# Boycotts: A First Amendment History

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*Over the past decade, more than half of U.S. states have enacted laws that prohibit recipients of public contracts and state investment from boycotting the State of Israel. These so-called "anti-BDS laws" have triggered a debate over whether the First Amendment's Free Speech Clause includes a "right to boycott." This Essay is the first to take up that question thoroughly 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 participation in the boycotts they approved (like those of apartheid-era South Africa and modern-day Russia), while prohibiting participation in the ones they opposed (like that of Israel).*

*The Essay 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 the doctrine is 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 avoid that problem by surgically targeting the act of boycotting, while leaving regulated entities free to say whatever they please. From the standpoint of history, these laws reflect First Amendment progress, not decay.*

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More than half of U.S. states have rules prohibiting public entities from investing in or contracting with companies that boycott the State of Israel. These so-called "anti-BDS laws" have triggered a lively First Amendment debate over the status of politically motivated boycotts. Defenders of the anti-boycott 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 explain, 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.[1] 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 the anti-BDS laws rejoin with an appeal to precedent and the boycott's "historical pedigree."[2] Drawing from 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.[3] So, even if anti-boycott laws are *conceptually* indistinguishable from other anti-discrimination laws, the critics still maintain that America's *history and traditions* have carved out the political boycott for special constitutional protection.[4]

That historical argument is vitally important to the modern debate over the constitutionality of anti-boycott laws. After all, history and tradition have emerged as frequent—indeed dominant—modes of constitutional adjudication in the modern era. And yet, the historical record with respect to the law of boycotts has so far evaded careful scrutiny, with scholarly discussion limited primarily to non-legal

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[1] *See, e.g.*, Eugene Kontorovich, *Can States Fund BDS?*, TABLET MAGAZINE (July 13, 2015), https://www.tabletmag.com/sections/news/articles/can-states-fund-bds; 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.] (recognizing that "people might have the First Amendment right to discriminate (or boycott) in some unusual circumstances—for instance when they refuse to participate in distributing or creating speech they disapprove of," and explaining that the signatories "disagree with each other" over the boundaries of that category).

[2] Brief of Amici Curiae First Amendment Scholars in Support of Plaintiff-Appellant at 3, 9, 13, *Waldrip* (No. 19-1378) [hereinafter First Amendment Scholars Br.].

[3] *Id.* at 3, 9-10 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)). To be clear, we use the terms "defender" and "critic" to reference only scholars' views on the *constitutionality* of anti-boycott laws.

[4] *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").

work focusing on the politics of boycott movements, rather than the history of boycott regulation.[5]

This Essay begins to fill that 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.

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.[6] 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."[7] 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.[8] None of this history squares with the distinctly contemporary view of the boycott as protected First Amendment expression.

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

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[5] *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* Section II.A-B.

[6] *Infra* Section II.A.

[7] *Infra* Section II.B.

[8] *Infra* Section II.C.

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. And 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.

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. 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 Essay 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 confirms that modern anti-boycott laws are no exception to the longstanding tradition: nothing in the legal history of boycotts sets anti-boycott laws apart from other presumptively constitutional rules that compel or proscribe commercial dealings consistent with the First Amendment.[9] To the contrary, the modern laws improve upon tradition by creating an additional layer of protection for the expressive activities that often accompany boycotts.

## I. The Role of History in First Amendment Analysis

Scholars have long divided over the role and significance of legal history in constitutional analysis.[10] According to some, especially living- and "common-law" constitutionalists, history does not "provide the answers to the problems of today," but at most helps to "frame the questions" of modern constitutional interpretation and identify potential pathways along which the law might evolve.[11] For originalists,

[9] Considering our historical focus, this Essay does not review the literature on the varying approaches to politically motivated boycotts under modern labor or antitrust law. For discussion of those subjects, see, for example, Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057 (2018); and John E. Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U. L. REV. 705 (1962).

[10] Jamal Greene & Yvonne Tew, *Comparative Approaches to Constitutional History*, *in* COMPARATIVE JUDICIAL REVIEW 379, 384 (Erin F. Delaney & Rosalind Dixon eds., 2018).

[11] 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).

by contrast, history plays a more substantial and constraining role in the interpretive process. Though originalists often debate which history matters most—*i.e.*, pre-Founding historical practice versus the "prevailing understandings" in 1868 when the Fourteen Amendment was ratified[12]—many leading originalist scholars and judges accept that post-enactment historical practice has at least some role to play in "liquidating" the meaning of constitutional provisions that are open-textured on their face or uncertain in their application.[13]

This Essay does not purport to grapple with the fundamental methodological debate over history's proper role. Instead, we accept, provisionally, the critics' premise that the boycott's "historical pedigree" could (at least in theory) distinguish anti-boycott legislation from other presumptively constitutional rules that regulate or compel commercial dealings consistent with the First Amendment. Our aim is simply to make headway on the descriptive question of whether history separates out the boycott for greater First Amendment protection than what is ordinarily accorded to refusals to deal. We thus take as a given, for present purposes, that both pre- and post-enactment history have a role to play in settling the First Amendment's scope with respect to the boycott.

As it happens, that assumption fits with several of the Supreme Court's most recent pronouncements on the role of history in First Amendment analysis. In *Houston Community College Systems v. Wilson*, the Court took up the question of whether a governmental body violates the First Amendment when it issues a "purely verbal censure" against a public official for engaging in protected speech.[14] 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, '[l]ong settled and established practice is a consideration of great weight.' Often, 'a regular course of practice' can illuminate or 'liquidate' our founding document's 'terms & phrases."[15] 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 "put to rest" any "question of the Constitution's

[12] *See* Richard H. Fallon Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1762-72 (2015); *see also N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2138 (2022) ("We also acknowledge that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government).").

[13] *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 44-45 (2019) (cited favorably in *N.Y. State Rifle & Pistol Ass'n*, 142 S. Ct. at 2136-37).

[14] 142 S. Ct. 1253, 1259 (2022).

[15] *Id.* (alteration in original) (citations omitted).

meaning."[16] 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."[17]

The Court took an (even more) favorable view of post-enactment history in *City of Austin v. Reagan National Advertising of Austin, LLC*, when it held that regulations of off-premises adverting 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."[18] A central question in *Reagan National Advertising* 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.[19] 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."[20] 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."[21] It held that this "unbroken tradition of on-/off-premises distinctions counsel[ed] against" subjecting such regulations to strict scrutiny.[22] The dissent, advocating for a more 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.[23] 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 context.[24]

Cases like *Wilson* and *Reagan National* reflect the 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.[25] For present purposes, then, we apply that same methodology to the

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[16] *Id.* at 1259-60.

[17] *Id.* at 1260.

[18] 142 S. Ct. 1464, 1469, 1474-75 (2022).

[19] *See generally* 576 U.S. 155 (2015).

[20] *Reagan Nat'l Advert.*, 142 S. Ct. at 1474.

[21] *Id.* at 1469, 1474-75.

[22] *Id.* at 1475.

[23] *Id.* at 1490 (Thomas, J., dissenting).

[24] *Id.* (emphasis added).

[25] *District of Columbia v. Heller*, 554 U.S. 570, 625 (2010); *accord, 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.'"); *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]

regulation of political boycotts: if textual, doctrinal, and conceptual arguments leave room for doubt about the First Amendment's application, then history should serve as a natural gap filler to resolve the question of whether the boycott should be viewed as protected expression and association or proscribable economic conduct.

As far as we are aware, no one has undertaken a rigorous examination of that issue. To be sure, critics of modern anti-boycott laws have claimed the mantle of history, chronicling the many admirable boycotts in America's past and insisting that they elevate the boycott for special First Amendment protection.[26] But that is not the inquiry envisioned by the Supreme Court's recent precedents. 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, and not whether boycotts have been used more frequently for good or bad purposes.[27] The legal history, surveyed for the first time below, appears to answer the relevant constitutional question in favor of boycott regulations.[28]

## II. The Boycott in Early American Law

It is true that political boycotts have been a feature of American life since before the Founding.[29] But, for just as long, those same boycotts also appear to have been the subject of aggressive governmental control. When the colonists agreed to undertake a mandatory boycott of British goods, colonial legislatures mandated

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Amendment's protections" in constitutional adjudication, and stressing that, although post-enactment history cannot defeat the Constitution's plain text, such history has a clear role to play in "liquidating indeterminacies" in that text (cleaned up)); *see also, e.g.*, *Lange v. California*, 141 S. Ct. 2011, 2022 (2021) (Fourth Amendment); *cf. Biden v. Knight First Amend. 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.").

[26] *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. *But see* GLICKMAN, *supra* note 5, at 61, 103, 111 & 337 n.38 (describing how whites in the antebellum South instigated race-based boycotts to promote slavery and segregation).

[27] *Washington v. Glucksberg,* 521 U.S. 702, 702 (1997); *see also, e.g.*, *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) (concluding that "our 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"); *accord N.Y. State Rifle & Pistol Ass'n*, 142 S. Ct. at 2138-56.

[28] The historical inquiry in this Essay 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 political boycotts," and not at a more general level as a "right to refuse to deal" or a "right to engage in symbolic inaction"—because that is the formulation relied upon by the laws' critics to evade the conceptual equivalence between anti-boycott laws and anti-discrimination laws more generally. *Accord Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, J.) (considering "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified").

[29] *Supra* note 26.

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.

That landscape sits in considerable tension with an expressive view of the boycott. Governments run afoul of the First Amendment not only when they *prohibit* speech, but also when they *compel* it. 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."[30] If boycotts were indeed inherent expression, 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 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."[31] 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 conscience, presumptively immune from coercion or state influence. Instead, the colonists viewed their boycott

[30] *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988).

[31] 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*, INTERCEPT (Nov. 29, 2021), https://theintercept.com/2021/11/29/boycott-film-bds-israel-palestine/ (ACLU attorney: "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.").

of the British as an economic instrument that their governing democratic bodies had the authority to control and compel.[32]

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.[33] The signatories called for a "Non-importation, Non-consumption, and Non-exportation Agreement,"[34] under which individual colonies would "create their own administrative and judicial machinery … to impose their own penalties" on those who failed to comply.[35] 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."[36]

The precise mechanisms of enforcement varied among 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."[37] In Connecticut, a "committee of inspection" could extract "a written confession of [a violator's] guilt in violating this regulation and a promise to deposit his surplus profit with the committee."[38] 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."[39] In Virginia, too, those who refused to join the boycott "could expect to be branded an 'enemy of the country'" unless they publicly apologized.[40] Connecticut conducted full trial "proceedings against an accused: a

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[32] *Cf. Hous. Comm. Coll. Sys.*, 2022 WL 867307, at *4 (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").

[33] ARTICLES OF ASSOCIATION (1774), https://founders.archives.gov/documents/Jefferson/01-01-02-0094.

[34] *Id.* The term "boycott" had not yet been invented; it was coined a century later in Ireland. *Boycott*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/boycott (last updated Dec. 20, 2021).

[35] ARTHUR MEIER SCHLESINGER SR., THE COLONIAL MERCHANTS AND THE AMERICAN REVOLUTION, 1763-1776, at 138 (1918).

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

[37] SCHLESINGER, *supra* note 35, at 486.

[38] *Id.* at 487.

[39] Abraham H. Van Vleck, Letter to the Publick (1775), https://www.loc.gov/resource/rbpe.10803200/.

[40] ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789, at 263-64 (2007).

formal summons, a charge, an opportunity to defend himself, [and] a chance to present witnesses."[41] A guilty verdict required the defendant to "forefeit all commercial connections with the community."[42]

These regimes were strictly enforced. Connecticut declared that "it universally adheres to all the Resolves of Congress."[43] New York's Lieutenant Governor Colden declared that "the non importation association of the Congress is ever rigidly maintained in this Place," and he observed that "the Association takes place as effectually as law itself … and that ministerial opposition is here obliged to be silent."[44]

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 delegates to the Continental Congress were exercising "the powers of legislation" in "forcing his Majesty's subjects *contrary to their consciences* to submit to their unreasonable, seditious and chimerical Resolves."[45] 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.[46]

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 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."[47] 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.[48]

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[41] SCHLESINGER, *supra* note 35.

[42] *Id.* at 488.

[43] *Id.*

[44] *Id.* at 493, 529.

[45] *Id.* at 525.

[46] *Id.* at 496-97.

[47] Letter from George Mason to Richard Henry Lee (June 7, 1770), *in* 1 PAPERS OF GEORGE MASON 1725-1792, at 118 (R. Rutland ed., 1970).

[48] 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").

In the colonial mind, the boycott was a form of economic coercion, calculated to "distress the various Traders and Manufacturers in Great Britain," not a personal right of expression vested with the individual boycotter.[49]

The nonimportation associations thus evince a decidedly nonexpressive 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. That is roughly analogous to today's anti-boycott laws, under which states 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.[50]

Of course, the analogy between the early non-importation 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*

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[49] Letter from George Mason, *supra* note 47, at 99; MAIER, *supra* note 48, 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 just 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 5, at 333, and Porterfield, *supra* note 5, at 28-31). But 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 conscience and 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.

[50] A number of anti-BDS laws, for instance, exempt individuals, small businesses, and low-value contracts from their purview. *See, 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(c) (exception for contracts worth less than $1,000); 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(3) (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 ("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 (exceptions for sole proprietors and deals worth $100,000 or less); S.D. Exec. Order No. 2020-01 (limiting anti-boycott mandate to contracts worth at least $100,000 with companies that have at least five employees).

legislative power. But it would be a mistake to overstate that formal distinction. As Schlesinger explains, 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.'"[51] 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."[52] The local committees that enforced the non-importation 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.[53] 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.[54] The germ of American democracy, then, was born from a system in which participation in a political boycott was not freely chosen, but instead ordained from on high and vigorously enforced. And while there was no written-down 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.[55] 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.

Subsequent state practice "suppl[ies] little reason to think the First Amendment was designed or commonly understood to upend" the colonial conception of the boycott.[56] 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.[57] Offenders faced forfeiture of their goods and fines thrice the value of the products.[58] Next came the Embargo Act of 1807, which similarly threatened hefty fines and

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[51] SCHLESINGER, *supra* note 35, at 428.

[52] Dennis J. Mahoney, *Association, The*, *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 132, 132-33 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000); MAIER, *supra* note 48, at 135 (nonimportation bodies "increasingly exercised functions normally reserved to a sovereign state").

[53] DANA FRANK, BUY AMERICA: THE UNTOLD STORY OF ECONOMIC NATIONALISM 9 (1999).

[54] ABRAHAM LINCOLN, FIRST INAUGURAL ADDRESS (1861), https://avalon.law.yale.edu/19th_century/lincoln1.asp.

[55] *See* Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 529-34 (2019).

[56] *Hous. Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1259 (2022).

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

[58] *Id.*

forfeiture of the offending goods (and the vessels that carried them) for anyone who violated the mandatory boycott of all foreign imports.[59] 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.[60] 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.[61] 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, because the decision of whom to deal with was *never* conceptualized as a right of free expression or association.

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,[62] and yet early state governments had no compunctions about telling Americans from whom they needed to buy and when. One especially notable example was when Henry Clay, a strong supporter of Jefferson's Embargo Act, introduced a resolution in Kentucky requiring state legislators to wear homespun suits made in the United States and boycott those made from British broadcloth.[63] That Clay and his fellow representatives believed they could *compel* Kentuckians 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 only dissenter was Humphrey Marshall, an "aristocratic lawyer [with] a sarcastic tongue" whose opposition to the measure escalated into a duel with Clay.[64] But even Marshall, an attorney, never suggested that Clay's proposition subverted his conscience 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, for example, has tried to recruit this

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[59] 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, 2 Stat. 453; Act of Mar. 12, 1808, 2 Stat. 473.

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

[61] 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) (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").

[62] *See* GLICKMAN, *supra* note 5, 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 Shanna 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").

[63] DAVID S. HEIDLER & JEANNE T. HEIDLER, HENRY CLAY: THE ESSENTIAL AMERICAN 70-71 (2010).

[64] CLEMENT EATON, HENRY CLAY AND THE ART OF AMERICAN POLITICS 17 (1957).

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 famous and then became one of the most famous U.S. Senators." [65] From that story, the Senator concludes "that you should be allowed to boycott, that it is an extension of your speech, that it is an extension of the First Amendment."[66] The history is mostly right, but the lesson backward. Clay was attempting to compel participation in the legislature's preferred boycott, and he was willing to shoot and kill the lone 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.[67]

* * *

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.[68] 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 that 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 governments had no compunctions about compelling boycotts and no sympathy for conscientious objectors—because boycotting, to them, was not speech. Several of the 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.[69] At same time, however, those same Founders recognized and defended a right to engage in certain

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[65] 165 Cong. Rec. S828 (daily ed. Feb. 4, 2019) (statement of Sen. Rand Paul), https://www.congress.gov/congressional-record/2019/02/04/senate-section/article/S819-4)

[66] 165 Cong. Rec. S828 (daily ed. Feb. 4, 2019) (statement of Sen. Rand Paul), https://www.congress.gov/congressional-record/2019/02/04/senate-section/article/S819-4)

[67] "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); Exec. Order No. 13,788, 82 Fed. Reg. 18837 (Apr. 18, 2017) (Trump administration implementing similar measures); Buy American Act, Pub. L. No. 72-428, 47 Stat. 1489 (1933) (codified at 41 U.S.C. §§ 8301-8305) (enacting similar policy).

[68] *Hous. Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1260 (2022) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819)).

[69] *See supra* notes 47-48 and accompanying text.

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 in the "right of the people 'to assemble upon all occasions to consult measures for promoting liberty and happiness.'"[70] 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.[71] 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 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.

That incongruity flouts common sense and settled First Amendment doctrine, which treats compulsion and prohibition as two sides of the same coin.[72] In fact, compelled speech is ordinarily viewed as the more sinister of the two offenses against free expression, since it "coerce[s] [people] into betraying their convictions."[73] The more natural and coherent reading of the early history, we think, is that the boycott—along with its close cousin, the buycott—was never seen as a fundamentally expressive act, but instead was treated as a species of regulable economic conduct. The government could prevent people from buying British goods, as the First

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[70] GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 323-324 (1969) (quoting Benjamin Rush's Diary (Feb. 4, 1777); and Letter from Daniel of St. Thomas Jenifer to Gov. Thomas Johnson, Jr. (May 24, 1779)).

[71] L. F. S. Upton, *Proceedings of Ye Body Respecting the Tea*, 22 WM. & MARY Q. 287, 292-93 (1965); *see also* WOOD, *supra* note 70, 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 173 (1989) (explaining that the North Carolina assembly 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 48, at 72 (similar); Pope, *supra* note 5, at 336-37 (describing the colonial-era connection between "the right of assembly" and the exercise of "popular *sovereignty*" (emphasis added)).

[72] *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797 (1988) (discussing "[t]he constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression"); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) ("There is necessarily … a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect."); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (no practical difference between compulsion and prohibition).

[73] *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, 663 (1943)).

Continental Congress did, and it could require that people "Buy American," as the Jefferson-era Congress did indirectly and Henry Clay did outright. It is of course *conceivable* that, by sheer happenstance, the law developed over time in a way that aligns with the critics' asymmetric. But we have found no affirmative evidence in the historical record to support it, and the post-Founding history cuts the other way. We turn next to that subsequent practice.

### 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.[74] By the end of the century, a majority of the states had codified that rule in their criminal codes.[75] Under these various conspiracy laws, judges would determine whether a particular boycott was "justified" 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.[76] That inquiry, in both principle and application, is fundamentally inconsistent with an "expressive" understanding of the boycott. If the boycott were a "categor[y] of speech" protected by the First Amendment, the kind of "ad hoc balancing of relative social costs and benefits" inherent in the judicial application of the conspiracy laws would have been flatly impermissible.[77]

The conspiracy laws cropped up most often in the labor context, with the earliest cases revealing a deep hostility to union boycotts. In *State v. Glidden*, 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

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[74] *See, e.g.*, Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 643-44 (1941) (discussing *Mogul Steamship Co., Ltd. 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'"); 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 B. & C. 247 (1825), which defined a civil conspiracy as a "wrongful act done intentionally without just cause or excuse."

[75] *See* ROBERT SAMUEL WRIGHT, THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS ___ (1887) (collecting statutes).

[76] Note, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131, 1156 (1980); *e.g.*, *Plant v. Woods*, 57 N.E. 1011, 1013 (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 molestation, such as to bring the acts of the defendant under the shelter of the principles of trade competition.").

[77] *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").

criminal conspiracy laws.[78] 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*!"[79] 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"[80] The boycott was so powerful an instrument, the court opined, that its freewheeling use would result in ever-escalating "abuses and excesses."[81]

The next prominent decision in this area was *Crump v. Commonwealth*, in which the Virginia Supreme Court took a similarly 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 of the boycott.[82] 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."[83] 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."[84] To these early 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 widespread economic and societal harm. As then-Judge William Howard Taft observed that "[b]oycotts, *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."[85]

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

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[78] GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND 36 (1999).

[79] *Id.*

[80] *Id.* (quoting *State v. Glidden*, 8 A. 890, 894 (Conn. 1887) (alterations in original)).

[81] *Glidden*, 8 A. at 894-95.

[82] *Crump v. Commonwealth*, 6 S.E. 620, 622, 629 (Va. 1888).

[83] *Id.* at 627.

[84] *Id.* at 630.

[85] *Thomas v. Cincinnati Ry.*, 62 F. 803 (C.C.S.D. Ohio 1894) (emphasis added).

conspiracy; while in cases in the New York state courts, and … in Connecticut, the extent to which boycotts are legal and the point at which they become criminal are clearly and on the whole liberally defined."[86] Indeed, some courts were particularly sympathetic to boycotts that were "motivated by the prospect of immediate economic gain for [the boycotters] themselves."[87] 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.[88] But even under that more defendant-friendly construction of the conspiracy laws, "broader or more attenuated motives" for boycotts "were [still] condemned as 'malicious.'"[89]

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 differently.[90] 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."[91] 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. …

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

[87] James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 544 (2004); *cf., e.g.*, *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").

[88] *P. 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 (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").

[89] Pope, *supra* note 87, at 544.

[90] Oliver Wendell Holmes Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 8-9 (1894-1895).

[91] *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").

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."[92] Notably, none of these critiques sound in principles of free speech or association.

In any event, conspiracy law survived these objections; its vague standards extended well into the twentieth century and far beyond labor disputes.[93] According to the First Restatement of Torts, "[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*."[94] The 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."[95] 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."[96]

This balancing analysis is difficult to square with an "expressive" model of the boycott: "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."[97] If boycotts were indeed viewed as inherently expressive, then allowing courts to determine the legality of a boycott under the conspiracy laws based on their own policy views would have flouted the Founders' decision to place speech beyond the whims of government actors. The persistence and sustained enforcement of the conspiracy laws thus provides additional evidence that the boycott existed primarily in the realm of economic conduct, not expression or association.

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[92] 2 WHARTON'S AMERICAN CRIMINAL LAW 191 (8th ed. 1880).

[93] *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).

[94] RESTATEMENT (FIRST) OF TORTS § 765 (1939) (emphasis added).

[95] RESTATEMENT (FIRST) OF TORTS § 765 cmt. d; *accord, 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.").

[96] RESTATEMENT (FIRST) OF TORTS § 765 cmt. d.

[97] *United States v. Stevens*, 599 U.S. 460, 470 (2010); *accord 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").

### 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.[98] 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-Chinese U.S. immigration policy precipitated the Chinese Boycott of 1905, a collective effort by Chinese merchants and civil-society groups 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 a matter of individual conscience but rather as coercive instruments of politics subject to the sovereign's plenary control.

#### 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.[99] Advocates for those boycotts argued—in terms both expressive and abhorrent—that "white citizens have as good a right to determine that they will not employ Chinese laborers as another class has to combine and exclude white labor from their employ."[100] Though such boycotts were rarely successful in pushing out Chinese-owned businesses,[101] they did on occasion have sufficient

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[98] 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).

[99] Gabriel J. Chin & John Ormonde, *The War Against Chinese Restaurants*, 67 DUKE L.J. 681, 693-694 (2018) (describing the American Federation of Labor's 1914 resolution admonishing "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, 292 nn.583-587 (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).

[100] *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; *see also Card to the Public*, TONOPAH (NEV.) BONANZA, 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.").

[101] Chin & Ormonde, *supra* note 99, at 698 (even when not enjoined, "nonviolent boycotts were rarely wholly successful"); Bernstein, *supra* note 99, at 292 nn.583-587 ("Chinese laundries thrived throughout the West, even in cities where they faced organized boycotts.").

economic impact to expose the organizers to civil liability or injunctions under the conspiracy laws.[102]

The boycott in Butte, Montana in 1897 was among the most significant and successful of the anti-Chinese boycotts from this period.[103] That boycott, 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.[104]

The boycotters employed multiple tactics to spread the word: they displayed banners across the city that included anti-Chinese images and calls to boycott; union members approached citizens and pressed them not to patronize Chinese business; and they successfully carried out secondary boycotts against all who were willing to do business with the Chinese.[105] That enterprise was justified in familiar terms: "The 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."[106] According to the boycotters, this "privilege" flowed directly from the proposition that "all shall enjoy equally the privileges of communication and intercourse."[107]

As noted, this boycott was unique in its success. Roughly three hundred and fifty Chinese people were compelled to leave Butte in search of a less hostile environment to live and work.[108] But not all Chinese-owned businesses capitulated.

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[102] Chin & Ormonde, *supra* note 99, at 695 n.69 (2018) (collecting examples).

[103] Stacy A. Flaherty, *Boycott in Butte: Organized Labor and the Chinese Community, 1896-1897*, MONTANA: MAG. W. HIS., Winter 1987, at 34, 35.

[104] *Id.* at 36 (quoting BUTTE SUNDAY BYSTANDER, Jan. 10, 1897). Note that "most of the Asians in Butte were Chinese." *Id.*

[105] *Id.* at 38, 41.

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

[107] *Id.*

[108] 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*

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."[109] As a remedy, the plaintiffs sought fifty thousand dollars in damages and an injunction against both the primary and secondary boycotts of Chinese businesses.[110]

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 [libelous] banners," and picketing "in the vicinity of the places of business of the said complainants."[111] 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."[112] They believed the TRO applied only to violent intimidation and that it could "not deprive us of our rights to patronize whom we please."[113]

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."[114] Media reports at the time described that final order as "sweeping," "far reaching in effect," and "calculated to make Chinese immune from harm."[115]

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*Transmitted To Congress December 3, 1901, Doc. 89*, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1901/d89.

[109] *That Temporary Restraining Order*, BUTTE SUNDAY BYSTANDER, April 24, 1897 (reprinting a "full and true copy of the bill of complaint").

[110] *Id.*

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

[112] *That Temporary Restraining Order*, *supra* note 109.

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

[114] 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*, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1901/d89.

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

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.[116] 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."[117] Indeed, after the district court declined to award damages, the Chinese Legation petitioned the highest ranking officials in U.S. State Department for just compensation to the victims.[118] 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 the harm they had suffered.[119] 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.[120]

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.[121] This was a popular, nongovernmental protest in response to the Chinese Exclusion Act, which prohibited virtually all Chinese immigration to the United States, and

[116] Flaherty, *supra* note 103, at 47 ("The 1896-1897 boycott of Asians in Butte was unique in that there was little physical violence against Asians.").

[117] *That Temporary Restraining Order*, *supra* note 109.

[118] Letter from Ambassador Wu Ting-fang to David J. Hill, *supra* note 108 (transmitting Letter from Hum Fay et al. to Ambassador Wu Ting-fang, *supra* note 114).

[119] 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*, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1901/d90.

[120] 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)*, 30 Ohio Dec. 64, 66 (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 67. 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 88.

[121] *Id.* at 123.

related encroachments on the rights of Chinese people already in the country.[122] 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."[123]

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,"[124] and he reported back to his superiors that China had promised to pursue "prompt and radical action to suppress [the boycott]."[125] 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."[126]

In response, Chinese leadership recommitted "to end[ing] the agitation by laying strong injunctions upon all classes."[127] But when 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

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[122] *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).

[123] John W. Foster, *The Chinese Boycott*, ATLANTIC MONTHLY, Jan. 1906, at 118, https://sourcebooks.fordham.edu/eastasia/1906foster.asp.

[124] 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 3, 1901, Doc. 218*, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1905/d218.

[125] Paraphrase of Telegram from Acting Sec'y of State to Ambassador William Woodville Rockhill (July 7, 1905), *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. 219*, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1905/d219.

[126] 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 3, 1901, Doc. 223*, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1905/d223.

[127] 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 Message of the President Transmitted To Congress December 3, 1901, Doc. 232*, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1905/d232.

> provisions … and is *an unwarranted attempt of the ignorant people to assume the functions of government and to meddle with international relations*.[128]

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."[129]

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 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.[130] 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

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[128] 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 3, 1901, Doc. 233*, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1905/d233 (transmitting Letter from Ambassador William Woodville Rockhill to Prince Ch'ing (Aug. 27, 1905)).

[129] 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 3, 1901, Doc. 234*, U.S. DEP'T STATE OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1905/d234.

[130] 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.").

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. 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."[131] That persistence has led some 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 foreigners resulting from such interference."[132] Now, that was hardly the consensus view.[133] 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.[134]

## 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.[135] 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 boycott policy.[136] But whatever the differences in method, the various approaches reflect a shared constitutional understanding that

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[131] Bouve, *supra* note 130, at 21.

[132] *Id.* at 39-40 (emphasis added).

[133] 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");

[134] *See* Charles Cheney Hyde & Louis B. Wehle, *The Boycott in Foreign Affairs*, 27 AM. J. INT'L L. 1 (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)).

[135] *Supra* Sections II.A-C.

[136] 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. Alliance 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)).

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."[137] The movement, which started at colleges and universities,[138] spread quickly to municipal and state governments across the country. By 1990, "26 states, 22 counties and over 90 cities ha[d] taken some form of binding economic action against companies doing business in South Africa."[139] These policies were both tactical and expressive, designed "to condemn the South African system of apartheid and, if possible, to hasten its demise through economic pressure."[140]

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.[141] 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.[142] States enforced their rules, just as they do modern anti-boycott laws, by

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[137] *U.S. Corporate Interests in South Africa: Report to the Senate Comm. on Foreign Relations,* S. Rep. No. 382-3, 95th Cong., 2d Sess. 6, 13 (1978); *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).

[138] *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).

[139] RICHARD KNIGHT, SANCTIONS, DISINVESTMENT, AND U.S. CORPORATIONS IN SOUTH AFRICA (2001), http://richardknight.homestead.com/files/uscorporations.htm; *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/; *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).

[140] 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).

[141] *Id.* at 821; *see also, e.g.*, PITTSBURGH, PA., ORDINANCE NO. 14 (1985) (banning city bodies from doing business with companies that have operations in South Africa and with their suppliers); N.Y.C. LOCAL LAW 19 (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).

[142] *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 New Jersey Laws, Act 308 (divestment law focused on financial institutions); Rhode Island General Laws ch. 35-10 (same). But not every state followed that approach. Wisconsin, for example, passed a broadly worded statute that prohibited

requiring the companies with whom they did business to certify their compliance with the state's preferred boycott policy.[143]

At the federal level, Congress and President Reagan sparred repeatedly over the propriety of boycotting South Africa. Whereas President Regan hoped to persuade South Africa to abandon apartheid through "constructive engagement,"[144] Congress was adamant that economic pressure presented the only path forward. In 1985, the President sought to bridge that gap, ordering a boycott that applied to a handful of industries.[145] 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.[146] 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.[147] 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.[148]

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.[149] Yet, as far we aware, it was never seriously

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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.

[143] *See, e.g.*, MD. ANN. CODE 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).

[144] 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, 169-71 (2015).

[145] Exec. Order No. 12,532 (Sept. 9, 1985).

[146] Pub. L. No. 99-440, §§ 4, 301-304, 309, 317-323, 100 Stat. 1086, 1089, 1099-1106 (1986).

[147] Michaels, *supra* note 144, at 187.

[148] *Id.* In 1991, President George H.W. Bush made the requisite findings to end the federal sanctions. Fenton, *supra* note 139, at 578.

[149] 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 AFRICAN 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

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.[150] There was no First Amendment right to buycott South Africa—presumably because the boycott laws regulated conduct, not expression.[151]

### 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 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.[152] Beginning in the 1890s, and especially throughout the 1920s and '30s, Arab political associations in Mandatory Palestine passed and promoted a range of anti-Jewish boycott resolutions barring economic relations with

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desirability of sanctions," which would be "gravely harmful … to the black majority" of South African residents); Stephen Chapman, *Trade Sanctions: Morality and Policy*, CHI. TRIB. (Aug. 7, 1985), https://www.chicagotribune.com/news/ct-xpm-1985-08-07-8502210466-story.html (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).

[150] *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); John H. Chettle, *The Law and Policy of Divestment of South African Stock*, 15 L. & POL'Y INT'L BUS. 445, 515-26 (1983) (same). Though we do not consider those other constitutional issues in this Essay, we note that we have detected nothing in the history of boycott regulation to distinguish state laws from federal laws for First Amendment purposes.

[151] South Africa was by no means the only target of state and local divestment laws. For additional examples, see Fenton, *supra* note 139, 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); 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).

[152] Eugene Kontorovich, *The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?*, 4 CHI. J. INT'L L. 283, 286 (2003).

the Jews of the area.[153] 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.[154] 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."[155] In 1933, the Grand Mufti of Jerusalem, Mohammad Amin al-Husayni, 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.[156] Reportedly, the Grand Mufti's only request for Berlin was that German Jews "not be sent to Palestine."[157] Calls for anti-Jewish boycotts in the Middle East continued up until 1939, months after the start of World War II.[158]

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. Its resolution declared "Jewish products … manufactured in Palestine … undesirable in the Arab countries" and called upon all Arabs to "refuse to deal in, distribute, or consume Zionist products or manufactured goods."[159] 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.[160] The boycott remains in place today, though a number of Arab League

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[153] 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).

[154] *Supra* note 153.

[155] 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) (quoting a contemporaneous news article about the boycotts from 1925).

[156] FRANCIS R. NICOSIA, THE THIRD REICH AND THE PALESTINE QUESTION ___ (1985).

[157] *Id.*

[158] *See generally* FEILER, *supra* note 153.

[159] The Boycott of Zionist Goods and Products, Res. 16, Arab League Council, 2d Sess. (1945); ANDREAS F. LOWENFELD, 3 TRADE CONTROLS FOR POLITICAL ENDS 95-113 (1977).

[160] Eugene Kontorovich, *The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?*, 4 CHI. J. INT'L L. 283, 286 (2003); *see also Hearings on Multinational Corporations and United States Foreign Policy Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess., pt. 11, at 214, 371-72 (1975); LEE E. PRESTON, TRADE PATTERNS IN THE MIDDLE EAST 51-52 (1970); *see also* Aderet, *supra* note 155.

countries have since normalized trade relations with Israel and repudiated the boycott.[161]

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.[162] The former Commissioner General of the Central Boycott Office described it as "one of the Arab weapons in confronting the Zionist entity,"[163] 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."[164] 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.[165]

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.[166] 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.[167] Critics of the boycott reply that any distinction between the only Jewish nation and the Jewish people is analytically fraught and practically untenable.[168] 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

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

[162] Henry J. Steiner, *International Boycotts and Domestic Order: American Involvement in the Arab-Israeli Conflict*, 54 TEX. L. REV. 1355, 1365 (1976); MUHAMMED KHALIL, THE ARAB STATES AND THE ARAB LEAGUE, A DOCUMENTARY RECORD 161 (1962).

[163] FEILER, supra 153, at 40 (quoting the Central Boycott Office Commissioner General).

[164] MARWAN ISKANDER, THE ARAB BOYCOTT OF ISRAEL 55 (1966).

[165] N.Y. TIMES, May 10, 1976, at 1, col. 5.

[166] Steiner, *supra* note 162, at 1365.

[167] *Id.* (describing this as a "hazy" boundary).

[168] *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").

for the Arab Boycott, "Jews support Israel and we consider those who provide assistance to our enemies as our own enemies."[169]

2. Federal Regulation of the Arab Boycott

The debate over boycotts of Israel is as morally contested today as it was in the 1970s.[170] 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 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."[171] Discerning the anti-Semitic underpinnings of the Arab Boycott, President Ford announced his refusal to "countenance the translation of any foreign prejudice into domestic discrimination against American citizens."[172]

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 "participate[] in or cooperate[] with" the Arab Boycott.[173] In 1977, Congress went a step further and banned outright American complicity in the Arab Boycott.[174] The Export Administration Amendments of 1977, 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

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[169] Losman, *supra* note 168.

[170] *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., George 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 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").

[171] White House Release of President Gerald Ford's Statement, 11 Weekly Comp. Of Pres. Doc. 1305 (Nov. 20, 1975).

[172] *Id.*

[173] Pub. L. No. 94-455, §§ 1061-64 (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 162, at 1374.

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

country against a country which is friendly to the United States."[175] 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.[176] For the past forty years, that scheme has been rigorously enforced and has consistently survived First Amendment challenge.[177]

President Carter's signing statement to Export Administration Amendments underscore all of the reasons these anti-boycott 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."[178] 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."[179] While former-President Carter appears to have reconsidered his private political views since leaving public office,[180] 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.

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[175] 50 U.S.C. § 4842(a)(1)(A), (D); *see also* David Cain, *International Business Communication and Free Speech*: Briggs and Stratton v. Baldridge, 9 B.C. INTL & COMP. 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. §§ 4601-4623). 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 13 (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.

[176] 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).

[177] *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) (Export Administration Act "is a constitutional statute").

[178] President Jimmy Carter, Remarks on Signing H.R. 5840 Into Law (June 22, 1977), https://www.presidency.ucsb.edu/documents/export-administration-amendments-1977-remarks-signing-hr-5840-into-law.

[179] *Id.*

[180] 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 (opposing proposed federal legislation as violative of the "right of individuals to participate in boycotts as a form of political protest").

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—including 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*."[181] Though Israel isn't mentioned by name, the law was broadly understood to be a "response to the Arab boycott,"[182] exposing anti-Israel boycotters to possible civil and criminal liability.[183] 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 [the target's] national origin or foreign trade relationships."[184] 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."[185]

The remaining laws varied in their details: some swept broadly across the entire economy,[186] others were restricted to particular kinds of business

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[181] N.Y. EXEC. LAW § 296(13) (McKinney Supp. 1980)).

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

[183] N.Y. PENAL LAW §§ 80.05(a), 80.10 (McKinney 1972) (misdemeanor fines, per N.Y. EXEC. LAW § 298(a)(3) (McKinney Supp. 1976)); *see also* Letter from Louis J. Lefkowitz, Att'y Gen. of N.Y., to Speaker of the House of the N.Y. Assembly Stanley Steingut (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) (successful suit 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).

[184] Act of Aug. 18, 1976, 1976 Mass. Acts 394, 395.

[185] *Massachusetts Law to Curb Arabs' Boycott is Enacted*, N.Y. TIMES (Aug. 20, 1976), https://www.nytimes.com/1976/08/20/archives/massachusetts-law-to-curb-arabs-boycott-is-enacted.html.

[186] *See* CONN. GEN. STAT. §§ 42-125a, 42-125c (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 (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

relationships,[187] and still others to particular economic sectors.[188] 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, they legislated 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, the officials who advance these boycott policies conceive of the boycott as regulable economic conduct well outside the heartland of First Amendment expression or association.

### A. *Compelling Boycotts: Russia's Invasion of Ukraine*

Russia's invasion of Ukraine has reinvigorated governments' historical power to compel boycotts. Several states have declared that they will not contract with or invest in any company that refuses to boycott the regime of Russian President Vladimir Putin.[189]

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refusal to deal with another person, including on the basis of "unlawful business associations," in order to comply with or support a foreign boycott); ILL. ANN. STAT. ch. 29, §§ 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) (rendering 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) (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 (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 (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; *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 these laws).

[187] N.J. STAT. ANN. §§ 10:5-:12 (West Supp. 1981) (employment); N.C. GEN. STAT. § 75B-2(4) (same).

[188] OHIO REV. CODE ANN. § 1129.11 (Anderson 1979) (financial institutions).

[189] 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), https://www.forbes.com/sites/lizfarmer/2022/03/11/the-pension-plans-divesting-from-russia/?sh=1eb7cf3b2b04 (collecting examples); and Sophie Quinton, *In Support of Ukraine, US Governors Cut Economic Ties with Russia*, PEW CHARITABLE TRS. (Mar. 3, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/03/03/in-support-of-ukraine-us-governors-cut-economic-ties-with-russia.

New York is a paradigm example. By executive order, Governor Katherine Hochul (1) prohibited state agencies from "contracting with businesses conducting business in Russia," (2) required bidders for state contracts to provide certifications regarding any Russia-related operations,[190] and (3) directed all state agencies to divest from any businesses headquartered in Russia.[191]

New York is far from alone in its efforts. At the federal level, President Joseph Biden declared illegal any "new investment in the Russian Federation by a United States person."[192] California has taken steps to fortify that mandate by requiring state contractors to certify their compliance with federal boycott rules.[193] New Jersey has taken a similar course, with Governor Philip Murphy ordering a mandatory review of all existing state contracts with "businesses that invest directly" in companies owned by or affiliated with the Russian government.[194] As the governor's order explains, all of those measures are 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."[195] 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.[196]

This flurry of regulatory activity presumes 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

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[190] 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.

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

[192] 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/.

[193] Cal. Exec. Order No. N-6-22 (April 22, 2022), https://www.gov.ca.gov/wp-content/uploads/2022/03/3.4.22-Russia-Ukraine-Executive-Order.pdf.

[194] N.J. Exec. Order No. 291 (March 2, 2022), https://nj.gov/infobank/eo/056murphy/pdf/EO-291.pdf.

[195] *Id.*

[196] N.C. Exec. Order No. 251 (Feb. 28, 2022), https://governor.nc.gov/media/2959/open; 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; Ohio Exec. Order No. 2022-02D (Mar. 3, 2022), https://governor.ohio.gov/media/executive-orders/executive-order-2022-02d.

association.[197] Hence, states may compel compliance with the boycotts they support, just as they may deter or ban participation in the ones they oppose.

### B. *Deterring Boycotts: The BDS Movement*

Today's anti-BDS laws require companies to abstain from boycotting Israel and those who do business there as a condition of eligibility for state investments and government contracts.[198] These laws respond to the Boycott, Divestment and Sanctions ("BDS") movement, an international effort to levy economic, political, and cultural pressure against Israel to extract policy concessions on Palestinian issues. BDS has garnered controversy for its singular focus on the Jewish State, statements by its chief architects questioning Israel's right to exist as a Jewish state, and the transparent anti-Semitism of its historical antecedents.[199] Since 2015, more than half

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[197] *See, e.g.*, *Clancy v. Office of Foreign Assets Control of U.S. Dep't of Treasury*, 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* at 28-30, *A&R Eng'g & Testing v. City of Houston*, No. 22-20047 (5th Cir. Apr. 21, 2022) ("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.).

[198] For investment laws, see, for example, ARIZ. REV. STAT. ANN. § 35-393.02 (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) (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) (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. ANN. § 287.135(2)(a) ("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) (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"); R.I. GEN. LAWS § 37-2.6-3 ("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 … .").

[199] *See, 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., George Mason Univ.); *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.

of the states have passed anti-BDS rules codifying their support for Israel and their opposition to BDS's methods and objectives.[200]

These laws serve 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 warfare" that "discriminates against Israel."[201] Its anti-BDS law "implement[s] the United States Congress's announced policy" of opposing boycotts against a "key all[y] and trade partner."[202] Iowa has, likewise, characterized boycotts aimed at Israel as "threaten[ing] the sovereignty and security of [an] all[y] and trade partner[] of the United States."[203] 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."[204] Louisiana has proclaimed that "[t]he refusal by a company operating in Louisiana to do business with Israel with the goal of advancing the BDS campaign harms the Israel-Louisiana relationship," which is "in the best interests of the people of Louisiana."[205] It has also declared that Louisiana's anti-BDS certification requirement for state contracts is "[c]onsistent with existing Louisiana non-discrimination provisions."[206] 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 "engaging in refusals to deal, terminating business activities, or other actions to discriminate against … the State of Israel."[207]

These measures are broadly consistent with the First Amendment because, as the above analysis suggests, they are regulating disfavored economic *conduct,* and do not target 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

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[200] *Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBRARY, https://www.jewishvirtuallibrary.org/anti-bds-legislation (last visited Feb. 16, 2022); Amy Spiro, *Israeli Envoy Urges 35 US States to Activate Anti-BDS Laws Against Ben & Jerry's*, TIMES ISR. (July 20, 2021), https://www.timesofisrael.com/erdan-asks-35-us-states-to-activate-anti-bds-laws-against-ben-jerrys/.

[201] ARK. CODE ANN. § 25-1-501(1)-(5).

[202] *Id.* § 25-1-501(4)-(6).

[203] IOWA CODE § 12J.1.

[204] 62 PA. CONS. STAT. § 3602.

[205] LA. STAT. ANN. § 39:1602.1(A)(4)-(5).

[206] *Id.* § 39:1602.1(B)(1).

[207] MO. REV. STAT. § 34.600(1)-(3).

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, while leaving unfettered their right to express whatever viewpoints they please through any other medium.[208]

### 1. Modern Anti-Boycott Laws Are a First Amendment Improvement

Today's anti-boycott laws are not merely consistent with past practice; they actually reflect a constitutional *improvement* over the regimes of old. 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.[209]

*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.[210] 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.[211] In addition, some courts recognized an expressive interest in explaining, defending, and advocating for the boycott, which presents yet another challenge in separating out unprotected conduct (the boycott) from potentially protected expression (advocacy for the boycott).[212]

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[208] *See, e.g.*, laws and executive orders cited at *supra* note 198.

[209] Lauterpacht, *supra* note 133, at 139 ("[N]o [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).

[210] RESTATEMENT (FIRST) OF TORTS § 765, cmt. a (describing the boycott right as derivative of the "liberty to acquire property").

[211] S*ee 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 that freedom of contract).

[212] *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*

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."[213] 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."[214]

Modern anti-boycott laws are a First Amendment improvement because they operate more surgically than their common-law antecedents. These laws specifically condition public contracts and investments only on a certification *not to boycott* 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.[215] 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.[216] 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

*Buck's Stove & Range Co. v. AFL,* 70 Al. L. J. 8, 10 (D.C. 1907) ("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."). None of those cases, however, conceived of the bare refusal to deal as a form of protected expression. That distinctly modern view is incompatible with the basic contours of conspiracy at common law. *See supra* Section II.B.

[213] LAIRD, *supra* note 209 (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).

[214] *Marx & Haas Jeans Clothing Co. v. Watson*, 67 S.W. 391, 394 (Mo. 1902).

[215] 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*, No. 4:21-CV-03577, 2022 WL 267880 (S.D. Tex. Jan 28, 2022), *appeal docketed*, No. 22-20047 (5th Cir. Feb. 1, 2022). We take no position on the meaning or scope of any particular provision of state law.

[216] 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 50.

boycotts. From the long view of history, modern anti-boycott laws reflect free speech progress, not decline.[217]

### 2. Modern Anti-Boycott Laws Resolve the *Claiborne Hardware* Problem

The Supreme Court's 1982 decision in *NAACP v. Claiborne Hardware Co.*—which has figured prominently in the debate over more recent anti-boycott laws—exposes both the dangers in applying conspiracy laws too broadly and the benefits of adopting the more surgical approach reflected in the modern 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.[218] Some affected merchants brought suit for damages and an injunction under the conspiracy laws.[219] 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.[220] The Court explained that the merchants' damages claims arose from a menu 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."[221] All of that "speech, assembly, association, and petition," the Court reasoned, meant that "the boycott clearly involved constitutionally protected activity."[222] As we read the case, *Claiborne Hardware* reflects the potential dangers in applying the conspiracy laws to political boycotts that bundle together issue advocacy and the concerted refusal to deal. Today's anti-boycott laws largely solve this "*Claiborne Hardware* problem" by focusing only on the boycott, while leaving the ancillary expression untouched.

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[217] Today's boycott regulations also reflect an improvement over 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 the anti-BDS laws argue that "BDS is not discriminatory" and that anti-BDS laws "are not [*really*] about discrimination." *Wielding Antidiscrimination Law*, *supra* note 170, at 1372-81; 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. But that is a contested moral argument, and it has been rejected by state governors and legislatures across the country. *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. Viewing boycotts as conduct, rather than speech, allows judges to defer to the consensus political judgment of elected officials.

[218] 458 U.S. 886, 889, 898-900 (1982).

[219] *Id.* at 889-96.

[220] *See id.* at 933-34.

[221] *Id.* at 907-10.

[222] *Id.* at 911-12.

Since the first anti-BDS measure was enacted seven years ago, both sides in the constitutional debate have engaged in a protracted exegetical struggle over what *Claiborne Hardware* really means. Defenders of the laws read the case as we do—as focused on the expression that accompanies the boycott, not the boycott itself.[223] Their opponents counter that *Claiborne Hardware* describes all of the "nonviolent" activity—including the boycott—as protected First Amendment expression.[224] But throughout this debate, 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.

The analysis in this Essay should alter the equation. America's legal traditions, from colonial times until today, have consistently conceived of the boycott as conduct, not expression. And if there is any doubt as to *Claiborne Hardware*'s "true" meaning, then that unbroken tradition counsels in favor of the narrower view. The Supreme Court, like Congress, does not "hide elephants in mouseholes,"[225] and when it breaks with two hundred years of legal history, we should expect that departure to be announced clearly and without qualification.[226] To use the Supreme Court's most recent formulation, *Claiborne Hardware* did not "cast doubt on the Nation's history of regulating" boycotts."[227]

*Claiborne Hardware* also "did not purport to cast doubt on [the Supreme Court's] cases" rejecting a broad First Amendment right to boycott.[228] In *International Longshoremen's Association v. Allied International, Inc.*—a case decided the same term as *Claiborne Hardware*—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.[229] The Court dismissed their

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[223] *See, e.g.*, Dorf et al. Amicus Br. 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.").

[224] *See, e.g.*, *Claiborne Hardware*, 458 U.S. at 915-32; First Amendment Scholars Amicus Br. at 2-8; *Waldrip* Opening Br. at 16-22.

[225] *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

[226] Even advocates for a First Amendment right to boycott under *Claiborne Hardware* concede the novelty of the concept. *See, e.g.*, Michael C. Harper, *The Consumer's* ***Emerging Right*** *to Boycott:* NAACP v. Claiborne Hardware *and its Implications for America Labor Law*, 91 YALE L.J. 409 (1984) (title emphasis added); Leonard Orland, *Protection for Boycotts*, N.Y. TIMES (July 31, 1982), https://www.nytimes.com/1982/07/31/opinion/protection-for-boycotts.html (arguing that *Claiborne Hardware* makes "clear, *for the first time*, that political protest that takes the form of a boycott will receive the full protection of the United States Constitution." (emphasis added)); *Recent Legislation,* 129 HARV. L. REV. 2029, 2038 (2016) ("*Claiborne Hardware* had not yet been decided in 1979, so *it was not yet clear* that participation in a political boycott was protected First Amendment activity.") (emphasis added).

[227] *City of Austin v. Reagan Nat'l Advert. of Austin*, 142 S. Ct. 1464, 1469, 1474 (2022).

[228] *Cf. id.*

[229] 456 U.S. 212, 214-16, 224-26 (1982).

First Amendment argument out of hand, reasoning that the union's "political" boycott was "designed not to communicate, but to coerce" through economic pressure.[230] Likewise, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, the Court rejected the notion that law schools have a First Amendment right to boycott military recruiters by denying them access to campus.[231] The Court explained that the boycott was "not inherently expressive": 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 by the speech that accompanies it."[232] These holdings are difficult to square with a sweeping First Amendment right to engage in political boycotts, and they fit with the consistent tradition of boycott regulations sketched through this Essay. Construing precedent is, in the end, an "exercise [in] discretion tempered by tradition."[233] And here, America's legal traditions cut decisively in favor of the narrow reading of *Claiborne Hardware*.[234]

**Conclusion**

The primary contribution of this Essay 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, consistent with the 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 absent contrary evidence, our findings cast serious doubt on the notion—advanced by the critics of modern anti-boycott laws—that American legal history enshrines a fundamental, First Amendment right to boycott. To the contrary, history casts the boycott as a form of economic discrimination that can be regulated like any other, consistent with the First Amendment.

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[230] *Id.*

[231] 547 U.S. 47, 64-66 (2006).

[232] *Id.*

[233] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).

[234] *Cf. City of Austin v. Reagan Nat'l Advert. of Austin*, 142 S. Ct. 1464, 1469, 1474-75 (2022).