CONFUSION IN THE MARKETPLACE:[1] ANTI-BDS LAWS AND FREE SPEECH PRINCIPLES

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[1] The Hold Steady, Confusion In the Marketplace (Frenchkiss Records, 2019). This is merely a title reference to a song that helped me stay positive throughout the writing of this Note, and bears no substantive relation to the content herein.

I. INTRODUCTION

The Boycott, Divest, Sanctions movement[2] ("BDS") is an activist campaign that, depending on who you ask is either an anti-Semitic attempt at destabilizing the State of Israel,[3] or a benign attempt to vindicate the human rights of Palestinians,[4] can inflame the passions of even the most detached and impartial legal debate.[5] It's not hard to see why, and certainly the concerns that animate either position on the issue stem from places of good faith. This Note will not pass upon the legitimacy of those arguments one way or another and instead seeks to understand how the Supreme Court might resolve the question of when we protect things that we *don't* do or say under the First Amendment – the near-infinite array of things people refrain from doing, consciously or subconsciously, at any given moment are just mere coincidence. In examining the constitutional status of state anti-BDS legislation,[6] this Note will delve into the fracturing consensus surrounding the protections afforded boycott actions, framed in the broader context of First Amendment history and precedent, through an analysis of contemporary lower-court anti-BDS-law litigation and a particular eye towards the two main, seemingly contradictory precedential cases that might govern the issue.[7] These two cases, *NAACP v. Claiborne Hardware Company*, and *Rumsfeld v. Forum for Academic and Institutional Rights* (*FAIR*) will have been seen recurring throughout lower court litigation

[2] *What Is BDS?,* BDS MOVEMENT, https://bdsmovement.net/what-is-bds, (last visited Jan. 23, 2021).

[3] 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, 6 n.17 (2018).

[4] *See* BDS MOVEMENT, *supra* note 2.

[5] Greendorfer, *supra* note 3, at 92-93 (Comparing BDS movement ideology to statements of Osama Bin Laden).

[6] *Anti-Semitism: State Anti-BDS Legislation,* JEWISH VIRTUAL LIBRARY https://www.jewishvirtuallibrary.org/anti-bds-legislation (last visited Jan. 23, 2021).

[7] *See*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982). *See also* Rumsfeld v. Forum for Academic & Institutional Rights, Inc. 547 U.S. 47 (2006).

concerning anti-BDS laws, and will almost certainly be considered as central in any potential Supreme Court ruling on such legislation. *Claiborne* was a case arising from Civil Rights Era activism, which supporters of BDS point to for the proposition that boycotts are constitutionally protected speech activity. In *Claiborne*, a robust range of protest activities undertaken, including a boycott, were at issue.[8] With the Supreme Court bringing boycotts in under the aegis of free speech protections alongside the rest of the activism involved in the case, arguments against BDS restrictions tend to turn toward *Claiborne* for reinforcement of their claim. On the other side of the debate is the usage of *FAIR*, where a law school's policy of barring military recruiters from campus, and the subsequent withholding of federal funds, was held not to be protected under the First Amendment. In *FAIR*, the decision to withhold military recruiters' access to campus was considered non-expressive by its nature unless elaborated upon via accompanying speech. While *Claiborne* would cut towards the constitutional protection of BDS activities, *FAIR* is typically deployed as a counter to the argument that boycotting is expressive activity afforded First Amendment shielding at all.

The question, on the terms of the argument as it has been occurring, is whether to expand the protection of boycotts per *Claiborne* or instead to reduce boycotting activity to simple decision-making regarding non-purchases. Although some anti-BDS law proponents might hope to narrow the scope of *Claiborne* in making their case, the bedrock of the argument tends to come from *FAIR*, where some kind of accompanying, explanatory speech elaborating upon the *reason* for not allowing military recruiters on campus was the magic ingredient for creating speech-like conduct. The manner in which these cases have been treated at the lower level will surely impact the way the Supreme Court may one day rule on anti-BDS laws, and are worth close attention as such.

Beyond that however, there are external pressures bearing down on the controversy as well, with the conflict brewing over the constitutional status of boycotts: our historical understanding of free speech in the United States as borne predominantly of Justice Oliver Wendell Holmes, Jr.'s marketplace metaphor. Taking into consideration the foundational ideas of speech, the cases that have staked out where First Amendment jurisprudence has either hit the mark or gone awry, and understanding the terms of the theoretical debate taking place will be essential to understanding that the tension between *Claiborne* and *FAIR* is only the tip of the iceberg. The implications of the main roads the nine Justices might traverse, seen through the lens of a century's-worth of First Amendment

[8] *See generally Claiborne*, 486 U.S. 886.

tradition, make it clear that any affirmation of anti-BDS legislation as constitutional would be a major rejection of deep-seeded free speech values fundamental to American law.

Part II of this Note will frame the problem facing the Supreme Court when it inevitably considers a BDS law case, whether it be *Arkansas Times, LP v. Waldrip*[9] or another case treating the issues at stake, by looking at the primary conflicts presented both in that case and in other BDS law cases, as well as a short review of basic free speech principles. Part III will look back to the early 20th century and attempt to trace, in broad strokes, the development of First Amendment law and theory as it has led us to the present-day impasse over how to adjudicate the constitutionality of BDS laws. Part IV will then apply the frameworks drawn out in Part III to *Claiborne* and *FAIR*, in an attempt to resolve the question of BDS laws' constitutionality. A brief conclusion will follow.

II. THE BDS CASE DEBATE

A. Koontz v. Watson[10]

1. Facts

The first BDS case worth considering in piecing together the current standstill the lower courts will constantly find themselves in as they await guidance from the Supreme Court is *Koontz v. Watson*, a case where a school teacher sought declaratory and injunctive relief, asking for the court to enjoin the enforcement of a Kansas law requiring anyone entering into a contract with the State to certify that they are not engaged in a boycott of Israel.[11] The plaintiff, Esther Koontz, brought suit on both First Amendment and Fourteenth Amendment equal protection grounds, after she was declined a job working with the Kansas State Department of Education training teachers due to her refusal to sign the certification.[12] Kansas's anti-BDS statute,[13] was passed in 2017 amidst statements by legislators during debate that the purpose of the bill was to oppose the BDS movement and limit public antagonism towards the State of Israel, with whom Kansas has a substantial import/export relationship with.[14] The Kansas statute is notable in its language; its first clause singles out those who adhere to calls

[9] *See* Arkansas Times LP v. Waldrip, 362 F.Supp.3d 617 (E.D. Ark. 2019). *See also* Arkansas Times LP v. Waldrip, No. 19-1378, 2021 WL 520658 (8th Cir. Feb. 12, 2021).

[10] Koontz v. Watson, 283 F.Supp.3d 1007 (D. Kansas, 2018).

[11] *Id.*, at 1012.

[12] *Id.*, at 1013-1014.

[13] KAN. STAT. ANN. § 75–3740(e)-(g) (2018).

[14] *Koontz*, 283 F.Supp.3d at 1013.

for boycotts of Israel, while the second clause more generally prohibits discrimination on the basis of nationality, national origin, or religion, although both are rooted in a generalized prohibition of "[e]ngaging in a refusal to deal, terminating business activities or performing other actions that are intended to limit commercial relations with persons or entities doing business in Israel or in territories controlled by Israel."[15] Koontz was a member of a Mennonite church, a religious affiliation whose leadership has called on Mennonites to take action regarding violence both Palestinians and Israelis have experienced, specifically by boycotting Israeli businesses or businesses operating in Israeli-occupied Palestine.[16] Koontz began to take part in such a boycott program in May of 2017, and completed her training for employment in the Department of Education on May 31, 2017, with Kansas's anti-BDS law taking effect on July 1 of that year.[17] On July 10 she was asked to sign the law's certification, and on August 9 she responded with her decision to not to do so, at which point she was told that she could not be paid as a state contractor unless she did.[18]

2. Argument/Holding

Before heading into the merits of the case, the Kansas District Court in *Koontz* first examined whether or not the case was worth reviewing in the first place. The court here applied a two-factor test, first considering the ripeness of the case before answering the question of what the hardship to the parties would be if the court withheld considering of the issue.[19] Looking towards Tneth Circuit precedent, the court noted that although typically a two-factor test would be applied, here, because of the facial challenge to a statute on First Amendment grounds, the rubric would instead be based on the hardship to the parties in withholding review, the potential chilling effect the challenged statute might have on First Amendment rights, and the fitness of the controversy for judicial review.[20] Finding each of these factors, as well as mootness analysis, cutting in favor of the plaintiff Koontz,[21] the court then turned to the general framework

[15] KAN. STAT. ANN. § 75–3740(f)(a) (2018).

[16] *Koontz*, 283 F.Supp.3d at 1014.

[17] *Id.*, at 1013.

[18] *Id.*, at 1013.

[19] *Id.*, at 1014-1015.

[20] *Id.*, at 1015.

[21] *Id.*, at 1015-1019. Seeing that the Kansas statute remained at the disposal of the State for use in disqualifying Koontz from a contract, hard ship was found alongside the potential that a prospective contractor would refrain from speaking in light of the statute, the notion that, as a facial First Amendment challenge to a statute law the matter was plainly fit for judicial review, and that the controversy was ripe and not moot despite the potential for a waiver of certification remaining possible, because other applicants for state contracts might not be offered such a waiver.

used for determining whether to grant a preliminary injunction.[22] In its determination that Koontz would be likely to succeed on the merits,[23] the district court made its judgement call largely along the lines of what is sure to be the schism the Supreme Court may well have to one day traverse in evaluating anti-BDS laws: whether *Claiborne* or *FAIR* controlled.[24] The eventual decision, after noting and then evaluating the notion that states cannot retaliate or impose conditions on independent contractors for speech reasons,[25] and beyond its brief discussion of expressive conduct and accommodational speech,[26] was that the defendant's reliance on *FAIR* is "misplaced,"[27] while "the conduct prohibited by the Kansas Law is protected for the same reason as the boycotters' conduct in *Claiborne* was protected."[28] Beyond the substantive speech issues at play, the Kansas District Court, in granting the injunction, determined that the plaintiff would suffer irreparable harm by not receiving the requested relief,[29] that the potential for harm to the state does not outweigh the harm to the plaintiff,[30] and, most notably, that in regards to the public harm at stake in the case, the "desire to prevent discrimination against Israeli businesses is an insufficient public interest to overcome the public's interest in protecting a constitutional right."[31]

3. Commentary

The first important point of analysis in the holding concerns ripeness, a particularly slippery concept in speech, due to particular nature of speech claims. Here, rather than using the typical two-factor test of fitness for judicial review and hardship to the parties of withholding review,[32] the

[22] *Id*., at 1019.

[23] *Id.*, at 1024.

[24] *Id.*, at 1021-1024.

[25] *Id.*, at 1020.

[26] *Id.*, at 1023-1024; *See also* Texas v. Johnson, 491 U.S. 397 (1989) (where the burning of a United States flag was deemed protected by the First Amendment in the context of communicating protest or objection to certain ideas). *See also* Hurley v, Irish-American Gay, Lesbian and Bisexual Group of Bos., 515 U.S. 557 (1995) (where organizers of a Saint Patrick's Day parade could not be forced by law to include LGBTQ+ individuals because doing so would alter the content of an existing expressive associational message). The court here is using two cases that might be considered by some ideologically inapposite as a way of forming a baseline against which to diminish the importance of *FAIR*.

[27] *Koontz*, 283 F.Supp.3d at 1024.

[28] *Id.*, at 1021.

[29] *Id*., at 1026.

[30] *Id.*, at 1027.

[31] *Id.*, at 1027.

[32] *Id*., at 1014-1015 ("Typically, federal courts 'apply a two-factor test to determine whether an issue is ripe.' These factors evaluate the fitness of 'the issue for judicial resolution and the hardship to the parties of withholding judicial consideration.' But when the claim presents a First Amendment facial

court brought in another element, that of the chilling effect.[33] While typically a court would be looking towards something that *has* happened (in other words, some sort of material injury), the consideration is one of what *hasn't* happened.[34] The court, in evaluating the presence of this indirect prevention of speech (as contrasts at least in mechanics from direct, prior restraints), noted that the question is that of vagueness, and that here despite being unable to pin down such a determination, it is enough of an open issue as to constitute a potential chilling effect.[35] A chilling effect, in essence, is the shadow of a prior restraint, although not scrutinized in quite the same fashion, at least not presumptively. The idea is that a law touching on speech creates an environment in which individuals withhold their speech, in essence self-censoring rather than being directly censored by the government.

Vagueness, is of course essential to this concept, because if an individual is uncertain if their speech will be clamped down upon by the state they might very well just opt not to express themselves. The court United States District Court for the District of Kansas went into some detail about the confusion latent in the potential for waivers of certification under the Kansas statute, specifically regarding the phrasing of "if the secretary determines that compliance is not practicable."[36] Because of the ambiguity present in the language of "not practicable," the court held that the Kansas anti-BDS law is at least *arguably* vague, especially in light of various statements made at oral argument by counsel for the state.[37] Here, although

challenge, the 'the ripeness analysis is "relaxed somewhat" . . . because an unconstitutional law may chill speech.') (internal citation omitted). Notable here is the way in which First Amendment claims are considered special in some ways, with an additional factor of analysis taken into consideration. *See generally The Chilling Effect In Constitutional Law*, 69 COLUM. L. REV 808 (1969) (overview of the chilling effect doctrine's underpinnings).

[33] *Koontz,* 283 F.Supp.3d at 1015.

[34] *See generally The Chilling Effect in Constitutional Law*, *supra* note 32. *See also* New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495 (10th Cir. 1995). The *Richardson* case is cited here by the court as utilized in *Kansas Judicial Review v. Stout*, 519 F.3d 1107 (10th Cir. 2008), for the basic doctrinal framework in which to place the theoretical principles of speech chills as far as the direct correspondence between a law and a party refrain from speech activity as a result of that law.

[35] *Koontz*, 283 F.Supp.3d at 1016. The court here is perhaps hedging to some degree, leaving the conclusion of whether there truly was a chilling effect on speech for later while nonetheless finding the situation problematic enough to require some judicial inspection.

[36] *Id*. ("When is compliance "not practicable?" The Kansas Law does not say. Indeed, it provides no guidance about the meaning intended for this important term.").

[37] *Id*. ("But at oral argument, defense counsel described the standard applied to date by Kansas's Secretary of Administration. The Secretary has received, defense counsel represented, a few requests to waive the certification requirement. Some requests were submitted by putative contractors who asserted that they just didn't "want to fill out another government form and deal with the state government to be a contractor." Counsel argued that the Secretary reasonably had determined it was "practicable" for these stubborn applicants to comply with the Kansas Law's certification requirement. Counsel contrasted this kind of contractor with Ms. Koontz. He explained that the plaintiff is "a member of a

the law only *might* be vague, it is enough to say that it's a valid question to ask as it pertains to the potential for a chilling effect.

The court, beyond just ripeness, considered the likelihood of success on the merits by looking towards *Kansas v. Umbehr*, *Perry v. Sindermann*, and *Pickering v. Board of Education of Township High School District 205, Will City, Illinois*, as a way to segue into *Claiborne*,[38] inching open the toolbox of First Amendment protections by pointing plainly to the threshold matter of *Pickering*'s requirement of protected conduct in the first place as being satisfied by *Claiborne*'s holding.[39] Those three cases, taken together, represent the idea that speech is special in its need for insulation from retaliatory conduct as it relates to state employment, especially as it pertains to matters critical to public debate and discourse.

From there, now that the court introduced *Claiborne*, it easily distinguished *FAIR* on theoretical grounds as far how we understand expression in the first place, framing the Supreme Court's holding in *FAIR* as being about the two-way street of communicative conduct.[40] In describing the two cases, the court is made a strong argument for what *Claiborne* is, based on its express terms, and what *FAIR*, is not, along similar lines; the former being a case squarely about boycotts and the latter being one geared more fundamentally towards conditions on state funding. Here we see that even *FAIR* is a double-edged sword, which can be selectively deployed in either opposition to, or defense of, anti-BDS laws. While defenders of anti-BDS laws occasionally attempt a similar trick with *Claiborne*,[41] it is contorted reasoning with little support in *Claiborne*'s text itself.[42] Insofar as there is a tug-o-war tension between *Claiborne* and *FAIR*, it pulls much more strongly towards BDS-protective result.

church, a church [where] there's a religious belief that would oppose doing business with Israel." So, defense counsel asserted, the Secretary of Administration "would grant the waiver when presented with evidence; [but] not [grant a waiver to a contractor who] just [said,] 'I don't want to do it.'.").

[38] *Id*., at 1021. *See* Kansas v. Umbehr, 518 U.S. 668 (1996); Perry v. Sindermann, 408 U.S. 593 (1972); Pickering v. Board of Education of Township High School District 205, Will City, Illinois, 391 U.S. 568 (1968).

[39] *Id*.

[40] *Id*., at 1023-1024 ("Conduct is inherently expressive when someone understands that the conduct is expressing an idea without any spoken or written explanation.").

[41] *See* Marc A. Greendorfer *The Inapplicability Of First Amendment Protections To BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE • NOVO 112 at 116 ("The *Claiborne* ruling was predicated on the boycott being implemented to vindicate rights 'that lie at the heart of the fourteenth Amendment itself . . . to effectuate rights guaranteed by the Constitution itself'") (*citing Claiborne,* 458 U.S. at 914).

[42] *Compare* Greendorfer, *id*., *with Claiborne,* 458 U.S at 913 ("It is not disputed that a major purpose of the boycott in this case was to influence governmental action. Like the railroads in *Noerr*, the petitioners certainly foresaw— and directly intended—that the merchants would sustain economic injury as a result of their campaign. Unlike the railroads in that case, however, the purpose of petitioners' campaign was not to destroy legitimate competition. Petitioners sought to vindicate rights of equality

B. Jordahl v. Brnovich[43]

1. Facts

Chronologically, the next case bringing anti-BDS laws before a federal court for constitutional review is *Jordahl v. Brnovich*,[44] which, although dismissed as moot on appeal[45] nonetheless sheds light on the considerations courts have made when analyzing the alignment of anti-BDS laws with First Amendment jurisprudence, and what further rulings might entail. In *Jordahl*, the statute is not dissimilar to the one in *Koontz*, that is to say, it prohibits public entities from contracting with a company or individual unless that contracting party signs a written certification that they are not engaged in a boycott of Israel, either for reasons of adherence to the generalized call for boycott, or for discriminatory reasons related to nationality, national origin, or religion.[46] Mikkel Jordahl, an attorney in private practice as the sole owner of Jordahl, P.C., ascribed to the BDS movement by boycotting consumer goods and services of companies supporting Israel's occupation of Palestine, stemming from his reception of a peace campaign promoted by the Evangelical Lutheran Church in America.[47] He was also a non-Jewish member of the organization Jewish Voices for Peace, which endorses the BDS movement.[48] Mr. Jordahl's personal preference was that his firm participate in BDS by both boycotting businesses operating in Israeli settlements in Palestine, as well as provide financial and legal resources for Jewish Voices for Peace.[49] His firm, however, also happened to have contracted with the Coconino County Jail

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."). Here, in the full quotation excerpted above, it is unclear where or how the phrasing indicates that the ruling in *Claiborne* was "predicated" on the fundamental character for what was being agitated for. *See also Claiborne*, 458 U.S. at 897 ("The petition included 19 specific demands. It called for the desegregation of all public schools and public facilities, the hiring of black policemen, public improvements in black residential areas, selection of blacks for jury duty, integration of bus stations so that blacks could use all facilities, and an end to verbal abuse by law enforcement officers. It stated that "Negroes are not to be addressed by terms as 'boy,' 'girl,' 'shine,' 'uncle,' or any other offensive term, but as 'Mr.,' 'Mrs.,' or 'Miss,' as is the case with other citizens."). Certainly these particularized demands, which sparked the *Claiborne* boycott, are not strictly guarantees of the Constitution, and yet the Court nonetheless held the boycott meant to actualize these demands protected speech nonetheless.

[43] Jordahl v. Brnovich, 336 F.Supp.3d 1016 (D. Ariz. 2018).

[44] *Id*.

[45] Jordahl v. Brnovich, 789 Fed.Appx. 589 (9th Cir. 2020).

[46] *Jordahl,* 336 F.Supp.3d at 1028.

[47] *Id*.

[48] *Id*.

[49] *Id*.

District for the provision of legal services to incarcerated individuals for the twelve years prior to the passage of Arizona's anti-BDS statute, at which point he was asked to certify on his firm's behalf that the firm was in compliance with the statute and not engaged in any boycotting activities directed towards the State of Israel.[50] With a failure to certify constituting, under the statute, a breach of contract, Jordahl signed the certification under protest and inquired with the county as to whether the certification applied to his personal purchasing decisions, receiving no response.[51] Following his signing of the anti-BDS contract certification, Jordahl turned down providing *pro bono* legal services to Jewish Voices for Peace, and personally opted not to speak out in support of the BDS movement out of fear it would lead to suspicion of prohibited activity under the statute.[52] The next time Jordahl's firm was up for a contract, he refused to sign on behalf of the firm, and although his firm continued to provide representation to incarcerated individuals in the Coconino County Jail, the county did not pay him for those services.[53] He estimated that he would lose roughly 10 percent of his income from the loss of his contract with the county.[54]

2. Argument/Holding

At the district court level, the approach in *Jordahl* was very similar to the way the court in *Koontz* looked at the anti-BDS legislation in that case, with certain slight differences. First, as at the outset the state lodged a substantial defense on the basis of standing, abstention, and certification, the United States District Court for the District of Arizona naturally spent significant time discussing whether their court was even permitted to enter into the controversy between the two parties.[55] After finding that the case was indeed justiciable,[56] the court proceeded to apply the same standard for preliminary injunctions as the one in *Koontz*, with the movant's likelihood of success on the merits, likelihood of irreparable harm in the absence of relief, the weightier position on the balance of equities, and a showing that the injunction is in the public interest being the factors at play.[57] Regarding the first consideration, the court first did away with the defendant state's invocation of *International Longshoremen's Association, AFL-CIO v.*

[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*, at 1029-1038.
[56] *Id.*, at 1038.
[57] *Id.*, at 1038.

Allied International, Inc.,[58] a case where the Supreme Court ruled against a secondary boycott undertaken in protest of the Soviet Union's war in Afghanistan during the 1980s. Flatly holding that the relevance of that case was "overstate[d]"[59] due to its highly specific labor-law context, the court then moved on to *Claiborne* and *FAIR*,[60] and distinguished the former from the latter by pointing out that while surely individual purchasing decisions entail very little First Amendment expression, the collective nature of the boycott made it "deserving of First Amendment protections" under *Claiborne*.[61] With jurisdiction-specific claims being raised that would only potentially be involved in a Supreme Court anti-BDS-law case following,[62] the court then moved on to apply the *Pickering* test regarding the constitutionality of different conditions on government employment, considered the potential for a chilling effect in the area of individual expression as a result of the certification requirement, and examined the question of whether the speech or expressive conduct touched on a matter of public concern, before finding that in all of these areas the plaintiff had met its burdens.[63] Wrapping up the matter by considering the equities of the dispute, the court underscored the seriousness of First Amendment infringements, holding that the harms to the plaintiffs in having their free speech and association rights curtailed were by definition irreparable and that there was no probability of harm as a result of the state being enjoined from enforcing a law that violated the First Amendment on its face.[64] Changes made to the law while the case was pending on appeal rendered the question moot due to the inapplicability of the amended statute to Jordahl's law firm, however, and the Ninth Circuit Court of Appeals vacated and remanded for determination of attorneys' fees.[65]

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[58] Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc., 456 U.S. 212 (1982).

[59] *Jordahl*, 336 F.Supp.3d at 1041.

[60] *Id*., at 1041-1042.

[61] *Id*., at 1042–43.

[62] *See Id*., at 1043. *See also* Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915 (7th Cir. 1984). Depending on what particular appellate court an anti-BDS law case comes up to the Supreme Court from, this case may not become relevant at all further down the line.

[63] *Jordahl*, 336 F.Supp.3d at 1044-1047. Beyond the chilling effects doctrine referenced elsewhere in this Note, the doctrinal aspects of speech during the course of government employment are of note. Citing primarily Lane v. Franks, 573 U.S. 228 (2014), Pickering v. Board of Education of Township High School District 205, Will City, Illinois, 391 U.S. 568 (1968), and Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 518 U.S. 668 (1996) the court goes into detail as far as the retention of First Amendment rights by citizens during government employment without condition, including employment of independent contractors, with consideration then undertaken as to whether the employee was speaking in their professional capacity or as a citizen speaking on matters of public concern.

[64] *Jordahl*, 336 F.Supp.3d at 1050.

[65] *Jordahl,* 789 Fed.Appx. 589 at 591.

3. Commentary

As far as the standing analysis goes, the most pertinent pronouncements from the court would come later, where the prospect of a chilling effect is again raised. What is notable is the careful look at the State's challenge to the plaintiff's injury-in-fact, namely the act of swearing to refrain from "engaging in a broad swatch of boycotting activities, at least *some* which is protected by the First Amendment (emphasis added)."[66] This understanding that not all of the conduct being regulated needs to be protected in order for parts of it to receive First Amendment shielding has a long history in First Amendment analysis,[67] and bears resemblance to the *Claiborne* Court's protection of that controversy's boycott and protest actions despite its condemnation of the violence that accompanied it.[68] What's just as notable is that the court here grounded Jordahl's practical injury in dollars and cents,[69] as contrasted to a more theoretical harm pointed to elsewhere, both in this case and others—the idea that an infringement on fundamental speech rights is itself an injury.[70] By no means shirking the First Amendment's aspirations, when treating the likelihood of success on the merits as in other cases as a factor of consideration regarding injunctive relief,[71] ideas of forced speech and the free exchange of ideas were offered, bearing some resemblance to certain fundamental justifications of speech with deep roots in the common-law speech tradition.[72] Looking later towards *International Longshoremen's*, the court flatly acknowledged the Supreme Court's cabining of that case in the labor law context, as well as *Claiborne*'s direct and fairly tepid citation to its applicability more generally.[73]

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[66] *Jordahl*, 336 F.Supp.3d at 1032.

[67] *See, e.g.* Stromberg v. California, 283 U.S 259 (1931) (holding that the blended nature of a conviction, where it was unclear as to what exact provision of a criminal anarchy statute the defendant was convicted under, made the entire conviction infirm despite the possibility that some of the provisions charged were constitutionally sound).

[68] *See Claiborne*, 458 U.S. at 932 ("The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds.").

[69] *Jordahl*, 336 F.Supp.3d at 1032.

[70] *Id*., at 1047 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (internal quotations and citation omitted).

[71] *Id*. at 1039.

[72] *Compare id*. *with* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). *See also* New York Times Co. v. Sullivan, 376 U.S. 264 (1964). Here, albeit in a situation not exactly implicating the violative aspects of forcing a child to recite the Pledge of Allegiance against their religious beliefs, nor amidst the feverish epoch of the Civil Rights Movement, the fundamental values of speech remain strong.

[73] *See Jordahl* 336 F.Supp.3d at 1040-1041; *See also Int'l Longshoremen's*, 456 U.S. at 222-226. *See also Claiborne*, 458 U.S. at 912.

As the opinion gathered momentum, and as the similarities between this case and others were simultaneously reinforced and elaborated upon, it becomes more and more evident what the Supreme Court is going to have to address in any anti-BDS law consideration: unconstitutional conditions on employment,[74] restriction of speech on matters of public concern,[75] and in contrast to its earlier bit of coyness, a bold statement on the inherent value of free speech.[76] These doctrinal areas are much what they sound like; depending on the circumstances, the state may not require certain rights compromises as a precondition to government employment or prevent government employees from expressing themselves on matters that would otherwise be permissible were they members of the general public. Any anti-BDS case that makes its way up the nine Justices will have to contend with at least some of these arguments, some of which are grounded in core First Amendment concerns ossified over many years, and there is a potential of course that all of these issues will be briefed and eventually addressed. The nuance called for by all of these questions does not bode well for the proponents of anti-BDS laws, who rely in many ways on surface-level analysis and *per se* justifications for their position. The more detailed analysis a court is called to conduct in evaluating an anti-BDS law, the less likely it seems the statute would survive a constitutional challenge; one would have to begin and end with the notion that boycotts simply aren't protected in order to find anti-BDS laws constitutional, something doubtful to happen if and when a case revolving around such a law makes it up to the Supreme Court.

C. Amawi v. Pflugerville Independent School District[77]

1. Facts

Amawi was a case which, similar to *Jordahl*, saw its story end at the circuit level after being dismissed by the Fifth Circuit as moot, but which similarly offers a window into practical judicial thinking surrounding the constitutional evaluation of anti-BDS laws.[78] In *Amawi* the plaintiffs in a condensed action for a preliminary injunction were a naturalized speech pathologist of Palestinian national origin who had contracted for nine years with the Pflugerville Independent school district,[79] as well as a freelance

[74] Jordahl, 336 F.Supp.3d at 1044.

[75] *Id*., at 1046.

[76] The statements referenced in note 69 as compared with *id*. at 1049 demonstrate the duality here – First Amendment harms are both real-world injuries as well as deeper, almost existential affronts.

[77] Amawi v. Pflugerville Indep. Sch. District, 373 F.Supp.3d 717 (W.D. Tex. 2019).

[78] Amawi v. Paxton, 956 F.3d 816 (5th Cir. 2020).

[79] *Amawi*, 373 F.Supp.3d at 731-732.

writer, an artist, an interpreter, a translator who had contracted with the University of Houston in various roles for several years,[80] a sophomore at Texas State University in San Marcos who was offered the opportunity to judge a debate competition at his former high school,[81] a graduate student at Rice University who also contracted with different public school districts to serve as a judge for debate tournaments,[82] and a radio reporter at an NPR affiliate licensed to Texas A & M University-Commerce.[83] Their respective involvements in the BDS movement situated themselves on a relatively flexible spectrum of decision-making and activities; the plaintiffs' boycott activities related to, among other things, whether the businesses boycotted seemed sympathetic to the plight of Palestinians[84] or by contrast conducted business operations in the West Bank,[85] in addition to the plaintiffs' supporting Palestinian art exhibits[86] and membership/educational outreach as part of national and local organizing groups.[87] All of the plaintiffs expressed some kind of ethical commitment to Palestinian rights,[88] several of them based their positions in personal experience,[89] and at least one of them clarified that they would not boycott an American business solely on the basis of Israeli ownership.[90] Texas's anti-BDS certification statute applied to all of their respective employment contracts, with various political actors involved in the process making statements expressing that the purpose of the statute was targeted towards the BDS movement specifically.[91] The five plaintiffs all expressed some kind of misgiving when presented with the anti-BDS certification, ranging from generalized free speech or First Amendment concerns, to practical apprehension surrounding their individual cessation of associational activities related to Palestinian rights,[92] with one plaintiff even worried that his decision to opt for one company's product over another's could be seen as taking a stance on BDS and thus putting him in violation of the certification he wound up

[80] *Id*., at 732.

[81] *Id*., at 733.

[82] *Id*., at 733-734.

[83] *Id*., at 734.

[84] *Id*., at 733.

[85] *Id*., at 734

[86] *Id*., at 732.

[87] *Id*., at 733.

[88] *Id.*, at 731-34.

[89] *Id*., at 731, 734.

[90] *Id*., at 733.

[91] *See* TEX. GOV'T CODE ANN. § 2270.001-2271.002 (2019) ("A governmental entity may not enter into a contract with a company for goods or services unless the contract contains a written verification from the company that it: (1) does not boycott Israel; and (2) will not boycott Israel during the term of the contract"). *See also Amawi*, 373 F.Supp.3d at 731.

[92] *Amawi,* 373 F.Supp.3d at 732, 734.

signing as a way to maintain his employment.[93] While some of the plaintiffs wound up signing for fear of losing their employment,[94] others refused and suffered significant financial consequences as a result.[95]

2. Argument/Holding

Owing certainly to the diverse and contoured set of circumstances and grievances present in *Amawi*, the holding was a fair bit more robust than either of *Koontz* or *Jordahl*, although *Amawi* too wound up dismissed as moot upon reaching the intermediate appellate level. [96] Closer to *Jordahl* than to *Koontz*, the district court's holding began with an extensive review of procedural rules and technical details before moving onward to the same standard for preliminary injunctions seen in prior cases.[97] After having determined that the plaintiffs did indeed have standing, the opinion moved straight into the likelihood of success on the merits, first answering the question of whether the plaintiffs' boycott activities were First Amendment activity in the affirmative, based on an analysis that centered *Claiborne* and denied the applicability of *FAIR*.[98] *Claiborne*, the court said, is clear in its relevance, with a fine-toothed comb applied to understanding the expressive nature of boycotts, while pointing out that *FAIR* doesn't even use the word "boycott" at all.[99] Recognizing the care and particularity with which the *Claiborne* Court picked apart the thorny facts presented in that case,[100] the district court then turned to *International Longshoremen's*, as in *Jordahl*.[101] With the emphasis placed, again as in *Jordahl*, on the labor law context explicitly delineated by the Court in *International Longshoremen's* as its own separate realm of inquiry,[102] the court moved quickly to two misplaced

[93] *Id*. at 735.

[94] *Id*., at 735.

[95] *Id.*, at 733.

[96] Amawi v. Paxton, 956 F.3d 816 (5th Cir., 2020).

[97] *Amawi*, 373 F.Supp.3d at 735-742. The court here first looks to the procedural matter of how to handle a motion to dismiss, considers its subject-matter jurisdiction, evaluates the injurious connection required to established standing (namely, chilled speech that can be traced to the defendants' conduct and which can be relieved by the court), Eleventh Amendment immunity, the relaxed ripeness standard seen elsewhere regarding First Amendment cases in particular, and a basic causation analysis.

[98] *Id*., at 742-743. Here the court seems to be pushing towards the notion that while *Claiborne* is a case for evaluating First Amendment claims in terms of their content, *FAIR* is more about what falls under the ambit of free speech protections in the first place, a way forward that could be seen further up on appeal as courts consider how to reconcile the two otherwise contradictory cases.

[99] *Id*., at 744.

[100] *Id.* Emphasizing that in *Claiborne* the idea of boycotts as historically significant in American protest culture allows the court here to then segue effectively into noting that the Texas statute *only* forbids boycotts undertaken for expressive protest purposes, as it contains an exemption for ordinary business reasons driving the non-purchase/refusal to contract with Israeli businesses.

[101] *Id*., at 755.

[102] *See id*., at 746. *See also* Jordahl v. Brnovich, 336 F.Supp.3d 1016, 1040-41 (D. Ariz. 2018).

interpretations of *Claiborne* sometimes offered in anti-BDS-law conversations. Namely, Texas argued both that *Claiborne* is inapplicable to anti-BDS legislation, because in *Claiborne* the purpose of the boycott activities was to vindicate constitutional rights, rather than a discriminatory enterprise geared towards a foreign nation.[103] The court here quickly jettisoned those arguments by noting the fundamental misunderstanding that such a narrowing of the First Amendment would entail,[104] before it proceeded to treat the issues of content-neutrality and the concomitant balancing test,[105] unconstitutional conditions on government benefits,[106] compelled speech,[107] and vagueness,[108] and found that under each of these

[103] *Compare Amawi*, 373 F.Supp.3d at 746, *with* Greendorfer, *supra* note 41, at 116.

[104] *Amawi*, 373 F.Supp.3d at 746 (*quoting* New York Times Co. v. Sullivan, 376 U.S. 264, 271 (1964)). After bluntly stating that *Claiborne* simply does not limit its protections to speech concerning constitutional rights, the court here then notes that this would plainly contradict the fundamental notion that constitutional protections don't turn on the social acceptability of an idea. Of course, if popularity is not a requirement for First Amendment protection, narrow self-reference to other constitutional rights isn't either. *See also* NAACP v. Button, 371 U.S. 415 (1963).

[105] *Amawi*, 373 F.Supp.3d at 747-752. This section primarily references Police Department of City of Chicago v. Mosley*,* 408 U.S. 92 (1972), Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015), R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) and Texas v. Johnson, 491 U.S. 397 (1989) in its discussion of the content-neutrality doctrine, essentially the idea that while certain topics broadly can be prohibited (i.e.: "no politics at the dinner table"), more specific excision of specific positions that fall under those topics cannot be (i.e.:"no *liberal* politics at the dinner table"). The court here engages in simple comparison in pointing out that while one could boycott Palestinian companies or boycott BDS supporters themselves, the reverse is not true, thus running afoul of content-neutrality. Texas, for its part, argued that the content specificity here was permissible because of the government itself speaking in support of Israel by citing to Walker v. Texas Division Sons of Confederate Veterans, Inc., S.Ct. 2239, 2245 (2015). Although not treated with great depth, the analogy to *Walker*'s holding that state governments could forbid certain kinds of license plates depending on their particular message is done away with quickly by noting that no reasonable observer would impute a BDS supporter's ideological stance to the state (unlike with Confederate-flag license plates), and that there isn't any permissible government interest involved anyway. Beyond that there is significant discussion of the Texas anti-BDS statute's legislative history as a way of buttressing an understanding of the plain ideological disagreement animating the law, followed by a brief note that even if the state did have some kind of permissible goal in mind, it is overbroad in its proscription of companies based on place of business without regard to their actual national-origin status (the latter quality being the crux of antidiscrimination purposes).

[106] *Amawi*, 373 F.Supp.3d at 752. *See also Lane*, 573 U.S. 228; *Pickering*, 391 U.S. 568; *Umbehr*, 518 U.S. 668. With a look towards *Lane*, *Umbehr*, *Pickering* and their progeny, the court discusses the different kinds of government benefits and the stricter kind of burden the government must carry in preemptively limiting speech (as opposed to retroactively punishing it) by citing specifically United States v. National Treasury Employees Union, 513 U.S. 454 (1995), before turning then to a discussion of broader government benefits versus direct ideological subsidization by the government through an analysis of Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983). Taken together, the court says here, because the government is not punishing a specific bad act, and because the government is withholding a general benefit with no specific tie to the contractors' BDS support, as opposed to essentially paying for the proliferation of a specific idea, the condition placed on government employment is impermissible.

[107] *Amawi,* 373 F.Supp.3d at 754. The compelled speech discussion is less weedy than the other doctrinal considerations made in *Amawi*, as they center on Wooley v. Maynard, 430 U.S. 705 (1977) and Baird v. State Bar of Arizona, 401 U.S. 1 (1971). The former case stands for the general proposition that

evaluative schema the plaintiffs here were likely to succeed on the merits of their First Amendment claims.[109] The remaining preliminary injunction factors also weighed in favor of the plaintiffs,[110] and upon handling the matter of the defendants' Rule 12(b)(6) motion to dismiss,[111] the court concluded with a forceful reification of First Amendment values.[112] Fortunately for the plaintiffs, but unfortunately for the prospects of resolving the legal battle over the anti-BDS laws' constitutionality more generally, on appeal the Fifth Circuit found that, because Texas had amended the law since the district court entered its preliminary injunction order, and as a result the statute no longer applied to the plaintiffs.[113] Now moot, the case was dismissed.[114]

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the First Amendment protects a right not to speak as well as the more obvious right to speak, while the second concerned the requirement of an anti-communist certification for admission to the practice of law. With a balancing test used in *Baird*, the court here similarly looks at what state interest is at stake, but finds that in light of the content-based discrimination and the state's naked curiosity in the plaintiffs' particular political viewpoint as a way of determining whether or not to offer them a state contract, there is no state interest in such a strong compulsion of speech.

[108] *Amawi,* 373 F.Supp.3d at 755-756. The vagueness doctrine is very much what it sounds like, with the analysis starting at the court's citation to Cramp v. Board of Public Instruction of Orange County, Florida, 368 U.S. 278 (1961) for the notion that if a statute prohibits conduct there must be no guesswork involved in determining what exactly that prohibition means. Pointing towards Smith v. Goguen*,* 415 U.S. 566 (1974) holding that statutes involving First Amendment implications are required an even greater level of specificity to avoid constitutional infirmity, the Texas anti-BDS statute's language is analyzed in light of the confusion one plaintiff testified to in reference to his declining to purchase computers from Hewlett-Packard, a company that does business in Israel despite not being of Israeli origin. Unclear as to whether he was now obligated to purchase HP computers, absent a clear business-related reason not to, the court sees enough vagueness in the Texas law to come down on the side of the plaintiffs here as well.

[109] *Amawi,* 373 F.Supp.3d at 757-758.

[110] *Id.*, at 758-759.

[111] *Id*., at 759-763. Given that any anti-BDS-law-based controversy making its way to the Supreme Court will likely involve a facial challenge, the procedural nitty-gritty of standards of evaluation for motions to dismiss is not especially relevant to this Note.

[112] *Id.*, at 763-764 ("In coming to its conclusions, the Court is guided by first principles. 'At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. (*quoting* Turner Broad. Sys. v. FCC, 512 U.S. 622, 641, (1994)).' . . . In Texas, only five legislators voted against. Texas touts these numbers as the statute's strength. They are, rather, its weakness. 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' (*quoting* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).").

The court continues on here with further citations to soaring statements of free speech apotheosis, although they are not all strictly necessary to list here for the notion that the First Amendment is protective of unpopular ideas in particular.

[113] *Amawi*, 373 F.Supp.3d at 821 ("In short, H.B. 793's enactment provided the plaintiffs the very relief their lawsuit sought, and even assuming that H.B. 89 is unconstitutional, the defendants can do nothing more to ameliorate their claimed injury.").

[114] *Id.*

3. Commentary

Concomitant with the diverse set of plaintiffs and the expansive holding of *Amawi* are broad implications the case has for any potential anti-BDS law dispute that makes its way higher up the chain. Looking toward *Claiborne*, as other courts have, and surely will, the court's finding that *FAIR* is barely worth factoring in as far as First Amendment analysis goes[115] is noteworthy in the way it broadens the range of viable arguments plaintiffs in anti-BDS law cases can potentially make. The court here, despite its firmness in doing away with the *FAIR* argument,[116] engages in direct comparison of the two, and points out that even if *FAIR* did apply as far as rendering boycott in support of the BDS movement a simple, banal purchasing decision, the statute at issue by its terms delineates between expressive and non-expressive purchasing decisions and proscribes only the former.[117] Honing in on the *International Longshoremen's* argument further whittles away at the anti-BDS laws' validity, with an in-depth reading highlighting not only the Supreme Court's limitation of *International Longshoremen's* to the labor law context, but teasing out *why* the *International Longshoremen's* Court held in favor of the ban on secondary boycotts in that case: the coercion of neutral parties into industrial strife. Doing so drives another nail into the coffin of the anti-BDS laws, in that we're now squarely back within the most historically-grounded framework of understanding speech limitations.[118] Where *International Longshoremen's* forbids bringing others into the marketplace of ideas and forcing them to choose a side, BDS supporters undertake no such mission and rather simply enter into a debate themselves, challenging those who have either deliberately decided to support the State of Israel through their business ventures or done so unwittingly, in which case the boycott is geared towards raising awareness and agitating for change. *Amawi* has further layers of course as well—boycotts as being valid outside of the narrow realm of vindicating constitutional rights,[119] the impermissible breach of content-neutrality,[120] unconstitutional conditions on government

[115] *Id*., at 743 (noting that the word "boycott" doesn't actually appear in the *FAIR* opinion).

[116] *Id*., at 744 ("Texas is incorrect.").

[117] *Id*., at *745*.

[118] *See, infra, generally* Part III.

[119] *See Amawi*, 373 F.Supp.3d at 746. *See also Umbehr*, 518 U.S. at 686; *Pickering*, 391 U.S. at 574. Although in both of these cases there was no presence of a constitutional right to state employment, First Amendment protections still applied.

[120] *Amawi*, 373 F.Supp.3d at 747-752. *See*, *e.g.*, *Barnette*, 319 U.S. at 642. While *Barnette* pre-dates the more focused, formalistic version of content-neutrality seen in other cases, its lofty pronouncements at its conclusion gesture towards the notion that preference-based speech laws are impermissible, and have been for quite some time.

employment,[121] compelled speech,[122] vagueness,[123] and an invocation of the highest aspirations of the First Amendment[124]—but the deft conversion, again, of the anti-BDS position into a double-edged sword is key here. If the standard is *FAIR*, and boycotting is just a banal consumer choice rather than expressive conduct, then why distinguish it from what the statutes *do* identify as banal consumer choices? If those inert purchasing decisions can be expressive First Amendment activity only when they're accompanied by explanatory speech; unfortunately for anti-BDS partisans the statutes *elicit* further speech when the certifications they entail inquire into whether those purchasing decisions are truly sterile or purposeful boycotts. Even if anti-BDS-law supporters shift gears into the *International Longshoremen's* context there is both the basic doctrinal issue (*International Longshoremen's* being a purposeful exception confined to labor law) and the deeper theoretical issue (this is not a coercive secondary boycott, its action taken by individuals in concert with others on their own initiative). What's left is a flimsy reading of *Claiborne*, to be considered later in this Note.[125]

D. Arkansas Times, LP v. Waldrip126

1. Facts

The most relevant case for the prognosticating how an anti-BDS law case might turn out when rising up to the top is *Arkansas Times v. Waldrip*, both in terms of the district court holding on summary judgement[127] and the recent Eighth Circuit appellate decision.[128] It's a familiar story, as compared to the aforementioned cases, except that it concerns a newspaper which contracted with a branch of the University of Arkansas to publish advertisements for the college. The State of Arkansas, however, passed an anti-BDS certification law not unlike those passed in other states,[129] and although the Arkansas Times had complied with the certification dozens of times in the past, in October of 2018 the paper raised First Amendment objections to the law for the first time and refused to sign, saying it should not have to choose between contracting with the state and its right to free

[121] *Amawi,* 373 F.Supp.3d at 752. *See Umberh*, 518 U.S at 680. *See also Pickering*, 391 U.S. at 568.

[122] *Amawi,* 373 F.Supp.3d at 754. *See generally Barnette*, 319 U.S. 624.

[123] *Amawi,* 373 F.Supp.3d at 755-756.

[124] *Id*. at 763-764.

[125] *See infra*, Part IV.

[126] Arkansas Times LP v. Waldrip, 362 F.Supp.3d 617 (E.D. Ark. 2019).

[127] *Id*.

[128] Arkansas Times LP v. Waldrip, No. 19-1378, 2021 WL 520658 (8th Cir. Feb. 12, 2021).

[129] *Arkansas Times*, 362 F.Supp.3d at 619. *See also* ARK. CODE ANN. § 25-1-503 (West, 2017).

expression.[130] Although the Times's editorial board had been critical of Arkansas's anti-BDS law, the paper had never engaged in nor expressed written support for the BDS movement, with no indication that it would in the future.[131] The Arkansas Times suffered a loss of several thousand dollars as a result.[132]

2. Argument/Holding

The holding in *Arkansas Times* is not unlike that of *Jordahl* and *Amawi*, in that the matter of standing is intimately tied the substance of the First Amendment claims being made, but the court here deploys something of a sleight of hand. The standing determination here is brief, because although it *might potentially* involve a consideration of chilling effects on speech, the factual convenience of the newspaper having *already* lost its state contract allows for a frame shift towards a much more sterile understanding of the stakes of the dispute, rather than implicating First Amendment values of significant magnitude.[133] Beyond that, the opinion turned to a discussion of the likelihood of success on the merits, except here the court is blunt at the outset, noting that its holding is fundamentally divergent from those in *Jordahl* and *Koontz*.[134] The standard, the court claimed here, is that the Times "must demonstrate that a refusal to deal, or its purchasing decisions, fall under the First Amendment, which protects speech and inherently expressive conduct."[135] The strict binary set up by that phrasing leads naturally into the next section, where the primary case is one cited in other cases along different lines, *FAIR*, as a way to argue that purchasing decisions are just that, and no more. [136] The subsequent section of the opinion went even further, with a discussion of *Claiborne* and *International Longshoremen's* being used to drive home the point that even if the Arkansas Times's purchasing decisions *were* an expressive boycott, such expressive activities are not protected.[137] Having neatly shuffled the dispute central to the case out from under the umbrella of the First Amendment, the court held that the newspaper simply had failed to state a claim, and granted the state's motion to dismiss.[138]

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130 *Arkansas Times,* 362 F.Supp.3d at 620.

131 *Id*.

132 *Id*. at 620.

133 *Compare id*. at 621, *Jordahl*, 336 F.Supp.3d at 1032 *with Amawi*, 373 F.Supp.3d at 737.

134 *Arkansas Times*, 362 F.Supp.3d at 622.

135 *Id*. at 622.

136 *Id*. at 623-624.

137 *Id*. at 624-626.

138 *Id.* at 626.

3. Commentary

Arkansas Times is not an especially confusing case to understand in its conclusion, but begins to unravel in its reasoning, even on its own terms. The district court made use of a certain kind of almost reductive simplicity, opting to take things at their most basic level rather than interrogate the implications of anti-BDS laws and state contracting. The court could have, for example, considered at least to some degree the chill on speech that might occur were people forced to choose between the ability to take a political stance via boycott action or state employment, but it did not such thing. Primarily, the court's understanding of boycotts was not one that stemmed from the perspective of those who typically embark upon boycotts, instead being one that looked at purchasing decisions as almost unconscious or at best grounded in pure economic preference.[139] While there are plenty of things the average individual *doesn't* buy without any particular reasoning, at least not one implicating constitutional protections, behind their choice, boycotts exist at root as a choice fully to the contrary—there is a specific reason for making such a choice. Although it is important to give credit to the court for its citation of *FAIR* as it pertains to certain kinds of expression requiring explanatory speech as accompaniment,[140] in the sense that it would be unreasonable to consider the full plethora of things an individual is *not* doing at any given moment in the light of free speech, the notion that *all* expression must be self-evident in its meaning is somewhat bizarre. Surely there is speech that require some inquiry into subtext on the part of the listener or witness, coupled with the notion that while there are things we find ourselves refraining from constantly without intent that does not rob *all* restraint of the potential for communicable meaning. Still, *Arkansas Times* is clear: not buying something is simply not buying something, nothing more and nothing less, per *FAIR*.[141] Engaging with *Claiborne* to say that even if consumer choices as boycotts were expression, there simply isn't a right to do so bears resemblance to this surface-level essentialism, perhaps lumping the boycott portion of the activism at play in *Claiborne* with the illegal activities undertaken by some in that case to enforce the boycott itself, although it is unclear given the

[139] *Id*. at 624.

[140] *Id*.

[141] *Id*. at 623-624 ("First, a boycott is not purely speech because, after putting aside any accompanying explanatory speech, a refusal to deal, or particular commercial purchasing decisions, do not communicate ideas through words or other expressive media … The Arkansas Times's argument that an individual's refusal to deal, or his purchasing decisions, when taken in connection with a larger social movement, become inherently expressive is well-taken but ultimately unpersuasive. Such an argument is foreclosed by *FAIR*, as individual law schools were effectively boycotting military recruiters as part of a larger protest against the Don't Ask, Don't Tell policy.").

court's lack of full analysis of *Claiborne*'s facts and holding. Just as the court glanced quickly at the nature of boycotts with a flat reduction of the myriad reasons people conduct themselves the way they do and the universe of expressive possibilities contained therein, the consideration of *Claiborne* was shallow and almost openly dismissive of the potential for BDS activities' entitlement to First Amendment protections. The conclusion drawn, then, was crystal clear, but the manner in reaching that destination was built upon strained premises. The district court noted that although *Claiborne* did protect the boycott in that case, "the Court arrived at its decision only after carefully inspecting the various elements of the boycott, which consisted of meetings, speeches, and non-violent picketing," but then pivoted hard to "the Court, however, did not hold that individual purchasing decisions were protected by the First Amendment."[142] Almost anything about a boycott, it seems, can be protected speech, except for the parts of it that entail the basic essence of what it means to boycott something. Raising the *International Longshoremen's* issue, another strange interpretative maneuver was used, whereby the district court acknowledged that "[w]hile *International Longshoremen's Association* was decided against the broader context of federal labor law, the Court held there that there is no unqualified right to boycott."[143] In other words, although that rule is couched contextually in a particular area of law, explicitly delineated as exceptional by the Court in that case,[144] it can be transmuted to any other contextually distinct scenario. This is one of the avenues litigants agitating on behalf of the anti-BDS laws could go down, however, and a more fleshed out version of arguments could find some success with such a strategy. Unfortunately for those proponents of the anti-BDS laws, at least for now, the Eighth Circuit Court of Appeals found this unavailing.

After citing Eighth Circuit precedent regarding their standard for *de novo* review of the issues presented in *Arkansas Times*,[145] the Eighth Circuit jumped right in to the First Amendment issues at play, first citing *Gitlow* for the notion that freedom of speech is an essential liberty protected by the Constitution.[146] Beyond that, the court relied in large part on *Umbehr*, *Perry*, and *Speiser v. Randall* to relate the denial of government benefits on the basis of First Amendment rights exercises to the chilling effects

[142] *Id*. at 625.

[143] *Id*. at 626.

[144] *See* Amawi v. Pflugerville Indep. Sch. District, 373 F.Supp.3d 717, 745 (W.D. Tex. 2019). The court here notes too that *International Longshoremen's* was decided within a relatively close timeframe as *Claiborne*.

[145] Arkansas Times LP v. Waldrip, No. 19-1378, 2021 WL 520658, at *2 (8th Cir. Feb 12, 2021).

[146] *Id*.

doctrine,[147] before turning directly to *Claiborne* and *FAIR* as the basis of the two sides' arguments, respectively.[148] With a brief note that the Supreme Court has opined to some extent on the constitutional status of boycotts since *Claiborne* in a manner more explicit than *FAIR*,[149] the opinion used the premise that at least *some* parts of boycotting activities may be protected by the First Amendment. In turning to the fundamental question then of *what* parts of boycotting activities are protected,[150] following further discussion of 8th Circuit precedent on *de novo* review,[151] full attention was given to the substantive speech issues at stake. The court went on to discuss the vague nature of the statute's language and the way in which contractors might eschew their expressive activities based on that quality,[152] which it said implicates constitutional rights, the inquiry is not over. The key question here, was whether those implications and conditions were unconstitutional, the court said,[153] and it arrived at the conclusion that they are.[154] A relatively straightforward opinion, the Eighth Circuit's holding was the correct one in its treatment of both *Claiborne* and *FAIR*, but still evinces the problem present in any anti-BDS constitutional litigation. While here there was genuine engagement with the two ends of the doctrinal debate, and although the lower court nonetheless brought this reversal upon themselves via a shallow holding on its part, the fact remains that this argument remains in vogue among proponents of the BDS restrictions.[155] It is sure to make a comeback in the likely event that this issue makes it up to the Supreme Court, and may be tempting to the nine Justices when they consider it. Still, there's an entire history of doctrine and theory that bears down upon this narrow reading of *Claiborne* and full

[147] *Id.*, at *2-*3.

[148] *Id*., at *3.

[149] *Id*., at *4 ("And the Supreme Court has reiterated since Claiborne that at least some elements of a boycott are entitled to First Amendment protection.") (internal citation omitted).

[150] *Id*. ("Thus, we must determine what the Act prohibits. Does it prohibit solely commercial activity that lacks any expressive or political value? Or does it also prohibit those elements of a boycott, such as speech and association, that we know enjoy First Amendment protection?").

[151] *Id*., at *5.

[152] *Id*. at *7 ("A contractor that does not want to risk violating the terms of its contract would likely refrain even from activity that is constitutionally protected.").

[153] *Id*. ("Determining that the Act's condition for contracting with Arkansas implicates the First Amendment does not end our analysis because not all such conditions are unconstitutional.") (internal citation omitted).

[154] *Id*. ("[T]he Act requires government contractors to abstain from such constitutionally protected activity. Without any explanation of how this condition seeks to 'define the limits of [the State's] pending program,' it can be viewed only as seeking to 'leverage funding to regulate speech outside the contours of the program itself.' Thus, the Act prohibits the contractor from engaging in boycott activity outside the scope of the contractual relationship 'on its own time and dime.'") (internal citations omitted).

[155] *See*, *e.g.*, Greendorfer, *supra* note 41, at 116.

application of *FAIR* that should make it hard for them to uphold the constitutionality of any anti-BDS statute.

III. THE BIG PICTURE OF SPEECH

A. Early 20th century speech restrictions: Holmes in dissent

Although the underpinnings of the Anglo-American understanding of free speech have a history dating back hundreds of years,[156] the general thrust of First Amendment law stems from the World War I era, when Justice Oliver Wendell Holmes, Jr. wrote the opinion in *Schenck v. United States*.[157] Postulating for the first time that American speech law could mean more than just a prohibition on the historically-dreaded suppressive device of prior restraints, Holmes nonetheless came down on the side of the government regarding the criminal sanction on dissident speech.[158] Although Holmes would, for the time being, err towards the state authority in the area of speech law, he would eventually craft the idea of what is sometimes misunderstood as the unencumbered "marketplace of ideas" in his *Abrams* dissent.[159] An opinion so controversial that his colleagues came

[156] *See* Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1005 (1979) for a discussion that charts a path between John Stuart Mill's *On Liberty* through to the present day via Justice Hugo Black, Alexander Meiklejohn, Alexander Bickel, Robert Bork. Among others. *See also* William T. Mayton, *Seditious Libel and the Lost Guarantee of Freedom of Expression*, 84 COLUM. L. REV. 91 (1984) for a deeper historical review, traced back to the 1300s the Edwardian Statute of Treasons era, the Star Chamber, English licensing laws and the impact this legacy had on the Founder. *See also* Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737 (1977), describing a more Lockean legacy that nonetheless has transformed over time and manifested itself in different principles of free speech that encompass a wide variety of practical contexts.

[157] Schenck v. U.S., 249 U.S. 47 (1919). This case is generally regarded as the origin of free speech law in the United States. *See* LEE C. BOLLINGER & GEOFFREY R. STONE, THE FREE SPEECH CENTURY 1 (Lee C. Bollinger & Geoffrey R. Stone, eds., 2019).

[158] *See Schenck*, 249 U.S. at 51-52. ("It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose …") *See also* Debs v. U.S., 249 U.S. 211 (1919). *See also* Eugene V. Debs, Canton, Ohio Speech (June 16, 1918). It is notable that Justice Holmes explicitly and purposefully eschews a holistic understanding of the text of Debs's speech, stating that "Without going into further particular we are of opinion that the verdict . . . must be sustained." Debs's speech was largely an indictment of various powerful figures with vested interests in the continuation of World War I, whose ideology of capital-driven imperialism and indifference to the common man would inevitably fall in the face of workers united under the banner of socialism. It contained no definite plans or specific encouragements of lawless action of any kind of imminence, at worst praising those who had resisted the military draft. Whatever danger there may have been in Debs's speech, it remains difficult to say that it was either clear or present.

[159] *See* Abrams v. United States, 250 U.S. 616, 630-631 (1919) (Holmes, J., dissenting) ("Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole

to his house and begged him not to issue it,[160] he nonetheless bore the paradigm of clashing ideas bringing about broad-based social preferences into dominance. This detached, aloof posture is certainly borne of his jurisprudential worldview perhaps borne of his traumatic experiences in the American Civil War,[161] but regardless, Holmes would continue to proffer his ideas on speech in dissents over the rest of his tenure on the Court. Most notably, he'd join with Justice Louis Brandeis on two occasions, in *Gitlow* and *Whitney*, where an important blending with Brandeis's more individualistic, dignitarian ideology took place.[162] Holmes's stance on the

heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."). *See also* Vincent Blasi, *Holmes and the Marketplace of Ideas,* 2004 SUP CT. REV. 1 (2005).

[160] Sheldon M. Novick, *The Unrevised Holmes and Freedom of Expression*, 1991 SUP. CT. REV. 303, 343 (1991).

[161] Robert W. Gordon, *Introduction: Holmes's Shadow*, THE LEGACY OF OLIVER WENDELL HOLMES, JR. (Robert W. Gordon, ed., 1992), *reprinted in* IDEAS OF THE FIRST AMENDMENT 552-555 (Vincent Blasi, ed., 2012). *See also* LIVA BAKER, THE JUSTICE FROM BEACON HILL (1991), *reprinted in* IDEAS OF THE FIRST AMENDMENT 556 (Vincent Blasi, ed.) ("'Mr. President,' Holmes replied, "you are in a war; I too was in a war. There is only one rule in a war. Form your battalions and fight."). *See also, generally*, Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40 (1918). From the very beginning of *Natural Law*, Holmes's skepticism, bordering on sarcasm takes center stage while he muses on the nature of rights and law in an almost metaphysical sense.

[162] *See* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("If what I think the correct test is applied it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory that it was an incitement. Every idea is an incitement. It offers itself for belief, and, if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."). *See also* Whitney v. California, 374 U.S. 357, 376-377 (1927) (Brandeis, J., concurring) ("Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one . . . . Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, selfreliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present,

social value of doing away with old, disfavored ideas out of a humble regard for fundamentally unknowable truth converges here with Brandeis's regard for the individual's fundamental role in participating in such a marketplace. While the marketplace may require mass confrontation between competing ideas, it is nonetheless fundamental to the idea of human dignity that they be allowed to wholly engage with those dynamics of discourse as an end itself. The result is an amalgam that threads the needle between personal and collective liberty, one where the relationships between individuals, society, and the state are taken into account. Still, neither the clear-and-present danger rubric for determination of when and

unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom"). *See also* New York Times Co. v. Sullivan, 376 U.S. 264, 270 (1964) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); New York Times Co. v. United States, 403 U.S. 713 (1971) (holding per curiam that the government had not met its "heavy" burden in order to suppress publication of reporting on the Pentagon Papers, with the seven concurrences debating the exact terms of that burden); Cohen v. California, 403 U.S. 15, 26 (1971) (protecting an individual's right to wear a jacket that read "Fuck the Draft" in a public courthouse as First Amendment expression); *R.A.V.* 505 U.S. at 396 (overturning a conviction based on a state statute that prohibited cross burning as an unconstitutional viewpoint restriction, eliding the fundamental marketplace corollary that government may infringe on speech where there is intent and imminence of, otherwise lawless action, in this case intimidation and the historical potential for violence, while instead parsing through the "fighting words" doctrine); Snyder v. Phelps, 562 U.S. 443, 460-61 (2011) (relieving a homophobic religious group premised on provocative agitation at the funerals of soldiers from government speech restriction, justified on the basis of society's obligation to encourage free discourse despite odious expression and stating that "[s]peech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case."); Thomas v. Collins, 323 U.S. 516 (1945) (demonstrating concern with the preemptive chilling effect government regulation can have on speech rights). Taken together, although there certainly is conflict and doctrinal incoherence among them, these cases demonstrate the blend of communal and individual concerns at the heart of First Amendment jurisprudence. *See also* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996) (constructing a descriptive account of First Amendment inquiry by the Court geared towards governmental motive with a focus on *O'Brien*, 391 U.S. 367); Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV 1633 (2013) (inquiring into the role of a speaker's intent as it pertains to chills on speech); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (discussing self-fulfillment, truth-seeking, and democratic self-governance as core principles of free speech); *and* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877 (1963) (attempting to synthesize a broadly coherent theoretical-doctrinal framework for understanding the First Amendment in light of what is an otherwise conflict-ridden body of law). Across all of these articles a theme begins to emerge: First Amendment jurisprudence can be seen through a diverse and fundamentally differing set of lenses, although they can in some ways be crudely boiled down to the ideological amalgamation of Holmes and Brandeis's ideologies.

how speech activity might fall outside of the protected boundaries of the First Amendment, nor Brandeis's emphasis on the self-actualization that comes along with freedom to speak one's mind, would come into their own fully until later in the 20th century.[163] Instead, simplistic deference to government justifications for suppressing speech—the kind initially espoused by Holmes in *Debs*, for example—would be the norm. Despite laying the foundations of America's hallowed and unique tradition of free speech, the golden era of the First Amendment would wait to flourish for some years.

B. Free Speech Vindication

As the 20th century carried on however, both the idea that unpopular speech should be allowed its fair chance to carry the day, as well as the fundamental individual freedom of conscience would eventually grow. Unpopular, controversial political positions would gain their protections through very careful, exacting analysis of statutory construction rather than blanket deference to the sovereign's interest in self-preservation,[164] and notably the freedom from forced speech in the name of a rather libertarian, heterodoxy-protective First Amendment would enter into the fold as well.[165] Rather than do what prior Courts had and rapidly open and close speech cases before them, the trend of examining First Amendment issues through a focused lens would begin to build upon the foundations previously laid by Holmes and Brandeis, albeit with those baseline ideas hiding perhaps in the background behind the more technical analysis deployed as the 1900s marched onward. Collective speech became widely understood as an extension of individual expression,[166] and conduct resembling spoken or

[163] *See*, *e.g.*, Bridges v. California, 314 U.S. 252, 272-278 (1941) (lifting the criminal sanction from labor organizers who threatened a strike and published critical editorials in anticipation of an unfavorable court decision).

[164] *See*, *e.g.*, *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting) (distinguishing the alleged incitement from one less and vague and closer to "an attempt to induce an uprising against government at once."); *See also* Near v. State of Minnesota, 283 U.S. 697, 709-713 (1931) (conducting highly thorough analysis of different potential functions and purposes of the statute at issue on the way to overturning a conviction for public libel); *Stromberg* 283 U.S. at 367-370 (engaging in focused examination of the particular clause of the statute under which defendant was convicted for displaying a red flag a at a summer camp as a method of protecting such speech); *But see* United States v. O'Brien, 391 U.S. 367, 381-382 (1968) (upholding a conviction for draft card burning because of the government's interest at stake in the proper administering of military affairs). Generally, the pattern that began to take form as the 20th century wore on was one skeptical of government interest in suppressing speech, although certain remnants of deference towards state authority would persist.

[165] *Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

[166] *See*, *e.g.*, NAACP v. Alabama, 357 U.S. 449 (1958). *See also Baird*, 401 U.S. at 7 (concluding that although "[o]f course Arizona has a legitimate interest in determining whether petitioner has the

written advocacy gained currency as well.[167] The understanding of speech began to mature and grow, forming a robust package of rights encompassing a wide variety of activity. At its heights, the Court would wax poetic about the sanctity of uninhibited, national dialogue and the incredible proximity of harm required to cut speech off at the pass.[168] Justices Black and Douglas's ability to take near-absolutist positions on First Amendment cases is in some ways indicative of the mid-20th century culture of free speech; plainly, no one on the Court would dare to be as defensive towards First Amendment values as they were in their time.[169]

qualities of character and the professional competence requisite to the practice of law," nonetheless "[w]hen a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest."); Edwards v. South Carolina, 372 U.S. 229, 236 (1963) (vacating breach of the peace judgement for peaceful assemblage on state government grounds where "There was no violence or threat of violence on their part, or on the part of any member of the crowd watching them. Police protection was 'ample.'"); Healy v. James, 408 U.S. 169, 187-188 (1972) (holding that disagreement with a student group's philosophy was not a valid reason for rejection of application for university recognition without further reason) ; U.S. v. Robel, 389 U.S. 258, 274 (1967) (stating that "For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile." in support of the notion that the government could not prohibit communists from serving in the military); Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. MARY BILL RTS. J. 595 (2001) (distinguishing the importance of freedom of expressive association from the discriminatory holding in *Boy Scouts of America v. Dale*.); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978 (2011) (elaborating upon the different forms of amplification associational speech provides). Although coming towards the idea from different angles, the preceding cases and articles demonstrate that at this point in time, expression via group association is a robust and multifaceted liberty well understood as part of the First Amendment's speech protections.

[167] *See*, *e.g., Texas v. Johnson*, 491 U.S. at 405 (1989). *See also* John Hart Ely, *Flag Desecration: A Case Study in the Role of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

[168] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See also* New York Times Co. v. United States, 403 U.S. 713 (1971). Although the latter case is a brief *per curiam* decision, the multiple concurrences attached to it are both forceful in their defense of free expression from government interference and delicate in their attempts to construct a workable framework for the borderline hypothetical possibility that a prior restraint could withstand constitutional scrutiny.

[169] *See* Noto v. U.S., 367 U.S. 290, 302 (1961) (Black, J., concurring) ("I have always thought, as I still do think, that this Government was built upon a foundation strong enough to assure its endurance without resort to practices which most of us think of as being associated only with totalitarian governments. I cannot join an opinion which implies that the existence of liberty is dependent upon the efficiency of the Government's informers. I prefer to rest my concurrence in the judgment reversing petitioner's conviction on what I regard as the more solid ground that the First Amendment forbids the Government to abridge the rights of freedom of speech, press and assembly."); Barenblatt v. U.S., 360 U.S. 109, 145 (1959) (Black, J., dissenting) ("Moreover, I cannot agree with the Court's notion that First Amendment freedoms must be abridged in order to 'preserve' our country. That notion rests on the unarticulated premise that this Nation's security hangs upon its power to punish people because of what they think, speak or write about, or because of those with whom they associate for political purposes."); Communist Party of the USA v. Subversive Activities Control Board, 367 U.S. 1, 137 (1961) (Black, J., dissenting) ("I do not believe that it can be too often repeated that the freedoms of speech, press, petition

C. Speech Doctrine Gone Wrong

As years pass and personnel changes, especially in light of political shifts, jurisprudence mutates, with preexisting building blocks being used by ideologically distinct Justices to craft jurisprudence that ostensibly serves as a continuation of prior trends, but which suffers from cataract-like symptoms as the shores from which First Amendment law initially departed disappeared from view. First Amendment law began to sour in the latter half of the 20th century, as the Court would lose sight of the first principles of the forest for empty-calorie trees of decision-making. Certain formalistic areas of doctrine began to offer paths forward for to twist speech law along different technicalities,[170] while the impulse to protect the speech society

and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish."); Garrison v. Louisiana, 379 U.S. 64, 80 (1964) (Black, J., concurring) ("Fining men or sending them to jail for criticizing public officials not only jeopardizes the free, open public discussion which our Constitution guarantees, but can wholly stifle it. I would hold now and not wait to hold later, that under our Constitution there is absolutely no place in this country for the old, discredited English Star Chamber law of seditious criminal libel."); Garrison v. Louisiana, 379 U.S. 64, 81 (1964) (Douglas, J., concurring) ("While the First Amendment remains the same, the gloss which the Court has written on it in this field of the discussion of public issues robs it of much vitality. Why does 'the freedom of speech' that the Court is willing to protect turn out to be so pale and tame?"); Speiser v. Randall, 357 U.S. 513, 535-36 (1958) (Douglas, J., concurring) ("Today what one thinks or believes, what one utters and says have the full protection of the First Amendment. It is only his actions that government may examine and penalize. When we allow government to probe his beliefs and withhold from him some of the privileges of citizenship because of what he thinks, we do indeed 'invert the order of things,' to use Hamilton's phrase."); Yates v. U.S., 354 U.S. 298, 340 (1957) (Black, J., concurring) ("I believe that the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal.").

[170] *Compare* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829-833 (1995) (finding that, despite the notion that government-created public fora could limit certain topics such as religion in general, the University of Virginia's policy of not funding a Christian student newspaper ran afoul of content-neutrality) *with* Ward v. Rock Against Racism, 491 U.S. 781, 800-803 (1989) (holding that government administering of sound engineering technology for a concert to be held in a public park was permissible despite its limiting effect on intended speech, as the park was a public forum subject to government regulation). *See also* Agency for Intern. Dev. v. Alliance for Open Soc'y, Inc., 570 U.S. 205, 220-221 (2013) (ruling that a government policy requiring affirmation rejecting prostitution was an impermissible violation of the First Amendment when applied to the organization as a whole); Pacific Gas and Electric Co. v. Public Utilities Comm'n of Cal., 475 U.S. 1, 18-20 (1986) (dissecting the matter of "extra space" in utility bill envelopes as it related to the filling of the envelopes with competing utility companies' literature); Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 479-481 (2009) (deciding that although a Ten Commandments monument could stand in a public park, a different religious organization could not erect a statue reflecting their beliefs); Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 173-174 (2015) (holding that a restriction on the size, duration, and location of temporary direction signs for religious services violated content neutrality doctrine); United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 476-477 (1995*)* (striking down a government restriction on certain government employees receiving honoraria was did not serve government purpose while impermissibly burdening First Amendment rights). *See also* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies* (Symposium), 58 STAN. L. REV. 1919 (2006) (examining the often vague and incoherent doctrine at play in seemingly innocuous government involvement in free expression). Across the board, these cases bring into high relief the seemingly scattershot application of various doctrinal tools to the effect of inconsistent results. Government restrictions on speech that might pass

holds in contempt would become contorted to allow free passage for the kinds of expression Holmes or Brandeis would never have tolerated.[171] Although not fully divergent from earlier speech doctrine, the latter half of the 20th century's speech law began to stretch beyond reason, with certain rubrics deployed in ways that bear little consideration for the ideas first espoused in the early 1900s. Holmes and Brandeis would likely see little need to fuss over things like content-neutrality or public forum/non-public forum distinctions, at least not directly. Navel-gazing evaluations of dangerous hate speech gained protection for its own sake, rather than the notion that certain kinds of odious ideas deserve protection to allow breathing room for tidal ebbs and flows of collective consensus, while still remaining proscribed were they to cross a certain line of obviously dangerous potential.[172] The idea that free speech is about free discourse takes a back seat as the reflex of protecting things commonly afforded social opprobrium for some twisted sense of pure individual liberty took hold. Instead of seeing things as Holmes and Brandeis did—with the broad

constitutional muster in one case fall in others when a different rubric is applied with some degree of randomness.

[171] *See R.A.V*, 505 U.S. 337 (1992); *See also Noto*, 367 U.S. at 299-300 (holding that the evidence in a conviction under the Smith act was insufficient support the idea that the Communist party pushed for the violent overthrow of the government); *See also Noto*, 367 U.S. at 391 (Black, J., concurring) (introducing the idea that the suppression of dissident political associations as encouraging effects that lead to totalitarian tendencies); *See also* Rust v. Sullivan, 500 U.S. 173, 195-197 (1991) (upholding restrictions on abortion counseling as a method of family planning as in accord with content-neutrality doctrine); *See also* Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737 (1977) (elaborating upon the Founders' high achievement of establishing a robust system of free expression, justified on the basis of truth searching, individual fulfillment, and the democratic process); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L. J. 1063 (1980) (dissecting the hesitancy to accept the notion of civil liberties as inherently tied to the political process). As a whole, these cases show the fissure between modern First Amendment doctrine, where certain kinds of speech Holmes or Brandeis would have found well-comporting with the First Amendment nonetheless subject to government restriction, while simultaneously allowing for the protection of highly violent acts. In other words, one would think Holmes or Brandeis would see cross-burning or abortion counseling through the lens of the potential for violence rather than content-neutrality, which would gesture towards very different results in those kinds of cases. This contradiction is not without note, and undermines both Brandeis's understanding of speech as related to the individual's interest in fully realizing their freedom of conscience and Holmes's agnostic inclination towards open ideological conflict as allowing for the shedding of ill-advised beliefs on the way to discovering true societal preferences. A chaotic marketplace with slanted competition and a stifling of individual self-actualization seem strange in both of the Justices' legal philosophies.

[172] *Compare Abrams*, 250 U.S. at 624-630 (Holmes, J. dissenting); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (distinguishing protected speech from that which contains nearly no "breathing room" in its direct encouragement of violent action as fully unprotected "fighting words."); *Snyder*, 562 U.S. 443 (2011) *with* Terminiello v. City of Chicago, 337 U.S. 1, 6 (1949) (overturning the conviction of a fascistic ex-priest for incitement of a riot outside of the auditorium where he was giving a speech while violent mobs fought outside). It is hard to imagine a world in which inflammatory picketing of funerals and encouragement of collective violence are not similar enough to nose-to-nose incitements of conflict otherwise subject to the criminal sanction, and yet as the timespan between *Terminiello* and *Snyder* demonstrates, this idea nonetheless persists without clarification.

process of conversation meriting the protection of unpopular speech—the right to speak no matter the consequences came into vogue. Clear and present danger, as augmented in *Brandenburg*,[173] saw its reduction to near-total abstraction, rather than a genuine, real-world possibility earlier Courts understood it to be.[174] The very notion of such a test implies that there *are* certain kinds of speech worth restricting, that dangerous speech of that kind *does* warrant foreclosure, albeit under very rare circumstances, but by turn of the new millennium almost nothing seems to fit that bill. What might appear to some as naked policy preferences can now win the requisite votes for a majority opinion, or not, seemingly dependent on the day of the week.[175] Although certainly the early/mid era of First Amendment law was

[173] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (modifying the "clear and present danger" test to include both a subjective element of intent and an objective element of imminent lawless action). Here we seen that the range of divergent opinions on where exactly the government may step in on speech, held in relief against other more restrictive decisions stretching beyond earlier foundation frameworks of evaluation.

[174] *See R.A.V.*, 505 U.S. 337, 383-390 (applying rubrics of, among other things, obscenity, fighting words, content-neutrality, and proscriptions of threats against the President rather with no mention of scant treatment of *Brandenburg* or any of its predecessors); Virginia v. Black, 538 U.S. 343, 359-366 (2003) (blending an inquiry into what constitutes a "true threat" and what is more or less group expressive in analyzing cross-burning); Holder v. Humanitarian Law Project, 561 U.S. 1, 21-23 (2010) (holding that despite an NGO's group's attempts to teach legal methods of advocacy to a registered terrorist group, the government could nonetheless subject it to criminal sanction on the basis that any assistance would constitute "material support" for a foreign terrorist group); Janus v. American Federation of State, County, and Municipal Employees, Council 31, 138 S. Ct. 2448, 2463-2463 (2018) (finding that "agency fees" paid by public-sector employees despite their non-membership in a union, used for collective bargaining purposes, was compelled speech); National Institute of Family and Life Advocates v. Becerra, 138 U.S. 2361, 2371 (2018) (ruling that requirements placed on pregnancy-related clinics to provide notice of publicly funded abortion services, as well as disclosing any lack of licensing, was a content-restrictive regulation in violation of the First Amendment); Sorrell v. IMS Health, Inc., 565 U.S. 552, 577-578 (2011) (finding that a Vermont law restricting the disclosure or prescription practices and other records was content-based and did not advance state interest of lowering prescription costs). *See also* Mari J. Matsuda, *Public Response to Racist Speech. Hate Speech, Cultural Diversity*, 87 MICH. L. REV. 2320 (1989) (proposing that an absolutist approach to the First Amendment fosters hate speech and perpetuating racism). Rather than situate its decision-making in a more theoretical/principle-bound understanding of the First Amendment, the Court in these cases applies various toolkits haphazardly, either restricting speech or allowing speech-restrictive laws to stand seemingly without rhyme or reason. Content-neutrality doctrine becoming an ends in of itself, rather than a means to facilitate social change or the democratic process, this stray venture narrows the playing field in contradiction of Holmes and Brandeis's generalized understanding of speech.

[175] *See*, *e.g.*, *Hurley*, 515 U.S. at 572-574 (framing the question as whether individual gay, lesbian, or bisexual individuals could participate in the parade versus whether they could carry their own banner as a unit is forcing others to change the content of their speech in what is traditionally understood to be the open arena of speech that are public streets); *Barnette*, 319 U.S. at 639-642 (looking at compulsory flag salute laws as invading the conscience and right to express diverse ideas within society at large); *Bridges*, 314 U.S. at 270-274 (discussing the relatively innocuous, and certainly not dangerous, forms of expression despite their purposely agitative character as they related to pending judicial proceedings in the labor context); Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 796-801 (1988) (holding that a licensing requirement for professional fundraisers who were to disclose the percentage of donations actually going towards charitable works was an unconstitutional burden on free

by no means a free-for-all,[176] thoughtful consideration bearing at least some resemblance both to Holmes's agnosticism and Brandeis's idealistic individualism would be a regular enough theme of the Court's speech jurisprudence.[177] Distorted by time and rigid, incoherent doctrinaire tendencies, we find ourselves in an era where two cases, both seemingly on-point in their control over novel speech issues, point in fully opposite directions.

speech); U.S. v. American Library Ass'n, 539 U.S. 194 (2003) (restricting government subsidies for internet service unless public libraries deployed a firewall preventing users from accessing certain websites). Further mutations of foundational speech ideas render the early-20th century's speech revolution borderline meaningless, with a clear "culture wars" theme running through cases that, while bearing some similarity to each other, differ in regards to what the government is seeking to accomplish in its regulations and whether the activity being regulated was otherwise permissibly sanctionable.

[176] *See*, *e.g.*, Street v. New York, 394 U.S. 576 (1969) (a predecessor to *Texas v. Johnson*, 491 U.S. 397 (1989) where in this case flag burning accompanied by speech was allowably prohibited, behind a fig leaf of speech rather than expressive-behavior regulation). *See Chaplinsky*, 315 U.S. at 573-574 (excluding "fighting words" from First Amendment protections); *Communist Party of the USA*, 367 U.S. at 88-90 (holding that Congress's enforcement of a registration requirement on the Communist Party did not suppress speech); *Communist Party of the USA*, 367 U.S. at 137-139 (Black, J. dissenting) (voicing grave concerns about the Court's ruling against the Communist Party in the case); *Barenblatt*, 360 U.S. at 126-134 (1959) (finding that a defendant's refusal to answer questions about communist affiliation was properly weighted against the government's security interests in upholding conviction); *Barenblatt*, 360 U.S. at 145 (1959) (Black, J., dissenting) (expressing dismay about the Court's balancing test deployed in the case as subverting core First Amendment freedoms); Dennis v. U.S. 341 U.S. 494, 508-511 (interpreting the "clear and present danger" test as justifying a defendant's conviction under the Smith Act); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 508-509 (1949) (Justice Black, writing for the majority, agreed that economic regulations restrictive of speech may be permissible under certain factual circumstances); Laird v. Tatum, 408 U.S. 1, 12-14 (1972) (finding that a chilling effect on speech did not exist in the context of government surveillance); Meese v. Keene, 481 U.S. 465, 477-480 (1987) (explaining that the term "propaganda" was clear in its meaning and entailed no negative connotations in upholding the disclosure by foreign agents of their presented materials). *See also* Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine* (Symposium), 78 NW. U L. REV. 1137 (1983). These several cases evince a certain hesitancy of on the Court to take as dramatic a stand as Holmes might on the matter of speech.

[177] *Barnette*, 319 U.S. 624; *Barenblatt*, 360 U.S. at 145 (Black, J., dissenting); Epton v. New York, 390 U.S. 29, 31-34 (1968) (Douglas, J., dissenting); First Unitarian Church of Los Angeles v. County of Los Angeles, 357 U.S. 545, 547-548 (1958) (Douglas, J., concurring) (invoking *Barnette*'s "fixed star" to say that "There is no power in our Government to make one bend his religious scruples to the requirements of this tax law."); Garrison v. Louisiana, 379 U.S. 64, 79-80 (1964) (Black, J., concurring) (comparing seditious libel laws to the English Star Cahmber proceedings); *Garrison*, 379 U.S. 64, 80 (Douglas, J., concurring) (affirming "hearty agreement" with the Court's ruling while bemoaning the "almost unrecognizable" form the First Amendment takes in the majority opinion). These opinions, though all except for one in dissent, on the whole, indicate the presence of the more basic sense that unless speech is obviously proximate to some form of illegality it may not be curtailed, either directly or indirectly via "chilling effects."

IV. APPLICATION TO CLAIBORNE AND FAIR

A. NAACP v. Claiborne Hardware[178]

1. Facts

The dispute over whether to apply *Claiborne*[179] or *FAIR,*[180] the crux of resolving the dissonance causing so much confusion for lower courts in deciding the constitutionality of anti-BDS laws, requires careful attention to the former case's rather extensive fact pattern. In 1966, a year embedded in the thick of the Civil Rights Movement, Black citizens in Claiborne County, Mississippi issued a list of specific demands for white elected officials regarding racial equality.[181] Following the rejection of their demands, the local NAACP chapter, at a meeting of several hundred people, resolved to boycott white merchants in the area as a way to agitate for social change.[182] The Supreme Court noted in its opinion one specific event of "particular significance,"[183] namely, a young black man being shot and killed by two local police officers.[184] What followed was a speech and march led by the local NAACP field secretary, Charles Evers, demanding the firing of the entire Port Gibson police department, which upon its rejection, resulted in the boycott being reinstated on all white merchants in the area.[185] Of note in this chain of events, is Evers's statement that violators would be disciplined, violent rhetoric in further speeches, and certain incidents of threatening provocation occurring in retaliation against boycott violators.[186] The dates on which some of these incidents occurred were unclear, but five of them were confirmed to have happened in 1966.[187]

2. Holding

In its discussion of the broad swath of activism at issue in *Claiborne*, the Supreme Court started by noting its blended quality, noted that each component part would normally be entitled to First Amendment protections, and went beyond simply extolling the amplification offered by expressive association, emphasizing that "[t]he right to associate does not

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178 *Claiborne*, 458 U.S. 886.

179 *Id*.

180 *FAIR*, 547 U.S. 47.

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

182 *Id*.

183 *Id*. at 902.

184 *Id*.

185 *Id*.

186 *Id*. at 903-906.

187 *Id.* at 906.

lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."[188] While pointing out that there was more than just peaceful assembly undertaken in the long chain of events that brought the case up to high court, the majority's opinion again underscored that if parts of the course of conduct were peaceful, then they were entitled to First Amendment protections.[189] Nonetheless, protected activity did not foreclose further analysis, the Court says, because regulations that have only an incidental effect on First Amendment liberties may still be justified under narrow circumstances.[190] Specifically mentioning governmental interest in well-regulated economic conditions, and for the purposes of the anti-BDS-law analysis, crucially mentioning that "[s]econdary 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,'" the Supreme Court still did not budge, saying that even in light of this authority "we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case."[191] The elevated importance of robust public discourse on matters of common concern was driven home,[192] and acknowledgment that the express purpose of the boycotts were to influence government policy was made.[193] The rest of the opinion is not strictly relevant to the matter of anti-BDS laws, as it has less to do with the constitutional status of boycotts and more to do with the sometimes-blurry frontier zone where advocacy and violence interact, a core area of inquiry in resolving the issue of damages liability.[194] It is, however, worth pointing out that the Court mused, albeit briefly, on what lengths an advocate may permissibly go to along the way of making their point, placing a premium on thorough public debate and setting a high bar as to the level of incitement required to penalize such advocacy.[195] The Court's solemn concluding paragraphs underscored the lofty aspirations of the First Amendment yet simultaneously condemned the violence that "colored the conduct of some of the petitioners."[196] Nonetheless "[a] massive and prolonged effort to change the social,

[188] *Id*. at 908.

[189] *Id*. at 909.

[190] *Id*. at 912.

[191] *Id.* at 912-913.

[192] *Id*. at 913. *See also* New York Times Co. v. Sullivan, 376 U.S. 264, 270 (1964).

[193] *Claiborne*, 458 U.S. at 914.

[194] *Id*. at 915.

[195] *Id*. at 929.

[196] *Id*. at 933.

political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts" and thus "the findings of the chancellor … are constitutionally insufficient to support the judgment that all petitioners are liable for all losses resulting from the boycott."[197]

3. Commentary

The first matter of importance here is the Court's ability to simultaneously understand that associational speech is *both* collective *and* individual, in its statement that speech does not lose its protection through vicarious guilt.[198] This cuts heavily against the anti-BDS tendency, based around *FAIR*'s holding, that purchasing decisions are simply individual inactions without further explanation. Here was the notion that while of course personal purchasing decisions are individualized transactions, those transactions can, and in cases like these do connect to a broader social movement. Parsing out the speech activities at issue is only the half of it—the Court was also inclined to think the better of the speakers involved in the broad campaign of activism centered around the boycott, pointing towards the notion that of course bad actors can be held liable, because we already have laws to take care of their misdeeds.[199] Along those lines, the Court said, misconduct duly regulated by its corresponding body of law can coexist alongside protected speech.[200] The Court was more discerning, however, and had no intention of irrationally picking a side in the dispute, because it cut through the layers of issues present in *Claiborne*,[201] specifically the inherent tension between the authority of the government and the rights of citizens against that government, as manifested by the impasse between economic regulation of secondary boycotts and political

[197] *Id*. at 933-34.

[198] *Id*. at 907, 909.

[199] *See id.* at 933 ("The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds."). *See also* George C. Covington, *Constitutional Law—The First Amendment and Protest Boycotts: NAACP v. Claiborne Hardware Co.*, 62 N.C. L. REV. 399 (1984).

[200] *Claiborne*, 458 U.S. at 933-934 ("A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that . . . carefully identify the impact of such unlawful conduct, and . . . [avoid] the imposition of punishment for constitutionally protected activity.").

[201] *Id.* at 912 ("The presence of protected activity, however, does not end the relevant constitutional inquiry. Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances.") (*citing* U.S. v. O'Brien, 391 U.S. 367 (1968).

expression.[202] The analysis here was clearsighted and libertarian in character—the Court laid out in plain terms the two poles pulling away from each other and elevated the speech rights of ordinary people—but by no means left them unexplained. The *reason* the Court erred on the side of First Amendment protection for the boycott action falls neatly within Holmes's marketplace metaphor, of staying out of the fight and allowing the straightforward ideological conflict play out on its own, while explaining the ostensible contradiction of *International Longshoremen's* as one wholly consistent with speech tradition. The clash of ideas in the marketplace is paramount and by its nature consensual, so the boycott in *International Longshoremen's*, aside from its specifically cabined setting in labor law, was sanctionable because it forces unwitting actors into the arena against their will.[203] The well-established proposition of public discourse on political issues as central to the American speech tradition is raised next,[204] and the Court's high regard for speech became solid and clear to the point of being hard to avoid in any attempt to elide the crux of the holding in any anti-BDS law argument. The Court here did *not* say that the boycott was protected because it was meant to vindicate constitutional rights, and read in the context of all of the other speech hagiography present in the case that line of reasoning begins to trip over itself continuously. For any state actor seeking to defend anti-BDS laws, *Claiborne* read in full is an extremely difficult circle to square.

B. Rumsfeld v. FAIR[205]

1. Facts

FAIR[206] is a more straightforward case than *Claiborne* in its factual background. The conflict stemmed from the Solomon Amendment,[207] a

[202] *Id.* ("This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incident effect on rights of speech and association") (internal citations omitted).

[203] *Claiborne*, 458 U.S. at 913 ("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 peaceful political activity such as that found in the boycott in this case.") (internal citation omitted).

[204] *Claiborne*, 458 U.S. at 913 ("This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' '[S]peech concerning public affairs is more than self-expression, it is the essence of self-government.' There is a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open) (internal citations omitted).

[205] *FAIR*, 547 U.S. at 52.

[206] *Id*.

[207] 10 U.S.C.A. § 983.

statute that required the Secretary of Defense to compare military recruiters' access to students on college campuses to those of other professional recruiters in evaluating the provision of federal funds to those colleges and universities, using an objective standard that looks towards the end result of recruitment capabilities on campus rather than examination of specific policies.[208] The appellant in this case was the Forum for Academic and Institutional Rights, a group of law schools and law faculties dedicated to promotion of rights and equity with regard to institutions of higher education. Among other things, the group advocated for the restriction of military recruitment on campuses in response to congressional policies respecting homosexuals in the military.[209] The Solomon Amendment's practical interpretation was a particular sticking point in *FAIR*, where the government had adopted an informal policy of requiring access to students of similar quality and scope as compared to other recruiters, rather than a stricter interpretation that would simply require physical entry to campuses.[210] FAIR sought a preliminary injunction against the enforcement of the Solomon Amendment, given the bright-line choice between enforcing nondiscrimination policies involving military recruiters on campus and the receipt of federal funding.[211] After a loss at the district court level, a divided panel of the Third Circuit Court of Appeals ruled in FAIR's favor and granted the injunction, and the Supreme Court then granted certiorari on appeal.

2. Holding

As compared to *Claiborne*, *FAIR* was a much more sterile, but certainly not any less detail-oriented, approach.[212] Following a short rebuke to the *amici* who submitted briefs in support of the notion that the Solomon Amendment is an impermissible content-based restriction, and instead favoring a less controversial reading as per both the government and FAIR's understanding,[213] a brief detour into the authority of the government regarding military affairs and indirect incentivization via the Spending Clause was taken.[214] Fundamentally rejecting the notion that the Solomon Amendment either limited the scope of law schools' speech or compelled them to speak in a certain way,[215] the Court delineated speech from more

[208] *FAIR*, 547 U.S. at 48.

[209] *Id*. at 51.

[210] *Id.* at 52.

[211] *Id.*

[212] *See generally id*.

[213] *Id*. at 57.

[214] *Id*. at 59.

[215] *Id*. at 60-61.

banal conduct,[216] somewhat of a hedge in the name of *protecting* speech is proffered. In citing *Hurley* and *Miami Herald*,[217] the majority in *FAIR* indicated a sensitivity towards compelled speech.[218] Now looking towards expressive conduct, analysis of *O'Brien* and *Texas v. Johnson* was undertaken, leading to the conclusion that there was in fact a substantial government interest at stake and that Congress, not the judiciary, should be afforded deference in terms of both their purpose and methods.[219] Lastly, consideration of associational speech was made, with the idea of there being First Amendment protection for collectively-amplified expression emphasized through citations of *Boy Scouts of America* and *United States Jaycees*, but the holding was that such a right is not implicated in this case.[220] Having checked all of the boxes necessary to push the law school's defiance of the Solomon Amendment away from the First Amendment's shield, the Supreme Court reversed the Third Circuit's more expansive judgement and remanded the case for proceedings consistent with its ruling.[221]

3. Commentary

FAIR, in contrast to *Claiborne*, cuts carefully but without purpose. The opinion attempted to get into the doctrinal weeds, but on a very basic level opted not to look especially hard for the meaning beneath the surface of such a seemingly low-stakes dispute. It is true that matters of compelled speech and expressive association were raised, but the examination was cursory and the sensitivities displayed somewhat empty. *Naturally*, the Court said, the government cannot forcibly draw speech from its citizens, but that's just not what's going on here. The company we choose to keep *is* a statement of identity, but not under these circumstances. By contrast, the government's authority to regulate military affairs is simply placed on the argumentative table, without any type of further critique in light of the potential encroachment on civil liberties, the same ones that the Court admitted could be involved, but plainly aren't. One would think that the possible violation of hallowed civil liberties would be worth looking into further, but a clean sidestep was taken here, and the Court threw its hands in the air to some degree. However stale the holding in *FAIR* might have

[216] *Id*. at 62.

[217] *See id*. at 63. *See also Hurley*, 515 U.S. 557; Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

[218] *Id*. at 63-65.

[219] *Id*. at 67-68. *See O'Brien*, 391 U.S. at 377. *See also Texas v. Johnson*, 491 U.S. at 406.

[220] *FAIR*, 547 U.S. at 69-70. *See also* Boy Scouts of America v. Dale, 530 U.S. 2446 (2000); Roberts v. United States Jaycees, 458 U.S. 609 (1984).

[221] *FAIR*, *id*., at 70.

been, it demonstrates the way anti-BDS laws could be upheld with ease, not unlike the technique used in *Arkansas Times*. Simply reduce things as much as possible, break things down into their elements *ad absurdum*, and the big picture will disappear almost on its own. There can't be any soaring structures of First Amendment aspirations if the building blocks with which those arguments shrink down to a degree of full uselessness, humored as a hypothetical concern but absent with no explanation.

V. CONCLUSION: RESOLVING THE BDS QUESTION

The problem with the split between *Claiborne* and *FAIR* is that any anti-BDS-law litigation, based on the deployment of the two cases thus far at the lower levels, will wind up involving two arguments that talk past each other. While there is certainly a jurisprudential current beneath the surface gesturing toward the notion that the two cases are fundamentally compatible, the trend seems to be set. District courts will continue to get reversed, circuit splits will grow deeper, and eventually the Supreme Court will have to weigh in. This leaves essentially two options for the nine Justices, one markedly more extreme and therefore less likely on a purely intuitive basis. Most moderately, the Court could do what *Jordahl* did and delineate carefully the differences between *Claiborne*'s expansive, explicit protection of boycotts and *FAIR*'s holding that as a factual matter doesn't refer to boycotts at all. Such a ruling would be something of a dodge, but certainly nowhere near out of character for any Supreme Court, let alone that of Chief Justice Roberts, with his avowed hesitancy to rock the boat. Simply distinguishing the two cases would point in only one direction, of course, because if *FAIR* doesn't concern boycotts at all then it would be hard to claim it more authoritative over a controversy concerning the Boycott, Divest, and Sanctions movement, but would still be the path of least resistance. Depending on the arguments made in the parties' briefs and in front of the Justices though, and most of all depending on the majority coalition, the Court could plausibly engage with the polarity of *Claiborne* and *FAIR* by stating that, yes, the two cases treat the same issue, and that one of them is controlling while the other ought to be abrogated. This would mean a dramatic outcome for such a case one way or another, because it would be either a reaffirmation of deep First Amendment commitments to open discursive conflict, or a resounding repudiation of those very same values. Perhaps here, a lighter touch will better maintain the speech *status quo*, as Chief Justice Roberts is allegedly committed to doing. One way or another it would be very hard for the Court to hold in favor of the anti-BDS laws' constitutionality without accusations of disingenuousness. Both the internal dissonance between the *Claiborne*/*FAIR* issue, and the external pressure of a century's worth of

First Amendment thought, despite all of its flaws, would unfortunately support such accusations.