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HOW THE CONFLICT BETWEEN ANTI-BOYCOTT LEGISLATION AND THE EXPRESSIVE RIGHTS OF BUSINESS ENDANGERS CIVIL RIGHTS AND ANTIDISCRIMINATION LAWS

Debbie Kaminer *
David Rosenberg **

INTRODUCTION

More so perhaps than at any time in recent American history, social and political activists are calling for boycotts of people, products, and even states and nations as a way to bring about change. The tactic has been particularly visible during the years of polarization following the 2016 presidential election and has continued during the time of the COVID-19 pandemic. As in the past, the promoters of boycotts span the political spectrum.[1] Among the most prominent boycotts during the last several years has been the attempt to isolate Israel through the Boycott, Divestment, and Sanctions movement (commonly known as "BDS").[2] This movement—and the attempts to combat it—have created a near-perfect

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1. Most boycotts focus on a single issue, many of which represent some of the most polarizing areas of public disagreement. Since 2010, activists have called for consumers to shun such entities as Chick-fil-A, Target, and the State of North Carolina because of policies that they view as homophobic or transphobic. Similarly, activists have also called for boycotts of Nike and the NFL itself over Colin Kaepernick's protest during the playing of the National Anthem at football games. *See* Jacey Fortin & Matthew Haag, *After Colin Kaepernick's Nike Deal, Some Salute Swoosh, Others Boycott It*, N.Y. TIMES (Sept. 4, 2018), https://www.nytimes.com/2018/09/04/sports/nike-protests-kaepernick-nfl-.html [https://perma.cc/3XHJ-Y9C2].

2. Several commentators have noted, both before and during the COVID-19 pandemic, that Israeli scientific research and technological innovations have made great contributions

storm of competing rights and values that encapsulates one of the great contradictions in contemporary American society: the conflict between personal freedoms and efforts to end bigoted and discriminatory behavior by commercial businesses.

This Article examines how opponents of anti-BDS laws may extend First Amendment rights in the business context to a point at which they actually threaten the validity of much antidiscrimination legislation. Part I discusses the BDS movement and state-based initiatives that attempt to penalize businesses that actively engage in a boycott of Israel. It examines the handful of cases in which federal courts have addressed the constitutionality of laws that require state contractors to affirm that they are not actively boycotting that country. Part II transitions to a discussion of the ways the Supreme Court has historically resolved conflicts between antidiscrimination laws and the constitutional rights of freedom of association and expression, and notes a transition from deference to enforcement of such laws to a recognition of the expressive rights of individuals and groups in both noncommercial and commercial contexts. The Article concludes in Part III with an application of the existing jurisprudence to state anti-BDS laws and highlights the dangers that successful opposition to such laws might present to the continued viability of antidiscrimination laws. It concludes that affirmation of the expressive rights of pro-BDS businesses could lead to serious challenges to the constitutionality of laws designed to prevent bigotry in the conduct of commercial affairs—including the landmark civil rights laws of the 1960s.

to the world, including to the lives of those calling for a boycott. *See* Stuart Winer, *BDS-Supporting Rashida Tlaib Uses Israeli Tech for Her Personal Website*, TIMES ISR. (Feb. 20, 2019), https://www.timesofisrael.com/bds-supporting-rashida-tlaib-uses-israeli-tech-for-her-personal-website/ [https://perma.cc/D24U-N3SN]. Indeed, in the early days of the pandemic, there was speculation that supporters of BDS would have to decide whether to honor the boycott or to take steps to protect their own health and to help end the health crisis facing the world, were Israeli scientists to succeed in developing a COVID-19 vaccine or treatment. *See, e.g.*, Algemeiner Staff, *BDS Leader Widely Mocked for Saying It'd Be Ok to Take Israeli-Developed Coronavirus Vaccine*, ALGEMEINER (Apr. 7, 2020), https://www.algemeiner.com/2020/04/07/bds-leader-widely-mocked-for-saying-itd-be-ok-to-take-israeli-developed-coronavirus-vaccine/ [https://perma.cc/R6EA-XRYZ]. Although the most promising vaccines have been developed elsewhere, the dilemma will almost certainly arise in some other context in the future.

I. BOYCOTTS AND THE BDS MOVEMENT

Throughout American history, activists have used commercial and cultural boycotts to promote political and social change. Indeed, the refusal to engage in certain business dealings helped bring about the American Revolution itself, the civil rights advances of the 1950s and 1960s, and the overthrow of South African apartheid, among other events.[3] Respecting the importance of boycotts in our history, American courts have usually viewed such protests as the exercise of a right which the framers of the Constitution intended to protect.[4] Such cases have typically recognized the right to boycott where it is used to express a point of view or to bring about a political goal and not when it is used for commercial purposes.[5] However, where the boycott takes place in the realm of business—where the boycotter has a commercial interest—the right is more easily subjected to government regulation.[6]

A. *The Rise of BDS*

Over the last twenty years or so, activists in the United States and elsewhere have begun to call for protests against the State of Israel through a variety of means, including a boycott of the country.[7] The movement has become known to supporters, opponents,

3. *See* Michael Livingston, *Q&A: Here's When Boycotts Have Worked—and When They Haven't*, L.A. TIMES (Mar. 1, 2018), https://www.latimes.com/nation/la-na-boycotts-history-20180228-htmlstory.html [https://perma.cc/8WAX-QJQL].

4. The Supreme Court has affirmed that many commercial boycotts are protected as free speech by the Constitution. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907–08 (1982).

5. In *Claiborne*, for example, the boycotters engaged in their refusal to deal as consumers, not as proprietors of commercial businesses; their boycott was simply a form of political expression and did not take place in the context of their role as businesspeople. *See id.* at 914.

6. For example, the Supreme Court has limited the rights to engage in commercial boycotts in specific situations where it might constitute an unfair labor practice under the National Labor Relations Act. *See, e.g.*, Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 225–26 (1982). Further, numerous federal laws prohibit compliance with boycotts against U.S. allies led by foreign governments and businesses. Among these is the law prohibiting cooperation with a foreign country's boycott of Israel that was initially passed in 1979, but now exists in the form of the Anti-Boycott Act of 2018, 50 U.S.C. § 4842.

7. While the BDS movement claims 2005 as its official inception, critics assert that it arose from the notorious UN-sponsored "World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance" which took place in Durban, South Africa, in 2001. Alexander B. Traum, *Applied Anti-Semitism: The BDS Movement and the Abuse of Corporate Social Responsibility*, 34 TOURO L. REV. 1025, 1028–29 (2018). As Traum points out, although the conference was billed as "a collective global response to racism, [it] ironically and sadly, devolved into an anti-Semitic hate-fest." *Id.* at 1029. Most organizations

and the media as "BDS" because its tactics include *boycotts, divestment, and sanctions* against various interests associated with Israel itself. While there is a formal umbrella organization that ostensibly leads the BDS movement,[8] its adherents are not uniform in their ideology, methods, or goals. What they all have in common is an attempt to bring about change to benefit the Palestinians by imposing economic and other kinds of pressure (cancellation of concert tours by pop stars, avoidance of academic conferences involving Israel or Israelis, and some occasionally high-profile forfeits of sporting contests) on the State of Israel.[9]

The precise focus of BDS's commercial boycott is ambiguous. The BDS movement states that its boycott "involve[s] withdrawing support . . . from all Israeli and international companies engaged in violations of Palestinian human rights."[10] Whether this is a call for the boycott only of companies that operate in the Occupied Territories, a boycott of all companies doing business in Israel as a whole or a much broader boycott of companies that might somehow benefit Israel is not entirely clear. Finally, the goals of the BDS movement are also varied. For some BDS advocates, the objective is to bring about a two-state solution as fast as possible; for others the goal is to destroy the Jewish state and replace Israel with a Palestinian state in the land currently consisting of Israel, Gaza, and the West Bank.[11] Finally, the BDS movement is frequently labelled

that take an anti-BDS stand also point to Durban as the starting point of the movement. *See, e.g.*, *BDS: The Global Campaign to Delegitimize Israel*, ANTI-DEFAMATION LEAGUE, https://www.adl.org/resources/backgrounders/bds-the-global-campaign-to-delegitimize-israel [https://perma.cc/ZXN9-KLSB].

8. Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE NOVO 112, 113–14. The group's website can be found at https://bdsmovement.net/ [https://perma.cc/XGK2-LZJT]. Another commentator describes the BDS movement in a way that suggests little formal organization: "The BDS movement is a loose coalition of individuals and institutions, some private, others state-sponsored, that seek to impose economic punishment on Israel for its alleged mistreatment of the Palestinians." Traum, *supra* note 7, at 1028.

9. *See* Timothy Cuffman, Note, *The State Power to Boycott a Boycott: The Thorny Constitutionality of State Anti-BDS Laws*, 57 COLUM. J. TRANSNAT'L L. 115, 122–23 (2018). The academic, cultural, and athletic targeting of BDS certainly accounts for much of its power to grab headlines. This Article, however, will focus on the commercial aspect of the boycott because that is the area in which the conflict with the traditional justification of antidiscrimination laws arises.

10. *What is BDS?*, BDS, https://bdsmovement.net/what-is-bds [https://perma.cc/P6GC-YF4R].

11. This is perhaps the most politically loaded issue that divides pro- and anti-BDS commentators. The official BDS statement is bold but almost certainly deliberately ambiguous. Traum, *supra* note 7, at 1030. It states three demands from Israel: "1. Ending its occupation and colonization of all Arab lands and dismantling the Wall; 2. Recognizing the

anti-Semitic because it singles out the world's only Jewish country for disproportionate criticism[12] and because some supporters use classic anti-Jewish tropes reminiscent of Nazi propaganda.[13]

B. *Anti-BDS Legislation*

Despite the zeal of its BDS movement, the United States is, in fact, among the most pro-Israel countries in the world. The United States government consistently supports Israel on the international stage, where many countries are extremely hostile to the Jewish state. This has included economic assistance, military cooperation, and diplomatic support. While the Constitution explicitly endows only the federal government with the power to conduct foreign policy, the overwhelming support for the State of Israel in many regions has led numerous states to pass legislation or executive orders designed to combat the BDS movement. These laws vary somewhat among the states, but most simply require that any business that contracts with the state verify that it does not boycott Israel.[14] Their purpose was summarized succinctly by New York Governor Andrew Cuomo: "If you boycott Israel, New York will boycott you."[15]

Almost all of the state anti-BDS laws are careful to avoid sanctioning pure speech that is merely critical of Israel. Such laws

fundamental rights of the Arab-Palestinian citizens of Israel to full equality; and 3. Respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in U.N. resolution 194." Lindsey Lawton, *A New Loyalty Oath: New York's Targeted Ban on State Funds for Palestinian Boycott Supporters*, 42 N.Y.U. REV. L. & SOC. CHANGE 649, 659 (2019). While demands two and three are fairly easily understood, demand one is open to broad interpretation. Many BDS supporters regard all of the current State of Israel (in addition to the West Bank and Gaza) as occupied territory and are plainly calling for its wholesale dismantling. If read as less extreme, the statement could simply mean the withdrawal of Israeli settlements and forces from the West Bank and an end to Israel's partial closure of Gaza (which it, along with Egypt on Gaza's southern border, has held in place for many years).

12. Lawton, *supra* note 11, at 660.

13. The Israeli government has published an illustrated report that includes many depictions of Israel in ways plainly reminiscent of Nazi-era material designed to stir hatred against Jews. MINISTRY OF STRATEGIC AFFAIRS & PUB. DIPLOMACY, STATE OF ISR., BEHIND THE MASK: THE ANTISEMITIC NATURE OF BDS EXPOSED 55–68 (2019).

14. One commentator has described these as "Contract-focused laws" in order to distinguish them from other anti-BDS laws that focus solely on how a state invests its own money, for example, its pension funds. Cuffman, *supra* note 9, at 129.

15. Andrew Cuomo, *Gov. 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 [https://perma.cc/CSH6-SA43].

would plainly violate the First Amendment. Rather, these laws are typically designed to prohibit the state from contracting with companies that actively "boycott" Israel or businesses and institutions connected with that country. This deliberately precise drafting of legislation is clearly intended to place anti-BDS laws in the realm of regulation of commercial activity and not traditionally protected expression. Further, state anti-BDS laws now typically only apply to businesses themselves and not to the personal or private conduct of those forming the business or working on its behalf. Indeed, several states have been forced to amend their anti-BDS laws so that they do not apply to people contracting with a state via a business organized as a sole proprietorship.[16]

C. *State Anti-BDS Laws in the Courts*

Since 2018, federal courts have heard a small handful of cases challenging the constitutionality of state anti-BDS laws.[17] These courts disagree largely based on their interpretation of two important Supreme Court cases that addressed the legality of certain boycotts. Those courts that found the state laws unconstitutional relied most heavily on *Claiborne*, which firmly established that advocacy of boycotts is protected by the First Amendment where the purpose of the boycott is political and not commercial: "While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case."[18] The Court took pains to note that the government may of course regulate commercial activity in myriad ways, but it may not outright prohibit promotion of boycotts of businesses that are designed to make a political statement.[19] The decision is ambiguous, however, regarding whether or

16. *See infra* notes 27–63 and accompanying text. It is important to note that these laws do not prohibit businesses generally from discriminating based on a protected category. Rather, they are focused quite narrowly and only apply to state contractors–companies that wish to enter into commercial contracts with states while simultaneously actively engaging in BDS.

17. *See, e.g.*, Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717 (W.D. Tex. 2019); Ark. Times LP v. Waldrip, 362 F. Supp. 3d 617 (E.D. Ark. 2019); Jordahl v. Brnovich, 336 F. Supp. 3d 1016 (D. Ariz. 2018); Koontz v. Watson, 283 F. Supp. 3d 1007 (D. Kan. 2018).

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

19. *Id.*

not such protection extends to the conduct associated with a boycott itself: the actual refusal to engage in commercial dealings with certain businesses.

The one court that has found a state anti-BDS law to be constitutional, however, relies instead on a case decided just before *Claiborne*, *International Longshoremen's Ass'n v. Allied International, Inc.*, in which the Supreme Court upheld sanctions against a labor union for engaging in a boycott by longshoremen who refused to unload ships doing business with the Soviet Union.[20] The Court held that such conduct was a refusal to deal and not protected pure expression.[21] The decision hinged on the Court's characterization of the labor union's action as a "secondary boycott," a tactic that the National Labor Relations Act intended to regulate.[22] Subsequent cases and most commentators have typically held that the *International Longshoremen's* precedent is limited to conflicts arising in the context of organized labor.[23]

Further, central to most of the recent decisions on anti-BDS laws was each court's approach to the precedent set in *Rumsfeld v. FAIR* in which the Supreme Court held that the federal government did not violate a law school's right to free speech by sanctioning the school for refusing to host military recruiters on its campus.[24] The Court held that requiring the law school to accommodate such recruitment was not an infringement of the school's freedom of expression because the mere provision of rooms and distribution of information is not "compelled speech."[25] Crucially, the Court insisted that the law school's actions of hosting did not, on its own, convey a message; rather, its meaning can only be understood "by the speech that accompanies it," and the Court was by no means prohibiting the law school's expression of ideas.[26]

In *Koontz v. Watson*, a 2018 case that led the Kansas legislature to revise its anti-BDS law, the United States District Court for the District of Kansas granted a preliminary injunction barring the

20. Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 214, 226 (1982).

21. *Id.* at 222, 226.

22. *Id.* at 223–24.

23. *See, e.g.*, Note, *Boycotting a Boycott: A First Amendment Analysis of Nationwide Anti-Boycott Legislation*, 70 RUTGERS U. L. REV. 1301, 1323 (2018).

24. Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (*FAIR*), 547 U.S. 47, 70 (2006).

25. *Id.* at 62.

26. *Id.* at 66.

state from denying the plaintiff, a "curriculum coach at a public school," a contract based on her refusal to certify that she was not participating in a boycott of Israel.[27] The court held that the Supreme Court's analysis of the expressive nature of the boycott in *Claiborne* was entirely applicable to Koontz's efforts to bring about change in Israel and Palestine through her decision to refrain from purchasing Israeli products.[28] The court explained that because Koontz's boycott was designed "to express . . . dissatisfaction with Israel and to influence governmental action," the government could not impose a sanction on it under its power to regulate economic activity.[29]

The Kansas district court distinguished Koontz's denial of employment by the state based on her commitment to BDS from the federal government's denial of funding to the law school in *FAIR* because of the school's boycott of military recruiters on its campus.[30] The distinction hinges on the holding in *FAIR* that the law school's conduct "is not inherently expressive" because people would not understand the message conveyed by the absence of military recruiters without further explanation from the school itself.[31] In *Koontz*, the court said that "[i]t is easy enough to associate plaintiff's conduct with the message that the boycotters believe Israel should improve its treatment of Palestinians. And boycotts—like parades—have an expressive quality."[32]

In the wake of the district court's ruling in favor of a preliminary injunction, Kansas amended its anti-BDS law to narrow its application in several ways. Most relevant to the original complaint, the law no longer requires compliance by individuals or sole proprietors such as Ms. Koontz.[33] Koontz's lawsuit was dismissed following the amendment to the law, but the state was ordered to pay

27. 283 F. Supp. 3d 1007, 1012–13 (D. Kan. 2018).

28. *Id.* at 1021–22.

29. *Id.* at 1022.

30. *Id.* at 1023–24.

31. *Id.* (citing *FAIR*, 547 U.S. at 65–66).

32. *Id.* at 1024. The reference to parades by the court is plainly a comparison of BDS to the St. Patrick's Day parade at issue in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). In that case, the Supreme Court held that the organizers of a parade could not be forced to include a gay group among participants because to do so would affect the message that the parade was intended to convey. *Id.* at 559. For a discussion of *Hurley*, see *infra* notes 104–06 and accompanying text.

33. KAN. STAT. ANN. § 75-3740f (amending 2017 Kan. Sess. Laws 1126 § 2(a) by replacing "individual or company" with "company.").

her upwards of $40,000 in legal expenses.[34] The ACLU, which represented Koontz, nonetheless claims that the law's infirmities remain: "While the changes reduce the number of people required to sign the anti-boycott certification, the fundamental purpose of the law—to suppress political boycotts of Israel and chill protected expression—remains unconstitutional."[35]

Another similar lawsuit challenging a state's anti-BDS legislation also resulted in an amendment to the law that narrowed its scope considerably. In *Jordahl v. Brnovich*, the plaintiff was an attorney who contracted with an Arizona county to provide legal services to inmates.[36] He was therefore asked, pursuant to Arizona's anti-BDS law, to affirm that neither he nor his company would "engage in a boycott of Israel."[37] Although Jordahl made such an affirmation in 2016, he refused to do so in 2017.[38] He then brought a lawsuit seeking to enjoin the state from enforcing the requirements of the law.[39]

After finding that Jordahl had standing to bring the case, the United States District Court for the District of Arizona addressed his motion for a preliminary injunction based on the likelihood of success on the merits of the claim that the law's certification requirement violates the First Amendment.[40] The court emphasized

34. *Lawsuit Dismissed Over Kansas Anti-BDS Law; State to Pay Plaintiff's Legal Fees*, TIMES ISR. (July 1, 2018), https://www.timesofisrael.com/lawsuit-dismissed-over-kansas-anti-bds-law-state-to-pay-plaintiffs-legal-fees/ [https://perma.cc/U3ZR-UWKE].

35. Press Release, ACLU, ACLU Withdraws from Free Speech Lawsuit Against Law Requiring Contractors to Sign Document Promising Not to Boycott Israel (June 29, 2018), https://www.aclu.org/press-releases/after-court-defeat-kansas-changes-law-aimed-boycotts-israel [https://perma.cc/R8MR-6GNE]. It remains to be seen whether subsequent courts will determine the constitutionality of the revised Kansas law based on the nature of the business entity engaging in the boycott. The Supreme Court has in the past extended certain rights to businesses based on their status as privately held rather than publicly held corporations, at least partly because such businesses are more easily identified with individual human beings. *See* David Rosenberg, *The Corporate Paradox of* Citizens United *and* Hobby Lobby, 11 N.Y.U. J.L. & LIBERTY 308, 315–16 (2017). The more a court regards a boycott as a First Amendment right, the more likely it will be to take seriously the claims of individual plaintiffs in cases calling into question the constitutionality of state anti-BDS legislation.

36. 336 F. Supp. 3d 1016, 1029 (D. Ariz. 2018).

37. *Id.*

38. *Id.*

39. *Id.* at 1030.

40. *Id.* at 1034. Interestingly, in the discussion of standing, the court cited *Citizens United v. FEC*, 558 U.S. 310, 342 (2010), for the proposition that "corporations . . . do not lose their First Amendment protections simply because they are not natural persons." *Jordahl*, 336 F. Supp. 3d at 1032. Other courts addressing anti-BDS laws have typically not emphasized that case but rather focused on the specific right to boycott in their discussion of the First Amendment implications of anti-BDS laws.

that the *International Longshoremen's* precedent was not applicable because that ruling is confined to boycotts engaged in by labor unions.[41] Instead, the court emphasized that the ruling in *Claiborne* governed the case: "*Claiborne* stands for the proposition that collective boycotting activities undertaken to achieve social, political or economic ends is conduct that is protected by the First Amendment."[42] Thus, the central issue for the court was "whether the Arizona legislature has infringed upon or restricted these types of boycotting activities."[43]

The court parsed the language of the statute at issue in order to show that it prohibits not just individual boycotts—which might not receive First Amendment protection—but also "collective conduct" that is taken with the aim of achieving a common end, in this case a boycott of Israel.[44] The court took pains to show that Jordahl's actions were part of a broader movement in order to distinguish the case from *FAIR*. Indeed, without a connection to others, the court said, Jordahl's refusal to buy Israeli products would lack the expressive quality required to fall under the First Amendment's protection.[45] The court concluded, though, that such a connection did exist and granted Jordahl's motion for a preliminary injunction.[46]

Additionally, the court addressed the right of government employers to limit the speech of their employees where it relates to their official duties, a right that the Supreme Court upheld in *Pickering v. Board of Education*.[47] Drawing on that decision, the *Jordahl* court said that restrictions by the government on the speech of its employees should be analyzed to determine "whether the restriction reaches only speech within the scope of a public employee's official duties, and whether it impacts speech on matters

41. *Jordahl*, 336 F. Supp. 3d at 1041.

42. *Id.*

43. *Id.*

44. *Id.* at 1042.

45. The court explains that a refusal to buy, for example, an HP printer does not convey a message unless "explanatory speech accompanies it." *Id.* This draws directly on the Supreme Court's decision in *FAIR* in which it found no suppression of free speech because the mere act of refusing to host military recruiters on campus did not convey a message unless it was accompanied by explanatory speech. *See supra* notes 24–26 and accompanying text. Since the law at issue in *FAIR* did not directly ban protected conduct, it did not run afoul of the First Amendment.

46. *Jordahl*, 336 F. Supp. 3d at 1044, 1051.

47. 391 U.S. 563, 574 (1968).

of public concern."[48] The court found that Jordahl's participation in a boycott of Israel had no "plausible relationship" to his duties as an attorney providing criminal defense for clients in jail.[49] It also found that his boycott of Israel plainly related to a matter of public concern: the actions of Israel in relation to Palestine.[50] This decision, however, was rendered moot when Arizona amended the law so that it applies only to "(1) companies with ten or more full-time employees, and (2) contracts valued at $100,000 or more."[51]

The question of whether or not boycotts of Israel constitute discrimination based on national origin was addressed in *Amawi v. Pflugerville Independent School District*.[52] The United States District Court for the Western District of Texas rejected that theory and, as in *Jordahl* and *Koontz*, held that a state's anti-BDS law did not pass constitutional muster, largely relying on the right to boycott as established in *Claiborne* and on the facts that distinguish this kind of case from *FAIR*.[53] Like the Arizona and Kansas laws, the constitutionality of the Texas statute as applied to state employees was rendered moot by the legislature's subsequent modification of the law so that it no longer applies to sole proprietorships.[54] Nonetheless, it is worthwhile to understand the reasoning behind the district court's ruling.

48. *Jordahl*, 336 F. Supp. 3d at 1047 (quoting *Pickering*, 391 U.S. at 571).

49. *Id.*

50. *Id.* at 1048.

51. Jordahl v. Brnovich, 789 Fed. App'x 589, 591 (9th Cir. 2020). The *Pickering* analysis is not central to the thesis of this Article. The *Jordahl* court relied on the *Pickering* analysis because anti-BDS legislation only applies to state contractors, so there is a potential issue of government speech. This Article focuses on the impact the anti-BDS legislation will have on general antidiscrimination laws—laws that apply to businesses regardless of whether they are government contractors. It highlights the dangers that successful opposition to anti-BDS legislation might present to the continued viability of these general antidiscrimination laws.

52. 373 F. Supp. 3d 717, 748–49 (W.D. Tex. 2019).

53. *Id.*

54. In late 2020, a lawsuit was filed claiming that the revised Texas statute remains unconstitutional based on a strikingly different set of facts. Katie Hall, *Former Travis County Employee Sues Ken Paxton, Challenging Anti-Israel Boycott Law*, AUSTIN AM.-STATESMAN (Dec. 24, 2020), https://www.statesman.com/story/news/2020/12/24/former-travis-county-worker-sues-ken-paxton-challenges-anti-israel-boycott-law/4039691001/ [https://perma.cc/GYF9-DMHP]. Plaintiff is a former Texas county prosecutor who contributed to a Texas state retirement fund. Pursuant to the requirements of Texas's anti-BDS law, the fund divested its holdings in the Norwegian financial services firm DNB ASA because that company was on a list of businesses that advocate for the boycott of Israel. *Id.* The Constitutional Law Center for Muslims in America is arguing that the prohibition on investment in that company violates freedom of speech and also constitutes an abandonment of the fiduciary responsibilities of those who control these funds. *Id.*

The plaintiff in *Amawi* was a speech pathologist who had contracted with a Texas school district to provide professional services for school children.[55] Upon attempting to renew her annual contract, Amawi was asked to sign an addendum that would have certified her compliance with the state anti-BDS law by acknowledging that she would not boycott Israel during the time in which she was employed.[56] Claiming that she had a First Amendment right to engage in such a boycott, she refused to sign.[57] Amawi and another similarly situated plaintiff moved for a preliminary injunction to dismiss the case.[58]

Like others that have addressed the issue, the *Amawi* court noted that, with regard to the plaintiffs' free speech claim, "[t]his issue is one of dueling precedents": *Claiborne* and *FAIR*.[59] The court applied a broad reading of *Claiborne* to include not only advocacy of a boycott, but the act of boycotting itself: "Thus, the desire to not purchase certain products is distinctly protected in the context of a political boycott. Had the Supreme Court wanted to hold otherwise—that only speech, association, and petitioning were protected, not the decision to withhold patronage—it could have done so."[60]

Further, the court rejected the relevance of *FAIR*, noting that the Supreme Court did not treat that case as about boycotts and pointing out that "the word 'boycott' appears nowhere in the opinion, the decision to withhold patronage is not implicated, and *Claiborne*, the key decision recognizing that the First Amendment protects political boycotts, is not discussed."[61] Further, the Texas district court limited the Supreme Court's holding in *International Longshoremen's* to the organized labor context, noting that in *Amawi*, "[p]laintiffs' BDS boycotts are not a labor union practice coercing participation in industrial strife."[62]

55. *Amawi*, 373 F. Supp. 3d at 731–32.
56. *Id.* at 732.
57. *Id.*
58. *Id.* at 735.
59. *Id.* at 743.
60. *Id.* at 744.
61. *Id.* at 743.
62. *Id.* at 746.

In its discussion of the nature of the state's compelling interests, the court rejected Texas's argument that its anti-BDS law was designed to prohibit "discrimination on the basis of national origin."[63] The court dwelled heavily on its view that the Texas law "singles out content and viewpoint for restriction," noting that "[t]he statute's plain text makes its purpose obvious: to prevent expressive conduct critical of the *nation* of Israel, not discriminatory conduct on the basis of Israeli *national origin*."[64] The court supported this point of view by examining the legislative history of the law. Although some legislators did mention the state's desire to combat "national origin discrimination against Israeli[s]," much of their language did indeed suggest that the law was designed to protect the political entity of Israel, and not its people, from discrimination.[65] As the court further pointed out, even the State of Texas's own briefs in the case spoke of protecting an "ally," not of protecting individual human beings.[66] The court therefore concluded that the law was an unconstitutional restriction on expression of a viewpoint and not a law aimed at preventing discrimination based on national origin.[67]

In contrast to these other cases, an Arkansas federal court held that a boycott of Israel is not protected by the First Amendment because it is not "inherently expressive conduct" and that the state's anti-BDS law was therefore not unconstitutional.[68] Relying on *FAIR*, rather than *Claiborne*, the court said, "Like the law schools' decision [in *FAIR*] to prevent military recruiters from coming to campus, the decision to engage in a primary or secondary boycott of Israel is 'expressive only if it is accompanied by explanatory speech.'"[69] The court explained that the act of refraining from buying Israeli goods does not send any protected message because, without further explanation, very few people would even understand that a boycott was taking place.[70] The court dismissed the relevance of *Claiborne*, stating that in that case the Supreme Court

63. *Id.* at 748–49.

64. *Id.* at 749. The court is perhaps careless in its use of language here. A better reference might have been to the "state" or "country" of Israel since that makes a clear distinction between the political entity and the people themselves.

65. *Id.* at 750.

66. *Id.*

67. *Id.* at 754.

68. Ark. Times LP v. Waldrip, 362 F. Supp. 3d 617, 623, 626 (E.D. Ark. 2019).

69. *Id.* at 624 (quoting Jordahl v. Brnovich, No. 18-16896, 2018 U.S. App. LEXIS 31057, at *4 (9th Cir. Oct. 31, 2018) (Ikuta, J., dissenting)).

70. *Id.*

"did not hold that individual purchasing decisions were protected by the First Amendment."[71] Finally, the court invoked *International Longshoremen's* for the proposition that "there is no unqualified right to boycott or a constitutional right to refuse to deal, or perhaps no First Amendment interest in boycotting at all."[72]

Supporters of anti-BDS laws believe that they are an effective tool to combat the economic, political, and cultural isolation of a country and its people. These recently litigated cases all addressed the constitutionality of such laws primarily from the perspective of First Amendment jurisprudence, hinging on the courts' interpretation of *Claiborne*, *International Longshoremen's*, and *FAIR*. Focusing on the expressive rights of boycotters, they mostly ignore the way that anti-BDS laws might fit in with other kinds of legislation that also promote the purpose of discouraging or banning discrimination against certain classes of people. Since the act of boycotting is simply a refusal to deal, it resembles the kind of acts prohibited by antidiscrimination laws in more than superficial ways. As courts increasingly begin to hold that commercial entities have expressive rights in other contexts, a real danger exists that they will begin to view the limitations imposed by antidiscrimination laws in a way that is analogous to their approach to anti-BDS laws.

II. THE CONFLICT BETWEEN ANTIDISCRIMINATION LAWS AND THE FIRST AMENDMENT RIGHT TO FREEDOM OF ASSOCIATION

This Part will trace the development of Supreme Court jurisprudence involving the conflict between antidiscrimination laws and the First Amendment, specifically focusing on the right to freedom of association. Until the 1995 case *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,[73] involving the right of a gay rights organization to march under its own banner in a parade, the Court had been unlikely to hold that antidiscrimination laws violated the First Amendment right to freedom of association. However, the tide began to turn with *Hurley* and the subsequent *Boy Scouts of America v. Dale*,[74] in which the Supreme Court relied on its reasoning in *Hurley* in determining that the Boy Scouts could not be required to provide membership to a gay scoutmaster. Yet

71. *Id.* at 625.
72. *Id.* at 626.
73. 515 U.S. 557 (1995); *see infra* notes 104–06 and accompanying text.
74. 530 U.S. 640 (2000).

despite these decisions, antidiscrimination legislation continues to prohibit commercial enterprises from asserting First Amendment rights as a justification for refusing to do business with protected classes of people.

Lower courts, relying on Supreme Court precedent, have distinguished between primarily commercial associations and primarily expressive associations, with only the latter entitled to First Amendment protection against antidiscrimination legislation. However, in recent years, several courts have heard cases that challenge this commercial–expressive distinction and instead support robust expressive rights for commercial entities that claim that antidiscrimination laws violate the First Amendment.

A. *The Early Supreme Court Cases*

In the 1960s, cases challenging the constitutionality of the Civil Rights Act of 1964 did not focus on the First Amendment's protection of freedom of association, but rather primarily challenged the Act under the Commerce Clause. In *Heart of Atlanta Motel v. United States*,[75] and a companion case, *Katzenbach v. McClung*,[76] the Supreme Court held that Congress had the power under the Commerce Clause to enact Title II of the Civil Rights Act, which prohibited discrimination in public accommodations, since the impacted businesses were sufficiently involved in interstate commerce.[77] While some commentators have argued that *Heart of Atlanta* upheld Title II of the Act against a free association challenge,[78] the Court did not explicitly reference the First Amendment in either of these cases.

In the 1970s the Supreme Court began to more directly address the conflict between the First Amendment right to freedom of association and antidiscrimination legislation, yet still continued to

75. 379 U.S. 241 (1964).

76. 379 U.S. 294 (1964).

77. *Heart of Atlanta*, 379 U.S. at 258; *Katzenbach*, 379 U.S. at 304–05.

78. *See* Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1217 (2014) ("Although we read *Heart of Atlanta* today for its congressional-power holding, the Court also explicitly rejected a challenge to the statute based on property, contract, free-association, and involuntary-servitude principles."); *see also* Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale: *A Tripartite Approach*, 85 MINN. L. REV. 1515, 1571 n.272 (2001).

rule in favor of the validity of antidiscrimination statutes.[79] In *Runyon v. McCrary*, the Court upheld an antidiscrimination statute that prohibited a private nonsectarian school from discriminating against African American students.[80] The Court explicitly recognized the right to freedom of association, acknowledging that "parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable."[81] However, the Court nonetheless concluded that forced integration would not harm this segregationist message.[82] While it is somewhat difficult to understand how an integrated school could successfully advocate in support of a segregationist message, the Court was able to sidestep this issue since none of the briefs in support of the school addressed this argument.[83] The *Runyon* Court's primary focus was simply whether the antidiscrimination statute applied to private schools, and the Court was therefore able to avoid fully analyzing the conflict between antidiscrimination laws and freedom of association.[84]

Throughout the 1980s, the Supreme Court continued to acknowledge the potential for conflict between antidiscrimination laws and the First Amendment right to freedom of association.[85] Yet despite this acknowledgement, in many cases the Court either denied that an organization's expressive associational rights were implicated or applied a watered down version of the compelling interest test.[86] In *Hishon v. King & Spalding*, the Court extended its reasoning in *Runyon* to a case involving Title VII's prohibition on workplace discrimination.[87] The *Hishon* Court rejected a law firm's

79. The Court also began to address the issue of whether antidiscrimination laws violate the Free Exercise Clause. *See, e.g.*, Brown v. Dade Christian Sch., Inc., 556 F.2d 310 (5th Cir. 1977) (addressing whether a school's claimed religious beliefs supporting segregation violated the Free Exercise Clause), *cert. denied*, 434 U.S. 1063 (1978).

80. 427 U.S. 160, 172–73 (1976).

81. *Id.* at 176.

82. *Id.*

83. David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 92 (2001).

84. The main issue in the case was whether the Civil Rights Act of 1866 prohibited segregation in the context of private schools. *Id.*

85. In the 1980s, the Supreme Court also more fully addressed whether antidiscrimination legislation violated the Free Exercise Clause of the First Amendment. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (holding that the University's free exercise rights were outweighed by the government's "fundamental, overriding interest in eradicating racial discrimination in education").

86. Bernstein, *supra* note 83, at 85.

87. 467 U.S. 69, 78–79 (1984).

claim that it had a constitutional right to discriminate against a female attorney who was being considered for partnership, but engaged in virtually no analysis, simply stating that "invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."[88]

While these earlier Supreme Court cases recognized the potential conflict between the right to freedom of association and antidiscrimination statutes, it was not until *Roberts v. United States Jaycees* that this conflict became the Court's primary focus.[89] The Jaycees, a leadership and networking organization whose purpose was "promoting the interests of young men," challenged the constitutionality of Minnesota's Human Rights Act, a public accommodation statute that required the Jaycees to admit women as full voting members.[90] The Court upheld the Act, finding that it did not violate the Jaycee's First Amendment right to freedom of expressive association, since there was no evidence that the compelled admission of women would change the message of the Jaycees or that women would be unwilling to support the interests of young men.[91] Justice Brennan, writing for the majority, emphasized that the Act did not require the Jaycees to change their central purpose of supporting young men, and that the organization would still be permitted to deny membership to both men and women who refused to support this mission.[92] Justice Brennan further determined that even if Minnesota's law did cause "some incidental abridgement" of the Jaycee's expressive rights, this was justified by the compelling state interest of "eliminating discrimination and assuring its citizens equal access to publicly available goods and services."[93]

88. *Id.* at 78 (quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973)).

89. 468 U.S. 609, 612 (1984). *See generally* Neal E. Devins, *The Trouble with* Jaycees, 34 CATH. U. L. REV. 901 (1985) (discussing how *Jaycees* is unhelpful precedent); Douglas O. Linder, *Freedom of Association After* Roberts v. United States Jaycees, 82 MICH. L. REV. 1878 (1984) (exploring the implications of the decision for other associations with restrictive membership policies).

90. *Jaycees*, 468 U.S. at 627.

91. *Id.* According to Justice Brennan, the claim that the mission of the Jaycees would be changed by the compelled admission of women as voting members relied "solely on unsupported generalizations about the relative interests and perspectives of men and women." *Id.* at 627–28.

92. *Id.* at 627.

93. *Id.* at 624, 628.

Justice O'Connor's concurrence in *Roberts* provided a different rationale, distinguishing between primarily expressive associations and primarily commercial associations.[94] She explained that if the association is expressive, then the First Amendment protects both its message as well as its membership since the "formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."[95] On the other hand, if the association is commercial, then it deserves minimal First Amendment protection, and "[t]he Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State."[96] Justice O'Connor clarified that if an "association's activities are not . . . the type protected by the First Amendment," it would be a commercial association.[97] In other words, if an association "enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas."[98] In providing this rationale, Justice O'Connor recognized that there could be close cases.

Justice O'Connor reiterated the commercial–expressive distinction in another concurrence a few years later in *New York State Club Ass'n v. City of New York*.[99] The majority in that case held that the admission of women and minorities would not jeopardize the expressive nature of large private New York City clubs.[100] Justice O'Connor emphasized that such clubs are "[p]redominantly commercial organizations."[101]

While Justice O'Connor was unable to command a majority in support of her position in either *Roberts* or *New York*, state courts and lower federal courts did begin to rely on the commercial–expressive distinction.[102] However, it was not until *Boy Scouts of*

94. *Id.* at 632 (O'Connor, J., concurring in part and concurring in the judgment).
95. *Id.* at 633.
96. *Id.* at 634–35.
97. *Id.* at 635.
98. *Id.* at 636.
99. 487 U.S. 1, 18–19 (1988) (O'Connor, J., concurring).
100. *Id.* at 13 (majority opinion).
101. *Id.* at 20 (O'Connor, J., concurring).
102. James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 466 (2015); *see, e.g.*, IDK, Inc. v. County of Clark, 836 F.2d 1185, 1195 (9th Cir. 1988) (holding that escort services are primarily commercial associations and therefore are not entitled to First Amendment freedom of association rights); Storer Cable Commc'ns v. City of Montgomery, 806 F. Supp. 1518, 1560–62 (M.D. Ala. 1992) (holding cable television ordinances

America v. Dale that the Supreme Court implicitly adopted the commercial–expressive distinction.[103]

B. *The First Amendment Trumps Antidiscrimination Laws*

The Supreme Court first held that an antidiscrimination law violated the First Amendment and was unconstitutional as applied in the 1995 case *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.[104] *Hurley* involved a gay rights organization, Irish-American Gay, Lesbian and Bisexual Group ("GLIB"), that argued that the Massachusetts public accommodation law protected its right to march in Boston's St. Patrick's Day Parade under its own banner.[105] The organizers of the parade, meanwhile, claimed a First Amendment right to exclude GLIB from marching since their inclusion would convey a message that the parade organizers did not support.[106]

In a unanimous opinion, Justice Souter held that the parade had the right to exclude GLIB, based on both the expressive nature of the parade and GLIB's express purpose of marching under its banner "to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants. . . ."[107] Justice Souter emphasized that "under the First Amendment . . . a speaker has the autonomy to choose the content of his own message."[108] In reaching this conclusion, he did not apply the compelling interest test despite the fact it had been relied on by both the trial court and the GLIB brief.[109] Justice Souter also distinguished *Roberts*, explaining that the inclusion of women in that case did not involve changing the message of the Jaycees.[110]

Five years later, in *Boy Scouts of America v. Dale*, the Supreme Court relied on its reasoning in *Hurley* in holding that the Boy

did not violate the First Amendment right to association as applied to commercial businesses).

103. Nelson, *supra* note 102, at 466; *see also* Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 MINN. L. REV. 1639, 1665–66 (2001) (discussing the commercial–expressive distinction after *Dale*).

104. 515 U.S. 557, 578–79 (1995).

105. *Id.* at 561.

106. *Id.* at 563.

107. *Id.* at 570, 572–73.

108. *Id.* at 573.

109. Bernstein, *supra* note 83, at 118.

110. *Id.*; *see Hurley*, 515 U.S. at 580.

Scouts could not be required to provide membership to a gay scoutmaster.[111] The Boy Scouts had challenged the constitutionality of New Jersey's public accommodation law which prohibited discrimination based on sexual orientation.[112] At the time, the Boy Scouts taught that "homosexual conduct is not morally straight."[113] In a 5–4 decision, Justice Rehnquist determined that "the Boy Scouts is an *expressive association* and that the forced inclusion of Dale would significantly affect its expression. . . ."[114] In holding for the Boy Scouts, Justice Rehnquist explained, "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[115] Rehnquist distinguished *Roberts*, determining that the forced inclusion of women did not change the Jaycees' message in that case.[116]

The main dissent in *Dale*, written by Justice Stevens, opined that forcing the Boy Scouts to provide Dale with a leadership position would not interfere with the Boy Scout's message.[117] Justice Stevens distinguished *Hurley*, explaining that simply joining the Boy Scouts is not on its own symbolic speech.[118] According to Stevens, Dale's participation sent "no cognizable message to the Scouts or to the world. Unlike GLIB, Dale did not carry a banner or a sign . . . and he expressed no intent to send any message."[119]

The *Dale* majority implicitly relied on the commercial–expressive distinction, articulated by Justice O'Connor in both *Roberts* and *New York*.[120] The Court explained that the Boy Scouts had a First Amendment right to be exempt from New Jersey's public accommodation law because they were an expressive association.[121] Additionally, Justice O'Connor's vote was needed for *Dale*'s 5–4

111. 530 U.S. 640, 653–56 (2000).
112. *Id.* at 645, 647.
113. *Id.* at 651.
114. *Id.* at 656 (emphasis added).
115. *Id.* at 653.
116. *Id.* at 657–58.
117. *Id.* at 664–65 (Stevens, J., dissenting).
118. *Id.* at 693–95.
119. *Id.* at 694–95.
120. Bernstein, *supra* note 83, at 126–27.
121. *Dale*, 530 U.S. at 656. Some commentators have argued that the Court did not explicitly rely on this distinction. *See, e.g.*, Bagenstos, *supra* note 78, at 1231 ("nothing in the Court's analysis turned on the law's application to a noncommercial entity").

majority, and there was no indication she had changed her position distinguishing between expressive and commercial associations.

After *Dale*, lower courts regularly applied the commercial–expressive distinction in determining that commercial associations did not have a First Amendment right to freedom of association.[122] For example, relying on this dichotomy, the Third Circuit held that the owner of a fraudulent tax business did not have a First Amendment right to freedom of association and could be compelled to provide a list of its customers to the government.[123] Likewise, courts have rejected freedom of association claims by a parking management company[124] and a nightclub.[125]

Similarly, a number of legal commentators have relied on Justice O'Connor's distinction in articulating why *Dale* does not generally threaten antidiscrimination laws. For example, Seana Shiffrin argues that, for purposes of the First Amendment right to freedom of association, there is "an important distinction between social associations and business associations . . . that significantly operate as parts of the competitive economy."[126] Likewise, Dale Carpenter asserts that this commercial–expressive distinction "preserves valuable associational freedom while saving antidiscrimination law from constitutional invalidation in the areas where equality guarantees are most critically needed."[127]

Yet other commentators believe that this distinction is both elusive as well as unfair.[128] These critics contend that the distinction is not meaningful since it is often extremely difficult to determine if an association is primarily expressive or commercial.[129] Many, if not most, associations involve different types of activities. Justice O'Connor somewhat conceded this issue in *Roberts*, explaining that

122. Nelson, *supra* note 102, at 467–68.

123. United States v. Bell, 414 F.3d 474, 485 (3d Cir. 2005).

124. Int'l Parking Mgmt., Inc. v. Padilla, 634 F. Supp. 2d 174 (D.P.R. 2007).

125. Rittenhouse Entm't, Inc. v. City of Wilkes-Barre, 861 F. Supp. 2d 470 (M.D. Pa. 2012).

126. Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 876 (2005).

127. Carpenter, *supra* note 78, at 1518*; see also* Nelson, *supra* note 102, at 467–68 (defending associational asymmetry from the perspective of identity formation).

128. Nelson, *supra* note 102, at 462–63.

129. John D. Inazu, *Factions for the Rest of Us*, 89 WASH. U. L. REV. 1435, 1450–54 (2012) (opining that it is impossible to distinguish between commercial and expressive associations); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 812 (2001) (explaining that commercial associations regularly engage in expression).

"[d]etermining whether an association's activity is predominantly protected expression will often be difficult, if only because a broad range of activities can be expressive."[130] Yet she also articulated how this distinction could work and that ultimately an "association must choose its market."[131]

In addition to being elusive, commentators have also maintained that the commercial–expressive distinction is fundamentally unfair, and that even if a line could be drawn between the two types of associations, there is no valid policy reason for doing so.[132] As one legal commentator explained, "If commercial organizations are just voluntary associations in which people join together to achieve goals that they could not attain on their own, and if activity in those associations is important to people both instrumentally and intrinsically, why are they still disfavored as a matter of constitutional law?"[133] As will be explained in the next section, courts are beginning to rely on some of these arguments and in recent years have been more likely to hold that the First Amendment protects commercial businesses from the full scope of antidiscrimination legislation. This evolution could have profound implications regarding the tension between free expression and the public policy objective of eradicating discrimination in the conduct of business, a conflict that might well be embodied by the issues arising from anti-BDS legislation.

130. Roberts v. U.S. Jaycees, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring in part and concurring in the judgment).

131. *Id.*; *see also supra* notes 94–98 and accompanying text.

132. Nelson, *supra* note 102, at 472–73.

133. *Id.* at 475; *see also* Bagenstos, *supra* note 78, at 1232 ("The more strongly one believes in the value of free association, the more likely one is to think that an exemption from the anti-discrimination principle for even some classes of commercial business is tolerable."); Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 120 (2000) (arguing that commercial associations, as well as expressive associations, are entitled to freedom of association protection); Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1241 (2014) (arguing that all groups should be entitled to the First Amendment protection of freedom of association); Robert K. Vischer, *How Necessary is the Right of Assembly?*, 89 WASH. U. L. REV. 1403, 1412–15 (2012) (opining that there are at least some commercial associations that are as deserving of constitutional protection as expressive associations).

C. *Cases Challenging the Commercial–Expressive Distinction*

In recent years, various cases have arisen challenging the commercial–expressive distinction and supporting more robust expressive rights for commercial entities that claim antidiscrimination laws violate their religious or First Amendment rights.[134] One group of cases, including the Supreme Court's decision in *Masterpiece Cakeshop*, involve private businesses that refuse to provide services, which they claim are expressive, to same-sex couples.[135] The second set of cases, which include *Hobby Lobby*, involve for-profit corporations claiming that the Affordable Care Act's "contraception mandate" violates the right to the free exercise of religion.[136] This related issue is premised on the principle that commercial entities have robust expressive rights.[137]

In *Masterpiece Cakeshop*, the Supreme Court ruled in favor of a Colorado baker who refused to design and bake a cake for a same-sex couple's wedding celebration based on his religious objections to gay marriage.[138] The couple claimed that the baker's refusal to make the cake violated the Colorado Antidiscrimination Act which prohibits discrimination based on a number of protected categories, including sexual orientation.[139] Writing for the majority, Justice Kennedy, in a narrow decision, determined that the Colorado agency that had ruled against the baker violated the Free Exercise Clause by showing hostility to religion.[140] While one of the baker's central arguments was that Colorado could not compel him to bake a cake since doing so would violate his First Amendment right to freedom of expression, the majority limited its decision to the Free Exercise Clause and did not rule on this issue.[141]

However, this case illustrates a recent legal development whereby private for-profit businesses argue that their goods and services are inherently expressive, and they therefore have a First Amendment defense to generally applicable antidiscrimination

134. Bagenstos, *supra* note 78, at 1205.

135. *Id.* at 1232; *see* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

136. Bagenstos, *supra* note 78, at 1233; *see* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

137. Bagenstos, *supra* note 78, at 1237–38.

138. *Masterpiece Cakeshop*, 138 S. Ct. at 1723–24.

139. *Id.* at 1723.

140. *Id.* at 1724.

141. *Id.* at 1723–24.

laws. Further, while Justice Kennedy did not rule on the free speech issue, he recognized that private commercial businesses might have a First Amendment right to be free from antidiscrimination laws, explaining that

> [t]he free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.[142]

In the aftermath of *Masterpiece Cakeshop*, a number of lower courts have addressed the issue of whether commercial for-profit businesses providing services they claim are expressive have a First Amendment defense to antidiscrimination laws. These cases have involved a florist,[143] a wedding video company,[144] and a website designer[145] who were opposed to providing services for same-sex weddings. These cases all represent an effort to chip away at the commercial–expressive distinction and present a First Amendment defense to antidiscrimination legislation.

Second, there have been challenges by for-profit corporations to the Affordable Care Act's contraception mandate, including the Supreme Court's decision in *Hobby Lobby*.[146] In that case, the shareholders of a large family-owned corporation petitioned to be excused from paying for health insurance for the business's employees that would include the provision of certain kinds of birth control.[147] The family argued that forcing them to do so would violate their free exercise of religion under the federal Religious Freedom Restoration Act because the family believed that the use of such birth control was a form of abortion and was, therefore, immoral.[148] By upholding the right of the members of the family to

142. *Id.* at 1723.

143. State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019) (holding that a flower shop owner did not have a First Amendment free association right to refuse to sell custom floral arrangements for a same-sex wedding in violation of Washington's Consumer Protection Act).

144. Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019) (holding that videographers had a First Amendment right to refuse to make videos for same-sex weddings).

145. 303 Creative LLC v. Elenis, 385 F. Supp. 3d 1147 (D. Colo. 2019) (holding that the business owner did not have a First Amendment right to discriminate in violation of the Colorado statute).

146. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

147. *Id.* at 688–91.

148. *Id.*

run their business consistent with their religious beliefs, the Court broke new ground in recognizing that certain fundamental rights extend to people in the conduct of their commercial enterprises.[149]

Hobby Lobby differs from the other cases discussed in this section since it relies primarily on the Religious Freedom Restoration Act and not on the First Amendment. Yet the reasoning of *Hobby Lobby* only applies if there is no commercial–expressive distinction. As one commentator explained, "A crucial premise . . . is that secular, for-profit corporations can be a vehicle for the religious exercise of their shareholders and that regulation of those corporations can thus violate rights to free exercise of religion. For the mandate's challengers to prevail, then, there must be no commercial–expressive distinction. . . ."[150]

This Part has traced the history of the Supreme Court jurisprudence involving the conflict between antidiscrimination legislation and the First Amendment right to freedom of association. Until *Hurley* and *Dale*, the Supreme Court was reluctant to hold that antidiscrimination laws violated the First Amendment right to freedom of association. In the aftermath of *Hurley* and *Dale*, lower courts began to distinguish between primarily commercial and primarily expressive associations, with only the latter entitled to robust First Amendment protection from antidiscrimination legislation. Yet in recent years, cases have begun to undermine this distinction, and there is now an increasing likelihood that antidiscrimination statutes will be found to violate the First Amendment. The next Part will examine how arguments advocated by opponents of the anti-BDS legislation fit into this framework.

III. BDS LEGISLATION AND THE COMMERCIAL–EXPRESSIVE DISTINCTION

This Part will examine how First Amendment challenges to anti-BDS legislation could further erode the commercial–expressive distinction and limit the impact of antidiscrimination laws. As explained in Part I, a number of commercial businesses have challenged anti-BDS legislation as violating their First Amendment

149. Rosenberg, *supra* note 35, at 315–16. In July 2020, the Supreme Court allowed an extension of the kind of exemption granted to Hobby Lobby to include any employer with a "sincerely held religious or moral objection" to the use of certain kinds of birth control. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020).

150. Bagenstos, *supra* note 78, at 1238.

rights. Essentially, these plaintiffs argue that commercial entities have a First Amendment right to choose with whom they will associate and with whom they will do business. These decisions have relied heavily on the Supreme Court case law involving the First Amendment and political boycotts and have not focused on the commercial–expressive distinction. Yet as this Part will explain, any holding that anti-BDS legislation is unconstitutional further limits the commercial–expressive distinction and increases the likelihood that antidiscrimination legislation will more generally be found to violate the First Amendment.

A. *Anti-BDS Laws as Antidiscrimination Laws*

While the various state anti-BDS laws differ somewhat from each other, these statutes essentially mandate that state contractors certify they will not boycott either Israel or others who do business with Israel.[151] It is important to recognize that these statutes only target commercial dealings and not advocacy. Businesses clearly have a First Amendment right to speak out for a boycott, and any attempt to limit peaceful calls for a boycott would be unconstitutional.[152] Further, these statutes do not target what individuals can do in their private capacity; as private consumers, business owners retain the right to participate in any boycott that they choose.[153]

While these statutes are referred to as anti-boycott statutes, they are in many ways analytically the same as antidiscrimination statutes since a boycott quite simply is a refusal to deal with someone.[154] For example, while anti-BDS laws sanction businesses that engage in discrimination against Israel and those who do business with Israel, the statute at issue in *Masterpiece Cakeshop* sanctions businesses that engage in discrimination against people based on

151. *See supra* section I.B.

152. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982).

153. It can be confusing to determine whether a sole proprietor is engaging in a boycott in her private capacity or business capacity, for example, if a sole proprietor refuses to buy an Israeli-made computer which she uses for both work and personal business. Recognizing this, Kansas, Texas, and Arizona have amended their anti-BDS statutes so that they no longer apply to sole proprietors. *See supra* notes 27–67 and accompanying text.

154. *See* David Bernstein, *Everything You Wanted to Know About Anti-BDS Laws, Part I*, VOLOKH CONSPIRACY (Feb. 18, 2019), https://reason.com/2019/02/18/everything-you-wanted-to-know-about-anti/ [https://perma.cc/8MFZ-UEDN].

their sexual orientation.[155] Similarly, federal antidiscrimination laws prohibit discrimination based on protected categories, including race and sex, and Supreme Court precedent has made it clear that businesses covered by federal law cannot refuse to deal with African American customers[156] or refuse to promote female attorneys.[157] As one legal commentator explained, if businesses discriminated based on race or sexual orientation and then argued they were "'exercising [their] freedom of association to refuse to deal with . . . contractors owned by African Americans, or '[they were] boycotting contractors owned by homosexuals to protest same-sex marriage' they would be laughed out of court."[158]

Opponents of anti-BDS legislation have not relied on Supreme Court jurisprudence involving First Amendment challenges to antidiscrimination legislation, but instead have relied on *Claiborne v. NAACP*.[159] While *Claiborne* held that advocacy of a boycott is constitutionally protected, it is unclear whether this protection extends to the actual boycott, the economic action itself, or whether it only covers advocacy of a boycott. Opponents of anti-BDS legislation read *Claiborne* broadly and argue that its reasoning applies not only to the advocacy of the boycott, but also to a commercial business's actual boycott or refusal to deal.[160] In applying *Claiborne*'s reasoning to commercial businesses, they are ignoring the commercial–expressive distinction and advocating for robust First Amendment rights for the for-profit sector.[161] If opponents of anti-BDS legislation prevail and commercial businesses have a First Amendment right to boycott, this could threaten the validity of most antidiscrimination statutes.

Interestingly, some vocal opponents of anti-BDS legislation have vigorously supported other types of antidiscrimination legislation against similar First Amendment challenges.[162] For example, the

155. The Colorado Anti-Discrimination Act prohibited discrimination based on the following protected categories: "disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry." COLO. REV. STAT. § 24-34-601(2)(a).

156. Newman v. Piggie Park Enters., 390 U.S. 400, 400–01 (1968).

157. Hishon v. King & Spalding, 467 U.S. 69, 78 (1984).

158. *See* Bernstein, *supra* note 154.

159. *See supra* section I.C.

160. *Id.*

161. This was evident in *Koontz*, where the district court ignored the commercial–expressive distinction determining that boycotts, like parades, have an expressive quality. *See supra* notes 27–35 and accompanying text.

162. *See, e.g.*, Eugene Kontorovich, Opinion, *For the ACLU, Antipathy to Israel Trumps Antidiscrimination*, WALL ST. J. (Feb. 11, 2019), https://www.wsj.com/articles/for-the-aclu-a

ACLU was on the side of the gay couple in *Masterpiece Cakeshop*.[163] These same opponents of anti-BDS legislation have attempted to distinguish anti-BDS laws from other antidiscrimination legislation. Yet, as the next section explains, none of these distinctions quite work. Therefore, if these opponents of anti-BDS legislation are successful, the impact will be to further limit the scope of antidiscrimination laws.

B. *Attempting to Distinguish Anti-BDS Laws from Traditional Antidiscrimination Laws*

Opponents of anti-BDS legislation argue that the legislation differs substantively from traditional antidiscrimination laws in a number of important ways.[164] They claim that ordinary antidiscrimination laws protect broad categories of people—for example prohibiting discrimination based on race, religion, or sex—while anti-BDS legislation focuses specifically on Israel and those who do business with Israel. Therefore, they contend that this legislation is illegal content or viewpoint discrimination. Additionally, they argue that unlike with other forms of discrimination, there is no compelling or even valid government interest in prohibiting discrimination against Israel and those who do business with Israel. This section will address these claims, explaining how none of the distinctions are persuasive.

Opponents often argue that antidiscrimination statutes are distinguishable from anti-BDS legislation since these traditional statutes generally regulate economic behavior and apply to broad classes of people with the goal of providing equality of opportunity.[165] This is often, but not always, true. For example, Title VII of the 1964 Civil Rights Act prohibits employment discrimination based on "race, color, religion, sex or national origin."[166] Under Title VII it is illegal to discriminate against, or boycott, both Muslims and

ntipathy-to-israel-trumps-antidiscrimination-11549928620 [https://perma.cc/72X5-EXHK].

163. *See supra* notes 138–42 and accompanying text; *see also* James Esseks, *Reading the Tea Leaves from the Supreme Court's Cakeshop Argument*, ACLU (Dec. 5, 2017), https://www.aclu.org/blog/lgbt-rights/lgbt-nondiscrimination-protections/reading-tea-leaves-supreme-courts-cakeshop [https://perma.cc/4QC7-7MBE].

164. *See, e.g.*, Amanda Shanor, *Laws Aimed at Silencing Political Boycotts of Israel are Categorically Different than Public Accommodation Laws*, BALKANIZATION (Feb. 20, 2019), https://balkin.blogspot.com/2019/02/laws-aimed-at-silencing-political.html [https://perma.cc/9KQL-48QJ]

165. *See id.*

166. 42 U.S.C. § 2000e.

Jews, both African Americans and Asian Americans, and both men and women.[167] Similarly, Title II of the 1964 Civil Rights Act prohibits discrimination in public accommodation based on "race, color, religion, or national origin."[168] As with Title VII, it applies to broad groups of people.

Yet there are also numerous examples of antidiscrimination statutes that regulate economic behavior but do not apply to broad classes of individuals. For example, the Age Discrimination in Employment Act ("ADEA") prohibits discrimination against employees who are forty or older.[169] It therefore does not apply to employees regardless of age, but only prohibits discrimination against employees of specific ages. Regardless of the term used, it is *legal* under ADEA to "boycott" or "refuse to deal with" or "discriminate" against employees who are less than forty years of age. Various state laws are even narrower in that they have both upper and lower age limits on discrimination. For example, in Indiana it is only illegal to discriminate against or boycott employees between the ages of forty and seventy-five[170] and in Missouri it is only illegal to discriminate against or boycott employees between the ages of forty and seventy.[171]

The same is true of statutes that prohibit disability discrimination in employment. While the Americans with Disabilities Act protects a broad class of individuals since it applies to "qualified individual[s] with a disability,"[172] many state statutes protect employees with very specific medical conditions. For example, Vermont explicitly protects individuals who are HIV positive from employment discrimination,[173] North Carolina specifically protects employees from discrimination based on sickle cell trait and hemoglobin C trait,[174] and Washington explicitly protects employees with positive HIV or Hepatitis C tests from discrimination.[175] These state statutes do not protect a broad class of individuals and

167. The term "sex" also covers discrimination based on sexual orientation or transgender status. *See* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

168. 42 U.S.C. § 2000a.

169. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, 623, 631.

170. IND. CODE §§ 22-9-2-1 to -3.

171. Missouri Human Rights Act, MO. REV. STAT. § 213.010, .055.

172. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112.

173. VT. STAT. tit. 21, § 495.

174. N.C. GEN. STAT. § 95-28.1.

175. WASH. REV. CODE §§ 49.60.172–.174.

thus permit employers to "boycott," "refuse to deal with," or "discriminate" against individuals with some medical conditions but not others. Therefore, while many antidiscrimination statutes do apply to broad categories of individuals, it is inaccurate to state that all do or that broad application is always required for an antidiscrimination statute to pass constitutional muster.

A related distinction made by opponents of anti-BDS legislation is that these statutes represent an impermissible content-based restriction since those opposed to BDS are singled out because of their political positions.[176] As one commentator argued, traditional antidiscrimination laws "don't care why someone refuses service—as part of a political movement, out of animus, due to fear of losing customers, or for no reason at all."[177] The problem with this argument is that it inaccurately presumes that all boycotters are doing so to express a viewpoint.

Clearly some boycotters are participating to express opposition to Israeli policies, but many others have non-expressive reasons for participating in the boycott. As one commentator explained, "Companies may boycott Israel to curry favor with Arab states or out of mere anti-Semitism. They may hope to avoid harassment from the BDS movement or simply cave in to pressure from Palestinian groups."[178] Perhaps the lack of viewpoint discrimination is most evident in the case of Airbnb, which initially announced it would not list rentals in the Israeli West Bank but reversed its position in response to a number of lawsuits.[179] Airbnb announced that its initial decision to participate had been entirely apolitical,[180] and that it was opposed to boycotts of Israel.[181]

Similarly, legislators may have a politically neutral interest in passing anti-BDS legislation. States have a valid interest in man-

176. *See, e.g.*, Lawton, *supra* note 11, at 666 (noting that anti-BDS laws are content-based by "singling out only *politically motivated* refusals to do business" with Israel); Shanor, *supra* note 164.

177. Shanor, *supra* note 164.

178. Kontorovich, *supra* note 162.

179. Note, *Wielding Antidiscrimination Law to Suppress the Movement for Palestinian Rights*, 133 HARV. L. REV. 1360, 1366 (2020).

180. *See* Kontorovich, *supra* note 162.

181. "Airbnb has always opposed the BDS movement. Airbnb has never boycotted Israel, Israeli businesses, or the more than 20,000 Israeli hosts who are active on the Airbnb platform." *Update on Listings in Disputed Regions*, AIRBNB NEWS (Apr. 9, 2019), https://news.airbnb.com/update-listings-disputed-regions [https://perma.cc/LY5C-8PU6].

dating that contractors buy the best and least costly goods, regardless of the country in which they are manufactured. If the best available software is made by an Israeli company, a state has a valid non-ideological reason for wanting its contractors to buy that software. Further, at least one commentator has argued that anti-BDS legislation is content-based since it singles out only Israel and does not apply to firms refusing to do business with any other country.[182] However, this ignores the reality that trade laws regularly treat commercial dealings with various countries differently without implicating freedom of speech.[183]

Finally, opponents of BDS legislation argue that these statutes are substantively different from traditional antidiscrimination statutes since they address no compelling interest[184] or even a "legitimate antidiscrimination interest in suppressing BDS activity."[185] Yet it is unclear why all the numerous protected categories in various antidiscrimination laws are somehow objectively more worthy of protection. For example, a number of states explicitly prohibit discrimination against smokers,[186] and Connecticut prohibits discrimination against medical marijuana users[187] despite the fact that marijuana is illegal under federal law.[188] New York currently prohibits discrimination based on thirteen protected categories.[189] Clearly, state legislators have significant discretion in determining who businesses should be prohibited from "boycotting" or "discriminating against."

Additionally, traditional antidiscrimination laws are regularly extended to protect categories closely connected to traditionally protected groups. For example, when sexual orientation is the protected category, courts have prohibited discrimination against same-sex weddings, since these events are closely associated with

182. Shanor, *supra* note 164.

183. *See* Michael C. Dorf, *Anti-BDS Laws, Anti-Discrimination Laws, Subjective Legislative Intent, and the First Amendment*, DORF ON LAW (Feb. 25, 2019), http://www.dorfonlaw.org/2019/02/anti-bds-laws-anti-discrimination-laws.html [https://perma.cc/29ME-E2WR].

184. Shanor, *supra* note 164.

185. *See* Note, *supra* note 179, at 1369–70.

186. *See, e.g.*, CONN. GEN. STAT. § 31-40s; IND. CODE § 22-5-4-1; R.I. GEN. LAWS § 23-20.10-14; N.Y. EXEC. LAW § 292.

187. Palliative Use of Marijuana Act (PUMA), CONN. GEN. STAT. § 21a-408p.

188. Controlled Substances Act, 21 U.S.C. §§ 801, 812.

189. N.Y. EXEC. LAW §§ 292, 296.

gay and lesbian people.[190] While race is a traditional protected category, New York has extended this by defining race as "traits historically associated with race, including but not limited to, hair texture and protective hairstyles."[191] Similarly, discrimination against Israel is closely associated with Jews since Israel is the only Jewish-majority country in the world, and the BDS movement began at an extraordinarily anti-Semitic conference.[192] Sixty-nine percent of American Jews say they are either very emotionally attached (thirty percent) or somewhat emotionally attached (thirty-nine percent) to Israel.[193] These statutes also prohibit boycotts against those who do business with Israel, which would include the forty-three percent of American Jews who have gone to Israel.[194]

As this Part has explained, anti-BDS legislation cannot be fully distinguished from other types of antidiscrimination laws that apply to the commercial sector. If opponents of anti-BDS legislation are successful, they may ultimately limit the scope of antidiscrimination laws in the commercial sector—laws which these opponents, such as the ACLU, support. The previous Part explained that there are already trends undermining the commercial–expressive distinction and providing commercial businesses with additional First Amendment defenses to antidiscrimination statutes. Opponents of anti-BDS legislation are furthering these trends and the end result may be to weaken antidiscrimination laws.

CONCLUSION

Opponents of anti-BDS legislation have advocated for a position that is likely to undermine antidiscrimination norms that some of these opponents, such as the ACLU, have supported for decades. As this Article has explained, the Supreme Court historically resolved conflicts between antidiscrimination laws and the constitutional rights of freedom of association and expression with deference to enforcement of such laws in the commercial context.

190. Telescope Media Grp. v. Lucero, 936 F.3d 740 (2019) (holding videographers had a First Amendment right to refuse to make videos for same-sex weddings); *see also* Dorf, *supra* note 183.

191. N.Y. EXEC. LAW § 292.

192. *See* Traum, *supra* note 7, at 1029.

193. *A Portrait of Jewish Americans, Chapter 5: Connection with and Attitudes Towards Israel*, PEW RES. CTR. (Oct. 1, 2013), https://www.pewforum.org/2013/10/01/chapter-5-connection-with-and-attitudes-towards-israel/ [https://perma.cc/C32A-5QK4].

194. *Id.*; *see also* Dorf, *supra* note 183.

However, in recent years, numerous cases have been brought challenging the commercial–expressive distinction and supporting more robust expressive rights for commercial entities, including those who claim that antidiscrimination laws are unconstitutional. If opponents of anti-BDS legislation are successful and the legislation is found to violate the First Amendment, this will further limit the commercial–expressive distinction and increase the likelihood that courts will find antidiscrimination laws more generally to be unconstitutional.