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The Right to Boycott as a Right of Assembly

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I. INTRODUCTION

For several years, laws requiring government contractors to certify that they are not participating in boycotts of Israel or Israeli settlements in the West Bank have proliferated in state legislatures.[1] These laws are colloquially known as "anti-BDS" laws because they are targeted at the Boycott, Divestment & Sanctions Movement—a social movement that "leverages boycotts, institutional divestment, and government sanctions to target entities deemed complicit in Israel's violations of Palestinian rights."[2] The laws have generated a considerable amount of litigation and led to divergent conclusions about whether the First Amendment protects the right to participate in politically-motivated consumer boycotts. Federal district courts in Kansas,[3] Arizona,[4] Texas,[5] and Georgia[6] have held that the First Amendment protects the right to boycott and that these anti-BDS laws unconstitutionally condition government benefits on the disavowal of First Amendment freedoms. But the *en banc* Eighth Circuit held in *Arkansas Times v. Waldrip* that the First Amendment does not protect the "purchasing decisions at the heart of a boycott."[7]

The dispute over the right to boycott boils down to an issue of dueling precedents.[8] On the one hand, the Supreme Court held in *NAACP v. Claiborne Hardware Co.* that "[t]he 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."[9] On the other, the Court held in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* ["*FAIR*"] that conduct is generally not "inherently expressive," and is therefore unprotected by the First Amendment, if its message cannot be perceived without "explanatory speech."[10] In *Arkansas Times*, the Eighth Circuit distinguished *Claiborne Hardware* by asserting that it protects the "expressive activities *accompanying* a boycott, rather than the purchasing decisions at the heart of a boycott."[11] Applying *FAIR* instead, the court held that, "[b]ecause those

1. *See* Timothy Cuffman, Note, *The State Power to Boycott a Boycott: The Thorny Constitutionality of State Anti-BDS Laws*, 57 COLUM. J. TRANSNAT'L L. 115, 128–130 (2018).

2. Note, *Wielding Antidiscrimination Law to Suppress the Movement for Palestinian Rights*, 133 HARV. L. REV. 1360, 1362 (2020); *see also* Cuffman, *supra* note 1, at 120–25.

3. Koontz v. Watson, 283 F. Supp. 3d 1007 (D. Kan. 2018).

4. Jordahl v. Brnovich, 336 F. Supp. 3d 1016 (D. Ariz. 2018), *vacated as moot*, 789 F. App'x 589 (9th Cir. 2020).

5. Amawi v. Pflugerville Ind. Sch. Dist., 373 F. Supp. 3d 717 (W.D. Tex. 2019), *vacated as moot sub nom.* Amawi v. Paxton, 956 F.3d 816 (5th Cir. 2020).

6. Martin v. Wrigley, 540 F. Supp. 3d 1220, 1223–24 (N.D. Ga. 2021), *aff'd on other grounds sub nom* Martin v. Chancellor for the Bd. of the Univ. of Ga., No. 22-12827, 2023 WL 4131443 (11th Cir. June 22, 2023) (affirming the district court's conclusion that plaintiff's § 1983 damages claims are barred by qualified immunity).

7. Arkansas Times, 37 F.4th 1386, 1392 (8th Cir. 2022), *cert. denied*, —- S. Ct. ——, No. 22-379, 2023 WL 2123748 (U.S. Feb. 21, 2023).

8. Amawi, 373 F. Supp. 3d at 743.

9. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 914 (1982).

10. 547 U.S. 47, 66 (2006).

11. Arkansas Times, 37 F.4th at 1392.

commercial decisions are invisible to observers unless explained, they are not inherently expressive and do not implicate the First Amendment."[12] Other courts have distinguished *FAIR* on the ground that it did not concern a consumer boycott and have instead applied *Claiborne Hardware*.[13]

In short, a split in authority has developed regarding whether the First Amendment protects the right to participate in politically-motivated consumer boycotts. Commentators have also divided over the issue.[14] This Article seeks to advance the discussion on this topic by demonstrating three related propositions. First, consumer boycotts have been ubiquitous in American politics since the Founding and have also historically been free from government regulation. Second, in *NAACP v. Claiborne Hardware Co.*, the Supreme Court recognized a First Amendment right to participate in politically-motivated consumer boycotts. Third, the right to boycott is founded, in significant part, on the right to peaceably assemble—it is therefore a category error to assess the constitutional status of consumer boycotts under *FAIR*'s test for inherently expressive symbolic conduct. Instead, this article proposes that boycotts should receive the same constitutional protection as protest marches, parades, sit-ins, and other historically significant forms of group demonstration.

Part II surveys the recent spate of legislation and litigation related to boycotts of Israel and other hot-button topics. Part III sketches the history of boycott movements in the United States, with particular attention to the Founding era and the development of the right to peaceably assemble. Part IV traces early decisions addressing civil rights boycotts and offers a close reading of the Supreme Court's decision in *NAACP v. Claiborne Hardware*. Part V describes the recognized limits on the right to boycott, including restrictions on economic boycotts, labor boycotts,

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12. *Id.* at 1394.

13. Martin v. Wrigley, 540 F. Supp. 3d 1220, 1226–29 (N.D. Ga. 2021), *aff'd on other grounds sub nom* Martin v. Chancellor for the Bd. of the Univ. of Ga., No. 22-12827, 2023 WL 4131443 (11th Cir. June 22, 2023); Amawi, 373 F. Supp. 3d at 743–45; Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1041–42 (D. Ariz. 2018), *vacated as moot*, 789 F. App'x 589 (9th Cir. 2020); Koontz v. Watson, 283 F. Supp. 3d 1007, 1021–24 (D. Kan. 2018).

14. *Compare, e.g.*, Cuffman, *supra* note 1, *and* Note, *Boycotting a Boycott: A First Amendment Analysis of Nationwide Anti-Boycott Legislation*, 70 RUTGERS U. L. REV. 1301 (2018), *and* Maria Kachniraz, Note, *Talk Isn't Cheap: Protecting Freedom of Speech in Light of Georgia's Anti-Boycott Legislation*, 52 GA. L. REV. 965 (2018), *and Recent Legislation*, 129 HARV. L. REV. 2029 (2016), *and* Theresa J. Lee, *Democratizing the Economic Sphere: A Case for the Political Boycott*, 115 W. VA. L. REV. 531 (2012), *and* Matthew Porterfield, *State & Local Policy Initiatives in Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT'L L. 1, 28–29 (1999), *and* James Gray Pope, *Republican Moments: The Role of Direct Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 333 (1990), *and* Lawrence A. Alexander & Maimon Schwarzschild, *Consumer Boycotts and Freedom of Association: A Comment on a Recently Proposed Theory*, 22 SAN DIEGO L. REV. 555 (1985), *and* Michael Harper, *The Consumer's Emerging Right to Boycott:* NAACP v. Claiborne Hardware *& Its Implications for American Labor Law*, 93 YALE L.J. 409 (1984), *with* Josh Halpern & Lavi Ben Dor, *Boycotts: A First Amendment History* 9–17 (Harv. Pub. L. Working Paper, Paper No. 23-01, Dec. 15, 2022), https://ssrn.com/abstract=4305186 (on file with the *University of the Pacific Law Review*), *and* Debbie Kaminer & David Rosenberg, *How the Conflict Between Anti-Boycott Legislation and the Expressive Rights of Business Endangers Civil Rights and Antidiscrimination Laws*, 55 U. RICH. L. REV. 827 (2021), *and* Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout Is Fair Play Under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29 (2018). *see generally* Gordon M. Orloff, Note, *The Political Boycott: An Unprivileged Form of Expression*, 1983 DUKE L.J. 1076 (1983).

and boycotts to advance unlawful goals. And Part VI argues that the "inherently expressive" test for symbolic conduct developed in *FAIR* is inappropriate for historically significant forms of group demonstration, such as protest marches and boycotts, which receive protection from the Assembly Clause as well as the Speech Clause. The Article concludes that recognizing the right to boycott's foundation in the Assembly Clause would place this important civil liberty on firmer constitutional ground.

II. THE RECENT PROLIFERATION OF ANTI-BOYCOTT LEGISLATION

In 2015, South Carolina enacted a novel law requiring government contractors to certify they are not "engage[d] in, the boycott of a person or an entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade."[15] The law's primary sponsor declared that he addressed the legislation to BDS boycotts of Israel.[16] Today, thirty-four states have laws restricting or penalizing boycotts of Israel in some way.[17] Over the past couple years, states enacted copycat laws to penalize boycotts of the fossil fuel industry[18] and the firearms industry.[19] New legislation expands these provisions to penalize boycotts of: the timber, mining, and agriculture industries; companies that do not meet environmental standards or disclosure criteria; companies that do not meet workplace diversity criteria; and companies that do not offer reproductive health care or gender affirming care.[20]

A number of federal district courts have held that these anti-BDS laws violate the First Amendment right to boycott recognized in *Claiborne Hardware*. In *Koontz v. Watson*, a substitute math teacher boycotting products associated with Israel's occupation of Palestine was barred from participating in Kansas' Math and Science Partnership Program because she would not sign the anti-boycott certification.[21] The U.S. District Court for the District of Kansas preliminarily enjoined the law, holding that "[t]he conduct prohibited by the Kansas Law is protected for the same reason as the boycotters' conduct in *Claiborne* was protected," and that the law impermissibly sought "to undermine the message of

15. *See Recent Legislation*, *supra* note 14, at 2030 (quoting S.C. CODE ANN. § 11-35-5300(A)).

16. *Id.* (quoting Rep. Alan Clemmons, Statement on Enactment of H. 3583 (June 4, 2015), https://web.archive.org/web/20150812095414/http://alanclemmons.com/index.html [http://perma.cc/Y6RA-5BEK]).

17. *Statistics*, PALESTINE LEGAL, https://legislation.palestinelegal.org/#statistics (last updated Aug. 12, 2022) (on file with the *University of the Pacific Law Review*).

18. KY. REV. STAT. § 41.480 (West 2022).

19. TEX. GOV'T CODE ANN. § 2274 (West 2021).

20. Reply Brief for Petitioner at 3, Arkansas Times LP v. Waldrip, 37 F.4th 1386 (8th Cir. 2022), cert. denied, —- S. Ct. ——, No. 22-379, 2023 WL 2123748 (U.S. Feb. 21, 2023); *see also* S.B. 261, 2023 Regular Sess. (Ala. 2023).

21. Koontz v. Watson, 283 F. Supp. 3d 1007, 1014 (D. Kan. 2018).

those participating in a boycott of Israel."[22] The case was voluntarily dismissed after Kansas amended its law to exempt sole proprietors and small businesses.[23]

In *Jordahl v. Brnovich*, an attorney boycotting products from Israeli settlements in the West Bank was unable to renew government contracts to provide legal representation to incarcerated people because he refused to sign the anti-boycott certification.[24] The U.S. District Court for the District of Arizona issued a preliminary injunction against the law, holding that "[t]he type of collective action targeted by the Act specifically implicates the rights of assembly and association that Americans and Arizonans use 'to bring about political, social, and economic change.'"[25] The case became moot on appeal after Arizona amended the law to exempt sole proprietors and small businesses, including the plaintiff's solo law practice.[26]

In *Amawi v. Pflugerville Independent School District*, state officials required numerous individuals—including a pediatric speech pathologist, a freelance writer, two university students engaged to judge high school debate tournaments, and a journalist—to certify that they would not boycott Israel as a condition of contracting with public institutions in Texas.[27] The U.S. District Court for the Western District of Texas issued a preliminary injunction, holding that "boycotts are 'deeply embedded in the American political process'—so embedded not because 'refusing to buy things' is of paramount importance, but because in boycotts, the 'elements of speech, assembly, association, and petition . . . "are inseparable"' and are magnified by the 'banding together' of individuals []to 'make their voices heard.'"[28] The court also held that the law imposed a content-based restriction on expression "because it single[d] out speech about Israel, not any other country," and that it imposed a viewpoint-based restriction because it targeted boycotts critical of Israel.[29] Here, too, the case became moot on appeal after Texas amended the law to exclude sole proprietors and small businesses.[30]

And, in *Martin v. Wrigley*, public university officials forced a journalist to cancel her keynote address at a conference after she refused to sign the anti-boycott certification.[31] The U.S. District Court for the Northern District of Georgia denied the state's motion to dismiss, holding that the law "prohibit[ed] inherently expressive conduct protected by the First Amendment, burden[ed] Martin's right

22. *Id.* at 1022.

23. *See* Agreed Order of Dismissal, Koontz v. Watson, Case No. 5:17-cv-4099-DDC-KGS (D. Kan. June 29, 2018), ECF No. 33; H.B. 2482, 2018 Legis. Sess. (Kan. 2018).

24. Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1028–29 (D. Ariz. 2018), *vacated as moot*, 789 F. App'x 589 (9th Cir. 2020).

25. *Id.* at 1043 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982)).

26. *See* Jordahl v. Brnovich, 789 F. App'x 589 (9th Cir. 2020).

27. Amawi v. Pflugerville Ind. Sch. Dist., 373 F. Supp. 3d 717, 731–35 (W.D. Tex. 2019), *vacated as moot sub nom.* Amawi v. Paxton, 956 F.3d 816 (5th Cir. 2020).

28. *Id.* at 744 (omission in original).

29. *Id.* at 748.

30. *Id.* at 821.

31. Martin v. Wrigley, 540 F. Supp. 3d 1220, 1223–24 (N.D. Ga. 2021),*aff'd on other grounds sub nom* Martin v. Chancellor for the Bd. of the Univ. of Ga., No. 22-12827, 2023 WL 4131443 (11th Cir. June 22, 2023).

to free speech, and [was] not narrowly tailored to further a substantial state interest."[32] The court also held that the law was content discriminatory because its application was "premised entirely upon the motive behind the contractor's decision" not to buy products or services from companies operating in Israel or Israel-controlled territories.[33] Here too, Georgia amended the law to exclude sole proprietors and small businesses, and the case was dismissed for mootness.[34]

On the other side of the ledger, the Eighth Circuit rejected a newspaper's challenge to Arkansas' Israel anti-boycott law in *Arkansas Times LP v. Waldrip.*[35] The newspaper lost advertising contracts with a public technical college after it refused to sign the anti-boycott certification.[36] The *en banc* Eighth Circuit ultimately upheld the law against the newspaper's First Amendment challenge. It read *Claiborne Hardware* to protect "expressive activities *accompanying* a boycott, rather than the purchasing decisions at the heart of a boycott.[37] Further, applying the Supreme Court's decision in *Rumsfeld v. FAIR*,[38] the court held that a consumer's decisions not to purchase particular goods and services in adherence to a boycott "are not inherently expressive and do not implicate the First Amendment," because they "are invisible to observers unless explained."[39]

III. THE ROLE OF BOYCOTTS IN U.S. PROTEST MOVEMENTS

A. The Colonial Boycott of British Goods

Politically motivated consumer boycotts have been a distinctive form of collective association and expression since the Founding. The Revolution itself was galvanized by a series of consumer boycotts—then known as nonimportation and nonconsumption agreements—protesting British policies.[40] The colonists initiated the boycott campaigns to protest taxes imposed by the Stamp Act of 1765, which was repealed the following year.[41] They renewed the boycotts in 1767 when Parliament passed the Townshend Act imposing onerous duties on various consumer products.[42] The boycott campaigns quickly gathered steam. "On October 28, [1769], the Boston town meeting adopted an agreement pledging to refrain from purchasing various imported products. The Boston selectmen sent copies of the agreement to other towns in Massachusetts and throughout the provinces, and

32. *Id.* at 1231.

33. *Id.* at 1230.

34. *See* Order, Martin v. Wrigley, No. 1:20-cv-596 (MHC) (N.D. Ga. July 20, 2022).

35. Arkansas Times LP v. Waldrip, 37 F.4th 1386 (8th Cir. 2022), *cert. denied*, —- S. Ct. ——, No. 22-379, 2023 WL 2123748 (U.S. Feb. 21, 2023).

36. Arkansas Times, 988 F.3d 453, 460 (8th Cir. 2021), *vac'd on reh'g en banc*, 37 F.4th 1386 (8th Cir. 2022), *cert. denied*, —- S. Ct. ——, No. 22-379, 2023 WL 2123748 (U.S. Feb. 21, 2023).

37. Arkansas Times, 37 F.4th at 1392.

38. *Id.*(discussing Rumsfeld v. F. for Acad. & Inst. Rts., Inc., 547 U.S. 47 (2006))

39. *Id.* at 1394.

40. *See, e.g.*, Porterfield, *supra* note 14, at 28–29.

41. *Id.* at 28.

42. *Id*.

numerous towns in Massachusetts, Rhode Island, and Connecticut quickly adopted similar agreements."[43] Colonial assemblies in Massachusetts, Connecticut, Rhode Island, and Virginia expressed their support for the nonimportation and nonconsumption agreements.[44]

The boycotts provoked intense Loyalist opposition. The Lieutenant Governor of Massachusetts, Thomas Hutchinson, wrote "that he had found 'by experience, that associations and assemblies, pretending to be legal and constitutional and assuming powers which belong only to the Established authority prove more fatal to this authority, than mobs, riots, and the mass tumultuous disorders.'"[45] Although he acknowledged that for "particular persons to forbear importing cannot be deemed criminal," he asserted that "it is quite another thing for numbers to confederate together and compel others to join them, and all with an avowed design to force the legislature to repeal their acts."[46] William Henry Drayton similarly "acknowledged that individuals might refrain from importing, but a 'confederacy' for that purpose would unlawfully 'oblige a man to act contrary to his inclination.'"[47]

Conversely, Patriot leaders insisted not just on the lawfulness of their actions, but on their constitutional right to boycott.[48] Christopher Gadsden, later a general in the Revolutionary War and the designer of the Gadsden flag featuring the motto "Don't Tread on Me",[49] wrote that "every body of English freemen, in cases of extremity like ours, have an undeniable constitutional right besides, if they think it necessary for their preservation, to come into such a[] [nonimportation] agreement."[50] John Dickinson, author of the influential *Letters from a Pennsylvania Farmer*,[51] similarly argued that, "[i]f respectful petitions were ignored . . . 'then that kind of opposition becomes justifiable, which can be made without breaking the laws, or disturbing the public peace,' namely 'withholding from Great-Britain, all the advantages she has been used to receive from us.'"[52] Another Patriot leader, John Mackenzie, asserted that "the [nonimportation]

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43. *Id.* at 28–29.

44. *See id.* at 29.

45. Pope, *supra* note 15, at 332 (1990) (quoting Letter from Thomas Hutchinson to Hillsborough (Oct. 20, 1769)*, in* 3 SPARKS MANUSCRIPTS, PAPERS RELATING TO NEW ENGLAND, at 41).

46. *Id.* at 332 n.198 (1990) (quoting BERNARD BAILYN, THE ORDEAL OF THOMAS HUTCHINSON 133 (1974)).

47. *Id*. (quoting Letter from Freeman (William Henry Drayton) to Libertas et Natali Solum (Oct. 12, 1769)*, in* THE LETTERS OF FREEMAN, ETC.: ESSAYS ON THE NONIMPORTATION MOVEMENT IN SOUTH CAROLINA 42, 47-48 (W. Drayton ed. 1771) (R. Weir ed. 1977)).

48. *Id.* at 333.

49. M.H. Hoeflich, *Reflections Upon Terrorism, Militias, Law, and the Judicial System: An Essay*, 67 U. KAN. L. REV. 713, 716 (2019).

50. Letter from Christopher Gadsden to Peter Timothy (Oct. 26, 1769)*, in* THE LETTERS OF FREEMAN, ETC.: ESSAYS ON THE NONIMPORTATION MOVEMENT IN SOUTH CAROLINA 57, 67 (W. Drayton ed., 1771) (R. Weir ed., 1977)).

51. James G. Wilson, *The Unconstitutionality of Eliminating Estate and Gift Taxes*, 48 CLEV. ST. L. REV. 771, 787 (2000).

52. Pope, *supra* note 14, at 331 (quoting J. DICKINSON, LETTERS FROM A FARMER IN PENNSYLVANIA TO THE INHABITANTS OF THE BRITISH COLONIES 31–35 (1903)).

'association assumes no other right' than the individual right to withhold patronage."[53]

Although the boycotts died down when significant portions of the Townshend Act were repealed in 1770,[54] the movement did not lay dormant for long. "In December 1773, the Sons of Liberty dumped the cargo of three British merchantmen into Boston Harbor to protest the Tea Act by which Westminster reasserted its taxing power over the colonies."[55] In response, Parliament imposed a slew of draconian restrictions on the Massachusetts colonists, collectively known as the Intolerable Acts.[56] Those restrictions included the Massachusetts Government Act of 1774, which took direct aim at the nonimportation and nonconsumption associations. Alleging that the Americans were "abusing their authorization 'to assemble together' by treating 'upon matters of the most general concern' . . . and passing 'many dangerous and unwarrantable resolves,'" the Act sought to suppress the associations by "prohibit[ing] citizens from calling meetings 'without the leave of the governor,' except for specified purposes."[57]

Meanwhile, another Boston town meeting "adopted a resolution calling for the reinstitution of the nonimportation campaign," which other towns throughout Massachusetts swiftly endorsed.[58] The Virginia House of Burgesses passed a resolution condemning Parliament's passage of the Intolerable Acts, prompting the colonial governor to dissolve the House—at which point, "the Burgesses adopted an 'Association' (drafted by Thomas Jefferson)" to boycott British goods.[59] The First Continental Congress convened in the fall of that tumultuous year.[60] It "declared the right of the people '*peaceably to assemble*, consider of their grievances, and petition the king.'"[61] It also called for a boycott of British goods.[62]

Josh Halpern and Lavi Ben Dor have suggested that Revolutionary-era sources undermine, rather than support, the notion that the First Amendment protects the

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53. *Id.* at 332 n.199 (quoting Letter by a Member of the General Committee (John Mackenzie) (Sept. 28, 1769)*, in* LETTERS OF FREEMAN, ETC.: ESSAYS ON THE NONIMPORTATION MOVEMENT IN SOUTH CAROLINA 33, 38 (W. Drayton ed., 1771) (R. Weir ed., 1977)).

54. Porterfield, *supra* note 14, at 29 (1999) (citing CHARLES MCLEAN ANDREWS, THE BOSTON MERCHANTS AND THE NON-IMPORTATION MOVEMENT 77 (1968); CARL UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 180 (1960)).

55. H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 466 (2000) (citing BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 118–19 (1967)).

56. *Id.* (citing BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 118–19 (1967)).

57. Pope, *supra* note 14, at 330 (quoting Massachusetts Government Act, 14 Geo. 3, ch. 45, § 7 (1774)).

58. Porterfield, *supra* note 14, at 29 (citing ARTHUR MEIER SCHLESINGER, THE COLONIAL MERCHANTS AND THE AMERICAN REVOLUTION, 1763–1776, at 313 (1918)).

59. *Id.* (citing NEIL R. STOUT, THE PERFECT CRISIS: THE BEGINNING OF THE REVOLUTIONARY WAR 121 (1976)).

60. *Id.* (citing NEIL R. STOUT, THE PERFECT CRISIS: THE BEGINNING OF THE REVOLUTIONARY WAR 121 (1976)).

61. Pope, *supra* note 14, at 330 (quoting Declaration of Rights, 14 October 1774, *Journal of the Proceedings of the First Congress Held at Philadelphia* Sept. 5, 1774, at 62 (1774)).

62. Porterfield, *supra* note 14, at 29 (citing I JOURNALS OF THE CONTINENTAL CONGRESS 1774–89, at 76 (1904)).

right to boycott.[63] Citing evidence that the First Continental Congress countenanced nonviolent pressure tactics against colonial merchants and other individuals who violated the non-importation and non-consumption policies—including by publishing the names of boycott violators, declaring them to be enemies of American liberty, and boycotting them as well—Halpern and Ben Dor argue that the Founders did not contemplate First Amendment protection for consumer boycott campaigns.[64] Likewise, Halpern and Ben Dor insist that the Framers did not recognize an individual right of conscience in connection with economic transactions.[65] Thus, they dismiss Christopher Gadsden's invocation of the Englishman's constitutional right to boycott. According to Halpern and Ben Dor, Gadsden "fits neatly with the broader colonial conception of the boycott as a collective tool of public revolution, not an instrument of conscience and protected expression."[66]

Framing the question in this way imposes a twentieth century conception of civil rights on the Framers, who largely conceived of civil rights in an "essentially majoritarian fashion as safeguards against oppressive *governmental* action," rather than "individual rights enforceable *against the community*."[67] As Halpern and Ben Dor acknowledge, the First Continental Congress was a non-governmental body.[68] Its endorsement of pressure tactics to *promote* the colonial boycott of British goods sheds little light on whether the Founders believed that the British government, or the new federal government that replaced it, possessed the power to suppress civil society boycotts. To the contrary, the colonists' resort to "intense and impolite protest tactics" to enforce the nonimportation and nonconsumption agreements is "characteristic of republican moments,"[69] when "social movements exert direct popular power on governmental and private institutions."[70] Charles Evers and the boycott organizers in *Claiborne Hardware* employed similar nonviolent pressure

63. Halpern & Ben Dor, *supra* note 14, at 9–17.

64. *Id. at* 10 (citing Arthur Meier Schlesinger Sr., THE COLONIAL MERCHANTS AND THE AMERICAN REVOLUTION, 1763–1776, at 138, 486–87 (1918)).

65. *Id.* at 9 ("[A] closer look at the early history reveals the opposite—that the Continental Congress, and the colonial governments that enforced its decisions, did not conceive of the boycott as a matter of conscience, presumptively immune from coercion or state influence.").

66. *Id.* at 12 n.49.

67. John P. Roche, Civil Liberty in the Age of Enterprise, 31 U. CHI. L. REV. 103, 103 (1963).

68. Halpern & Ben Dor, *supra* note 14, at 12–13 (acknowledging that "the First Continental Congress lacked *de jure* legislative power"); *see also, e.g.*, David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 480 (1946) ("Was the First Continental Congress a de facto and de jure sovereign power by virtue of original authority derived from the people? An examination of the instructions of the various delegations reveals that it was not." (footnote omitted)); ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION 1763–1789, at 193 (1982) ("Although unconventional, this league of merchants, mechanics, and planters in Charleston was hardly more unusual than the resort to unofficial bodies in all the colonies to enforce nonimportation. Such bodies, most commonly called committees of inspection, operated without any formal sanction of government, which of course in normal times regulated trade.").

69. Pope, *supra* note 14, at 331.

70. *Id.* at 293; *see also* MIDDLEKAUFF, *supra* note 68, at 195 (describing how the colonial boycott campaigns resulted in "a more varied participation in public life, and a more popular politics," which did not "bode[] well for British power in America").

tactics to promote compliance with the Port Gibson boycott.[71] The use of nonviolent pressure tactics to promote boycott compliance may be in tension with a robust commitment to individual freedom of conscience, but that is irrelevant to the Assembly Clause, which exists to protect popular protest movements against government suppression.

B. The Assembly Clause

The debates around the Assembly Clause reveal that it was designed to protect more than individual autonomy and expression, as reflected by the Clause's reference to "the right *of the people* peaceably to assemble."[72] Theodore Sedgwick, a Federalist from Massachusetts, argued that the Assembly Clause should be excised from the First Amendment because it was redundant of the right to free speech expression. "If people freely converse together," he pointed out, "they must assemble for that purpose," and it would be "derogatory to the dignity of the House to descend to such minutiae."[73] But other Framers "rejected Sedgwick's 'trivial' view of the clause,"[74] which was not removed. Invoking the colonial non-importation and nonconsumption campaigns, James Jackson of Georgia declared he supported the right to assemble because 'it had been used in this country as one of the best checks on the British Legislature in their unjustifiable attempts to tax the colonies.'"[75] Thus, as James Gray Pope has observed, "[t]he legal justifications for" the colonial boycotts of British goods "were intimately bound up with the development of the right of the people peaceably to assemble."[76]

Some have suggested that, even if the First Amendment protects politically-motivated consumer boycotts, that protection extends only to boycotts seeking to vindicate domestic civil and constitutional rights.[77] Such an approach is not consistent with governing precedent on activity protected under the Speech Clause, which unequivocally applies to speech protesting foreign governments.[78] But one might sensibly ask whether the text of the Assembly Clause—protecting "the right

71. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 903–04 (1982) ("The names of persons who violated the boycott were read at meetings of the Claiborne County NAACP and published in a mimeographed paper entitled the 'Black Times.' As stated by the chancellor, those persons 'were branded as traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites.'" (quoting Pet. App. 19b)).

72. U.S. CONST, amend. I (emphasis added).

73. Pope, *supra* note 14, at 342 (1990) (quoting ANNALS OF CONG. 759 (J. Gales ed., 1834)).

74. *Id*.

75. *Id.* (quoting ANNALS OF CONG. 761 (J. Gales ed., 1834)).

76. *Id.* at 329.

77. *See* Arkansas Times LP v. Waldrip, 362 F. Supp. 3d 617, 625 (E.D. Ark. 2019), *aff'd*, 37 F.4th 1386 (8th Cir. 2022), *cert. denied*, —- S. Ct. ——, No. 22-379, 2023 WL 2123748 (U.S. Feb. 21, 2023). The boycott in *Claiborne Hardware* was aimed at vindicating the constitutional and civil rights of the boycott participants. *See* NAACP v. Claiborne Hardware Co., 485 U.S. 886, 918 (1982) ("Petitioners withheld their patronage from the white establishment of Claiborne County to challenge a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a Civil War to secure."). But the opinion does not state whether this was an incidental or necessary characteristic.

78. *See* Boos v. Barry, 485 U.S. 312, 321–22 (1988).

of the people peaceably to assemble, and to petition the Government for a redress of grievances"[79]—suggests that the right to assemble, insofar as it is a freestanding right, is limited to assemblies petitioning U.S. federal, state, and local government entities for a redress of grievance.

The history of the Assembly Clause dispels this argument. The proposed language James Madison submitted to the House of Delegates stated: "The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances."[80] As John Inazu has observed, "the endorsement of the common good of the people who assemble rather than the common good of the state signaled the possibility that the interests of the people assembled need not be coterminous with the interests of those in power."[81] Still, debate ensued over the Clause's limitation to assemblies for the "common good."[82] Although the Senate defeated a motion to strike the reference to the "common good" on August 30, 1789, the reference was removed the following week, when the Amendment was modified to include the Religion Clauses.[83]

The removal of the reference to the "common good" expanded the scope of the Assembly Clause. It also placed the Clause immediately adjacent to the Petition Clause, which is limited to actions seeking "redress of grievances."[84] "This left ambiguous whether the amendment recognized a single right to assemble for the purpose of petitioning the government or whether it established both an unencumbered right of assembly and a separate right of petition."[85] There are two problems with the former interpretation. First, "the comma preceding the phrase 'and to petition' appears to be residual from the earlier text that had described the 'right of the people peaceably to assemble and consult for their common good, and to apply to the government for a redress of grievances.'"[86] Second, "at least some members of the First Congress appeared to have conceived of a broader notion of assembly," particularly with respect to religious assemblies.[87]

In short, the Assembly Clause is not limited to assemblies for the "common good." This means that the First Amendment protects even assemblies "that might be antithetical" to official definitions of the common good, so long as those assemblies remain peaceful.[88] Nor is the Assembly Clause limited to assemblies that petition for redress of grievances, "which means that the constitutional

79. U.S. CONST., amend. I

80. John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 572 (2010) (quoting THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 129 (Neil H. Cogan ed., 1997)).

81. *Id.* (quoting THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 129 (Neil H. Cogan ed., 1997)).

82. *Id*.

83. *Id.* at 573 (citing S. JOURNAL, 1st Cong., 70 (Sept. 3, 1789); *id.* at 77 (Sept. 9, 1789)).

84. *Id.* at 573–74 (citing Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 712–13 (2002)).

85. *Id.* at 573.

86. Inazu, *supra* note 80, at 574 (quoting THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 143 (Neil H. Cogan ed., 1997)).

87. *Id.*; *see also id.* at 575–76.

88. *Id.* at 576.

expression of assembly may take many forms for many purposes."[89] The broad sweep of the Assembly Clause found purchase in *Claiborne Hardware*, where the Supreme Court recognized that a politically-motivated consumer boycott seeking to effect political, economic, and social change amounted to a constitutionally protected assembly.[90]

C. Consumer Boycotts From 1789 to Today

In the decades following the Revolutionary War, American abolitionists wielded the boycott as a means of protesting slavery and advocating manumission. John Jay and Alexander Hamilton served as founder and first secretary, respectively, of the New York Society for Promoting the Manumission of Slaves.[91] The Society, which was inaugurated in 1785, organized consumer boycotts against New York merchants who sold goods produced by slaves and against newspaper owners who advertised for the purchase and sale of slaves in their papers.[92] The Society itself belonged to a larger "free produce" movement, which was conceived of and popularized by British Quakers in the decades following the Revolutionary War.[93] William Fox, a radical British abolitionist, published a pamphlet in 1791 advocating a transatlantic boycott of slave-produced rum and sugar.[94] The pamphlet's circulation surpassed Thomas Paine's Rights of Man and helped foment support for abolitionist boycotts throughout Quaker communities, women's groups, and the general public.[95] The Philadelphia Society for the Relief of Free Negroes Unlawfully Held in Bondage, over which Benjamin Franklin once presided, resolved to boycott slave-made products at its 1797 convention.[96] The author is not aware of any governmental attempts to restrict or suppress these prominent abolitionist boycott campaigns.[97]

Halpern and Ben Dor argue that the Jefferson Administration "compelled" participation in the federal government's "boycott" of foreign countries through the Non-Importation Act[98] and the Embargo Act of 1807,[99] which broadly

89. *Id.* at 576–77 (2010).

90. *See infra* Part IV.

91. A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 140, 142 (1978).

92. *Id.* at 140.

93. *Id*. at 142 .

94. WILLIAM FOX, AN ADDRESS TO THE PEOPLE OF GREAT BRITAIN ON THE UTILITY OF REFRAINING FROM THE USE OF WEST INDIA SUGAR AND RUM (1791).

95. JULIE HOLCOMB, MORAL COMMERCE: QUAKERS AND THE TRANSATLANTIC BOYCOTT OF THE SLAVE LABOR ECONOMY 43 (2016).

96. *Id.* at 65.

97. Halpern & Ben Dor, *supra* note 14, at 10 ("[I]t is worth observing that the great majority of the early historical examples concern compulsion of a political boycott, whereas modern anti-boycott laws involve deterrence or prohibition of the boycott.").

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

99. Embargo Act of 1807, Pub. L. No. 10-5, 2 Stat. 451.

prohibited imports from Great Britain and other foreign countries.[100] But these foreign trade restrictions hardly demonstrate that the early sessions of the United States Congress, let alone the Framers, endorsed the federal government's power to suppress actual boycott campaigns. To argue otherwise, Halpern and Ben Dor conflate Congress' power to regulate an affirmative transaction and its power to regulate a non-transaction. Those powers are not equivalent under the Constitution. As the Supreme Court has explained in another context, "[T]he distinction between doing something and doing nothing would not have been lost on the Framers, who were 'practical statesmen,' not metaphysical philosophers."[101] The nonimportation and nonconsumption associations were an exercise of the people's right to collectively *withhold* patronage from boycotted enterprises. That right neither implies nor depends on a converse right to *engage* in commercial transactions for expressive or other reasons.

For more than two centuries, boycotts have remained a permanent fixture of the American political landscape.[102] A detailed history of these social movements is beyond the scope of this Article, so a few examples here will have to suffice: Abolitionist boycotts, including the free-produce movement, continued well into the antebellum era.[103] Consumers used boycotts to support labor's struggle against industry during the Gilded Age.[104] After Hitler's election to power in Germany, American Jewish leaders launched a boycott of the Nazi state; by 1939, sixty-five percent of Americans had joined the boycott.[105] Around the same time, antifascist protesters, the League of Women Shoppers, and the American Student Union boycotted Japanese silk to protest Japan's military aggression against China.[106] The Catholic Church's boycott of "vulgarity and coarseness" in motion pictures drew in seven million adherents, leading the Motion Picture Association of America to implement a nationwide production code assessing films for sexual

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100. Halpern & Ben Dor, *supra* note 14, at 13–14; *see also id.* at 14 ("[A]s far as we are aware, the Congress that passed the laws never appears to have entertained the possibility that mandatory boycotts might somehow intrude on the freedom of speech or association, because the decision of whom to deal with was never conceptualized as a right of free expression or association.").

101. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 555 (2012) (quoting Indus. Union Dep't, AFL–CIO v. Am. Petroleum Inst., 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring in judgment)).

102. *See* F.T.C. v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 447–48 (1990) (Brennan, J., concurring in part and dissenting in part) ("From the colonists' protest of the Stamp and Townsend Acts to the Montgomery bus boycott and the National Organization for Women's campaign to encourage ratification of the Equal Rights Amendment, boycotts have played a central role in our Nation's political discourse. In recent years there have been boycotts of supermarkets, meat, grapes, iced tea in cans, soft drinks, lettuce, chocolate, tuna, plastic wrap, textiles, slacks, animal skins and furs, and products of Mexico, Japan, South Africa, and the Soviet Union." (citing Missouri v. National Organization for Women, Inc., 620 F.2d 1301, 1304, n.5 (8th Cir. 1980); Note, 80 COLUM. L. REV. 1317, 1318, 1334 (1980))).

103. *See generally* Carol Faulkner, *The Root of the Evil: Free Produce and Radical Antislavery, 1820–1860*, 27 J. EARLY REPUBLIC 377 (2007).

104. *See* LAWRENCE B. GLICKMAN, BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA 225–26, 314–15 (2009).

105. R. GOTTLIEB, AMERICAN ANTI-NAZI RESISTANCE, 1933–1941: AN HISTORICAL ANALYSIS 262 (1982).

106. *See* GLICKMAN, *supra* note 107, at 225–26, 314–15.

content, profanity, and violence.[107] As discussed in the next Part, boycotts played a central role in the movements for racial and gender equality.[108] They have also played a leading role on both sides of the struggle for LGBTQ equality.[109] American consumers began boycotting apartheid South Africa long before American public policy turned firmly against the regime.[110] In recent years, consumer boycotts have been wielded by Americans across the political spectrum—from boycotts of companies that support Planned Parenthood to boycotts of companies that support the National Rifle Association.[111]

Although consumer boycotts have long been ubiquitous in American politics and society, there is an almost total absence of historical precedent for government restrictions on this activity. That is perhaps unsurprising, since the notion that the government has the authority to regulate consumer choices at all—let alone a consumer's reasons for deciding to withhold patronage from a particular business—has long been controversial.[112]

Two specific instances of boycott regulation bear noting. First, in the Gilded Age, several lower courts held that consumer boycotts organized by labor unions, including boycotts of Chinese-owned businesses, violated common-law principles of conspiracy and tortious interference with business relations—without suggesting that such restrictions implicated the First Amendment.[113] These cases provide some precedent for judicial restrictions on consumer boycotts, at least in the context of labor disputes, but they are best understood as exceptions that prove the rule. The Gilded Age is not esteemed for its First Amendment jurisprudence.[114]

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107. Lee, *supra* note 14, at 543 (quoting MONROE FRIEDMAN, CONSUMER BOYCOTTS: EFFECTING CHANGE THROUGH THE MARKETPLACE AND THE MEDIA 160 (1999); citing Gregory D. Black, *Hollywood Censored: The Production Code Administration and the Hollywood Film Industry, 1930–1940*, *in* 3 FILM HISTORY 167, 177 (1989); RUTH A. INGLIS, FREEDOM OF THE MOVIES 121 (1947)).

108. *See infra* Part IV.

109. Lee, *supra* note 14, at 541–42 (describing the eleven-year boycott of Cracker Barrell to protest the company's discriminatory employment policies) (citing MONROE FRIEDMAN, CONSUMER BOYCOTTS: EFFECTING CHANGE THROUGH THE MARKETPLACE AND THE MEDIA 160 (1999)); *id.* at 544 (describing a boycott launched by the American Family Association and the Southern Baptist Conference to protest the Walt Disney Company's "gay friendly" policies" (citing MONROE FRIEDMAN, CONSUMER BOYCOTTS: EFFECTING CHANGE THROUGH THE MARKETPLACE AND THE MEDIA 170–71 (1999)).

110. *See* Cecelie Counts, *Divestment Was Just One Weapon in Battle Against Apartheid*, N.Y. TIMES (Jan. 27, 2013), https://perma.cc/PWK3-BE6Q (on file with the *University of the Pacific Law Review*). *See generally* Donald R. Culverson, *The Politics of the Anti-Apartheid Movement in the United States, 1969–1986*, 111 POL. SCI. Q. 127, 146 (1996).

111. *See* Tamar Lewin, *Anti-Abortion Group Urges Boycott of Planned Parenthood Donors*, N.Y. TIMES, Aug. 8, 1990, at A13; Tiffany Hsu, *Big and Small, N.R.A. Boycott Efforts Come Together in Gun Debate*, N.Y. TIMES, Feb. 28, 2018, at A12.

112. *See generally* Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles & Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66 (2013) (arguing that popular conceptions of individual liberty—in particular, the liberty to refrain from the marketplace—played a pivotal role in the Supreme Court's analysis of the constitutionality of the Affordable Care Act under the Commerce Clause).

113. Halpern & Ben Dor, *supra* note 14, at 17–27.

114. *See, e.g.*, David Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514, 523 (1981) ("The overwhelming majority of [pre-World War I] decisions in all jurisdictions rejected free speech claims, often by ignoring their existence. . . . This pervasive hostility did not emerge from a coherent theoretical framework. The cases were as doctrinally sparse as they were factually diverse. Like many decisions in all areas of the law

And, as discussed in the next Part, the Supreme Court's decision in *Claiborne Hardware* repudiated the application of common-law conspiracy and tortious interference principles to consumer boycott campaigns outside the labor context.[115] Within the labor context, Section 8(b)(4) of the National Labor Relations Act restricts secondary boycotts and picketing by labor unions.[116] However, this has been justified by Congress' compelling interest in preventing labor strife, rather than a categorical exclusion of boycotts and picketing from First Amendment protection.[117]

Second, the Export Administration Amendments of 1977 prohibit U.S. persons from entering into explicit or tacit agreements with foreign governments to boycott countries friendly to the United States.[118] Congress passed the Amendments in response to the Arab League's efforts to coerce American businesses into joining the League's boycott of Israel as a condition of doing business in League countries.[119] Courts upheld the Export Administration Amendments on the ground that they vindicate the government's important interest in "forestalling attempts by foreign governments to 'embroil American citizens in their battles against others by forcing them to participate in actions which are repugnant to American values and traditions.'"[120] By their own terms, the Amendments do not apply to consumer boycotts organized in "civil society."[121]

IV. JUDICIAL RECOGNITION OF A RIGHT TO BOYCOTT IN *CLAIBORNE HARDWARE*

The legal controversies surrounding Gilded Age labor boycotts did not initially extend to other boycott campaigns. As Theresa Lee has pointed out, "[n]on-labor political boycotts were not generally targeted by litigation in the early part of the twentieth century."[122] That changed when boycotts began playing a prominent role in the civil rights struggles for racial and gender equality in the middle of the last century.[123] The attempts to suppress these boycott campaigns met stiff resistance from the federal judiciary, ultimately resulting in the Supreme Court's recognition

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before World War One, these First Amendment cases typically invoked formal pieties at the expense of rigorous analysis, thus precluding the interchange and criticism necessary to the evolution of doctrine." (footnote omitted)).

115. *See infra* Part IV.

116. *See* National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4).

117. *Id*.

118. Halpern & Ben Dor, *supra* note 14, at 33–34; *see also* 50 U.S.C. § 4842(a)(1)(A) (prohibiting refusals to deal "pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country").

119. Briggs & Stratton Corp. v. Baldrige, 539 F. Supp. 1307, 1309–10 (E.D. Wis. 1982), *aff'd*, 728 F.2d 915 (7th Cir. 1984).

120. *Id.* at 1319 (citation omitted).

121. *See* Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1043–44 (D. Ariz. 2018) (rejecting the analogy between the commercial activity regulated by the Export Administration Act and the plaintiff's politically-motivated consumer boycott), *vacated as moot*, 789 F. App'x 589 (9th Cir. 2020); *accord* Amawi v. Pflugerville Ind. Sch. Dist., 373 F. Supp. 3d 717, 746 (W.D. Tex. 2019), *vacated as moot sub nom.* Amawi v. Paxton, 956 F.3d 816 (5th Cir. 2020).

122. Lee, *supra* note 14, at 544.

123. *Id*.

of a First Amendment right to boycott in *Claiborne Hardware*.[124] This Part traces the development of the right to boycott in First Amendment doctrine.

A. The Right to Boycott Before Claiborne Hardware

In the early twentieth century, civil rights activists used consumer boycotts to fight racial injustice.[125] "Between 1900 and 1906," for example, "streetcar boycotts took place in over twenty-five Southern cities to fight against the segregation laws of Jim Crow."[126] The streetcar boycotts eventually gave way to the bus boycotts of the 1950s.[127] The most famous of these, the Montgomery bus boycott, is likely "the best-known and most influential boycott in America's history."[128] The boycott began after Rosa Parks was arrested for refusing to give up seat in the "white" section of a segregated Montgomery bus.[129] In a speech delivered at the Holt Street Baptist Church the night before Mrs. Parks' trial, the newly elected president of the Montgomery Improvement Association—Martin Luther King, Jr.—issued a stirring call for the Black citizens of Montgomery to boycott Montgomery's buses.[130] "The boycott lasted 382 days, from December 5, 1955, to December 21, 1956," with "[u]pwards of ninety percent of the black, bus-riding population . . . honor[ing] the plea to stay off the buses."[131] The Supreme Court ultimately "vindicated the boycotters' legal theory that *de jure* segregation on the buses violated the federal constitution."[132]

King was prosecuted, and convicted, "for violating a state law that criminalized conspiring 'without a just cause or legal excuse' to hinder a business."[133] King's case never reached a federal forum due to procedural defects in his appeal.[134] But in a separate case, *NAACP v. Alabama* ex rel. *Flowers*,[135] the Supreme Court had occasion to address (in dicta) the constitutionality of King's conviction. There, Alabama sought to exclude the NAACP from operating in the state on various grounds, including the allegation that the NAACP "had 'engaged in organizing, supporting and financing an illegal boycott' to compel a bus line in

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124. *Id*.

125. *Id*. at 539.

126. *Id.* (citing MONROE FRIEDMAN, CONSUMER BOYCOTTS: EFFECTING CHANGE THROUGH THE MARKETPLACE AND THE MEDIA 96–97 (1999)).

127. *Id*.

128. MONROE FRIEDMAN, CONSUMER BOYCOTTS: EFFECTING CHANGE THROUGH THE MARKETPLACE AND THE MEDIA 96–97 (1999).

129. Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1016–17 (1989) (footnotes omitted).

130. *Id.* at 1000, 1021–22

131. *Id.* at 1022.

132. *Id.* at 1047 (footnote omitted) (citing Gayle v. Browder, 352 U.S. 903 (1956)).

133. *Id.* at 1022 (quoting ALA. CODE § 54, tit. 14 (1940)).

134. *Id.* at 1043 (citing King v. State, 98 So. 2d 443 (Ala. Ct. App. 1957)).

135. NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964).

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Montgomery, Alabama, not to segregate passengers according to race . . . ."[136] In a unanimous opinion by Justice Harlan, the Court brushed this argument aside, stating:

> Even if we were to indulge the doubtful assumption that an organized refusal to ride on Montgomery's buses in protest against a policy of racial segregation might, without more, in some circumstances violate a valid state law, such a violation could not constitutionally be the basis for a permanent denial of the right to associate for the advocacy of ideas by lawful means.[137]

The women's equality movement has also relied on boycotts to raise public awareness about gender injustice. "In 1977, after a number of defeats in state legislatures, [the National Organization for Women ("NOW")] launched a boycott of the states that had not yet ratified the [Equal Rights Amendment], calling on supporters to refuse to travel to these states and to conduct no business with companies located within them."[138] "The impact was such that the Missouri motels and restaurants catering to the convention trade, and the Missouri economy as a whole, were suffering revenue losses."[139] The State of Missouri brought a lawsuit for injunctive relief in federal court, arguing that NOW's boycott violated the Sherman Act, Missouri's state antitrust law, and the common-law tort of intentional infliction of harm without legal excuse.[140]

The Eighth Circuit affirmed the district court's denial of injunctive relief.[141] After an extensive discussion of the Supreme Court's decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, which held that a lobbying and publicity campaign to petition the legislature to pass laws could not give rise to antitrust liability,[142] the panel majority held that "using a boycott in a non-competitive political arena for the purpose of influencing legislation is not proscribed by the Sherman Act,"[143] and that the same principle extended to Missouri's antitrust statute.[144] It also rejected the common-law tort claim, reasoning (again based on *Noerr*) "that the right to petition is of such importance that it is not an improper interference even when exercised by way of a boycott."[145] Dissenting, Judge Gibson argued that *Noerr* "does not imply the conclusion that the first amendment immunizes politically motivated boycotts against antitrust

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136. *Id.* at 302.

137. *Id.* at 307.

138. Lee, *supra* note 14, at 545 (quoting MONROE FRIEDMAN, CONSUMER BOYCOTTS: EFFECTING CHANGE THROUGH THE MARKETPLACE AND THE MEDIA 152–53 (1999)).

139. Missouri v. Nat'l Org. for Women, Inc., 620 F.2d 1301, 1302 (8th Cir. 1980).

140. *Id.* at 1302, 1316.

141. *Id.* at 1302.

142. *Id.* at 1310–16 (discussing E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)).

143. *Id.* at 1315.

144. *Id.* at 1316.

145. Missouri, 620 F.2d at 1317.

attack."[146] He did not dispute that NOW's boycott was protected by the First Amendment. Instead, he argued that the case should be remanded so that the district court could balance the First Amendment interests against Missouri's interest in enforcing the antitrust laws.[147]

B. The Supreme Court's Decision in Claiborne Hardware

Questions about whether, and under what circumstances, the First Amendment protects the right to boycott finally landed on the Supreme Court's doorstep in *NAACP v. Claiborne Hardware Co.*[148] The case concerned a boycott of white-owned businesses in Port Gibson, Mississippi to protest ongoing racial segregation and inequality.[149] The boycott consisted of a concerted refusal to deal with those businesses until the government, those businesses, and society more broadly met the boycotters' demands.[150] It was supported by speeches, public meetings, and nonviolent picketing.[151] In addition, there were individual instances of "violence and threats of violence."[152] Merchants targeted by the boycott sued the boycott participants, seeking to recover business losses caused by the boycott and to enjoin future boycott activity.[153] A Mississippi chancellor held that the entire boycott was unlawful under the common law tort of malicious interference with business relations, the state law prohibiting secondary boycotts, and the state antitrust statute.[154] On appeal, the Mississippi Supreme Court dispensed with the latter two theories on statutory grounds, but nevertheless "concluded that the entire boycott was unlawful" under the common-law tort theory because (it asserted) the boycott participants "had *agreed* to use force, violence, and 'threats' to effectuate the boycott."[155]

The U.S. Supreme Court unanimously reversed.[156] Justice Stevens' opinion for the Court framed the question in terms of whether the Port Gibson boycott was an "unlawful conspirac[y]" or a "constitutionally protected assembl[y]," involving "a host of voluntary decisions by free citizens."[157] After recounting the factual

146. *Id.* at 1324 (Gibson, J., dissenting).

147. *See id.*(Gibson, J., dissenting).

148. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 889 (1982).

149. *Id*.

150. *Id.* at 915.

151. *Id.*

152. *Id.* at 933.

153. *See id.* at 893.

154. *Id.* at 891–92.

155. *Id.* at 894–95. Mississippi's anti-boycott statute was eventually declared unconstitutional pursuant to a settlement agreement. *See* Echols v. Parker, 909 F.2d 795, 797 (5th Cir. 1990).

156. Claiborne Hardware, 458 U.S. 886. Then-Justice Rehnquist concurred in the judgment without issuing a separate opinion. *Id.* at 934. Justice Marshall was recused from the case. *Id.*

157. *Id.* at 888. The Court's introduction to the opinion is worth reading in full:

"The term 'concerted action' encompasses unlawful conspiracies and constitutionally protected assemblies. The 'looseness and pliability' of legal doctrine applicable to concerted action led Justice Jackson to note that certain joint activities have a 'chameleon-like' character. The boycott of white merchants in Claiborne County, Miss., that gave rise to this litigation had such a character; it included elements of criminality and elements of majesty.

background and procedural history of the case, the Court began its legal analysis by addressing the constitutional status of the activities associated with the boycott.[158] And the first activity the Court scrutinized was the boycott participants' collective refusal to deal.[159] Observing that "[t]he black citizens named as defendants in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect," the Court remarked that "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."[160] The Court reaffirmed that "collective effort" enables individuals to "make their views known, when, individually, their voices would be faint or lost," and that the First Amendment protects such group activity when it amounts to "political expression."[161]

After analyzing the private association and collective activity at the heart of the Port Gibson boycott as a form of political assembly, the *Claiborne Hardware* Court went on to describe how "[o]ther elements of the boycott . . . also involved activities ordinarily safeguarded by the First Amendment."[162] Thus, the Court held that peaceful picketing in support of the boycott was constitutionally protected,[163] as well as speech urging nonparticipants "to join the common cause" and applying "social pressure and the 'threat' of social ostracism" against holdouts.[164] This speech was undoubtedly coercive in at least some instances, but that did not undermine its claim to First Amendment protection. To the contrary, the Court reiterated "that 'offensive' and 'coercive' speech [is] nevertheless protected by the First Amendment."[165] "In sum," the Court concluded, "the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.' Through exercise

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Evidence that fear of reprisals caused some black citizens to withhold their patronage from respondents' businesses convinced the Supreme Court of Mississippi that the entire boycott was unlawful and that each of the 92 petitioners was liable for all of its economic consequences. Evidence that persuasive rhetoric, determination to remedy past injustices, and a host of voluntary decisions by free citizens were the critical factors in the boycott's success presents us with the question whether the state court's judgment is consistent with the Constitution of the United States." *Id.* at 888–89 (footnote omitted).

158. *Id.* at 907 ("We consider first whether petitioners' activities are protected in any respect by the Federal Constitution and, if they are, what effect such protection has on a lawsuit of this nature.").

159. *See* Brief of Amici Curiae First Amendment Scholars in Support of Plaintiff-Appellee 5–6, A & R Eng'g v. Paxton, No. 22-20047 (5th Cir. June 22, 2022).

160. Claiborne Hardware, 458 U.S. at 907 (quoting Citizens Against Rent Control Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 294 (1981)).

161. *Id.* at 907, 908, 910 (quoting Citizens Against Rent Control, 454 U.S. at 294, 296). This passage quotes heavily from Citizens Against Rent Control, which struck down a California law that limited contributions to ballot issue campaigns. 454 U.S. at 300. For a discussion of the right to boycott as a corollary of the right to contribute to political campaigns, see Hunter Pearl, Note & Case Comment, *Political Nonexpenditures: "Defunding Boycotts" as Pure Speech*, 45 HARV. J.L. & PUB. POL'Y 703, 705 (2022).

162. Claiborne Hardware, 458 U.S. at 909.

163. *Id.* (citing Thornhill v. Alabama, 310 U.S. 88, 99 (1940)).

164. *Id.* at 910 (citing Thomas v. Collins, 323 U.S. 516, 537 (1945)).

165. *Id.* at 911 (citing Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

of these First Amendment rights, [the boycotters] sought to bring about political, social, and economic change."[166]

The Court then proceeded to assess the tension between the First Amendment rights inherent in the boycott and the government's authority to regulate economic activity.[167] Recognizing "the strong governmental interest in certain forms of economic regulation," the Court held that "[g]overnmental regulation that has *an incidental effect* on First Amendment freedoms may be justified in certain *narrowly defined* instances."[168] Thus, "[t]he right of business entities to 'associate' to suppress competition may be curtailed." Likewise, "[u]nfair trade practices may be restricted."[169] And "[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.'" [170] The Court also suggested that "a boycott designed to secure aims that are themselves prohibited by a valid state law" would raise a more difficult First Amendment question.[171]

These "narrowly defined" exceptions make sense only against an implied rule—the First Amendment protects participation in politically-motivated boycotts. While acknowledging that "[s]tates have broad power to regulate economic activity," the Court did "not find a comparable right to prohibit peaceful political activity such as that found in the [Port Gibson] boycott."[172] To the contrary, the Court "recognized that expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values."[173] Characterizing "[s]peech concerning public affairs" as more than just "self-expression," but even "the essence of self-government," the Court reaffirmed the "'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'"[174] It concluded that "[t]he 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."[175]

Just as the *Noerr-Pennington* doctrine protects petitioning activity against liability under the Sherman Act,[176] the Court reasoned, a "careful limitation on damages liability" for the common-law tort of interference with businesses

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166. *Id.* (quoting Thomas, 323 U.S. at 530).

167. *Id.* at 912.

168. *Id.* at 912 & n.47 (emphases added) (citing United States v. O'Brien, 391 U.S. 367, 376–66 (1968)).

169. Claiborne Hardware, 458 U.S. at 912.

170. *Id.* (citation omitted).

171. *Id.* at 915 n.49 (citing Hughes v. Superior Ct., 339 U.S. 460 (1950)).

172. *Id.* at 913.

173. *Id*. (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)).

174. *Id.* (citations omitted).

175. Claiborne Hardware, 458 U.S. at 914 (citing NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 307 (1964); Missouri v. Nat'l Org. for Women, Inc., 620 F.2d 1301, 1302, 1317 (8th Cir. 1980)).

176. *See id.* at 913–15.

relations had to be imposed to accommodate "the important First Amendment interests at issue" in the Port Gibson boycott.[177] The Court explained: "Petitioners *withheld their patronage* from the white establishment of Claiborne County to challenge a political and economic system that had denied them basic rights of dignity and equality . . . . While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of *nonviolent protected activity*."[178] The Court accordingly rejected the Mississippi chancellor's "view that voluntary participation in the boycott was a sufficient basis on which to impose liability."[179]

The Mississippi Supreme Court's decision, which upheld the chancellor's imposition of liability on subtler grounds, required more searching review.[180] The Mississippi Supreme Court did not hold that state law prohibited voluntary participation in a peaceful boycott. Instead, it held that the boycott participants "were liable for all damages 'resulting from the boycott'"—including "all businesses losses [that] were not proximately caused by the violence and threats of violence found to be present"—because the boycott was partly effectuated through force and violence.[181] In the Mississippi Supreme Court's view, the use of threats and violence to effectuate the Port Gibson boycott turned the boycott campaign into an unlawful conspiracy, for which all the participants could be held liable. Although this rationale was somewhat narrower than the chancellor's, it still effectively punished anyone who voluntarily participated in the Port Gibson boycott.

The U.S. Supreme Court saw through the ruse. It held that although "[t]he Mississippi Supreme Court did not sustain the chancellor's imposition of liability on a theory that state law prohibited a nonviolent, politically motivated boycott . . . [t]he fact that such activity is constitutionally protected" required the Court "to examine critically the basis on which liability was imposed."[182] The Court accordingly scrutinized the Mississippi Supreme Court's decision to determine whether it unconstitutionally penalized mere participation in a protected boycott. On the one hand, the Court held that liability could not be imposed on the boycott participants merely because they participated in a constitutionally protected assembly together with other individuals who engaged in unlawful acts. Recognizing that such broad-based associational liability "would present 'a real danger that legitimate political expression or association would be impaired,'"[183] the Court concluded that "[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence."[184] Rather, "[f]or liability to be imposed by reason of association alone,

177. *Id.* at 918.

178. *Id.* (emphases added).

179. *Id.* at 921 (approving the Mississippi Supreme Court's rejection of this theory).

180. Claiborne Hardware, 458 U.S. at 915.

181. *Id.* at 921 (citations omitted).

182. *Id.* at 915.

183. *Id.* at 919 (quoting United States v. Scales, 367 U.S. 203, 229 (1961)).

184. *Id*. at 920.

it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims."[185] Because the chancellor's findings did not suggest that most of the boycott participants "authorized, ratified, or even discussed" the use of threats or violence to enforce the boycott, they could not be held liable for the damages resulting from these unlawful actions.[186]

The Court also faulted the Mississippi Supreme Court for failing to distinguish between the damages resulting from unlawful threats or violence, on the one hand, and the business losses incurred as a result of peaceful boycott participation, on the other. Observing that many "business losses were not proximately caused by the violence and threats of violence found to be present" in the Port Gibson boycott, the Court held that the Mississippi Supreme Court's decision impermissibly sought "to compensate [the boycotted businesses] for the *direct consequences* of nonviolent, constitutionally protected activity"—i.e., the boycott itself.[187] "[I]n this case," the Court summarized, "the Mississippi Supreme Court has relied on isolated acts of violence during a limited period to uphold respondents' recovery of all business losses sustained over a 7-year span. No losses are attributed to the voluntary participation of individuals determined to secure 'justice and equal opportunity.' The court's judgment 'screens reality' and cannot stand."[188]

The Court therefore dismissed the claims against the rank-and-file boycott participants and store watchers, while allowing that those who engaged in violence or threats of violence—the only elements of the boycott that were constitutionally unprotected—could be held liable for that conduct.[189] It also held that liability could not be imposed against NAACP Field Secretary and activist Charles Evers "for his presence at NAACP meetings or his active participation in the boycott itself."[190] The Court went on to hold that Evers and the NAACP could not be held liable for Evers' speeches urging compliance with the boycott, because his speeches did not incite violence, and there was no evidence that either Evers or the NAACP authorized, directed, or ratified unlawful conduct.[191]

In its conclusion, the Court returned to its opening question—was the Port Gibson boycott an unlawful conspiracy or a constitutionally protected assembly? "Concerted action is a powerful weapon," the Court acknowledged.[192] "History teaches that special dangers are associated with conspiratorial activity. And yet one of the foundation[s] of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means."[193] To protect this

185. *Id*.
186. *Id.* at 924.
187. *Id.* at 923 (emphasis added).
188. *Id.* at 924.
189. Claiborne Hardware, 458 U.S. at 926.
190. *Id.* (emphasis added).
191. *See id.* at 927–932.
192. *Id.* at 932.
193. *Id.* at 932–33.

fundamental right, the Court held that any attempt to characterize a nonviolent, politically motivated boycott as an unlawful conspiracy "must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, *and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity*."[194] The Mississippi Supreme Court failed to meet this demanding standard when it relied on individual findings of threats or coercion "to support the judgment that all petitioners are liable for all losses resulting from the boycott."[195]

In short, *Claiborne Hardware* concluded that the Port Gibson boycott was a constitutionally protected assembly, not an unlawful conspiracy. In reaching that conclusion, the Court established that the First Amendment prohibits the government from penalizing nonviolent participation in boycotts designed to effect political, economic, or social change, except in certain narrowly defined circumstances.[196]

The import of the Court's holding was not lost on contemporary observers—the same day, the New York Times reported that "[t]he decision was a significant reaffirmation of the constitutional right to conduct a boycott to seek political changes."[197] Mississippi's boycott law was subsequently declared unconstitutional pursuant to settlement agreement.[198] And Justice Scalia later described "civil-rights boycotts directed against businesses with segregated lunch counters" as an "activit[y] long thought to be protected by the First Amendment."[199]Although the First Amendment right to boycott was widely acknowledged, the scope of that right required further elaboration. The next Part addresses the judiciary's attempt to define the existing limits on the right to boycott after *Claiborne Hardware*.

V. LIMITS ON THE RIGHT TO BOYCOTT

Claiborne Hardware recognized that "[g]overnmental regulation that has an incidental effect on First Amendment freedoms," including the right to boycott, "may be justified in certain narrowly defined instances," given "the strong governmental interest in certain forms of economic regulation."[200] Thus, the government may enforce antitrust and other unfair competition laws to suppress boycotts that "suppress competition" or perpetuate "unfair trade practices."[201] Likewise, "[s]econdary boycotts and picketing by labor unions may be prohibited"

194. Claiborne Hardware, 458 U.S. at 933–34 (emphasis added).

195. *Id.* at 934.

196. *Id.* at 912–13.

197. *Justices Decide for N.A.A.C.P. in Boycott Case*, N.Y. TIMES, July 30, 1981, at 1; *see also* Leonard Orland, Op-Ed, *Protection for Boycotts*, N.Y. TIMES, July 31, 1982, at 27.

198. *See* Echols*, supra* note 156.

199. Cloer v. Gynecology Clinic, Inc., 528 U.S. 1099 (2000) (Scalia, J., dissenting from the denial of certiorari).

200. Claiborne Hardware, 458 U.S. at 912.

201. *Id.* (citing Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679 (1978)).

in order to prevent "industrial strife."[202] And, although *Claiborne Hardware* did not directly address this issue, it implied that the government likely has the power to suppress boycotts "designed to secure aims that are themselves prohibited by a valid state law."[203] This Part sketches out how these exceptions to the *Claiborne Hardware* doctrine have been applied by the Supreme Court and lower courts.

A. Economic Boycotts

The Court revisited the scope of First Amendment protection for boycotts in *FTC v. Superior Court Trial Lawyers Association*.[204] There, a group of criminal defense lawyers collectively refused to accept Criminal Justice Act assignments until they received increased compensation.[205] The FTC found that the trial lawyers' boycott constituted an "unfair method of competition," in violation of Section 5 of the Federal Trade Commission Act, because it amounted to a restraint of trade under Section 1 of the Sherman Act.[206] The. D.C. Circuit vacated the FTC's order.[207] Although the court determined that the trial lawyers' boycott was not protected under *Claiborne Hardware* or *Noerr*, it concluded that the boycott was expressive conduct under *United States v. O'Brien*,[208] requiring the FTC to prove that the government interests supporting the Sherman Act justified its application to the trial lawyers' boycott.[209] In another opinion by Justice Stevens, the Supreme Court reversed, holding that the D.C. Circuit erred in creating an *O'Brien* exception to the Sherman Act's *per se* liability rules for collective refusals to deal that have an expressive component.[210] The Court explained that the government's overriding interest in enforcing the antitrust laws does not vary according to the expressiveness of the underlying economic activity or the market power of the participants.[211]

The trial lawyers alternatively argued that the *Claiborne Hardware* doctrine protected their collective refusal to accept case assignment, but the Supreme Court rejected this analogy.[212] According to the Court, the *Claiborne Hardware* boycott "differ[ed] in a decisive respect. Those who joined the *Claiborne Hardware* boycott sought no special advantage for themselves."[213] By contrast, the defense lawyers' "immediate objective was to increase the price that they would be paid

202. *Id.* (citing NLRB v. Retail Store Emps., 447 U.S. 607, 617–618 (1980) (Blackmun, J., concurring in part); Longshoremen v. Allied Int'l, Inc., 456 U.S. 212, 222–223 & n.20 (1982)).

203. *Id.* at 915 n.9 (citing Hughes v. Superior Ct., 339 U.S. 460 (1950)).

204. FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411 (1990).

205. *Id.* at 414.

206. *Id.* at 418–420.

207. *Id.* at 420.

208. United States v. O'Brien, 391 U.S. 367 (1968).

209. Superior Ct. Trial Laws. Ass'n, 493 U.S. at 420–21 (1990) (citing Superior Ct. Trial Laws. Ass'n v. FTC, 856 F.2d 226, 250 (D.C. Cir. 1988)).

210. *Id.* at 428–436.

211. *Id.* at 430.

212. *Id.* at 425–28.

213. *Id.* at 426.

for their services."[214] The Court concluded that "[s]uch an economic boycott is well within the category that was expressly distinguished in the *Claiborne Hardware* opinion itself."[215] *Superior Court Trial Lawyers Association* thus reaffirmed *Claiborne Hardware*'s fundamental distinction between "economic boycotts," which are subject to rational government regulation, and "'peaceful, political activity such as that found in the [Mississippi] boycott,'" which is "entitled to constitutional protection."[216]

This distinction would have been irrelevant if *Claiborne Hardware* had not established that the First Amendment protects the right to participate in political boycotts, not just the right to speak and associate in support of such boycotts.[217] All parties in *Superior Court Trial Lawyers Association* agreed that the First Amendment protects speech in support of a boycott, regardless of whether the boycott itself is "political" or "economic" in nature. The Court stated that "[i]t is, of course, clear that the association's efforts to publicize the boycott, to explain the merits of its cause, and to lobby District officials to enact favorable legislation—like similar activities in *Claiborne Hardware*—were activities that were fully protected by the First Amendment. But nothing in the FTC's order would curtail such activities."[218] Rather, the FTC's order prohibited "a concerted refusal by CJA lawyers to accept any further assignment until they receive an increase in their compensation."[219] If *Claiborne Hardware* merely protected speech and association supporting a boycott, then it would have been obvious that the FTC's order did not implicate the First Amendment. But that is not how the Court disposed of the case. Instead, the Court held that the "politically motivated" boycott in *Claiborne Hardware* was protected because it was designed to effect social change, while the defense lawyers' boycott was unprotected because it was designed to secure higher wages for its participants. That distinction rests on the assumption that the First Amendment protects the act of *participating* in a politically motivated boycott.

Justice Brennan's partial dissent from the Court's opinion, joined by Justice Marshall and in substance by Justice Blackmun, underscores this point.[220] As Justice Brennan pointed out, "[t]he issue . . . is *not* whether boycotts may ever be punished under [Section] 5 of the Federal Trade Commission Act, consistent with the First Amendment; rather the issue is *how* the government may determine *which* boycotts are illegal."[221] *Claiborne Hardware* "held that a civil rights boycott was

214. *Id.* at 427.

215. *Id.* at 427 & n.11 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 914–15 (1982)).

216. Superior Ct. Trial Laws. Ass'n, 493 U.S. at 428 & n.12 (alteration in original) (quoting Claiborne Hardware, 458 U.S. at 912); Roberts v. U.S. Jaycees, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring in part and concurring in the judgment) ("A group boycott or refusal to deal for political purposes may be speech,, though a similar boycott for purposes of maintaining a cartel is not." (citation omitted) (citing Claiborne Hardware, 458 U.S. at 912–15)).

217. *See* Brief of Amici Curiae First Amendment Scholars, *supra* note 163, at 9–10.

218. Superior Ct. Trial Laws. Ass'n, 493 U.S. at 426.

219. *Id.*

220. *See id.* at 436 (Brennan, J., concurring in part and dissenting in part) (citation omitted); *id.* at 453 (Blackmun, J., concurring in part and dissenting in part).

221. *Id.* at 438 (Brennan, J., concurring in part and dissenting in part) (citation omitted).

political expression."[222] The question in *Superior Court Trial Lawyers Association* was whether this protection should extend to the trial lawyers' boycott campaign.[223] The majority concluded that the trial lawyers' boycott was unprotected, despite its expressive character, because the primary purpose of the boycott was "economic" rather than "political."[224] The dissent concluded that all expressive boycotts deserve First Amendment protection, regardless of whether they are economically or politically motivated.[225] But both sides acknowledged that the act of boycotting is entitled to First Amendment protection in at least some circumstances.

Another distinction between *Claiborne Hardware* and *Superior Court Trial Lawyers Association* went unremarked by the Court: the former involved a consumer boycott, whereas the latter did not. The Court did not definitively address whether the right to boycott recognized in *Claiborne Hardware* applies only to consumer boycotts, but the Court's earlier decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.* already suggested that consumer boycotts are generally much more likely to receive First Amendment protection than other types of refusals to deal.[226] There, the Court held that the First Amendment did not immunize a manufacturer's anticompetitive attempt to exclude economic rivals from inclusion in industry standards against antitrust, even though the industry standards had a "political" impact insofar as they were frequently codified through legislation.[227] The Court distinguished *Claiborne Hardware* on the ground that the Port Gibson "boycotters were *consumers* who did not stand to profit financially from a lessening of competition in the boycotted market," whereas the defendant manufacturer in *Allied Tube* "was at least partially motivated by the desire to lessen competition, and, because of [its] line of business, stood to reap substantial economic benefits from making it difficult for [its rival] to compete."[228]

B. Labor Boycotts

Claiborne Hardware also held that secondary boycotts by labor unions are unprotected under the First Amendment, citing a decision the Court had released just a few months earlier in *International Longshoremen's Ass'n v. Allied International, Inc.*[229] In *International Longshoremen*, the "president of the International Longshoremen's Association (ILA), ordered ILA members to stop

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222. *See id.* at 449 (Brennan, J., concurring in part and dissenting in part) (citation omitted).

223. *See id.* (Brennan, J., concurring in part and dissenting in part).

224. *Id.* at 426.

225. *See* Superior Ct. Trial Laws. Ass'n, 493 U.S. at 447–51 (1990) (Brennan, J., concurring in part and dissenting in part).

226. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508 n.11 (1988).

227. *Id.*

228. *Id.*

229. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982) (citing NLRB v. Retail Store Emps., 447 U.S. 607, 617–18 (1980); Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 222–23 & n.20 (1982)).

handling cargoes arriving from or destined for the Soviet Union," in order "to protest the Russian invasion of Afghanistan."[230] As a result, "longshoremen up and down the east and gulf coasts refused to service ships carrying Russian cargoes."[231] An American import company sued the ILA, claiming that the union's boycott violated the NLRA's restriction on secondary labor boycotts.[232] The Supreme Court agreed, writing:

> As understandable and even commendable as the ILA's ultimate objectives may be, the certain effect of its action is to impose a heavy burden on neutral employers. And it is just such a burden, as well as widening of industrial strife, that the secondary boycott provisions were designed to prevent.[233]

The Court explained that "the purpose of the secondary boycott provisions as twofold: the preservation of the right of labor organizations to place pressure on employers with whom there is a primary dispute as well as the protection of neutral employers and employees from the labor disputes of others," adding that "[i]n the circumstances of this case . . . only the second of these objectives has any relevance."[234] In a terse paragraph at the end of the decision, the Court also held that "application of [the NLRA's secondary-boycott restriction] to the ILA's activity in this case will not infringe upon the First Amendment rights of the ILA and its members."[235] Noting that it had "consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment," the Court stated that "it would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment."[236] The Court concluded "[t]he labor laws reflect a careful balancing of interests," and that "[t]here are many ways in which a union and its individual members may express their opposition to Russian foreign policy without infringing upon the rights of others."[237]

Some have argued that *International Longshoremen* broadly rejected a First Amendment right to boycott.[238] But *Claiborne Hardware* rebuts that contention. There, the Court cited *International Longshoremen* for the proposition 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

230. Int'l Longshoremen's Ass'n, 456 U.S. at 214.

231. *Id.* at 214–15.

232. *Id.* at 216 (citing 29 U.S.C. § 158(b)(4)).

233. *Id.* at 223.

234. *Id.* at 223 n.20.

235. *Id.* at 226.

236. Int'l Longshoremen's Ass'n 456 U.S. at 226 & n.26 (citing NLRB v. Retail Store Emps., 447 U.S. 607, 617–18 (1980) (Stevens, J., concurring)); United States v. O'Brien, 391 U.S. 367, 376 (1968).

237. *Id.* at 226–27 (citing Retail Store Emps., 447 U.S. at 617 (Blackmun, J., concurring in part)).

238. *See* Halpern & Ben Dor, *supra* note 14, at 43.

from coerced participation in industrial strife.'"[239] The Court's reference to "union freedom of expression" belies the notion that boycotts are not properly part of the freedom of expression. It is hard to appreciate why *Claiborne Hardware* included the qualifier "by labor unions" if *International Longshoremen* held that boycotting is not protected at all. Furthermore, the broad reading of *International Longshoremen* is impossible to square with the Court's efforts to distinguish *Claiborne Hardware* in *Superior Court Trial Lawyers Association*; if *International Longshoremen* controlled, there would have been no question that the trial lawyers' boycott was unprotected. As others have pointed out, the more plausible reconciliation of *International Longshoremen* and *Claiborne Hardware* is that, in labor boycott and picketing cases, the Court defers to the comprehensive regulatory scheme Congress has developed to balance workers' free expression interests against the government's need to prevent the specific harms associated with industrial strife.[240]

C. Boycotts to Achieve Unlawful Goals

Finally, *Claiborne Hardware* suggested that "a boycott designed to secure aims that are themselves prohibited by a valid state law" would likely not receive First Amendment protection.[241] The Second Circuit's decision in *Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc.* provides a good example of what such a boycott might look like.[242] There, the Second Circuit held that a jury could reasonably conclude that the Jewish Community Relations Council of New York violated state and federal antidiscrimination laws prohibiting discrimination on the basis of religion by threatening to boycott a resort if the resort did not cancel its contract with Jews for Jesus.[243] The court also rejected the Council's argument that its threatened boycott was protected under *Claiborne Hardware*.[244] It explained that, unlike the Port Gibson boycott, the Council's threatened boycott sought "to achieve an objective prohibited by valid state and federal statutes"—i.e., the denial of access to a public accommodation based on religious belief.[245] The court further noted that, "in contrast to the boycott in *Claiborne Hardware*, the [Council's alleged] conduct was not political speech designed to secure governmental action to vindicate legitimate rights, but was a series of private communications in the context of a private dispute."[246] The court

239. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982) (emphases added) (citing Retail Store Emps., 447 U.S. at 617–18 (Blackmun, J., concurring in part)); Int'l Longshoremen's Ass'n, 456 U.S. at 222–23 & n.20).

240. Lee, *supra* note 14, 568–69.

241. Claiborne Hardware, 458 U.S. at 915 n.49 (citing Hughes v. Superior Ct., 339 U.S. 460 (1950)).

242. Jews for Jesus, Inc. v. Jewish Cmty. Rels. Council of N.Y., Inc., 968 F.2d 286 (2d Cir. 1992).

243. *Id.* at 288, 291–95.

244. *Id.* at 297–98.

245. *Id.*

246. *Id.* at 298.

therefore concluded that "the safe harbor carved out by *Claiborne Hardware* for certain boycott activity [was] unavailable."[247]

As the Second Circuit's decision shows, this limitation on the right to boycott is straightforward. Boycotts designed to secure illegal objectives, including actions by third parties that violate valid anti-discrimination laws, do not enjoy First Amendment protection. But what about consumer boycotts that themselves discriminate on the basis of a protected characteristic, such as race or nationality, in order to achieve a lawful goal? *Claiborne Hardware* concerned just such a boycott—the Black citizens of Port Gibson implemented a total boycott of white-owned businesses in Claiborne County to protest Jim Crow.[248] The Court did not suggest that this aspect of the boycott threatened its claim to constitutional protection. To the contrary, the Court characterized the boycott participants' collective decision to "withh[o]ld their patronage from the white establishment of Claiborne County" as "nonviolent, protected activity" for which liability could not be imposed.[249] For present purposes, it suffices to note that legislative characterization of particular consumer boycotts as "discriminatory" does not, by itself, deprive those boycotts of constitutional protection; otherwise, it would be trivially easy for the government to evade First Amendment protections through the manipulation of legislative categories. Instead, the First Amendment requires the government to show that any penalties imposed for boycott participation are narrowly tailored to advance a genuinely compelling interest unrelated to boycott suppression.[250]

Questions regarding the government's authority to regulate discriminatory consumer boycotts remain largely theoretical because existing antidiscrimination laws largely do not regulate consumer choices—likely because government regulation of invidious consumer choices would impose intolerably high costs on privacy and autonomy interests.[251] However, some commentators argue that recognizing a right to participate in politically-motivated consumer boycotts would jeopardize existing anti-discrimination laws.[252] They argue that recognizing a First Amendment right to participate in discriminatory consumer boycotts would

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247. *Id*.

248. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 899–900 (1982).

249. *Id.* at 918.

250. Some courts and commentators have concluded that anti-BDS laws, in particular, are not narrowly tailored to the government's compelling anti-discrimination interests. *See* Amawi v. Pflugerville Ind. Sch. Dist., 373 F. Supp. 3d 717, 740 (W.D. Tex. 2019) ("The statute's plain text makes its purpose obvious: to prevent expressive conduct critical of the *nation* of Israel, not discriminatory conduct on the basis of Israeli *national origin*."), *vacated as moot sub nom.* Amawi v. Paxton, 956 F.3d 816 (5th Cir. 2020); Note, *Wielding Antidiscrimination Law to Suppress the Movement for Palestinian Rights*, *supra* note 2, at 1360 (arguing that anti-BDS laws are not supported by a valid anti-discrimination interest). *But see Confronting the Rise in Anti-Semitic Domestic Terrorism: Hearing Before the Subcomm. On Intel. & Counterterrorism of the H. Comm. On Homeland Sec*., 116th Cong. 40 (2020) (statement of Eugene Kontorovich, Professor, Antonin Scalia Law School, George Mason University) (arguing that boycotts of Israel constitute invidious discrimination against the Jewish State).

251. *See generally* Katherine T. Bartlett & Mitu Gulati, *Discrimination by Customers*, 102 IOWA L. REV. 223 (2016).

252. *See* Brief of Profs. Michael C. Dorf, Andrew M. Koppelman, and Eugene Volokh as Amici Curiae in Support of Defendants-Appellants, A & R Eng'g v. Paxton, No. 22-20047 (5th Cir. Apr. 18, 2022).

necessarily imply a First Amendment right to engage in other discriminatory refusals to deal, such as the denial of access to public accommodations on the basis of protected characteristics.[253]

This argument relies on a conflation between consumers and other economic actors, which may make sense at the abstract level of economic theory, but it is untethered to the historical operation of antidiscrimination law, which has left consumer choices unregulated. There is no reason why First Amendment doctrine cannot take that fact into account, along with the historical pedigree of consumer boycotts as a distinct form of popular protest, in distinguishing consumer boycotts from other types of refusals to deal.[254] *Claiborne Hardware* did precisely that—it held that the Black citizens of Port Gibson engaged in constitutionally "protected activity" when "[they] withheld their patronage from the white establishment of Claiborne County to challenge a political and economic system that had denied them the basic rights of dignity and equality."[255]

VI. THE RIGHT TO BOYCOTT AS A RIGHT TO ASSEMBLE: RESOLVING THE TENSION BETWEEN *NAACP V. CLAIBORNE HARDWARE* AND *RUMSFELD V. FAIR*

In *Arkansas Times v. Waldrip*, the Eighth Circuit concluded that *Claiborne Hardware* recognized First Amendment protection for "expressive activities *accompanying* a boycott, rather than the purchasing decisions at the heart of a boycott."[256] In lieu of *Claiborne Hardware*, the Eighth Circuit instead applied the Supreme Court's decision in *Rumsfeld v. FAIR*,[257] which held that conduct is generally not protected by the First Amendment unless it is "inherently expressive," such that a reasonable observer would understand it as expressive without the benefit of accompanying speech.[258] The Eighth Circuit held that a consumer's decisions not to purchase particular goods and services in adherence to a boycott "are not inherently expressive and do not implicate the First Amendment" because they "are invisible to observers unless explained."[259]

For the reasons discussed above, the Eighth Circuit's crabbed interpretation of *Claiborne Hardware* is unpersuasive. Most glaringly, it fails to explain why *Claiborne Hardware* took pains to identify the "narrowly defined" instances in

253. *Id.*

254. Reference to the historical absence of regulation, for instance, informs the traditional public forum analysis. *See, e.g.*, Hague v. CIO, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.").

255. Claiborne Hardware, 458 U.S. at 918.

256. 37 F.4th 1386, 1392 (8th Cir. 2022), *cert. denied*, —- S. Ct. ——, No. 22-379, 2023 WL 2123748 (U.S. Feb. 21, 2023).

257. *Id.* (discussing Rumsfeld v. F. for Acad. & Inst. Rts., Inc., 547 U.S. 47 (2006)), *cert. denied*, —- S. Ct. ——, No. 22-379, 2023 WL 2123748 (U.S. Feb. 21, 2023).

258. *See* FAIR, 547 U.S. at 65–66.

259. Arkansas Times, 37 F.4th at 1394.

which the government could regulate boycotts,[260] and what the Supreme Court meant when it held that "[t]he 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."[261]

The question remains, however, whether *Claiborne Hardware*'s recognition that the First Amendment protects consumer boycotts is in tension with *FAIR*'s holding that the *O'Brien* doctrine, which affords First Amendment protection to expressive conduct,[262] generally applies only when the conduct at issue is *inherently* expressive. This Article proposes that there is no tension between *Claiborne Hardware* and *FAIR* because First Amendment protection for politically-motivated consumer boycotts rests, in significant part, on the Assembly Clause. *FAIR*, on the other hand, is designed to suss out whether individual symbolic conduct is sufficiently expressive enough to merit protection under the Speech Clause.

FAIR addressed a First Amendment challenge to the Solomon Amendment, which requires educational institutions that receive federal funds to allow military recruiters equal access to on-campus recruiting.[263] A consortium of law schools challenged the Solomon Amendment, arguing that it conflicted with their policies prohibiting access to on-campus recruiting services for employers that discriminate on the basis of sexual orientation, because the U.S. military at that time still prohibited gay and lesbian individuals from openly serving in the armed forces.[264] The law schools argued that "the Solomon Amendment was unconstitutional because it forced [them] to choose between exercising their First Amendment right to decide whether to disseminate or accommodate a military recruiter's message, and ensuring the availability of federal funding for their universities."[265]

The Court held that the compelled inclusion of military recruiters in on-campus recruiting activities did not implicate the law schools' First Amendment rights.[266] As particularly relevant here, the Court held that the law schools' denial of equal access to military recruiters was not expressive conduct entitled to First Amendment protection under the *O'Brien* doctrine.[267] It reasoned that the government may regulate conduct that is not inherently expressive, such as affording equal access to recruiters, without triggering heightened First Amendment scrutiny.[268] Although the law schools' conduct was politically motivated—they sought to express disapproval of the military's exclusion of gay

260. Claiborne Hardware, 458 U.S. at 912.

261. *Id.* at 914.

262. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968).

263. FAIR, 547 U.S. at 51 (citing 10 U.S.C. § 983(b) (Supp. IV 2000)).

264. *Id.* at 52.

265. *Id.* at 53.

266. *Id.*

267. *Id.* at 65–66.

268. *Id.*

and lesbian servicemembers by denying military recruiters access to their facilities—the Court observed that "the point of requiring military interviews to be conducted on the undergraduate campus [i.e., outside the law school campus] is not 'overwhelmingly apparent,'" and would presumably go unnoticed absent some explanation from the law schools about what they were doing and why they were doing it.[269]

The Court found the need for such "explanatory speech" to articulate the law schools' message to be "strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection under *O'Brien*."[270] The Court remarked that, if explanatory speech were sufficient to make any conduct inherently expressive under *O'Brien*, "a regulated party could always transform conduct into 'speech' simply by talking about it."[271] Under that theory, the Court posited, "if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, [courts] would have to apply *O'Brien* to determine whether the Tax Code violates the First Amendment."[272] The Court concluded that "[n]either *O'Brien* nor its progeny supports such stuff."[273] The Court alternatively held that the Solomon Amendment satisfies *O'Brien* scrutiny because it "promotes the substantial Government interest in raising and supporting the Armed Forces—an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers."[274]

FAIR's recognition that not all conduct is potentially expressive was consistent with prior precedent. *O'Brien* itself rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea,"[275] but courts have since struggled to define which conduct merits First Amendment protection.[276] *FAIR*'s gloss on the *O'Brien* framework—that, in order to justify applying heightened First Amendment scrutiny to regulations on conduct, the regulated conduct must be inherently expressive—provides a plausible heuristic for courts to distinguish between certain forms of constitutionally protected symbolic expression, such as flag burning, and unprotected civil disobedience, such as refusing to pay one's

269. FAIR, 547 U.S. at 66.

270. *Id.* (citing United States v. O'Brien, 391 U.S. 367, 376 (1968)).

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 67 (2006) (citing United States v. Albertini, 472 U.S. 675, 689 (1985)); *see also id.* at 58 ("[T]he fact that legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality; as we recognized in *Rostker*, 'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies." (omission in original) (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981))). Justice Scalia has suggested that the principal distinction between regulations of conduct that trigger First Amendment scrutiny and those that do not is whether the government regulation is directed toward the conduct's communicative attributes. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 577 (1991) (Scalia, J., concurring in the judgment).

275. O'Brien, 391 U.S. at 376.

276. *See* James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 57 (2008).

taxes.[277] But the particular test *FAIR* adopted, which requires courts to assess whether the regulated conduct is communicative even when it is abstracted from surrounding context, is reliable only insofar as it applies to First Amendment claims based on the individual symbolic value of the regulated conduct.

FAIR's test leads to difficulties when applied to other categories of conduct that derive First Amendment protection (at least in part) from the right to peaceably assemble. For instance, it is well-established that the First Amendment protects protest marches,[278] parades,[279] picketing,[280] and sit-ins.[281] The conduct at the heart of each of these protected forms of popular assembly—walking from one destination to another, patrolling a particular location, and sitting down—is not particularly expressive when considered on an individual level and abstracted from surrounding explanatory speech.[282] Nonetheless, this ordinarily unexpressive conduct enjoys constitutional protection when it takes place in the context of a protected demonstration, as the Supreme Court made clear in *Hurley* when it said that "[t]he protected expression that inheres in a parade is not limited to its banners and songs . . . for the Constitution looks beyond written or spoken words as mediums of expression."[283] But why does ordinarily unexpressive conduct, such as walking, receive special protection in these specific contexts?

The Assembly Clause resolves this anomaly because it protects both the speech and nonspeech elements of historically significant forms of group demonstration. Thus, in *Edwards v. South Carolina*, the Supreme Court held that a protest march in front of the state capitol involved the "rights of free speech, free assembly, and freedom to petition" in "their most pristine and classic form."[284] As the Court recognized in *Claiborne Hardware*, consumer boycotts also involve the rights of "speech, assembly, and petition."[285] Like marches, boycotts derive their expressive power from people's "collective effort" to "make their views known when, individually, their voices would be faint or lost."[286] Also like marches,

277. *See* FAIR, 547 U.S. at 66 (discussing Texas v. Johnson, 491 U.S. 397, 406 (1989)); *see also* McGoldrick, Jr., *supra* note 280, at 17–23 (classifying this form of symbolic conduct as "play acting and acts of theater").

278. Edwards v. South Carolina, 372 U.S. 229 (1963).

279. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).

280. Thornhill v. Alabama, 310 U.S. 88 (1940).

281. Brown v. Louisiana, 383 U.S. 131 (1966).

282. *See* Hurley, 515 U.S. at 568 ("If there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself. Some people might call such a procession a parade, but it would not be much of one.").

283. *Id.* at 569; *see also* Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235, 1241 (11th Cir. 2018) ("Context also differentiates the act of sitting down—ordinarily not expressive—from the sit-in by African Americans at a Louisiana library which was understood as a protest against segregation." (citing Brown, 383 U.S. at 141–42); Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 623 (D.C. Cir. 1983) (Scalia, J., dissenting) (footnotes omitted), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

284. 372 U.S. 229, 235 (1963).

285. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982).

286. *Id.* at 907–08 (quoting Citizens Against Rent Control Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 294, 295 (1981)).

boycotts are routinely accompanied by other expressive activities—including picketing, petitioning, and editorializing—that translate the message of collective action into articulable demands.[287] Lastly, like marches, boycotts are "deeply embedded in the American political process."[288] Regulations that suppress the specific activity at the heart of these group demonstrations—whether it is the arbitrary denial of a parade permit,[289] or an anti-boycott certification[290]—infringe the right to assemble.

VII. CONCLUSION

Boycotts are an essential tool for galvanizing popular protest movements and swaying public opinion. "It is no accident that boycotts have been used by the American colonists to throw off the British yoke and by the oppressed to assert their civil rights. Such groups cannot use established organizational techniques to advance their political interests, and boycotts are often the only effective route available to them."[291] Precisely because boycotts are an effective tool for channeling popular dissent, governments often have strong incentives to suppress boycott campaigns that express disfavored messages, as demonstrated by litigation against civil rights boycotts in the twentieth century and legislation against BDS today.

The Framers were familiar with this dynamic. Patriot leaders insisted on the people's right to boycott British goods to protest Parliament's economic policies in North America. After initially accommodating many of the colonists' demands, the British government eventually lost its patience and sought to suppress the boycott campaigns through the Intolerable Acts. The attempt backfired, prompting the American Revolution. Mindful of this experience, the Framers established the First Amendment rights to speak, assemble, and petition. The Black citizens in *Claiborne Hardware* drew on this tradition, arguing the Framers "must have intended that the guarantees of free speech and assembly and of petition for redress of grievances would cover boycotts of the type in which they themselves had engaged."[292]

Debates over the constitutional status of consumer boycotts have tended to focus on whether the act of withholding patronage is sufficiently expressive to merit First Amendment protection under the Speech Clause. This debate is understandable, since the Assembly Clause has not featured prominently in the Supreme Court's modern First Amendment jurisprudence.[293] But the Assembly

287. *Id.* at 907.

288. *Id.* (quoting Citizens Against Rent Control, 454 U.S. at 294).

289. *See* Shuttelsworth v. City of Birmingham, 394 U.S. 147, 153, 158–59 (1969).

290. Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1042 (D. Ariz. 2018), *vacated as moot*, 789 F. App'x 589 (9th Cir. 2020).

291. F.T.C. v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 451 (1990) (Brennan, J., concurring in part and dissenting in part) (citation omitted).

292. Pet. Br. at 13, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (No. 81-202)

293. *See* Inazu, *supra* note 83, at 607–611.

Clause protects values and practices that are not fully captured by the Speech Clause. In particular, the Assembly Clause protects the people's right to "band[] together" and "make their views known, when, individually, their voices would be faint or lost."[294] A myopic focus on the individual voice, to the exclusion of the chorus, misses the point entirely. A proper appreciation for the Assembly Clause's unique role in the constitutional structure would dispel the uncertainty that currently clouds the right to boycott.

294. Claiborne Hardware, 458 U.S. at 907 (quoting Citizens Against Rent Control Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 294, 296 (1981)).

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