BOYCOTTS: A FIRST AMENDMENT HISTORY

JOSH HALPERN AND LAVI M. BEN DOR

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Anti-boycott laws are more popular and pervasive today than ever before. More than half of U.S. states have "anti-BDS laws" that prohibit recipients of public contracts and state investment from boycotting the State of Israel. And almost as many have proposed or passed "anti-ESG" rules that restrict boycotts of fossil fuels, firearms, and other contested industries in similar ways. These controversial rules have triggered a fierce debate—and nationwide litigation—over whether the First Amendment includes a "right to boycott."

This Article is the first to take up the question from a historical standpoint. Examining the boycott's constitutional status from before the Founding to the present era, we find that state actors have consistently treated the boycott as economic conduct subject to governmental control, and not as expression presumptively immune from state interference. Before the Founding, the colonists mandated a strict boycott of Britain, which local governmental bodies enforced through trial proceedings and economic punishments. At common law, courts used the doctrine of conspiracy to enjoin "unjustified" boycotts and hold liable their perpetrators. And in the modern era, state and federal officials have consistently compelled

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participation in the boycotts they approved, while prohibiting participation in the ones they opposed.

The Article concludes that modern anti-boycott laws not only fit within, but improve upon, this constitutional tradition. As the Supreme Court's 1982 decision in NAACP v. Claiborne Hardware *illustrates, the common-law approach risks violating the First Amendment if applied to restrict not only the act of boycotting or refusing to deal, but also the expressive activities that accompany such politically motivated refusals. Modern anti-boycott laws minimize that problem by surgically targeting the act of boycotting while leaving regulated entities free to say whatever they please. Hence, from the standpoint of history, these laws reflect First Amendment progress, not decay.*

Anti-boycott laws are on the rise and making waves. Since 2015, more than half of U.S. states have enacted so-called "anti-BDS" laws, which prohibit public entities from investing in or contracting with companies that boycott the State of Israel.[1] These laws respond directly to the Boycott, Divestment and Sanctions ("BDS") movement—an international effort to levy pressure against Israel to extract policy concessions on Palestinian issues—and they convey a clear message to all BDS participants: "if you boycott against Israel, we [the State] will boycott you."[2] And that is just the tip of the anti-boycott iceberg. In the past few years alone, nearly twenty states have proposed or enacted "anti-ESG" laws that impose similar restrictions on financial firms that "boycott" fossil fuels, firearms,

1. *See infra* note 235 (collecting examples); Aila Slisco, *Companies Boycotting Israel Can't Do Business with These U.S. States*, NEWSWEEK (May 19, 2021), https://www.newsweek.com/companies-boycotting-israel-cant-do-business-these-us-states-1593099 [https://perma.cc/D2AA-TTHH] (listing the states with anti-BDS laws).

2. Scott Powers, *Airbnb Drops Ban on Listings of Jewish-Owned Properties in West Bank*, FLA. POL. (Apr. 9, 2019), https://floridapolitics.com/archives/293099-airbnb-drops-ban-west-bank/ [https://perma.cc/WF2Q-W9CE] (quoting Florida state representative Randy Fine); *see also* Gilad Edelman, *Cuomo and B.D.S.: Can New York State Boycott a Boycott?*, NEW YORKER (June 16, 2016), Https://www.newyorker.com/news/news-desk/cuomo-and-b-d-s-can-new-york-state-boycott-a-boycott [https://perma.cc/9V7A-8DWG] (quoting then-New York Governor Andrew Cuomo as defending an anti-BDS policy on the grounds that "[i]f you boycott against Israel, New York will boycott you").

and other contested industries.[3] These newer laws take aim at ESG—a movement to prioritize environmental, social, and corporate governance issues in investing—and convey a similar threat: "if you boycott Texas energy, then Texas will boycott you."[4]

Perhaps unsurprisingly, this wave of anti-boycott legislation has spawned a fierce debate and a swell of litigation over whether companies have a First Amendment right to engage in politically motivated boycotts.[5] Should these anti-boycott rules be viewed as valid limits on economic discrimination, or instead as restrictions on expressive activity that are calculated to thwart disfavored messages?

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3. *See, e.g.*, KY. REV. STAT. § 41.480 (fossil fuel boycott law); TEX. GOV'T CODE ANN. § 2274 (firearm boycott law); H. 3564, 125th Sess. (S.C. 2023) (proposed bill covering boycott of timber, mining, and agricultural industries); *see also* Brenna Goth, *State Lawmakers Push Texas-Style Business Penalties Against ESG*, BLOOMBERG LAW (Jan. 30, 2023), https://news.bloomberglaw.com/esg/state-lawmakers-push-texas-style-business-penalties-against-esg [https://perma.cc/5T8W-WCTY] (summarizing efforts in numerous state legislatures to enact such laws).

4. Mario A. Ariza & Mose Buchele, *Texas Stumbles in Its Effort to Punish Green Financial Firms*, NPR (Apr. 29, 2022), https://www.npr.org/2022/04/29/1095137650/texas-stumbles-in-its-effort-to-punish-green-financial-firms [https://perma.cc/WUM7-SMXY] (quoting Texas State Representative Phil King); *see also* Ross Kerber, Isla Binnie & Simon Jessop, *U.S. Finance Faces ESG Backlash, More To Come in 2023*, REUTERS (Dec. 27, 2022), https://www.reuters.com/business/sustainable-business/us-finance-faces-esg-backlash-more-come-2023-2022-12-27/ [https://perma.cc/KF8T-Z5J3].

5. *See* Jacey Fortin, *She Wouldn't Promise Not to Boycott Israel, So a Texas School District Stopped Paying Her*, N.Y. TIMES (Dec. 18, 2018), https://www.nytimes.com/2018/12/19/us/speech-pathologist-texas-israel-oath.html [https://perma.cc/FSU2-AZM9] ("[A]t the federal level . . . congressional lawmakers . . . are considering legislation that would keep American companies from participating in boycotts. . . . In the meantime, the state-level battles continue" in courts and statehouses.). For a sampling of cases challenging the anti-BDS laws, *see* Ark. Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021), *rev'd on reh'g en banc*, 37 F.4th 1386 (2022), *cert. denied*, 143 S. Ct. 774 (2023); A&R Eng'g & Testing Inc., v. City of Houston, 582 F. Supp. 3d 415 (S.D. Tex. 2022), *rev'd & rem'd*, 72 F.4th 685 (5th Cir. 2023); Martin v. Wrigley, 540 F. Supp. 3d 1220 (N.D. Ga. 2021), *aff'd*, No. 22-12827, 2023 WL 4131443, (11th Cir. 2023); Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717 (W.D. Tex. 2019), *vacated as moot sub nom.* Amawi v. Paxton, 956 F.3d 816 (5th Cir. 2020); Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1041–43 (D. Ariz. 2018), *vacated as moot*, 789 F. App'x 589 (9th Cir. 2020); Koontz v. Watson, 283 F. Supp. 3d 1007, 1021–22 (D. Kan. 2018). For the first-ever legal challenge to an anti-ESG law, *see* Hope of Ky., LLC v. Cameron, No. 322-CI-842 (Ky. Franklin Cir. Ct. Oct. 31, 2022).

Leading First Amendment scholars have lined up on both sides of that question.

Defenders of these laws maintain that "boycott" is just another term for the refusal to buy goods or services—a decision the law has long viewed as constitutionally unprotected under the First Amendment. Anti-boycott laws, they assert, should be treated no differently than other anti-discrimination, public-accommodations, and common-carrier rules, all of which compel commercial dealing without triggering heightened First Amendment scrutiny.[6] Hence, while the speech and expressive activities that precede and accompany a boycott may enjoy First Amendment protection, *the boycott itself*—that is, the act of refusing to deal with a particular counterparty—is not an inherently expressive act within the meaning of the First Amendment.

Critics of these laws rejoin with an appeal to precedent and the boycott's "historical pedigree."[7] Drawing on the Supreme Court's decision in *NAACP v. Claiborne Hardware*, critics insist that the political boycott has become so "deeply embedded in the American political process" that it has come to acquire heightened protection under the First Amendment's speech and assembly clauses.[8] So, even if anti-boycott laws are *conceptually* indistinguishable from

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6. *See, e.g.*, Eugene Kontorovich, *Can States Fund BDS?*, TABLET MAG. (July 13, 2015), https://www.tabletmag.com/sections/news/articles/can-states-fund-bds [https://perma.cc/YK79-725M]; Brief of Profs. Michael C. Dorf, Andrew M. Koppelman, and Eugene Volokh as Amici Curiae in Support of Defendants-Appellees at 3–17, Ark. Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021) (No. 19-1378) [hereinafter Dorf et al. Amicus Br.].

7. *See, e.g.*, Brief of First Amendment Scholars as Amici Curiae in Support of Plaintiff-Appellant at 3, 9, 13, *Waldrip* (No. 19-1378) [hereinafter First Amendment Scholars Amicus Br.]; Amanda Shanor, *Laws Aimed at Silencing Political Boycotts of Israel are Categorically Different than Public Accommodations Laws*, TAKE CARE (Feb. 21, 2019), https://takecareblog.com/blog/laws-aimed-at-silencing-political-boycotts-of-israel-are-categorically-different-than-public-accommodations-laws [https://perma.cc/694N-M832]; *see also* Brad Kutner, *US Chamber's CLO Defends Corporate Activism as Free Speech*, NAT'L L.J. (Nov. 11, 2022), https://www.law.com/nationallawjournal/2022/11/11/us-chambers-clo-defends-corporate-activism-as-free-speech/ [https://perma.cc/CJ2P-6F6S].

8. First Amendment Scholars Amicus Br. at 3, 9–10 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)). We use the terms "defender" and "critic" to refer only to scholars' views on the general *constitutionality* of anti-boycott laws.

other anti-discrimination laws, the critics still maintain that America's *history and traditions* have carved out the political boycott for special constitutional protection.[9]

That historical argument is vitally important to the modern debate over the constitutionality of anti-boycott laws. History and tradition have emerged as frequent—indeed dominant—modes of constitutional adjudication in the modern era, especially for a majority of the Justices on today's Supreme Court.[10] And yet, the historical record with respect to boycott regulation has largely evaded close scrutiny, with scholarly discussions limited almost exclusively to non-legal work focusing on *the politics of boycott movements*, rather than *the history of boycott regulation*.[11]

This Article begins to fill the scholarly void by taking up the historical inquiry through the prism of constitutional law. Its findings are straightforward: boycotts—no matter the motivation behind them—have long been treated as proscribable conduct, not sacrosanct expression. Government actors throughout U.S. history have regularly compelled compliance with the boycotts they support, while deterring or prohibiting participation in the ones they oppose. Until quite recently, no one appears to have seriously entertained the notion that these boycott regulations implicated, let alone abridged, the boycotter's First Amendment rights of speech, assembly, or association.

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9. *Cf.* Brief of American Unity Fund and Profs. Dale Carpenter and Eugene Volokh as Amici Curiae in Support of Respondents at 7, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) (acknowledging that economic conduct, though generally fair game for government regulation, may nonetheless be "covered by the Free Speech Clause when it is historically protected").

10. *See* Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 435 (2023).

11. *See, e.g.*, LAWRENCE B. GLICKMAN, BUYING POWER: A HISTORY OF CONSUMER ACTIVISM (2009). The only near-exceptions of which we are aware are James Gray Pope, *Republican Moments: The Role of Direct Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 330–35 (1990), and Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT'L L. 1, 28–31 (1999), each of which devotes a few pages to the possible First Amendment implications of colonial and revolutionary-era non-importation agreements. The relevant materials are discussed *infra* Sections II.A–B.

This history of governmental control over the boycott traces all the way back to the pre-Founding era, when the first Continental Congress mandated a boycott of British goods. The colonies enforced that mandate through certification requirements, much like the ones used by states to enforce their anti-boycott rules today. But unlike modern states, the colonies subjected those accused of violating the boycott mandate to full-blown trials and punished violators with severe sanctions.[12] A century later, judges at common law decided whether boycotters should be punished for engaging in civil and even criminal "conspiracies" based in large part on a judicial assessment of whether the boycotters' ends were "justified."[13] And in the late nineteenth and early twentieth centuries, U.S. courts employed the conspiracy laws to enjoin political boycotts of Chinese-owned business, just as America demanded that Chinese authorities impose reciprocal "suppression" of consumer boycotts in China aimed at American businesses.[14]

Boycott measures of the past fifty years follow a similar pattern, as governments have compelled compliance with the boycotts whose objectives they supported, while deterring or prohibiting participation in the ones they opposed. Throughout the 1980s, states and municipalities conditioned public investment, tax benefits, and contracts on compliance with the boycott of apartheid South Africa. Those same governments took the equal but opposite approach to boycotts of Israel: companies could access that same panoply of public benefits only by certifying that they would *not* join the boycott effort. These modern rules are notably less severe than some of their predecessors: rather than banning or compelling boycotts outright, they simply withhold benefits from those who fail to comply with the government's preferred boycott policy. In doing so, they fortify the constitutional understanding, reflected throughout the country's history, that boycotts are not speech or association and that governments enjoy broad latitude to control them, free from the constraints of the First Amendment. And while

12. *Infra* Section II.A.
13. *Infra* Section II.B.
14. *Infra* Section II.C.

the legacy of compelling boycotting is admittedly older and deeper than the corresponding tradition of banning or deterring boycotts, both strands exist clearly in the historical record, reflecting a unified understanding of the boycott as economic coercion, not protected expression.

Indeed, the modern anti-boycott laws constitute a meaningful constitutional improvement over the common-law conspiracy regimes that preceded them. In *NAACP v. Claiborne Hardware*, the Supreme Court held that those older regimes violate the First Amendment if they are applied to restrict not only the act of boycotting itself, but also the explanatory speech and expressive activities that accompany the boycott.[15] Modern anti-boycott rules avoid that problem by focusing surgically on *the boycott itself*, while leaving regulated entities and the government's contractual counterparties completely free to engage in whichever expressive activities they please. Hence, despite contemporary criticism, these laws reflect First Amendment progress, not decay.

The structure of this Article is straightforward and largely chronological. After a note on methodology, it marches through the relevant history, in which state actors compelled the boycotts they favored and deterred the ones they opposed. The analysis concludes by observing that modern anti-boycott laws fit within, and improve upon, this longstanding tradition by adding an extra layer of protection for the expressive activities that often accompany boycotts.

I. THE ROLE OF HISTORY IN FIRST AMENDMENT ANALYSIS—AND THIS ARTICLE

History's normative place in constitutional analysis is deeply contested at every step. Scholars disagree at the threshold over whether and how much history should matter to the analysis; they diverge over which periods of history should matter most; and they disagree over the kinds of historical practices that should bear upon

15. *See* NAACP. v. Claiborne Hardware Co., 458 U.S. 886, 913, 932–33 (1982).

the Constitution's meaning.[16] Our goal in this Article is to avoid these fraught debates and, instead, to offer a fundamentally descriptive account of how state actors viewed and treated the boycott from colonial times through the present. That said, we begin with a brief sketch of those debates to situate our descriptive analysis within the various normative frameworks.

The first and most fundamental debate in the scholarship concerns history's fundamental capacity to answer contested constitutional questions. Many "living" and "common-law" constitutionalists maintain that history and tradition cannot "provide the answers to the problems of today," but instead help, at most, to "frame the questions" of modern constitutional interpretation and to identify potential pathways along which the law might evolve.[17] By contrast, many originalists maintain that history can "constrain" the interpretive process by "provid[ing] relevant context that may disambiguate and enrich the semantic [original] meaning of the [Constitution's] text."[18]

But that latter camp is hardly uniform in its view of history. Originalist scholars disagree over which eras of history matter most to the interpretative analysis, and over which kinds of traditions deserve legal weight. To take just one pertinent example, scholars disagree over whether the Bill of Rights, as incorporated against the states by the Fourteenth Amendment, should be construed against the backdrop of pre-Founding historical practice, or instead against the prevailing understandings in 1868 when the Fourteenth Amendment was ratified.[19] And just as there is a debate about

16. *See* Jamal Greene & Yvonne Tew, *Comparative Approaches to Constitutional History*, *in* COMPARATIVE JUDICIAL REVIEW 379, 384 (Erin F. Delaney & Rosalind Dixon eds., 2018) (noting the "long-standing normative debate over the place of historical argument in US constitutional interpretation").

17. John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 533 (1964); *accord* David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973, 973–77 (2011).

18. Barnett & Solum, *supra* note 10, at 442, 446.

19. *See, e.g.*, Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1441 (2022) ("When the people adopted the Fourteenth Amendment, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings. There is only one Freedom of Speech

where history ought to "start," there is also a corresponding debate about where it ought to "end" in the analysis—and whether post-ratification historical practice can bear upon the Constitution's meaning. According to one camp, the Constitution's meaning was fixed entirely at ratification or shortly thereafter, and nothing that comes long after can bear upon its meaning.[20] Others have argued that early historical practice, in particular, is most likely to shed light on the Constitution's original public meaning because it is closest in time to the enactment of the constitutional language.[21] And still others maintain that even somewhat later historical practices may "settle" interpretive questions, if they previously divided Americans of generations past.[22]

In addition to these temporal debates, scholars are similarly divided over the kinds of post-enactment traditions and practices that may inform the Constitution's meaning. Some have suggested that entities as diverse as "Congress, the executive, state legislatures, common law courts, and maybe even juries" may contribute to "longstanding practice[s]" that fix the Constitution's meaning,[23]

Clause—the one the people spoke into existence in 1791 but then *respoke* in 1868." (emphasis in original)); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION at xiv, 223, 243 (1998) (similar); Richard H. Fallon Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1762–72 (2015) (describing the various methodological difficulties in identifying the relevant history); *see also* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2138 (2022) (acknowledging the debate).

20. *See, e.g.*, Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1168–69 (2003) (arguing that post-ratification sources only deserve weight if they come from the fifty years following ratification); *cf.* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1356 (2018) (taking the outlier view that the Constitution's text had a fully determinate meaning when ratified).

21. *See, e.g.*, Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 29–30 (noting that adherents of certain forms of the liquidation theory believe that "initial practice, which typically although not necessarily will be early practice," is most useful to understanding the Constitution, and that later history is largely irrelevant).

22. *See, e.g.*, William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 59–60 (2019).

23. Michael W. McConnell, Lecture, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1771–72 (2015). Note, too, that there is a debate over the *kinds of provisions* that may be "liquidated" through post-enactment historical practice. Some have argued

while others focus more narrowly on the federal branches in describing the kinds of state action that can meaningfully "liquidate" the Constitution's meaning.[24] Hence, even for those who place considerable stock in historical analysis, there is relatively little agreement about which history matters most.

These normative uncertainties afflict the different methodologies in different ways and to different degrees. For flexible approaches like "constitutional pluralism," the stakes are not terribly high and the problems are less acute, because the entire purpose of the method is to integrate new and diverse historical developments into the interpretive process.[25] But for more rigid originalist methodologies, there is considerable tension between the method's focus on the original public meaning and a willingness to consider subsequent history in explicating the text's meaning.[26]

That tension is especially sharp in the First Amendment context because, according to some leading First Amendment scholars, modern doctrine extends the protections of the First Amendment

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that "historical practice" plays a special role "in the separation of powers context," because in that context, reliance "on past practice . . . does not typically raise concerns about the oppression of minorities or other disadvantaged groups the way that it does in some individual rights areas." Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 416 (2012). By contrast, others maintain that the Constitution's rights and structural provisions are necessarily interconnected, and that post-enactment history may broaden or contract the scope of the rights provisions. *See* Baude, *supra* note 22, at 49–51; McConnell, *supra*, at 1775–76.

24. *Cf.* Baude, *supra* note 22, at 16–18; Bradley & Siegel, *supra* note 21, at 25–31.

25. *See, e.g.*, Richard H. Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189 (1987) (explaining the process of "reflective equilibrium" by which constitutional interpretation integrates *new* historical inputs); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994) ("Pluralistic theories of constitutional interpretation hold that there are multiple legitimate methods of interpreting the Constitution.").

26. *See* Barnett & Solum, *supra* note 10, at 435 (acknowledging this tension); *see also* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) (describing the "fixation thesis"); Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice 2–3 (Apr. 6, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 [https://perma.cc/4BFW-M6RP] (describing the "constraint principle").

well beyond its original public meaning.[27] Under many of the leading originalist accounts of the First Amendment, it seems that boycotts, even if politically motivated, would not have been viewed as protected "speech" or "assembly" as the Founders conceived of those concepts.[28]

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27. *See, e.g.*, Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 263 (2017) (arguing that "[a] huge swath of modern case law . . . falls outside of the First Amendment's original legal ambit," such that adhering to original meaning would require "a radical dismantling of speech doctrine"); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2168–69 (2015) (similar).

28. A leading scholarly view is that the Free Speech Clause was originally understood to protect only "well-intentioned statements of one's thoughts" and ban only "prior restraints," and that it broadly permitted legislatures to abridge expressive conduct to "promote the public good." Campbell, *supra* note 27, at 260, 263–64. By that account—and many others—the original Free Speech Clause did not enshrine a right to boycott, nor would it limit the government's ability to impose ex-post consequences for participation in a boycott, as modern anti-boycott laws do. *See, e.g.*, Lakier, *supra* note 27, at 2179 (arguing that the original First Amendment "provided to speakers almost-absolute protection against the prior restraint of speech or writing but only limited protection against after-the-fact punishment for what they uttered or wrote"); Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1083 (2009) (arguing that "the original meaning of the First Amendment protects symbolic expression to the same extent that it protects spoken, written, and printed verbal expression," but never suggesting that includes boycotts or other refusals to deal). For a more libertarian view, *see* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 924 (1993), which postulates that the Free Speech Clause's protection of expression was limited only by the rights of others.

The original Assembly Clause also would not have been understood to encompass an individual right to boycott under most, if not all, leading scholarly accounts. *See, e.g.*, Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1729 (2021) (offering a historical account of the right to assemble as "the right to use government to solve [social] problems," which might include "boycotts" or "throwing tea into the harbor," but never suggesting that individuals had an individual right to deviate from the majority's preferred boycott policy); Nicholas S. Brod, Note, *Rethinking a Reinvigorated Right to Assemble*, 63 DUKE L.J. 155, 162 (2013) (surveying the historical materials to show that "the right to peaceably assemble is best understood as an assembly right, one that protects in-person, flesh-and-blood gatherings like protests and demonstrations" (emphasis omitted)); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 547 (2009) (arguing that assembly covers collective deliberation on issues of public and political importance); Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 713 (2002) (arguing that the assembly right can be exercised only to petition the government); *see generally* James M. Jarrett & Vernon A. Mund, *The Right of Assembly*, 9 N.Y.U. L.Q. REV. 1, 13 (1931) (arguing that the original Assembly Clause did not mean that the government had "surrendered [its] right to control assemblages of

From a normative standpoint, then, it is not entirely clear what weight, if any, "history and tradition" should carry in a modern First Amendment analysis of the boycott. But, for purposes of this Article, we can set that complexity aside. That is because our goal is more modest: to offer a fundamentally descriptive account of the ways in which state actors have viewed and regulated the boycott since before the Founding through the present day. Our starting place is not "abstract principles," but instead concrete government "practices"—and the implied understandings that best explain them.[29] While much of that analysis will intersect with, and merit more or less weight under, various legal theories of the First Amendment, our focus is primarily on historical facts. That is why we need not, and do not, adopt or defend any particular view about what the Free Speech or Assembly Clause was originally understood to mean—or even what it should mean today.

Our approach will not satisfy a reader's instinct for grand narratives and first principles, but it does seem to fit reasonably well with several of the Supreme Court's most recent pronouncements on the role of history in the First Amendment context. In *Houston Community College Systems v. Wilson*,[30] for example, the Court took up the question of whether a governmental body violates the First Amendment by issuing a "purely verbal censure" against a public official for engaging in protected speech.[31] The case presented a doctrinal quandary of whether to view the "verbal censure" as an impermissible punishment for protected speech or as permissible counter-speech. Wilson answered that murky doctrinal question by reference to concrete historical practice: "When faced with a dispute about the Constitution's meaning or application, long settled and established practice is a consideration of great weight. Often, a

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people in the interest of good order and the peace of society"). *But cf.* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 576, 612 (2010) (advocating for a broad view of "assembly" that includes unpopular methods of political dissidence).

29. Marc O. DeGirolami, *Traditionalism Rising*, J. CONTEMP. LEGAL ISSUES (forthcoming 2024) (manuscript at 7), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4205351 [https://perma.cc/RUH5-LEQS].

30. 142 S. Ct. 1253, 1258 (2022).

31. *Id.* at 1259 (citations omitted).

regular course of practice can illuminate or liquidate our founding document's terms and phrases."[32] Surveying examples from "colonial times" all the way through the present, at both the state and federal levels, the Court discerned a uniform historical practice of verbal censure that effectively "put at rest the question of the Constitution's meaning."[33] That affirmative evidence was especially powerful, the Court explained, because nothing in the historical record "suggest[ed] [that] prior generations thought an elected representative's speech might be 'abridg[ed]' by censure."[34]

The Court took a similarly favorable view of post-enactment history in *City of Austin v. Reagan National Advertising of Austin, LLC*,[35] when it held that regulations of off-premises advertising are not "subject to strict scrutiny" under the Free Speech Clause, in large part, because of "the Nation's history of regulating off-premises signs."[36] A central question in *City of Austin* concerned the meaning of the Supreme Court's prior decision in *Reed v. Town of Gilbert*, and whether *Reed*'s test for "content-based" restrictions was broad enough to encompass regulations of off-premises adverting.[37] In upholding the regulation, the Court explained that "*Reed* did not purport to cast doubt on [the Court's prior] cases" taking a narrower view of the kinds of restrictions that counted as content-based, "[n]or did *Reed* cast doubt on the Nation's history of regulating off-premises signs."[38] The Court acknowledged that such regulations "were not present in the founding era," but they did trace back to the 1800s and were ubiquitous at all levels of government "for the last 50-plus years."[39] It held that this "unbroken tradition of on-/off-premises distinctions counsel[ed] against" subjecting such regulations to strict scrutiny.[40] The dissent, advocating for a more

32. *Id.* (citations omitted) (internal quotation marks omitted).
33. *Id.* at 1259–60 (internal quotation marks omitted).
34. *Id.* at 1260.
35. 142 S. Ct. 1464 (2022).
36. *Id.* at 1469, 1474–75.
37. *See generally* 576 U.S. 155 (2015).
38. *City of Austin*, 142 S. Ct. at 1474.
39. *See id.* at 1469, 1474–75.
40. *Id.* at 1475.

robust reading of *Reed*, criticized the majority's historical argument on the grounds that its "earliest example" traced back to the 1930s and that virtually all the rest postdated 1965.[41] But, critically, even the dissent agreed that "history and tradition" are, at the very least, "relevant to identifying and defining" doctrinal categories in the Free Speech Clause context.[42]

Cases like *Wilson* and *City of Austin* reflect the modern Supreme Court's broader commitment to resolving difficult conceptual and doctrinal questions by reference to the "historical understanding of the scope of the right" reflected in America's legal traditions.[43] That is the same methodology we apply here to the regulation of political boycotts: if textual, doctrinal, and conceptual arguments—under whatever legal theory of constitutional interpretation—leave room for doubt about the First Amendment's application, then history makes sense as a natural gap filler to resolve whether the boycott should be viewed as protected expression and association or as proscribable economic conduct.

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41. *Id.* at 1490 (Thomas, J., dissenting).

42. *Id.* (emphasis added).

43. District of Columbia v. Heller, 554 U.S. 570, 625 (2010); *see also* Barnett & Solum, *supra* note 10, at 455–78 (documenting this trend); *e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) ("An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some exception within the Court's Establishment Clause jurisprudence." (internal quotation marks omitted)); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130, 2136–37 (2022) (reaffirming the role of "historical evidence about the reach of the First [and Second] Amendment's protections" in constitutional adjudication, and stressing that, although post-enactment history cannot defeat the Constitution's plain text, it has a clear role to play in "liquidating indeterminacies" in that text (cleaned up)); *cf., e.g.*, Lange v. California, 141 S. Ct. 2011, 2022 (2021) (surveying "[t]he common law in place at the Constitution's founding" to help ascertain the scope of the Fourth Amendment); *cf.* Biden v. Knight First Amdt. Inst. at Columbia Univ., 141 S. Ct. 1220, 1223–24 (2021) (Thomas, J., concurring) ("[R]egulations that might affect speech are valid if they would have been permissible at the time of the founding."); Washington v. Glucksberg, 521 U.S. 702, 702 (1997) (stressing history and tradition as a method of analysis); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995) (concluding that "[o]ur tradition of free speech" deems a parade fundamentally expressive because, "from ancient times," public expression of ideas through assemblies such as parades "[has] been a part of the privileges, immunities, rights, and liberties of citizens" (citations omitted)).

But regardless of what one might think about history's normative place in First Amendment analysis, our descriptive analysis still has important work to do in the current debate over modern anti-boycott laws.[44] That is because one side in that debate has already seized the mantle of history to defend its view.[45] Critics of anti-boycott laws insist that these laws are distinguishable from anti-discrimination and common-carrier regulations—which similarly restrict refusals to deal but do not enjoy First Amendment protections—because history and tradition set the boycott apart for special constitutional protection.[46] But as far as we are aware, no one has ever attempted to undertake a rigorous examination of the full "history and tradition" of boycott regulation.

In fairness, critics of modern anti-boycott laws have chronicled the many admirable boycotts in America's past, claiming that these laudable projects elevate the boycott for special First Amendment protection.[47] But that is not the inquiry envisioned by the Supreme Court's recent precedents, nor is it the one prescribed by any of the leading normative accounts canvassed above.[48] The relevant question, as a matter of precedent and interpretive common sense, is whether "legal doctrine and practice" have conceived of the boycott as legally protected expression, not whether boycotts have been used more for good or bad purposes.[49] The legal history, surveyed for the first time below, appears to answer the relevant constitutional question in the affirmative: modern anti-boycott laws are consistent with the robust tradition of boycott regulation.

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44. *See, e.g.*, Br. in Opp. at 2–3, 8, Ark. Times LP v. Waldrip, 143 S. Ct. 774 (2023) (No. 22-379) [hereinafter *Waldrip* Opp. to Pet.] (citing an earlier draft of this Article to argue that Arkansas's anti-BDS law is constitutional because "[b]oycotting . . . has never been treated as speech" throughout history).

45. *Supra* notes 6–9 and accompanying text.

46. *Supra* notes 6–9 and accompanying text.

47. *See, e.g.*, Brian Hauss, *The First Amendment Protects the Right to Boycott Israel*, ACLU (July 20, 2017), https://www.aclu.org/blog/free-speech/first-amendment-protects-right-boycott-israel [https://perma.cc/QJ9S-4EQP]. *But see* GLICKMAN, *supra* note 11, at 61, 103, 111 & 337 n.38 (describing how white people in the antebellum South instigated race-based boycotts to promote slavery and segregation).

48. *See supra* notes 16–43 and accompanying text.

49. *Supra* note 43.

Our historical treatment of the boycott is the most thorough to date, but it is by no means exhaustive. Several important questions exceed our scope. First, we do not address contemporary labor and antitrust statutes and the ways in which courts have viewed politically motivated boycotts under those laws. That is because these laws have already received significant scholarly attention in other contexts, and because our inquiry is more historical and backward-looking.[50] For our purposes, any protracted discussion of modern doctrine would have, at best, diminished marginal returns.

Second, we avoid the thorny issue of whether religiously motivated boycotts are protected under the First Amendment's Free Exercise Clause.[51] As with the modern labor and antitrust statutes, there exists a vast body of historical literature on whether the Free Exercise Clause was originally understood to compel exemptions from neutral and generally applicable laws.[52] Viewing this issue from the pro-exemption perspective, it is at least conceivable that, when a closely held corporation refuses to buy goods or services from a particular vendor for religious reasons, it does not engage in speech for purposes of the Free Speech Clause, but does engage in

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50. *See, e.g.*, Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057 (2018); John E. Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U. L. REV. 705 (1962); *cf.* FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 414 (1990) (holding that the First Amendment did not protect "a group of lawyers [who] agreed not to represent indigent criminal defendants . . . until the . . . government increased the lawyers' compensation"); Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 226–227 (1982) (holding that a union's politically motivated secondary boycott of Soviet-sourced cargo violated the National Labor Relations Act and was not protected First Amendment expression).

51. *Cf.* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (describing the history behind the church autonomy doctrine and recognizing that a church's refusal to hire someone as clergy is categorically protected by the Free Exercise Clause, even if it violates an antidiscrimination statute).

52. The scholarly literature on this question is immense. For a sampling, compare Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Kurt T. Lash, *The Second Adoption of The Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1111–14 (1994); and Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55 (2020) (defending the exemption thesis), with AKHIL REED AMAR, THE BILL OF RIGHTS 327 n.96 (1998) (arguing that the thesis "lack[s] textual and structural support" and "finds next to no [historical] support").

religious exercise for purposes of the Free Exercise Clause. As far as we are aware, no one has ever raised a Free Exercise challenge to an anti-boycott law in litigation. And while our historical findings might indirectly bear on the Free Exercise question, we focus solely on free speech—because that is the issue actually being litigated in courts and debated in legislatures across the country.[53]

II. THE BOYCOTT IN EARLY AMERICAN LAW

Political boycotts have been a feature of American life since before the Founding.[54] And for just as long, they have been subject to rigorous governmental control. When the colonists agreed to undertake a mandatory boycott of British goods, colonial legislatures mandated compliance by putting violators on trial and imposing civil forfeiture or even criminal punishment. Shortly after the Founding, the Jefferson Administration picked up the thread and compelled Americans to boycott foreign merchants, insisting instead that they "Buy American." And just as boycotts were compelled in furtherance of governmental policy objectives, so too were they proscribed. Courts deployed the common law of civil and criminal "conspiracy"—and the state statutes codifying those rules—to enjoin boycotts they deemed "unjustified," including, among the most prominent examples, efforts to drive Chinese immigrants and their businesses out of the western United States.

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53. One final below-the-line caveat: the historical inquiry in this Article necessarily implicates difficult questions regarding the "level of generality" at which a potential constitutional right ought to be described. *See* Laurence Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990). We define the right specifically and narrowly—as the "right to engage in a political boycott," and not at a more general level as a "right to refuse to deal" or a "right to engage in symbolic inaction." We do so because that is the formulation critics rely upon in litigation to evade the conceptual equivalence between anti-boycott laws and anti-discrimination laws generally. *Cf.* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J.) (looking to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified").

54. *Supra* note 47. The term "boycott" was not coined until 1880 in Ireland, after tenants in a rent dispute organized a "boycott" of their land agent, Captain Charles Cunningham Boycott. *See* GLICKMAN, *supra* note 11, at 115. That is why the particular term "boycott" makes no appearance in colonial- and Founding-era materials.

That landscape sits in considerable tension with an expressive view of the boycott. If boycotts were indeed inherently expressive, then the states and the federal government should not have been permitted to proceed as they have, compelling the boycotts with which they agreed and banning or deterring those whose objectives they detested. The best explanation for this early history is that the boycott was traditionally viewed as a tool of economic coercion subject to government control, and not as an inviolable method of individual expression or collective association.

A. Compelled Boycotts at the Founding

Critics of anti-boycott laws often cite the Revolutionary-era boycotts of the British as evidence that boycotts are a fundamentally expressive feature of our politics. Senator Rand Paul, for example, has argued that "boycotting is speech" because America was "founded with a boycott" and that the method of protest is "fundamental to our country."[55] But a closer look at the early history reveals the opposite—that the Continental Congress, and the colonial governments that enforced its decisions, did not conceive of the boycott as a matter of free expression, presumptively immune from coercion or state influence. Instead, the colonists viewed their boycott of the British as an economic instrument that their governing democratic bodies had the authority to control and compel.[56]

In October 1774, the First Continental Congress passed the Articles of Association, charging the colonies to boycott British goods unless and until the Coercive Acts were repealed.[57] The signatories

55. 165 CONG. REC. S828 (daily ed. Feb. 4, 2019) (statement of Sen. Rand Paul); *accord* Alice Speri, *Anti-BDS Laws Could Upend the Constitutional Right to Engage in Boycott*, THE INTERCEPT (Nov. 29, 2021), https://theintercept.com/2021/11/29/boycott-film-bds-israel-palestine/ [https://perma.cc/W3Q2-8DS2] (quoting ACLU attorney as claiming, "It would be shocking for a court to say that there is no right to participate in a political boycott, given the long history of boycotts in this country all the way back to the Boston Tea Party, the Montgomery Bus Boycott, boycott of apartheid South Africa. . . . This is a rich tradition.").

56. *Cf.* Hous. Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253, 1259 (2022) (holding that a form of government action did not intrude on free speech because it had been regularly used by states dating back "[a]s early as colonial times").

57. ARTICLES OF ASSOCIATION OF 1774.

called for a "Non-importation, Non-consumption, and Non-exportation Agreement,"[58] under which individual colonies would "create their own administrative and judicial machinery and . . . impose their own penalties" on those who failed to comply.[59] In his leading history on the subject, Arthur Schlesinger explains that

> [t]his machinery was to consist of a committee in every county, city and town, chosen by those qualified to vote for the representatives in the legislature. These committees were "attentively to observe the conduct of all persons touching this association," and, in case of a violation, to publish "the truth of the case" in the newspapers, to the end that all such "enemies of the American liberty" might be universally contemned [sic] and boycotted.[60]

The precise mechanisms of enforcement varied among the colonies, but several operated in the mirror image of modern anti-boycott laws. Providence, for example, "facilitated the enforcement of the non-consumption regulation by requiring all dealers to show a certificate that the goods offered for sale conformed in every way to the specifications of the Association."[61] In New York, the well-known merchant Abraham H. Van Vleck was compelled in 1775 to issue a public confession and apology for breaching the boycott—what he called "a most atrocious Crime against my Country."[62] In Virginia, too, those who refused to join the boycott "could expect to be branded an 'enemy of the country.'"[63] Connecticut authorized "committee[s] of inspection" to extract "a written confession of [a violator's] guilt in violating this regulation and a promise to deposit

58. *Id.* The term "boycott" had not yet been invented; it was coined a century later in Ireland. *Boycott*, ENCYCLOPEDIA BRITANNICA (Oct. 9, 2023), https://www.britannica.com/topic/boycott [https://perma.cc/ Q942-NYXC].

59. ARTHUR MEIER SCHLESINGER, THE COLONIAL MERCHANTS AND THE AMERICAN REVOLUTION, 1763-1776, at 427 (1918).

60. *Id.*; *see also* DANA FRANK, BUY AMERICAN: THE UNTOLD STORY OF ECONOMIC NATIONALISM 8 (1999) (describing this as a call to "set up an official enforcement system").

61. SCHLESINGER, *supra* note 59, at 486.

62. Abraham H. Van Vleck, *To the Public.* (1775), https://www.loc.gov/resource/rbpe.10803200/ [https://perma.cc/V7UN-9UH9].

63. ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789, at 263–64 (rev. ed. 2005).

his surplus profit with the committee."[64] Alternatively, the accused would undergo full trial "proceedings": a formal summons, a charge, an invitation to defend himself, and a chance to present witnesses.[65] A guilty verdict required the defendant to "forfeit all commercial connections with the community."[66]

These regimes were strictly enforced. Connecticut "universally adhere[d] to all the Resolves of Congress."[67] New York's Lieutenant Governor Cadwallader Colden declared that "the non importation association of the Congress is ever rigidly maintained in this Place."[68] Similar sentiments were expressed in South Carolina; its General Committee noted that "the Association takes place as effectually as law itself . . . and that ministerial opposition is here obliged to be silent."[69]

Opponents of the colonial boycott, much like the critics of boycott restrictions today, sometimes framed their opposition in terms of free expression and conscience. Josiah Martin, the last British Governor of North Carolina, complained that the local committees tasked with enforcing the Articles of Association were "forcing his Majesty's subjects *contrary to their consciences* to submit to their unreasonable, seditious and chimerical Resolves."[70] The Quakers in Pennsylvania similarly claimed that the boycotts "manifested great inattention to our religious principles . . . and the rules of Christian discipline" by requiring participation in what they considered subversive political acts.[71]

But the Continental Congress and local colonial associations paid such voices no heed and made no exception for pacifists or political dissenters. In his famous letter to Richard Henry Lee, George

64. SCHLESINGER, *supra* note 59, at 487.
65. *Id.*
66. *Id.* at 488.
67. *Id.*
68. *Id.* at 493.
69. *Id.* at 529.
70. *Id.* at 525.
71. *Id.* at 496-97; *cf.* NOAH FELDMAN, THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT 19–21 (2017) (describing James Madison's mixed reaction to the Quakers' religiously motivated opposition to the non-importation agreements).

Mason defended the compelled colonial boycott against the charge that it was "infringing the Rights of others," on the grounds that "[e]very Member of Society is in Duty bound to contribute to the Safety & Good of the Whole," and that "those merchants who have conformed themselves to the opinion and interest of the country have some right to expect that *violators* of the Association shou[l]d *suffer* upon the Occasion."[72] For Mason and others, the boycott was a tool of economic pressure, not a protected method of individual expression—which is why the decision to boycott (or not) was one for the political majority, based upon its assessment of the "safety and good of the whole," and not for individual colonists.[73] In the colonial mind, the boycott was a form of economic coercion, calculated to "distress the various Traders & Manufacturers in Great Britain," not a personal right of expression vested with the individual boycotter.[74]

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72. Letter from George Mason to Richard Henry Lee (June 7, 1770), *in* 1 THE PAPERS OF GEORGE MASON, 1725–1792, at 116, 118 (Robert A. Rutland ed., 1970) (emphasis in original).

73. PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765–1776, at 138 (1972) (ascribing to Samuel Adams, another prominent defender of the compelled boycott, the view that compelled boycotts were justified because "individuals were bound to act according to the common will of their fellow citizens or to leave").

74. Letter from George Mason to George Washington (Apr. 5, 1769), *supra* note 72, at 99; MAIER, *supra* note 73, at 137 (describing the nonimportation association as a reflection not of "individual rights," but instead of "the corporate rights of the community" to govern itself through "the associations' right to coerce nonconformers").

We are aware of only a single Founding-era source that has been interpreted by some to represent a contrary view of the boycott as constitutionally protected activity. Christopher Gadsden, a delegate to the First Continental Congress, argued in a letter that "every body of *English* freemen, in cases of extremity like ours, have an undeniable constitutional right besides, if they think it necessary for their preservation, to come into such a[] [nonimportation] agreement." Letter from Christopher Gadsden to Peter Timothy (Oct. 26, 1769), *in* THE LETTERS OF FREEMAN, ETC.: ESSAYS ON THE NONIMPORTATION MOVEMENT IN SOUTH CAROLINA 57, 67 (R. Weir ed., 1977) (W. Drayton ed., 1771) (quoted in part in Pope, *supra* note 11, at 333, and Porterfield, *supra* note 11, at 30). Taken in context, Gadsden's position fits neatly with the broader colonial conception of the boycott as a collective tool of public revolution, not an instrument of protected expression. For Gadsden, the "constitutional right" is one of a collective (a "body") to exercise its combined economic power, "in cases of extremity" and when "necessary for [a people's] preservation"—the exact opposite of a private right of expression.

The nonimportation associations thus evince a decidedly non-expressive view of the boycott. The First Continental Congress mandated a boycott; the colonies then used certification techniques to police their citizens for compliance; they held formal trials for the alleged violators; and, for the guilty, they issued formal punishments and prohibited economic associations.[75] That is roughly analogous to today's anti-boycott laws, under which states agree to deal only with those who decline to boycott Israel, ensure compliance through certification, and break off economic associations with violators. Indeed, the Articles of Association painted with a far broader brush than today's anti-boycott laws, applying equally to individuals and businesses and without exception for even *de minimis* trades and transactions.[76]

Of course, the analogy between the early nonimportation rules and modern anti-boycott laws is not perfect. For one thing, the Articles of Association were not "mandatory," strictly speaking, because the First Continental Congress lacked *de jure* legislative power. But it would be a mistake to overstate that formal distinction. First of all, each of the colonies implemented that Articles' mandate through political processes that were undisputedly

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75. ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789, at 188 (2005).

76. A number of anti-BDS laws, for instance, exempt individuals, small businesses, and low-value contracts from their purview. *E.g.*, ALA. CODE § 41-16-5(c) (exception for state contracts for less than $15,000 or noncompliant businesses willing to accept at least 20% less than the lowest bid from a compliant firm); ARIZ. REV. STAT. ANN. §§ 35-393, 35-393.01(a) (law limited to "contract[s] with a value of $100,000 or more" with companies with at least ten employees); CAL. PUB. CONT. CODE § 2010 ($100,000 Minimum); GA. CODE ANN. § 50-5-85(b) (exception for contracts worth less than $100,000); KAN. STAT. ANN. § 75-3740e(c) (exclusion for deals worth no more than $100,000 or entered into by sole proprietorships); KY. REV. STAT. ANN. § 45A.607(2) (carveout for individual contractors, companies with five or fewer employees, and contracts worth less than $100,000); LA. STAT. ANN. § 39:1602.1(F) (same, except no sole-proprietor exception); MO. REV. STAT. § 34.600(2) ("This section shall not apply to contracts with a total potential value of less than one hundred thousand dollars or to contractors with fewer than ten employees."); OKLA. STAT. tit. 74, § 582(D) (exceptions for sole proprietors and deals worth $100,000 or less); S.D. Exec. Order No. 2020-01, § 3 (limiting anti-boycott mandate to contracts worth at least $100,000 with companies that have at least five employees).

coercive.[77] And, second, to quote Schlesinger, the text of the Articles "exposed its real character as a *quasi-law*, inasmuch as its binding force was not limited to those who accepted its provisions but was made applicable to 'all persons.'"[78] The Articles were, in other words, "the first prescriptive act of a national Congress to be binding directly on individuals, and the efforts at enforcement of or compliance with [their] terms certainly contributed to the formation of a national identity."[79] The local committees that enforced the nonimportation mandate—through economic isolation and more punitive measures—represented "new systems of colonial government . . . which were in many ways more democratic" than the existing colonial legislatures.[80] Indeed, President Abraham Lincoln explained in his First Inaugural Address that the Union was "much older than the Constitution[,]" having been "formed, in fact, by the Articles of Association in 1774" before being "matured" by the Declaration of Independence and the Articles of Confederation.[81] The germ of American democracy, then, was born from a system in which participation in a political boycott was not freely chosen, but instead was ordained from on high and vigorously enforced. And while there was no First Amendment at the time to constrain the decisions of the First Continental Congress and the state legislatures, freedom of speech as a natural right was certainly part of the prevailing legal culture.[82] That the same generation of founders embraced both the Free Speech Clause and the Articles of Association suggests that the values underlying the former were not undermined by the latter.

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77. *Supra* notes 59–73 and accompanying text.

78. SCHLESINGER, *supra* note 59, at 428.

79. DENNIS J. MAHONEY, *Association, The*, *in* 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 132, 132–33 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000); MAIER, *supra* note 73, at 135 (nonimportation bodies "increasingly exercised functions normally reserved to a sovereign state").

80. FRANK, *supra* note 60, at 9.

81. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), https://avalon.law.yale.edu/19th_century/lincoln1.asp [https://perma.cc/2ND3-HHC6].

82. *See* Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 529–34 (2019).

Subsequent practice supplies little reason to think the First Amendment upended the colonial conception of the boycott. To the contrary, the earliest pieces of formal legislation in American history implicitly ratified the notion that the boycott could be regulated as economic conduct. Soon after the Founding, Congress—at President Thomas Jefferson's urging—passed a succession of laws requiring Americans to boycott certain foreign nations. The Non-Importation Act prohibited Americans from importing most goods made from leather, silk, hemp, flax, tin, or flax that were made or sold in Britain.[83] Offenders faced forfeiture of their goods and fines thrice the value of the products.[84] Next came the Embargo Act of 1807, which similarly threatened hefty fines and forfeiture of the offending goods (and the vessels that carried them) for anyone who violated the mandatory boycott of all foreign imports.[85] Congress partly repealed the Embargo Act two years later through the Non-Intercourse Act, which permitted Americans to trade with some countries but still left intact the compelled boycotts of Britain and France.[86] Opponents of the bills decried "an invasion" of "the liberty of the people" and of their "civil rights" to dispose of property as they pleased.[87] But, as far as we are aware, the Congress that passed the laws never appears to have entertained the possibility that mandatory boycotts might somehow intrude on the freedom of speech or association.

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83. Non-Importation Act, Pub. L. No. 9-29, 2 Stat. 379 (1806).

84. *Id.*

85. Embargo Act of 1807, Pub. L. No. 10-5, 2 Stat. 451. The enforcement mechanisms did not originate in the Embargo Act itself but rather arose in two supplementary acts passed in subsequent months. Act of Jan. 8, 1808, Pub. L. No. 10-8, 2 Stat. 453; Act of Mar. 12, 1808, Pub. L. No. 10-33, 2 Stat. 473.

86. Non-Intercourse Act, Pub. L. No. 10-24, 2 Stat. 528 (1809).

87. WILLIAM J. WATKINS, JR., RECLAIMING THE AMERICAN REVOLUTIONS: THE KENTUCKY AND VIRGINIA RESOLUTIONS AND THEIR LEGACY 88 (2004); REUEL ROBINSON, HISTORY OF CAMDEN AND ROCKPORT, MAINE 136 (1907); *see also* Blakely Brooks Babcock, The Effects of the Embargo of 1807 on the District of Maine 9 (1963) (M.A. thesis, Trinity College) (on file at the University of Maine) (chronicling that objectors to the embargo accused the federal government of intruding on their "right of 'acquiring property', or of enjoying it and possessing it").

The same held true for the "buycott," the politically motivated decision to affirmatively patronize a particular firm. That practice has a pedigree in American politics nearly as old as the boycott,[88] and yet early state governments had no compunctions about telling Americans from whom they needed to buy and when. In one notable example, Henry Clay, a strong supporter of Jefferson's embargo policies, "introduced a resolution" in Kentucky requiring state legislators to wear "homespun suits" made in the United States and boycott those made from "British broadcloth."[89] That Clay and his fellow representatives believed they could *compel* Kentuckians (or at least members of the Kentucky legislature) to buy and wear American goods, and thus boycott British ones, underscores their view of the boycott and the buycott as economic acts, not protected expression. Clay's proposal passed with overwhelming support; the more prominent of the two dissenters was Humphrey Marshall, an "aristocratic lawyer who possessed a sarcastic tongue" and whose opposition to the measure escalated into a duel with Clay.[90] But even Marshall, an attorney, never suggested that Clay's proposition subverted his free-expression rights or compelled him to engage in speech with which he disagreed.

The lesson of the Clay anecdote should be clear, yet critics of anti-boycott laws consistently miss the point. Senator Paul (R-KY), for example, has tried to recruit this example as support for his critical view: "In my State," he says, "Henry Clay was famous for passing legislation boycotting British goods so that people could wear American clothing. He actually fought a duel over that and became

88. *See* GLICKMAN, *supra* note 11, at 69–72 (tracing the "buycott" back at least to the Free Produce movement of the 1820s, in which Quaker and free black abolitionists encouraged consumers to buy exclusively products made by "free labor"). For a more modern example, *see* Shauna Snow, *ACLU Starts a "Buycott" of TV Programs*, L.A. TIMES, Oct. 13, 1989 (describing campaign "in which members will be urged to go out of their way to buy the [favored] companies' products").

89. CLEMENT EATON, HENRY CLAY AND THE ART OF AMERICAN POLITICS 17 (1957); DAVID S. HEIDLER & JEANNE T. HEIDLER, HENRY CLAY: THE ESSENTIAL AMERICAN 71 (2010).

90. EATON, *supra* note 89, at 17.

famous and then became one of the most famous U.S. Senators."[91] From that story, the Senator concludes that it is part of the American identity "that you should be allowed to boycott, that it is an extension of your speech, that it is an extension of the First Amendment."[92] The history is mostly right, but the lesson is backwards. Clay was attempting to compel participation in the boycott preferred by the legislature, and he was willing to shoot and kill the leading holdout to preserve the boycott's integrity. Rather than establishing the boycott as a mode of individual expression, these early events show that governments could and did mandate boycotts and buycotts as tools of economic policy.[93]

* * *

Before moving on, it is worth observing that the great majority of the early historical examples concern compulsion of a political boycott, whereas modern anti-boycott laws involve deterrence or prohibition of the boycott. As a result, this earliest history cannot, in the Supreme Court's words, "put at rest the question of the Constitution's meaning" with respect to modern anti-boycott laws.[94] Still, the colonial examples are at least meaningfully probative for two fundamental reasons.

First, the colonial examples provide affirmative historical support for the doctrinal distinction—which underlies modern anti-boycott laws—between the unprotected economic act of boycotting (i.e., refusing to deal with) a particular counterparty, on the one hand, and the protected *expressive* activities that often precede and accompany the boycott, on the other. It is clear that the Founders and colonial

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91. Statement of Senator Rand Paul, *supra* note 55, 165 CONG. REC. at S828.

92. *Id.*

93. "Buy American" initiatives like Henry Clay's cropped up repeatedly over the next two centuries. *See, e.g.*, Exec. Order No. 14,005, 86 Fed. Reg. 7475 (Jan. 25, 2021) (Biden Administration adopting preference for American-made goods in government procurement to replace those adopted by the Trump Administration); Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (Apr. 18, 2017) (Trump Administration implementing similar measures); Buy American Act, Pub. L. No. 72-428, 47 Stat. 1520 (1933) (codified as amended at 41 U.S.C. §§ 8301–8305) (enacting similar policy).

94. Hous. Cmty. Coll. Sys. v. Wilson, 595 U.S. 468, 476 (2022) (quoting M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819)) (internal quotation marks omitted).

governments had no compunctions about compelling boycotts and no sympathy for conscientious objectors—because boycotting, to them, was not speech. Several Founders, including Samuel Adams and George Mason, made clear their view that individuals had no expressive right to defy the binding majoritarian determinations of colonial assemblies with respect to the boycott.[95] At the same time, however, those same Founders recognized and defended a right to engage in certain expressive activities that preceded and sometimes accompanied the refusal to deal. Adams, for example, "justified" the colonial "conventions and committees for the purpose of regulating the economy" and boycotting the British as an exercise of the "right of the people 'to assemble upon all occasions to consult measures for promoting liberty and happiness.'"[96] As Adams saw it, "a free and sensible People when they felt themselves injured . . . had a Right to meet together to consult for their own Safety"—that is, a right to assemble, to deliberate collectively, and to vote on their preferred boycott policy, free from British interference.[97] This Founding-era understanding presages the modern doctrinal distinction—between boycotts and antecedent expression—that harmonizes anti-boycott laws with the First Amendment.

Second, the colonial examples also force the critics of anti-boycott laws into an awkwardly asymmetric view of the First Amendment. The colonists and early legislatures, in their view, must have been

95. *See supra* notes 72–73 and accompanying text.

96. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 323–24 (1969) (quoting Benjamin Rush's Diary (Feb. 4, 1777), and a letter from Daniel of St. Thomas Jenifer to Governor Thomas Johnson, Jr. (May 24, 1779)).

97. L. F. S. Upton, *Proceedings of Ye Body Respecting the Tea*, 22 WM. & MARY Q. 287, 292–93 (1965); *see also* WOOD, *supra* note 96, at 312 ("It was this right of assembly that justified the numerous associations and congresses that sprang up during the Stamp Act crisis, all of which were generally regarded as adjuncts . . . of the constituted governments."); WILLIAM S. POWELL, NORTH CAROLINA THROUGH FOUR CENTURIES 171–73 (1989) (explaining that the North Carolina Provincial Congress justified its exercise of political authority against the British on the theory that it was "the right of the people, or their representatives, to assemble and petition the Crown for relief from their grievances"); MAIER, *supra* note 73, at 71–72 (similar); Pope, *supra* note 11, at 336–37 (describing the colonial-era connection between "the right of assembly" and the exercise of "popular *sovereignty*" (emphasis added)).

allowed to *compel* a boycott (as the colonists, the Jefferson administration, and the Clay-led legislature did), but they absolutely could not prohibit, deter, or even chill a boycott. To be fair, there is clearly an intuitive difference between *requiring* a person to purchase goods from a certain source and *prohibiting* them from buying from that source.[98] But, as we explain below, that distinction has been understood historically as a reflection of the freedom of *contract*, not of speech.[99] We have found no affirmative evidence in the historical record to suggest that this distinction bears any *First Amendment* significance, and the post-Founding history cuts decisively the other way. The most natural reading of the early sources, we think, is that the boycott—along with its close cousin, the buycott—was seen as a tool of economic coercion, and not as a fundamentally expressive act immune from governmental control. That is why the government could prevent people from buying British goods, as the First Continental Congress did, and why it could require that people "Buy American," as the Jefferson-era Congress did indirectly and Henry Clay did outright.

It is also worth noting that the asymmetric view is incompatible with modern First Amendment doctrine, which treats compulsion and prohibition as two sides of the same unconstitutional coin. As the Supreme Court has explained, "[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."[100] In fact, compelled speech is ordinarily

98. *Cf.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 649–50 (2012) (Scalia, J., dissenting) (distinguishing, for purposes of the Commerce Clause, between forcing someone to buy a product they do not want and regulating participants who have voluntarily opted into a particular market).

99. *See infra* notes 253–254 and accompanying text.

100. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796–97 (1988); *see also* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) ("There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." (quoting Est. of Hemingway v. Random House, Inc., 244 N.E.2d 250, 255 (N.Y. 1968));

viewed as the more sinister of the two offenses against free expression, since it "coerce[s] [people] into betraying their convictions."[101] If the Founders could compel a boycott, then modern First Amendment logic dictates that they could prevent one, too. Subsequent historical practice directly supports this view, and we turn to that evidence next.

B. Prohibited Boycotts as Common-Law Conspiracies

Since the nineteenth century, American courts have held boycotters liable under the common law of "conspiracy" whenever they agreed to a boycott that interfered unjustifiably in the business enterprise of a third party.[102] By the end of the century, a majority of the states had codified conspiracy doctrines in their criminal codes.[103] Under these various laws, judges would determine whether a particular boycott was "justified," so to speak, by "evaluat[ing] the social worth of the boycotters' objective" and then balancing that value against the harms wrought upon the target of the boycott.[104] If the boycott was deemed to be "unjustified," judges

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cf. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974) (no practical difference between compulsion and prohibition of newspaper publication).

101. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2464 (2018) ("[A] law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." (quoting W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 633 (1943)).

102. Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 643–44 (1941) (discussing Mogul Steamship Co. v. McGregor, 23 Q.B.D. 598 (1889), which held that combinations may be criminal if "the act agreed to 'between the defendants must have been the intentional doing of some act to the detriment of the plaintiffs' business without just cause or excuse'"); *see also* Joseph E. Ulrich & Killis T. Howard, *Injuries to Business Under the Virginia Conspiracy Statute: A Sleeping Giant*, 38 WASH. & LEE L. REV. 377, 387 (1981). The origins of this doctrine can be traced at least as far back as Bromage v. Prosser, 4 Barn. & C. 247, 255 (1825), which defined malice as a "wrongful act, done intentionally, without just cause or excuse."

103. *See* ROBERT SAMUEL WRIGHT, THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS 237–52 (1887) (collecting statutes).

104. Note, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131, 1154–56 (1980); *see also, e.g.*, Plant v. Woods, 57 N.E. 1011, 1014–15 (Mass. 1900) (holding, over a dissent from then-Chief Justice of the Supreme Judicial Court Oliver Wendell Holmes, that union defendants' striking activity was unlawful: "The necessity [of the boycotters' cause] is not so great . . . as compared with the right of the plaintiffs to be free from

would then issue injunctions against further boycotting activities and award damages for any economic harms that the target was forced to endure as a result of the unlawful boycott.[105] That body of law is difficult to square with an "expressive" view of the boycott, and instead suggests that the boycott was viewed as an economic tool that states—and even state-court judges—could freely regulate in their discretion.

The application of conspiracy laws to boycotts cropped up most often in the labor context, with the earliest cases revealing a deep hostility to union boycotts.[106] In *State v. Glidden*,[107] the first published American decision to use the term "boycott," the Connecticut Supreme Court affirmed the convictions of a group of union sympathizers under the state's criminal conspiracy laws.[108] The defendants passed out leaflets urging the public not to buy papers from or advertise with a publishing company that had refused to hire solely union members: "A word to the wise is sufficient, boycott the *Journal* and *Courier*!"[109] The court rejected the defendants' claims that they had a right to advocate for the boycott, on the theory that such a right would subject "all business enterprises . . . to their dictation. No one is safe in engaging in business, for no one knows . . . whether law and justice will protect the business, or brute force, regardless of law, will control it."[110] The boycott was so powerful an instrument, the court opined, that its freewheeling use would result in ever-escalating "abuses and excesses."[111]

The next prominent decision in this area was *Crump v. Commonwealth*,[112] in which the Virginia Supreme Court took a similarly

molestation, such as to bring the acts of the defendant under the shelter of the principles of trade competition.").

105. *E.g.*, Ulrich & Howard, *supra* note 102, at 407 (damages); Plant v. Woods, 176 Mass. 492, 504 (Mass. 1900) (injunction).

106. *See* GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND 35–37 (1999).

107. 8 A. 890 (Conn. 1887).

108. MINDA, *supra* note 106, at 36.

109. *Id.* (quoting *Glidden*, 8 A. at 898) (internal quotation marks omitted).

110. *Id.* (quoting *Glidden*, 8 A. at 894) (internal quotation marks omitted).

111. *Id.* at 36–37 (quoting *Glidden*, 8 A. at 894–95) (internal quotations marks omitted).

112. 6 S.E. 620 (Va. 1888).

hostile view of the boycott. That case, like *Glidden*, involved a conspiracy conviction arising from a union-organized boycott, in which the defendant and others had sent letters to patrons of a non-unionized printing firm threatening to "black list" all who violated the boycott.[113] The court condemned the tactic, describing the "essential idea of boycotting" as "a confederation . . . of many persons, whose intent is to injure another by preventing any and all persons from doing business with him, through fear of incurring the displeasure, persecution, and vengeance of the conspirators."[114] The court thus declared boycotts "unlawful, and incompatible with the prosperity, peace, and civilization of the country; and, if they can be perpetrated with impunity by combinations of irresponsible cabals or cliques, there will be an end of government and of society itself."[115]

To these state courts, the boycott reflected the use of a collective economic power—a kind of quasi-sovereign power—over which the government could and should exercise plenary control to prevent economic and societal harm. As then-Judge William Howard Taft observed, "Boycotts, *though unaccompanied by violence or intimidation*, have been pronounced unlawful in every state of the United States where the question has arisen, unless it be Minnesota."[116]

But judicial perspectives on the union boycott were dynamic, evolving, and hardly uniform. As the historian E.P Cheney recognized at the time,

> [t]he criminality of [the boycott] has been looked upon quite differently by different judges. In cases in Wisconsin and Virginia . . . the boycott was condemned *in toto*, as a criminal conspiracy; while in cases in the New York state courts, and . . . in Connecticut,

113. *Id.* at 622, 629.

114. *Id.* at 627.

115. *Id.* at 630.

116. Thomas v. Cincinnati, N.O. & T.P. Ry. Co., 62 F. 803, 819 (C.C.S.D. Ohio 1894) (emphasis added). Boycotts were subsequently held unlawful in Minnesota as well. Ertz v. Produce Exchange of Minneapolis, 81 N.W. 737 (Minn. 1900).

> the extent to which boycotts are legal and the point at which they become criminal are clearly and on the whole liberally defined.[117]

Indeed, some courts were particularly sympathetic to boycotts that were "motivated by the prospect of immediate economic gain for [the boycotters] themselves."[118] It was appropriate, in their view, for workers to engage in a boycott, even if it caused some "incidental" damage to their employer, so long as their "primary purpose" was "to better the condition of the boycotters as laborers, and not to do irreparable injury" to their employer.[119] But even under that more defendant-friendly construction of the conspiracy laws, "broader or more attenuated motives" for boycotts "were [still] condemned as 'malicious.'"[120]

This disuniformity evoked sharp critique from some nineteenth-century commentators and judges, concerned about the ways in which the conspiracy laws authorized judges to enjoin or punish boycotters based on their subjective, ad hoc assessments of the defendants' objectives. But, as far as we are aware, none of the prominent critics ever suggested that the conspiracy laws ran afoul of the First Amendment. Most famous among them, Oliver Wendell Holmes Jr. wrote at length about the contested political judgments behind every application of the conspiracy statutes. Surveying a broad swath of decisions, Holmes reasoned that the ultimate "ground of decision" in the cases was "policy," and that "judges with different economic sympathies" were deciding like cases

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117. E.P. Cheyney, *Decisions of the Courts in Conspiracy and Boycott Cases*, 4 POL. SCI. Q. 261, 273 (1889).

118. James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 544 (2004); *cf.* Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 437 (1911) (noting split in authority among, on the one hand, courts holding that direct and secondary boycotts predicated on refusals to deal (or pressure on others to refuse to deal for fear of being boycotted themselves) were unlawful and, on the other, courts holding that "no boycott can be enjoined unless there are acts of physical violence, or intimidation caused by threats of physical violence").

119. Reardon, Inc., v. Caton, 189 A.D. 501, 512–13 (N.Y. App. Div. 1919) (Jenks, P.J., concurring); *see also, e.g.*, Radio Station KFH Co. v. Musicians Ass'n, 220 P.2d 199, 204 (Kan. 1950) ("[I]t is the rule today that . . . the public interest in improving working conditions is of sufficient social importance to justify such peaceful labor tactics").

120. Pope, *supra* note 118, at 544.

differently.[121] As a judge, Holmes pointed out repeatedly that courts were deeply divided "on the question of what shall amount to a justification" under the conspiracy laws because, in his view, the "true grounds of decision are considerations of policy" that "rarely are unanimously accepted."[122] The legal writer Francis Wharton shared similar concerns, though he articulated them in due process-like terms:

> "No man can know in advance whether any enterprise in which he may engage may not . . . become subject to prosecution. . . . Legislative and judicial compromises, which one court may view as essential to the working of the political machine, another court may hold to be indictable as a corrupt conspiracy."[123]

Notably, none of these critiques sounded in principles of free speech or association.

In any event, conspiracy law survived these various objections, and its vague standards extended well into the twentieth century and far beyond labor disputes.[124] According to the First Restatement of Torts, for example, "[p]ersons who cause harm to another by a concerted refusal in their business to enter into or to continue business relations with him are liable to him for that harm . . . if their concerted refusal *is not justified under the circumstances*."[125] The

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121. Oliver Wendell Holmes Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 8 (1894).

122. Vegelahn v. Gunter, 44 N.E. 1077, 1080 (Mass. 1896) (Holmes, J., dissenting); *accord* Aikens v. Wisconsin, 195 U.S. 194, 204 (1904) (Holmes, J.) (explaining that the "justification" for the concerted refusal to deal "may vary in extent according to the principle of policy" and "the end for which the act is done").

123. 2 WHARTON'S AMERICAN CRIMINAL LAW 191 (8th ed. 1880).

124. *Compare* A. S. Beck Shoe Corp. v. Johnson, 274 N.Y.S. 946, 953 (Sup. Ct. 1934) (holding that a boycott's goal of "having members of one race discharged in order to employ the members of another race will not justify this direct damage"), *with* Green v. Samuelson, 178 A. 109, 110–13 (Md. Ct. App. 1935) (goals related to racial equality may justify the boycott); *compare* Gott v. Berea College, 161 S.W. 204, 205–07 (Ky. Ct. App. 1913) (head of school not liable for directing his students not to patronize plaintiff's restaurant), *with* Hutton v. Walters, 179 S.W. 134, 134–35, 137–38 (Tenn. 1915) (college president held liable for organizing a similar boycott).

125. RESTATEMENT (FIRST) OF TORTS § 765 (1939) (emphasis added).

commentary to that provision explains that the "[d]ecision in each case depends upon a comparative appraisal of the values of the object sought to be accomplished by the actors' conduct."[126] That balancing inquiry grants judges broad latitude to conclude that, "even though the interest sought to be advanced is laudable, the concerted refusal to deal is [still] not justified" because it is "prejudicial to a paramount social interest."[127]

This body of law is difficult to square with a view of the boycott as protected First Amendment expression. Under the nineteenth-century landscape, state legislatures and judges could prohibit, enjoin, and penalize boycotting activities whenever they disagreed with the boycotters' objectives and deemed those objectives "prejudicial" to the public good. We are aware of no evidence to suggest that this balancing analysis was informed by First Amendment considerations. The boycott enjoyed no special presumption of legality, and there is no indication in the case law that courts conducting anything remotely as exacting as modern "strict scrutiny" analysis in deciding whether an injunction was justified.[128] To the contrary, the ad hoc balancing reflected in the case law appears to have permitted judges with different values to reach dramatically different results in indistinguishable cases, based primarily on their particular conceptions of the public good.

In addition, if boycotts were indeed viewed as symbolic speech, then the ad hoc judicial balancing might itself be inconsistent with the First Amendment, as originally understood. According to Professor Jud Campbell, the Founders believed that the job of "assessing the public good—generally understood as the welfare of the

126. *Id.* § 765 cmt. d; *see also, e.g.*, Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 591–92 (1970) ("Whether there is justification is determined not by applying precise standards but by balancing, in the light of all the circumstances, the respective importance to society and the parties of protecting the activities interfered with on the one hand and permitting the interference on the other.").

127. RESTATEMENT (FIRST) OF TORTS § 765 cmt. d.

128. *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011) (under modern doctrine, "restriction[s] on the content of protected speech" are presumed "invalid" unless shown to "pass[] strict scrutiny," a "demanding standard" that is "rare[ly]" met (citation omitted)).

entire society—was almost entirely a *legislative task*, leaving very little room for judicial involvement," and that "the boundaries of the freedom of opinion depended on political rather than judicial judgments."[129] If boycotts were indeed speech, then "judges [would have] had no business" usurping the legislative role and "resolving [conspiracy] cases based on judicial assessments of the general welfare."[130] The persistence and sustained enforcement of the conspiracy laws thus provides additional evidence that the boycott was understood to exist primarily in the realm of economic conduct, and not expression or association.[131]

C. Boycott Suppression in Sino-American Relations

Relations between the United States and China in the late nineteenth and early twentieth centuries were marked by a series of high-profile political boycotts on both sides of the Pacific.[132] Labor groups in the western United States organized widespread boycotts of Chinese-owned laundromats and restaurants in furtherance of an anti-immigrant, anti-Chinese ideology. But that "expressive" purpose did not stop American courts from enjoining the boycotters under the conspiracy laws. Around the same time, anti-

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129. Campbell, *supra* note 27, at 253, 267, 287.

130. *Id.* at 267. *But see* Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 32 (2011) ("Pragmatic [judicial] balancing seems more consistent with the framing-era meaning of free speech and a free press."); David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 458 (1983) ("At a minimum, the freedom of speech meant that restrictions on speech are impermissible unless necessary to accomplish a legitimate function of government, and that the courts rather than the legislature should ultimately determine that necessity.").

131. It is also worth noting that conspiracy-law judicial balancing would be inconsistent with modern doctrine if boycotts were indeed expression. *See* United States v. Stevens, 559 U.S. 460, 470 (2010) (explaining that "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs" and that "[o]ur Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it"); *see also* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (rejecting the notion of cost-benefit analysis in constitutional interpretation because "the First [Amendment] . . . is the very product of an interest balancing by the people").

132. Sin-Kiong Wong, *The Making of a Chinese Boycott: The Origins of the 1905 Anti-American Movement*, 6 AM. J. CHINESE STUD. 123, 123–124 (1999).

Chinese U.S. immigration policy precipitated the Chinese Boycott of 1905, a collective effort by merchants and civil-society groups in China to shut down trade with their American counterparts. The State Department responded aggressively, insisting that Chinese authorities deploy force to suppress the boycott and promising to hold the Chinese government accountable for any economic injuries suffered by American businesses. Neither side of this story squares with an expressive view of politically motivated boycotts. Boycotts, both foreign and domestic, were seen not as matters of individual expression but rather as coercive instruments of politics subject to the sovereign's plenary control. And while it is, of course, true that foreign boycotts conducted on foreign soil would never have been regarded as constitutionally protected activities,[133] the broader historical narrative on both sides still clearly reflects a view of the boycott as a tool of economic coercion and not of speech.

1. Union Boycotts of Chinese-Owned Businesses

Around the turn of the nineteenth century, American labor unions mounted a systematic campaign to boycott Chinese-owned restaurants and laundries in the western United States.[134] An advocate argued—in terms both expressive and abhorrent—that "white citizens have as good a right to determine that they will not employ

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133. *See* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2086 (2020) ("[I]t is long settled as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution."); *id.* at 2087 (applying that rule to the First Amendment). *But cf.* Nathan S. Chapman, *Due Process Abroad*, 112 NW. U. L. REV. 377, 381 (2017) (arguing that "the Constitution's historical background and text and early American practice all strongly support the conclusion that the founding generation understood the Due Process Clause to apply to U.S. law enforcement against anyone, anywhere.").

134. Gabriel J. Chin & John Ormonde, *The War Against Chinese Restaurants*, 67 DUKE L.J. 681, 693–94 (2018) (describing the American Federation of Labor's 1914 resolution urging "affiliated membership to give their patronage to American laundries and restaurants" only); David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 265 & n.421, 292–93 nn.583–87 (1999) (chronicling boycott efforts in the West); Raymond Lou, *Chinese-American Agricultural Workers and the Anti-Chinese Movement in Los Angeles, in* LABOR DIVIDED: RACE AND ETHNICITY IN THE UNITED STATES LABOR STRUGGLES, 1835–1960, at 57–58 (Robert Asher & Charles Stephenson eds., 1990) (describing failed boycott efforts in Los Angeles).

Chinese laborers as another class has to combine and exclude white labor from their employ."[135] Though such boycotts were rarely successful in pushing out Chinese-owned businesses,[136] they did on occasion have sufficient economic impact to expose the organizers to civil liability or injunctions under local conspiracy laws.[137]

The boycott in Butte, Montana in 1897 was among the most significant and successful of the anti-Chinese boycotts from this period.[138] It, too, was announced in decidedly expressive terms:

> A general boycott has been declared upon all Chinese and Japanese restaurants, tailor shops and wash houses, by the Silver Bow Trades and Labor Assembly. All friends and sympathizers of organized labor will assist in this fight against lowering Asiatic standards of living and of morals.
>
> America v. Asia, progress v. retrogress, are the considerations now involved. American manhood and American womanhood must be protected from competition with these inferior races and further invasions of industry and further reductions of the wages of native labor by the employment of these people must be strenuously resisted.[139]

The boycotters employed multiple tactics to spread the word: they displayed banners across the city that included anti-Chinese images and calls to boycott; approached citizens and pressed them not to patronize Chinese businesses; and successfully carried out

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135. *Notes and Comments*, DAILY DEMOCRAT, Apr. 2, 1886, at 2, https://cdnc.ucr.edu/?a=d&d=SRPD18860402.2.13&e=-------en--20--1--txt-txIN--------1l [https://perma.cc/ TWS7-EQYN]; *see also Card to the Public*, TONOPAH BONANZA (Nev.), Jan. 17, 1903, at 6 (ad from union encouraging readers "to cease their patronage of Chinese restaurants, laundrys, and all places where Chinese labor is employed, thus giving our own race a chance to live").

136. Chin & Ormonde, *supra* note 134, at 698 ("Even when not enjoined, nonviolent boycotts were rarely wholly successful."); Bernstein, *supra* note 134, at 292 ("Chinese laundries thrived throughout the West, even in cities where they faced organized boycotts.").

137. Chin & Ormonde, *supra* note 134, at 695 n.69 (collecting examples).

138. Stacy A. Flaherty, *Boycott in Butte: Organized Labor and the Chinese Community, 1896–1897*, MONT. MAG. W. HIST., Winter 1987, at 34, 35.

139. *Id.* at 36 (quoting BUTTE SUNDAY BYSTANDER, Jan. 10, 1897). Note that "most of the Asians in Butte were Chinese." *Id.* at 36–37 n.8.

secondary boycotts against all who were willing to do business with the Chinese.[140] That enterprise was justified in familiar terms: "[T]he guiding principle of the boycott," the organizers insisted, was "that a man enjoys the privilege of patronizing whosoever he pleases; that he can solicit patronage for whoever may please him, or that he can divert patronage by moral suasion from whoever may displease him. . . ."[141] According to the boycotters, this "privilege" flowed directly from the proposition that "all shall enjoy equally the privileges of communication and intercourse. . . ."[142]

As noted, this boycott was unique in its success. Roughly 350 Chinese people were compelled to leave Butte in search of a less hostile environment to live and work.[143] But not all Chinese-owned businesses capitulated. Several restaurant owners and merchants struck back, filing a federal civil suit against the individuals and labor unions at the forefront of the racial boycott. Their complaint alleged, among other things, that these defendants were participating in an illegal "conspiracy" by calling upon "all persons" not to "patronize [Chinese] business" and then threatening to "place such patrons under a boycott" "if they . . . continue[d] to patronize such alien Chinese."[144] As a remedy, the plaintiffs sought fifty thousand dollars in damages and an injunction against both the primary and secondary boycotts of Chinese businesses.[145]

The federal district court in Montana responded by entering an expansive TRO that barred the defendants from "boycotting [the plaintiffs]," "advising [potential patrons against] patronizing said complainants," "causing to be carried through the streets of Butte

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140. *Id.* at 41.

141. *The Boycott–What Is It?*, BUTTE SUNDAY BYSTANDER, Mar. 27, 1897 at 4. A secondary boycott is a boycott of those who refuse to boycott the target of the primary boycott.

142. *Id.*

143. Letter from Ambassador Wu Ting-fang to David J. Hill, Acting Sec'y of State (July 6, 1901), *in Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 3, 1901, Doc. 89*, 124, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1901/d89 [https://perma.cc/VUK3-G8F7].

144. *Id.* at 106–08 (reprinting the "Bill of complaint").

145. *Id.* at 110–11.

[libelous] banners," and picketing "in the vicinity of the places of business of the said complainants."[146] But, even then, the boycotters refused to concede. Their union newsletters didn't take "seriously" the possibility "that a court of the United States will interfere with the American citizens in the exercise of their inalienable and undeniable right to patronize with friends."[147] They believed the TRO applied only to violent intimidation and that it could "not deprive us of our rights to patronize whom we please."[148]

But the district court did not agree. After a special master issued findings of fact that confirmed the plaintiffs' allegations, the court issued a permanent injunction categorically barring the defendants "from further combining or conspiring to injure or destroy the business of the [plaintiffs]; and from maintaining or continuing the boycott and conspiracy against said Chinese."[149] Media reports described that final order as "sweeping," "far reaching in effect," and "calculated to make [the] Chinese immune from harm."[150]

These events occupy a significant place in the history of conspiracy litigation. The Butte boycott was among the most systematic in the country, motivated by racial politics and ideology as much as economic self-interest, and largely devoid of violence.[151] Despite all that, the episode ended with a permanent injunction that flatly prohibited the boycott and subverted the boycotters' asserted "right to patronize with friends."[152] Indeed, after the district court declined

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146. *The Restraining Order*, BUTTE SUNDAY BYSTANDER, Apr. 24, 1897 (reprinting judicial order).

147. *That Temporary Restraining Order*, *supra* note 144.

148. *Trades and Labor Resolution*, BUTTE SUNDAY BYSTANDER, Apr. 24, 1897 (reprinting labor resolution).

149. Letter from Hum Fay et al. to Ambassador Wu Ting-fang (July 6, 1901), Exhibits C (findings of fact), E (permanent injunction), *in Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 3, 1901*, Doc. 89, 110, 127, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1901/d89 [https://perma.cc/VUK3-G8F7].

150. *Decision in Boycott Case, Sweeping Injunction Against All Who Would Injure Chinese*, DAILY INTER MOUNTAIN, May 19, 1900, at 3.

151. Flaherty, *supra* note 138, at 47 ("The 1896-1897 boycott of Asians in Butte was unique in that there was little physical violence against Asians.").

152. *That Temporary Restraining Order*, *supra* note 144.

to award damages, the Chinese Legation petitioned the highest ranking officials in U.S. State Department for just compensation to the victims.[153] The Secretary of State at the time, John Hay, placed the federal government's imprimatur on the court's injunction even as he denied the damages request. In his estimation, "the rights of the Chinese subjects mentioned were violated by the boycott," and the injunction was a fully justified and "adequate remedy" for their harm .[154] The judicial and political response to the Butte boycott provide yet another prominent example in which the boycott—even when inflected with politics or ideology—was viewed as proscribable conduct, and not sacrosanct expression or association.[155]

2. The Chinese Boycott of 1905

In 1905, the Shanghai Chamber of Commerce announced a sweeping boycott of U.S. products, kicking off a movement that would sweep quickly across China.[156] This was a popular, nongovernmental protest in response to the Chinese Exclusion Act, which prohibited virtually all Chinese immigration to the United States, and related encroachments on the rights of Chinese people already

153. Letter from Ambassador Wu Ting-fang to David J. Hill, *supra* note 143 (transmitting Letter from Hum Fay et al. to Ambassador Wu Ting-fang, *supra* note 149).

154. Letter from John Hay, Sec'y of State, to Ambassador Wu Ting-fang (Dec. 4, 1901), *in Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 3, 1901, Doc. 90*, at 127–128, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1901/d90 [https://perma.cc/R9RV-35BG].

155. While the Butte boycott litigation was the most prominent, it was hardly a one-off. In another well-known example from Cleveland, Ohio, labor unions picketed and boycotted two Chinese restaurants, the Golden Pheasant and the Peacock Inn, "on the ground that they are [run by] Chinamen and members of the yellow race, and that Americans should not patronize a Chinese restaurant, but should confine their patronage and support to restaurants operated by Americans or by white persons." Park v. Hotel & Rest. Emp. Int'l Alliance, (Locals Nos. 106, 107, 108, 167), 22 Ohio N.P.(n.s.) 257, 261 (Ct. Com. Pleas 1919). Owners of the Peacock Inn struck back with a civil suit, alleging that the unions' tactics amounted to a "common unlawful conspiracy and boycott against the plaintiffs." *Id.* at 259. In ruling for the plaintiffs, the court stressed not only that the manner and method of picketing was "coercive" and "intimidating," but also that the organized boycott, with its aim of "influencing of parties outside the combination not to deal with the plaintiff," violated the conspiracy laws. *Id.* at 282.

156. Wong, *supra* note 132, at 123.

in the country.[157] As former U.S. Secretary of State John W. Foster explained at the time, "the boycott movement owes its initiative, not to the Chinese government, but to individual and popular influence, and is almost entirely the outgrowth of the ill-feeling of the people who have been the victims of the harsh exclusion laws and the sufferers by the race hatred existing in certain localities and classes in the United States."[158]

The U.S. government responded aggressively to this popular boycott movement. Within a month of the boycott's announcement, the Ambassador to China, William Woodville Rockhill, demanded that Chinese political leadership "take prompt action to put a stop to the agitation," and he reported back to his superiors that China had promised to pursue "prompt and radical action to suppress [the boycott]."[159] When that "radical action" failed to materialize, the Acting Secretary of State Alvey Augustus Adee advised that America would hold the Chinese government "responsible for any loss sustained by the American trade on account of any failure on the part of China to stop the present organized movement against the United States."[160]

In response, Chinese leadership recommitted "to end[ing] the agitation by laying strong injunctions upon all classes."[161] But when

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157. *See* ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943, at 24–30 (2003); Mark Kanazawa, *Immigration, Exclusion, and Taxation: Anti-Chinese Legislation in Gold Rush California*, 65 J. ECON. HIST. 779, 779–81, 784–87 (2005).

158. John Foster, *The Chinese Boycott*, ATL. MONTHLY, Jan. 1906, at 118, https://sourcebooks.fordham.edu/eastasia/1906foster.asp [https://perma.cc/7HFG-E9V E].

159. Letter from Ambassador William Woodville Rockhill to Sec'y of State (July 6, 1905), *in Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 5, 1905, Doc. 218*, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1905/d218 [https://perma.cc/BX3D-CLK9].

160. Paraphrase of Telegram from Alvey Augustus Adee, Acting Sec'y of State to Ambassador William Woodville Rockhill (Aug. 5, 1905), *in Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 5, 1905, Doc. 223*, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1905/d223 [https://perma.cc/4TX3-E38E].

161. Letter from Ambassador William Woodville Rockhill to Sec'y of State (Aug. 26, 1905), *in Papers Relating to the Foreign Relations of the United States, with the Annual*

the boycotts were nonetheless allowed to continue, Ambassador Rockhill delivered his sharpest warning yet:

> My government is emphatically of [the] opinion . . . that it has been and still is the duty of the Imperial Government to completely put a stop to this movement, which is carried on in open violation of solemn treaty provisions . . . and is *an unwarranted attempt of the ignorant people to assume the functions of government and to meddle with international relations*.[162]

At that point, Chinese leadership finally paid heed and published an imperial edict "condemning boycotting of American goods and enjoining on the viceroys and governors the duty of taking effective action to stop it and prevent further agitation."[163]

This story again reflects a "non-expressive" view of consumer boycotts. The Chinese consumer boycott targeting the United States was plainly motivated by politics, designed to convey disapproval of U.S. policy toward Chinese Americans and Chinese immigrants. And yet, the executive branch demanded that China take "radical steps" to suppress the boycott, just as its own courts were issuing sweeping anti-boycott injunctions to prevent white Americans from targeting Chinese-owned businesses at home. As Ambassador Rockhill's final warning made clear, the State Department conceived of the boycott as an economic tool over which the sovereign could and should exercise control. Indeed, the Ambassador's characterization of the boycott as an "unwarranted attempt of the

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Message of the President Transmitted to Congress December 5, 1905, Doc. 232, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1905/d232 [https://perma.cc/P9HQ-HCVX].

162. Letter from Ambassador William Woodville Rockhill to Sec'y of State (Aug. 29, 1905), *in Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 5, 1905, Doc. 233*, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1905/d233 [https://perma.cc/P64W-AELD] (transmitting Letter from Ambassador William Woodville Rockhill to Prince Ch'ing (Aug. 27, 1905)) (emphasis added).

163. Letter from Ambassador William Woodville Rockhill to Sec'y of State (Aug. 29, 1905), *in Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 5, 1905, Doc. 234*, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1905/d234 [https://perma.cc/LX6E-LB5C].

ignorant people to assume the functions of government and to meddle with international relations" mirrors the views of the well-known British jurist, James Fitzjames Stephen, who argued forcefully that the popular boycotts reflected a fundamental "usurpation of the functions of government" that should be suppressed under the conspiracy laws.[164] So while it is of course possible that the United States could have been demanding that China do something the United States was not authorized to do at home, the historical context around the State Department's demands plausibly suggests that restrictions on boycotts were deemed permissible on both sides of the Pacific—the United States was demanding *reciprocity*.

The government officials involved in these controversies do not appear to have even entertained the distinctly contemporary notion that a popular, politically motivated boycott ought to be protected against government intrusion as a core exercise of free expression. In fact, the U.S. went so far as to claim that China would *violate its bilateral treaty obligations* if it failed to suppress such a boycott.[165] As one scholar observed, "[t]he question of China's obligation to put an end to the boycott appears not only to have been seriously raised by the United States, but to have been pressed to a satisfactory conclusion with marked persistence and vigor."[166] It is precisely because those treaty obligations were bilateral that the Chinese could demand that the United States engage in reciprocal suppression of boycotts harmful to Chinese nationals on U.S. soil.

This persistent enforcement on both sides has led some international-law scholars to conclude that "the government is under the *duty* to prevent unauthorized interference by its nationals in the orderly conduct of diplomatic negotiations," including through politically motivated boycotts, "and is responsible for injuries to

164. James Fitzjames Stephen, *On the Suppression of Boycotting*, *in* 20 THE NINETEENTH CENTURY: A MONTHLY REVIEW 765, 769 (James Knowles ed., 1886); *accord* C.L. Bouve, *The National Boycott as an International Delinquency*, 28 AM. J. INT'L L. 19, 38 (1934) (describing the American view that China's popular boycott reflected an "injection of these private activities into the sphere of foreign intercourse").

165. Bouve, *supra* note 164, at 21.

166. *Id.*

foreigners resulting from such interference."[167] Now, that was hardly the consensus view.[168] But the critical point, for our purposes, is that scholars and states were battling, not over whether governments *could* ban popular boycotts, but whether they *needed to* do so in service of their international-law duties. That entire debate presupposed a view of the boycott as conduct that states could—and perhaps should—regulate and control.[169] Even though foreign conduct on foreign soil is generally understood to fall outside the Constitution's ambit,[170] the overall historical narrative still fits best with a fundamentally non-expressive view of the boycott.

III. TWENTIETH CENTURY BOYCOTT LEGISLATION

The early legal history surveyed above indicates that state actors across the country sought repeatedly to both compel compliance with the boycotts they supported and deter participation in the boycotts they opposed.[171] Boycott legislation in the modern era fits with that tradition: governments pushed and prodded private companies into compliance with the boycott of apartheid-era South Africa, and they did precisely the opposite for the boycott of Israel. The key difference between these more recent laws and their earlier antecedents lies in the ever-expanding range of tools that governments have at their disposal to achieve their preferred policy outcomes. Modern governments, moving beyond the more rudimentary mandates and injunctions, have sought to divest from, or deny contracts and tax benefits to, companies that flout their preferred

167. *Id.* at 39–40 (emphasis added).

168. *See, e.g.*, H. Lauterpacht, *Boycott in International Relations*, 14 BRIT. Y.B. INT'L L. 125, 140 (1933) (imprudent to "impose upon states the duty to suppress peaceful boycott[s] of foreign goods").

169. *See* Charles Cheney Hyde & Louis B. Wehle, *The Boycott in Foreign Affairs*, 27 AM. J. INT'L L. 3 (1933) ("[I]t may be well worth while for particular countries to endeavor to agree to use a certain measure of diligence to restrain the people within their respective territories from exercising, perhaps irreparably, their right to injure their common commercial interests through the weapon of combination. *The matter is, however, purely one of policy . . . .*" (emphasis added)).

170. *See supra* note 133 and accompanying text.

171. *Supra* Sections II.A–C.

boycott policy.[172] But whatever the differences in method, the various approaches reflect a shared constitutional understanding that the boycott is an economic instrument subject to sovereign control, not a method of expression or association presumptively immune from regulation.

A. Compelling Boycotts: Apartheid-Era South Africa

Beginning in the 1970s, governments at all levels began pressuring individuals and companies to join the boycott of apartheid-era South Africa. Advocates for the boycott argued that American investment abroad was essentially subsidizing apartheid by "strengthen[ing] the [regime's] economic and military self-sufficiency."[173] The movement started at colleges and universities,[174] but it spread quickly to municipal and state governments across the country. By 1990, "26 states, 22 counties and over 90 cities had taken some form of binding economic action against companies doing business in South Africa."[175] These policies were both tactical and

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172. We take as a given that conditioning public contracts, tax benefits, or investments on promising to engage in—or not to engage in—protected expression can violate the First Amendment. *See* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, *Inc.*, 570 U.S. 205, 221 (2013). *But see id.* at 226 (Scalia, J., dissenting) ("[C]ompell[ing] as a condition of [government] funding the affirmation of a belief . . . is the reasonable price of admission to a limited government-spending program that each organization remains free to accept or reject." (citation and emphasis omitted)).

173. S. COMM. ON FOREIGN RELS., 95TH CONG., U.S. CORPORATE INTERESTS IN SOUTH AFRICA 13 (Comm. Print 1978) (primarily authored by Dick Clark); *see also* Martha J. Olson, Note, *University Investments with a South African Connection: Is Prudent Divestiture Possible?*, 11 N.Y.U. J. INT'L L. & POL'Y 543, 544–51 (1979).

174. *See* Grace A. Jubinsky, *State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 U. CIN. L. REV. 543, 544 (1985).

175. Richard Knight, *Sanctions, Disinvestment, and U.S. Corporations in South Africa*, *in* SANCTIONING APARTHEID (Robert E. Edgar, ed., 1990), http://richardknight.homestead.com/files/uscorporations.htm [https://perma.cc/8RKT-VZW9]; *accord* Stephen Kaufman, *Pressure to End Apartheid Began at Grass Roots in U.S.*, U.S. MISSION INT'L ORGS. GENEVA (Dec. 17, 2013), https://geneva.usmission.gov/2013/12/17/pressure-to-end-apartheid-began-at-grass-roots-in-u-s/ [https://perma.cc/X9DN-UBTL]; *see also* Howard N. Fenton, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT'L L. & BUS. 563, 564 (1993); Christine Walsh, *The Constitutionality of State and Local Governments' Response to Apartheid: Divestment Legislation*, 13 FORDHAM URB. L.J. 763, 776 (1985).

expressive; they were designed "to condemn the South African system of apartheid and, if possible, to hasten its demise through economic pressure."[176]

Governments promoted the boycott in two ways—by divesting public funds from companies that did business with South Africa or by conditioning public contracts on a company's commitment not to do so.[177] Most of the laws addressed South Africa's apartheid policies clearly and explicitly, thus codifying the popular (but hardly unanimous) political judgment that America should sever economic ties.[178] States enforced their rules, just as they do modern anti-boycott laws, by requiring the companies with whom they did business to certify their compliance with the state's preferred boycott policy.[179]

At the federal level, Congress and President Reagan sparred repeatedly over the propriety of boycotting South Africa. Whereas

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176. Peter J. Spiro, Note, *State and Local Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 822 (1986).

177. *Id.* at 821; *see also, e.g.*, *id.* at 821–22 & n.47 (citing, among other divestment policies, Pittsburgh, Pa., Ordinance No. 14 (Feb. 25, 1985), which banned city bodies from doing business with companies that have operations in South Africa and with their suppliers); N.Y.C., N.Y., Local Law No. 19 (Mar. 15, 1985) (allowing the city to refuse to grant a contract to the lowest bidder who fails to certify that it is not doing business in South Africa if another vendor who has completed an anti-apartheid certification submits a comparable or slightly worse bid).

178. *See, e.g.*, CONN. GEN. STAT. § 3-13f (Supp. 1984) (divestment law); MASS. ANN. LAWS ch. 32, § 23(1)(d)(ii) (Michie/Law Co-op. Supp. 1984) (same); 1985 N.J. LAWS ACT 308 (divestment law focused on financial institutions); R.I. GEN. LAWS ch. 35-10 (same). But not every state followed that approach. Wisconsin, for example, passed a broadly worded statute that prohibited investment in any company that "practice[d] or condone[d] through its actions discrimination on the basis of race, religion, color, creed, or sex." WIS. STAT. § 36.29(1) (Supp. 1984-1985). That law's indeterminacies prompted Wisconsin's Attorney General to issue an opinion clarifying the state's position on its applicability to South Africa. Letter from Att'y Gen. Bronson La Follette to President Edwin Young (Jan. 31, 1978), *reprinted in* 67 Wis. Op. Att'y Gen. 20 (1978). This uncertainty surely undermined the statute's purpose, which was to codify the legislature's opposition to apartheid and its support for the boycott. Presumably, that is why few if any states followed Wisconsin's lead.

179. *See, e.g.*, MD. CODE ANN. art. 95, § 21 (Supp. 1984) (requiring financial institutions to certify to the state treasurer that they do not have any outstanding loans to South African government-controlled entities and ordering the treasurer not to deposit funds in any banks who failed to do so).

President Reagan hoped to persuade South Africa to abandon apartheid through "constructive engagement,"[180] Congress was adamant that applying economic pressure was the only path forward. In 1985, President Reagan sought to bridge that gap, ordering a boycott that applied to a handful of industries.[181] But for Congress, that was not enough. Overriding the President's veto, it imposed a nationwide boycott by enacting the Comprehensive Anti-Apartheid Act of 1986, which banned the importation of currency, military equipment, and an array of natural resources from South Africa. [182] Congress followed up the next year with the Rangel Amendment to the Budget Reconciliation Act, which prohibited the IRS from giving American companies operating in South Africa credit for taxes paid in South Africa, effectively "double taxing" their South African profits.[183] The impact was so great that Mobil Corporation—then the biggest American company operating in South Africa—withdrew from the country entirely as a result.[184]

While a majority of the country favored this political boycott, Americans were nonetheless divided on its merits. A vocal minority shared President Reagan's preference for "constructive engagement" and even his (controversial and contested) moral stance that harsh sanctions were "repugnant" for their potential economic impact on the people of South Africa.[185] Yet, as far as we aware, it was

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180. Robert H. Jerry II & O. Maurice Joy, *Social Investing and the Lessons of South Africa Divestment: Rethinking the Limitations on Fiduciary Discretion*, 66 OR. L. REV. 685, 691 (1987); *see also* Joshua Michaels, *The Comprehensive Anti-Apartheid Act of 1986: Separation of Powers, Foreign Policy, and Economic Sanctions as a Tool of Social Justice*, 8 NW. INTERDISC. L. REV. 153, 159–62 (2015).

181. Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (Sept. 9, 1985).

182. Pub. L. No. 99-440, §§ 4, 301–304, 309, 317–323, 100 Stat. 1086, 1089, 1099–1100, 1102, 1104–1106 (1986).

183. Michaels, *supra* note 180, at 187.

184. *Id.* In 1991, President George H.W. Bush made the requisite findings to end the federal sanctions. Fenton, *supra* note 175, at 578.

185. JOHN F. LYONS, AMERICA IN THE BRITISH IMAGINATION: 1945 TO THE PRESENT 109 (2013); *see also, e.g.*, Charles M. Becker, *The Impact of Sanctions on South Africa and Its Periphery*, 31 AFR. STUD. REV. 61, 64 (1988) (noting that, despite "general agreement in the West concerning [the] ultimate aim[]" of defeating apartheid, there was "disagreement over the long run effectiveness and hence desirability of sanctions," which would be "gravely harmful . . . to the black majority" of South African residents); Stephen

never seriously suggested that the First Amendment deprived political majorities of the power to establish a uniform boycott policy with respect to South Africa and demand that everyone comply—even those who considered sanctions imprudent or those who wished to support the regime through business dealings.[186] There was no First Amendment right to buycott South Africa—presumably because the boycott laws regulated conduct, not expression.[187]

B. Prohibiting Boycotts: Israel

In the niche sphere of international-facing boycotts, modern Israel is the legislative mirror image of apartheid-era South Africa. In both cases, lawmakers deployed a virtually identical set of tools to promote their preferred boycott policy: the federal government assessed tax penalties and imposed civil and criminal penalties against violators of official boycott policy, while state and local governments threatened to withhold public contracts and investments to ensure compliance. The only difference in the two cases is

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Chapman, *Trade Sanctions: Morality and Policy*, CHI. TRIB. (Aug. 7, 1985) https://www.chicagotribune.com/news/ct-xpm-1985-08-07-8502210466-story.html [https://perma.cc/H4KS-H8KB] (noting that "it isn't at all clear that trade sanctions will contribute to a good outcome" and arguing that sanctions have a "highly dubious" "moral stature" and do not "offer much hope of improving the lot of South Africa's black majority"); James Barber & Michael Spicer, *Sanctions Against South Africa—Options for the West*, 55 INT'L AFFS. 385, 389–90 (1979) (similar).

186. *See, e.g.*, Lynn Loshin & Jennifer Anderson, *Massachusetts Challenges the Burmese Dictators: The Constitutionality of Selective Purchasing Laws*, 39 SANTA CLARA L. REV. 373, 379–407 (1999) (addressing Supremacy Clause, Dormant Commerce Clause, and federal foreign affairs power objections, but not First Amendment arguments); *see also* John H. Chettle, *The Law and Policy of Divestment of South African Stock*, 15 L. & POL'Y INT'L BUS. 445, 515–26 (1983). Though we do not consider those other constitutional issues in this Article, we note that we have detected nothing in the history of boycott regulation to distinguish state laws from federal laws for First Amendment purposes.

187. South Africa was by no means the only target of state and local divestment laws. For additional examples, see Fenton, *supra* note 175, at 569 (discussing Michigan law requiring state-run educational institutions to divest from companies operating in the Soviet Union); *id.* at 568–69 (citing legislation from fourteen states and several localities that threatened divestment from firms operating in Northern Ireland that tolerated religious discrimination against Catholics); *see also* MASS. GEN. LAWS ANN. Ch. 32, § 23(2)(g)(iii), (2A)(h) (same); CONN. GEN. STAT. ANN. § 3-13g(c) (requirement to divest from firms doing business in Iran).

directional—governments deployed these tools to compel compliance with the boycotts of South Africa and to deter or prohibit participation in the boycotts of Israel.

1. A Brief History of the Oldest Boycott

The boycott of Jewish businesses in Israel is among the oldest and longest boycotts in world history.[188] Beginning in the 1890s, and especially throughout the 1920s and 1930s, Arab political associations in Mandatory Palestine passed and promoted a range of anti-Jewish boycott resolutions barring economic relations with the Jews of the area.[189] Arab merchants in Jerusalem—deploying the same tools as the American colonists of old—created committees to supervise and enforce the anti-Jewish boycott by imposing secondary boycotts on those who resisted.[190] And, in echoes of the anti-Chinese boycotts in the United States, their notices declared: "Don't buy from the Jews, come and bargain with the Arab merchant . . . . We must completely boycott the Jews."[191] In 1933, the Grand Mufti of Jerusalem, Mohammad Amin el-Husseini, expressed to the German consul in Jerusalem his support for anti-Jewish boycotts in Germany and reportedly pledged to promote similar efforts against Jews across the Arab world.[192] Reportedly, the Grand Mufti's only request for Berlin was that German Jews "not be sent to

188. *See* Eugene Kontorovich, *The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?*, 4 CHI. J. INT'L L. 283, 285 (2003).

189. *See* GIL FEILER, FROM BOYCOTT TO ECONOMIC COOPERATION: THE POLITICAL ECONOMY OF THE ARAB BOYCOTT OF ISRAEL 21–24 (1998); AARON J. SARNA, BOYCOTT AND BLACKLIST: A HISTORY OF ARAB ECONOMIC WARFARE AGAINST ISRAEL 3 (1986) (noting boycotts in 1891, 1908, and 1911).

190. Kontorovich, *supra* note 188, at 286–87.

191. Ofer Aderet, *From the British Mandate to Ben & Jerry's: 100 Years of Boycott and Israel*, HAARETZ (July 21, 2021), https://www.haaretz.com/israel-news/.premium.TIMELINE-from-the-british-mandate-to-ben-and-jerry-s-100-years-of-boycott-and-israel-1.10016885 [https://perma.cc/N3RK-47DS] (quoting a contemporaneous news article about the boycotts from 1925).

192. FRANCIS R. NICOSIA, THE THIRD REICH AND THE PALESTINE QUESTION 85–86 (1985).

Palestine."[193] Calls for anti-Jewish boycotts in the Middle East continued up through 1939, after the start of World War II.[194]

Against that historical backdrop, the newly minted Arab League issued its first formal boycott against the Jews of Mandatory Palestine in 1945, still a few years prior to the formation of the modern State of Israel.[195] Its resolution declared "Jewish products and manufactured (goods) in Palestine shall be (considered) undesirable in the Arab countries" and called upon all Arabs to "refuse to deal in, distribute, or consume Zionist products and manufactured (goods)."[196] In the years that followed, the League established a Central Boycott Office in Cairo, a "complex, centralized boycott apparatus" that enforced not only the primary boycott of Israel, but also secondary and tertiary boycotts against non-Israeli companies that traded with Israel or with those that did business in Israel.[197] The boycott remains in place today, though a number of Arab League countries have since normalized trade relations with Israel and repudiated the boycott.[198]

Both its advocates and its critics have long described the Arab Boycott as a form of "economic warfare," designed to isolate Israel politically and advance the League's political interests in the region.[199] The former Commissioner General of the Central Boycott

193. *Id.*

194. *See* FEILER, *supra* note 189, at 24.

195. *Id.*

196. Council of the Arab League, 2d Sess., *The Boycott of Zionist Goods and Products*, Res. 16, at 6 (Dec. 2, 1945); *see also* ANDREAS F. LOWENFELD, 3 TRADE CONTROLS FOR POLITICAL ENDS 99–113 (1977).

197. *See* Kontorovich, *supra* note 188, at 286–87; *see also Hearings on Multinational Corporations and United States Foreign Policy Before the Subcomm. on Multinational Corps. of S. Comm. on Foreign Rels.*, 94th Cong., pt. 11, at 214, 371–72 (1975); LEE E. PRESTON, TRADE PATTERNS IN THE MIDDLE EAST 51–52 (1970); Aderet, *supra* note 191.

198. *See* List of Countries Requiring Cooperation with an International Boycott, 86 Fed. Reg. 18,374, 18,374–75 (Apr. 8, 2021).

199. *See* Book Review, 82 MICH. L. REV. 1053, 1054 (1984) (reviewing KENNAN L. TESLIK, CONGRESS, THE EXECUTIVE BRANCH, AND SPECIAL INTERESTS: THE AMERICAN RESPONSE TO THE ARAB BOYCOTT OF ISRAEL (1982)); Henry J. Steiner, *International Boycotts and Domestic Order: American Involvement in the Arab-Israeli Conflict*, 54 TEX. L. REV. 1355, 1365 (1976); MUHAMMED KHALIL, 2 THE ARAB STATES AND THE ARAB LEAGUE, A DOCUMENTARY RECORD 161 (1962).

Office, Zuhair Aqil, described the boycott as "one of the Arab weapons in confronting the Zionist entity,"[200] and members of the Palestinian Liberation Organization insisted that the "war . . . between the Arab League countries and Israel . . . justifies the boycott," which, "short of actual open fighting, has proven to be the most effective weapon in the hands of the Arabs[.]"[201] On the flipside, prominent opponents of the boycott, like Henry Kissinger, have called upon the League to take "steps to end [its] *economic warfare*" against Israel.[202]

As with the modern BDS movement, the most "politically volatile" aspect of the debate around the Arab Boycott is whether its stated refusal to deal with "Zionists" is equivalent to, or a proxy for, "religious discrimination" against Jews.[203] Defenders insist that the boycott "blacklists only those persons—whatever their religious, ethnic, or national identity—who maintain proscribed relations with Israel," and that it does not target Diaspora Jews who lack the requisite economic ties to Israel.[204] Critics of the boycott reply that any distinction between the only Jewish nation and the Jewish people is analytically fraught and practically untenable.[205] In their view, a boycott that takes singular aim at the Jewish state and all who associate with it (disproportionately Jews), is anti-Semitic in all but name. In the words of former King Faisal of Saudi Arabia, one of the most prominent advocates for the Arab Boycott,

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200. FEILER, *supra* note 189, at 40.

201. MARWAN ISKANDER, THE ARAB BOYCOTT OF ISRAEL 55 (1966).

202. Bernard Gwertzman, *Kissinger Calls for an End of U.S.-Israel "Wrangling,"* N.Y. TIMES, May 10, 1976, at 1 (emphasis added).

203. Steiner, *supra* note 199, at 1366–67.

204. *Id.* at 1367 (describing this as a "hazy" boundary).

205. *See id.*; Donald L. Losman, *The Arab Boycott of Israel*, 3 INT'L J. MIDDLE E. STUD. 99, 109 (1972) ("Because the establishment and promulgation of the state of Israel is, in large part, due to the financial contributions of world Jewry, the anti-Israel campaign has taken on an anti-Semitic character."); Robert Wistrich, *Anti-Zionism and Anti-Semitism*, 16 JEWISH POL. STUD. REV. 27, 28 (2004) (arguing that "the call for a scientific, cultural, and economic boycott of Israel" and the Arab states' decades-long "policy of isolating the Jewish state and turning it into a pariah" are "virtually identical to the methods, arguments, and techniques of racist anti-Semitism").

"Jews support Israel and we consider those who provide assistance to our enemies as our own enemies."[206]

2. Federal Regulation of the Arab Boycott

The debate over boycotts of Israel is as morally contested today as it was in the 1970s.[207] But as a political matter, bipartisan majorities across the country have coalesced on a view of the Israel boycott, not as a form of desirable social action, but as a form of economic discrimination, repugnant to American values and contrary to U.S. foreign policy interests. Government actors have consistently relied on that understanding in taking action against American companies that contributed to the Arab League's efforts.

In 1975, President Ford took the first decisive act against the Arab Boycott of Israel, directing the Secretary of Commerce to issue regulations prohibiting U.S. companies from "complying in any way with [discriminatory] boycott requests."[208] Discerning the anti-Semitic underpinnings of the boycott, President Ford announced his refusal to "countenance the translation of any foreign prejudice into domestic discrimination against American citizens."[209]

Congress acted on that commitment the following year and passed the bipartisan Ribicoff Amendment to the Tax Reform Act of 1976, which assessed a steep tax penalty against all who

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206. Losman, *supra* note 205, at 109–10.

207. *Compare, e.g.*, *Confronting the Rise in Anti-Semitic Domestic Terrorism: Hearing Before the Subcomm. on Intel. & Counterterrorism of the H. Comm. on Homeland Sec.*, 116th Cong. 40 (2020) (statement of Eugene Kontorovich, Professor, Antonin Scalia L. Sch., Geo. Mason Univ.) (describing "[t]he campaign to 'boycott Israel'" as "seek[ing] to legitimize discriminatory refusals to deal with people or companies simply because of their connection to the Jewish state" and "a legitimization of bigotry"), *with* Note, *Wielding Antidiscrimination Law to Suppress the Movement for Palestinian Rights*, 133 HARV. L. REV. 1360, 1381 (2020) (pushing back on claims that present-day boycotts targeting Israel "constitute[] religious and national-origin discrimination" and are "*conceptually* discriminatory").

208. Statement by the President Announcing a Series of Administrative Actions and Legislative Proposals to Provide a Comprehensive Response to Discrimination Against Americans, 11 WEEKLY COMP. PRES. DOC. 1305 (Nov. 20, 1975).

209. *Id.*

"participate[] in or cooperate[] with" the Arab Boycott.[210] In 1977, Congress went a step further and banned outright American complicity in the Arab Boycott.[211] The Export Administration Amendments, which passed both houses by wide margins, direct the President to issue regulations prohibiting "any United States person . . . from taking or knowingly agreeing to" a boycott, "with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States."[212] Violators are subject to potential criminal penalties, and companies are required to report any boycott requests they receive to the Commerce Department's Office of Antiboycott Compliance.[213] For the past forty years, that scheme has been rigorously enforced and has consistently survived First Amendment challenge.[214]

President Carter's signing statement to the Export Administration Amendments underscores all of the reasons these anti-boycott

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210. Pub. L. No. 94-455, §§ 1061–64, 90 Stat. 1649, 1649–1650 (1976) (codified at I.R.C. §§ 908, 952(a), 995(b)(1), 999). The first legislative response to the Arab League boycott actually came in 1965, when Congress announced that it was the policy of the United States "to oppose . . . boycotts . . . against other countries friendly to the United States." Pub. L. No. 91-184, § 3(5), 83 Stat. 841 (1969) (codified at 50 U.S.C. app. § 2402(5) (Supp. V. 1975)) (expired September 1976); *see also* Steiner, *supra* note 199, at 1374.

211. Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977).

212. 50 U.S.C. § 4842(a)(1)(A), (D); *see also* David Cain, *International Business Communication and Free Speech:* Briggs and Stratton Corp. v. Baldridge, 9 B.C. INT'L & COMPAR. L. REV. 131, 137 n.55 (1986). The law was reenacted without alteration in the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979) (codified at 50 U.S.C. app. 2407). The law lapsed under a sunset provision, but its force and effect were preserved by subsequent Presidents acting under the National Emergencies Act and the International Economic Emergency Powers Act. MARTIN A. WEISS, CONG. RSCH. SERV., RL33961, ARAB LEAGUE BOYCOTT OF ISRAEL 6 n.18 (2015). The Export Administration Act of 1979 was ultimately repealed and replaced in 2018 by the John S. McCain National Defense Authorization Act, Pub. L. 115-232, §§ 1741–1781, 132 Stat. 1636, 2208–38 (2018), which included the Anti-Boycott Act of 2018, 50 U.S.C. § 4842.

213. 50 U.S.C. § 4842(b)(2); *cf.* Maurice Portley, *State Legislative Responses to the Arab Boycott of Israel*, 10 U. MICH. J.L. REFORM 592, 608 (1977).

214. *See, e.g.*, Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915, 917–18 (7th Cir. 1984) (companies' responses to Arab League questionnaires not protected by the First Amendment); Karen Mar. Ltd. v. Omar Int'l, Inc., 322 F. Supp. 2d 224, 227 (E.D.N.Y. 2004) (explaining the Export Administration Act "is a constitutional statute").

measures have withstood constitutional scrutiny. Describing "boycotts" (the refusal to buy goods or services) as a form of "discrimination," President Carter expressed his own political judgment that the Arab Boycott—though nominally focused solely on Israel—was in fact "aimed at Jewish members of our society."[215] The boycott was a tool of economic influence, and the law reflected Congress's political judgment that "the divisive issues in the Middle East, which give rise to current boycotts, can be resolved equally satisfactorily through a similar process of reasonable, peaceful cooperation."[216] While former-President Carter appears to have reconsidered his private political views since leaving public office,[217] the underlying constitutional judgment cannot be so easily amended. Uniform historical practice confirms that political boycotts, especially of foreign nations, have always been viewed as regulable conduct, not inherent expression.

3. State Regulation of the Arab Boycott

The federal government was not the first to outlaw complicity in the Arab Boycott. Throughout the late 1970s and early '80s, thirteen states—New York, Connecticut, California, Florida, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, North Carolina, Ohio, Oregon, and Washington—enacted similarly sweeping anti-boycott measures. New York's law declared it "an unlawful discriminatory practice for any person to discriminate against, boycott or blacklist, or to refuse to buy from, sell to or trade with, any person, because of the race, creed, color, national origin or sex of such person, *or of such person's . . . business associates, suppliers or customers*."[218]

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215. President Jimmy Carter, Remarks on Signing into Law the Export Administration Amendments of 1977, THE AM. PRESIDENCY PROJECT, (June 22, 1977), https://www.presidency.ucsb.edu/documents/export-administration-amendments-1977-remarks-signing-hr-5840-into-law [https://perma.cc/C6F8-2YKL].

216. *Id.*

217. Press Release, Carter Ctr., President Carter Issues Statement on BDS Act of 2019 (Apr. 5, 2019), https://www.cartercenter.org/news/pr/statement-045019.html [https://perma.cc/ZF9V-LFRU] (opposing proposed federal legislation as violative of the "right of individuals to participate in boycotts as a form of political protest").

218. N.Y. EXEC. LAW § 296(13) (McKinney 1980) (emphasis added).

Though Israel isn't mentioned by name, the law was broadly understood to be a "response to the Arab boycott,"[219] exposing anti-Israel boycotters to possible civil and criminal liability.[220] Massachusetts, too, made it "unlawful for any person doing business in the commonwealth . . . to refuse, fail or cease to do business in the commonwealth" when it reflects an "agreement" with "[any] foreign person" and is "based upon such [a] person's . . . national origin or foreign trade relationships."[221] In signing the bill, Governor Michael Dukakis explained that he wished to send "a clear and unequivocal message to those who submit to Arab pressure tactics that we will not stand for this type of blatant discrimination."[222]

The remaining laws varied in their details: some swept broadly across the entire economy,[223] others were restricted to particular

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219. Note, *The Constitutionality of New York's Response to the Arab Boycott*, 28 SYRACUSE L. REV. 631, 631, 653 (1977).

220. N.Y. PENAL LAW §§ 80.05(a), 80.10 (McKinney 1972) (misdemeanor fines, per N.Y. EXEC. LAW § 298(a)(3) (McKinney 1976)); *see also* Maurice Portley, *State Legislative Responses to the Arab Boycott of Israel*, 10 U. MICH. J.L. REFORM 592, 610 (1977) (citing Letter from Louis J. Lefkowitz, Att'y Gen. of N.Y., to Stanley Steingut, Speaker of the N.Y. State Assembly (Nov. 3, 1976) (clarifying that banks that comply with the Arab Boycott are violating New York's anti-boycott law)). It appears that few cases involving Israel have been litigated under the New York statute, either because of widespread compliance or because violations are difficult to detect. *But see* Bibliotechnical Athenaeum v. Nat'l Lawyers Guild, Inc., No. 653668/2016 (N.Y. Sup. Ct. N.Y. Cnty. Mar. 30, 2017) (finding colorable claim under New York law by Israeli organization, Bibliotechnical Athenaeum, against National Lawyers Guild for refusing to sell it advertising space as part of an anti-Israel boycott).

221. Act of Aug. 18, 1976, 1976 Mass. Acts, ch. 297, at 394, 395.

222. *Massachusetts Law to Curb Arabs' Boycott Is Enacted*, N.Y. TIMES, Aug. 20, 1976, at A22.

223. *See* CONN. GEN. STAT. §§ 42-125a, 42-125c (1977) (deeming it state policy "to oppose . . . discriminatory boycotts . . . which are fostered or imposed by foreign persons, foreign governments or international organizations against any domestic individual on the basis of race, color, creed, religion, sex, nationality or national origin" and prohibiting knowing participation in such boycotts); MD. CODE ANN., COM. LAW §§ 11-101, 11-103 (1976) (announcing Maryland's "policy" to oppose "foreign discriminatory boycotts not specifically authorized by the law of the United States which are fostered or imposed by foreign persons," and deeming it "unlawful for a person to . . . [k]nowingly participate in," or "[k]nowingly aid or assist any other person in participating in," "a discriminatory boycott"); FLA. STAT. ANN. § 542.34 (West Supp. 1981) (forbidding blacklists and agreements requiring discrimination or refusal to deal with another person, including on the basis of "unlawful business associations," in order to comply with

kinds of business relationships,[224] and still others to particular economic sectors.[225] But all were predicated on a shared historical understanding of the boycott as a permissible object of regulation, not an inherently protected medium of expression. And, in the case of Israel, state officials legislated based on the political judgment that the Arab boycott of Zionism was wrongful discrimination, not desirable social action.

IV. PRESENT-DAY BOYCOTT REGULATION

Contemporary boycott laws mirror their twentieth-century counterparts, with political actors compelling compliance with the boycotts they support (Russia) while deterring participation in the ones they oppose (Israel). Today, consistent with centuries of American legal history, these boycott policies reflect a conception of the boycott as regulable economic conduct well outside the heartland of First Amendment expression or association.

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or support a foreign boycott); 29 ILL. COMP. STAT. ANN. §§ 91–96 (West Supp. 1981) (banning discrimination based on "any connection between [the target] and another entity"); MINN. STAT. ANN. § 3250.53 (West Supp. 1981) (deeming an unlawful "restraint of trade" the exclusion of persons from a business transaction based upon their engagement in "business in a particular country"); N.C. GEN. STAT. § 75B-2(1) (1977) (prohibiting "enter[ing] into any agreement . . . with any foreign government, foreign person, or international organization, which requires such person or the State to refuse, fail, or cease to do business in the State with any other person who is domiciled or has a usual place of business in the State, based upon such other person's . . . national origin or foreign trade relationships"); OHIO REV. CODE ANN. § 133.01-99 (1976) (banning refusals "to buy from, sell to, or trade with" another person because the person is on a blacklist or is boycotted by a foreign country); OR. REV. STAT. § 30.860 (1977) (creating private cause of action against anyone who "boycott[s]" someone "because of foreign government imposed or sanctioned discrimination"); WASH. REV. CODE ANN. § 49.60.030 (West Supp. 1981) (enshrining "the right to engage in commerce free from any discriminatory boycotts or blacklists"); CAL. BUS. & PROF. CODE §§ 16721, 16721.5 (1976); *see also* Nina J. Lahoud, *Federal and New York State Anti-Boycott Legislation: The Preemption Issue*, 14 N.Y.U. J. INT'L L. & POL'Y 371, 402 n.132 (1982) (collecting laws).

224. *See* N.J. STAT. ANN. § 10:5–12 (West Supp. 1981) (employment); N.C. GEN. STAT. § 75B-2(4) (1977) (same).

225. *See* OHIO REV. CODE ANN. § 1129.11 (Anderson 1979) (repealed 1997) (financial institutions).

1. Compelling Boycotts: Russia's Invasion of Ukraine

Russia's invasion of Ukraine in early 2022 reinvigorated governments' historical power to compel boycotts. In the wake of the war's inception, several U.S. states declared that they would not contract with or invest in any company that refused to boycott the regime of Russian President Vladimir Putin.[226]

New York is a paradigm example. By executive order, Governor Katherine Hochul (1) prohibited state agencies from "contracting or investment with businesses . . . in Russia," (2) required bidders for state contracts to provide certifications regarding any Russia-related operations,[227] and (3) directed all state agencies to divest from any businesses headquartered in Russia.[228]

New York was far from alone in its efforts. At the federal level, President Joseph Biden prohibited any "new investment in the Russian Federation by a United States person."[229] California fortified that mandate by requiring state contractors to certify their compliance with federal boycott rules.[230] New Jersey took a similar course, with Governor Philip Murphy ordering a mandatory review of all

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226. For collections of many relevant state actions up to this point, see Liz Farmer, *A Guide to the State Pension Funds Divesting from Russia*, FORBES (Mar. 11, 2022, 9:31 AM), https://www.forbes.com/sites/lizfarmer/2022/03/11/the-pension-plans-divesting-from-russia/?sh=1eb7cf3b2b04 [https://perma.cc/E4HW-WHQ6] (collecting examples); Sophie Quinton, *In Support of Ukraine, U.S. Governors Cut Economic Ties with Russia*, STATELINE (Mar. 3, 2022, 12:00 AM), https://stateline.org/2022/03/03/in-support-of-ukraine-u-s-governors-cut-economic-ties-with-russia/ [https://perma.cc/T6SX-GUNR].

227. N.Y. Exec. Order No. 16 (Mar. 17, 2022), https://www.governor.ny.gov/executive-order/no-16-prohibiting-state-agencies-and-authorities-contracting-businesses-conducting [https://perma.cc/ZAD6-N9UC].

228. N.Y. Exec. Order No. 14 (Feb. 27, 2022), https://www.governor.ny.gov/sites/default/files/2022-02/Executive%20Order%20No.%2014.pdf [https://perma.cc/N8W3-L9GF].

229. Press Release, The White House, Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression (Apr. 6, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/04/06/prohibiting-new-investment-in-and-certain-services-to-the-russian-federation-in-response-to-continued-russian-federation-aggression/ [https://perma.cc/PT48-KR9E].

230. Cal. Exec. Order No. N-6-22 (Mar. 4, 2022), https://www.gov.ca.gov/wp-content/uploads/2022/03/3.4.22-Russia-Ukraine-Executive-Order.pdf [https://perma.cc/4FHF-54EB].

existing state contracts with "businesses that invest directly" in companies owned by or affiliated with the Russian government.[231] As the governor's order explained, all of those measures were consistent with states' "*long history of leveraging [their] economic power*," through mandatory boycott and divestment laws, "to further the[ir] values [and interests] throughout the world."[232] A number of other governors, including those of Colorado, North Carolina, and Ohio, instructed state entities to work to divest assets from, and terminate contracts with, companies in Russia or Russian government-owned businesses.[233]

This flurry of regulatory activity presumed that boycotts are regulable conduct. If things were otherwise, politically motivated "buycotters" (*i.e.*, those who wish to support the Russian people through continued trade and investment) would be entitled to First Amendment exceptions. But no federal court has *ever* sustained a First Amendment challenge to sanctions regimes like these—because the decision whether or not to buy is generally regulable conduct, not protected speech or association.[234] It follows, then, that

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231. N.J. Exec. Order No. 291 (Mar. 2, 2022), https://nj.gov/infobank/eo/056murphy/pdf/EO-291.pdf [https://perma.cc/AFP9-ZT3G].

232. *Id.* (emphasis added).

233. N.C. Exec. Order No. 251 (Feb. 28, 2022), https://governor.nc.gov/media/2959/open [https://perma.cc/ES8W-YMG5]; Colo. Exec. Order No. D 2022 011 (Feb. 24, 2022), https://www.colorado.gov/governor/sites/default/files/inline-files/D%202022%20011%20Ukraine%20EO.pdf [https://perma.cc/6RKB-Z5SG]; Ohio Exec. Order No. 2022-02D (Mar. 3, 2022), https://governor.ohio.gov/media/executive-orders/executive-order-2022-02d [https://perma.cc/L76F-ZQ4J].

234. *See, e.g.*, Clancy v. Geithner, 559 F.3d 595, 605 (7th Cir. 2009) (sanctions statute governed "action," which was not "inherently expressive," even if plaintiff used it as a medium to "express his belief in peace and his protest against government action that would harm innocent Iraqi citizens"); Karpova v. Snow, 402 F. Supp. 2d 459, 472–73 (S.D.N.Y. 2005) (sanctions "reach[ed] only plaintiff's actions—not her speech"), *aff'd*, 497 F.3d 262 (2d Cir. 2007); *see also* Brief of Eighteen Constitutional and Business Law Professors as Amici Curiae in Support of Appellant at 28–30, A&R Eng'g & Testing, Inc. v. Scott, 72 F.4th 685 (5th Cir. 2023) (No. 22-20047) ("If . . . decisions *not* to do business with people or companies associated with a particular country constitute speech indicating policy disapproval of that country, then . . . [t]hat would create a novel, broad—and intolerable—First Amendment carve-out to foreign sanctions laws" that does not exist in precedent.).

states may compel compliance with the boycotts they support, just as they may deter or ban participation in the ones they oppose.

2. Deterring Boycotts: The BDS and ESG Movements

Anti-boycott laws are more popular now than ever before. Since 2015, more than half of the states have passed anti-BDS rules requiring companies to abstain from boycotting Israel and entities that do business there as a condition of eligibility for state investments and government contracts.[235] And, in just the past three years, at least eighteen states have proposed or enacted copycat anti-ESG measures, imposing similar restrictions on companies that boycott fossil fuels, firearms, and other contested industries.[236]

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235. For investment laws, see, for example, ARIZ. REV. STAT. ANN. § 35-393.02 (2022) (encouraging divestment by state treasurer and retirement system from any company that "is participating in a boycott of Israel or that . . . has taken a boycott action" as part of a boycott of Israel); 40 ILL. COMP. STAT. ANN. 5 / §§ 1-110.16(a), (f) (2022) (requiring companies that boycott Israel to be placed on a "restricted companies" list, from which the state pension fund must divest); N.Y. Exec. Order No. 157 (June 5, 2016), https://ogs.ny.gov/executive-order-157#:~:text=Executive%20Order%20No.,and%20Sanctions%20campaign%20against%20Israel [https://perma.cc/77R5-82SY] (instructing state bodies to "divest their money and assets from any investment in" any company that "participate[s] in boycott, divestment, or sanctions activity targeting Israel"). For contracting laws, see, for example, FLA. STAT. § 287.135(2)(a) (2012) ("A company is ineligible to, and may not, bid on, submit a proposal for, or enter into or renew a contract with an agency or local governmental entity for goods or services . . . if, at the time of bidding on, submitting a proposal for, or entering into or renewing such contract, the company is on the Scrutinized Companies that Boycott Israel List . . . or is engaged in a boycott of Israel."); NEV. REV. STAT. § 332.065(4) (2019) (prohibiting government agencies from contracting with businesses "unless the contract includes a written certification that the company is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel"); 37 R.I. GEN. LAWS § 37-2.6-3 (2016) ("A public entity shall not enter into a contract with a business . . . unless the contract includes a representation that the business is not currently engaged in, and an agreement that the business will not during the duration of the contract engage in, the boycott of any person, firm, or entity based in, or doing business with, a jurisdiction with whom the state can enjoy open trade . . . .").

236. *See, e.g.*, KY. REV. STAT. ANN. § 41.480 (2022) (fossil fuel boycott law); TEX. GOV'T CODE ANN. § 2274 (2021) (firearm boycott law); H. 3564, 125th Sess. (S.C. 2023) (proposed bill covering boycott of timber, mining, and agricultural industries); *see also* Lance C. Dial et al., *2023 ESG State Legislation Wrap Up*, K&L GATES (July 25, 2023), https://www.klgates.com/2023-ESG-State-Legislation-Wrap-Up-7-19-2023 [https://perma.cc/L5H6-9RNU]; Elizabeth S. Goldberg & Rachel Mann, *Update: Four More States*

The anti-ESG rules are still in their infancy, and it remains to be seen how they will be applied and the precise grounds on which they will be challenged.[237] The anti-BDS laws, by contrast, have been applied and challenged frequently, generating a litigation track record that lends itself to a more sustained and informed analysis. We therefore focus primarily on this latter category.

As their moniker suggests, the anti-BDS laws take aim at the BDS movement against Israel. Historically, the movement has been criticized for its singular focus on the Jewish State, for its unwillingness to accept Israel's right to exist as a Jewish state, and for its more transparently anti-Semitic antecedents.[238] Recent events vindicate those criticisms. In the aftermath of Hamas's October 7 attacks on Israel, leading proponents of BDS—including Students for Justice in Palestine and the Council on American-Islamic Relations—defended the largest genocide of Jews since the Holocaust, claiming that Israel was "entirely responsible" for the atrocities and that they were "happy to see" the perpetrators exercising their "right to self-

Move Toward Anti-ESG Regulations, MORGAN LEWIS: ML BENEITS (Oct. 13, 2022), https://www.morganlewis.com/blogs/mlbenebits/2022/10/update-four-more-states-move-toward-anti-esg-regulations [https://perma.cc/4DR7-7CRZ] (identifying eighteen states that proposed or adopted anti-ESG legislation in 2022).

237. The Kentucky Bankers Association recently filed a lawsuit against the state's Attorney General, challenging his anti-ESG investigative demands, in part, on First Amendment grounds. *See* J. Paul Forrester & Matthew Bisanz, *The [First?] Battle Is Joined: Two Groups Sue the Kentucky Attorney General Over ESG Investigations*, MAYER BROWN (Nov. 18, 2022), https://www.mayerbrown.com/en/perspectives-events/publications/2022/11/the-first-battle-is-joined-two-groups-sue-the-kentucky-attorney-general-over-esg-investigations [https://perma.cc/45AC-4GJK] (citing Complaint for Declaration of Rights and for Injunctive Relief, Hope of Ky., LLC v. Cameron, No. 322-CI-842 (Ky. Franklin Cir. Ct. Oct. 31, 2022)). That litigation, which has been removed to federal court, appears to be the first of its kind and is still in its early stages.

238. *Supra* notes 1–2; *see also, e.g.*, *Hearing on Rise in Anti-Semitic Domestic Terrorism*, *supra* note 207 (statement of Eugene Kontorovich); *see also* 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, 32–39 (2017); David M. Halbfinger et al., *Is B.D.S. Anti-Semitic? A Closer Look at the Boycott Israel Campaign*, N.Y. TIMES (July 27, 2019), https://www.nytimes.com/2019/07/27/world/middleeast/bds-israel-boycott-antisemitic.html [https://perma.cc/X4QC-AD8F].

defense" against Israel's civilian population.[239] Major American cities and university campuses have in recent months seen an unprecedented rise in antisemitism,[240] as BDS activists across the country target Jews and Jewish-owned businesses—from Jerry Seinfeld's comedy show in Syracuse to a falafel shop in Philadelphia—solely because of their Jewish and Israel identities and affiliations.[241] Increasingly, too, these BDS activists have deployed slogans like

239. Peter Baker, *White House Disavows U.S. Islamic Group After Leader's Oct. 7 Remarks*, N.Y. TIMES (Dec. 8, 2023), https://www.nytimes.com/2023/12/08/us/politics/white-house-cair-nihad-awad.html [https://perma.cc/Q8W7-PY3S] (quoting national executive director of Council on American-Islamic Relations ("CAIR")); Madeline Halpert, *Growing Backlash Over Harvard Students' Pro-Palestine Letter*, BBC NEWS (Oct. 10, 2023), https://www.bbc.com/news/world-us-canada-67067565 [https://perma.cc/CB59-PRL7] (quoting from letter authored by Harvard Undergraduate Palestine Solidarity Committee and signed by groups including Harvard Law School Justice for Palestine); *see also Recent Campus BDS Victories*, NAT'L STUDENTS FOR JUSTICE IN PALESTINE, https://nationalsjp.org/bds-victories [https://perma.cc/4GQP-75T6] (last visited Dec. 15, 2023) (celebrating BDS successes by Students for Justice in Palestine college chapters); Press Release, Counsel on Am.-Islamic Relations, CAIR Says Fight Against Anti-BDS Laws Will Continue After SCOTUS Declines to Hear Arkansas Newspaper Case (Feb. 22, 2023), https://www.cair.com/press_releases/cair-says-fight-against-anti-bds-laws-will-continue-after-scotus-declines-to-hear-arkansas-newspaper-case/ [https://perma.cc/PF9Y-TFFX] (noting CAIR's efforts to block anti-BDS laws in court and defend those who refuse to comply with them).

240. Rebecca Beitsch, *FBI Director Warns of "Historic" Antisemitism Level*, THE HILL (Oct. 31, 2023), https://thehill.com/homenews/senate/4286146-fbi-director-warns-of-historic-antisemitism-levels/ [https://perma.cc/UU68-LGXT]; Kanishka Singh, *US Antisemitic Incidents Up About 400% Since Israel-Hamas War Began, Report Says*, REUTERS (Oct. 25, 2023), https://www.reuters.com/world/us/us-antisemitic-incidents-up-about-400-since-israel-hamas-war-began-report-says-2023-10-25/ [https://perma.cc/VPR6-98MV]; *see also 2022 FBI Hate Crimes Statistics*, U.S. DEP'T OF JUST. (Oct. 30, 2023), https://www.justice.gov/crs/highlights/2022-hate-crime-statistics [https://perma.cc/GN8Q-R6XY] (finding that more than half of all religion-based hate crimes in 2022 were committed against Jews).

241. Griffin Uribe Brown, *Hundreds March for Palestine Downtown, Protest Jerry Seinfeld Show*, DAILY ORANGE (Dec. 9, 2023), https://dailyorange.com/2023/12/demonstrators-march-for-palestine-protest-jerry-seinfeld-show/ [https://perma.cc/R7Y4-X378]; Johnny Diaz, *White House Condemns Protest at Israeli Restaurant in Philadelphia*, N.Y. TIMES (Dec. 4, 2023), https://www.nytimes.com/2023/12/04/us/white-house-philadelphia-protesters.html [https://perma.cc/KZJ2-MAFH]; *see also BDS Activists are Refocused on Attacking Israeli, Jewish Businesses and Individuals*, ADL (Dec. 7, 2023), https://www.adl.org/resources/blog/bds-activists-are-refocused-attacking-israeli-jewish-businesses-and-individuals [https://perma.cc/4UEC-RW2E] (collecting examples).

"globalize the intifada"—a call for genocide against Israeli Jews—and, on numerous occasions, have accompanied those calls for violence with direct threats against and physical harassment of Jewish and Israeli Americans.[242]

Notably, Florida officials pointed to the October 7 massacre and its BDS apologists in explaining why their anti-BDS law was a critical means of "support[ing]" Florida's "Jewish and Israeli" communities and "hold[ing] companies accountable for discriminating against Israel."[243] And Florida is no outlier: thirty-seven states to date have passed anti-BDS rules to codify their support for Israel and their opposition to BDS's methods and objectives.[244]

These laws state three principal aims: (1) preventing state funds from being used to subsidize a boycott of a critical U.S. ally, (2) promoting economic engagement with Israel, and (3) protecting Jews around the world, Israelis of all faiths, and Palestinians in Israel-controlled territories from BDS's discriminatory effects. To take one example, Arkansas views the boycotts as a "tool[] of economic

242. *See, e.g.*, Madeline A. Hung & Joyce E. Kim, *Harvard Pro-Palestine Groups Organize "Week of Action," Drawing Criticism for "Intifada" Chants*, HARV. CRIMSON (Dec. 4, 2023), https://www.thecrimson.com/article/2023/12/4/pro-palestine-week-of-action/ [https://perma.cc/L86J-UY59]; Nick Mordowanec, *Map Showing U.S. Targets Sparks Fears of Attacks*, NEWSWEEK (Nov. 16, 2023), https://www.newsweek.com/map-showing-us-targets-sparks-fears-attacks-1844560 [https://perma.cc/WYX3-8CCZ] (discussing map labeled "Globalize the Intifada: Zone of Operations" designating businesses in New York City as targets); Luke Tress, *Jewish Students Barricade in Cooper Union Library as Protesters Chant "Free Palestine," On Day of Protest Across NYC Campuses*, JEWISH TELEGRAPHIC AGENCY: NY JEWISH WEEK (Oct. 26, 2023), https://www.jta.org/2023/10/26/ny/jewish-students-barricade-in-cooper-union-library-as-protesters-chant-free-palestine-on-day-of-protest-across-nyc-campuses [https://perma.cc/GG99-F4G4] (reporting on protestors "advocating a boycott of Israel" who surrounded a library and "pounded on the building's doors and windows" while Jewish students sheltered inside).

243. Press Release, Governor Ron DeSantis, Florida Places Morningstar-Sustainalytics on List of Scrutinized Companies that Boycott Israel (Oct. 26, 2023), https://www.flgov.com/2023/10/26/florida-places-morningstar-sustainalytics-on-list-of-scrutinized-companies-that-boycott-israel/ [https://perma.cc/46CG-RCNA].

244. *Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBRARY, https://www.jewishvirtuallibrary.org/anti-bds-legislation [https://perma.cc/5AUM-YBXQ] (last visited Dec. 15, 2023); Zvika Klein, *New Hampshire Becomes 37th US State To Adopt Anti-BDS Law*, JERUSALEM POST (July 6, 2023), https://www.jpost.com/international/article-749152 [https://perma.cc/3ZLX-L7GR].

warfare" that "discriminate[s] against Israel."[245] Its anti-BDS law "implement[s] the United States Congress's announced policy" of opposing boycotts against a "key all[y] and trade partner."[246] Pennsylvania has deemed it "in the interest of the United States and the Commonwealth to stand with Israel"—which is "America's dependable, democratic ally in the Middle East"—"by promoting trade and commercial activities and to discourage policies that disregard that interest."[247] Louisiana has proclaimed that refusals to do business with Israel "with the goal of advancing the BDS campaign" "harm[] the Israel-Louisiana relationship," which is "in the best interests of the people of Louisiana."[248] It has also declared that Louisiana's anti-BDS certification requirement for state contracts is "[c]onsistent with existing Louisiana non-discrimination provisions."[249] And Missouri's anti-BDS measure, known as the "Anti-Discrimination Against Israel Act," defines impermissible "boycott[s] of the State of Israel" as including various "actions to discriminate against . . . the State of Israel."[250]

These measures fit with the country's historical boycott regulations because they target disfavored economic *conduct* but do not proscribe protected speech or association. While the laws may burden a boycotter's methods and objectives—that is, the BDS movement's campaign of discriminatory "economic warfare" designed to pressure people and companies to cut ties with Israel—they do *not* silence dissent or political debate on that subject. These laws train themselves solely to conduct by requiring covered entities to certify only that they will not boycott Israel (as enforced through denials of state funds to those who fail to make the certification, and revocations of funds or civil penalties for false certifications), while

245. ARK. CODE ANN. § 25-1-501 (2017).

246. *Id.* at §§ 25-1-501(4)–(6); *accord* IOWA CODE § 12 J.1 (2016) (characterizing boycotts aimed at Israel as "threaten[ing] the sovereignty and security of [an] all[y] and trade partner[] of the United States").

247. 62 PA. CONS. STAT. § 3602 (2017).

248. LA. STAT. ANN. §§ 39:1602.1(A)(4)–(5) (2019).

249. *Id.* § 39:1602.1(B)(1).

250. MO. REV. STAT. §§ 34.600(1)–(3) (2020).

leaving unfettered their right to express whatever viewpoints they please through any other medium.[251]

Indeed, these contemporary laws aren't merely consistent with past practice; they actually reflect a constitutional improvement over previous regimes. Prior methods of boycott regulation, particularly the use of the conspiracy laws, faced two interconnected challenges—one practical, the other constitutional—that anti-boycott laws are uniquely well-designed to address.

First, an isolated decision to boycott is extremely difficult to detect *ex ante* or police *ex post*. A single person or company might refuse to engage in a commercial transaction for myriad reasons, and it is difficult to say after the fact whether that refusal to deal reflected participation in a proscribed boycott or an entirely innocuous and lawful business decision. That is especially so for political boycotts, which, as a general matter, were historically far less prone to cause actual economic injury than facially tortious ones, and were thus more difficult to detect.[252]

Second, there are important countervailing rights-based interests at play whenever state actors seek to regulate a disfavored boycott. For one thing, anti-boycott regulation implicates the boycotter's "freedom to engage in business" and choose her trading partners.[253] That freedom of contract (not speech)—which is restricted by all manner of anti-discrimination, public-accommodations, and common-carrier laws—may arguably have counseled caution before judges entered anti-boycott injunctions designed to compel unwanted commercial dealings.[254] In addition, some courts recognized an expressive interest in explaining, defending, and advocating for the boycott, which presents yet another challenge in

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251. *See, e.g.*, laws and executive orders cited at *supra* note 235.

252. Lauterpacht, *supra* note 168, at 139 ("No [law] can effectively compel the population of a country to buy goods from a foreign state."); HEATHER LAIRD, SUBVERSIVE LAW IN IRELAND, 1879–1920: FROM "UNWRITTEN LAW" TO THE DAIL COURTS 34 (2005).

253. RESTATEMENT (FIRST) OF TORTS § 762, cmt. a (1939) (describing the boycott right as derivative of the "liberty to acquire property").

254. *See generally* J.W.O., *The Boycott as a Weapon in Industrial Disputes*, 116 A.L.R. 484 (originally published in 1938) (collecting examples in which courts described and respected the freedom of contract).

separating out unprotected conduct (the boycott) from potentially protected expression (advocacy for the boycott).[255]

The conspiracy laws of old tackled the enforcement problem, but in a manner that aggravated the constitutional concerns. As the historian Heather Laird has explained, governments that lacked "a means to punish the communal act of boycotting" would "bypass[] the action or inaction of the [individual] boycotter and focus on a figure easier dealt with[:] the individual who . . . instigated the boycott."[256] But shooting for the center also risked chilling protected expression, as the organizers often defended their boycotts through advocacy and expression, "tell[ing] the story of their wrongs . . . by word of mouth or with pen or print."[257]

Modern anti-boycott laws are a First Amendment improvement because they operate more surgically than their common-law antecedents. For example, the anti-BDS laws specifically condition public contracts and investments only on a certification *not to boycott*

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255. *See* HARRY W. LAIDLER, BOYCOTTS AND THE LABOR STRUGGLE: ECONOMIC AND LEGAL ASPECTS 198 (1913) ("Boycotters have often contended that to prevent them from publishing notices of the boycotts, and otherwise announcing them in print, is an infringement of the freedom of the press."). *But see* Transcript of Record at 377, Gompers v. Buck's Stove & Range Co., 70 Al. L. J. 8 (D.C. 1907) (No. 1990) ("All this [First Amendment worry] would have merit, if the act of the defendants in making such publication stood alone, unconnected with other conduct both preceding and following it. But it is not an isolated fact; . . . it is an act in a conspiracy to destroy plaintiff's business, an act which has a definite meaning[.]").

The law regarding whether and when speech soliciting unlawful conduct may itself be proscribed is notoriously fraught and riddled with "unresolved tension[s]." Benjamin Means, *Criminal Speech and the First Amendment*, 86 MARQ. L. REV. 501, 507–14, 526 (2002). Recently, in *United States v. Hansen*, the Supreme Court rejected a claim that a prohibition on "encourag[ing] or induc[ing]" unlawful presence in the United States was overbroad under the First Amendment, holding that the law passed muster because it prohibited only intentional solicitation or facilitation of unlawful conduct. 143 S. Ct. 1932, 1937 (2023). The Court took as a given that even "words [alone] may be enough" to constitute solicitation, and that criminalizing those words may be consistent with the First Amendment's exception for "speech integral to unlawful conduct." *See id.* at 1940–44, 1947-48.

256. LAIRD, *supra* note 252 (writing about Ireland's Prevention of Crime Act of 1882, which mirrors many of the state conspiracy laws in the United States discussed, *supra*, in Section II.B).

257. Marx & Haas Jeans Clothing Co. v. Watson, 67 S.W. 391, 394 (Mo. 1902).

Israel or entities that do business in Israel. They apply evenly to all businesses that deal with the government—not merely the advocates or architects of BDS—and they leave intact everyone's right to speak out and advocate for either side in the Israel-Palestinian conflict.[258] Moreover, the consequences of noncompliance are comparatively limited: those who insist on participating in the boycott are not fined or otherwise subject to legal sanction, but merely lose their access to certain privileges like state contracts or investments. Anti-BDS laws thus expand the buffer zone between regulated conduct and protected expression and offer even greater prophylactic protection to the speech that often accompanies political boycotts.[259] In that respect, these modern rules reflect a substantial constitutional improvement over the common-law traditions, in which judges enjoined boycotts they deemed "unjustified" and executive branch officials demanded "radical" suppression of foreign boycotts. From the long view of history, modern anti-boycott laws reflect free speech progress, not decline.[260]

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258. Courts have occasionally found that anti-BDS laws violate the First Amendment if their "catch-all" provisions are broad enough to cover protected advocacy as well as boycotting. *E.g.*, Ark. Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021), *rev'd on reh'g en banc*, 37 F.4th 1386 (2022); A&R Eng'g & Testing v. City of Houston, 582 F. Supp. 3d 415 (S.D. Tex. 2022), *rev'd & rem'd*, 72 F.4th 685 (5th Cir. 2023). We take no position on the meaning or scope of any particular provision of state law.

259. Many anti-BDS laws also include prophylactic measures aimed at distancing the laws even further from conduct or expression even potentially implicating the First Amendment. *See, e.g.*, LA. STAT. ANN. § 39:1602.1(F) (restricting anti-boycott measure to contracts worth at least $100,000 with companies that have at least five employees); R.I. GEN. LAWS § 37-2.6-4 ("[T]his section shall not apply to contracts with a total potential value of less than ten thousand dollars[.]"); *supra* note 76.

260. Today's boycott regulations also improve on the common law of conspiracy from a rule-of-law perspective because they reassign the underlying policy judgments about which boycotts are "justified" from the judiciary to the elected political branches. For example, critics of anti-BDS laws argue that "BDS is not discriminatory" and that anti-BDS laws "cannot properly be viewed as combatting discrimination." *Wielding Antidiscrimination Law*, *supra* note 207, at 1372–81. But that is a contested moral argument—one that has become even more contested in the wake of the October 7 terrorist attack and the ensuing worldwide wave of antisemitism—and it has been rejected by state governors and legislatures across the country. *See, e.g.*, *All 50 American Governors Sign Anti-BDS Statement*, JERUSALEM POST (May 18, 2017), https://www.jpost.com/arab-israeli-conflict/all-50-american-governors-sign-anti-bds-statement-492085

V. A CODA ON *CLAIBORNE*

The Supreme Court's 1982 decision in *NAACP v. Claiborne Hardware Co.* has figured prominently in the debate over more recent anti-boycott laws. The petitioners in that case included black residents of Claiborne County, Mississippi, who had "place[d] a boycott on white merchants in the area" in protest of race discrimination.[261] Some affected merchants brought suit for damages and an injunction under the conspiracy laws.[262] After the merchants prevailed in the Mississippi Supreme Court, the U.S. Supreme Court reversed, holding that the conspiracy laws had been applied unconstitutionally to restrain the boycotters' speech rights.[263] The Court explained that the merchants' damages claims arose from a menu of protected activities: speeches, "nonviolent picketing," oral and print dissemination of the "names of boycott violators," and efforts to persuade others to join in through "personal solicitation."[264] All of that "speech, assembly, association, and petition," the Court reasoned, meant that "the boycott clearly involved constitutionally protected activity."[265] The Court explained, in noticeably broader terms, that "[t]he right of the States to regulate economic activity could *not* justify a complete prohibition against a nonviolent, politically motivated boycott."[266]

Since the first anti-BDS measure was enacted nine years ago, both sides in the constitutional debate have engaged in a protracted exegetical struggle over what *Claiborne* really means. Defenders of the laws read the case as focused on the expression that accompanies

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[https://perma.cc/BB75-A9YB]. Viewing boycotts as conduct, rather than speech, allows judges to defer to the consensus political judgment of elected officials.

261. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 889, 898–900 (1982).

262. *Id.* at 889–96.

263. *See id.* at 933–34.

264. *Id.* at 907, 909.

265. *Id.* at 911.

266. *Id.* at 914 (emphasis added).

the boycott, not the boycott itself,[267] while critics read the case more broadly as protecting the boycott itself from government control.[268]

Advocates for the narrow reading cite other precedents, like *International Longshoremen's Association v. Allied International, Inc.* and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, which they claim are difficult to reconcile with a broad First Amendment right to boycott. In *International Longshoremen's Association*—a case decided the same Term as *Claiborne*—the Court rejected a First Amendment defense by union members who were sued for engaging in a purely political boycott of cargo shipped from the Soviet Union.[269] The Court dismissed their claim out of hand, reasoning that the union's "political" refusal to work was "designed not to communicate but to coerce" through economic pressure.[270] Defenders of the anti-boycott laws emphasize that the same Court that decided *Claiborne* could not have reached the result in *International Longshoremen's Association* if it broadly conceived of politically motivated boycotts as protected expression.[271]

Likewise, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, the Court rejected the notion that private law schools have a First Amendment right to deny military recruiters access to campus.[272] The Court explained that to deny access was "not inherently expressive."[273] Rather, the refusal to deal with military recruiters was "expressive only because the law schools accompanied their conduct with speech explaining it," and "[t]he expressive component of a law school's actions is not created by the conduct itself but

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267. *See, e.g.*, Dorf et al. Amicus Br., *supra* note 6, at 6–11; *see also* Ark. Times LP v. Waldrip, 37 F.4th 1386, 1392 (8th Cir. 2022) (en banc) ("*Claiborne* only discussed protecting expressive activities *accompanying* a boycott, rather than the purchasing decisions at the heart of a boycott.").

268. First Amendment Scholars Amicus Br., *supra* note 7, at 2–8; Appellant's Opening Br. at 16–22, *Waldrip* (No. 19-1378).

269. *See* Int'l Longshoremen's Ass'n v. Allied Int'l, 456 U.S. 212, 214–16, 224–26 (1982).

270. *Id.* at 224–26.

271. *E.g.*, Dorf et al. Amicus Br., *supra* note 6, at 8–9; *Waldrip* Opp. to Pet., *supra* note 44, at 9–10.

272. *See* Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 64–66 (2006).

273. *Id.* at 64.

by the speech that accompanies it."[274] Defenders of the anti-boycott laws maintain that refusal to host is conceptually indistinguishable from the "refusal to buy" that defines the boycott.[275]

Critics of the laws rejoin with contrary language from *Claiborne*. "The right of the States to regulate economic activity," the Supreme Court explained there, "could *not* justify a complete prohibition against a nonviolent, politically motivated boycott."[276] Indeed, *Claiborne* expressly distinguished between "unlawful conspiracies and constitutionally protected assemblies," implicitly suggesting that the politically motivated boycott in that case was a constitutionally protected exercise in assembly.[277] As for *International Longshoremen's Association* and *Rumsfeld*, the critics contend that neither case concerned the kinds of *consumer* boycotts at issue in *Claiborne* and restricted by the modern anti-boycott laws. They claim that *Claiborne* is the most on-point precedent and that its most straightforward reading ought to control: politically motivated boycotts are protected under the First Amendment.[278]

One notable feature of this debate is that neither side has approached the Supreme Court's decision through the full lens of constitutional *history*—because, at least until now, no one had surveyed that history. Whatever the "best" reading of *Claiborne*'s text, only the narrower reading is consistent with the history and tradition of boycott regulation that preceded the case and which consistently conceived of the boycott as conduct, not expression. Construing precedent is, in the end, an "exercise [in] discretion informed by tradition."[279] To fit *Claiborne* within this historical tradition, one must read the case as reflecting the distinct dangers in applying the

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274. *Id.* at 66.

275. *E.g.*, Dorf et al. Amicus Br., *supra* note 6, at 3–4, 12; *Waldrip* Opp. to Pet., *supra* note 44, at 14–18.

276. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 914 (1982) (emphasis added); Appellant's Opening Br., *supra* note 276, at 16–22; *accord* First Amendment Scholars Amicus Br., *supra* note 7, at 2–8.

277. 458 U.S. at 888.

278. Petition for a Writ of Certiorari at 14, Ark. Times LP v. Waldrip, 143 S. Ct. 774 (2023) (No. 22-379).

279. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).

conspiracy laws to political boycotts that bundle together issue advocacy and a concerted refusal to deal.[280] Modern anti-boycott laws thus circumvent the "*Claiborne* problem" because they focus only on the boycott, while leaving the ancillary expression untouched.

CONCLUSION

This Article's primary contribution is to begin to trace more than two hundred years of legal history in which state actors compelled compliance with the boycotts they supported, while prohibiting participation in the ones they opposed. Our findings suggest that states have broad authority to regulate even politically motivated boycotts, in line with our nation's history and traditions. Because scholars have not yet paid this subject careful attention, our findings are necessarily preliminary—and we hope they mark the start, not the end, of a broader scholarly investigation of boycott regulation throughout American history. But what we have uncovered casts serious doubt on the notion—advanced by critics of modern anti-boycott laws—that American legal history enshrines a fundamental, First Amendment right to boycott. To the contrary, history and tradition appear to cast the boycott as a form of economic discrimination that can be regulated like any other, consistent with the First Amendment.

280. *Cf.* City of Austin v. Reagan Nat'l Advert. of Austin, 142 S. Ct. 1464, 1469, 1474–75 (2022).