POLITICAL NONEXPENDITURES: "DEFUNDING BOYCOTTS" AS PURE SPEECH

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ABSTRACT

Recent challenges to state anti-BDS laws have exposed the anachronistic foundations of First Amendment protection for boycotts. Grappling with precedent that assumed a complete separation between economic activity and speech, courts have conducted substantially different First Amendment analyses of nearly identical laws. This Note addresses the legal confusion by applying the Supreme Court's modern conceptions of political expenditures and compelled subsidization from cases like Citizens United v. Federal Election Commission *and* Janus v. American Federation of State, County, and Municipal Employees *to boycott law. When people who disagree with an entity's speech boycott that entity, this Note argues that they are effectively defunding that speech. Laws prohibiting such boycotts directly infringe upon the quantity and extent of the boycotters' speech and thus should be subject to exacting or strict scrutiny. This conception could prove vital in protecting contemporary boycotts, which are less outwardly expressive but are nonetheless deeply political.*

INTRODUCTION

In 2017, the state of Arkansas enacted a statute requiring companies doing business with state entities to certify that they are not

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boycotting Israel.[1] In *Arkansas Times LP v. Waldrip*,[2] the United States District Court for the Eastern District of Arkansas considered whether the law violated the First Amendment.[3] After a brief paragraph stating that a refusal to engage in commercial dealings was not pure speech,[4] the court examined whether a boycott of Israel is expressive conduct by considering whether such a boycott is inherently expressive.[5] Finding the boycott neither pure speech nor inherently expressive conduct, the court concluded that the Arkansas law did not even implicate the First Amendment. It distinguished *NAACP v. Claiborne Hardware Company*,[6] in which the Supreme Court found a boycott *was* protected under the First Amendment, either because it involved meetings, speeches, and non-violent picketing or because it sought to vindicate domestic civil rights.[7] An Eighth Circuit panel reversed the district court, holding that the Arkansas law imposed unconstitutional conditions on government contractors because the act could apply to verbal or written speech supporting an anti-Israel boycott.[8] On rehearing en banc, the Eighth Circuit rejected the panel's reasoning and instead adopted the district court's reasoning, characterizing the boycott as unexpressive

1. *See* Ark. Code Ann. § 25-1-503(a)(1)–(2) (Westlaw current through 2021 Reg. Sess., 2021 First Extraordinary Sess., 2021 Sec. Extraordinary Sess.).

2. 362 F. Supp. 3d 617 (E.D. Ark. 2019), *aff'd*, No. 19-1378, 2022 WL 2231807 (8th Cir. June 22, 2022).

3. *See Waldrip*, 362 F. Supp. 3d at 622–26.

4. *See id.* at 623.

5. *See id.* (citing Rumsfeld v. F. for Acad. And Inst. Rts., Inc. (FAIR), 547 U.S. 47, 66 (2006)).

6. 458 U.S. 886 (1982).

7. *See Waldrip*, 362 F. Supp. 3d at 624–26. The district court found the facts of the instant case more similar to those of *International Longshoremen's Association, AFL-CIO v. Allied Intern., Inc.*, 456 U.S. 212 (1982). *See Waldrip*, 362 F. Supp. 3d at 625–26. The court read *International Longshoremen's Association* as the rule and *Claiborne Hardware* as the exception. *See id.*

8. Arkansas Times LP v. Waldrip, 988 F.3d 453, 467 (8th Cir. 2021), *rev'd en banc*, No. 19-1378. 2022 WL 2231807 (8th Cir. June 22, 2022).

commercial conduct entitled to no First Amendment protection.[9] Beyond the Eighth Circuit, other courts considering challenges to laws targeting Boycott, Divestment, Sanctions (BDS) boycotts have concluded that the First Amendment protects BDS boycotters but have diverged in their reasoning. For example, courts have found that such laws violated protected expressive conduct without sufficient justification for those violations[10] or illicitly targeted the viewpoints behind or surrounding the boycott.[11]

Yet perhaps there is more merit to the idea of boycotts as speech-qua-speech than these judgments have considered. Starting with *Buckley v. Valeo*,[12] politically motivated campaign spending has been protected as pure speech, a conception that the Supreme Court brought to compelled subsidization of speech outside the campaign finance context in *Janus v. American Federation of State, County, and Municipal Employees*.[13] This Note argues that the Court's views on speech that developed in the campaign finance cases and *Janus* directly apply in the boycott context. Indeed, boycotts that target an entity based on that entity's speech on issues of political concern functionally defund those communications, so the boycotts are themselves political communications entitled to protection as speech. This understanding would extend greater First Amendment protection to these "defunding boycotts" than they might otherwise receive as expressive conduct.

Part I of this Note identifies the history of the Court's evolving conceptions of boycotts and their interactions with the First

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9. *See* Arkansas Times LP v. Waldrip, No. 19-1378. 2022 WL 2231807, at *4 (8th Cir. June 22, 2022) (en banc).

10. *See* Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1039–49 (D. Ariz. 2018), *vacated and remanded*, 789 Fed. Appx. 589 (9th Cir. 2020).

11. *See, e.g.*, Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717, 757–78 (W.D. Tex. 2019), *vacated as moot*, Amawi v. Paxton, 956 F.3d 816 (5th Cir. 2020); Koontz v. Watson, 283 F. Supp. 3d 1007, 1020–24 (D. Kan. 2018); Martin v. Wrigley, 540 F. Supp. 3d 1220, 1227–31 (N.D. Ga. 2021).

12. 424 U.S. 1 (1976).

13. *See* 138 S. Ct. 2448, 2486 (2018).

Amendment: boycotts as unlawful restraint of trade in mid-twentieth Century labor union cases, boycotts as movements with inseparable constitutionally protected elements such as speech and assembly in *Claiborne Hardware*, and boycotts as discreet acts that are protected only insofar as they are inherently expressive in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR*). Part II introduces a different way to think about certain politically motivated purchases—political expenditure as pure speech—that developed in the campaign finance context. Finally, Part III argues that, consistent with modern First Amendment jurisprudence, the conception of political expenditure as pure speech should be applied to boycotts. This conception would bestow stronger First Amendment protection upon boycotts that aim to defund speech implicating political issues.

I. HISTORIC TREATMENT OF BOYCOTTS

A. Labor Union Cases

First Amendment protections for boycotts have evolved over time. Although boycotting in the United States predates the Founding,[14] the use of the tactic grew in prominence in the first half of the twentieth century in the labor dispute context.[15] Labor unions' role in the national economy was a politically fraught question during this time. Indeed, unions gained significant power under the National Labor Relations Act of 1935 ("Wagner Act") but lost much of this power under the Labor Management Relations Act of 1947 ("Taft-Hartley Act").[16] Between the passage of these two acts, the

14. *See On This Day, the Boston Tea Party Lights a Fuse*, NAT'L CONST. CTR. (Dec. 16, 2021), https://constitutioncenter.org/blog/on-this-day-the-boston-tea-party-lights-a-fuse/ [https://perma.cc/5N9M-W4LE] (describing colonists' protest of Crown policies).

15. *See* Zoran Tasic, *The Speaker the Court Forgot: Re-Evaluating NLRA Section 8(b)(4)(b)'s Secondary Boycott Restrictions in Light of* Citizens United *and* Sorrell, 90 WASH. U. L. REV. 237, 245–46 (2012).

16. *See id.* at 245–48.

Supreme Court recognized in *Thornhill v. Alabama*[17] that the First Amendment's speech and press clauses protected peaceful picketing. In *Thornhill*, the Court struck down a state law that banned all labor picketing.[18] Only a year later, however, the Court limited *Thornhill* when it upheld an injunction preventing a labor union from engaging in any picketing because its boycott effort had included acts of violence and property destruction.[19]

The Court continued to limit First Amendment protection for boycotts and picketing well into the latter half of the twentieth century. In *Giboney v. Empire Storage & Ice Co.*,[20] the Court upheld an anti-picketing injunction because the "sole immediate purpose" of the boycott was to restrain trade in violation of state law.[21] In *Hughes v. Superior Court*,[22] the Court used the unlawful purpose or objectives test to uphold an anti-picketing injunction against a group trying to pressure a grocery store to hire black clerks in proportion to the racial makeup of its customer base.[23] The group's objectives did not violate any specific statutes, but the Court deferred to the California Supreme Court's finding that promoting any race-based hiring was contrary to California's general public policy.[24] In 1957, the Court upheld an injunction under a state statute that severely restricted picketing, noting that since *Thornhill*, the case law

17. 310 U.S. 88 (1940).

18. *See id.* at 101; *see also* Am. Fed'n of Lab. V. Swing, 312 U.S. 321, 324–26 (1941) (holding unconstitutional Illinois's common law policy prohibiting any picketing except by employees against their employer).

19. *See* Milk Wagon Drivers Union of Chi., Loc. 753 v. Meadowmoor Dairies, 312 U.S. 287, 294–95 (1941).

20. 336 U.S. 490 (1949).

21. *See id.* at 501; *see also* Am. Radio Ass'n, AFL-CIO v. Mobile S.S. Ass'n, Inc., 419 U.S. 215, 229 (1974).

22. 339 U.S. 460 (1950).

23. *See id.* at 461.

24. *See id.* at 468.

"established a broad field in which a State, in enforcing some public policy . . . could constitutionally enjoin peaceful picketing[.]"[25]

The Court's deference to state public policy led to a series of cases deferring to the National Labor Relations Board's ("NLRB") national authority over labor disputes. In 1959, the Landrum-Griffin Act amended the Taft-Hartley Act to make more explicit the Act's prohibition on economically pressuring an entity to "cease doing business with any other person"[26]—that is, a "secondary" boycott.[27] Although the Court interpreted the prohibition narrowly,[28] it found that the prohibition "impose[d] no impermissible restrictions upon constitutionally protected speech" when applied to picketing that "spreads labor discord by coercing a neutral party to join the fray."[29]

This short constitutional analysis held true even when a secondary boycott was politically motivated. In *International Longshoremen's Association, AFL-CIO v. Allied International, Inc.*,[30] the Court applied the secondary boycott provision to a union that refused to load and unload ships engaged in trade with the Soviet Union due to political disagreement with the Soviet invasion of Afghanistan.[31]

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25. *See* Int'l Brotherhood of Teamsters, Loc. 695, A.F.L. v. Vogt, Inc., 354 U.S. 284, 293 (1957).

26. 29 U.S.C. § 158(b)(4)(i)(B).

27. *See Boycott*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[S]econdary boycott. (1903) A boycott of the customers or suppliers of a business so that they will withhold their patronage from that business."); *see also* Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(b) of the National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 912–16 (2005).

28. *See, e.g.*, NLRB v. Fruit & Vegetable Packers & Warehousemen, Loc. 760 (Tree Fruits), 377 U.S. 58, 71–72 (1964) (finding that picketing that asked customers to not buy a particular product was not an unfair labor practice); NLRB. V. Servette, Inc., 377 U.S. 46, 55 (1964).

29. NLRB v. Retail Store Emps. Union, Loc. 1001, 447 U.S. 607, 616 (1980).

30. 456 U.S. 212 (1982).

31. *See id.* at 226–27 ("We have consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment . . . . It would seem even clearer that

The fact that the boycotter was a labor union might have led the Court to implicitly discredit the boycotter's legitimate political motivations. If the secondary boycott prohibition was meant to curb unfair competition by economic pressure designed "not to communicate but to coerce," it would be overinclusive as applied to political boycotts that *are* trying to communicate. The rule would also be underinclusive, because a large direct political boycott can exert just as much economic pressure as a secondary political boycott. More fundamentally, the Court did not even try to justify why First Amendment protection for boycotts should simply disappear once a certain threshold of economic pressure is crossed.

B. Political Boycotts as Expressive Conduct

The same year the Court decided *International Longshoremen*, the Court also decided *NAACP v. Claiborne Hardware Co.*,[32] a landmark case that absorbed scholarly analysis of the First Amendment right to boycott.[33] *Claiborne Hardware* involved an NAACP civil rights

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conduct designed not to communicate but to coerce merits still less consideration under the First Amendment."). Though the Court accepted the NLRB's finding that the union's "sole dispute is with the USSR over its invasion of Afghanistan," *id.* at 223 (quoting Int'l Longshoremen's Ass'n, Loc. 799, 257 NLRB 1075, 1078 (1981)), it refused to find a political exception to the statutory provision. *See id.* at 226.

32. 458 U.S. 886 (1982).

33. *See, e.g.*, Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout Is Fair Play Under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29, 59 (2018); *Recent Legislation*, 129 HARV. L. REV. 2029, 2031–34 (2016) [hereinafter HLR Note]; Barbara Ellen Cohen, Note, *The Scope of First Amendment Protection for Political Boycotts: Means and Ends in First Amendment Analysis:* NAACP v. Claiborne Hardware Co., 1984 WIS. L. REV. 1273 (1984); 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 (1984); Gordon M. Orloff, Note, *The Political Boycott: An Unprivileged Form of Expression*, 1983 DUKE L.J. 1076 (1983).

boycott of white-owned businesses in Claiborne County, Mississippi.[34] One of the boycott's animating forces was a demand that the businesses hire black clerks and cashiers.[35] However, the "major purpose of the boycott . . . was to influence governmental action."[36] The Mississippi Supreme Court had sustained the imposition of common law tort damage liability on the NAACP and individual boycott leaders for the white merchants' economic losses.[37] The Supreme Court of the United States reversed, holding that "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself."[38]

Although *Claiborne Hardware* is often cited for the proposition that all political boycotts are entitled to First Amendment protection,[39] its text supports a more limited reading. The Court in *Claiborne Hardware* distinguished *Hughes v. Superior Court*, which enjoined a similarly political boycott, by stating that the NAACP's boycott in *Claiborne Hardware* was not "designed to secure aims that are themselves prohibited by a valid state law."[40] The boycott in *International Longshoremen*, which was also politically motivated,[41] was distinguished as a secondary boycott and thus regulable as unfair competition.[42] This distinction is arguable because the lower court in *Claiborne Hardware* found that the boycott *was* a secondary

34. *See Claiborne Hardware*, 458 U.S. at 889.

35. *Id.* at 900.

36. *Id.* at 914.

37. *Id.* at 894–96.

38. *Id.* at 914.

39. *See, e.g.*, Koontz v. Watson, 283 F. Supp. 3d 1007, 1021 (D. Kan. 2018); Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1041 (D. Ariz. 2018), *vacated and remanded*, 789 Fed. Appx. 589 (9th Cir. 2020) (unpublished); HLR Note, *supra* note 33, at 2031–32.

40. *Claiborne Hardware*, 458 U.S. at 915 n.49. This circular reasoning raises the question: to what extent may a law validly restrict the aims of boycotts?

41. *See* Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Intern., Inc., 456 U.S. 212, 223 (1982).

42. *See Claiborne Hardware*, 458 U.S. at 912.

boycott, a characterization the Court only meekly disputed in footnotes.[43] The more likely difference between the two cases is that the Court was more willing to allow the NLRB to regulate a union boycott in the shipping industry than it was to allow Mississippi to punish civil rights boycotters who refused to purchase certain consumer goods to "vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself."[44]

Even if *Claiborne Hardware* protects all political boycotts and not just those that "effectuate rights guaranteed by the Constitution itself,"[45] it probably offers only mild protection. The Court in *Claiborne Hardware* cited *United States v. O'Brien*[46] for the proposition that regulation which has an incidental effect on First Amendment freedoms may be justified in certain instances.[47] *O'Brien* established a test for when "expressive conduct"—that is, nonspeech conduct that nonetheless implicates speech elements—may be regulated.[48] The Court has treated the *O'Brien* test as an equivalent to

43. Although the NAACP chapter listed the white merchants' refusal to hire black clerks as one of their demands, *Claiborne Hardware*, 458 U.S. at 900, the boycott primarily aimed at changing government policy which the local businesses could not control. *Id.* at 914. The Court did not squarely address the secondary boycott argument because, although the trial chancellor found the boycotters to be in violation of a state law against secondary boycotts, the Mississippi Supreme Court held the statute inapplicable because it had been enacted two years after the boycott began. *See id.* at 891–92, 894. The U.S. Supreme Court suggested in footnotes that the boycott might not have been secondary because "[m]any of the owners of these boycotted stores were civic leaders," but it did not explicitly hold that this was a novel exception to the secondary boycott definition. *See id.* at 890 n.3, 892 n.8.

44. *See id.* at 914. *Compare id.*, *with* Intl. Longshoremen's Ass'n, AFL-CIO v. Allied Intern., Inc., 456 U.S. 212, 227 (1982) ("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.").

45. *Claiborne Hardware*, 458 U.S. at 914.

46. 391 U.S. 367 (1968).

47. *Claiborne Hardware*, 458 U.S. at 912.

48. "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression;

intermediate scrutiny review applied to time, place, or manner restrictions on speech.[49] *Claiborne Hardware*'s ambiguous analysis has sparked debate about how the Court actually made use of *O'Brien*'s test, if it did at all.[50] For the purposes of this paper, it is sufficient to note that the Supreme Court has subsequently read *Claiborne Hardware* to rest, at least in part, on *O'Brien*,[51] and it has emphasized *Claiborne Hardware*'s civil rights context rather than characterizing it broadly as a political consumer boycott.[52]

C. The "Inherently Expressive" Requirement

In the twenty-first century, protection for boycotts as expressive conduct might have narrowed further. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR*)[53] dealt with an association of law schools and law faculties that attempted to restrict military recruiting on their campuses to protest the military's "don't ask, don't tell" policy.[54] In response, Congress enacted the Solomon Amendment, which withdrew federal funds from any school that did not offer military recruiters the same access to its campus and

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and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377.

49. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984).

50. The Court might have implicitly done the *O'Brien* analysis, simply concluding that a complete prohibition on a peaceful civil rights boycott was clearly greater than was essential to further the government's interest in this case. It also might have found that the boycott was illicitly targeted for suppression based on its speakers or viewpoint and was therefore entitled to the highest protection. *See, e.g.*, Cohen, *supra* note 33, at 1284–88; Orloff, *supra* note 33, at 1091–92. Or perhaps the Court found the expressive conduct at issue to be inseparable from fully protected speech elements and so applied strict scrutiny. Greendorfer, *supra* note 33, at 59. Or, finally, the boycott might have been itself a protected First Amendment category such as association or a petition for grievances, or an innovation like a right to political action. Harper, *supra* note 33, at 417, 420–21.

51. FTC v. Super. Ct. Trial Laws. Ass'n, 493 U.S. 411, 431 (1990).

52. *See id.* at 425–26.

53. 547 U.S. 47 (2006).

54. *See id.* at 52.

students that it provided to nonmilitary recruiters.[55] The Court rejected any First Amendment protection for what was in essence a military recruiter boycott[56] because such an act was not "inherently expressive"—that is, the message it was expressing would not be overwhelmingly apparent to an outside observer.[57] An observer could not understand the reason why a military recruiter was interviewing away from a law school campus without hearing the school's accompanying speech that they were protesting military policy. That accompanying explanatory speech, however, cannot make the conduct expressive.[58]

The requirement that expressive conduct be inherently expressive could be fatal to boycotts' First Amendment protection. The expression latent in burning a draft card[59] or an American flag[60] is visceral, but the actual act of a boycott is simply a refusal to engage or deal in commercial relations. Perhaps the boycott in *Claiborne Hardware*, where hundreds of previously loyal black customers suddenly ceased patronizing the local white-owned businesses,[61] was inherently expressive—but even if so, should courts withhold protection for smaller and less obvious boycotts? In *Claiborne Hardware*, the Court approvingly noted that the boycott was surrounded by protected elements of speech, assembly, association, and petition, which the Court called "inseparable."[62] Yet under the subsequent *FAIR* test, these elements are merely explanatory speech that cannot transform a boycott into inherently expressive conduct.

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55. *Id.* at 51.
56. Notably, the Court did not use the word "boycott." *See generally id.*
57. *See id.* at 66.
58. *Id.*
59. United States v. O'Brien, 391 U.S. 367 (1968).
60. Texas v. Johnson, 491 U.S. 397 (1989).
61. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 922–23 (1982).
62. *Id.* at 911 (citation omitted).

FAIR and *Claiborne Hardware* set the stage for modern debates on First Amendment protections for boycotts. Strong First Amendment protection is triggered if the government targets the viewpoint behind the boycott or the core speech activities surrounding the boycott—such as speech, assembly, association, and petition.[63] If government action affects only the refusal to deal itself, however, it is constitutional unless the boycott is inherently expressive and the government cannot satisfy some form of intermediate scrutiny.[64] Earlier labor union cases are still good law and apparently could apply when the context is more commercial than political.[65] These conceptions are consistent with the Supreme Court's caselaw dealing with boycotts, but they reflect a separation of economic transactions and protected speech that is alien to the Court's modern jurisprudence in other areas.

II. POLITICAL EXPENDITURES AS SPEECH

The Supreme Court has increasingly recognized that First Amendment protection does not stop when money is involved; indeed, monetary transactions can be speech-qua-speech, entitled to the same protection as spoken and written words.[66] This conception of "money as speech" grew up in the campaign finance context but has been applied elsewhere recently.[67] It coincides with the Supreme Court's increasingly serious constitutional protection for

63. *See, e.g.*, Arkansas Times LP v. Waldrip, 988 F.3d 453, 461 (8th Cir. 2021), *rev'd en banc*, No. 19-1378. 2022 WL 2231807 (8th Cir. June 22, 2022) (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982)).

64. *See, e.g.*, Arkansas Times LP v. Waldrip, No. 19-1378. 2022 WL 2231807, at *2–3 (8th Cir. June 22, 2022) (en banc); Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1039–49 (D. Ariz. 2018), *vacated and remanded*, 789 Fed. Appx. 589 (9th Cir. 2020).

65. *See, e.g.*, FTC v. Super. Ct. Trial Lawyers Ass'n, 493 U.S. 411, 426 (1990) (finding a boycott whose "undenied objective . . . was to gain an economic advantage" to be a restraint of trade in violation of antitrust laws).

66. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336–40 (2010).

67. *See infra* notes 68–92.

speech made for commercial purposes as well as stronger protections against compelled association.

The modern origins of this conception come from *Buckley v. Valeo*.[68] In *Buckley*, the Court examined, among other things, the Federal Election Campaign Act of 1971's limits on campaign contributions and expenditures.[69] The D.C. Circuit had upheld these provisions under the *O'Brien* test,[70] but the Supreme Court rejected the equation of expenditure of money for political communications with *O'Brien* and expressive conduct:

> The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.[71]

The *Buckley* Court similarly rejected the equation of content-neutral time, place, and manner restrictions with limits on the amount of money that can be spent for, and thus the quantity and extent of, political speech.[72] Recognizing that "virtually every means of communicating ideas in today's mass society requires the expenditure of money,"[73] the Court upheld the provisions limiting individual campaign contributions under heightened scrutiny,[74]

68. 424 U.S. 1 (1976).
69. *Id.* at 6–7.
70. *Id.* at 15–16.
71. *Id.* at 16.
72. *Id.* at 17–18 & n.17.
73. *Id.* at 19.
74. *Id.* at 29. The Court would later call this "closely drawn" scrutiny. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 94 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

but struck down the provisions limiting campaign expenditures by a candidate on his or her own behalf, total expenditures in multiple campaigns, and expenditures on behalf of a candidate under "exacting" scrutiny.[75]

In subsequent campaign finance cases, the Court expanded *Buckley*'s insight that there is no wall of separation between the exchange of money and political speech core to the First Amendment. *First National Bank of Boston v. Bellotti*[76] held that corporate contributions to ballot initiative campaigns were protected speech, regardless of whether they were related to the corporation's financial interests.[77] The Court struck down the state law at issue, finding that it did not serve a sufficiently compelling government interest and was not closely drawn to avoid unnecessary infringement on speech.[78]

In the 1990s and early 2000s, the Court decided cases upholding campaign finance laws, seeming to retreat from strong constitutional protections for political spending.[79] But then the Court reversed course, decisively expanding *Buckley* and *Belotti*.[80] The landmark case in this new jurisprudence was *Citizens United v. Federal Election Commission*.[81] Applying strict scrutiny, the *Citizens United* court found a federal law's restrictions on independent corporate

75. *See Buckley*, 424 U.S. at 44–45, 58–59. The scrutiny was very strict in application.

76. 435 U.S. 765 (1978).

77. *See id.* at 784.

78. *See id.* at 794–95.

79. *See, e.g.*, *McConnell*, 540 U.S. at 94, *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Fed. Election Comm'n v. Beaumont, 539 U.S. 146 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Austin v. Michigan State Chamber of Com., 494 U.S. 652 (1990), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

80. *See, e.g.*, McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014); American Tradition P'ship., Inc. v. Bullock, 567 U.S. 516 (2012); Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008); Randall v. Sorrell, 548 U.S. 230 (2006).

81. 558 U.S. 310 (2010).

expenditures for political advertisements impermissibly burdened speech.[82] The Court reiterated that for-profit corporations are entitled to full First Amendment protection for their political expenditures,[83] and some scholars have read the case as a strong indication that the Court is moving towards equal scrutiny for abridgements of "commercial speech" —that is, speech that proposes a commercial transaction.[84] In subsequent campaign finance cases, the Court went on to hold aggregate limits on campaign contributions unconstitutional[85] and reaffirmed that even spending caps on individual campaign contributions infringe on speech if they are too low.[86]

The understanding that purchases can be speech has migrated outside of the campaign finance context. In *Janus v. American Federation of State, County, and Municipal Employees*,[87] the Supreme Court held that state laws requiring public-sector employees to pay union agency fees (funds germane to collective bargaining) violate the First Amendment.[88] In doing so, the Court overturned *Abood v. Detroit Board of Education*,[89] a landmark case supporting compulsory agency fees, and—according to the dissent—also overturned four decades of precedent supporting *Abood*.[90] Sidestepping whether compelled subsidies should be subject to "exacting" or "strict"

82. *See id.* at 365–66.

83. *Id.* at 365.

84. *See, e.g.*, Tamara R. Piety, Citizens United *and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16, 19 (2010). The trajectory appears to have come full circle; the landmark commercial speech case cited *Buckley* for the proposition that "[i]t is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976) (citing Buckley v. Valeo, 424 U.S. 1, 35–59 (1976)).

85. *McCutcheon*, 572 U.S. at 218.

86. Thompson v. Hebdon, 140 S. Ct. 348, 351 (2019).

87. 138 S. Ct. 2448 (2018).

88. *Id.* at 2478.

89. 431 U.S. 209 (1977).

90. *Janus*, 138 S. Ct. at 2497 (Kagan, J., dissenting).

scrutiny,[91] the Court found that forcing public employees to pay money to unions did not serve a sufficiently compelling government interest and used means that were too restrictive on associational freedoms, regardless of whether those forced payments were for collective bargaining or more overtly political purposes.[92]

Just as limiting the amount of money one can spend for political speech is a restriction on speech itself, compelling one to pay money for private speech with a political valence infringes on one's right to say—or not to say—whatever one wishes. Notably, even the *Janus* dissent did not dispute that personal financial expenditure could constitute speech.[93] Additionally, because paying unions dues or fees are part and parcel of union association, the Court was also concerned with workers' freedom to eschew association.[94] The Court treated freedom of association seriously, giving it detailed discussion and integrating it into the compelled subsidization analysis.[95] This analysis suggests that, where government action implicates both compelled subsidization and compelled association concerns, the government's burden is greater than it would be to satisfy either concern individually.

III. BOYCOTTS AS POLITICAL EXPENDITURES

Boycotts that make political statements and defund political communication *through* the refusal to commercially deal with certain parties are best understood using the money-as-speech model developed in *Citizens United* and *Janus*. *Citizens United* held that

91. *Id.* at 2464–65 (majority opinion).

92. *Id.* at 2466.

93. David F. Forte, *To Speak or Not to Speak, That Is Your Right:* Janus v. AFSCME, 2018 CATO SUP. CT. REV. 171, 175 (2018).

94. *Janus*, 138 S. Ct. at 2463.

95. *Id.* at 2465 (2018) (explaining that "a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms'") (quoting Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 310 (2012) (internal quotation marks and alterations omitted)).

courts must critically examine laws that target any point in the speech process, including the funding stage.[96] Courts therefore must critically examine laws that restrict boycotts of speaking entities because such laws compel speech by compelling the funding of speech. The speaking entity need not be a political actor. Although the regime under *Abood* would have allowed the compulsion of union fees except those that explicitly subsidized political or ideological speech not germane to collective bargaining,[97] *Janus* recognized that even commercial and union speech in collective bargaining can have political valence, entitling workers to full constitutional protection against compelled subsidization.[98] Indeed, this protection is at least as great as that given to government workers compelled to join a particular political party.[99] Even the purchase or nonpurchase of mundane goods can be speech if it is done with the intent of funding or defunding the seller's speech. And just as the Court in *Janus* protected non-union workers from the compelled association that is created by forced commercial relations with a union,[100] courts should protect boycotters who make statements through refusing economic relations from state attempts to compel those relations.

To determine if a boycott should qualify for this protection, a court should look at the reasons that sparked the boycott. Suppose a boycotting group is politically opposed to a message that the boycotted entity endorsed. In that case, the boycott engages in counterspeech at the funding step of the communication process—or, alternatively, refuses to fund that message—and thus is itself speech. The boycotted party's message could be a political creed, commercial speech that has taken on a political valence (as in *Janus*), or perhaps even monetary funding for another speaking entity. As long

96. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336–37 (2010).
97. *Id.* at 2460–61.
98. *See id.* at 2474, 2483.
99. *Id.* at 2484.
100. *Janus*, 138 S. Ct. at 2486.

as the money withheld in the boycott plausibly could have funded the boycotters' disfavored speech, to prohibit the boycott would in effect compel those boycotters to support that speech—regardless of whether an observer would perceive it as an endorsement.

Other boycotts may not qualify. Private decisions to refrain from buying an inferior product are not protected boycotts because they are not motivated by a desire to express a political message through boycott. And suppose a business refuses to serve a customer based on that customer's race or other intrinsic characteristic. In that case, the business is not engaged in a protected boycott because intrinsic characteristics are not speech and cannot be defunded. Some organized boycotts are in response to nonspeech actions by the boycotted entity; because speech is not present, even politically motivated boycotts of this type are closer to expressive conduct than speech. Yet *Janus* suggests that if the boycott is motivated by commercially oriented speech activity by the boycotted entity—for which a political valence is likely present if it has inspired a boycott—the boycott is speech.[101]

Challenges to laws and executive orders aimed at the Boycott, Divestment, Sanctions (BDS) movement[102] are instructive of the boundaries of boycotts as speech. These laws, enacted in at least 35

101. *See id.* at 2483.

102. Movement organizers describe BDS as a "Palestinian-led movement" that "urges action to pressure Israel to comply with international law." These actions include withdrawing investments from "all Israeli and international companies that sustain Israeli apartheid" and withdrawing support from "complicit Israeli sporting, cultural and academic institutions[.]" *What is BDS?*, BDS MOVEMENT, https://bdsmovement.net/what-is-bds [https://perma.cc/F5AE-P5HX] (last visited Feb 1, 2022).

states,[103] often assert that the measures aim to prohibit discriminatory boycotts,[104] suggesting religious or national origin-based discrimination. Many proponents of these laws have argued that the BDS movement is anti-Semitic,[105] a charge that the movement denies.[106] Still, the BDS movement states that it targets institutions "complicit" in the Israeli government's actions,[107] a term that may include entities that have never offered speech support for the Israeli government. Indeed, the BDS movement's list of companies to boycott include Israeli companies of all kinds,[108] suggesting that national origin or economic presence is at issue rather than the companies' speech. Because the BDS boycott is not directed at defunding speech specifically, it is not a good candidate for protection as pure speech.

But that does not end the inquiry. Although these laws aimed at the BDS movement, they could be applied to boycotts that intend to defund speech. In *Koontz v. Watson*,[109] a federal district court considered the application of a Kansas anti-BDS law to a member of Mennonite Church USA who participated in the church's boycott

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103. *See Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIB., https://www.jewishvirtuallibrary.org/anti-bds-legislation [https://perma.cc/RLP4-5JEX] (last visited Feb. 1, 2022).

104. *See, e.g.*, Minn. Stat. § 3.226(1)(a) (2017); Nev. Rev. Stat. §§ 332.065(5)(a)(1)(II); S.C. Code Ann. § 11-35-5300 (2015).

105. 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/opinion/anti-bds-laws-dont-perpetuate-discrimination-they-prevent-it [https://perma.cc/5FZR-SX8D].

106. *What is BDS?*, BDS MOVEMENT, https://bdsmovement.net/what-is-bds [https://perma.cc/F5AE-P5HX] (last visited Feb 1, 2022) ("BDS is an **inclusive**, **anti-racist** human rights movement that is **opposed** on principle to all forms of **discrimination**, including **anti-semitism** and **Islamophobia**.") (emphasis in original).

107. *Id.*

108. *BDS List*: *Boycott These Products and Companies to Stop Israeli Apartheid*, BDS LIST, http://bdslist.org/full-list/ [https://perma.cc/X2RC-YL25] (last visited Feb 1, 2022).

109. 283 F. Supp. 3d 1007 (D. Kan. 2018).

of certain Israeli products.[110] Describing its boycott as a "third way" on Israel and Palestine,[111] the church resolved to engage in "economic boycotts and divestment from companies that support the occupation of the West Bank and Gaza."[112] This focus on companies' support for political decisions makes it far more likely that Mennonite Church USA's boycott would qualify for protection as pure speech, although a proper inquiry must also consider which companies the boycott selected and why those particular companies were chosen. Had the court in *Koontz* done this analysis, it could have considered the extent to which the Mennonite Church USA's boycott acted upon a genuine intention to defund objectionable speech versus identity-based discrimination. The existence of defunding boycotts also informs the First Amendment analysis for cases like *Arkansas Times LP v. Waldrip*,[113] which considered the constitutionality of a certification requirement applied to a newspaper that had not engaged in a boycott of Israel but wanted to reserve that right. If such a certification requirement could include a defunding boycott in its prohibition, it must surpass at least exacting scrutiny to avoid overbreadth.

This conception of defunding boycotts as speech is a necessary addition to the First Amendment jurisprudence because Supreme Court cases dealing with labor picketing and boycotts from the first half of the 20th Century up through *International Longshoremen* seem to have relied on a presumption that labor relations were a category outside of constitutionally protected expression. This conception

110. *Id*. at 1013.

111. *Mennonites Choose 'Third Way' on Israel and Palestine* (July 6, 2017), MENNONITE CHURCH USA, https://www.mennoniteusa.org/news/mennonites-choose-third-way-israel-palestine/ [https://perma.cc/RP3Y-KX4F].

112. *Seeking Peace in Israel and Palestine: A Resolution for Mennonite Church USA*, MENNONITE CHURCH USA, https://www.mennoniteusa.org/wp-content/uploads/2020/08/IP-Resolution.pdf [https://perma.cc/N49C-HV2P] (last visited Oct. 12, 2021).

113. No. 19-1378, 2022 WL 2231807, at *4 (8th Cir. June 22, 2022).

was alien to the Court in *Janus*, which applied strong speech protection against compelled collective bargaining.[114] In *Claiborne Hardware*, the Court's finding of First Amendment protection stressed the speech and assembly activities that accompanied the boycott but avoided explicit pronouncements about the protection for the refusal to deal that characterized the boycott itself.[115] Picking apart noncommercial expressive actions is unnecessary under the Court's holding in *Buckley*, reaffirmed in *Citizens United*, that a regulation dealing with the expenditure of money to create political speech is a content-based reduction in the quantity of expression and thus deserves enhanced scrutiny.[116] And to the extent *FAIR* suggests that one's politically motivated refusal to deal with an entity is not entitled to First Amendment protection unless that refusal to deal is itself obviously expressive of a political message, it is squarely at odds with *Janus*'s holding that the First Amendment protected even recognizably non-union employees from compulsory agency fees.

A reorientation of boycott law towards the Supreme Court's modern understanding of the interplay between money and speech would not completely resolve the difficulties shown by the varying analyses of anti-BDS laws, but it would clarify some confusion. When a compelled purchase would fund disfavored speech, neither the presence of an intermediary nor a lack of obvious expression will diminish the strong First Amendment protection afforded to the boycott. When a boycott instead targets an entity's nonspeech action, expressive conduct analysis is more appropriate. This expressive conduct analysis could potentially consider third-party coercion or the lack of obvious expression. Still, a strict separation between "economic" conduct and "expressive" conduct is unwarranted: political boycotts often focus on the nonpurchase of commonplace goods. Courts should generally recognize that even

114. *See* Forte, *supra* note 93, at 172.

115. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982).

116. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010).

moderate limitations on boycotts can impose serious burdens on the expression of politically disempowered groups.

Some still resist the idea that compelled monetary payments can burden speech. For example, Professors William Baude and Eugene Volokh argue that compelled payments are similar to taxes and never implicate the First Amendment, even when they fund speech of which we disapprove politically.[117] Baude and Volokh acknowledge that this conception goes against the assumptions of *both* the majority and dissent in *Janus*.[118] They maintain, however, that it should not be unconstitutional for the government to compel public-sector workers to pay agency fees because it would not even implicate the First Amendment if the government simply paid its employees less and then gave the difference to unions.[119] Characterizing the government as the representative of the people does not eliminate this inconsistency; whether or not a majority of the population supports a particular compelled message does not decide its First Amendment protection.[120]

One way to reconcile this inconsistency is as follows: all Americans have an equal stake in the way that their tax dollars are spent, so the only protection that the constitution offers against morally objectionable government expenditures is the political process—elections, bicameralism and presentment, etc. If the government were prohibited from giving money to speaking entities that any groups oppose, it would be in practice prohibited from giving money to *any* speaking entities because there will always be groups that oppose certain speech. Such a regime would raise First Amendment issues of its own; for instance, it would forbid government

117. William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 171–72 (2018).

118. *Id.* at 179 ("Even the dissent in *Janus* — which adopted a generally barn-burning rhetorical approach — never really disputed this general view of compelled subsidies as compelled speech.").

119. *See id.* at 174–75.

120. *Id.* at 182.

contractors from speaking at all, lest they upset some group. The way the government spends money from general funds can be more than a negligible promotion of certain speech. Still, the government interest in allowing funds to go to speaking entities is overwhelming. Similarly, although the government has wide latitude to express even controversial political speech through its own rhetoric, the First Amendment imposes limits on compelling or even subsidizing private speakers to express government speech.[121]

Under this reasoning, it would be constitutionally suspect for Congress to create systems outside of its general taxation and spending process for continuous forced payments from one group to subsidize another group's speech. Baude and Volokh draw support for their contention that the First Amendment permits such compelled subsidization schemes from *Board of Regents of the University of Wisconsin System v. Southworth*[122] and *Johanns v. Livestock Marketing Association*.[123] In *Southworth*, the Supreme Court upheld a public university's activity fee which made students subsidize private student organizations because the university constructed the fee in a content-neutral manner.[124] This analysis is clearly foreclosed by *Janus*, and Baude and Volokh acknowledge that *Janus* has put *Southworth*'s future in jeopardy.[125] *Johanns*, wherein the Court upheld a targeted assessment on beef producers for generic beef advertising as permissible government speech,[126] presents a tougher issue. Perhaps this scheme is acceptable because the funds pass through the government, where they may be separated and politically scrutinized as depletions of the public purse. But if this proves too fine or formal of a distinction, the current Court probably is

121. *See, e.g.*, Leg. Servs. Corp. v. Velazquez, 531 U.S. 533, 548–49 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995).

122. 529 U.S. 217 (2000).

123. 544 U.S. 550 (2005).

124. *Southworth*, 529 U.S. at 229–30.

125. Baude & Volokh, *supra* note 117, at 200.

126. *Johanns*, 550 U.S. at 561–67.

more devoted to the *Janus* regime and would sooner overturn *Johanns* than adopt Baude and Volokh's position. Government speech is best thought of as the exception to the otherwise government-free marketplace of ideas.

Given the Court's general consensus that compelled subsidization of speech raises First Amendment concerns,[127] the contention that paying cannot be speaking seems, at best, aspirational. One year after *Janus*, Volokh joined one of the many amicus briefs submitted for the Eighth Circuit appeal of *Arkansas Times v. Waldrip*, taking the position that "[d]ecisions not to buy or sell goods or services are generally not protected by the First Amendment."[128] The brief supports this statement with examples of refusals to serve or hire certain classes of people that would implicate antidiscrimination laws, public accommodation laws, or common carrier laws,[129] but finds only rare exceptions for boycotts whose refusals to deal implicate the First Amendment (mostly based on other clauses).[130] It did not mention *Janus*, a case that would require such a big exception that it makes the whole framework implausible. Many services besides collective bargaining include speech with a political valence, and even the sale of goods can be central to funding an entity's speaking agenda.

As explained above, this Note agrees that a "boycott" against a person based on his or her physical identity is not entitled to speech protection because one's identity is not speech. One cannot defund an innate characteristic, and, in any case, nondiscrimination in public accommodations is a compelling end.[131] For the application of anti-BDS laws, it thus matters whether entities are being targeted

127. Janus v. Am. Fedn. of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448, 2464 (2018).

128. Brief of Profs. Michael C. Dorf, Andrew M. Koppelman, and Eugene Volokh as Amici Curiae in Support of Defendants-Appellees at 1, Arkansas Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021), No. 19-1378, 2019 WL 2488957.

129. *Id.* at 1–3.

130. *Id.* at 18.

131. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252–53 (1964).

because of their Israeli identity or because they have expressed a message in support of the Israeli government's political actions. If it is the latter, it is a political refusal to deal that has the purpose and effect of defunding speech, just like the *Janus* workers' refusal to pay union agency fees. Any government attempts to compel subsidization of this message infringe on the First Amendment and should be subject to exacting, if not strict, scrutiny.

The practical effect of adding this new conception to boycott law will likely be modest at first, but it may soon prove quite important based on recent trends. Boycotts historically tended to be created and maintained by small local groups, often with similar economic interests. But national partisan news outlets and social media have made boycotts an increasingly national affair. They have also made it possible to organize a boycott nearly immediately and without cost. That alone is sufficient to expect a national increase in the frequency of boycotts. But even stronger stimuli include partisanship among the general population and a modern expectation that corporations—even those that sell mundane goods like chicken sandwiches or pillows—make statements in support of certain political causes.

For example, in June of 2020, the CEO of Goya Foods made positive statements about then-president Donald Trump. Within days, politicians and celebrities posted on social media calling for a boycott of Goya—which in turn led to an anti-boycott ("buycott") by those supportive of the statements.[132] These politically motivated consumption decisions were not part of a movement involving parades and picketing and thus were not obviously expressive, and it is conceivable that a law or agency could regulate boycotts of basic food staples like rice and beans without targeting viewpoints. But

132. Sumner Park, *How a Goya Boycott Led to a 'Buycott'*, FOX BUS. (Oct. 16, 2020), https://www.foxbusiness.com/lifestyle/goya-boycott-led-to-a-buycott [https://perma.cc/GM3J-K4TF].

the purposes of the boycott and buycott were, respectively, to defund and fund political speech, so we should treat them as speech.

While one may criticize the increasing association of everyday purchasing decisions with political (and often partisan) positions,[133] we are still better off in a world in which the government cannot restrict defunding boycotts. Before political actors finish drawing the battle lines over Environmental, Social, and Governance (ESG) investing,[134] we would do well to agree *ex ante* that the government should not attempt to restrict private investment choices. Choosing default rules for public pension funds is a legitimate government function, but leveraging government funds to coerce private actors goes too far and would lead to a counterproductive environment. For example, one state government punishing entities that boycott ESG-rejecting companies could provoke other state governments—or even the federal government—to require such a boycott. Absent government restrictions, citizens can vote with their dollars whether to support, ignore, or counter any defunding effort. Behind these efforts are more than impersonal market forces; politically disempowered groups may turn to boycotts as their only way to avoid complicity in funding speech they oppose.

CONCLUSION

First Amendment protection for boycotts has fluctuated in the last century. The Supreme Court appeared to show serious support for political boycotts in *Claiborne Hardware*, but the holding was vague and subject to qualifications. Furthermore, by implicitly associating boycotts with expressive conduct, the Court established

133. *See, e.g.*, VIVEK RAMASWAMY, WOKE, INC.: INSIDE CORPORATE AMERICA'S SOCIAL JUSTICE SCAM 281–92 (2021) (arguing that political boycotts and buying sprees degrade the democratic process because they rely on "one dollar, one vote" rather than "one person, one vote").

134. Erika Bolstad, *Boycotting the Boycotters: In Oil-Friendly States, New Bills Aim to Block Divestment from Fossil Fuels*, IN THESE TIMES (Mar. 19, 2021), https://inthesetimes.com/article/fossil-fuel-divestment-ban-texas-north-dakota-oil [https://perma.cc/3HCL-SSJ3].

weak constitutional protections that only grew weaker after *FAIR*. But the Court's more recent holdings in *Citizens United* and *Janus* point toward stronger protections for boycotts. Political boycotts that have the purpose and effect of defunding an entity's speech express messages at the funding stage in the same way as political expenditures. Laws that restrict these boycotts thus compel speech and should be subject to exacting, if not strict, scrutiny. This conception could prove vital in protecting modern boycotts that respond to the political statements of ordinary companies and do not involve the visibly expressive marches and picketing of older boycotts.