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Marc A. Greendorfer

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MARC A. GREENDORFER*

ABSTRACT

Organized boycotts are among the most powerful means of expressing a viewpoint. Boycotts have become so prevalent and persuasive in American politics and culture that many local and state governments have adopted this form of expression as well, particularly through laws and policies that prohibit state funds from being invested in, or spent to contract with, parties whose actions the state finds objectionable. While the First Amendment status of many boycotts has been robustly covered in court opinions and scholarly works, the constitutionality of state and local governments responding in kind with their own boycotts is not as well understood.

Many commentators, and some litigants, take the position that state boycott action violates, inter alia, the Dormant Commerce Clause and the Unconstitutional Conditions Doctrine, predicated on what is often a false belief that all boycott activity by non-state actors is absolutely protected First Amendment expression.

This Article examines the intersection of state and local boycotts of boycotters, on the one hand, and the Dormant Commerce Clause and Unconstitutional Conditions Doctrine, on the other hand. One of the most

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 Marc Greendorfer received his Bachelor of Arts degree from the University of California, Davis in 1986. He received his Juris Doctorate from Benjamin N. Cardozo School of Law in 1996 and is admitted to practice in California and New York and before the United States Supreme Court. He graduated *magna cum laude* and served as Articles Editor-Submissions of the *Cardozo Law Review* from 1995 to 1996. After working at AmLaw 100 law firms in New York and San Francisco for more than a decade, Mr. Greendorfer founded Tri Valley Law in 2008, where he is currently a partner. Mr. Greendorfer is also the founder and President of Zachor Legal Institute, a non-profit legal foundation that produces scholarship on constitutional matters and works to enhance civil liberties and the rule of law. Zachor Legal Institute's website is www.ZachorLegal.org. Mr. Greendorfer's other scholarly papers, including versions of his Supreme Court briefs, are available for download on his Social Science Research Network page, at https://perma.cc/6RM2-6DMP.

contentious cases of states boycotting the boycotters involves state anti-discrimination laws designed to allow states to refuse to enter into contracts with parties engaged in organized boycotts of Israel. This Article takes an in-depth look at this particular boycott movement and state laws enacted to deal with the discriminatory intent and impact of those boycotts. It finds that states are on firm constitutional ground in enacting laws that boycott the boycotters.

INTRODUCTION

At the time of this Article's publication, twenty-four states[1] (State Regulators) have enacted laws or executive orders directed at limiting state

1. The states are Alabama (ALA. CODE § 41-16-5 (LexisNexis Supp. 2016)), Arizona (ARIZ. REV. STAT. ANN. §§ 35-393 to -393.03 (Supp. 2016)), Arkansas (ARK. CODE ANN. § 25-1-501 (West, Westlaw through 2017 Reg. Sess.)), California (CAL. PUB. CONT. CODE § 2010 (West 2017)), Colorado (COLO. REV. STAT. § 24-54.8-201 (2017)), Florida (FLA. STAT. ANN. §§ 215.4725, 287.135 (West Supp. 2017)), Georgia (GA. CODE ANN. § 50-5-85 (Supp. 2017)), Illinois (40 ILL. COMP. STAT. ANN. 5/1-110.16 (West Supp. 2017)), Indiana (IND. CODE ANN. § 5-10.2-11-1 to -26 (West 2017)), Iowa (IOWA CODE § 12J.1 to 12J.7 (2017)), Kansas (Act of June 16, 2017, ch. 97, 2017 Kan. Sess. Laws 1126), Maryland (MD. Exec. Order No. 01.01.2017.25 (Oct. 23, 2017)) Michigan (MICH. COMP. LAWS ANN. § 18.1261 (West, Westlaw through 2017 P.A.189)), Minnesota (MINN.

contracts with or investments in entities that engage in boycotts against Israel (State Anti-Boycott Laws). Similar in purpose to longstanding federal anti-boycott law,[2] the State Anti-Boycott Laws are a legislative response to the spread of a discriminatory movement that targets one nationality, drawing American consumers and markets into a foreign conflict.[3] While the State Anti-Boycott Laws are each unique, and some deal with the issue of boycotts against Israel in an indirect manner (e.g., by limiting the law's applications to discriminatory boycotts generally rather than boycotts against Israel specifically), they all have a similar effect. The State Anti-Boycott Laws are structured to prohibit the respective State Regulators from contracting with boycotting entities and/or require the state to divest from such entities. Of the twenty-four State Regulators, twelve have enacted laws that restrict the state from contracting with boycotting entities (No Contracts Laws),[4] five require the state to divest from investments in boycotting entities (Divestiture Laws),[5] and seven have both No Contracts and Divestiture Laws.[6]

Some of the State Anti-Boycott Laws have been opposed by various groups who claim that the laws violate the First Amendment, the Commerce Clause, and the Unconstitutional Conditions Doctrine.[7] The

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STAT. ANN. §§ 3.226 and 16C.053 (West Supp. 2017), Nevada (NEV. REV. STAT. ANN. §§ 286 and 332-333 (West Supp. 2017), New Jersey (N.J. STAT. ANN. § 52:18A-89.14 (West Supp. 2017)), New York (N.Y. Exec. Order No. 157 (June 5, 2016)), North Carolina (Act of Jun. 29, 2017, Sess. L. 2017-193, 2017-4 N.C. Adv. Legis. Serv. 607 (West) (to be codified at N.C. GEN. STAT. § 147-86.80)), Ohio (OHIO REV. CODE ANN. § 9.76 (West, Westlaw through 2017 File 23 of the 132nd Gen. Assemb.)), Pennsylvania (62 PA. STAT. AND CONS. STAT. ANN. §§ 3601–3606 (West Supp. 2017)), Rhode Island (37 R.I. GEN. LAWS §§ 37-2.6-1 to -4 (Supp. 2016)), South Carolina (S.C. CODE ANN. § 11-35-5300 (Supp. 2017)), Texas (TEX. GOV'T CODE ANN. §§ 2270.001–2270.002 (West Supp. 2017) and Wisconsin (Wis. Exec. Order No. 261 (Oct. 27, 2017)).

2. Export Administration Act of 1979 § 8, 50 U.S.C. § 2407 (2012).

3. *See, e.g.*, H.B. 161 pmbl., 2017 Gen. Assemb. (N.C. 2017) (to be codified at N.C. GEN. STAT. § 147-86.80) ("Whereas, companies that refuse to deal with United States trade partners such as Israel, or entities that do business with or in such countries, make discriminatory decisions on the basis of national origin that impair those companies' commercial soundness . . . .").

4. The states with "No Contracts Laws" are Alabama, California, Georgia, Kansas, Michigan, Maryland, Minnesota, Ohio, Pennsylvania, Rhode Island, South Carolina and Wisconsin.

5. The states with "Divestiture Laws" are Colorado, Illinois, Indiana, New Jersey, and New York.

6. The states that have combined "No Contracts and Divestiture Laws" are Arizona, Arkansas, Florida, Iowa, Nevada, North Carolina, and Texas.

7. *See, e.g.*, *Public Contracts: California Combating the Boycott, Divestment, and Sanctions of Israel Act of 2016: Hearing on A.B. 2844 Before the Assemb. Comm. on Judiciary*, 2015–2016 Sess. (Cal. 2016); Letter from Sarah Wunsch, Deputy Legal Dir.,

author has previously examined the question of First Amendment protections for the Boycott, Divestment, and Sanctions (BDS) Movement, finding that such protections are not applicable to BDS activity as they are for traditional political speech relating to constitutional rights of the speakers.[8] This Article examines the application of the Commerce Clause and the Unconstitutional Conditions Doctrine to State Anti-Boycott Laws and demonstrates that there are no such constitutional infirmities with the laws.

Opponents of the State Anti-Boycott Laws claim that the laws are unconstitutional because boycotts against Israel are protected political speech connected to a civil rights movement.[9] This premise mischaracterizes the boycott campaign and whitewashes its sordid birth and evolution. The State Anti-Boycott Laws were enacted in response to the spread of discriminatory boycotts that targeted companies doing business in Israel, often with the stated goal of eliminating the state of Israel altogether.[10] This "BDS Movement" was conceived by state sponsors of terrorism as part of a plan to reinvigorate and weaponize the Arab League's boycott of Israel and companies doing business with and within Israel, with

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ACLU of Mass., to Co-Chairs and Members of the Joint Comm. on State Admin. and Regulatory Oversight (July 11, 2017) (stating ACLU's opposition to bills that prohibited discrimination in state contracts); Letter from Bradley A. Smith, Chairman, Ctr. For Competitive Politics, & David Keating, President, Ctr. For Competitive Politics, to Governor Andrew M. Cuomo regarding Exec. Order No. 157 (June 16, 2016) [hereinafter Cuomo Letter] (stating that Exec. Order No. 157 is unconstitutional).

8. Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE NOVO 112 (2016) [hereinafter BDS and the First Amendment].

9. *See, e.g.*, Complaint at 1, Koontz v. Watson, No. 5:17-cv-04099 (D. Kan. Oct. 11, 2017) (arguing that participation in BDS boycotts is protected political speech).

10. For a detailed discussion of the BDS Movement, *see* 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 (2017)). *See also* the state recitals to their respective State Anti-Boycott Laws. New Jersey, for example, has the following as a legislative finding:

> The State is deeply concerned about the Boycott, Divestment and Sanctions (BDS) effort to boycott Israeli goods, products, and businesses which is contrary to federal policy articulated in numerous laws.
>
> . . . .
>
> Nationality-based boycott actions are often *veiled discrimination*, and it is against the public policy of New Jersey to support such discrimination.
>
> Boycotts, such as those against Israel, do not make for effective business decision making, prevent a business from making the best use of the resources available to it and should be opposed as an impairment to the soundness of commercial contracting performance.

N.J. STAT. ANN. § 52:18A-89.13 (West Supp. 2017) (emphasis added).

the ultimate goal of weakening, marginalizing, and then destroying Israel.[11] Far from being a civil rights movement engaged in protected political speech, the BDS Movement is an extremist tool designed to turn American commercial markets, educational institutions, and cultural establishments into a new front in a foreign conflict.[12] Whether American BDS Movement supporters are aware of the true nature and goals of the movement is irrelevant to the analysis of the constitutionality of the State Anti-Boycott Laws.

This Article begins by providing a background on the emergence of State Anti-Boycott Laws. Part II of this Article explains that these laws are not susceptible to challenges under the Commerce Clause because they fit within the Market Participant Exemption. Part III explains how these laws do not violate the Unconstitutional Conditions Doctrine, principally because no protected First Amendment rights are affected by the laws and because citizens are free to continue their boycott efforts. Finally, this Article concludes that State Anti-Boycott Laws are a constitutionally valid exercise of the state's authority to regulate its own participation in commercial markets and such choices do not violate protected constitutional rights of those engaged in BDS Movement boycotts.

I. BACKGROUND ON THE STATE ANTI-BOYCOTT LAWS

In recent years, a discriminatory boycott movement focused on Israel has spread through the United States.[13] The movement is multifaceted and

11. *See infra* Part III.

12. *See, e.g.*, *Impact of the Boycott, Divestment, and Sanctions Movement: Hearing Before the Subcomm. on Nat'l Sec. of the H. Comm. on Oversight & Gov't Reform*, 114th Cong. 10 (2015) (written testimony of Professor Eugene Kontorovich, Northwestern University School of Law (available at https://perma.cc/T3AQ-YPRN) [hereinafter Kontorovich Testimony] ("Thus the so-called 'Boycott, Divestment, and Sanctions' campaign is not some grass-roots effort initiated by 'Palestinian civil society' in 2005, but a well organized campaign, backed by U.N. agencies and often funded by European governments, that picks up where the Arab League boycott left off . . . . This is simply the economic parallel of the move from traditional state vs. state warfare to warfare through guerilla and other unorganized groups.").

13. *See generally U.S. BDS Victories*, U.S. CAMPAIGN FOR PALESTINIAN RTS., https://uscpr.org/campaign/bds/bdswins/ (last visited Dec. 9, 2017). While the results of the commercial boycott are difficult to quantify, the academic and cultural boycotts have had tangible and damaging results. *See* Khalid Abdalla et al., Letter, *Over 100 Artists Announce a Cultural Boycott of Israel*, GUARDIAN (Feb. 13, 2015, 11:51 AM), https://perma.cc/LH9H-P5LJ; Judy Maltz, *Jewish Group Releases Blacklist of U.S. Professors Who Back Academic Boycott of Israel*, HAARETZ (Mar. 30, 2017, 5:51 PM), https://perma.cc/F2PH-D38T; Peter Walker & Ian Black, *UK Academics Boycott Universities in Israel to Fight for Palestinians' Rights*, GUARDIAN (Oct. 27, 2015, 5:20 AM), https://perma.cc/YF25-UGQQ.

has called for commercial, academic, and cultural boycotts to varying degrees of success.[14] Across American university campuses, BDS Movement affiliates such as Students for Justice in Palestine, American Muslims for Palestine, and the Muslim Students' Association have waged a proxy war against Israel by vilifying, attacking, marginalizing, and effectively silencing pro-Israel students, Jewish campus groups, academics whose work is seen as supporting Israel, and speakers affiliated with Israel or pro-Israel viewpoints.[15]

States have taken notice and have been working to ensure that state funds and resources are not used to promote or support those who foster these campaigns. South Carolina was the first state to take legislative action, enacting a No Contracts Law in 2015.[16] The law's clear, concise, and minimal language is emblematic of other No Contracts Laws enacted around the country; it reads as follows:

> (A) A public entity may not enter into a contract with a business to acquire or dispose of supplies, services, information technology, or construction unless the contract includes a representation that the business is not currently engaged in, and an agreement that the business will not engage in, the boycott of a person or an entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade, as defined in this article.
>
> (B) For purposes of this section:
>
> > (1) "Boycott" means to blacklist, divest from, or otherwise refuse to deal with a person or firm *when the action is based on race, color, religion, gender, or national origin of the targeted person or entity*. "Boycott" does not include:
> >
> > > (a) a decision based on business or economic reasons, or the specific conduct of a targeted person or firm;
> > >
> > > (b) a boycott against a public entity of a foreign state when the boycott is applied in a nondiscriminatory manner; and
> > >
> > > (c) conduct necessary to comply with applicable law in the business's home jurisdiction.
> >
> > (2) "Public entity" means the State, or any political subdivision of the State, including a school district or agency, department, institution, or other public entity of them.

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14. *U.S. BDS Victories*, *supra* note 13.

15. *See, e.g.*, Barry Kosmin, *UCLA Student is Latest Victim of Anti-Semitism on Campus*, CNN (Mar. 10, 2015, 8:14 AM), https://perma.cc/37VN-RXMF; *see also* Perry Chiaramonte, *Pro-Palestinian Students Bring Hate, Intimidation to Campus, Critics Say*, FOX NEWS (June 9, 2014), http://www.foxnews.com/us/2014/06/09/pro-palestinian-students-bring-hate-intimidation-to-campus-critics-say.html (last visited Dec. 13, 2017).

16. S.C. CODE ANN. § 11-35-5300 (Supp. 2017) (effective since June 4, 2015).

> (3) A "jurisdiction with whom South Carolina can enjoy open trade" includes World Trade Organization members and those with which the United States has free trade or other agreements aimed at ensuring open and nondiscriminatory trade relations.
>
> (C) This section does not apply if a business fails to meet the requirements of subsection (A) but offers to provide the goods or services for at least twenty percent less than the lowest certifying business. Also, this section does not apply to contracts with a total potential value of less than ten thousand dollars.[17]

The most important thing to note when reviewing this and other No Contracts Laws is that the laws only apply to the expenditure of state funds.[18] The laws do not regulate the conduct of private citizens and do not prohibit any person from engaging in boycott activity. Individual residents of a state with a No Contracts Law are free to contract with boycotting entities, even if the law prohibits the state from doing so.

Likewise, the law only applies to specific conduct and not speech. That is, if a person were to speak out against Israel, that person would still be eligible to contract with the state. The law says, in essence, that if a party chooses to engage in conduct that the state considers discriminatory, the state will not enter into a contract with that party.[19]

The Divestiture Laws are more complex than the No Contracts Laws but, in function, are similarly discrete and focused on specific conduct, rather than speech. New Jersey's Divestiture Law is a good representation:

> a. . . . no assets of any pension or annuity fund under the jurisdiction of the Division of Investment in the Department of the Treasury, or its successor, *shall be invested in any company that boycotts the goods, products, or businesses of Israel, boycotts those doing business with Israel, or boycotts companies operating in Israel or Israeli-controlled territory.* This section shall not apply to those boycotts organized by foreign governments pursuant to 50 U.S.C. s.4607(c). The activities of any

17. *Id.* (emphasis added).

18. *Id.* § 11-35-5300(A). All of the No Contracts Laws have similar limiting language to ensure that the prohibition on contracts applies only to state, rather than private party, contracting.

19. *See, e.g.*, Act of Sept. 24, 2016, §§ 1(j)-(k), 2016 Cal. Stat. 4023, 4025 (West 2016) (codified at CAL. PUB. CONT. CODE § 2010 historical and statutory notes) ("(j) It is the intent of the Legislature to ensure that taxpayer funds are not used to do business with or otherwise support any state or private entity that engages in discriminatory actions against individuals under the pretext of exercising First Amendment rights. This includes, but is not limited to, discriminatory actions taken against individuals of the Jewish faith under the pretext of a constitutionally protected boycott or protest of the State of Israel. (k) It is the intent of the Legislature to ensure that taxpayer funds are not used to do business with or support discriminatory actions against any individuals.").

> company solely providing humanitarian aid to the Palestinian people through either a governmental or non-governmental organization shall not render the company subject to the provisions of this act . . . unless it is also engaging in the prohibited boycotts or otherwise discriminating against goods, products, or businesses of Israel, or entities operating in Israel or Israeli-controlled territory.
>
> b. The State Investment Council and the Director of the Division of Investment shall take appropriate action to sell, redeem, divest, or withdraw any investment held in violation of subsection a. of this section. This section shall not be construed to require the premature or otherwise imprudent sale, redemption, divestment, or withdrawal of an investment, but such sale, redemption, divestment, or withdrawal shall be completed not later than 24 months following the effective date of this act.[20]

Like the No Contracts Laws, Divestiture Laws do not prohibit speech and only apply to the investment of state funds.[21] Individual citizens of the state are free to engage in any type of boycott activity, including boycotts of Israel, without state interference. Moreover, individuals are free to invest their own funds in boycotting companies that are subject to divestiture. It bears repeating that the Divestiture Laws only apply to state investment of state funds. Furthermore, each state's Divestiture Law contains a robust process for a company deemed to be engaged in a prohibited boycott—and, thus, subject to divestiture—to contest this finding and appeal for removal from the state's divestiture list.[22]

Generally, the Divestiture Laws only apply to entities that issue publicly traded securities.[23] In addition, some states' laws also apply to securities issued through private placements or those that are otherwise exempt from securities laws and thus not considered publicly traded, even

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20. N.J. STAT. ANN. § 52:18A-89.14 (West Supp. 2017) (emphasis added).

21. *See, e.g.*, IOWA CODE § 12J.1 (2017) ("The general assembly is deeply concerned and does not support boycotts and related tactics that have become a tool of economic warfare that threaten the sovereignty and security of allies and trade partners of the United States, including the state of Israel. Therefore, the general assembly intends that *state funds and funds administered by the state, including public employee retirement funds, should not be invested in*, and public contracts should not be entered into with, companies that refuse to engage in commerce with Israel and boycott Israel or persons doing business in Israel or territories controlled by Israel." (emphasis added)).

22. *See, e.g.*, COLO. REV. STAT. §24-54.8-202(3) (2017) (setting out a requirement that the state agency first provide a company with written notice of potential divestment and give the company a 180-day period with which to rebut the state's findings).

23. *See, e.g.*, *id.* § 24-54.8-201(1) (defining a "Company" that may be subject to divestment as an entity with "publicly traded securities"); IOWA CODE § 12J.2(1) (also defining a "Company" that may be subject to divestment as an entity that is publicly traded).

if held in the portfolios of institutions and public pension funds.[24] Moreover, the Divestiture Laws employ a narrowly tailored definition of boycott activity. To wit, under most Divestiture Laws, a company's boycott must be discriminatory, be politically motivated, be intended to inflict economic harm, or infringe on commercial activity in order to subject that company to divestiture.[25]

II. STATE ANTI-BOYCOTT LAWS UNDER THE COMMERCE CLAUSE

While State Anti-Boycott Laws have enjoyed support from a diverse group of organizations and individuals, some opponents have argued that the laws violate the Constitution's Commerce Clause.[26] Whether one analyzes the State Anti-Boycott Laws under traditional Dormant Commerce Clause theory or Foreign Commerce Clause theory, the constitutionality of the laws remains on firm ground.

A. The Dormant Commerce Clause and the Market Participant Exemption

The Commerce Clause vests the federal government with the power to regulate commerce among the states and, by extension, prohibits states from creating barriers to interstate trade.[27] As the Supreme Court stated in *Freeman v. Hewit*:

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24. For example, the Florida Divestiture Law defines a "Company" that may be subject to divestment as any entity that exists for the purpose of making a profit. FLA. STAT. ANN. § 215.4725(1)(b) (West Supp. 2017). Since the definition is not qualified to securities that are publicly traded (which generally means a security that has been registered under securities laws), and because many institutional investors invest in securities that have been issued in transactions exempt from registration under applicable securities laws, the Florida law effectively subjects to divestment non-publicly traded securities held directly or indirectly by Florida's public funds.

25. *See* COLO. REV. STAT. § 24-54.8-201(3) (defining "Economic prohibitions against Israel" as actions that are politically motivated); FLA. STAT. ANN. § 215.4725(1)(a) (defining "Boycott" as one that is conducted in a discriminatory manner); GA. CODE ANN. § 50-5-85(a)(1)(B) (Supp. 2017) (defining "Boycott" as one that discriminates on the basis of, inter alia, nationality or national origin).

26. U.S. CONST. art. I, § 8, cl. 3. In particular, the "Dormant Commerce Clause" (that is, the doctrine that a state cannot impose regulations that interfere with interstate commerce) is invoked by opponents of the State Anti-Boycott Laws. *See, e.g.*, JIM ZANOTTI ET AL., CONG. RESEARCH SERV., R44281, ISRAEL AND THE BOYCOTT, DIVESTMENT, AND SANCTIONS (BDS) MOVEMENT 25–26 (2017) [hereinafter CRS BDS REPORT]. It has also been argued that the State Anti-Boycott Laws violate the "Foreign Commerce" regulation provision of the Commerce Clause. *Id.*

27. U.S. CONST. art. I, § 8, cl. 3.

> [T]he Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.[28]

Under the Commerce Clause, a state cannot regulate in a way that clearly creates a barrier to trade, such as by imposing fees on out-of-state products coming into the state;[29] however, when the state is acting as a participant in the market, it is free from such restrictions.[30] In *Hughes v. Alexandria Scrap Corp.*, the Supreme Court examined a state program that encouraged recycling of cars registered in the state and imposed more stringent requirements on out-of-state recyclers.[31] The Court held that because the state was acting on its own behalf to increase the price for junked cars in the state (and thus encouraging recycling of those cars), rather than as a regulator of commerce among and between states, there was no violation of the Commerce Clause.[32] This became known as the "Market Participant" Doctrine. From *Hughes* came the general proposition that when a state is acting in its proprietary capacity to spend or invest state funds in a manner that comports with the economic or ideological sentiments of its citizens, such action does not violate the Commerce Clause.[33]

However, if a state operates outside of its proprietary capacity in the market to act as a regulator, it is subject to Commerce Clause limitations.[34] In *White v. Massachusetts Council of Construction Employers*, Justice Rehnquist succinctly summarized the rule as:

> If the city is a market participant, then the Commerce Clause establishes no barrier to conditions such as these which the city demands for its

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28. Freeman v. Hewit, 329 U.S. 249, 252 (1946) (citing S. Pac. Co. v. Arizona, 325 U.S. 761 (1945); then citing Morgan v. Virginia, 328 U.S. 373 (1946)), *overruled on other grounds by* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

29. *See* Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 339–42 (1992); *see also* City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278–80 (1988).

30. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976).

31. *Id.* at 809–10.

32. *Id.*

33. *See* Michael Burger, *"It's Not Easy Being Green": Local Initiatives, Preemption Problems, and the Market Participant Exception*, 78 U. CIN. L. REV. 835, 846 (2010).

34. *Hughes*, 426 U.S. at 806 ("The common thread of all these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation. By contrast, Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price.").

> participation. Impact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause.[35]

The Supreme Court has reaffirmed (and, in fact, expanded) the Market Participant Doctrine in subsequent cases.[36] In *Reeves, Inc. v. Stake*, the Court explained:

> The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. *There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market. . . .*
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> Restraint in this area is also counseled by considerations of state sovereignty, the role of each State "as guardian and trustee for its people," and "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." Moreover, state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause. Finally, as this case illustrates, the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, *Alexandria Scrap* wisely recognizes that, as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court.[37]

The highlighted text above speaks to the core rationale of the Market Participant Doctrine: each state, when acting in the market for its own citizens, has the same right to make business decisions as any private party would; the state acts, in effect, as a fiduciary for its citizens' interests. To stifle this right would be a direct attack on that state's sovereignty, a fatal blow to principles of federalism, and, thus, a violation of the clear limits on federal power contained in the Constitution—one of the country's founding principles. The Commerce Clause was never meant to limit states'

35. White v. Mass. Council of Constr. Emp'rs, Inc., 460 U.S. 204, 210 (1983).

36. *See, e.g.*, Dep't of Revenue v. Davis, 553 U.S. 328, 339–40 (2008); *White*, 460 U.S. at 207 n.3; Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

37. *Reeves*, 447 U.S. at 438–39 (emphasis added) (footnotes and citations omitted) (quoting Heim v. McCall, 239 U.S. 175, 191 (1915); then quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

proprietary power, and the Supreme Court has consistently ruled accordingly.[38]

Above and beyond the constitutional underpinnings of the Market Participant Doctrine, as a policy matter, stripping state lawmakers of their power to make purchasing and investing decisions would not only fail to advance the intended goals of the Commerce Clause, it would effectively deny the citizens of those states their rights to act through elected representatives to further their own economic and ideological interests. Indeed, absent a No Contracts Law, a state might be compelled to do business with a party that offends the ideological interests of the state's citizens if the party happens to be the lowest bidder for a contract.[39] Likewise, since state investment funds must be operated in accordance with fiduciary standards,[40] a state without a Divestiture Law could be compelled to invest in securities of a company that provides exceptional returns on investment but acts in a manner opposed to the interests of the citizens of that state. Such a result would do nothing to further the aims of the Commerce Clause and would undermine the representative nature of state and local political structures.

Though it is eminently clear that, under the Market Participant Doctrine, states can enact Anti-Boycott Laws, one opponent of New York's State Anti-Boycott Executive Order argued:

> It is well established that, under the market participation doctrine, states have the power to place certain conditions on state investments without running afoul of the Commerce Clause of the U.S. Constitution. Although use of the state's proprietary activities to engage in socially activist investing has been sharply criticized as poor trusteeship of public employee pensions and state assets, ([as New York City Mayor Michael Bloomberg said,] "I don't think that we should be using the city's investments policies . . . to advance social goals, no matter how admirable those goals are and no matter how much I believe in it[]")[,] such activist investing by state governments is, within limits, constitutionally permissible.
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> [New York's Anti-Boycott Executive Order] goes further, however, by specifically basing state investment decisions not only on whether a company or other institution complies with state laws, but on a company's

38. *See* Burger, *supra* note 33, at 841.

39. *See, e.g.*, CAL. PUB. CONT. CODE § 10306 (West 2017) ("If prior to making the award, any bidder who has submitted a bid files a protest with the department against the awarding of the contract or purchase order on the ground that he or she is the lowest responsible bidder meeting specifications, the contract or purchase order shall not be awarded until either the protest has been withdrawn or the department has made a final decision as to the action to be taken relative to the protest."). Most, if not all, other states have similar protest provisions for state contracts.

40. *See* JUN PENG, STATE AND LOCAL PENSION FUND MANAGEMENT 93–94 (2009).

> or institution's willingness to surrender its First Amendment rights as a condition of state investment.[41]

The argument is, at best, muddled. It starts with a discussion of the Commerce Clause, even acknowledging that the Market Participant Doctrine makes Divestiture Laws "constitutionally permissible,"[42] then questions the Divestiture Laws under policy rather than legal considerations, and then transitions into a non sequitur on the First Amendment (a clumsy introduction to the totally separate Unconstitutional Conditions Doctrine).[43]

The Congressional Research Service was more successful in setting out the Commerce Clause argument with the simple recitation of Commerce Clause principles:

> Under this established principle, states and localities are prohibited from unreasonably burdening or discriminating against either interstate or foreign commerce unless they are authorized by Congress to do so . . . . [T]he [Supreme Court] has required a closer examination of measures alleged to infringe the Foreign Commerce Clause than is required for those alleged to infringe its interstate counterpart, but has also provided some room for state measures in situations where a federal role is not clearly demanded.[44]

The Congressional Research Service appropriately concluded that measures like the Anti-Boycott Laws "may be defended on the ground that the state or local government is merely making investment or purchasing choices for itself and not regulating other investors or buyers, as the case may be."[45]

In sum, looking at the State Anti-Boycott Laws under the Market Participant Doctrine, it is clear that these laws do not violate the Commerce Clause. The laws only apply to transactions where a State Regulator enters the market to purchase products or services or invest in securities. The laws have absolutely no regulatory effect on commerce. The only effect they have is to disqualify certain parties from doing business with a state when the state acts on its own account. Even the Department of Justice, when considering whether state and local divestment laws relating to South Africa violated the Dormant Commerce Clause, opined that such divestment laws were "an exercise of proprietary power to spend or invest

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41. Cuomo Letter, *supra* note 7 (citations omitted) (citing *White*, 460 U.S. at 210; then citing Jon Entine, *The Politicization of Public Investments*, *in* PENSION FUND POLITICS 1, 1–12 (Jon Entine ed., 2005)).

42. *Id.*

43. *See infra* Section III.B.

44. CRS BDS REPORT, *supra* note 26, at 25 (footnotes omitted).

45. *Id.* at 26.

state funds in a manner that reflects [the state's] citizens' moral sentiments or economic interests, and accordingly ought to escape invalidation under the Commerce Clause."[46]

B. The Foreign Commerce Clause

Some have argued, as did the Congressional Research Service, that Anti-Boycott Laws may violate the Foreign Commerce Clause.[47] This argument is without basis. The Foreign Commerce Clause applies to commercial activities with foreign nations and provides the federal government with broad powers to override state laws that conflict with the federal government's desire for a unified and consistent foreign commerce policy.[48]

The threshold question in any Foreign Commerce Clause inquiry is whether there is an attempt to regulate commerce with foreign nations.[49] As the Supreme Court explained in *Veazie v. Moor*, "Commerce with foreign nations[] must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately, or at some stage of their progress, must be extraterritorial."[50] State Anti-Boycott Laws do not attempt to, nor do they actually, regulate commerce with foreign nations. They only apply to domestic commerce in

46. Constitutionality of S. African Divestment Statutes Enacted by State and Local Gov'ts, 10 Op. O.L.C. 49, 50 (1986). This Department of Justice opinion was drafted in response to a wave of state and local divestment laws that were being enacted in response to South African apartheid. *See id.* at 49. The Commerce Clause conclusions reached were based primarily on the Department of Justice assuming the Supreme Court would find a market participant exception for the Foreign Commerce Clause that would be similar in effect to the exception for the Interstate Commerce Clause. *Id.* at 52. In fact, however, the Supreme Court has not found a Foreign Commerce Clause market participant exception in the thirty-one years since the Department of Justice published this opinion. Because State Anti-Boycott Laws only implicate the Interstate Commerce Clause, the Department of Justice's rationale continues to be applicable. But, in the case of a state law that attempted to impose such restrictions on contracts with or investments in a foreign country, subsequent case law on the existence of a market participant exception to the Foreign Commerce Clause (and other constitutional issues relating to foreign affairs, discussed *infra*) contradicts the opinion of the Department of Justice that a state or locality can engage in divestment campaigns against foreign governments or companies.

47. *See* CRS BDS REPORT, *supra* note 26, at 25–27.

48. *See generally* Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 959–66 (2010) (distinguishing between "inward-looking" power, i.e., the federal government's power regarding state action that regulates commerce with foreign nations, and "outward-looking" power, i.e., the federal government's power to regulate extraterritorially).

49. *See id.* at 959.

50. Veazie v. Moor, 55 U.S. 568, 573 (1852).

very specific situations—when a party seeks to contract with a state or when a state invests in securities of a company. They do not prohibit a state from contracting with foreign countries or foreign entities, nor do they require divestment from the securities of foreign countries. Neither type of the State Anti-Boycott Laws implicates foreign commerce.

C. *The Implicit Question: Can States or Local Governments Boycott Israel?*

A state law prohibiting state contracts with, or state investments in, foreign nations would likely be subject to scrutiny under the Foreign Commerce Clause. Such a law would have an extraterritorial effect and cause potential conflicts with the federal government's power to conduct a unified and consistent program of foreign affairs. Indeed, in *Crosby v. National Foreign Trade Council*, the Supreme Court reviewed a Massachusetts state law that prohibited state agencies from purchasing goods or services from companies that conducted business with Burma.[51] The Court found that the law was preempted by subsequently enacted federal law which established sanctions on Burma.[52] Because the Court found that the state law was preempted, it expressly declined to review the Foreign Commerce Clause issue.[53] The lower court undertook that analysis and found that the law was in violation of the Foreign Commerce Clause because (i) the state was not acting as a market participant and (ii) it was unlikely that the market participant exception applied to Foreign Commerce Clause cases even if the state was acting in such a capacity.[54]

Thus, while State Anti-Boycott Laws do not violate the Commerce Clause, a state law that imposed sanctions on Israel (either by prohibiting the state from contracting with companies doing business with or in Israel or a law that required the state to divest from investments in Israel or Israeli companies) would unquestionably fail on numerous grounds.

First, federal law explicitly encourages commercial relations between the United States and Israel and opposes all boycott and divestment campaigns against Israel.[55] As the Supreme Court found in *Crosby*, where

51. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366 (2000).

52. *Id.* at 388.

53. *Id.* at 374 n.8 (stating that the lower court's decision was affirmed on the basis that the state law presented an obstacle to the federal government's objectives and declining, therefore, to address either the foreign affairs or Dormant Foreign Commerce Clause arguments).

54. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 62–66 (1st Cir. 1999), *aff'd sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

55. Trade Facilitation and Trade Enforcement Act of 2015 § 909, 19 U.S.C. §§ 4452(b)(4)-(5) (Supp. 2017) ("Congress . . . (4) *opposes politically motivated actions that*

a state law conflicts with an act of Congress, even if Congress did not intend to "occupy the field," the state law is preempted under the Supremacy Clause to the extent that it conflicts with federal law.[56] A state law that required divestment from, or a boycott of, Israel (either directly or indirectly) would unambiguously conflict with the purposes of Congress set forth in the federal law. The Supreme Court also made explicit in *Crosby* that, while a market participant exemption applies in Commerce Clause cases, there is no market participant exemption for pre-emption cases.[57]

Second, it is well established that the foreign affairs power rests exclusively with Congress and the president[58] and that United States' law and foreign policy oppose boycotts, sanctions, and divestment campaigns against Israel.[59] While the Court did not reach this question in *Crosby*, the lower court did.[60] Applying the framework used by that court, state law prohibiting commercial relations with Israel or Israeli companies, or mandating divestment from Israel or Israeli companies, would be in conflict with federal policy on commercial relations with Israel and, thus, invalid under the foreign affairs provisions of the Constitution.[61]

Third, state or local laws restricting commerce with Israel would violate the Foreign Commerce Clause for the same reasons that the lower court discussed in *Crosby*: they would interfere with the federal government's ability to speak with one voice and would regulate conduct beyond the state's respective borders.[62]

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penalize or otherwise limit commercial relations specifically with Israel, such as boycotts of, divestment from, or sanctions against Israel; (5) notes that boycotts of, divestment from, and sanctions against Israel by governments, governmental bodies, quasi-governmental bodies, international organizations, and other such entities are contrary to principle of nondiscrimination under the [General Agreements on Tariffs and Trade] 1994 . . . ." (emphasis added)).

56. *Crosby*, 530 U.S. at 372 (citing Hines v. Davidowitz, 312 U.S. 52, 66–67 (1941); then citing California v. ARC Am. Corp., 490 U.S. 93, 100–01 (1989); and then citing United States v. Locke, 529 U.S. 89, 109 (2000)).

57. *See id.* at 373 n.7.

58. *See* Zschernig v. Miller, 389 U.S. 429, 436 (1968).

59. *See* 19 U.S.C. § 4452; *see also* Export Administration Act of 1979 § 8, 50 U.S.C. § 2407 (2012).

60. *Crosby*, 530 U.S. at 371–72.

61. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 45 (1st Cir. 1999), *aff'd sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

62. *Crosby*, 530 U.S. at 386–88; *see also* Nat'l Foreign Trade Council, Inc. v. Giannoulias, 523 F. Supp. 2d 731, 748 (N.D. Ill. 2007) (discussing whether the market participant exception applies in Foreign Commerce Clause cases and noting a split in authority).

Thus, while a state law that attempted to promote a boycott of Israel would violate the Foreign Commerce Clause, State Anti-Boycott Laws are not implicated by the Foreign Commerce Clause and are protected by the market participant exception under the Dormant Commerce Clause. This leaves us with the final substantive constitutional challenge to the State Anti-Boycott Laws: The "Unconstitutional Conditions Doctrine."

III. STATE ANTI-BOYCOTT LAWS AND THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

The analysis of State Anti-Boycott Laws under the Commerce Clause was a straightforward review of Commerce Clause principles not dependent on an understanding of the underlying activity that prompted the enactment of the laws. However, analysis of the laws under the Unconstitutional Conditions Doctrine, which prohibits the government from conditioning the receipt of a benefit on the foregoing of a constitutionally protected right,[63] requires an understanding of the activities of the BDS Movement that prompted enactment of the laws.

A. Background on the BDS Movement as the Impetus for the State Anti-Boycott Laws.

The impetus for enactment of State Anti-Boycott Laws was the rise of the BDS Movement and its discriminatory campaign against Israel and Jews generally. Some of the State Anti-Boycott Laws are silent as to the connection between the law and the BDS Movement, while others explicitly reference BDS activity.[64] Indiana, for example, made the following legislative findings when enacting its law:

> (4) The fundamental principles of the United States are offended by attempts to:
>
> (A) delegitimize Israel's existence;
>
> (B) demonize the Jewish state; or
>
> (C) undermine the Jewish people's right to self determination; through an international campaign to boycott, divest from, or sanction Israel.

63. *See* Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

64. *See, e.g.*, 37 R.I. GEN. LAWS § 37-2.6-2 (Supp. 2016) (defining "boycott" as a refusal to deal based on, among other things, national origin, but there are no references to Israel or BDS); *but cf.* N.J. STAT. ANN. §§ 52:18A-89.13 to -89.14 (West Supp. 2017) (stating that it is the policy of New Jersey to oppose BDS, and that the law explicitly applies to boycotts against Israel and Israeli companies).

(5) Efforts to promote an international campaign to boycott, divest from, or sanction Israel:

(A) increasingly occur on college and university campuses nationwide, leading to a climate of intimidation, fear, and violence on campuses in Indiana;

(B) disproportionately harm thousands of Palestinian workers employed by Israeli owned firms; and

(C) are antithetical and deeply damaging to the cause of peace, justice, equality, democracy, and human rights for all people in the Middle East.

(6) The federal Bipartisan Congressional Trade Priorities and Accountability Act of 2015 . . . specifies principal negotiating objectives regarding commercial partnerships of the United States in negotiation of a transatlantic trade and investment partnership agreement, as follows:

(A) To discourage actions by potential trading partners that prejudice or discourage commercial activity solely between the United States and Israel.

(B) To discourage politically motivated actions to boycott, divest from, or sanction Israel.

(C) To seek elimination of politically motivated nontariff barriers on Israeli goods, services, or other commerce imposed on the Jewish state of Israel.

(D) To seek elimination of state sponsored unsanctioned foreign actions to boycott, divest from, or sanction Israel or compliance with the Arab League boycott of Israel by prospective trading partners.[65]

Arkansas's law has a more explicit legislative finding, stating, "Companies that refuse to deal with United States trade partners such as Israel, or entities that do business with or in such countries, make discriminatory decisions on the basis of national origin . . . ."[66] In its legislative findings, California went so far as to find that claims of First Amendment protection for BDS Movement boycott activity are nothing more than a pretext for discrimination against Jews.[67] The State of New

65. IND. CODE ANN. § 5-10.2-11-1 (West 2017).

66. ARK. CODE ANN. § 25-1-501(3) (West, Westlaw through 2017 Reg. Sess.).

67. Act of Sept. 24, 2016, §§ 1(f), (j), 2016 Cal. Stat. 4023, 4025 (West 2016) (codified at CAL. PUB. CONT. CODE § 2010 historical and statutory notes)) ("(f) The exercise of one's First Amendment rights is not a justification for engaging in acts of unlawful discrimination. . . . (j) It is the intent of the Legislature to ensure that taxpayer funds are not used to do business with or otherwise support any state or private entity that engages in discriminatory actions against individuals under the pretext of exercising First Amendment rights. *This includes, but is not limited to, discriminatory actions taken against individuals*

Jersey made a similar legislative finding that BDS activity is a nationality-based boycott and is thus discriminatory.[68]

State Regulators have had ample reason to deem BDS Movement activity discriminatory. Under the most charitable version of its history, the BDS Movement is the child of the longstanding Arab League boycott of Israel and the toxic anti-Semitism of Iran and radical elements of the Arab world.[69] Former Congressman Tom Lantos, the founder of the Congressional Human Rights Caucus, was present at the conference that led to the creation of the BDS Movement and described it as "an anti-American, anti-Israeli circus" at which there were "transparent attempt[s] to de-legitimize the moral argument for Israel's existence as a haven for Jews."[70]

The goal of the BDS Movement is not, as some have claimed, to promote civil rights. Rather, the BDS Movement was created to complement Arab state military action to destroy Israel as a Jewish state. Omar Barghouti, the co-founder of the BDS Movement, has made public statements that suggest the goal of BDS is to create a "one-state" solution that "end[s] Israel's existence."[71] The BDS Movement openly and repeatedly rejects the right of Israel to exist as an independent state,[72] and even prominent critics of Israel, such as Norman Finkelstein, concede that the goal of the BDS Movement is the destruction of Israel:

> They don't want Israel. They think they're being very clever. They call it their three tiers . . . . We want the end of the occupation, we want the right of return, and we want equal rights for Arabs in Israel. And they think they are very clever, because they know the result of implementing all three is what? What's the result? You know and I know what's the result: there's no Israel.[73]

Middle East peace advocates also have disputed the claim that BDS is a rights movement and have criticized the discriminatory aims of

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of the Jewish faith under the pretext of a constitutionally protected boycott or protest of the State of Israel." (emphasis added)).

68. N.J. STAT. ANN. § 52:18A-89.13.

69. *See* Kontorovich Testimony, *supra* note 12, at 2–3.

70. Tom Lantos, *The Durban Debacle: An Insider's View of the UN World Conference Against Racism*, 26 FLETCHER F. WORLD AFF. 31, 32, 37 (2002).

71. *See* Ali Mustafa, *"Boycotts Work": An Interview with Omar Barghouti,* ELECTRONIC INTIFADA (May 31, 2009), https://perma.cc/B2HK-QAWV.

72. *See, e.g.*, Ali Abunimah et al., *The One State Declaration*, ELECTRONIC INTIFADA (Nov. 29, 2007), https://perma.cc/3UFL-XNPZ.

73. Ali Abunimah, Opinion, *Finkelstein, BDS and the Destruction of Israel,* AL JAZEERA (Feb. 28, 2012), https://perma.cc/TX4R-8AA4 (quoting an interview with Norman Finkelstein).

movement. Scholars for Peace in the Middle East noted ties between the BDS Movement and Hamas and concluded that:

> A careful look at the BDS movement and its methodology shows not legitimate criticism but a movement that is racist and anti-Semitic. . . .
>
> Overall, the BDS campaign is contrary to the search for peace, since it represents a form of misguided economic warfare. It is directly in opposition to decades of agreements between Israeli and Arab Palestinians, in which both sides pledged to negotiate a peaceful settlement and a commitment to a two state solution . . . .[74]

The BDS Movement was not only founded with the discriminatory goal of eliminating the State of Israel because of its Jewish nature, it has been promoted and supported by individuals and groups committed to the spread of hate and named as designated terror organizations by the United States. Founding members of the BDS Movement include the Palestine Liberation Organization and five designated terror organizations, including Hamas, the Popular Front for the Liberation of Palestine, and the Palestinian Islamic Jihad,[75] and there has been testimony before Congress to that effect:

> In the case of three organizations that were designated, shut down, or held civilly liable for providing material support to the terrorist organization Hamas, a significant contingent of their former leadership appears to have pivoted to leadership positions within the American BDS campaign.[76]

In subsequent testimony before Congress, additional information was provided regarding funding and strategic ties between the BDS Movement and the Palestine Liberation Organization. That testimony demonstrated that the Palestine Liberation Organization's treasury is likely the key source of BDS Movement funding and that the Palestine Liberation Organization coordinates BDS activity worldwide.[77]

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74. *Israel's War with Hamas Reinvigorates BDS Movement*, SCHOLARS FOR PEACE MIDDLE EAST (Sept. 11, 2014), https://perma.cc/ZLH8-G9HB; *see also* THE THIRD NARRATIVE, AMEINU, WHAT'S THE PROBLEM WITH BDS?

75. *See Foreign Terrorist Organizations*, U.S. DEP'T STATE, https://perma.cc/3L3R-GC24 (listing Hamas, the Popular Front for the Liberation of Palestine, and the Palestinian Islamic Jihad as Designated Foreign Terrorist Organizations).

76. *Israel Imperiled: Threats to the Jewish State: Joint Hearing Before the Subcomm. on Terrorism, Nonproliferation, & Trade and the Subcomm. on the Middle E. & N. Afr. of the H. Comm. on Foreign Affairs*, 114th Cong. 23 (2016) (statement of Dr. Jonathan Schanzer, Vice President of Research, Foundation for Defense of Democracies) [hereinafter Schanzer Testimony].

77. *Israel, the Palestinians, and the United Nations: Challenges for the New Administration: Joint Hearing Before the Subcomm. on the Middle E. & N. Afr. and the Subcomm. on Afr., Glob. Health, Glob. Human Rights, & Int'l Orgs. of the H. Comm. on Foreign Affairs,* 115th Cong. 42–43 (2017) (statement of Dr. Jonathan Schanzer, Senior

In the United States, the BDS Movement is an ideological umbrella under which several affiliated groups operate. Among those are Students for Justice in Palestine (SJP) and the Muslim Students' Association. SJP is a university-based group, co-founded by American Muslims for Palestine (AMP) chairman Hatem Bazian and former Popular Front for the Liberation of Palestine member Senan Shaqdeh.[78] SJP promotes BDS activity across American university campuses.[79] Much of the leadership is interconnected with AMP.[80] SJP chapters frequently violate university policies and have been banned or suspended from several university campuses as a result.[81] A study of the group by NGO Monitor found that, while individual SJP chapters operate autonomously with their own constitutions and funding sources, and frequently without carrying the "Students for Justice in Palestine" name, they nonetheless receive funding from groups like AMP through their affiliation with SJP.[82] NGO Monitor noted that "due to a fundamental lack of transparency on the part of SJP and its donors, only a fraction of SJP's funding is known and publicly accessible," making it difficult to know exactly how much funding SJP chapters are receiving from sources outside of their own universities.[83]

These BDS Movement affiliates propagate hate and discrimination that is thinly veiled as anti-Israel activism.[84] AMP provides significant

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Vice President for Research, Foundation for Defense of Democracies). "[The Palestinian National Fund] reportedly pays the salaries of the [PLO's] members, as well as students, who received tens of millions of dollars in support of BDS activities each year. . . . PLO operatives in Washington, DC are reportedly involved in coordinating the activities of Palestinian students in the U.S. who receive funds from the PLO to engage in BDS activism. This, of course, suggests that the BDS movement is not a grassroots activist movement, but rather one that is heavily influenced by PLO-sponsored persons." *Id.*

78. Caroline B. Glick, *Column One: Defeating Hamas in America*, JERUSALEM POST (Apr. 27, 2016 10:34 PM), https://perma.cc/UP8S-74A7.

79. *See* Alex Kane, *Despite Attacks, National Conference Unites Students for Justice in Palestine*, ELECTRONIC INTIFADA (Oct. 21, 2011), https://perma.cc/2A5W-V5TM.

80. *See* ANTI-DEFAMATION LEAGUE, PROFILE: AMERICAN MUSLIMS FOR PALESTINE (2013) [hereinafter AMERICAN MUSLIMS FOR PALESTINE]; *see also* ANTI-DEFAMATION LEAGUE, PROFILE: STUDENTS FOR JUSTICE IN PALESTINE 3 (2014). As noted above, Hatem Bazian, a founder of Students for Justice in Palestine, is also a founder of American Muslims for Palestine. Glick, *supra* note 78.

81. Most recently, the SJP chapter at the University of California, Irvine was suspended for a period of two years. *See Student Conduct Review Regarding Incident of May 10, 2017*, UCI OFFICE OF INCLUSIVE EXCELLENCE, https://perma.cc/59PD-6UR6.

82. YONA A. SCHIFFMILLER, NGO MONITOR, BDS ON AMERICAN CAMPUSES: SJP AND ITS NGO NETWORK 1 (2015).

83. *Id.*; *see also*, Chiaramonte, *supra* note 15.

84. The question of what distinguishes legitimate criticism of Israel's policies from veiled anti-Semitism is one that has been debated for decades. Some, such as Reverend

levels of support for the Muslim Students' Association.[85] SJP has extensive ties with former backers and officials of the now-defunct Holy Land Foundation for Relief and Development (HLF), an entity controlled by individuals who were convicted of providing material support to Hamas—a designated foreign terrorist organization.[86] AMP functions both as a direct promoter of BDS activity in the United States and as a quasi-parent organization to other BDS promoters.[87] In a 2013 report, the Anti-Defamation League chronicled the numerous ties between former HLF officials and founding members of AMP:

> AMP has its organizational roots in the now-defunct Islamic Association of Palestine (IAP), an anti-Semitic group that served as the main propaganda arm for Hamas in the United States. AMP's inaugural conference in November 2006, titled, "Palestine—A Just Cause," in Rosemont, Illinois featured several former IAP leaders, including Rafeeq Jaber, a former IAP president; Kifa Mustapha, a former IAP board member and head of the Holy Land Foundation's Chicago office; Osama Abu Irshaid, an AMP board member and former editor of IAP's official newspaper; Nihad Awad, former IAP public relations director and current executive director of the Council on American-Islamic Relations (CAIR); and Raed Tayeh, a former IAP member . . . .[88]

IAP was prosecuted alongside the HLF and ultimately held civilly liable for supporting Hamas.[89] In addition to Hatem Bazian, the leadership of AMP includes a number of high profile extremists with ties to Hamas and other terrorist organizations.[90]

Martin Luther King, Jr., have stated that anti-Zionism and anti-Semitism are one and the same. *See, e.g.*, Seymour Martin Lipset, "*The Socialism of Fools": The Left, the Jews & Israel*, ENCOUNTER MAG., Dec. 1969, at 24 (quoting Martin Luther King, Jr.: "When people criticize Zionists, they mean Jews. You're talking anti-Semitism!"). Others have a more nuanced view of when the line between criticism and racism is crossed. *See generally* Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY BILL RTS. J. 837, 837–39 (2007). Even under a nuanced view of the question, it is clear that the BDS Movement's goal of eliminating the modern state of Israel can't be considered a form of legitimate criticism of Israel.

85. *FAQs*, AM. MUSLIMS FOR PALESTINE, https://perma.cc/E293-QLQQ.

86. *See* Schanzer Testimony, *supra* note 76, at 25–27.

87. *See id.*

88. AMERICAN MUSLIMS FOR PALESTINE, *supra* note 80, at 3.

89. Schanzer Testimony, *supra* note 76, at 27.

90. *See id.* at 27–30. Among those identified in the preceding sources as leaders of AMP are Osama Abuirshaid, who was the editor of *Al Zaytounah*, the official newspaper of the IAP; Rafeeq Jaber, a former president of the AMP; and Salah Sarsour, a member of AMP's board of directors who reportedly spent eight months in jail in Israel for Hamas activity. *Id.* at 27–29.

NGO Monitor has also investigated AMP and detailed its support for SJP through production of media and activism guidebooks; AMP has similarly supported campus activities by providing speakers for SJP campus events, publicizing campus events on its website and through social media, and organizing workshops and conferences.[91] NGO Monitor found that AMP "accuses Israel of 'apartheid,' and advocates for a 'right of return' and the elimination of Israel," and quoted the group as saying, "Palestinians are more determined than ever to fight on until total liberation, until every refugee can return, until the land of Palestine is free from the river to the sea!"[92]

The Muslim Students' Association (MSA) was founded by the Muslim Brotherhood in 1963.[93] It now has nearly 600 chapters on North American campuses and is active in sponsoring conferences, speakers, publications, and websites.[94] Part of its primary focus is the promotion of radical Islamic ideology and BDS on university campuses.[95] After conducting a thorough investigation, the New York Police Department issued a report that deemed the MSA an "incubator" for radical Islamist activity.[96]

In 2010, journalist Patrick Poole detailed deep ties between the MSA and terror organizations, providing a list of individuals who had been active in MSA's university chapters and later charged with or convicted for terrorist activities.[97] For instance, "Former University of Arizona MSA president, Wael Hamza Julaidan . . . has the distinction of being one of al-Qaeda's co-founders and its logistics chief."[98] Anwar Al-Aulaqi was

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91. *American Muslims for Palestine (AMP)*, NGO MONITOR (Aug. 27, 2017), https://perma.cc/H7KY-XT2T [hereinafter *NGO Monitor on AMP*]; *see also American Muslims for Palestine's Web of Hamas Support*, INVESTIGATIVE PROJECT ON TERRORISM (Dec. 14, 2011), https://perma.cc/KV3L-YWWV.

92. *NGO Monitor on AMP*, *supra* note 91.

93. Noreen S. Ahmed-Ullah et al., *A Rare Look at Secretive Brotherhood in America*, CHICAGO TRIBUNE (Sept. 19, 2004), https://perma.cc/SJR6-CGRN.

94. *See* MUSLIM STUDENTS ASSOCIATION, INVESTIGATIVE PROJECT ON TERRORISM.

95. *See generally id.*

96. MITCHELL D. SILBER & ARVIN BHATT, NYPD INTELLIGENCE DIVISION, RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT 68 (2007). This 2007 report was initially published online, but as a result of a lawsuit, the New York City Police Department was ordered to remove the report. Stipulation of Settlement and Order at 4, Raza v. City of New York, No. 13-CV-3448 (E.D.N.Y. 2017).

97. Patrick Poole, *The Muslim Student Association's Terror Problem*, PJ MEDIA (Aug. 20, 2010), https://perma.cc/N8RR-N9MH.

98. *Id.* "He was listed as a *specially designated global terrorist* by the U.S. government[,]" which identified him as "a close associate of Osama bin Laden and other

another notable member who served as the chaplain for the George Washington University MSA and "reportedly played a role in the Ft. Hood massacre, the failed Christmas Day underwear bomber plot, and the recent attempted Times Square bombing."[99] Aafia Siddiqui, who was "convicted . . . of attempted murder of a U.S. Army captain while she was incarcerated and being interrogated by authorities at a prison in Afghanistan," reportedly wrote a guide for the national organization to distribute to its members.[100] And, Omar Hammami, a top official of the al-Qaeda-linked Somali terrorist group al-Shabaab, "served as president of the MSA chapter at the University of South Alabama in 2001 and 2002."[101]

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al-Qaeda leaders" and director of the Rabita Trust, a "designated terrorist finance entity" providing logistical and financial support to al-Qaeda. *Id.* (emphasis added).

99. *Id.*

100. *Id.* "A 2005 article in *Vogue*, which speculated that Siddiqi's [sic] radicalization began with her association with the MSA, noted that Siddiqi [sic] had authored a guide published by the national MSA organization that encouraged MSA members not to water down Islamic doctrine—particularly on the topics of jihad and the treatment of women, saying that perseverance was needed until 'America becomes a Muslim land.'" *Id.* "According to news reports, she had been captured in 2008 with explosives, deadly chemicals, and a list of New York City landmarks. Described as 'alQaeda's Mata Hari' and 'Lady al-Qaeda,' Siddiqui was active in the MSA at MIT, where she studied neuroscience." *Id.*

101. *Id.* Poole identified other radicalized members of MSA chapters. Tarek Mehanna, a self-proclaimed former MSA official at the Massachusetts College of Pharmacy and Health Science, faced charges for providing material support to terrorists. *Id.* "Ali Asad Chandia, who was convicted in June 2006 on terror charges as part of the Northern Virginia jihad network, had previously served as president of the Montgomery College (MD) MSA in 1998 and 1999. He was sentenced to 15 years in prison for convictions on three separate counts of conspiracy and material support to the Pakistani Lashkar-e-Taiba terrorist group." *Id.* "Abdurahman Alamoudi, who served as MSA national president in 1982 and 1983, is currently serving a 23-year prison sentence for his extensive international terrorist activities. Once the most prominent Muslim political activist in the country, and counselor to U.S. presidents and cabinet officials, the U.S. government now claims that he was one of al-Qaeda's top fundraisers." *Id.* "Howard University dental student Ramy Zamzam and four other D.C.-area men were arrested in Pakistan and charged with plotting to join the Jaish-e-Muhammed terrorist group with plans to attack U.S. soldiers in Afghanistan. The five were active in the MSA, but Zamzam served as the president of the MSA's D.C. Council. They were convicted in a Pakistani court . . ." *Id.* Syed Maaz Shah, the secretary of the MSA at the University of Texas-Dallas in December 2006, was arrested for his involvement in conducting paramilitary training at an Islamic campground and intention to fight United States troops with the Taliban. *Id.* "Shah had posted comments on the UTD MSA's website praising insurgents killing troops in Iraq and posting links to terrorist videos." *Id.* "Al-Qaeda's chief procurement agent in the U.S. during the 1990s, Ziyad Khaleel, was also the president of the Columbia College (MO) MSA. A computer science student, he also registered and operated the English-language website for the Hamas terrorist organization." Khaleel, who also regularly lectured at the University of Missouri MSA as a representative of the Islamic Association for Palestine (a Hamas front), was

In a 2015 *Washington Times* op-ed, journalist David Horowitz described the MSA and SJP as the two leading campus organizations promoting BDS activity in the United States.[102] While the groups claim to simply be a rights-based organizations seeking peace and justice, it is clear that the founders and leaders have ties to groups designated by the United States government as terrorist organizations and one of the primary objectives of some of the groups is to normalize discrimination against Israel.[103] Clearly, one can support boycotts against Israel without being complicit in the BDS Movement's discriminatory campaign, but the vast majority of current boycott campaigns against Israel are affiliated with the BDS Movement.[104] Individuals who participate in these groups and BDS activities without knowledge of the discriminatory intent may be, as Vladimir Lenin is reported to have called liberals, "useful idiots"[105] to the BDS Movement, but the laws that prohibit discriminatory boycott activity apply to them with the same force as they apply to those who masterminded the campaigns.

One can analogize the BDS Movement supporters to the activists in *Holder v. Humanitarian Law Project*.[106] In that case, a group sought to assist designated foreign terror organizations in developing advocacy and legal strategies to advance their goals. The assistance was, on its face, entirely non-violent. Nonetheless, the Supreme Court found that federal law prohibiting material support (i.e., the provision of advisory support and engaging in activism favorable) to foreign terror organizations did not violate the constitutional rights of the activists, even if the support was intended to be used only for purportedly humanitarian activities of the

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tasked by a top al-Qaeda operative in 1996 to purchase a $7,500 satellite phone for Osama bin Laden. Over the next two years he purchased a spare battery for the phone and at least 2000 airtime minutes. The phone, dubbed by intelligence authorities as the 'jihad phone,' was used to plan the 1998 U.S. embassy bombings." *Id.*

102. David Horowitz, Opinion, *When Students Cheer Jihad*, WASH. TIMES, Nov. 5, 2015.

103. *See generally* Greendorfer, *supra* note 10. The author argues that BDS Movement activity violates a number of federal laws, including the Racketeer Influenced and Corrupt Organizations Act with a material support to designated terror organizations predicate. *Id.* at 106–09. This is not to argue that each participant in BDS Movement activity is as culpable as the leadership; indeed, it is very likely the case that there are many unsuspecting BDS participants who believe the leadership's claims that BDS is a rights movement.

104. *See Recent Legislation—First Amendment—Political Boycotts—South Carolina Disqualifies Companies Supporting BDS from Receiving State Contracts.—S.C. Code Ann. § 11-33-5300 (2015)*, 129 HARV. L. REV. 2029, 2030 (2016) [hereinafter HLR Note]; *see, e.g.*, IOWA CODE § 12J.1 (2017) (discussing the legislative findings behind Iowa's State Anti-Boycott Law).

105. *See* William Safire, *On Language*, N.Y. TIMES MAG., Apr. 12, 1987.

106. Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

foreign organization.[107] Just as in *Humanitarian Law Project*, BDS activists may claim their support is intended only for the non-violent activities of the entities that serve as the *éminence grise* of the BDS Movement, but that does not upend the constitutionality of the applicable law.

B. The Unconstitutional Conditions Doctrine

Under the "'unconstitutional conditions' doctrine . . . the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit. . . ."[108] Assuming arguendo that the types of transactions affected by State Anti-Boycott Laws are benefits that otherwise would be subject to the Unconstitutional Conditions Doctrine, the threshold question is whether BDS Movement boycott activity is constitutionally protected free speech. Given the background on the BDS Movement presented in Section III.A, it is clear that the Unconstitutional Conditions Doctrine is not implicated by the State Anti-Boycott Laws.

1. The First Amendment Argument of BDS Proponents.

In an unsigned "Recent Legislation" update in a 2016 volume of the Harvard Law Review (HLR Note), the author of the note argued that South Carolina's No Contracts Law violated First Amendment rights and was invalid under the Unconstitutional Conditions Doctrine.[109] The note states

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107. *Id.* at 39.

108. Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972)). *But see* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990) (thoroughly discussing the doctrine and arguments for its elimination). Professor Sunstein rightly notes:

> The Constitution offers no general protection against the imposition of penalties on the exercise of rights. Instead, the question the Constitution ordinarily makes it necessary to ask whether government has intruded on a right in a way that is constitutionally troublesome and, if so, whether government can justify its intrusion under the appropriate standard of review.

Id. at 603.

109. HLR Note, *supra* note 104, at 2031. It is important to note that even though the South Carolina No Contracts Law never mentions BDS or Israel, the HLR Note presumes that the law is aimed at BDS Movement boycotts and applies specifically to BDS activity. *Id.* at 2030 ("Though the law applies to boycotts of any of the state's trading partners, legislators made clear that they were targeting BDS."). This presumption bolsters this Article's assertion that the boycotts against Israel in the United States are overwhelmingly affiliated with the BDS Movement, and the nature of the BDS Movement—including its

that BDS Movement boycotts are political boycotts entitled to the highest level of First Amendment protection.[110] To support this conclusion, the note misreads and distorts *NAACP v. Claiborne Hardware Co.*[111]

Claiborne is a civil rights-era case that arose from the boycotting of businesses by African Americans asserting their civil rights against the owners of those businesses and the local government, which had deep ties to those businesses.[112] The Supreme Court found the boycott activity to be political in nature and thus protected by the First Amendment.[113] This point cannot be over-emphasized, and the Court made explicit mention of it in a footnote: the objects of the boycott were people and entities directly tied to the suppression and infringement of the constitutional rights of the boycotting African Americans.[114]

The boycotters in *Claiborne* were engaging in the ultimate expression of political speech—taking direct economic action against those depriving them of rights. The connection between the boycotters, the boycotted, and the grievance were all of a primary order. BDS Movement boycotts are secondary and tertiary, rather than primary, since there is no direct connection between those in the United States engaging in the boycotts, on the one hand, and those subject to the disputed policies of Israel, on the other hand.

The HLR Note ignores that *Claiborne* did not—and has never in subsequent decisions been found to—stand for the proposition that all boycott activities enjoy the same protection under the First Amendment. Indeed, contrary to the characterization in the HLR Note that *Claiborne* "categorically extends First Amendment protection to political boycotts,"[115] the *Claiborne* Court explicitly acknowledged that a number of different

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discriminatory origins and nature—are intimately tied to the legal analysis of the State Anti-Boycott Laws.

110. *See id.* at 2032.

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

112. *See id.* at 888.

113. *Id.* at 915 (holding that the state court could not hold the boycotters liable for damages arising from their economic boycott).

114. *Id.* at 889 n.3 ("The affected businesses represented by the merchants included four grocery stores, two hardware stores, a pharmacy, two general variety stores, a laundry, a liquor store, two car dealers, two auto parts stores, and a gas station. Many of the owners of these boycotted stores were civic leaders in Port Gibson and Claiborne County. Respondents Allen and Al Batten were Aldermen in Port Gibson, Robert Vaughan, part owner and operator of one of the boycotted stores, represented Claiborne County in the Mississippi House of Representatives, respondents Abraham and Hay had served on the school board, respondent Hudson served on the Claiborne County Democratic Committee." (citations omitted)).

115. HLR Note, *supra* note 104, at 2031 n.17.

types of boycotts, some of which may have political elements, were not covered by the decision. The Court explained:

> We need not decide in this case the extent to which a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct or certain types of secondary pressure may restrict protected First Amendment activity. No such statute is involved in this case. Nor are we presented with a boycott designed to secure aims that are themselves prohibited by a valid state law.[116]

As the author of this Article argued in a previous article published in 2016:

> *Claiborne* does not stand for a blanket First Amendment protection for any and all boycott activity, especially activity that is in contravention of United States law and policy and which has only an attenuated nexus to domestic concerns. The mere fact that there may be some distant and speculative offshore effect on a foreign conflict from commercial coercion occasioned by the boycotters who choose to agitate in United States commercial markets does not vest that activity with First Amendment protections. The *Claiborne* ruling was predicated on the boycott being implemented to vindicate rights "that lie at the heart of the Fourteenth Amendment itself . . . to effectuate rights guaranteed by the Constitution itself."
>
> To reiterate this point, which is clear in *Claiborne* but ignored by those who seek to legitimize BDS Movement activity in the United States, the *Claiborne* Court specifically tied First Amendment protections for boycott activity to the effect that the underlying boycott would have on the assertion of Fourteenth Amendment rights of those engaging in the boycott. Whatever one may think of the conflict between the State of Israel and Palestinian Arabs, it is not an issue governed by the Fourteenth Amendment or any other provision of the United States Constitution; the rights of the parties involved are outside the scope and reach of United States' laws. Thus, BDS Movement boycott activity in the United States is not covered by the protections afforded under *Claiborne*.[117]

And, in fact, in *International Longshoremen's Association v. Allied International, Inc.*,[118] a case decided in the same year as *Claiborne*, the Supreme Court upheld a law regulating boycott activity directed at a matter of foreign affairs.[119] *International Longshoremen's Association* shows that,

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116. *Claiborne*, 458 U.S. at 915 n.49 (citing Hughes v. Superior Court of Cal., 339 U.S. 460 (1950)).

117. BDS and the First Amendment, *supra* note 8, at 115–16.

118. Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982).

119. *See id.* 226–27 (finding that secondary boycotts in the United States directed at foreign companies to pressure a foreign country to change its policies were not protected speech under the First Amendment). The CRS BDS Report acknowledges that there are

contrary to the HLR Note's erroneous reading of the case, *Claiborne* clearly does not stand for the proposition that all boycotts with a political element receive the highest levels of First Amendment protections.

The Congressional Research Service repeated, in part, the HLR Note's erroneous First Amendment analysis in its recent report on BDS.[120] Whatever else one may say about BDS Movement boycotts, it can't be said that they are of the same nature as the boycotts in *Claiborne.* BDS Movement boycotts are much more similar to the boycotts in *International Longshoremen's*. Nor can it be said that the State Anti-Boycott Laws pose any risk of chilling political speech, as the HLR Note and the CRS BDS Report each argue, since actual speech and legitimate expressive conduct are not affected by the laws.

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characteristics that distinguish the protected boycott in *Claiborne* from the BDS Movement, which might factor into a reviewing court's analysis as to whether BDS activity is similarly protected by the Constitution. CRS BDS REPORT, *supra* note 26, at 15. While the CRS BDS Report raises the possibility that *International Longshoremen's Association* is limited to law regulating labor activity and notes that the *Claiborne* opinion carved out such laws, it ignores the fact that the *Claiborne* opinion also carved out laws relating to secondary boycotts (which is the best categorization for BDS Movement boycotts). *Id.* at 17–18. The CRS BDS Report also conveniently ignored the *Claiborne* Court's language of "[n]or are we presented with a boycott designed to secure aims that are themselves prohibited by a valid state law" as well as the fact that anti-discrimination laws (which is the proper characterization of the State Anti-Boycott Laws) have repeatedly been found to be valid state laws. *Claiborne*, 458 U.S. at 915 n.49. Thus, *International Longshoremen's Association* is precise precedent for upholding the constitutionality of the State Anti-Boycott Laws and distinguishing BDS Movement activity from the protected protest activity in *Claiborne*.

120. CRS BDS REPORT, *supra* note 26, at 14–15. ("However, boycotts aimed at achieving something other than an economic advantage, particularly when the motivation is political or social in nature, may have more of an expressive element which, according to Supreme Court precedent, could qualify for First Amendment protection. . . . While recognizing the government had considerable power to restrict economically motivated boycotts, the Court in *Claiborne Hardware* held that the 'right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.' It may be argued that, like the *Claiborne Hardware* boycotters, BDS participants' intent is to cause economic harm, but their aim is not to destroy competition. Instead, BDS proponents' stated aim is to place pressure on Israel to make desired policy changes. Moreover, the BDS participants might claim that their activity is non-violent and politically motivated, designed to force governmental change. Following that reasoning, it might be argued that their activity should receive a similar degree of protection under the First Amendment as the boycott at issue in *Claiborne Hardware*." (footnotes omitted)). The CRS BDS Report did, however, incorporate the argument the author of this Article made in BDS and the First Amendment, *supra* note 8, at 116, regarding the inapplicability of *Claiborne's* protections to BDS. *See* CRS BDS REPORT, *supra* note 26, at 15–16.

The BDS Movement was formed to oppose the existence of the State of Israel, which the BDS Movement terms a "colonial" entity that has usurped the rights of Palestinian Arabs.[121] The BDS Movement acknowledges that its boycott activity is of a secondary or tertiary nature, meant to inflict economic harm on Israeli companies and thus, presumably, force them to put pressure on the government of Israel.[122] In both *Claiborne* and *International Longshoremen's Association*, the Supreme Court explicitly stated that secondary boycotts are not accorded the same types of protections under the First Amendment as primary boycotts.[123]

Even if we accept the claim that BDS is a campaign to change the way the government of Israel treats Palestinian Arabs, this goal is utterly disconnected from the companies subject to BDS Movement boycotts, as they are private—not government-controlled—companies. For example, an American real estate company that does business internationally, including in Israel, has been targeted by BDS Movement boycotters.[124] American real estate companies have absolutely no power to change the policies of the government of Israel, yet these, and other private companies, are primary targets of BDS Movement boycotts.[125]

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121. The organizing document of the BDS Movement, posted on the BDS Movement's website, is an unsigned document titled *Towards a Global Movement: A Framework for Today's Anti-Apartheid Activism*. GRASSROOTS PALESTINIAN ANTI-APARTHEID WALL CAMPAIGN, TOWARDS A GLOBAL MOVEMENT (2007) [hereinafter BDS CHARTER]. The BDS Charter describes Israel as a colonial and racist occupier of Palestinian lands. *Id.* at viii ("The outbreak of the second Intifada brought us back to the fact that our struggle remains a struggle against colonialism, racism and expulsion.").

122. The BDS Charter notes the rise of Israel's economic fortunes in the past several decades and then spends fifteen pages on a detailed analysis of each major sector of Israel's economy, from agriculture to technology to military to tourism, and concludes with a directed call for a global attack on commercial entities in Israel:

> The effectiveness of any programme of sanctions aimed at a country's foreign trade will depend upon the degree of dependence of its economy on trade with the rest of the world. Israel . . . has a vulnerable and volatile economy that could feel the impact of coordinated BDS campaigns.

Id. at 161.

123. *Claiborne*, 458 U.S. at 912 ("Secondary boycotts and picketing by labor unions may be prohibited . . . ."); *Int'l Longshoremen's Ass'n*, 456 U.S. at 226–27 (holding that a law prohibiting secondary boycotts did not violate the First Amendment and stating, "It would seem even clearer that conduct designed not to communicate, but to coerce, merits still less consideration under the First Amendment.").

124. Ben Norton, *Boycott RE/MAX Protests Flood the US During Week of Action*, BDS (Dec. 9, 2014), https://perma.cc/SS9H-35C2.

125. By way of example, the published list of companies targeted for BDS Movement boycotts includes only one company owned by the government of Israel: Israel Military Industries. *Full List*, BDS LIST, https://perma.cc/8AJZ-K5WC.

Unlike the boycotts in *Claiborne*, the boycott activity of the BDS Movement is a mutation of commercial speech that is used as a weapon to inflict economic harm on third parties who are only tangentially related to the object of the political speech—the government of Israel. The political speech element of BDS activity consists of actual speech criticizing the policies and actions of the government of Israel, which is not subject to the State Anti-Boycott Laws. A total ban on boycotts against Israeli companies would not negatively impact the speech of those who oppose the government of Israel.[126]

The boycott activity in *Claiborne* was properly described as political speech since the boycotters were personally being deprived of constitutionally protected rights by the store owners being boycotted.[127] In that case, the commercial and political became one and the same. The Supreme Court made this clear in *Claiborne* by noting that the ruling was predicated on the fact that the boycotts were undertaken to address concerns "that lie at the heart of the Fourteenth Amendment itself . . . . to effectuate rights guaranteed by the Constitution itself."[128] There was no way to separate the boycott from the political speech in *Claiborne*, as they had merged into a unified whole.

In the case of BDS Movement activity, however, participants in the United States are not subject to Israel's control, and Israel is not infringing on any rights protected under the Constitution, let alone any rights protected by the Fourteenth Amendment. The goal of the BDS Movement is not to assert the rights of those boycotting; rather it is to inflict economic harm on a foreign nation for purely extra-territorial reasons by attacking the economic interests of companies that operate in that foreign nation. Because those who engage in BDS Movement boycotts are not acting to protect any right guaranteed by the Constitution from infringement by those who are being boycotted, BDS Movement boycotts are the essence of what the *Claiborne* Court described as "nonviolent and totally voluntary boycott[s] [that] may have a disruptive effect on local economic conditions."[129] With regard to this type of boycott, the *Claiborne* Court stated, "This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association."[130]

126. *See, e.g.*, Rumsfeld v. Forum for Acad. & Inst. Rights, 547 U.S. 47, 67–70 (2006) (upholding a federal law requiring schools to provide access to military recruiters).

127. *Claiborne*, 458 U.S. at 911.

128. *Id.* at 914.

129. *Id.* at 912.

130. *Id.*

BDS Movement boycotts should not be viewed as political speech. Rather, they are economic boycotts that are often, though never inextricably, linked to the political positions being advocated by adherents vis-á-vis United States foreign policy. The boycotts are aimed entirely at third parties to the dispute—parties that have no power to provide redress to the boycotters. Thus, while some boycotts, such as those in *Claiborne*, are expressive conduct that cannot be separated from the underlying political speech, BDS Movement boycotts can be separated from the associated political speech.

In his opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, Justice Stewart opined that "[i]deological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man."[131] The converse holds true, as well. Some ideological expression can be utterly divorced from the exposition of thought. An economic boycott against companies of a foreign country is one such ideological expression that can be divorced from the exposition of disagreement with the government of that foreign country.

The *Rumsfeld* Court dealt with this specific issue and noted that to receive the highest level of First Amendment protection, conduct (which would include boycotting, as well as excluding military recruiters from campus), must be "inherently expressive," and the expressive component cannot simply be superfluous speech accompanying the conduct.[132] The conduct in BDS Movement boycotts is actually entirely unrelated to the purported message of BDS. That is, BDS claims that its speech is meant to protest the government of Israel, yet the boycott activity is against third parties that have no control over the actions of the Israeli government.[133] If BDS Movement boycotts were limited solely to boycotts of the Israeli government, the First Amendment claims of BDS supporters relative to their boycott activity would have more merit.

One can assert the political position against Israel through protests, through public speech, and through any number of other means of communication that do not involve boycotts, all without running afoul of

131. Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 779 (1976) (extending First Amendment protections to commercially related speech) (Stewart, J., concurring).

132. Rumsfeld v. Forum for Acad. & Inst. Rights, 547 U.S. 47, 66 (2006).

133. While the boycotts in *Claiborne* also targeted private businesses, those businesses were owned by local political and civic leaders who were infringing the constitutional rights of the boycotters. *Claiborne,* 458 U.S. at 889 n.3. This direct connection between the boycott targets and their complicity in the infringement of the boycotters' rights does not exist in BDS Movement boycotts.

the State Anti-Boycott Laws. Because of this, the boycott activity that is the cornerstone of the BDS Movement can be severed from political speech critical of Israel. In other words, the secondary and tertiary boycotts promoted by the BDS Movement are properly characterized as a form of commercial boycott and, thus, a form of commercial speech, which has far less robust constitutional protections than political speech. Under the "participatory model" of First Amendment commercial speech theory, a BDS Movement boycott is a punitive weapon and nothing more, while a *Claiborne* boycott is the classic case of a commercial action that invites dialogue and discourse on an issue and deserves enhanced First Amendment protections.[134] The State Anti-Boycott Laws are, in fact, exactly the type of narrowly tailored statutes aimed at boycotts prohibited by valid state law that the *Claiborne* Court used as an example for a situation where the First Amendment would not protect a boycott from regulation.

The Supreme Court has consistently found that state and federal anti-discrimination laws that relate to race, religion, color, and national origin do not violate the highest level of First Amendment protections.[135] In

134. *See generally* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 12 (2000) ("One theory, which has deeply informed the development of First Amendment jurisprudence, is the participatory model . . . [that] emphasizes the importance of preserving uncensored access to public discourse so that citizens can maintain the warranted sense that their government is responsive to them. The participatory model protects public discourse in order to preserve a necessary (but not sufficient) precondition for democratic legitimation. Commercial speech, however, does not seem a likely candidate for inclusion within public discourse, because we most naturally understand persons who are advertising products for sale as seeking to advance their commercial interests rather than as participating in the public life of the nation. We do not characterize them as inviting reciprocal dialogue or discussion; nor do we perceive their speech as an effort to make the state responsive to them. We instead view them as attempting to sell products." (footnotes omitted)).

135. *See, e.g.*, Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987). This case involved a First Amendment challenge to California's Unruh Act, which forbade discrimination on the basis of, inter alia, religion and national origin. *Id.* at 541. California's Anti-Boycott Law applies the Unruh Act's anti-discrimination provisions to determine if a boycott is in violation of the Anti-Boycott Law. CAL. PUB. CONT. CODE § 2010(a) (West 2017). Given the extensive and deep ties between the principals of the BDS Movement and foreign terror organizations, the question of whether restrictions on BDS activity violates the First Amendment is answered by Holder v. Humanitarian Law Project, 561 U.S. 1, 39 (2015) (finding that a federal statute prohibiting the provision of material support to terror groups did not violate First Amendment rights). *See* Grove City Coll. v. Bell, 465 U.S. 555, 575–76 (1984) (upholding federal anti-discrimination law against a First Amendment challenge); Christian Legal Soc'y v. Martinez, 561 U.S. 661, 697–98 (2010) (upholding a public university's non-discrimination policy against a First Amendment challenge).

addition, existing federal contracting law explicitly prohibits discrimination on the basis of, inter alia, race, religion, and national origin.[136] It would be incongruous for a state analog of such a law to fail court review where the federal law has consistently been upheld.

This is not to say that such laws have no First Amendment implications; rather, a court must first examine whether a State Anti-Boycott Law infringed upon speech (as opposed to conduct) and then determine the level of scrutiny under which the law is to be examined. Many laws that regulate activity seen to be odious, such as incitement or pornography, receive rational basis review, which simply requires that the state demonstrate that the law is rationally related to a legitimate government purpose.[137]

BDS Movement boycotts are discriminatory campaigns that relate to foreign affairs over which the objects of the boycotts have utterly no power. There are no Fourteenth Amendment or other constitutional rights being asserted by the boycotters. There can be no serious question whether a state law intended to prevent discrimination is valid. While the HLR Note implicitly dismissed the discriminatory nature of the BDS Movement by simply regurgitating, without investigating or questioning, the sanitized and utterly misleading talking points posted on the BDS Movement's website,[138] it correctly acknowledged that government action regulating

136. 42 U.S.C. § 2000e-2 (2012).

137. *See e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 571–72 (1991) (finding that nude dancing is expressive conduct for First Amendment purposes but upholding a state law regulating erotic dancing establishments under rational basis review); United States v. Stevens, 559 U.S. 460, 468 (2010) (noting that certain forms of speech, such as fraud, obscenity, incitement, and speech integral to criminal conduct, receive no First Amendment protections at all). *See also* Note, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836 (2005) (discussing intermediate scrutiny under the First Amendment); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004) (noting that many types of speech regulation, such as under antitrust, securities and labor laws, are not subject to analysis under the First Amendment).

138. HLR Note, *supra* note 104, at 2029 (describing the BDS Movement as "an international campaign launched in July 2005 that aims to put economic pressure on the State of Israel until it meets certain conditions with respect to the Palestinian people. . . . BDS leaders do not officially prefer either a one- or two-state solution . . . ." (footnote omitted)). In fact, as this Article has documented, the founding documents of the BDS Movement and leaders of the BDS Movement explicitly call for the elimination of Israel as a Jewish state, reject a two-state solution, and intend for BDS activity to continue until Israel ceases to exist, without regard to whether Israel "[m]eets certain conditions with respect to the Palestinian people." *Id.* The Congressional Research Service engaged in a similar act of scholarly malpractice in repeating BDS Movement self-descriptions without

discriminatory conduct (which is precisely what BDS Movement boycotts are) would survive First Amendment scrutiny.[139] A law regulating speech that survives First Amendment scrutiny would obviously not be subject to the Unconstitutional Conditions Doctrine, as no constitutionally protected rights are infringed by such a law.

In support of the argument that BDS Movement activity is discriminatory, the International Executive Board of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), one of the country's largest labor unions, recently had an opportunity to examine the nature of BDS. The union found that the BDS Movement "espouses discrimination and vilification" of union members who were of Israeli or Jewish origin.[140]

The words of the UAW speak volumes about the true nature of BDS and the impact of BDS support:

> [T]he local union's BDS Resolution, inherently, targets . . . Israeli and/or Jewish members . . . . [T]his call to action by the local union, in association with the BDS Resolution, is in disregard of the rights of . . . members of the UAW. Moreover, this type of activity is suggestive of *discriminatory labeling and a disparagement of these members*.
>
> Similarly, the local union's attempt to address the predicament of Palestinian people appears to be accomplished through *biased targeting of Israeli/Jewish UAW members* . . . .
>
> . . . [W]e find that the provisions of the BDS Resolution, despite semantical claims to the contrary by the local union, can easily be construed as *academic and cultural discrimination against union members on the basis of their national origin and religion*. . . .
>
> . . . .

investigating the veracity of the statements or including any counterpoints. CRS BDS REPORT, *supra* note 26, at 1.

139. HLR Note, *supra* note 104, at 2032. The HLR Note was responding to a cogent argument advanced by Professor Eugene Kontorovich that State Anti-Boycott Laws regulate discriminatory conduct, much like President Obama's executive order forbidding discrimination on the basis of sexual orientation did. *Id.* The HLR Note attempted to distinguish the two laws by claiming that gender or racial discrimination is not expressive speech (and thus not protected) while engaging in a discriminatory boycott, presumably, is protected expressive speech, simply because the HLR Note deems the latter to be a political boycott. *Id.* Curiously, in the first line of the HLR Note, the author describes BDS activity as an economic boycott, rather than a political one. *Id.* at 2029; *see also* Marcus, *supra* note 84, for a compelling argument that the anti-Zionist rhetoric at the heart of BDS Movement activity is properly seen as racial discrimination.

140. INT'L EXEC. BD., UAW, DECISION IN BRUMBAUGH V. UAW LOCAL UNION 2865, at 118 (2015) [hereinafter UAW Appeal].

> . . . [N]otwithstanding the denotation and connotation of words, it is our unanimous belief that the notion of *BDS, credibly, espouses discrimination and vilification* against Israelis and UAW members who are of Jewish lineage. . . . Thus, the local union's platform is apparent in its unfavorable stance against the state of Israel, Israelis and, invariably, Jewish union members.[141]

On this basis, the UAW found that BDS support violates the UAW's International Constitution's prohibition on discrimination based on race, ethnicity, religion, and national origin.[142]

There is a significant distinction between BDS activity and legitimate individual protest against Israel, just as such a distinction was found, for purposes of the federal statute prohibiting the provision of material support to terrorist groups, between providing material support to a designated terror group and engaging in independent advocacy for a goal that may have come into alignment with some of the objects of a designated terror group. As the Supreme Court noted in *Humanitarian Law Project*, where the material-support-to-terrorism statute was challenged on First Amendment grounds:

> Plaintiffs claim that Congress has banned their "pure political speech." It has not. Under the material-support statute, plaintiffs may say anything they wish on any topic. They may speak and write freely about the PKK and LTTE, the Governments of Turkey and Sri Lanka, human rights, and international law. They may advocate before the United Nations. As the Government states: "The statute does not prohibit independent advocacy or expression of any kind." Section 2339B also "does not prevent [plaintiffs] from becoming members of the PKK and LTTE or impose any sanction on them for doing so." Congress has not, therefore, sought to suppress ideas or opinions in the form of "pure political speech." Rather, Congress has prohibited "material support," which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.[143]

State Anti-Boycott Laws are of a similar nature. Individuals are free to boycott Israel and engage in advocacy against Israel. The Court was exceedingly clear about this point in *Humanitarian Law Project*, noting that the law in question did not apply to "[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives . . . ."[144] The only thing that is subject to regulation under the

141. *Id.* at 117–18 (emphasis added).

142. *Id.* at 118.

143. Holder v. Humanitarian Law Project, 561 U.S. 1, 25–26 (2010) (citations omitted).

144. *Id.* at 23.

State Anti-Boycott Laws is participation in the discriminatory boycott campaign fostered by the BDS Movement. And, even then, the only inhibition on the right to participate in such protest is a restriction on entering into contracts with the state or having state funds invested in the participating entity.

Notwithstanding the whitewashing of the history and goals of the BDS Movement, the boycott activity undertaken by BDS Movement supporters is comprised of discriminatory intent and impact; it does not enjoy the type of First Amendment protections provided under *Claiborne*. As a result, purported First Amendment considerations do not render the State Anti-Boycott Laws violative of the Unconstitutional Conditions Doctrine.

2. The Unconstitutional Conditions Doctrine Balancing Test.

Even if First Amendment protections were to apply to the State Anti-Boycott Laws, the Unconstitutional Conditions Doctrine provides a balancing test to weigh the interests of government, on the one hand, against the interests of the individual whose speech is being regulated, on the other.[145] Though the laws do not apply to the political speech of government employees, the case of *Pickering v. Board of Education* is nonetheless applicable.[146] The *Pickering* balancing test has been described as a:

> "[B]alance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." In striking that balance, we have concluded that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest

145. For purposes of this Article, we will accept, without agreeing with, the notion that independent contractors or other persons have a right to the benefit represented by either entering into a contract with the state or having the state invest state funds in securities issued by such person. While the argument supporting this notion may have some support when it comes to existing contracts with a state, the Court has explicitly withheld application of the holdings to applicants of new contracts. *See* Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668 (1996); O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996) (upholding application of the Unconstitutional Conditions Doctrine to the termination of existing contracts with independent contractors). The Supreme Court has not extended application of the Unconstitutional Conditions Doctrine to new contracts.

146. Pickering v. Bd. of Educ., 391 U.S. 563 (1968). While *Pickering* dealt with the Unconstitutional Conditions Doctrine as applied to public employees, the *Umbehr* and *O'Hare* cases expanded *Pickering* to the private sector. *Umbehr*, 518 U.S. at 673 ("We agree with the Tenth Circuit that independent contractors are protected, and that the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of their protection.").

> when it acts as sovereign to a significant one when it acts as employer." We have, therefore, "*consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.*"[147]

State Anti-Boycott Laws have been enacted to confront the pernicious spread of an organized and focused discriminatory campaign. The laws, in fact, do the minimum that a state is empowered to do to protest discrimination: forbid the state from contracting with or investing in companies who choose to engage in discriminatory conduct. The State Anti-Boycott Laws make a simple but powerful statement to those who choose to discriminate, while leaving them free to engage in that conduct.

Applying the *Pickering* balancing to the State Anti-Boycott Laws, it is very unlikely that a business seeking to contract with a state will actually be foreclosed from participating in protest activity unless that business obtains the majority of its revenue from state contracts. In such a case, however, the state has a strong interest in not funding a business if the state believes that discriminatory BDS activity is incompatible with the interests of the citizens of that state. Furthermore, even if prohibited from contracting with the state, the business remains free to engage in actual speech (rather than expressive conduct) to oppose Israel.

On the other side of the *Pickering* balancing test is the potential societal harm that would come from regulating BDS activity. If we ignore the long history of discriminatory intent behind the formation and operation of the BDS Movement and instead view it as a protest movement aimed at opposing a foreign nation, there is still very little value in protecting "speech" consisting of boycotting third parties to a conflict solely because of their dealings in that foreign nation. The typical *Pickering* case involves individuals who are speaking on a matter of local (or, at least, domestic) concern, such as the functioning of school districts, public hospitals, or local law enforcement.[148] Certainly, such speech is valuable and important

147. *Umbehr*, 518 U.S. at 676 (emphasis added) (citations omitted) (quoting *Pickering*, 391 U.S. at 568; then quoting Waters v. Churchill, 511 U.S. 661, 675 (1994); and then quoting *Waters*, 511 U.S. at 673).

148. *See e.g.*, Connick v. Myers, 461 U.S. 138 (1983) (involving speech related to the functioning of a local district attorney's office); Rankin v. McPherson, 483 U.S. 378 (1987) (concerning a local government employee commenting on the attempted assassination of President Reagan); *Waters*, 511 U.S. 661 (concerning a nurse at a public hospital questioning the efficacy of the hospital's management); City of San Diego v. Roe, 543 U.S. 77 (2004) (concerning a city police officer's sale of pornographic videos in which he starred); Garcetti v. Ceballos, 547 U.S. 410 (2006) (concerning a deputy district attorney disclosing misconduct in the local district attorney's office).

to the functioning of a robust and healthy democracy.[149] Economic attacks upon companies that do business in a foreign nation to protest that foreign nation's policies, however, have remote and nebulous connections to the interests of a state and its citizens. Political expressions are more appropriately made through actual speech, which remains unimpeded by State Anti-Boycott Laws, than economic boycotts of third parties that have a primary result of harming American consumers and spreading a message of discrimination.[150]

In sum, because BDS Movement activity is not protected political speech under the First Amendment, state laws that regulate the discriminatory activity that is inherent in BDS Movement boycotts are not in violation of the Unconstitutional Conditions Doctrine.

CONCLUSION

There are a multitude of reasons why people choose to engage in boycotts. In most situations, boycotts are indeed legitimate forms of protest and protected under the Constitution. Generally, one can engage in boycotts and protests against the State of Israel while still enjoying constitutional protections. However, when one engages in boycotts that are fostered and supported by foreign hate groups using the civil rights banner as cover for a nefarious and discriminatory campaign to inject a foreign dispute into American communities and commercial markets, those constitutional protections are not available.

While supporters of the BDS Movement have engaged in a wide-ranging campaign to sanitize the history and goals of BDS Movement boycotts, and a number of governmental, educational, and legal bodies

149. *See e.g.*, Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1163 (2012) ("[T]he function of the First Amendment is to protect speech that enables or facilitates the operation, and enriches the quality, of a democratic, open society, and the role of its members in the collective process of creating and maintaining it. The special protection of the First Amendment serves to enable individuals to discuss, consider, and decide how a democratic society should be structured and function . . . .").

150. *See* Greendorfer, *supra* note 10, at 46–49, 76–81 for a detailed discussion of the legislative history of the EAA. BDS Movement Boycotts, like the Arab League Boycott of Israel before them, amount to economic warfare waged by foreign groups against Israel, using the United States' commercial markets and American consumers as the battlefield. *Id.* Far from being political speech, these boycotts are, as Senator Adlai Stevenson said during the legislative hearings on the EAA, an intrusion "[o]n American sovereignty." *Foreign Investments and Arab Boycott Legislation: Hearing on S. 69 and S. 92 Before the Subcomm. on Int'l Fin. of the S. Comm. on Banking, Hous. & Urban Aff.*, 95th Cong. 1 (1977). "[They] interfere[] with basic human rights and religious freedom. [They] impede[] free competition in the marketplace and systematically enlist[] American citizens against their will in a war with Israel." *Id.*

have become unquestioning conduits for BDS propaganda,[151] a public relations campaign cannot change underlying facts. These facts are easy to find, and they demonstrate the true nature of the BDS Movement and its boycotts. The BDS Movement was founded by a consortium of countries and organizations devoted to the destruction of Israel, many of whom have been designated as foreign terror organizations by the United States. The movement is nothing more than the latest evolution of an intolerant and bigoted mindset that believes Jews should not have the right to their own country or self-governance in the lands from which they came. Knowing that many people in the United States and Europe would not support such a movement if its true goals were announced, the founders of BDS cloaked their agenda with the patina of a civil rights movement, co-opted the language of legitimate civil rights movements from South Africa and the United States, and found a willing audience of people who have failed to do basic research into what they are actually supporting.

To the extent there are participants in BDS Movement boycotts who are unaware of, or unopposed to, the eliminationist goals of BDS, their presence cannot serve as a prophylactic for the organization's clearly stated goal of destroying a foreign state by waging a global commercial war on businesses from that state.

The governors of all fifty states recently signed a statement affirming opposition to BDS, stating that BDS's "single-minded focus on the Jewish State raises serious questions about its motivations and intentions."[152] This unified and universal acknowledgement of the nature of BDS should be recognized when undertaking a legal analysis of rights associated with BDS Movement activity.

Opponents of the State Anti-Boycott Laws argue that they have a right to protest against Israel. The laws in no way infringe upon this right. Citizens of the State Regulators can still take to the streets to voice their opinions against Israel, and individuals can, if they so choose, avoid doing business with Israel. The State Anti-Boycott Laws represent the expression of the State Regulators' proprietary power to spend or invest state funds in a manner that reflects the moral and economic interests of the people of those states.

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151. The author of this Article has contacted the authors of the CRS BDS Report to advise them of material misstatements that were made in the report regarding the nature of the BDS Movement. These misstatements mirror the talking points of BDS supporters such as Palestine Legal and the National Lawyers Guild, which falsely portray BDS as a civil rights movement. As of the date of this Article's publication, the CRS BDS Report's misstatements remain uncorrected.

152. *Governors United Against BDS*, AM. JEWISH COMMITTEE, https://www.ajc.org/governors (last visited Dec. 15, 2017).

Opponents of the State Anti-Boycott Laws claim they only seek to protect the freedom to boycott and that State Anti-Boycott Laws "chill" speech. In fact, the only thing that the State Anti-Boycott Laws seek to chill is discriminatory conduct. The motive and history of the State Anti-Boycott Laws are simply to ensure that the states do not enter into commercial relationships with parties that discriminate. These laws are common-sense legislative solutions to the unfortunate and harmful spread of discriminatory hate campaigns that target minority populations. The laws are narrowly tailored to preserve the rights of the people to speak and protest while allowing states to avoid involvement in, and funding for, those who choose to participate in the campaigns.

If opponents of the State Anti-Boycott Laws believe that laws allowing a state to choose to not enter into contracts with, or make investments in, those who discriminate will infringe anyone's rights, that should be taken as an admission that BDS Movement activity is intended to be discriminatory. Without the State Anti-Boycott Laws, states could be compelled to enter into financial arrangements with parties who promote discrimination. It is entirely disingenuous to mischaracterize a hate movement's agenda as legitimate political speech and then use that mischaracterization as constitutional cover to force states to provide financial support for those who support discriminatory campaigns.