STOP DEFENDING DISCRIMINATION: ANTI-BOYCOTT, DIVESTMENT, AND SANCTIONS* STATUTES ARE FULLY CONSTITUTIONAL

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I. INTRODUCTION

The Boycott, Divestment, and Sanctions (BDS) Movement operates as a coordinated and sophisticated effort to disrupt the economic and financial stability of the State of Israel.[1] It also attempts to cause direct harm to the economic interests of persons conducting business in and with Israel,[2] or with

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* Boycott, Divestment, and Sanctions (BDS).

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1. *See* OMAR BARGHOUTI, BOYCOTT, DIVESTMENT, SANCTIONS: THE GLOBAL STRUGGLE FOR PALESTINIAN RIGHTS 223 (2011); *see also* Bob Unruh, *Hate-Israel Movement Flames Out as Investments Rise*, WND (June 4, 2016), http://www.wnd.com/2016/06/hate-israel-movement-flames-out-as-investments-rise/324754/#!.

2. YASMEEN ABU-LABAN ET AL., APARTHEID IN PALESTINE: HARD LAWS AND HARDER EXPERIENCES 100 (Ghada Ageel ed. 2016) [hereinafter APARTHEID IN PALESTINE].

people that the Movement deems to be affiliated with Israel in some way.[3] The BDS Movement claims responsibility for significant damage to Israeli business interests.[4] The Movement uses the threat of withdrawing financial support in an effort to coerce companies to cease or refuse to engage in business relations with the State of Israel, its nationals, and its residents.[5] Moreover, especially in its accompanying "cultural and academic boycotts," the BDS Movement also targets people who are Jewish or who do business with persons who are Jewish.[6]

Of course, that is how the BDS Movement and its leaders would describe it.[7] Others would not be so charitable and would likely point out that the BDS Movement has been a significant factor in the recent trend of anti-Semitic incidents, both globally and domestically.[8] In addition, critics have also pointed out that the unambiguous goal of the international BDS Movement is the elimination of the State of Israel,[9] that it has been linked to

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3. *Boycott Israel Products*, BOYCOTT ISR. TODAY (Sept. 8, 2014), https://boycottisraeltoday.wordpress.com/boycott-israel; Karl Vick, *This Is Why It's Hard to Boycott Israel*, TIME (June 5, 2015), http://time.com/3910835/israel-boycott/.

4. APARTHEID IN PALESTINE, *supra* note 2. Unfortunately for innocent Palestinians caught in their crosshairs, far from vindicating their rights, the BDS movement tends to hurt Palestinian interests at least as much as Israeli interests. *See* Emily Harris, *When 500 Palestinians Lose Their Jobs at SodaStream, Who's To Blame?*, NPR: PARALLELS (Mar. 27, 2016, 6:12 AM), http://www.npr.org/sections/parallels/2016/03/27/471885452/when-500-palestinians-lose-their-jobs-at-sodastream-whos-to-blame.

5. Ziva Dahl, *Birds of a Feather? The Link Between BDS and Hamas*, OBSERVER (Apr. 22, 2016, 4:00 PM), http://observer.com/2016/04/birds-of-a-feather-the-link-between-bds-and-hamas/.

6. BREAKING NEWS: *Concern Mounts Over BDS Moves Against Kosher Food Products in Miami*, KOSHER TODAY (June 29, 2016), http://www.koshertoday.com/breaking-news-concern-mounts-bds-moves-kosher-food-products-miami/; *see also* Ben Cohen, *Analysis: Hindered by New Anti-Discrimination Laws, BDS May Increasingly Target U.S. Jews*, TOWER (Feb. 7, 2016, 10:33 AM), http://www.thetower.org/2921-analysis-hindered-by-new-anti-discrimination-law-bds-may-increasingly-target-u-s-jews; Daniel Greenfield, *Racist BDS Activists Try to Put Pig's Head in Kosher Food, Put it in Halal Instead*, FRONT PAGE MAG. (Oct. 24, 2014), http://www.frontpagemag.com/point/243757/racist-bds-activists-try-put-pigs-head-kosher-food-daniel-greenfield; Scott Jaschik, *2 Events Unsettle Jewish Students at Brown*, INSIDE HIGHER EDUC. (Mar. 21, 2016), https://www.insidehighered.com/news/2016/03/21/two-events-unsettle-jewish-students-brown-university; Kemberlee Kaye, *Dozens of Groups Support Plea for Help from Vassar Jewish Students*, LEGAL INSURRECTION (May 12, 2016, 1:00 PM), http://legalinsurrection.com/2016/05/dozens-of-groups-support-plea-for-help-from-vassar-jewish-students; *Student Voices: What Students are Saying About Anti[-S]emitism on Their Campuses*, AMCHA INITIATIVE, http://www.amchainitiative.org/student-voices-being-jewish-on-campus (last visited Nov. 24, 2017).

7. *See What Is BDS: Overview*, BDS FREEDOM JUST. EQUALITY, https://bdsmovement.net/bdsintro (last visited Nov. 24, 2017).

8. *See* Jonathan Marks, *BDS Nonviolence Provides Cover for Violent Allies*, JAMES G. MARTIN CTR. (Oct. 30, 2015), https://www.jamesgmartin.center/2015/10/bds-nonviolence-provides-cover-for-violent-allies/; James B. Milliken, *ZOA Letter to CUNY Leaders about Anti-Semitic, Violence-Inducing Rallies There*, ZIONIST ORG. OF AM. (Feb. 22, 2016), http://zoa.org/2016/02/10315402-letter-to-cuny-chancellor-and-board-of-trustees-jew-haters-spread-fear-at-cuny-colleges/#ixzz4u7UH70HE.

9. *See* Rachel Avraham, *Goal of the BDS Movement: Delegitimize Israel*, UNITED WITH ISR. (July 10, 2013), https://unitedwithisrael.org/the-real-goal-of-the-bds-movement-is-israels-delegitimization/; Harold Brackman, *Boycott Divestment Sanctions (BDS) against Israel: An Anti-Semitic, Anti-Peace Poison Pill*, SIMON WIESENTHAL CTR. (Mar. 2013), http://www.wiesenthal.com/atf/cf/%7B54d385e6-f1b9-4e9f-8e94-890c3e6dd277%7D/REPORT_313.PDF.

radical terror groups,[10] and that the BDS Movement itself constitutes nothing less than "economic terrorism."[11] The latter, by the way, is not mere rhetoric, but an actual term of art. Per the definition given by the Geneva Centre for Security Policy:[12]

> "[E]conomic terrorism" would be undertaken by transnational or non-state actors. This could entail varied, coordinated and sophisticated or massive destabilizing actions in order to disrupt the economic and financial stability of a state, a group of states or a society (such as market oriented western societies) for ideological or religious motives. These actions, if undertaken, may be violent or not. They could have either immediate effects or carry psychological effects which in turn have economic consequences.[13]

The legislative responses to the BDS Movement have not been and should not be a partisan issue. In their 2016 party platforms, both the Republican[14] and the Democratic[15] parties included language disavowing the BDS Movement. At the state level, in response to the BDS Movement, the bi-partisan leaders of several states (twenty-one to date) have enacted, or are considering enacting, state "anti-BDS bills."[16] None of the state laws ban or punish speech that is critical of Israel, nor do they "stop[] anyone from boycotting Israel . . . . These laws simply say: If you want the state to do business with you, you need to abide by the state's policies of sound and fair business practices, including anti-discrimination rules."[17]

Recent scholarship has criticized these bills and statutes as "part of a flurry of anti-BDS legislative activity" that the authors claim is

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10. Dahl, *supra* note 5.

11. *See* Avi Isaacharoff & Chaim Levinson, *PA Upgrades Boycott of Settlement Products Despite Israeli Warnings*, HAARETZ (May 20, 2010, 3:14 AM), http://www.haaretz.com/pa-upgrades-boycott-of-settlement-products-despite-israeli-warnings-1.291128; Adam Shay, *Manipulation and Deception: The Anti-Israel "BDS" Campaign (Boycott, Divestment, and Sanctions)*, JERUSALEM CTR. FOR PUB. AFF. (Mar. 19, 2012), http://jcpa.org/article/manipulation-and-deception-the-anti-israel-bds-campaign-boycott-divestment-and-sanctions/; Leah Vukmir, *The Boycott, Divestment and Sanctions Movement*, AM. LEGIS. EXCHANGE COUNS. (June 15, 2016), https://www.alec.org/article/the-boycott-divestment-and-sanctions-movement/.

12. *About GCSP*, GENEVA CTR. FOR SECURITY POL., www.gcsp.ch (last visited Nov. 24, 2017). "[A]n international foundation established in 1995, with [fifty-one] member states, for the primary purpose of promoting peace, security and international cooperation through executive education and training, applied policy analysis and dialogue." *Id.*

13. *Roundtable on 'Economic Terrorism'*, GENEVA CTR. FOR SECURITY POL. (July 11–12, 2005), http://web.archive.org/web/20070927104321/http:/www.gcsp.ch/e/meetings/SecurityChallenges/CIP/EconomicTerrorism roundtable/programme.pdf.

14. *2016 Republican Party Platform*, GOP (July 18, 2016), https://www.gop.com/the-2016-republican-party-platform/.

15. AM. PRESIDENCY PROJECT, 2016 DEMOCRATIC PARTY PLATFORM 48 (2016), http://www.presidency.ucsb.edu/papers_pdf/117717.pdf.

16. Eugene Kontorovich, *What Do Anti-BDS Bills Do? They Don't Perpetuate, but Prevent Discrimination*, N.J. JEWISH NEWS (June 22, 2016), http://njjewishnews.com/article/31350/what-do-anti-bds-bills-do-they-dont-perpetuate-but-prevent-discrimination#.Wc8CjNOGM0o.

17. *Id.*

unconstitutional.[18] Among many faults, the claims that have been made mischaracterize facts, history, and case law regarding the First Amendment generally, boycotts specifically, and what these bills actually say and do—in particular, South Carolina's anti-BDS legislation.[19] Unsubstantiated, heavy-handed claims do a disservice to parties on both sides of the issue because the glaring errors dissuade interest in further debate. This Article will correct some of the more blatant mistakes that have been made in the hopes of moving the conversation forward and encouraging sophisticated discussion on the topic.

Part II discusses the overall stance of the United States regarding boycotting the State of Israel, along with state-specific reactions to the BDS Movement.[20] An emphasis will be placed on the first anti-BDS statute that was passed, the South Carolina statute, as a model of a fully constitutional response.[21] Part III focuses on the legality of anti-BDS statutes generally, including how United States Supreme Court precedent has consistently interpreted such statutes as constitutional.[22] Finally, Part IV takes the specific claims and assertions from recent scholarship and addresses them in detail.[23]

II. THE UNITED STATES' POSITION ON BDS

A. Federal Approach

The President of the United States is empowered to take foreign policy stances which is a derivative of his powers to recognize foreign governments and exercise broad discretion in foreign policy.[24] Every single American President since the founding of the State of Israel in 1948 (including the current President) have expressed their unwavering support for the nation.[25] In fact, specifically as it relates to boycotts designed to pressure Israel, every President, Congress, and administration since President Carter signed the anti-boycott amendments to the Export Administration Act in 1977,[26] has

18. *First Amendment—Political Boycotts—South Carolina Disqualifies Companies Supporting BDS from Receiving State Contracts*—S.C. CODE ANN. § 11-35-3500 (2015), 129 HARV. L. REV. 2029, 2031 (2016) [hereinafter *First Amendment*].

19. *Contra id.*

20. *See infra* Part II.

21. *See* S.C. CODE ANN. § 11-35-5300 (2015).

22. *See infra* Part III.

23. *See infra* Part IV.

24. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 329 (1936) (recognizing in the context of foreign affairs, "broad discretion vested in the President . . .").

25. *See U.S.-Israel Relations: Roots of the U.S.-Israel Relationship*, JEWISH VIRTUAL LIBR., http://www.jewishvirtuallibrary.org/roots-of-the-u-s-israel-relationship (last visited Oct. 21, 2017).

26. Statement by President Carter upon the Signing of Anti-Boycott Legislation, ISR. MINISTRY OF FOREIGN AFF., http://mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook3/Pages/5%20Statement%20by%20President%20Carter%20upon%20the%20signing%20o.aspx (last visited Dec. 20, 2017).

affirmed their support.[27] President Carter's signing statement itself was quite telling:

> For many months I have spoken strongly on the need for legislation to outlaw secondary and tertiary boycotts and discrimination against American businessmen on religious or national grounds . . . . My concern about foreign boycotts stemmed, of course, from our special relationship with Israel, as well as from the economic, military and security needs of both our countries. But the issue also goes to the very heart of free trade among all nations . . . . The bill seeks instead to end the divisive effects on American life of foreign boycotts aimed at Jewish members of our society. If we allow such a precedent to become established, we open the door to similar action against any ethnic, religious, or racial group in America.[28]

On February 11, 2016, President Barack Obama expressed similar sentiments when he signed the Trade Facilitation and Trade Enforcement Act of 2015[29] into law.[30] The Act promotes United States and Israel relations by discouraging cooperation with entities that participate in BDS Movements against Israel and requires regular reporting on such entities.[31] As the President explained, "I have directed my administration to strongly oppose boycotts, divestment campaigns, and sanctions targeting the State of Israel."[32]

For anyone who is still unsure about the position of the United States on the matter, it is worth quoting several provisions of the Trade Facilitation and Trade Enforcement Act:

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27. *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, 47–48 (2017). Though the EAA Anti-Boycott Law has statutorily lapsed by its own terms pursuant to its sunset provision, as the CRS Report states

> its provisions are continued under the authorization granted to the President in the National Emergencies Act [50 U.S.C. §§ 1601–1651 (1976)] and the International Economic Emergency Powers Act [50 U.S.C. §§ 1701–1708 (1977)] most recently under Executive Order 13222 signed August 17, 2001. Under this authority, the provisions of the EAA Anti-Boycott Law remain in effect as though its sunset provisions had not yet become effective . . . . Executive Order 13222 was amended by President Barack Obama on March 8, 2013 in [Executive Order 13637,] 78 Fed. Reg. 16129 (Mar. 13, 2013). The 2013 amendments did not affect the EAA Anti-Boycott Law's operative provisions.

Id. at 47–48, 47–48 n.181.

28. *Id.* at 46–47 (emphasis removed).

29. *See generally* Trade Facilitation and Trade Enforcement Act, 19 U.S.C. §§ 4301–4456 (2016); Trade Facilitation and Trade Enforcement Act of 2015, H.R. 644, 114th Cong. (2015–2016).

30. JTA, *President Obama Signs Anti-BDS Bill—Won't Apply to Settlements*, FORWARD (Feb. 25, 2016), http://forward.com/news/breaking-news/334195/president-obama-signs-anti-bds-bill-wont-apply-to-settlements/.

31. *Id.*

32. *Id.*

> (a) FINDINGS.—Congress finds the following:
> (1) Israel is America's dependable, democratic ally in the Middle East—an area of paramount strategic importance to the United States.
> . . . .
> (6) It has been the policy of the United States Government to combat all elements of the Arab League Boycott of Israel . . . .
> . . . .
> (b) STATEMENTS OF POLICY.—Congress—
> (1) supports the strengthening of economic cooperation between the United States and Israel and recognizes the tremendous strategic, economic, and technological value of cooperation with Israel;
> . . . .
> (4) opposes politically motivated actions that 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 GATT 1994 . . . .
> . . . .
> (c) PRINCIPAL TRADE NEGOTIATING OBJECTIVES OF THE UNITED STATES.—
> . . . .
> (A) To discourage actions by potential trading partners that directly or indirectly prejudice or otherwise discourage commercial activity solely between the United States and Israel.
> (B) To discourage politically motivated boycotts of, divestment from, and sanctions against Israel and to seek the elimination of politically motivated nontariff barriers on Israeli goods, services, or other commerce imposed on Israel.
> (C) To seek the elimination of state-sponsored unsanctioned foreign boycotts of Israel, or compliance with the Arab League Boycott of Israel, by prospective trading partners.[33]

The United States' position is clear: It supports Israel. It does not support the BDS Movement or any other form of boycott against Israel. Aside from security and other considerations, America's purely economic interest in Israel is staggering; Israel is America's twenty-fifth largest trading partner, with over $40 billion annually in trade.[34]

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33. 19 U.S.C. § 4452; H.R. 644.

34. *Israel*, OFF. OF THE U.S. TRADE REPRESENTATIVES (Apr. 29, 2014), http://ustr.gov/countries-regions/europe-middle-east/middle-east/north-africa/israel.

B. The State Response to BDS

In response to the BDS Movement, several states[35] have enacted, or are considering enacting, state "anti-BDS bills," some of which are modeled in the spirit of the 1977 amendments to the Export Administration Act (EAA)[36] and the Ribicoff Amendment to the 1976 Tax Reform Act (TRA).[37] These laws seek to prevent United States citizens—and the businesses that drive the free-market economy of the nation—from being coerced, under threat of significant economic loss or ruin, into becoming embroiled in foreign conflicts (including the Palestinian conflict with Israel) and from being forced to participate in actions (such as discrimination), which are repugnant to American values and traditions.[38] Aside from protecting citizens from coercion and protecting the government from involving itself in discriminatory practices, the anti-BDS bills and statutes also serve to protect the economic interests of the United States, which could be detrimentally

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35. *See* David Bernstein, *Don't Believe Their Hype: BDS Is a Marginal Phenomenon*, JEWISH TELEGRAPHIC AGENCY (July 13, 2016, 5:36 PM), http://www.jta.org/2016/07/13/news-opinion/opinion/dont-believe-their-hype-bds-is-a-marginal-phenomenon.

> Anti-BDS bills have passed in state legislatures by huge margins and BDS resolutions have gone down in defeat at several progressive institutions. At last count, 14 states have passed anti-BDS bills in this past legislative session alone. Some of the legislation merely condemns BDS and encourages a negotiated solution. And some measures place companies that accede to a BDS campaign on a state no-buy list, forcing them to think long and hard before pulling out of Israel. In the Illinois House of Representatives, the anti-BDS bill passed by a vote of 102-2, and in the Florida Senate it was 38-0 with 2 abstentions. In every state legislative body that had a roll call taken, the anti-BDS bill passed by decisive if not overwhelming margins.

Id.

36. Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977); *see* John Dworkin, *Losing Public Opinion on BDS, Activists Turn to 'Lawfare'*, MONDOWEISS (May 22, 2015), http://mondoweiss.net/2015/05/lawfare-against-divestment/. While it is true that the EAA and other federal laws were originally passed as a response to the Arab League Boycott of Israel, exporters have already made it clear that,

> [i]t makes no difference that the boycotts targeted by earlier laws were promulgated by countries, and the current round is promoted by private groups (which are often funded by governments). This is simply the economic parallel of the move from traditional state vs. state warfare to warfare through guerilla and other unorganized groups. Indeed, the same groups behind "BDS" lobby the European Union and other governmental actors to impose sanctions on Israel—BDS and European measures are deeply intertwined. Crucially, the 1970s boycott laws, like the laws recently passed in South Carolina and Illinois, addressed private companies' adherence to boycotts of Israel, regardless of the motive of the boycott proponents or participants.

Impact of the Boycott, Divestment, and Sanctions Movement: *Before the H. Comm. on Oversight and Gov't Reform Subcomm. on Nat'l Security* (July 28, 2015) [hereinafter Kontorovich], https://oversight.house.gov/wp-content/uploads/2015/07/7-28-2015-Natl-Security-Hearing-on-BDS-Kontorovich-Northwestern-Testimony.pdf (statement of Eugene Kontorovich, Professor, Northwestern University School of Law).

37. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976) (codified as amended at 26 U.S.C. § 999 (2012)).

38. S. Con. Res. 104, 95th Cong. (1977); *see also* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. §§ 1981–2000 (2017)).

impacted by concerted efforts to disrupt the economic stability of Israel, an ally in the region.[39]

The Ribicoff Amendment states in relevant part that:

> (3) DEFINITION OF BOYCOTT PARTICIPATION AND COOPERATION.—For purposes of this section, a person participates in or cooperates with an international boycott if he agrees—
>
> (A) as a condition of doing business directly or indirectly within a country or with the government, a company, or a national of a country—
>
> (i) to refrain from doing business with or in a country which is the object of the boycott or with the government, companies, or nationals of that country;
>
> (ii) to refrain from doing business with any United States person engaged in trade in a country which is the object of the boycott or with the government, companies, or nationals of that country;
>
> (iii) to refrain from doing business with any company whose ownership or management is made up, all or in part, of individuals of a particular nationality, race, or religion, or to remove (or refrain from selecting) corporate directors who are individuals of a particular nationality, race, or religion; or
>
> (iv) to refrain from employing individuals of a particular nationality, race, or religion . . . .[40]

And the EAA says:

> (1) For the purpose of implementing the policies set forth in [subparagraph (A) or (B) of paragraph (5) of section 3 of this Act,] the President shall issue rules and regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation:
>
> (A) Refusing, or requiring any other person to refuse, to do business with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country. The mere absence of a business relationship with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country,

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39. Michael Eisenstadt & David Pollock, *Friends with Benefits: Why the U.S.-Israeli Alliance Is Good for America*, WASH. INST. (Nov. 7, 2012), http://www.washingtoninstitute.org/policy-analysis/view/friends-with-benefits-why-the-u.s.-israeli-alliance-is-good-for-america.

40. 26 U.S.C. § 999.

> or with any other person, does not indicate the existence of the intent required to establish a violation of rules and regulations issued to carry out this subparagraph.
>
> (B) Refusing, or requiring any other person to refuse, to employ or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person or of any owner, officer, director, or employee of such person.
>
> (C) Furnishing information with respect to the race, religion, sex, or national origin of any United States person or of any owner, officer, director, or employee of such person.
>
> (D) Furnishing information about whether any person has, has had, or proposes to have any business relationship (including a relationship by way of sale, purchase, legal or commercial representation, shipping or other transport, insurance, investment, or supply) with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country. Nothing in this paragraph shall prohibit the furnishing of normal business information in a commercial context as defined by the Secretary of Commerce.
>
> (E) Furnishing information about whether any person is a member of, has made contributions to, or is otherwise associated with or involved in the activities of any charitable or fraternal organization which supports the boycotted country . . . .[41]

There has been some pushback against state legislatures that have passed, or are moving in the direction of passing state-level anti-BDS statutes.[42] Specifically, some have advanced the rather dubious claim that these statutes might somehow infringe on vaguely defined First Amendment rights.[43] This Article explains exactly what these statutes do and do not prohibit in order to clearly dispel any such concerns. As a point of reference, it is helpful to look at one concrete example of a state anti-BDS statute, explain what it does, and respond to the criticism that it has received. While not all of the statutes and laws are identical, they all have a lot in common. The hope is that the analysis of one will elucidate the others.

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41. Export Administration Amendments of 1977 (emphasis added).

42. Jill Jacobs, *Opposing BDS: Anti-BDS Law Can't Be 'Pro-Israel' if It Tramples on Free Speech*, HERITAGE FLA. JEWISH NEWS (July 1, 2016), http://www.heritagefl.com/story/2016/07/01/opinions/opposing-bds-anti-bds-law-cant-be-pro-israel-if-it-tramples-on-free-speech/6439.html; Aidan Quigley, *Are State Boycotts of the Anti-Israel BDS Movement Constitutional?*, CHRISTIAN SCI. MONITOR (June 27, 2016), http://www.csmonitor.com/USA/Foreign-Policy/2016/0627/Are-state-boycotts-of-the-anti-Israel-BDS-movement-constitutional; Times Editorial Bd., *Boycotts of Israel Are a Protected Form of Free Speech*, L.A. TIMES (July 5, 2016), http://www.latimes.com/opinion/editorials/la-ed-bds-bill-20160630-snap-story.html; David Wildman, *Anti-BDS Legislation Violates Free Speech*, BDS MOVEMENT (Apr. 24, 2016), https://bdsmovement.net/2016/anti-bds-legislation-violates-free-speech-13959.

43. Wildman, *supra* note 42.

C. South Carolina's Anti-BDS Statute

In June of 2015, South Carolina became the first state to pass an anti-BDS statute.[44] As such, this Article will focus on that statute as the model of a constitutionally sound approach to dealing with the BDS Movement.[45]

The South Carolina statute reads as follows:

> ARTICLE 23
>
> Statewide Provisions
>
> SECTION 11-35-5300. Prohibition of contracting with discriminatory business.
>
> (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.
>
> (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.
>
> (D) Failure to comply with a provision of this section is not grounds for a protest filed pursuant to Section 11-35-4210 or any other pre-award protest

44. *See* S.C. CODE ANN. § 11-35-5300 (2015).
45. *Id.*

> process appearing in a procurement ordinance adopted by a political subdivision pursuant to Section 11-35-50 or Section 11-35-70, or similar law.
>
> HISTORY: 2015 Act No. 63 (H.3583), Section 1, eff June 4, 2015.
>
> Editor' Note 2015 Act No. 63, § 5, provides as follows:
>
> "SECTION 5. This act takes effect upon approval by the Governor and, does not apply to contracts entered into before the effective date of this act."[46]

While others have written extensively (and persuasively) about the application of the federal anti-boycott laws to the BDS Movement,[47] this Article will focus more on state laws, such as the South Carolina statute. The federal laws are still relevant, however, because the scopes of state anti-BDS statutes are similarly limited to target only those institutions and corporations that act directly against the best interests of the individual states in relation to established United States foreign policy,[48] as well as the states' own financial interests. For anyone who thinks that South Carolina is merely paying lip-service to the idea of protecting its own interests, "South Carolina did over $120 million in trade with Israel in 2014, 22 percent more than the year prior . . . . The economic considerations are substantial enough to have compelled the state to protect these ties through public policy."[49]

The South Carolina statute neither prohibits nor prevents any individuals from exercising their own free speech rights, nor does it infringe on any persons' freedom to invest their funds as they see fit.[50] It simply protects the interests of South Carolina and the United States and removes the state's funding of discriminatory action.[51] It is not far-fetched to assume that investing state funds in an institution or company that supports the BDS Movement would represent that the state directly supports the BDS Movement; state dollars passed through pro-BDS organizations could

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46. *Id.*

47. *See* Greendorfer, *supra* note 27.

48. In addition to the EAA:

> The legislative response with the first tangible enforcement provisions was an amendment to the 1976 Tax Reform Act. This legislation, known as the 'Ribicoff Amendment,' was a fairly discrete policy implementation that denied tax benefits to companies that participated in the Arab League Boycott . . . the provisions of the Ribicoff Amendment are still in effect. As an indication of United States policy . . . the Ribicoff Amendment stands alongside the EAA Anti-Boycott Law as a resounding pronouncement that foreign boycotts imposed in the United States on friendly countries were contrary to United States' interests and would not be tolerated.

Id. at 43–44; *see also* OFFICE OF ANTIBOYCOTT COMPLIANCE, U.S. DEP'T OF COMMERCE: BUREAU OF INDUS. AND SEC., http://www.bis.doc.gov/index.php/enforcement/oac (last visited Dec. 19, 2017) (expressing an overview).

49. Aaron Meneberg, *Israel Gives Much More to the U.S. Economy than you Imagined*, TOWER, http://www.thetower.org/articlesisrael-gives-much-more-to-the-u-s-economy-than-you-imagined/ (last visited Nov. 24, 2017).

50. Kontorovich, *supra* note 16.

51. S.C. CODE. ANN. § 11-35-5300 (2015).

directly reach BDS Movement activists. As Governor Andrew M. Cuomo wrote shortly after he signed Executive Order No. 157 in New York, which directed state entities to divest all public funds supporting the boycotts, divestment and sanctions campaign against Israel, "[a]s a matter of law, there is a fundamental difference between a state suppressing free speech and a state simply choosing how to spend its dollars. To argue otherwise would be to suggest that New York state is constitutionally obligated to support the BDS Movement, which is not only irrational but also has no basis in law."[52]

III. ANTI-BDS LEGISLATION IS CONSTITUTIONAL

The first question that a person might ask when approaching an anti-BDS statute like the one in South Carolina is whether or not the anti-BDS law infringes on First Amendment rights.[53] This is a legitimate question to ask, and in fact, it is the reason that the statutes are so carefully constructed; no one wants to infringe on anyone else's First Amendment rights. The short answer to the preceding question is no, the bills and statutes do not infringe on First Amendment rights, for two simple reasons.

In order for an anti-BDS statute to violate of the First Amendment, two propositions need to be established: (1) that the actions proscribed by the statute are restrictions on private speech, not government speech; and (2) that the activity of engaging in BDS (on the part of the companies and institutions) is the kind of speech that is protected speech under the First Amendment. Neither of these propositions are true.

A. Anti-BDS Laws Affect Only Government Speech

The Supreme Court in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* held that "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."[54] Without this exemption, the government "would [simply] not work."[55] In *Walker*, a nonprofit organization brought an action against the Texas Department of Motor Vehicles alleging that the government had violated its right to free speech because the government had denied the nonprofit's application to

52. Andrew Cuomo, *If You Boycott Israel, New York State Will Boycott You*, WASH. POST (June 10, 2016), https://www.washingtonpost.com/opinions/gov-andrew-cuomo-if-you-boycott-israel-new-york-state-will-boycott-you/2016/06/10/1d6d3acc-2e62-11e6-9b37-42985f6a265c_story.html?utm_term=.17cf47bcda43.

53. *First Amendment*, *supra* note 18.

54. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015); Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009).

55. *Walker*, 135 S. Ct. at 2246 (expressing the impossibility of ever creating or running a program with which even one person disagreed). "[I]t is not easy to imagine how government could function if it lacked th[e] freedom to select the messages it wishes to convey." *Id*. (internal quotations removed) (citing *Summum*, 555 U.S. at 468).

order specialty license plates with the confederate flag on them.[56] The Court concluded that the government had the right to decide the message it wanted to convey on license plates.[57] "[A]s a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf."[58] In fact, the Supreme Court has continually refused "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals."[59]

In the case of the South Carolina statute, the government does not even seek to fund a controversial program. Instead it seeks merely to *not* fund; it desires to disassociate itself and its public funds from divisive companies and organizations.[60] The Court has consistently held that doing so is permissible for the government because it "can speak for itself."[61] Moreover, the Court has explicitly held that "when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position."[62] In doing so, the government has the right to advance, perfect, or conform itself to that program, policy, or position.

The question still remains: How does one know when the government is speaking as opposed to a private citizen? Thankfully, there are a few clear ways to tell. In *Walker*, the Court concluded that the government had the right to decide the message it wanted to convey on the license plates[63] because the Court reasoned that the state maintained "direct control over the messages conveyed;" it had "sole control" over all aspects of the license plates; and the public often associated the medium with state speech.[64] Additionally, the Court weighed the fact that the license plates had "traditionally been used as a medium for government speech," in favor of holding that the state's actions were government speech.[65] Furthermore, in *Walker*, the state decided it did not want to convey a message, real or imagined, of racism, hatred, or discrimination by allowing a Confederate flag on its license plates.[66]

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56. *Id.* at 2245.
57. *Id.* at 2249–53.
58. *Id.* at 2246.
59. *Id.* (citing Rust v. Sullivan, 500 U.S. 173, 194 (1991)).
60. S.C. CODE ANN. § 11-35-5300 (2015).
61. *Walker*, 135 S. Ct. at 2246 (citing Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000)).
62. *Id.*
63. *Id.* at 2253.
64. *Id.* at 2249.
65. *Id.* at 2250.
66. *See id.* at 2246.

The State of South Carolina desired to do exactly the same thing: "[P]romote a program, espouse a policy, [and] take a position" that distances the state from divisive, harmful, and often hateful discriminatory speech that directly opposes its message and its social and economic values.[67] The state wished to do so because it has direct control over the messages conveyed with its funding, sole control over the medium of funding decisions, and because the public often associates the medium of state funding with state speech and state support.[68] The state of South Carolina is no different than any other government entity or its fellow states. In order to operate, it requires the ability to make decisions that promote the values of its constituents, and advance programs and policies that further its own interests without having to cater to every opposing interest.

To summarize: First, the statute in question is merely the state taking a position on an issue, which is within its discretion to do.[69] Second, the state is speaking through a medium that it solely and directly controls—no other entity outside of the state and its various institutions exercises control over the use, allocation, and investment of public money in South Carolina.[70] Third, the medium the government is using to deliver its message is intimately associated with the government and its voice; where a person, or a government for that matter, chooses to invest money, that person sends quite a strong message about which beliefs and values he or she, or it, agrees with and hold.[71] Fourth, the use and investment of public funds to convey a message is a traditional method the government uses to express itself and its policies.[72]

Lest there be any confusion, the Supreme Court has also held that certain forms of government speech may "implicate the free speech rights of private persons" and that even in cases of government speech the "First Amendment stringently limits a [s]tate's authority to compel a private party to express a view with which the private party disagrees."[73] In *Walker*, the Court noted that the government cannot force a person to "convey 'the [s]tate's ideological message'" on his or her car or license plate.[74]

Here, however, just as in *Walker*, there is no issue of compelled speech.[75] The government is not requiring the individual companies or institutions who engage in BDS activities targeting Israel to alter their beliefs,

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67. *Id.* at 2241.
68. *Id.* at 2249.
69. *Id.* at 2246.
70. *Id.* at 2249.
71. *See generally* Rust v. Sullivan, 500 U.S. 173 (1991); Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983); Widmar v. Vincent, 454 U.S. 263 (1981).
72. *See generally Rust*, 500 U.S. 173.
73. *Walker*, 135 S. Ct. at 2252–53.
74. *Id.* at 2253 (quoting Wooley v. Maynard, 430 U.S. 705, 715 (1977)).
75. *See id*.

stop their support for BDS, or change their message in any way.[76] The statute merely expresses the state's position on the issue, explains how and where it will spend public funds within its jurisdiction, and notifies the public as to its actions.[77] Texas was not forcing its citizens to choose a specific license plate. South Carolina is not forcing its citizens to support, or not support, Israel.

Finally, for those who would raise the specter of viewpoint discrimination, the answer is once again right there in *Walker*:

> When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says . . . . Were the Free Speech Clause interpreted otherwise, government would not work.[78] How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization? "[I]t is not easy to imagine how government could function if it lacked th[e] freedom" to select the messages it wishes to convey . . . . We have therefore refused [t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals."[79]

South Carolina, like Texas, is free to advance its own permissible goals, and doing so is not an act of impermissible viewpoint discrimination.

The discussion should really be over now: Anti-BDS bills and statutes do not violate the First Amendment because they relate only to government speech, not private speech. But even if it was necessary to evaluate the second proposition, anti-BDS statutes do not violate the First Amendment either because the actions proscribed by them do not constitute the kind of speech that is considered protected speech under the First Amendment.[80]

B. BDS Activity Is Not Protected Speech

Contrary to claims made by many BDS Movement supporters, the issuance of an executive order, or any state or federal law, to prohibit the funding of BDS does not violate the First Amendment because BDS is not

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76. *See* S.C. CODE ANN. § 11-35-5300 (2015).

77. *See id.*

78. *Walker*, 135 S. Ct. at 2245–46.

79. *Id.* (quoting Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467–68 (2009); Rust v. Sullivan, 500 U.S. 173, 194 (1991)).

80. *See infra* Section III.B.

protected speech.[81] A case often cited by BDS advocates in support of their contentions is *NAACP v. Claiborne Hardware Co.*, a case that dealt with First Amendment protections related to boycotts.[82] For instance, as Palestine Legal, a pro-BDS group, notes in their legal primer, "[b]oycotts have long played a significant role in [United States] history, and the Supreme Court has held that boycotts to effect political, social, and economic change are protected by the First Amendment of the Constitution."[83] There are, however, multiple important factual distinctions between the *Claiborne* case and the dissimilarly situated BDS Movement that tries to use a surface reading of *Claiborne* in its favor.[84] These factual distinctions actually demonstrate that support of BDS in and of itself is not protected speech.

In *Claiborne*, black citizens at a local NAACP meeting voted to boycott some local white merchants in order to induce elected officials and business leaders to adopt racial justice measures.[85] Participants refused to patronize some white-owned businesses.[86] They engaged in speeches, picketing, and other nonviolent conduct, while a few of them committed or threatened acts of violence.[87] The targeted white merchants retaliated by filing suits against the NAACP for damages associated with lost earnings and to enjoin future boycott activity.[88]

To begin, *Claiborne* involved private individuals seeking tort damages against other private individuals, whereas the anti-BDS bills involve the government, public funds, and no claim of tort damages.[89] Unlike the judicial decision overturned in *Claiborne*, the statute in South Carolina is not a blanket ban on the organization of a boycott or any activity associated with it.[90] Instead, it is the statement of a policy position and a directive to the state to affect that position by not participating in the specific commercial boycott of Israel.[91] Also, while the defendants in *Claiborne* boycotted local businesses that were involved in discriminating or supported discrimination against them, those that support the BDS Movement advocate the boycott of an entire nation—a nation that is a United States ally—as well as other

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81. *See* United States v. O'Brien, 391 U.S. 367, 276–77 (1968) (holding that incidental limitations on First Amendment freedoms are acceptable if the regulation's main purpose is to advance a substantial non-speech related interest).

82. *See generally* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982). For a discussion about how some have misread *Claiborne* specifically in the context of the South Carolina bill, see *infra* text accompanying notes 84–96.

83. *Anti-BDS Legislation in the United States,* PALESTINE LEGAL, http://palestinelegal.org/legislation (last visited Nov. 24, 2017).

84. *Id.*

85. *Claiborne*, 458 U.S. at 889.

86. *Id.*

87. *Id.* at 894.

88. *Id.* at 889–90.

89. *Id.*

90. *See* S.C. CODE ANN. § 11-35-5300 (2015).

91. *Id.*

innocent American citizens that it deems to be supportive of that ally.[92] It is these distinctions and others that make the boycotts addressed by the South Carolina statute profoundly different from the boycotts in *Claiborne*.[93]

Even if it was the case that the South Carolina statute placed limits on the First Amendment, the Court in *Claiborne* also stated that governmental regulations that have an incidental effect on First Amendment freedoms may be justified in specific instances.[94] The Court's decision does not suggest that simply because boycotts include protected speech that all activities associated with boycotting are protected by the First Amendment.[95] It also does not mean that the First Amendment prohibits regulating all types of boycotts.[96]

1. The BDS Movement Does Not Function as a Primary Boycott

The BDS activity in question in South Carolina, and in other States, is not a primary boycott.[97] A primary boycott is usually defined as a boycott in which the boycotter is acting against the entity that it has a grievance with (for example, retail clerks picketing their employer over wages or working conditions).[98] A secondary boycott is one in which the party boycotting an entity has a goal of affecting a third party, rather than the boycotted entity.[99] A tertiary boycott is one in which the goal is to affect a fourth party, who supports the third party supporting the boycotted entity.[100] BDS Movement activists are engaging in something of a hybrid of a secondary-tertiary boycott.[101] Their issue appears to be with the State of Israel, but they are not just engaging in a boycott of the government of Israel.[102] The bulk of the individual companies, academics, institutions, and others who are targeted by BDS are not representing the government of Israel, and the bulk of the boycott activity is directed against them (a secondary boycott) and the people that support them (a tertiary boycott).[103] Secondary–tertiary boycotts have

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92. *What Is BDS?*, BDS FREEDOM JUST. EQUALITY, https://bdsmovement.net/what-is-bds (last visited Nov. 24, 2017).

93. *See supra* text accompanying notes 85–93 (discussing the issues which arose in *Claiborne*).

94. *Claiborne*, 458 U.S. at 912 (citing United States v. O'Brien, 391 U.S. 367 (1968)).

95. *See generally id.*; Marc A. Greendorfer, *The Inapplicability of First Amendment Protection to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE NOVO 112, 115–16 (2016) (stating "*Claiborne* does not stand for a blanket First Amendment Protection for any and all boycott activity . . .").

96. *See* Greendorfer, *supra* note 95.

97. *See* Greendorfer, *supra* note 27.

98. *See Primary Boycott*, BLACK'S LAW DICTIONARY (10th ed. 2014).

99. *See Secondary Boycott*, BLACK'S LAW DICTIONARY (10th ed. 2014).

100. *See, e.g.*, Clair L. Hall & Deanna R. Reitman, *To Report or Not to Report: Responding to Boycott Requests*, LAW360 (Sept. 21, 2015, 3:21 PM), https://www.law360.com/articles/704672/to-report-or-not-to-report-responding-to-boycott-reqiests ("A tertiary boycott is when one country refuses to trade with anyone who does business with companies or firms that are on their 'blacklist[s] . . . .").

101. *See* Greendorfer, *supra* note 27, at 88.

102. *Id.*

103. *Id.*

very little protection under the First Amendment.[104] The BDS supporters are not trying to protect their own constitutional rights; they are trying to use commerce to inflict harm on a foreign nation (and to discriminate against Americans who are of Jewish descent or who support Israel).[105]

Many of the proposed BDS bills, like South Carolina's now enacted statute, involve two distinct prohibitions: (1) A prohibition on the state doing business with those who engage in secondary boycott activities—that is, the exertion of coercive pressure or restraint against person A with the object of compelling person A to cease doing business with a jurisdiction with whom South Carolina can enjoy open trade;[106] and (2) a prohibition on the state doing business with those who engage in discriminatory business practices, that is—refuses to deal with person A *because of* the race, color, religion, gender, or national origin of the targeted person or entity of either person A or another person with whom person A is associated.[107]

To be clear, nothing in this statute, or suggested in this Article, prevents Americans from protesting against Israel or engaging in individual primary boycotts of Israeli goods.[108] It goes almost without saying that a person is free to do business, or not do business, with anyone that he or she wants for any reason.[109] There is no claim made, or position taken, that says "Americans cannot be critical of or protest against Israel, including by way of a primary boycott of Israeli goods. However, there is a long and established history in the United States of prohibiting support for organizations and ideology that are declared to be contrary to United States' interests."[110] That is why bills and statutes, like South Carolina's, have such a clear definitions section explaining that *intent matters* and that the state will only refuse to do business with those who engage in discriminatory behavior based exclusively on, or because of, a person's particular race, color, religion, gender, or national origin.[111] Even the description of the statute is quite clear in this regard: the statute is a "[p]rohibition of contracting with discriminatory business."[112]

In addressing this issue in the context of *Claiborne*, perhaps the most important factual distinction between the boycott addressed by the Court in that case and the boycott activities against Israel addressed by the South

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104. *See* Greendorfer, *supra* note 95, at 116–17.

105. *Id.* at 117.

106. *See* S.C. CODE ANN. § 11-35-5300 (A)–(B) (2015) (stating "that the business will not engage in, the boycott of a person or an entity . . . *doing business with* a jurisdiction with whom South Carolina can enjoy open trade, as defined in this article" (emphasis added)).

107. *Id.* (stating "that the business will not engage in, the boycott of a person or an entity *based in* . . . a jurisdiction with whom South Carolina can enjoy open trade, as defined in this article" (emphasis added)).

108. *See generally id.*

109. *See, e.g.*, Greendorfer, *supra* note 27, at 144–45.

110. *Id.* at 99 n. 317.

111. S.C. CODE ANN. § 11-35-5300(A)–(B) (2015).

112. *Id*. § 11-35-5300.

Carolina statute is that the former was a primary boycott, while the latter—to the extent that it involves a traditional boycott and not mere discrimination—is a secondary boycott. This distinction is both factually and legally significant.

As stated above, a primary boycott involves refusing to buy from, sell to, or enter into a business contract with the boycotted institution.[113] A secondary boycott, on the other hand, is an attempt to influence the actions of one organization by exerting pressure on another entity.[114] The Court in *Claiborne* held that primary boycotts are afforded some protections.[115] Even these protections are not absolute and can be circumscribed by reasonable regulations, "even though such regulation may have an incidental effect on rights of speech and association."[116] There is no First Amendment right to engage in a secondary boycott.[117]

In applying these boycotting principles to the South Carolina statute, a primary boycott would involve a direct refusal to buy from, sell to, or enter into business with either the Israeli government or an Israeli citizen. A secondary boycott would extend this primary boycott to any business, organization, or institution worldwide and involves the blacklisting of any entity that does business not only with the Israeli government but also with any private business in Israel. On its face, the BDS Movement seems like a call for a primary boycott because it urges supporters to cease all business activity with Israel.[118] However, as it manifests itself in the domestic economic context, it operates as a secondary boycott, and this explicitly is the only behavior that South Carolina will no longer support.[119]

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113. *See Primary Boycott*, BLACK'S LAW DICTIONARY (10th ed. 2014).

114. *See Secondary Boycott*, BLACK'S LAW DICTIONARY (10th ed. 2014).

115. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912–13 (1982).

116. *Id.* at 912.

117. NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607, 611, 614–16, (1980) (holding that "threaten[ing], coerc[ing], or restrain[ing]" any person engaged in commerce with the object of compelling such person to cease doing business with another is prohibited under the National Labor Relations Act (NLRA) when those secondary boycott activities "threaten neutral parties with ruin or substantial loss" and reiterating that "Congress may prohibit secondary [boycott activities] calculated 'to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer'" (quoting NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760, 377 U.S. 58, 63 (1964))); *see also* Int'l Longshoreman's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 224, 226 (1982) (holding that "when a purely secondary boycott 'reasonably can be expected to threaten neutral parties with ruin or substantial loss,' . . . the pressure on secondary parties must be viewed as at least one of the objects of the boycott or the statutory prohibition would be rendered meaningless" and expressly "declin[ing] to create a far-reaching exemption from [the anti-secondary boycott] provision for 'political' secondary boycotts" (quoting *NLRB.*, 447 U.S. at 614)).

118. *See* GRASSROOTS PALESTINIAN ANTI-APARTHEID WALL CAMPAIGN, TOWARDS A GLOBAL MOVEMENT: A FRAMEWORK FOR TODAY'S ANTI-APARTHEID ACTIVISM 41–74 (2007), http://bdsmovement.net/files/bds%20report%20small.pdf [hereinafter TOWARDS A GLOBAL MOVEMENT].

119. *See id.*

To illustrate the secondary boycott aspect, even on a surface level (as opposed to the more obvious as applied), the BDS Movement has actually laid out its objectives in a manifesto.[120] The BDS manifesto contains

> fifteen pages [of] detailed analysis of each major sector of Israel's economy, from agriculture to technology to military to tourism, [followed by] a direct[] call for a global attack on Israel's commercial interests:[121] "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."[122]

The BDS manifesto further explains that "[b]uilding a movement that will create effective pressure and impact must take in the isolation of the Israeli economy as a whole."[123]

This call to isolate Israel is explicitly why BDS activists try to pressure companies that do business with or in Israel to stop. For example, BDS called for a boycott of the cell phone giant Orange and forced Orange to leave Israel.[124] BDS activists were not boycotting Israel, they were boycotting a third party to hurt Israel, and they have tried similar campaigns with many other companies, including Hewlett-Packard, Motorola, and Black & Decker.[125]

To get around the secondary nature of these boycotts, some BDS scholars have claimed that they are not targeting these companies to hurt Israel, but rather because these companies themselves are somehow complicit in Israeli activity. Companies like Sabra Dipping Co.,[126] a Farmingdale, New York based company whose "complicity" is that the company is co-owned by Pepsico, and the Strauss Group—whose website says that its donation program includes Israeli soldiers.[127]

Taking this factually strained claim of complicity at face value, it is also wrong as a matter of law. These "complicit" companies do not fall under

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120. *See id.*

121. *See* Greendorfer, *supra* note 27.

122. *Id.* (quoting TOWARDS A GLOBAL MOVEMENT, *supra* note 118, at 161).

123. TOWARDS A GLOBAL MOVEMENT, *supra* note 118, at 161.

124. Ali Abunimah, *Campaigners Hail "Inspiring" BDS Victory as Orange Quits Israel*, ELECTRONIC INTIFADA (Jan. 11, 2016), https://electronicintifada.net/blogs/ali-abunimah/campaigners-hail-inspiring-bds-victory-orange-quits-israel.

125. *Full List*, BDS LIST, bds.list.org/full-list/ (last visited Nov. 24, 2017).

126. Michal Toiba, *Strauss Group Removes Support for IDF from Website*, JERUSALEM POST (Nov. 18, 2010, 12:46 PM), http://www.jpost.com/International/Strauss-Group-removes-support-for-IDF-from-website.

127. *Id.* In the academic and cultural context the problem is even starker; on campuses across the country we have seen Jewish (not even Israeli) students and organizations punished, boycotted, threatened, fired, etc. just for being Jewish. Eric Alterman, *The B.D.S. Movement and Anti-Semitism on Campus*, N.Y. TIMES (Mar. 29, 2016), https://www.nytimes.com/2016/03/29/opinion/the-bds-movement-and-anti-semitism-on-campus.html?mcubz=0/.

primary boycott analysis for being "complicit" in the actions of the State of Israel for three reasons. First, the ally doctrine in boycott law tells us that if the second party being boycotted does not have the power to resolve the underlying claims, they cannot be considered part of the primary boycott.[128] No one can make the claim that Sodastream[129] has the power to change Israeli policy in any way. Second, as mentioned above, the Movement, and its actual manifesto, explicitly describes what it is doing as a "*global attack on Israel's commercial interests*"[130] designed to force the "isolation of the Israeli economy as a whole"[131]—not, in any way, an attack on the commercial interests of companies that are complicit. Third, even if it did make the claim that it would want to also boycott Orange for being complicit in Israel's action, courts have held that when boycotts are motivated in whole or in part by the desire to advance defendants' interests in their primary dispute with the primary boycott, and the second party would not have independently been boycotted, that is still considered a secondary boycott.[132] It is abundantly clear that if the BDS Movement did not have a problem with Israel, it would not be boycotting these companies anyway.

Prohibitions on secondary boycotts have been held permissible in the labor context to protect third parties from getting caught in the midst of a primary boycott.[133] The general prohibition against "threatening, coercing, or restraining" any person engaged in commerce, with the object of compelling such person to cease doing business with another, is taken directly from the National Labor Relations Act,[134] and has been expressly upheld against a First Amendment challenge by the Supreme Court.[135] The

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128. *See* Jacopo Busnach Ravenna, *Secondary Boycotts and Ally Doctrine in the US Law of Strikes*, 34(3) N.Z. J. OF EMP. REL. 65, 71–72 (2009). These companies share none of the ally considerations—that is, integration of business and operation, common ownership and control, co-employers, or common control over labor relations. *See generally id.*

129. Avid Horovitz, *Victory for BDS Soda Stream's Last Palestinian Workers Lost Their Jobs*, TIMES OF ISR. (Feb. 29, 2016, 4:41 PM), https://www.timesofisrael.com/victory-for-bds-as-sodastreams-last-palestinian-workers-lose-their-jobs/.

130. *See* Greendorfer, *supra* note 27 (emphasis added).

131. TOWARDS A GLOBAL MOVEMENT *supra* note 118, at 161.

132. *See, e.g.*, Ramar Coal Co. v. Int'l Union, United Mine Workers of Am., 814 F. Supp. 502, 506 (W.D. Va. 1993).

133. *See, e.g.*, NLRB v. Retail Store Emp. Union, Local 1001, 447 U.S. 607, 617–18 (1980) (Blackmun, J., concurring in part) (agreeing with the Court's decision to uphold as constitutional prohibitions against secondary boycott activities and picketing by labor unions as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife").

134. National Labor Relations Act, 29 U.S.C. § 158(b)(4)(ii)(B) (1982).

135. *See NLRB*, 447 U.S. at 614–16 (limiting construction of the phrase "threaten, coerce or restrain" in NLRA to those secondary boycott activities "that reasonably can be expected to threaten neutral parties with ruin or substantial loss," and reiterating that "Congress may prohibit secondary [boycott activities] calculated 'to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer'" (quoting NLRB v. Fruit & Vegetable Packers & Warehousemen, 377 U.S. 58, 63 (1964))); *see also* Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 225–26 (1982) (holding that "when a purely secondary boycott

general language and purpose of the statute closely tracks those of the EAA, and the nondiscrimination provision is virtually the same as that of Title VII, albeit in the context of commerce (as opposed to employment).[136] In short, the South Carolina statute, and others like it, are fully supported by good law and solid policy. Additionally, to the extent that there *would* be a primary boycott aspect to the BDS Movement, the law explicitly does not touch it, and the laws in question, as demonstrated above, do not even have anything to do with private speech in the first place.[137]

2. Longshoremen *Rules*

Next, it is important to note that the proper precedent is in *International Longshoremen's Ass'n v. Allied International, Inc.*, not *Claiborne*, for BDS activity in the United States.

In *Longshoremen*, which was argued and decided in the same term as *Claiborne*, the Supreme Court upheld a federal law that prohibited participation in boycotts that were directed at a matter covered by United States foreign policy.[138] The Court concluded that the union's boycott was a secondary boycott and upheld the constitutionality of the National Labor Relations Act's prohibition on secondary boycotts.[139] The Court reasoned that the prohibition did not infringe on First Amendment rights based upon the fact that the "conduct designed not to communicate but to coerce[, thus it] merits still less consideration under the First Amendment."[140]

At the time of *Longshoremen*, the Soviet Union had invaded Afghanistan and, because of this, the United States began a series of boycotts and embargos against the sale of goods to the Soviet Union.[141] However, the United States exempted certain goods, including those to be shipped by a labor union.[142] The labor union in question expanded the embargo to a blanket boycott on all cargo from the Soviet Union.[143] As a result, it boycotted the wood cargo from a company because the wood was from the Soviet Union, even though such cargo was explicitly exempt from the United

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'reasonably can be expected to threaten neutral parties with ruin or substantial loss,' . . . the pressure on secondary parties must be viewed as at least one of the objects of the boycott or the statutory prohibition would be rendered meaningless" and expressly "declin[ing] to create a far-reaching exemption from [the anti-secondary boycott] provision for 'political' secondary boycotts" (citation omitted) (quoting *NLRB*, 447 U.S. at 614)).

136. *See generally* Title VII Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e-17 (2012); Export Administration Act of 1979 (EAA), 50 U.S.C. §§ 4601–4623 (2012).

137. *See supra* text accompanying 106–16 (discussing the South Carolina statute and contrasting it with the primary boycott from *Claiborne*).

138. *Longshoremen*, 456 U.S. at 218.

139. *Id.*

140. *Id.* at 226.

141. *Id.* at 215–16.

142. *Id.* at 215.

143. *Id.* at 221–22.

States's embargo.[144] The boycotted company claimed that, under federal law, the labor union engaged in an unlawful boycott.[145] Specifically, the union claimed the federal law, which provided for relief from unlawful boycotts, infringed on its First Amendment rights.[146] The Court held that the federal law did not infringe on the First Amendment rights of the union and that the union's boycott violated the applicable federal law.[147] The Court concluded that boycotts that impede United States commerce and are political protests intended to punish foreign nations for their offshore conduct may be limited by the government.[148]

The context of BDS does not deal with unions, but the holding in *Longshoremen* is not limited to union boycotts either.[149] The Court in *Longshoremen* held that any federal law could restrict boycotts in the United States without violating the First Amendment.[150] "[W]here a federal law regulates boycott activity and the purpose of that law is a legitimate expression of national policy in the realm of foreign relations and commerce, and the law does not relate to the suppression of speech on substantive matters subject to Constitutional protections, the First Amendment does not protect the boycott activity."[151] In the case of BDS boycotts, as in *Longshoremen*, there is long-standing federal legislation that opposes restrictive-trade practices against nations friendly to the United States, including Israel.[152] The federal law on boycotting Israel, like the South Carolina statute in question, is one that reflects national policy in foreign relations, expresses government opinion, and does not relate to the suppression of protected speech.[153]

The case to protect against Israeli boycotts is arguably even stronger than the situation in *Longshoremen* because in that case the government was already participating in a partial boycott of the Soviet Union, a foreign policy directive.[154] The union's actions were illegal because they *expanded* the scope of the boycott. In the case of BDS, the United States has explicitly stated that it will not participate *at all* in boycotts against Israel.[155] This is important because if companies ignore this directive and boycott anyway, it implicates United States foreign policy and relations, as well as domestic and

144. *Id.* at 215.
145. *Id.* at 216.
146. *Id.* at 226.
147. *Id.*
148. *Id.* at 221.
149. *See generally id.* However, if a union wanted to participate in the boycott of Israel, *Longshoremen* would be on point to determine that those actions would be illegal. *See generally id.*
150. *Id.* at 226.
151. Greendorfer, *supra* note 27, at 9.
152. 50 U.S.C. § 4607(a)(1) (1979)).
153. *See id.*
154. *Longshoremen*, 456 U.S. at 225.
155. Trade Facilitation and Trade Enforcement Act of 2015, H.R. 644, 114th Cong. § 908(b)(4) (2015–2016), https://www.congress.gov/bill/114th-congress/house-bill/644/text.

international commercial activity.[156] Bearing this in mind, it seems clear why it would be worse to boycott a nation contrary to United States policy rather than simply to expand a boycott that the United States has already joined.[157]

To review, the Court in *Claiborne* specifically stated that secondary boycotts and other actions that impact commercial activities can, in fact, be prohibited, and *Longshoremen* provided an example of when that might be appropriate. The fact that *Claiborne* and *Longshoremen* were decided in the same term (that is, within two months of one another) shows that the Court clearly did *not* ever intend for *Claiborne* to protect all boycotts, particularly those directed at offshore actors.

Further evidence that anti-BDS statutes do not violate the First Amendment can be found in the holding of *Jews for Jesus, Inc. v. Jewish Community Relations Council of N.Y., Inc*.[158] In *Jews for Jesus*, a religious organization was sued for violating anti-discrimination statutes when it convinced a resort to cancel its contract with a company.[159] The religious organization argued that the anti-discrimination statutes, including the New York Human Rights Law, were a burden on its freedom of speech guaranteed under the First Amendment.[160] The Second Circuit ruled that the statutes in question were plainly aimed at conduct in the form of discrimination and not speech.[161] The court went on to state that New York had constitutional authority and a compelling interest in prohibiting "racial and religious discrimination in obtaining public accommodations," adding that the federal government has a similar interest in preventing "discriminatory interference with constitutional rights, such as the right to interstate travel."[162] The court concluded that suits brought under discrimination statutes, like New York's Human Rights Law, would withstand a First Amendment challenge even when the laws had an incidental burden on speech.[163]

As in *Jews for Jesus*, the purpose of anti-BDS statutes is to prevent discriminatory commercial boycotting based on national origin.[164] Also, in *Jews for Jesus*, even if one argues that the statutes do place an incidental limit on speech, the statutes may be permitted to do so because their primary goal is not to limit speech but rather to protect against discriminatory economic

156. *See id.*

157. *See id.*

158. *See* Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of N.Y., Inc., 968 F.2d 286, 296 (2d Cir. 1992).

159. *Id.* at 289–90.

160. *Id.* at 290.

161. *Id.* at 295.

162. *Id.*

163. *See id.*

164. *Compare id.* (stating that the New York statutes at issue were aimed at discrimination, not speech), *with* Kontorovich, *supra* note 16 (purporting that the purpose of anti-BDS statutes is to prevent unfair and discriminatory business decisions).

activity.[165] South Carolina has the same authority acknowledged by the court in *Jews for Jesus*—both constitutional authority and a compelling, rather than merely substantial, interest in prohibiting discrimination.[166]

To review, the South Carolina statute (and others like it) regulates both discriminatory activity and secondary boycott activity. Because the purpose of the law is a legitimate expression of state and national policy in foreign relations and commerce, and because the law does not relate to the suppression of speech on substantive matters subject to constitutional protections (the State of Israel has no power to affect the rights of American citizens in the United States, so there is no domestic individual or group right being protected in boycotting Israel), the First Amendment does not protect the boycott activity in question.[167]

IV. RESPONDING TO ADDITIONAL CLAIMS

A. BDS Boycotts Are Not Protected under the First Amendment

Returning to the earlier discussion, even if one assumes that *Claiborne* (and not *Longshoremen*) is the governing precedent for BDS boycotts, BDS supporters severely misread the case in trying to support this first proposition. In order to do so, the scholarship they rely on, including a recent article in the Harvard Law Review,[168] follows the logical chain explained below as the crux of its argument. [169]

First, in *Claiborne*, the NAACP boycotted white merchants over issues of public concern (racism), and the Court held that the boycott was protected under the First Amendment.[170] Next, the South Carolina statute in question says that if a person boycotts based on race, then the state will not enter into a contract with that person.[171] Therefore, the statute must be overbroad because the South Carolina statute would have prohibited the state from doing business with the NAACP, simply because it engaged in a boycott against white merchants,[172] a boycott that the Court held acceptable.[173] According to this theory, under the holding in *Claiborne*, the boycott of

165. *First Amendment*, *supra* note 18 (stating that the anti-BDS statutes serve to protect both the government from involving itself in discriminatory practices and the economic interests of the United States).

166. *Cf. Jews for Jesus*, 968 F.2d 286 (discussing that, while *Jews for Jesus* concerns discrimination in public accommodation and the anti-BDS statutes are concerned with discrimination in commercial business practices, the protected interests are equally important).

167. *See* Greendorfer, *supra* note 95, at 120.

168. *First Amendment*, *supra* note 18, at 2031–32.

169. *See generally* Int'l Longshoreman's Assn v. Allied Int'l, Inc., 456 U.S. 212 (1982); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

170. *First Amendment*, *supra* note 18, at 2031–32. *See generally Claiborne,* 458 U.S. 886.

171. *First Amendment, supra* note 18, at 2032.

172. *Id.*

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

Israelis by BDS supporters over issues of public concern (human rights violations) should also be protected.[174]

However, this logical chain fails because the Harvard article draws a false comparison between the BDS boycott and a contorted shadow of the protected boycott in *Claiborne*.[175] The Court did not permit the boycotters in *Claiborne* to target *all* whites because of their racial status or identity, but rather those local white merchants that had victimized the boycotters and violated their constitutional and statutory rights through discrimination.[176] To encourage racial discrimination or retaliation as a posited remedy for discrimination suffered, as the Harvard article suggests, would be *flagrantly counterintuitive*.[177]

While it is true that in *Claiborne*, as the Harvard article notes, the boycott was "directed at white merchants," it is obvious that the protesters did not boycott simply because the offending group was white, but rather because they actually engaged in or supported discriminatory behavior.[178] This truth is evidenced by four facts. First, the boycott did not extend to all white people, but only to *some* local white-owned businesses in Port Gibson, where the local government discriminated against blacks.[179] Second, the businesses targeted for boycott were actually affiliated with local civic and political leaders who engaged in racist behavior.[180] Third, when white merchants who were not on the original list (because they were considered nonracist) engaged in racist conduct afterward, their businesses were added to the list.[181] Fourth, and lastly, when white merchants from the list who had originally supported racism agreed to stop acting in such manner—for example, pharmacy-owner Melvin McFatter who agreed to hire a black clerk and had his store removed from the list[182]—the boycott on their store was immediately lifted.

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174. *First Amendment*, *supra* note 18, at 2032.

175. *See generally Claiborne*, 458 U.S. 886.

176. *See generally id.*

177. *First Amendment*, *supra* note 18, at 2032.

178. *Id.*

179. *Claiborne*, 458 U.S. at 889.

180. *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, Record 15111; 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.

Id. (citations omitted).

181. For example, as in the case of Meyer-Marx owner Pete Jordan. *See* Ted Ownby, *The Civil Rights Movement in Mississippi*, 52 S. Q. 227, 286 (2014).

182. EMILYE CROSBY, A LITTLE TASTE OF FREEDOM: THE BLACK FREEDOM STRUGGLE IN CLAIBORNE COUNTY, MISSISSIPPI 201 (2006).

What *Claiborne* actually stands for is the First Amendment protection of a boycott for vindication of a Fourteenth Amendment individual right, a holding that is completely consistent with the South Carolina statute.[183] The statute in question says that the state will not conduct business with new bidders who boycott others based on "race, color, religion, gender, or national origin of the target person or entity."[184] To be absolutely clear: the statute prohibits the state from doing business with those who engage in targeted discrimination through boycotting. That prohibited discriminatory boycott in the South Carolina statute is the antithesis of the protected boycott in the *Claiborne* holding.[185] The two claims that the Harvard article asserted are in tension: (a) the state of South Carolina refusing to conduct business with people who discriminate against others through boycott; and (b) the *Claiborne* holding that allows people to boycott those who discriminate against them (again referring to the actual conduct and not the status of the perpetrators). These assertions have no conflict whatsoever with one another.[186] If anything, their relationship is complementary in function. Accordingly, a boycott is only protected expression when it is particularized and focused on affecting something other than animus. Otherwise, it is just discrimination.

As it relates to the BDS Movement, BDS overtly champions the same kind of over-inclusive boycott that its scholarship misreads into *Claiborne* (and which does not actually exist within its protections)—discriminating against people based on their race, religion, or national origin, allegedly in the name of some unrelated issue of public concern. A prime and well-publicized example of this thought process is the BDS Movement's attempt in 2015 to boycott Jewish-American (non-Israeli) reggae star Matthew Paul Miller, who is also known as "Matisyahu."[187] The singer was scheduled to perform at the Spanish Rototom Sunsplash Festival in August 2015, but when the BDS Movement got wind of his performance, it pressured the festival to demand that Matisyahu, the only Jewish artist invited, issue a statement in support of Palestinian statehood.[188] That condition was not placed on any other artist at the festival.[189] After an international outcry against this blatant anti-Semitism,[190] the festival retracted its statement,

183. *Claiborne*, 458 U.S. at 907–08.

184. S.C. CODE ANN. § 11-35-5300 (2015).

185. *See generally Claiborne*, 458 U.S. 886.

186. *See generally id.*

187. Emily Shire, *Has Jewish Music Star Matisyahu Got a Middle East Problem?*, DAILY BEAST (Aug. 30, 2015, 12:01 AM), http://www.thedailybeast.com/has-jewish-music-star-matisyahu-got-a-middle-east-problem.

188. BDS País Valencià & RESCOP, *Human Rights Campaigners in Spain Clarify Background to Matisyahu's Concert Cancellation at Rototom Sunsplash Festival in Spain*, CAMPANA BDS (Aug. 19, 2015), http://boicotisrael.net/bds/aclaracion_cancelacion_matisyahu/.

189. *That Anti-Israel Reggae Beat*, WALL STREET J. (Aug. 18, 2015, 6:42 PM) [hereinafter *Anti-Israel Reggae Beat*], http://www.wsj.com/articles/that-anti-israel-reggae-beat-1439937739.

190. Donna Rachel Edmunds, *Jewish Rapper Matisyahu Banned by Israel Boycotters . . . Except He's*

offered an apology, and Matisyahu performed.[191] What happened (and did not happen) next is quite interesting and rarely talked about. First, several BDS organizations tried to distance themselves from BDS Valencia, because what it did seemed so clearly indefensible.[192] Then, BDS leaders issued statements explaining why it was not anti-Semitic to boycott the one Jewish, non-Israeli individual because of alleged Israeli human rights violations, claiming that comments Matisyahu had made over the years about his support for Israel somehow made him "institution-like" and therefore worthy of boycotting.[193] Interestingly, no one tried to defend this kind of boycott on *Claiborne*-based grounds. In other words, no party argued that it is okay to discriminate against a group of people (whites, Jews, for instance) for a general human rights issue[194] because such a conclusion would be ridiculous and offensive under *any* system of law.

It is also revealing that—for a Movement that claims to be protesting alleged human rights violations—BDS seems just a bit too focused on the lone democratic state in the Middle East, while blatantly disregarding the heinous atrocities of other neighboring sovereigns.[195] Of course, BDS activists respond by saying that they do not unfairly single out Israel, and that it is not about the Jewish State at all, but about Palestinian rights.[196] Still, it is odd that BDS does not care that Palestinians have no civil rights in Lebanon, are starving in Syria, or are oppressed by Hamas in Gaza.[197] Mark Segal, a member of the original Gay Liberation Front, has pointed out: "It is so unsafe for out [(that is, openly gay)] Palestinians that the organization fighting for Palestinian queer rights has to be located in Israel. Why? The Hamas-controlled Gaza Strip has declared homosexuality punishable by

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Not Israeli, BREITBART LONDON (Aug. 17, 2015), http://www.breitbart.com/london/2015/08/17/jewish-rapper-matisyahu-banned-by-israel-boycotters-except-hes-not-israeli/.

191. Max Kutner, *Matisyahu Dropped from Concert Lineup for Not Endorsing Palestine*, NEWSWEEK (Aug. 16, 2015, 12:22 PM), http://www.newsweek.com/matisyahu-concert-canceled-palestine-363350.

192. *Id.*; *cf.* Arutz Sheva Staff, *BDS Group That Banned Matisyahu: 'That Wasn't BDS'*, ARUTZ SHEVA (Aug. 20, 2015, 7:01 PM), http://www.israelnationalnews.com/News/News.aspx/199712 (stating that BDS País Valencià said banning Matisyahu was not part of BDS).

193. J.J. Goldberg, *How Matisyahu Ban Backfired on BDS Backers*, FORWARD (Aug. 21, 2015), http://forward.com/opinion/319583/how-matisyahu-ban-backfired-on-bds-backers/.

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

195. *See* Wadie Said, *The Palestinians in Lebanon: The Rights of the Victims of the Palestinian-Israeli Peace Process*, 30 COLUM. HUM. RTS. L. REV. 315 (1999).

196. Goldberg, *supra* note 193.

197. Said, *supra* note 195; *see also* Myer Freimann, *Hamas Killed 160 Palestinian Children to Build Tunnels*, TABLET (July 25, 2014), http://www.tabletmag.com/scroll/180400/hamas-killed-160-palestinian-children-to-build-terror-tunnels; Mariam Karouny, *Lebanon Law Gives Palestinians Few Civil Rights*, REUTERS (Aug. 17, 2010), http://www.reuters.com/article/us-lebanon-palestinian-rights-idUSTRE67G3S920100817; Kamala Kelkar, *UN: Thousands Face Starvation Risk at Palestinian Refugee Camp in Syria*, PBS NEWSHOUR (Apr. 17, 2016), http://www.pbs.org/newshour/rundown/un-thousands-face-starvation-risk-at-palestinian-refugee-camp-in-syria/.

death."[198] Israel is the *only* Middle-Eastern country to support gay rights legislation, and it serves as a sanctuary by attracting members of the LGBTQ community from Palestine and Lebanon.[199] Meanwhile in Palestine, "[t]he Palestinian National Authority awards the death penalty for homosexuals,"[200] and family members may commit an "[honor] killing" of a "[woman] suspected of 'immoral sexual conduct'"[201] based on uncorroborated rumors.[202] One would think that a Movement working only to secure Palestinian rights would be deeply concerned about these issues. And yet, in 2015, other Rototom performers including Capleton, a singer whose lyrics call for LGBT people to be killed, appeared at Rototom. It speaks volumes that neither he, nor fellow Rototom invitees "Micah Shemaiah, Andrae Jay Sutherland and other Jamaican artists weren't asked to disavow antigay violence [and] . . . Sudanese journalist and festival presenter Sami al-Hajj, a former Guantanamo detainee, wasn't required to publicly denounce the Khartoum regime's human-rights abuses."[203] As a Wall Street Journal editorial so aptly put it: "Remember the Matisyahu affair the next time proponents of the anti-Israel [BDS Movement] insist their aim is to promote Palestinian rights, not anti-Jewish bigotry."[204]

How could someone accidentally read *Claiborne* to support this kind of overtly discriminatory boycott? It seems that the BDS supporters would have to miss or ignore the reasoning spelled out in the actual decision. Even if their assumptions about the boycott in *Claiborne* were correct (which they are not), the Court made it very clear that the boycott it upheld is nothing like the one that is currently being advocated for by the BDS Movement, and that the reasons the Court protected the boycott in *Claiborne* are completely inapplicable to BDS.[205] To be clear, this is *not* a matter of interpretation; the

198. Mark Segal, *A Careless Anti-Semitism Shames the LGBT Community*, ADVOCATE (Jan. 28, 2015, 5:55 AM), https://www.advocate.com/commentary/2016/1/28/careless-anti-semitism-shames-lgbt-community.

199. *The Five Most Improved Places for Gay Tolerance*, INDEPENDENT (Sept. 16, 2008), http://www.independent.co.uk/life-style/love-sex/taboo-tolerance/the-five-most-improved-places-for-gay-tolerance-932635.html; Rod Liddle, *In Palestine, Homosexuality Is a Capital Offence. Does Peter Tatchell Not Realise This?*, SPECTATOR (Sept. 11, 2014), http://blogs.spectator.co.uk/2014/09/peter-tatchell-should-pay-closer-attention-to-palestines-attitude-to-homosexuality (stating that, in Israel, homosexuality has been legal de facto since 1963 and de jure since 1988).

200. Liddle, *supra* note 199.

201. Lena Odgaard, *Upsurge in Palestinian 'Honour Killings'*, AL JAZEERA (Mar. 25, 2014), http://www.aljazeera.com/indepth/features/2014/03/upsurge-palestinian-honour-killings-gaza-20143237 2831899701.html.

202. Anne-Marie O'Connor, *Honor Killings Rise in Palestinian Territories, Sparking Backlash*, WASH. POST (Mar. 3, 2014), https://www.washingtonpost.com/world/middle_east/honor-killings-rise-in-palestinian-territories-sparking-backlash/2014/03/02/1392d144-940c-11e3-9e13-770265cf4962_story.html.

203. *Anti-Israel Reggae Beat, supra* note 189.

204. *Id.*

205. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 888–90, 914 (1982) (finding that a nonviolent boycott of white businesses by black citizens cannot be stifled by a state's right to regulate economic activity).

opinion is objectively explicit. The relevant parts of the Court's reasoning are described below.

First, the Court noted that the boycott in *Claiborne* involved constitutionally protected activity, recognizing that the "established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.'"[206] The Court rightly understood that the intended aim of the petitioners was "to bring about political, social, and economic change" within a "social order that had consistently treated them as second-class citizens" and to do so by means of "speech, assembly, and petition—rather than through riot or revolution."[207]

Next, the Court explained that this is not the only relevant consideration for deciding the constitutional propriety of some action. While government regulations may unduly infringe on an individual's First Amendment freedoms, "incidental effect[s] . . . may be justified in certain narrowly defined instances."[208] To quote the opinion at length:

> A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. 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 . . . . The right of business entities to "associate" to suppress competition may be curtailed . . . . Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." . . . .
> . . . While States have broad power to regulate economic activity, we do not find a comparable right to prohibit[209] peaceful[210] political activity such as that found in the boycott in this case. This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values."[211]

How then are courts and legislatures left to strike this balance? What kinds of boycotts can be regulated, and which are of the "peaceful political activity" variety, made of "speech concerning public affairs" and as such cannot be regulated?[212] Thankfully, the Court spells out that answer as well:

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206. *Id.* (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)).

207. *Id.* at 911–12.

208. *Id.* at 912.

209. *See* S.C. CODE ANN. § 11-35-5300 (2015) (showing that South Carolina is not prohibiting discriminatory speech, it is just refusing to fund it).

210. *See supra* text accompanying notes 1–6 (recalling that BDS is not peaceful and seeks to disrupt the economic stability of Israel).

211. *Claiborne*, 458 U.S. at 912–13.

212. *Id.* at 913 (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

> Petitioners sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself. 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.[213]

Thus, not all participation in all political boycotts is protected First Amendment activity.[214] The scholarship in support of BDS does not take care to define the mechanisms or limitations of the protection in question, and it does nothing to prove that BDS should fall within the protected category. Quite the contrary in fact—as Marc Greendorfer succinctly put it:

> 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*.[215]

Once more, *Claiborne* forbids the complete prohibition of peaceful political activity designed to effectuate Constitutional rights.[216] The South Carolina statute, for example, does not actually prohibit any citizen from doing anything—it merely refuses to fund discrimination,[217] and certainly, it is not a "complete prohibition" in any sense of the phrase. BDS is also not a peaceful political activity. It has nothing to do with domestic law and, in fact, runs counter to longstanding American foreign policy.[218] It also coerces consumers to participate in industrial strife and functions as a secondary, not a primary, boycott. *Claiborne*, then, does not present a challenge to the South Carolina statute.[219]

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213. *Id.* at 914.

214. *See id.* at 914–15; NAACP v. Ala. *ex rel.* Flowers, 377 U.S. 288, 307 (1964) (stating that it is doubtful to assume that an organized refusal to ride on city buses in protest against a policy of racial segregation, might without more, in some circumstances violate a valid state law).

215. Greendorfer, *supra* note 95.

216. *Claiborne*, 458 U.S. at 914.

217. *See* S.C. CODE ANN. § 11-35-5300 (2015).

218. Greendorfer, *supra* note 95, at 116–17.

219. *Id.* at 117.

Continuing our march through recent scholarship's strained reproach of the South Carolina statute, some have constructed the following straw man argument only to then knock it down:

> Nor can South Carolina's statute escape the scope of *Claiborne Hardware* because it regulates businesses rather than individuals. In the age of *Citizens United*, laws that burden political speech receive strict scrutiny regardless of whether the speaker is an individual, corporation, or any other business association.[220]

While this is possibly true, it is also quite disingenuous in its presentation as a rebuttal, because no one has made any such claim regarding South Carolina's statute.

1. The Government Can Make Conditions on Contracts

Having failed to establish that BDS is protected activity, BDS supporters continue with the following argument from the Harvard Law Review article that BDS supporters are fond of quoting:

> Still, a defender of the anti-BDS law might dispute the proposition that governments cannot condition a contract for services on the surrender of First Amendment rights, pointing out that the state tort judgment invalidated in *Claiborne Hardware* effectively prohibited boycotts, whereas the South Carolina statute only withdraws a privilege from businesses participating in boycotts. But under the doctrine of "unconstitutional conditions," which holds that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech," this distinction between direct and indirect burdens on protected speech makes no constitutional difference. In fact, the Supreme Court has applied the doctrine to directly hold that the state cannot terminate contracts in retaliation for a contractor's exercise of First Amendment rights.[221]

This argument is flawed on multiple levels. First, the Harvard article failed to establish that BDS support is protected speech. Second, even if it was protected speech, the distinction between direct and indirect burdens on protected speech does, in fact, make a constitutional difference, as evidenced by the source that the Harvard article cites in order to define the unconstitutional conditions doctrine that it introduces.[222] Sullivan writes:

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220. *First Amendment*, *supra* note 18, at 2032.

221. *Id.*

222. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

> [N]othing about the doctrine of unconstitutional conditions rules out the possibility that some conditions or selective subsidy schemes designed to pressure rights will be upheld in compelling cases. Indeed, the nature of the government benefit involved will sometimes furnish uniquely strong justifications absent in the case of "direct" regulation . . . .
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> . . . .
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> Other conditions on public employee speech also may be upheld because some overriding government purpose justifies them, not because they do not pressure rights. Although the Court has held that the [F]irst [A]mendment bars the state from firing public employees for speaking out on matters of public concern, and to bar dismissal from nonpolicy making government jobs based on political affiliation, it has upheld restrictions on speech or political association that would destroy workplace electoral neutrality, or would impair "the efficiency of the public services the state performs through its employees," by, for example, exacerbating labor grievances. The latter decisions should not be understood to hold that government wields a free hand over speech when "[g]overnment funds are involved," or because government is "master in its own house." Rather, such conditions should be treated as infringing speech and thus in need of strong justification, but as arguably justified by the need for an efficient or depoliticized bureaucracy.[223]

Third, the fact that the Supreme Court has applied the doctrine of unconstitutional conditions to hold that a state cannot terminate contracts in retaliation to a contractor's exercise of First Amendment rights has no bearing on this statute whatsoever.[224] To quote the relevant portion of the editor's note: "This act . . . does not apply to contracts entered into before the effective date of this act."[225]

Unfortunately, the cases that the note quotes to support the argument above do nothing of the sort. Aside from the ironic fact that they are the very same cases Kathleen Sullivan cited to prove the opposite of what the article previously asserted (that is, that indirect and direct burdens are constitutionally different). The cases also all have the same fatal flaw that the BDS supporters make no attempt to conceal: They deal with pre-existing contracts. The Harvard article explains:

> [I]n *Pickering v. Board of Education*, the Court held that the First Amendment protects public employees *who are fired* in retaliation for commenting on matters of public concern, and fashioned a balancing test to determine the extent of the protection. A decade later, *Elrod v. Burns*

223. *Id.* at 1503–04 (alteration in original) (footnotes omitted).
224. *See id.*
225. S.C. CODE ANN. § 11-35-5300 ed. n. (2015).

> established a categorical rule that governments *cannot discharge* non[-]policymaking employees solely because of their party affiliation.[226]

Both cases involve an existing contractual relationship and a subsequent termination thereof—something that the South Carolina statute avoids entirely by excluding existing contracts.[227]

The Harvard article in question also cites to two other cases, *Board of County Commissioners v. Umbehr* and *O'Hare Truck Service, Inc. v. City of Northlake*, to make the point that the *Pickering* and *Elrod* protections extend to independent contractors.[228] Needless to say, both of those cases also deal with the termination of pre-existing contracts.[229] This is yet another instance of the Harvard article setting up a straw man to (ineffectively) strike it down; no one made the claim that independent contractors would or should be treated differently in South Carolina.[230] The Harvard article then makes the somewhat absurd claim that:

> [E]ven if the anti-BDS statute did not fall to the categorical rule of *Elrod* and *O'Hare*, it would still be subject to the *Pickering* balancing test because it burdens pro-boycott speech. It is very difficult to imagine the statute surviving such review. Even on the most uncharitable interpretation of the BDS Movement and its goals, it is clearly directed at a matter of public concern, and it is unlikely that a company's participation in a boycott of Israel would interfere with its ability to efficiently carry out the duties required by its contract.[231]

It is difficult to begin unpacking and responding to this argument. First, it cannot be stressed enough that the *Pickering* case involved the balancing test applied when public employees faced retaliation or job loss.[232] It is a test that "public employees must clear [] in order to state a cognizable First Amendment claim alleging [that] they have been discharged for the content of their speech."[233] Even in the Harvard article's flawed conception and misapplication, its claims are unfounded for the following reasons.

First, as noted, *Pickering* does not apply here because it is an existing contract issue. Second, the balancing test does not apply—the statute in South Carolina does not burden protected speech; it chooses not to reward

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226. *First Amendment*, *supra* note 18, at 2033 (emphasis added).

227. *See* S.C. CODE ANN. § 11-35-5300 (2015).

228. *First Amendment*, *supra* note 18, at 2033 (emphasis added). *See generally* Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 671 (1996); O'Hare Truck Serv. Inc. v. City of Northlake, 518 U.S. 712 (1996).

229. *See Umbehr*, 518 U.S. at 671; *O'Hare*, 518 U.S. at 715, 721.

230. *See* Greendorfer, *supra* note 95 (defending anti-BDS legislation not because the *Claiborne* protections do not extend to independent contractors, but rather because the *Claiborne* protections do not extend to the BDS Movement as a whole).

231. *First Amendment*, *supra* note 18, at 2034.

232. David L. Hudson Jr., *Balancing Act: Public Employees and Free Speech*, 3 FIRST REP. 23 (2002).

233. *Id.*

discriminatory speech. Third, if the balancing test did apply, it is *not* unlikely that a company's participation in a boycott of Israel would interfere with its ability to efficiently carry out the duties required by its contract. As the Harvard article notes in a footnote, such an example would arise when "a company may fail to use the best subcontractors, products, or partners because of their national origin and thus simply do a worse job."[234] The article claims that *Pickering* requires those situations to be identified on a case-by-case basis to avoid penalizing boycott activity that does not affect job performance, but in fact the case never says that.[235] It is also ironic that the article cited by the authors to justify the unconstitutional conditions doctrine in connection with *Pickering* explicitly denies that a balancing test is appropriate despite how *Pickering* has come to be used.[236] Fourth, as to the argument that it is unlikely that a company's participation in a boycott of Israel would interfere with its ability to efficiently carry out the duties required by its contract, apparently, the authors did not read *Pickering*. As Gordon Smith noted:

> Objective criteria for disruption can be found in *Pickering* itself. The Court listed four "general lines along which an analysis of the controlling interests should run." Of the four, three dealt with the disruptive effect of the speech on the efficiency of the government: (1) whether the statements were directed at any person with whom the appellant would normally be in contact in the course of daily work; (2) whether the speaker or the speaker's coworkers were unable to perform their daily duties or whether the agency was unable to maintain regular operations; and (3) whether the harmful impact of the speech on the public would be difficult for the government to counter. Under the proposed analysis, if the employer can show that the

234. *First Amendment*, *supra* note 18, at 2034 (quoting Eugene Kontrorovich, *Can States Fund BDS?*, TABLET (July 13, 2015), http://www.tabletmag.com/jeriwsh-news0and politics/192110/can-states-fund-bds).

235. *See generally* Pickering v. Bd. of Educ. of Twp. High Sch. Dist., Will Cty., Ill., 391 U.S. 563 (1968).

236. Michael Toth's rendering of the Pickering decision says: "Pickering may well be remembered for Marshall's dictum about the need for balancing. In actuality, however, the case was not decided on the basis of balancing. Presented with a speech condition on public employment, Marshall engaged in a germaneness inquiry to determine the correct level of scrutiny. The discussion of balancing is pure dicta." Michael Toth, *Out of Balance: Wrong Turns in Public Employee Speech Law*, 10 U. MASS. L. REV. 346, 368 (2015). While the article cited does argue that *Pickering* stands consistent with prior applications of the unconstitutional conditions doctrine and the germaneness test, it does not endorse a balancing test despite how *Pickering* has been applied. *See id.* The Harvard article seemingly argues for a conflated approach:

> Even on the most uncharitable interpretation of the BDS [M]ovement and its goals, it is clearly directed at a matter of public concern, and it is unlikely that a company's participation in a boycott of Israel would interfere with its ability to efficiently carry out the duties required by its contract.

First Amendment, *supra* note 18, at 2034.

> speech at issue fits any one of the three criteria, the speech should be presumed to be disruptive.[237]

Per the First Amendment Center's Primer on Public Employees and Free Speech:

> The second prong of the *Pickering-Connick* test requires the courts to balance the employee's right to free speech with the employer's interest in an efficient, disruption-free workplace. Sometimes courts will defer to employers' judgments about the potential disruptiveness of employee speech. For example, one federal appeals court ruled in 1998 that Illinois prison officials could terminate a corrections officer for his membership in the Ku Klux Klan and his expression of a white-supremacist viewpoint in the prison . . . .
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> . . . .
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> Similarly, the Supreme Judicial Court of Massachusetts ruled in 2000 that the state's Department of Social Services could fire an investigator for telling a racist joke at a dinner honoring retiring members of a city council. The court noted that "a public employee has a strong interest in speaking her mind free from government sanction." However, the court reasoned that in this instance the employee's racist speech had the "clear potential" to undermine the DSS's relations with its clients and the community.[238]

A state is certainly at liberty to decide that funding a discriminatory movement, a movement that, as the article goes on to demonstrate is antithetical to American foreign policy and has the potential to undermine its relationship with the community. Fifth, and lastly, it is not true that BDS "is clearly directed"[239] at a matter of public concern. Again, as Gordon Smith has noted:

> The most fundamental problem with the public concern threshold test has emerged from attempts to apply it: no one knows what "public concern" is. Connick defined "public concern" as "any matter of political, social, or other concern to the community" in light of "the content, form, and context of a given statement, as revealed by the whole record" . . . . On the other hand, the Court explained that public concern included statements: (1) "of public import in evaluating the performance of . . . an elected official;" (2) "seek[ing] to inform the public that the [government office or agency] was not discharging its governmental responsibilities;" and (3) "seek[ing] to bring to light actual or potential wrongdoing or breach of the public trust on the part of [a government official]." These descriptions of public concern provided just enough guidance to confuse everyone. As Justice

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237. D. Gordon Smith, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 271 (1990) (footnotes omitted).

238. Hudson, *supra* note 232, at 26.

239. *First Amendment*, *supra* note 18, at 2034.

> Brennan predicted in his *Connick* dissent, the concept eluded consistent definition as the lower courts developed their own "public concern" jurisprudence. Many circuit courts condition their protection of public employee speech on whether the speech will help the public evaluate the performance of government.[240]

The Ninth Circuit, for example, takes a *Connick* approach and looks to whether statements "are of public import in evaluating the performance of . . . an elected official,"[241] while the Tenth Circuit is slightly broader, asking whether the speech did or did not "sufficiently inform the issue as to be helpful to the public in evaluating the conduct of government."[242] "The Eleventh Circuit has also emphasized the usefulness of the speech [in informing] the public" debate about how our society is to be governed.[243]

Thus, for various reasons and consideration, the Ninth, Tenth, and Eleventh Circuits, at the very least, would not categorize BDS as directed at a matter of public concern, viewing it instead as having nothing to do with informing the public about the way our government runs.[244]

Finally, the Harvard article moves on to a new argument. It states that "[t]he fate of the anti-BDS law is less certain as applied to new bids for government contracts,"[245] claiming that "it is still likely unconstitutional."[246] The article's confidence is striking given the weakness of the claims put forth. The authors explain that *Umbehr* and *O'Hare* reserved judgment on whether their holdings would extend to new contracts, then note that Scalia, in dissent, thought that they should.[247] The article describes a circuit split on the issue and makes it clear that the district courts disagree as well.[248] So far, so good; there would seem to be an acknowledgement that on some of these points (not all) reasonable people may differ. Next, the authors reiterate that in light of this division in the lower courts, it is less certain that the anti-BDS law is unconstitutional as applied to new bidders for government contracts.[249]

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240. Smith, *supra* note 237, at 258–59 (alteration in original omitted) (footnotes omitted).

241. Connick v. Myers, 461 U.S. 138, 148 (1983); *see, e.g.*, McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983).

242. Koch v. City of Hutchinson, 847 F.2d 1436, 1447 (10th Cir. 1987).

243. Smith, *supra* note 237 (citing Ferrara v. Mills, 781 F.2d 1508, 1514 (11th Cir. 1986)).

244. *See generally Koch*, 847 F.2d 1436; *Ferrara*, 781 F.2d 1508; *McKinley*, 705 F.2d 1110. Furthermore, the article the Harvard article cites in footnote 26 also rejects the "public concern" analysis both for the reasons above and because the test is self-contradictory. Toth, *supra* note 236, at 382. Michael Toth writes that "[t]he distinction between issues of public and private concern is rooted in the notion that speech related to public concerns is essential to self-government and therefore deserving of heighted protection. The public-concern test, however, undermines self-government by allowing courts to function as the ultimate arbiters of what constitutes an issue of public concern." *Id.*

245. *First Amendment*, *supra* note 18, at 2035.

246. *Id.*

247. *Id.*

248. *Id.* at 2036.

249. *Id.*

Again, so far so good, but the article does not end there.[250] Instead, it tries yet again to find some constitutional problem with the statute, claiming that:

> By explicitly making nonparticipation in boycotts a condition for receiving state contracts, the anti-BDS statute raises an unconstitutional conditions problem more often seen in government spending cases than the typical retaliation case. Recently, in *Agency for International Development v. Alliance for Open Society International, Inc.* (*AID*), the Court clarified the rule governing statutes or regulations that put explicit speech-burdening conditions on the expenditure of government funds: "[T]he relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program . . . and conditions that seek to leverage funding to regulate speech outside the contours of the program itself." As noted above, in the case of the anti-BDS statute, it is difficult to argue that a company's decision to boycott a particular nation is related to its ability to perform a contract for which it bids. Instead, the state is using its economic leverage to discourage protected boycott activity. With the unconstitutional conditions doctrine "undergoing something of a renaissance in the Roberts Court," the Court could well use *AID*'s formulation of the doctrine to invalidate the anti-BDS statute even if it stopped short of extending First Amendment protection to all new bidders.[251]

Once more, the authors have never established that BDS is a protected activity, and have not rebutted the fairly obvious claim that states are free to determine that aligning themselves with those who promote a discriminatory message damages the state's relationship with the public.[252] Also, the authors failed to include the very next two sentences in the case that they cite, which state the following:

> In the present context, the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself. *The line is hardly clear*, in part because the definition of a particular program can always be manipulated to subsume the challenged condition.[253]

In this instance, no such manipulation is even required; South Carolina does not wish to enter into contracts with people that engage in prohibited forms

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250. *See id.*

251. *Id.* at 2036–37.

252. *See, e.g.*, *id.*

253. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2328 (2013) (emphasis added).

of discrimination.[254] Note again that the definition section of the South Carolina statute severely limits the scope of its applicability:

> (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.[255]

Still, despite the earlier admissions of shaky ground based on lower court circuit splits, the Harvard article states that "[t]hough the weight of precedent indicates that the statute is unconstitutional, two federal statutes adopted in response to the Arab League's boycott of Israel seem at first glance to suggest otherwise."[256] In an incredible act of hubris, the authors contend that the federal anti-boycott laws are in fact themselves unconstitutional and have been since *Claiborne* was decided.[257]

2. Federal Anti-Boycotting Statutes

The Harvard article's claim that, because "*Claiborne Hardware* had not yet been decided in 1979, . . . it was not yet clear that participation in a political boycott was protected First Amendment activity, [so t]oday, the federal antiboycott statutes may be unconstitutional."[258] This is very difficult to fathom.

First, the EAA's provisions have been litigated since that time, and courts have found that they do *not* violate the First Amendment.[259] In *Briggs & Stratton v. Baldridge*, a 1984 consolidated appeal of two cases that challenged the EAA under the First Amendment, the Seventh Circuit upheld the constitutionality of the EAA's anti-boycott provisions.[260] This case was decided after *Claiborne*. Furthermore, since *Briggs*, no court has ever struck down the EAA's anti-boycott provisions.[261]

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254. *See id.*
255. S.C. CODE ANN. § 11-35-5300 (2015).
256. *First Amendment*, *supra* note 18, at 2037.
257. *See id.* at 2038.
258. *Id.*
259. *See generally* Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915 (7th Cir. 1984).
260. *See generally id.*
261. *See generally id.*

The next argument presented by the Harvard article represents yet another error that is either irresponsible or troubling. The authors claim that if one was inclined to assume that decades-old federal statutes are constitutional, one could still keep those federal statues on the books while condemning South Carolina's statute because of the following:

> A key feature of both federal statutes is that they apply only to boycotts organized *by foreign nations* against allies of the United States . . . . The Court is likely to defer to Congress's factual judgments regarding national security, even when First Amendment rights are at issue. By contrast, BDS is led by civil society groups, not foreign sovereigns or terrorist organizations. And, of course, the anti-BDS statutes are being considered by states, which do not have the foreign affairs powers of Congress.[262]

In addressing this argument, it is important to note that first of all, neither statute says that it only applies to boycotts organized by foreign nations. The Ribicoff Amendment states in relevant part:

> (3) Definition of boycott participation and cooperation.—For purposes of this section, a person participates in or cooperates with an international boycott if he agrees—
> (A) as a condition of doing business directly or indirectly within a country or with the government, a company, or a national of a country—
> (i) to refrain from doing business with or in a country which is the object of the boycott or with the government, companies, or nationals of that country . . . .[263]

And the EAA says:

> (1) For the purpose of implementing the policies set forth in subparagraph (A) or (B) of paragraph (5) of section 3 of this Act, the President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation.[264]

While BDS leaders may claim that the BDS Movement is led by civil society groups, it certainly includes nationals of countries (Ribicoff) that

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262. *See First Amendment*, *supra* note 18, at 2038.
263. 26 U.S.C. § 999 (2016) (emphasis added).
264. Export Administration Act of 1979, Pub. L. No. 96-72, 58, 93 Stat. 503, 521–24 (codified at 50 U.S.C. § 4618 (2016)).

foster the boycott (EAA).[265] What is troubling is that the Harvard article cites to these definition sections before the authors disregarded about them when constructing the argument.[266]

The Harvard article's next attempt at finding a problem with the South Carolina statute—the claim that the anti-BDS statutes are problematic because they are being considered by states, which do not have the foreign affairs powers of Congress, is also, at best, disingenuous.[267] Even if there was a clear doctrine of dormant federal power and preemption in regard to state laws affecting foreign relations—and there is not[268]—as the article itself explained itself before, the South Carolina statute is in lockstep accordance with federal policy, as outlined in the EAA and the Ribicoff Amendments.[269] Surely states are allowed to legislate in accordance with federal policy.

V. CONCLUSION

Combining the explicit holding of *Longshoremen*, *Claiborne*'s acknowledgement that many boycotts, including secondary boycotts, are not protected speech, and the *Briggs* case, along with the support of every congress and every president since the passing of the Ribicoff Amendment and the EAA, it is hard to find any support for the claim that anti-boycott statutes are unconstitutional.[270]

Of course, it is clear why BDS supporters might feel uncomfortable with a statute like South Carolina's. Ironically, BDS supporters do not like it when someone puts *them* on a list of people who will not get certain business opportunities. But that has nothing to do with the statute's legality. Despite what critics may say (although to be sure, as the Harvard article notes, serious critics have actually kept quiet) it is certainly constitutional for a state to refuse to fund discriminatory action.

At the very least, going forward, any and all confusion over the use of the term "boycott" in a particular statute, or the situations in which a particular statute applies, should be easily solved by simply doing a thorough reading of the statute in question before raising First Amendment concerns.

When people engage in free speech that others disagree with, the proper response is counter-speech. But when people set up illegal secondary boycotts that discriminate against the Jewish people and the Jewish state, like

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265. *See* Greendorfer, *supra* note 27.

266. *See First Amendment*, *supra* note 18, at 2037 n.61, 2038 n.63).

267. *See id.* at 2038.

268. *See State Laws Affecting Foreign Relations—Dormant Federal Power and Preemption*, JUSTIA, http://law.justia.com/constitution/us/article-2/26-dormant-foreign-relations.html (last visited Nov. 24, 2017).

269. *See First Amendment*, *supra* note 18, at 2037.

270. *See generally* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Int'l Longshoremen's Ass'n. v. Allied Int'l, Inc., 454 U.S. 814 (1981); Briggs & Stanton Corp. v. Baldrige, 728 F.2d 915 (7th Cir. 1984)

the BDS Movement has done, others develop tools to stop them. Anti-BDS statute are one such constitutional tool.