be described as "cross-border" in nature. That is, insofar as the ultimate aim of the expression is the Israeli government, the boycotts are inherently non-domestic in nature. The Ninth Circuit's reasoning, then, can be understood to imply that the NAACP boycott would be subject to greater First Amendment protections than BDS boycotts.[220]

There is certainly a question of whether a BDS boycott is actually cross-border expression. Advocating for sanctions against Israel, for example, could perhaps be described as a domestic concern, particularly in light of the United States' status as a key ally and financial supporter of Israel. Whether a BDS supporter could craft a similar analogy regarding boycotts of and divestment from Israeli-connected entities is less clear. In any case, if a court were to hold that the foreign origins (i.e., either the Arab League Boycott or Palestinian civil society organizations) and the foreign object of the boycott (i.e., Israel) render BDS sufficiently foreign (or cross-border, not domestic), there could be sufficient grounds for limiting individual First Amendment interests in participating in BDS.

e. In Furtherance of a Protected Right

The boycotters in *Claiborne* exercised rights, as the Court explained, "that lie at the heart of the Fourteenth Amendment itself . . . to effectuate rights guaranteed by the Constitution itself."[221] For

219. As already noted, two state statutes make clear that they are not intended to be applied to U.S.-based companies at all. *See supra* note 80 and accompanying text. Accordingly, these statutes would seemingly be immune from any First Amendment challenge under existing Supreme Court jurisprudence.

220. It is important to note that, even if cross-border expression is entitled to less protection as a matter of principle, states would need to fashion an independent rationale that would permit it to regulate cross-border speech, because they do not have available the justifications provided by the Court in *Humanitarian Law Project*—that is, conducting foreign affairs and the regulation of foreign commerce. However, insofar as cross-border expression is inherently subject to lesser protection than domestic speech, regardless of the state interest, a state could provide any of the rationales described by the judge in *Koontz* as "permissible" government interests.

221. NAACP v. Claiborne Hardware, 458 U.S. 886, 914 (1982).

Greendorfer, this fact is essential to *Claiborne*'s holding, concluding that "[t]he First Amendment right must be coupled with another protected right for the boycott to be eligible for First Amendment protections."[222] This argument is bolstered by the core of *Claiborne*'s holding regarding political boycotts—a state's power to regulate economic activity cannot 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*."[223] In *Claiborne*, individuals who had suffered racial discrimination were seeking to vindicate their Fourteenth Amendment rights. In contrast, the BDS Movement does not allege violations of the U.S. Constitution or any other U.S. law at all—instead, they allege violations of international law, outside the scope of U.S. law.[224] Federal courts have yet to hold in favor of protecting First Amendment rights to engage in a political boycott that is disconnected from the rights of either the protesters themselves or those closely connected to the protesters.

Another version of Greendofer's argument was presented by Harper, well before BDS even came into existence. Harper argued that Justice Stevens's majority opinion in *Claiborne*, by relying so centrally on *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, implicitly characterized the boycotters' First Amendment right as an exercise of the "right to petition the Government for a redress of grievances."[225] In *Noerr*, the Court suggested that the First Amendment right to petition the government shielded a railroad's campaign for anti-trucking legislation from liability under the Sherman Act.[226] Indeed, Stevens did stress the fact that the *Claiborne* boycotters' concerted action was aimed at producing a response from government by way of direct action against third parties.[227] Insofar as the First Amendment's reference to "the Government" refers to the government of the United States, or to a state government via Fourteenth Amendment incorporation, however, it would seemingly not apply to the government of Israel or any other foreign government.

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222. Greendorfer, *supra* note 112, at 117 n.16.

223. *Claiborne*, 458 U.S. at 912–14.

224. What Is BDS?, *supra* note 20.

225. Harper, *supra* note 165, at 417–18.

226. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138–39 (1961).

227. Incidentally, one relevant side-effect of this characterization is that, unlike characterizing the right as an exercise of speech, association, etc., a petition of government protects the right to boycott *because* of its potential economic effects, not *in spite* of them. Harper, *supra* note 165, at 418.

Accordingly, the First Amendment does not protect a U.S. citizen's right to petition the state of Israel, except insofar as that petition also implicates speech, association, or some other protected First Amendment interest vis-à-vis U.S. federal or state government regulation.

In *Koontz*, the judge sidestepped this issue. The judge recognized that the "main purpose" of the NAACP boycotts was to "influence governmental action," and the government's power to regulate the conduct was thereby limited.[228] For the same reason, the judge stated, BDS activities are protected. Koontz and members of the Mennonite Church, of which Koontz is a part, have "banded together to express collectively their dissatisfaction with the injustice and violence they perceive, as experienced both by Palestinians and Israeli citizens."[229] They "seek to amplify their voices to influence change" and "influence government action," just like the boycotters in *Claiborne*.[230] The judge did not distinguish between boycotters aiming to influence U.S. government action and the actions of another government. Neither did the judge distinguish between the vindication of a domestic right for U.S. persons on U.S. territory and the vindication of a right under international law for non-U.S. persons on non-U.S. territory.

This is an issue that could plague BDS advocates in future litigation. There is a parallel between the NAACP protesters in *Claiborne* and BDS protesters in the twenty-first century, insofar as both groups aim to influence social and political policy writ large. However, there are stark distinctions between the two contexts that courts will likely need to address and that could prompt a court to hold in favor of a state government, particularly if a plaintiff, unlike Koontz, has not "banded together" with other BDS participants and has no stronger connection to Palestinian rights than the individual's own political ideals.

D. Conclusion Regarding the First Amendment Protection for BDS Activities

It is relatively safe to conclude that BDS activities are entitled to First Amendment protection. However, whether or not anti-BDS statutes serve as mere incidental infringements on these interests is far more complicated. There are permissible government interests

228. Koontz v. Watson, 283 F. Supp. 3d 1007, 1022 (2018).

229. *Id.*

230. *Id.*

for regulating boycott activities in general, such as the economic health of the state. If a state government, in contrast to Kansas in the *Koontz* proceedings, were to present compelling evidence that the state's commercial relations with Israel had been inhibited by boycotts of Israel, then this could serve as a relatively strong government interest. However, even if the right to participate in boycotts of Israel were lesser than the right in *Claiborne*, it is not clear that there is a sufficient government interest to overcome it. Courts have generally been reluctant to permit governmental infringement on political expression. Accordingly, the fate of anti-BDS laws is likely dependent on the specifics of each particular statute, each particular court's interpretation of the scope of *Claiborne*, each particular state's presentation of its interest in regulating boycotts of Israel, and each particular characterization of the BDS activities in question. Furthermore, the extent of protection for BDS activities will depend on whether a judge is willing to entertain subtle distinctions—such as between a consumer boycott and a producer boycott, or a grievance aimed at a foreign government rather than a U.S.-based government—and how such a distinction could intersect with a particular state anti-BDS statute.

III. THE ULTIMATE CONSTITUTIONALITY OF STATE ANTI-BDS STATUTES

Even if an outright prohibition of BDS-related boycotts were held to violate the First Amendment, the state anti-BDS statutes already in existence are not necessarily thereby unconstitutional, because they do not directly prohibit boycotts of Israel, whether through civil or criminal sanctions. Instead, they use participation in boycotts of Israel to trigger mandatory state divestment from the boycotter and/or a prohibition on the boycotter receiving government contracts. Accordingly, it is necessary to conduct a second stage of analysis, considering whether the contract-focused laws violate the Unconstitutional Conditions Doctrine and whether the investment-focused laws violate the Supreme Court's jurisprudence regarding the government's powers to condition spending.

A. Contract-Focused Laws: Unconstitutional Conditions?

1. The Unconstitutional Conditions Doctrine in General

The Unconstitutional Conditions Doctrine stands for the principle that the government may not do "indirectly" what it could not

permissibly do "directly."[231] For example, the government could not directly compel every citizen of the United States to register as a Democrat without violating the First Amendment—therefore, it could not condition receipt of some public benefit on a person registering as a Democrat without likewise running afoul of the First Amendment. This principle is derived from a long line of twentieth-century Supreme Court cases,[232] and its clearest expression came in *Perry v. Sindermann* in 1972: The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interest, especially his interest in freedom of speech."[233] By extension, if government could not directly prohibit a person from participating in a political boycott of Israel without violating the First Amendment, it then cannot do so indirectly by requiring a person or entity to relinquish its right as a condition for receiving a government contract or investment funds.

While the doctrine was an important bulwark against the government's loyalty oaths during the era of McCarthyism,[234] Philip Hamburger called the Unconstitutional Conditions Doctrine a "Gordian knot"[235] because of its complexities and unresolved questions. Meanwhile, Cass Sunstein has argued that the doctrine is inadequate for its purported purpose and that, indeed, "[s]ometimes the government may do indirectly what it cannot do directly."[236] Ultimately,

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231. Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990).

232. The Supreme Court established in *Frost v. Railroad Commission of California* that the government "may not impose conditions which require the relinquishment of constitutional rights." 271 U.S. 583, 594 (1926). Later, it held that the government cannot "produce a result which [it] could not command directly." Speiser v. Randall, 357 U.S. 513, 526 (1958).

233. Perry v. Sindermann, 408 U.S. 593 (1972).

234. Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE W. RES. L. REV. 97, 102–03 (1989).

235. Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 479–80 (2012).

236. Sunstein argues that the doctrine is "far too crude and general" to address the complex and varied relationships between constitutional protections and the modern regulatory state. Cass Sunstein, *Is There an Unconstitutional Conditions Doctrine?* 26 SAN DIEGO L. REV. 337, 338 (1989). He concludes that the doctrine is inadequate because it focuses attention on the largely irrelevant distinction between a "threat" (penalty) and an "offer" (subsidy), and because it prompts courts to disregard the particularity of the context and of the right at issue and thereby not ask the relevant question. Whether a condition is permissible depends on the constitutional provision in question, and the relevant question is "whether the particular infringement affects a protected interest in a constitutionally troublesome way, and, if so, whether the government is able to justify any such effect." *Id.*

explains Sunstein, each case rests on its own merits, bounded by the appropriate conception of the particular right at issue, not on the directness/indirectness distinction.[237] Whatever the ultimate status of the doctrine as an independent and overarching principle,[238] it is still in force, and it is relatively clear how it will shape challenges to certain contract-focused anti-BDS laws.

2. Unconstitutional Conditions on Pre-Existing Government Contracts

Since the latter half of the twentieth century, the Supreme Court has consistently held that the government's power to terminate pre-existing contracts is severely limited if the termination is the result of the contract-holder's protected First Amendment expressions. In the earliest of such cases, *Pickering v. Board of Education* and *Elrod v. Burns*, the Court held that the First Amendment rights of public employees protect them from certain forms of adverse employment action.[239] The Court extended the principles from these early cases to protect independent government contractors in a pair of 1996 cases: *Board of County Commissioners v. Umbehr*[240] and *O'Hare Truck Service, Inc. v. City of Northlake*.[241] *Umbehr* involved the non-renewal of a trash-hauling contract after the contractor openly criticized the local Board of Commissioners. *O'Hare* similarly involved the removal of a towing contractor from the city's rotation list of contractors after O'Hare supported the incumbent mayor's opponent in an election. The Court held in both cases that instances of retaliation for protected expressive activities violated the First Amendment.[242]

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237. *Id.* at 344.

238. Sunstein's argument notwithstanding, the doctrine is undergoing something of a renaissance in the Roberts Court, as one commentator has argued. Recent Legislation, *supra* note 114, at 2036–37.

239. In *Pickering*, the Court created a balancing test to determine the extent of protection for government employees who are fired in retaliation for commenting on matters of legitimate public concern. 391 U.S. 563, 568 (1968). The test balances the interests of the employee in commenting upon matters of public concern and the interest of the State in promoting the efficiency of the public services it performs through its employees. *Id.* In *Elrod*, the *Pickering* balancing test gave way to a categorical rule that the government may not fire non-policymaking employees solely because of their party affiliation. 427 U.S. 347, 350 (1976).

240. Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668 (1996).

241. O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712 (1996).

242. *Umbehr*, 518 U.S. at 686; *O'Hare*, 518 U.S. at 714–15.

Based on these cases, it is relatively clear that contract-focused anti-BDS statutes are unconstitutional insofar as they permit the termination of pre-existing government contracts on the basis of the contract-holder's protected conduct (assuming, of course, that the requisite First Amendment violation is present). Additionally, while *Pickering*, *Elrod*, and *O'Hare* all relate to the termination of pre-existing contracts, *Umbehr* makes clear that First Amendment protection extends to the termination of the automatic renewal of a contract.[243] One question that remains open is whether the same principles would apply to the non-automatic renewal of a contract, or whether such renewal would instead be classified as a new contract. Furthermore, the strength of these arguments is less than clear when applied to boycotting conduct rather than relatively traditional forms of expression, such as party affiliation and candidate support. In any case, even if there were instances in which a state could permissibly terminate contracts, it is clear that contract-focused anti-BDS statutes are over-broad insofar as they permit termination of contracts that fall within the holdings of these four Supreme Court precedents.

3. Unconstitutional Conditions on New Contracts

While the constitutionality of contract-focused anti-BDS statutes is reasonably clear when applied to preexisting contracts, the fate of anti-BDS laws is more uncertain as applied to bids for new government contracts. This uncertainty is primarily a product of the fact that the Supreme Court has not yet directly addressed the issue. The Court found no occasion in either *Umbehr* and *O'Hare* to decide whether its holdings extended to bidders or applicants for new government contracts who bear no reliance interest in a preexisting contractual relationship, and *Umbehr* explicitly reserved judgment on that question.[244]

In the lower courts, the Third Circuit and the Fifth Circuit are split on the issue. The Third Circuit held in *McClintock v. Eichelberger* that a government's denial of a contract to a new bidder is not subject to First Amendment scrutiny.[245] In contrast, the Fifth Circuit in *Oscar Renda Contracting, Inc. v. City of Lubbock* relied on the fact that the Supreme Court had already extended the doctrine to ap-

243. *Umbehr*, 518 U.S. at 685.

244. *Id.* ("[W]e emphasize the limited nature of our decision today. Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship.").

245. McClintock v. Eichelberger, 169 F.3d 812 (3d Cir. 1999).

plicants for government employment to thereby extend the protection to bidders for government contracts.[246] Following *Umbehr* and *O'Hare*, in which the Supreme Court held that contractors should be treated the same as employees, it is reasonable to conclude that the Fifth Circuit's reasoning in *Oscar Renda* would win out if and when the issue is litigated before the Supreme Court.[247] Indeed, Justice Scalia argued in dissent in *Umbehr* and *O'Hare* that extending First Amendment scrutiny to the denial of a bid for a new contract is "the natural and foreseeable jurisprudential consequence" of the two cases[248]—though uncertainty persists until such a case should arise.

B. Investment-Focused Laws: Exceeding Limits on Government Spending?

Whether a state violates the First Amendment by limiting its investments in entities because of the entity's speech is, according to one scholar, without "direct precedent, at least at the Supreme

246. Oscar Renda Contracting, Inc. v. City of Lubbock, 577 F.3d 264, 272 (5th Cir. 2009).

247. The distinction between a state mandate and an optional contract cannot be plausibly sustained for reasons already pointed out, and because it misidentifies the harm. The harm to a contractor arises not from the decision to sign the certification but rather from the choice that the anti-BDS statutes force them to make—that is, the choice between contracting with the state or supporting a boycott of Israel. *See* Koontz v. Watson, 283 F. Supp. 3d 1007, 1026 (D. Kan. 2018). Other commentators have reached the same conclusion—that the denial of a bid because of BDS activities, assuming the activities are protected under *Claiborne*, is probably unconstitutional. Recent Legislation, *supra* note 114, at 2037. In finding a violation of the Unconstitutional Conditions Doctrine, the orders in *Koontz* and *Jordahl* lend further credence to this conclusion, because the facts involved individuals attempting to obtain a supplemental government contract (in *Koontz*) and a renewal of a government contract (in *Jordahl*). Furthermore, in arguing that anti-BDS statutes do not run afoul of the Unconstitutional Conditions Doctrine, Greendorfer rests on the assumption that the doctrine is not implicated because BDS activities are not protected by the First Amendment at all. Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout Is Fair Play Under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29, 33 (2018). The implication by omission is that, assuming a prohibition on BDS would be a substantive First Amendment violation, anti-BDS statutes would impose unconstitutional conditions on government contracts.

248. *Umbehr*, 518 U.S. at 709–10. In other contexts, courts have held that constitutional protections apply to applicants in addition to benefits-holders. For example, applicants for government benefits, under certain conditions, are entitled to protections under the Due Process Clause. *See, e.g.*, Kapps v. Wing, 404 F.3d 105 (2d Cir. 2005). Similarly, if the government cannot arbitrarily deny an application for government benefits, it cannot deny a bid for a government contract due to the protected speech of the bidder.

Court."[249] Nevertheless, there are two lines of case law that provide clues regarding the constitutionality of investment-focused anti-BDS laws. A Congressional Research Service report on the BDS Movement identified the Supreme Court's line of cases analyzing restrictions on government funding in general as the closest precedential analogue for state statutes mandating divestment from entities involved in BDS-related activities,[250] and this is certainly the case. However, the still-nascent case law involving mandatory foreign divestment of public funds (for example, from Sudan or Iran) may also become highly relevant for the constitutionality of anti-BDS laws, at least by way of contrast and foil.

1. Spending Power Cases: Unconstitutional Conditions Redux

The Supreme Court articulated its standard for determining whether restrictions on spending that also affect expression run afoul of the First Amendment in *USAID v. Alliance for Open Society International*: "[T]he relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself."[251] In other words, courts are to judge whether the government is simply expressing its funding priorities, which is permissible, or whether it is wielding the threat of withdrawal of funding to pressure people to alter their expressions, which is impermissible. In essence, this represents another version of the Unconstitutional Conditions Doctrine presented above.[252] If the government cannot directly coerce a person to undertake a particular expressive act, then it cannot indirectly coerce a person to undertake that act by threatening to withhold government funds.

In *Alliance for Open Society*, the Court struck down a federal statute that conditioned the issuance of public funds to nongovernmental organizations to combat HIV/AIDS worldwide on the organization explicitly opposing prostitution as a matter of policy. Such a

249. Edelman, *supra* note 9 (quoting University of Chicago law professor Geoffrey Stone).

250. ZANOTTI, *supra* note 52, at 23. While the Constitution vests the Spending Power in the U.S. Congress, the same First Amendment restrictions would apply to conditions on state government spending. *Id.* at 19.

251. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214–15 (2013).

252. See *supra* note 232 and accompanying text.

provision runs afoul of the First Amendment, the Court held, because it compelled speech on the part of organizations that could not be "confined within" the program itself.[253] Congress can prevent the use of funds for particular purposes, such as those that support prostitution, but it cannot permissibly restrict funding to those organizations that "pledge allegiance to the Government's policy of eradicating prostitution."[254]

Like the statutory program in *Alliance for Open Society*, investment-focused anti-BDS laws effectively condition the investment of state funds on the funded entity refraining from undertaking a particular form of expressive conduct—that is, boycotts of Israel. The fact that the entities remain entitled to publicly denounce Israel and support BDS is irrelevant—in other words, the mere fact that an entity can protest through other means does not limit the extent to which the entity's expression is inhibited. The requirement in *Agency* for an entity to adopt an anti-prostitution policy did not foreclose other manners of engaging with prostitution that would be inconsistent with such a policy, but it nevertheless violated the First Amendment. Likewise, assuming a direct prohibition on BDS would violate the First Amendment, the mere fact of alternative means of supporting BDS does not reduce the extent to which conditioning the receipt of state funds on refraining to boycott Israel would also violate the First Amendment.

2. Foreign Divestment Cases

Mandatory divestment of public pension funds has been a common strategy for states (California in particular) to oppose foreign atrocities and human rights abuses,[255] health crises,[256] gun violence,[257] climate change,[258] and restrictive immigration policy.[259]

253. *Agency for Int'l Dev.*, 570 U.S. at 221.

254. *Id.* at 220.

255. Shira Schoenberg, *Pension Politics: The History of Divestment in Massachusetts*, MASS LIVE (May 8, 2014, updated 7:14 AM), http://www.masslive.com/politics/index.ssf/2014/05/the_history_of_divestment_in_m.html [https://perma.cc/437Y-9793] (describing Massachusetts's divestment from Iran, Sudan, and South Africa).

256. Id.; Robin Respaut, *CalPERS Votes to Broaden Ban on Tobacco Investments*, REUTERS (Dec. 19, 2016, 6:57 PM), https://www.reuters.com/article/us-california-calpers-tobacco/calpers-votes-to-broaden-ban-on-tobacco-investments-idUSKBN1482FE [https://perma.cc/NFD5-29Q9] (describing California's divestment from tobacco companies).

257. Kriston Capps, *Why Public Pension Funds Are Slow to Divest from Gun Manufacturers*, CITYLAB (June 15, 2016, 6:48 PM), https://www.citylab.com/life/2016/06/

Assuming such divestment campaigns withstand fiduciary challenges,[260] such laws could face an additional hurdle when the divestment affects expressive activities. Challenges to the legality of such state divestment policies have not yet reached a federal appellate court, let alone the Supreme Court. Indeed, the only state pension divestment case that has been fully litigated in federal court is the 2007 case *National Foreign Trade Council v. Giannoulias*.[261]

In *Giannoulias*, the U.S. District Court for the Northern District of Illinois considered the constitutionality of a 2005 Illinois statute restricting the investment of state funds, including pension funds, in Sudan-connected entities and institutions, and also restricting the deposit of state funds in financial institutions that do business with Sudan-connected entities.[262] The Court ultimately struck down the statute on preemption grounds—the two provisions of the statute conflicted with a federal statute and with the federal government's authority to govern foreign affairs and regulate foreign commerce.[263]

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how-cities-fund-gun-manufacturers/487019/ [https://perma.cc/NF7J-36RX] (discussing various local and national firearms divestment initiatives, including the divestment of California's public retirement fund from firearm manufacturing).

258. Anita Chabria, *California Passes Bill Forcing Biggest Pension Funds to Divest from Coal*, GUARDIAN (Sept. 2, 2015, 6:48 PM), https://www.theguardian.com/environment/2015/sep/02/california-pension-funds-divest-coal [https://perma.cc/Y2P5-8VTA] (discussing California's divestment from coal companies).

259. David Siders, *Democrats Turn the Screws on Border Wall Builders*, POLITICO (Apr. 26, 2017, 6:41 PM) https://www.politico.com/story/2017/04/26/trump-border-wall-democrats-california-237659 [https://perma.cc/MUG3-KPME] (describing proposed legislation in California, New York, and Rhode Island to divest state funds from companies involved in constructing a border wall between the United States and Mexico).

260. Because divestment for political rather than financial reasons compromises the financial integrity of the fund, some have concluded that "[p]ension funds should not be in the business of divestment." *Walling Off Assets Is Wrong*, PENSIONS & INVESTMENTS (April 3, 2017), http://www.pionline.com/article/20170403/PRINT/304039998/walling-off-assets-is-wrong. [https://perma.cc/H7GG-DCPE]. Indeed, divestment from BDS-involved companies could open up state pension funds to lawsuits for violation of fiduciary duty in some states. Significantly, however, Arizona, Arkansas, Colorado, Illinois, North Carolina, Oklahoma, and Texas explicitly preempt the application of any conflicting state law related to fiduciary duties.

261. Nat'l Foreign Trade Council, Inc. v. Giannoulias, 523 F. Supp. 2d 731 (N.D. Ill. 2007).

262. *Id.*

263. In *Giannoulias*, the court held that the statute's restrictions on the deposit of state funds unconstitutionally conflicted with federal law and interfered with the federal government's power to conduct foreign affairs, based on its "lack of flexibility, extended geographic reach, and impact on foreign entities." *Id.* at 741–42. It reached the opposite conclusion concerning the statute's provision on pension fund divestment, but found that it

The court in *Giannoulias* did not address any First Amendment issues related to the ban on engaging in business with Sudanese companies and financial institutions that do business with Sudanese companies.[264] If the Illinois statute had not been preempted, there are strong reasons to think that the law would have withstood a First Amendment challenge.

While it is tempting to draw a parallel in this regard between the Illinois law and anti-BDS laws, there are at least three features of the Illinois law that contrast with investment-focused anti-BDS laws and that together would support the opposite conclusion. First, Palestine Legal urged state legislators to differentiate between action against companies involved in BDS, and previous state action against companies that engaged in "prohibited business operations" in Iran and Sudan, because the latter was based on the U.S. State Department's designation of both countries as "state sponsors of terrorism" rather than on the basis of core political speech.[265] While this contention is certainly true, it is not a strong argument in light of the relatively stronger local interests involved with a state regulating a boycott that can have negative economic effects compared with those involved in exerting pressure on a foreign government.

Second, the Illinois law restricted investment directly in foreign-connected entities and in institutions that actively do business with foreign-connected entities, while investment-focused anti-BDS laws restrict investment in entities that *refuse* to conduct business with foreign entities. This fact is perhaps marginally relevant for the First Amendment inquiry, insofar as the Illinois statute regulated conduct that was more actively cross-border in nature, and perhaps thereby would be rendered as less constitutionally protected than domestic BDS advocacy or other BDS activities that are less clearly cross-border in nature.[266]

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violated the Commerce Clause by regulating the investment choices of municipal pension funds in addition to state-controlled pensions. *Id.* at 748.

264. Nor were any First Amendment claims raised by the plaintiff in the case. The only reference to the First Amendment in any of the filings is a bizarre argument by the State of Illinois that "the purpose and spirit of the First Amendment are embodied in a State divestment law that seeks to, much like a consumer boycott, prohibit its pension funds from investing in a genocidal country such as Sudan," citing *Claiborne*, and an implication that states have First Amendment rights. Defendant's Memorandum in Response to Plaintiff's Motion for a Preliminary Injunction at 6, *Giannoulias*, 523 F. Supp. 2d 731.

265. *Palestine Legal Urges FL Lawmakers to Withdraw Anti-Boycott Bill*, PALESTINE LEGAL (Oct. 20, 2015), https://palestinelegal.org/news/2015/10/20/palestine-legal-urges-fl-lawmakers-to-withdraw-anti-boycott-bill. [https://perma.cc/LT7H-28BK].

266. See *supra* note 206 and accompanying text.

Third, and most significantly, it would be much more difficult to claim that commercial relations with Sudanese companies are "political" or predominantly "expressive" in nature, such that they could receive significant First Amendment protection, than it is to claim that refusals to conduct business with Israeli entities are political in nature. Kontorovich argued that, if refusing to conduct business can be considered political expression, then conducting business itself must likewise be considered political expression.[267] If Kontorovich is correct, then there would be no relevant distinction between the Illinois Sudan Act and the various investment-focused anti-BDS statutes. This is an attractive argument, at least in principle, especially if there were some campaign or movement to support a particular country, and the investor explicitly linked the choice to invest with a desire to support that cause rather than to pursue financial incentives. In such a case, it would be more likely that such business dealings could be considered protected expressive conduct, much like domestic campaign contributions are considered protected First Amendment activities.[268] However, such investments are still distinct from political contributions in one key way—the former yields a financial return (that is, commercial advantage), while the latter does not. This factor appears decisive toward the conclusion that the permissible regulation of foreign-connected entities does not thereby entail that anti-BDS statutes are similarly permissible.

CONCLUSION

In 2016, after South Carolina passed its contracts-focused law, the *Harvard Law Review* concluded that the significance of anti-BDS laws is "primarily symbolic."[269] In some respects, this prophecy has proven to be a poor reflection of reality, as borne out in *Koontz*, *Jordahl*, and the farcical incident in Dickinson, Texas, regarding flood relief. However, there is some truth to it. In December 2017, when New York released the list of companies from which its public pension plan would need to divest, pursuant to the requirements of Governor Cuomo's executive order, none of the ten companies listed were U.S.-based entities.[270] While the implications for

267. Kontorovich, *supra* note 9.

268. *See* McCutcheon v. Fed. Election Comm'n, 472 U.S. 185 (2014); Buckley v. Valeo, 424 U.S. 1 (1976).

269. Recent Legislation, *supra* note 114, at 2038.

270. The list has expanded to twelve companies, as of June 2018. N.Y. OFFICE OF GEN. SERVS., INSTITUTIONS OR COMPANIES DETERMINED TO PARTICIPATE IN BOYCOTT,

those companies could be significant, Cuomo's grandiose 2016 declaration—"if you boycott Israel, New York will boycott you"—lost some of its bite.

As the *Harvard Law Review* correctly predicted, the "biggest hurdle" for challenging anti-BDS laws is and will be finding a boycotting entity with standing to sue, both in light of the relative weakness of the BDS movement in the United States, and more so because of the de jure and de facto limitations of state anti-BDS laws. While New York's listing of only foreign entities reduces the extent of the law's impact in opposing BDS activists, it also reduces the likelihood that a suit could be brought to challenge the executive order on First Amendment grounds. This is in addition to the various inherent limitations to anti-BDS laws discussed above,[271] including the fact that many anti-BDS laws do not cover the full range of BDS activities, such as divestment from Israeli-connected entities and advocacy for sanctions against Israel.

The differences in anti-BDS laws outlined in Section I are also deeply significant, because district courts must consider state anti-BDS laws one at a time, and structural differences between laws will likely result in some laws being upheld and others struck down. The general applicability of judicial decisions will depend on which specific elements courts deem to be impermissible and which limitations are sufficient to sustain the laws against constitutional challenge. Future litigation might very well result in the invalidation of portions of anti-BDS laws and prompt states to restrict the scope of their laws. For example, states with investment-focused laws could avoid First Amendment liability by carving out all of the entities that would have standing to sue, following the lead of Colorado and Illinois. Litigation may never reach federal appellate courts for a judgment on the merits at all, much less the Supreme Court, if legal challenges are mooted by states, as Kansas did by reducing the scope of its anti-BDS law to keep it on the books. If this becomes a trend, however, state anti-BDS laws may ultimately be reduced to symbolic denunciations of BDS. In the meantime, states may get precisely what they want—that is, a symbolic victory in passing the laws and also deterrence of at least some BDS activity.

On the legal front, significant uncertainties surrounding the fate of anti-BDS laws will persist until the Supreme Court weighs in on several unsettled lines of doctrine. While the core First Amendment issues are relatively clear, in light of *Claiborne* and other relat-

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DIVESTMENT, OR SANCTIONS ACTIVITY TARGETING ISRAEL (2018), https://www.ogs.state.ny.us/eo/157/Docs/EO157_Institutions_Companies_List.pdf [https://perma.cc/CBX8-GJJZ].

271. See *supra* notes 99–102 and accompanying text.

ed cases, several factors pose a significant hurdle to obtaining consistent and widely applicable judgments regarding anti-BDS laws. For example, there remains a lack of clarity regarding the scope of the First Amendment in cross-border situations and with regard to political boycotts that are not aimed at vindicating domestic rights. Furthermore, after the First Amendment questions are resolved, questions remain regarding the scope of the Unconstitutional Conditions Doctrine for new contracts, renewals of contracts, and states divesting from entities involved in purportedly objectionable behavior. Ultimately, based on the constitutional doctrines as they exist, many of the anti-BDS laws are likely unconstitutional, at least in part, but determining the precise limits of the state power to boycott a political boycott will undoubtedly proceed on a case-by-case manner unless and until the Supreme Court sees fit to weigh in. However, even a Supreme Court decision might not resolve the relevant issues, depending on the specific cases before the Court and the scope of the Court's holdings in those cases.

In any event, the general principles and framework outlined in this Note apply to political boycotts in general and many other contexts in which expression is central, not just BDS. For example, the principles at stake in a challenge to the constitutionality of state anti-BDS laws are directly relevant to consumer boycotts of multinational corporations, the First Amendment rights of corporations in the chain of production, and the rights of U.S. persons to express ideas in cross-border settings, among other contexts. While courts may simply ignore legal subtleties in favor of sweeping principles, blunt resolutions to such complex legal and factual circumstances—through, for example, a hasty extension of *Claiborne*'s holding—will come at the cost of stable legal footing for those who wish to challenge a particular political order as much as those who wish to preserve that order. Regardless of the manner of resolution, though, it is clear that the adjudication of anti-BDS laws will help shape the future of protest and the tools available to spark political change, particularly on the international stage.

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