

# COMMENT

## Secondary Boycotts in American Labor Law and the First Amendment:

### An Application to the Boycott, Divestment, and Sanctions Movement

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#### INTRODUCTION

On July 9, 2005, 170 Palestinian civil society organizations jointly issued a call for boycott, divestment, and sanctions (BDS) against Israel.<sup>1</sup> Inspired by the South African anti-apartheid movement,<sup>2</sup> this call for trans-border solidarity was made in the context of repeated failures of the international community and peace processes to convince Israel “to comply with humanitarian law, to respect fundamental rights and to end its occupation and oppression of the people of Palestine.”<sup>3</sup> Along with a wide range of other civil society organizations, Palestinian unions played an integral role in launching what has come to be known as the BDS movement.<sup>4</sup>

There are three components of the BDS movement. Generally, a boycott describes a “concerted refusal” to deal with an entity, “usually to express disapproval or to force acceptance of certain conditions.”<sup>5</sup> In relation to Israel, boycotts have taken the form of targeted consumer boycotts, which

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1. BDS National Committee, *Palestinian Civil Society Call for BDS* (2005), <https://bdsmovement.net/call> [<https://perma.cc/TR2B-KWND>].

2. See South African History Online, *South Africa’s Academic and Cultural Boycott*, <https://www.sahistory.org.za/article/south-africas-academic-and-cultural-boycott> [<https://perma.cc/KG6F-HQY6>]; see also United Nations, General Assembly Resolution 35/206, *Policies of apartheid of the Government of South Africa*, A/RES/35/206 (1980), <https://www.un.org/documents/ga/res/35/a35r206e.pdf> [<https://perma.cc/2HU3-3R7U>].

3. BDS National Committee, *supra* note 1.

4. *Id.*

5. “Boycott,” Merriam-Webster (2018), <https://www.merriam-webster.com/dictionary/boycott>.

attempt to convince retailers to stop selling products from Israeli companies and encouraging consumers to refrain from purchasing those products, particularly when those products are manufactured in illegal Israeli settlements<sup>6</sup>; refusing to participate in sporting events where Israel is represented<sup>7</sup>; and withdrawing support from cultural events and academic exchanges with Israeli institutions that are viewed to be involved in, complicit with, or whitewashing the violation of Palestinian human rights.<sup>8</sup> Divestment campaigns urge organizations including banks, municipalities, churches, universities and pension funds to withdraw their investments from all such companies.<sup>9</sup> Finally, sanctions campaigns urge governments to put pressure on Israel by ending cooperation in military and free-trade agreements, and by excluding Israel from participation in international

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6. See, e.g., *From Motorola to Ahava: The UN Blacklist of Companies Doing Business in Israeli Settlements*, HAARETZ, Oct. 26, 2017, <https://www.haaretz.com/israel-news/from-motorola-to-ahava-the-un-blacklist-of-companies-working-in-settlements-1.5460550> [https://perma.cc/Z3QQ-9Z5E]; *Soda Stream leaves West Bank as CEO says boycott antisemitic and pointless*, THE GUARDIAN, Sept. 2, 2015, <https://www.theguardian.com/world/2015/sep/03/sodastream-leaves-west-bank-as-ceo-says-boycott-antisemitic-and-pointless> [https://perma.cc/4823-8U7V]; Ora Coren, *BDS Target Ahava to Relocate From West Bank Into Israel*, HAARETZ, Mar. 10, 2016, <https://www.haaretz.com/israel-news/.premium-bds-target-ahava-to-relocate-from-west-bank-into-israel-1.5416111> [https://perma.cc/AR9R-ULF5].

7. See, e.g., Stuart Winer, *Spanish municipality nixes Israel-Spain water polo game amid boycott pressure*, TIMES OF ISRAEL, Nov. 6, 2018, <https://www.timesofisrael.com/spanish-municipality-nixes-israel-spain-water-polo-game-amid-boycott-pressure/> [https://perma.cc/SEF7-9XTX]; *Palestinian FA urges Lionel Messi to boycott Israel friendly*, INDIA TODAY, June 4, 2018, <https://www.indiatoday.in/sports/fifa-world-cup-2018/video/palestinian-fa-urges-lionel-messi-to-boycott-israel-friendly-1249731-2018-06-04> [https://perma.cc/MXN3-WUWE]; *BDS urges N-Ireland to cancel football match against Israel*, MIDDLE EAST MONITOR, Aug. 3, 2018, <https://www.middleeastmonitor.com/20180803-bds-urges-ireland-to-cancel-football-match-against-israel/> [https://perma.cc/VR9Y-9AJ3].

8. See, e.g., Aaron Bandler, *More Than 30 Student Groups Announce Boycott of NYU Tel Aviv*, JEWISH J., Oct. 24, 2018, <http://jewishjournal.com/news/nation/240787/30-student-groups-announce-boycott-nyu-tel-aviv/>; Chris Johnston, *Lana Del Rey pulls out of Israeli festival after backlash*, THE GUARDIAN, Aug. 31, 2018, <https://www.theguardian.com/music/2018/aug/31/lana-del-rey-pulls-out-of-israeli-festival-after-backlash>; Open letter to the Batsheva Dance Company, ADALAH-NY, Jan. 19, 2017, <https://adalahny.org/document/1452/open-letter-batsheva-dance-company-january-19-2017>; Yousef Munayyer, *Thank You, Lorde, For Standing Up For Palestinian Human Rights*, THE FORWARD, Dec. 26, 2017, <https://forward.com/opinion/390845/thank-you-lorde-for-standing-up-for-palestinian-human-rights/>; *Eurovision, Boycott Eurovision Song Contest hosted by Israel*, THE GUARDIAN, Sept. 7, 2018, <https://www.theguardian.com/tv-and-radio/2018/sep/07/boycott-eurovision-song-contest-hosted-by-israel>; ACADEMIC ASSOCIATIONS ENDORSING BOYCOTT AND RESOLUTIONS, US CAMPAIGN FOR THE ACADEMIC AND CULTURAL BOYCOTT OF ISRAEL, <https://usacbi.org/academic-associations-endorsing-boycott/>.

9. See, e.g., *In first, UK university divests from firms supplying Israel army*, MIDDLE EAST MONITOR, Nov. 5, 2018, <https://www.middleeastmonitor.com/20181105-in-first-uk-university-divests-from-firms-supplying-israel-army/>; COUNCIL OF AFRICAN INDEPENDENT CHURCHES, *Media Statement: Apartheid in the Holy Land—Israel*, July 11, 2017, <http://www.bdssouthafrica.com/wp-content/uploads/2017/07/MEDIA-STATEMENT-Council-of-African-Independent-Churches.pdf>; FRIENDS OF SABELL NORTH AMERICA, *MENNONITE CHURCH USA VOTES OVERWHELMINGLY FOR ISRAELI OCCUPATION INVESTMENT SCREEN*, <https://www.fosna.org/mennonite-win-release>.

forums like the United Nations and Federation International de Football Association.<sup>10</sup>

Labor unions in South Africa, Canada, Norway, India, the United Kingdom, Brazil and Uruguay have endorsed BDS.<sup>11</sup> Several unions in the United States have also responded to the call, including the United Electrical, Radio, and Machine Workers of America (UE) and graduate student unions at the University of California and the University of Massachusetts Amherst.<sup>12</sup> This essay will focus exclusively on the boycott aspect of the BDS campaign.

Under the National Labor Relations Act (NLRA), labor unions can face injunctions and damages for engaging in BDS if it is construed as prohibited secondary boycott activity.<sup>13</sup> Notwithstanding current Supreme Court authority to the contrary, the National Labor Relations Board and the courts would err in concluding that labor union support for BDS has a secondary object. Boycott actions, including work stoppages, that respond to international calls for solidarity are better interpreted as primary boycott campaigns against an employer who persists in maintaining a relationship with the secondary entity. Even if labor union support for BDS was found to have a secondary object, as prohibited by the provisions of the NLRA, the

10. See, e.g., Aubrey Bloomfield, *FIFA must take action on Israeli settlement clubs*, ALJAZEERA, Jan. 6, 2017, <https://www.aljazeera.com/indepth/opinion/2017/01/fifa-action-israeli-settlement-clubs-170106135455991.html>; 'People power works': Peace campaigners welcome Glasgow council announcement of no more arms fairs, *Common Space*, June 29, 2016, <https://www.commonspace.scot/articles/12962/people-power-works-peace-campaigners-welcome-glasgow-council-announcement-no-more>; Meeting of the Council of the Socialist International at the United Nations, Declaration on the Palestinian Question, June 26-27, 2018, <http://www.socialistinternational.org/images/dynamicImages/files/ENG%20Palestinian%20Q.pdf>; Itamar Eichner, *Palestinians push initiative to remove Israel from UN*, YNET NEWS, Aug. 14, 2018, <https://www.ynetnews.com/articles/0,7340,L-5328414,00.html>.

11. Alex Kane, *NLRB Upholds Union's Right To Endorse BDS Against Israel*, IN THESE TIMES, July 27, 2016, [http://inthesetimes.com/working/entry/19332/nlr\\_b Upholds\\_unions\\_right\\_to\\_endorse\\_bds\\_against\\_israel](http://inthesetimes.com/working/entry/19332/nlr_b Upholds_unions_right_to_endorse_bds_against_israel) [<http://perma.cc/M9AP-CPVH>]; see also, e.g., CANADIANS FOR JUSTICE AND PEACE IN THE MIDDLE EAST, CJPME CONGRATULATES UNIFOR FOR PASSAGE OF BDS RESOLUTION, Sept. 6, 2017, [http://www.cjpme.org/pr\\_2017\\_09\\_06](http://www.cjpme.org/pr_2017_09_06); PALESTINIAN BOYCOTT, DIVESTMENT AND SANCTIONS NATIONAL COMMITTEE, 16 MILLION-STRONG ORGANIZATION IN INDIA JOINS THE BDS MOVEMENT, Oct. 23, 2017, <https://bdsmovement.net/news/16-million-strong-organization-india-joins-bds-movement>; JTA, *Norway's Largest Trade Union Calls for Blanket Boycott of Israel*, JERUSALEM POST, May 13, 2017, <https://www.jpost.com/Diaspora/Norways-largest-trade-union-calls-for-blanket-boycott-of-Israel-490585>; *South Africa trade union president urges government to downgrade Israel ties*, MIDDLE EAST MONITOR, Sept. 21, 2018, <https://www.middleeastmonitor.com/20180921-south-africa-trade-union-president-urges-government-to-downgrade-israel-ties/>; Soraya Misleh, *Brazil Says No to Israeli Arms*, SOCIALIST WORKER, Apr. 24, 2013, <https://socialistworker.org/2013/04/24/brazil-says-to-no-israeli-arms>; FEDERACIÓN URUGUAYA DE EMPLEADOS DE COMERCIO Y SERVICIOS, DECLARACIÓN CONTRA EL APARTHEID ISRAELI, Apr. 20, 2016, <https://fueci.wordpress.com/2016/04/20/declaracion-contra-el-apartheid-israeli/>; Tamar Pileggi, *Britain's student union votes to boycott Israel*, TIMES OF ISRAEL, June 2, 2015, <https://www.timesofisrael.com/britains-student-union-votes-to-boycott-israel/>.

12. PALESTINE LEGAL, UNION OFFICIALS SUPPRESS MEMBER SUPPORT FOR BDS, May 25, 2016, <https://palestinelegal.org/news/2016/5/25/union-officials-suppress-member-support-for-bds>.

13. 29 U.S.C. §§ 151–169.

Act could not be applied to labor union support for BDS without running afoul of the protections guaranteed by the First Amendment, despite Supreme Court precedent to the contrary. Still, while verbal or symbolic endorsement of boycott action, including BDS, would squarely fall within the protections established by the First Amendment, it is less clear that courts are willing to extend similar protection for speech that has a greater coercive effect, like work stoppages.

This note uses the BDS movement as a lens through which to examine the legal limitations on unionized American workers who want to participate in international boycott movements. Part I will explore American union support for BDS and place it in the context of a long tradition of American union support for the cause of working people and oppressed minorities worldwide. Part II will briefly survey the evolution and interpretation of boycott actions in American labor law, paying particular attention to the amendments to the NLRA that regulate secondary boycott actions by workers and drawing attention to the fact that courts have distinguished between actions seeking to vindicate labor rights and those seeking to advance civil rights or advance political causes.

The notion of a moral economy put forth by Bruce Western and Jake Rosenfeld can be expanded to understand the operation of labor and capital as necessarily having moral and political implications. In this landscape, there is no such thing as a “neutral business,” and boycott campaigns that respond to international calls for solidarity can and should be understood as primary boycott campaigns against employers who maintain a relationship with the secondary entity in violation of the solidarity call. Thus construed, BDS would not violate the anti-secondary boycott provisions of the NLRA, because BDS does not have a prohibited secondary object. Under this framework, a worker’s decision to strike in order to force her employer to conform to a particular call for solidarity is protected political speech under the First Amendment of the U.S. Constitution.

## I. BDS AND AMERICAN UNIONS

The BDS movement invokes the power of transnational grassroots solidarity to effectuate change where national governments have been unable or unwilling to do so. The idea behind BDS is similar to union participation in other political movements, namely that organized people can peacefully mobilize the power they have as a collective to pressure an actor with whom they have a direct relationship to end its complicity in actions of a third party. Recalling the influence that labor unions have had in the past, Francesca Rosa of the Justice in Palestine Coalition’s Labor Solidarity Committee and Services Employees International Union (SEIU) Local 535 in San Francisco stated that “it was when the AFL-CIO leadership said that the AFL-CIO would completely divest from South African bonds [that the movement

succeeded].”<sup>14</sup> Several local chapters of American unions have endorsed BDS, including the 200,000-member strong Connecticut branch of the AFL-CIO in October 2015.<sup>15</sup>

American labor solidarity with Palestine is not new, nor are other labor solidarity expressions of opposition to political events or regimes. Black labor unions played a major role in resisting apartheid in South Africa from within the country, and when more than thirty-three unions joined together in November 1985 to form the Congress of South African Trade Unions, they formed a 500,000 worker strong force dedicated to undermining the white rulers.<sup>16</sup> Supporting those workers from the San Francisco Bay Area, members of the International Longshore and Warehouse Unions boycotted South African cargo by refusing to unload the Dutch ship *Raki*, which arrived at San Francisco’s Pier 19 carrying South African asbestos, coffee, and hemp.<sup>17</sup> In 1969, the League of Revolutionary Black Workers took a position against Zionism, and in 1973, Black and Arab workers in the United Automobile Workers union held wildcat strikes against the union to protest its investment in Israeli bonds.<sup>18</sup>

In December 2014, UAW Local 2865, which represents 13,000 student workers in the University of California system, voted in support of a BDS resolution.<sup>19</sup> Union members were asked to vote on whether the University of California and UAW International should divest their holdings from Israeli state institutions and Israeli companies operating internationally “complicit

14. Lauren Anzaldo, *Labor for Palestine*, LEFT TURN: NOTES FROM THE GLOBAL INTIFADA (2005), <http://www.leftturn.org/labor-palestine> [http://perma.cc/9HBN-A59Q].

15. CONNECTICUT AFL-CIO, RESOLUTION 7: SUPPORTING JUSTICE AND PEACE FOR THE PEOPLES OF PALESTINE AND ISRAEL, Oct. 29–30, 2015, <https://uslaboragainstar.org/Article/74453/ct-afl-cio-convention-resolution-supporting-justice-and-peace-for-the-peoples-of-palestine-and-israel>. The delegates passed a resolution calling on the national AFL-CIO to adopt BDS “in connection with companies and investments profiting from or complicit in human rights violations arising from the occupation of the Palestinian territories by the State of Israel, and to urge its affiliates and related pension and annuity funds to adopt similar strategies.” *Id.* The endorsement of BDS by the Connecticut chapter stood in contrast to the AFL-CIO’s position as a strong backer of Israel for decades. Ali Abunimah, *Connecticut Labor Federation Backs Israel Boycott*, THE ELECTRONIC INTIFADA, Nov. 11, 2015, <https://electronicintifada.net/blogs/ali-abunimah/connecticut-labor-federation-backs-israel-boycott> [http://perma.cc/92PE-M8C4].

16. Alan Cowell, *The Struggle: Power and Politics in South Africa’s Black Trade Unions*, N.Y. TIMES, June 15, 1986, <https://www.nytimes.com/1986/06/15/magazine/the-struggle-power-and-politics-in-south-africa-s-black-trade-unions.html>.

17. Peter Cole, *Bay Area Longshore Workers Fought Against Apartheid*, FOUND SF, [http://www.foundsf.org/index.php?title=Bay\\_Area\\_Longshore\\_Workers\\_Fought\\_Against\\_Apartheid](http://www.foundsf.org/index.php?title=Bay_Area_Longshore_Workers_Fought_Against_Apartheid) (last accessed Mar. 19, 2019).

18. PAMELA E. PENNOCK, *THE RISE OF THE ARAB AMERICAN LEFT: ACTIVISTS, ALLIES, AND THEIR FIGHT AGAINST IMPERIALISM AND RACISM, 1960S–1980S* (2017).

19. Nora Barrows-Friedman, *Victory: US Student Workers’ Union Backs Israel Boycott in Landslide Vote*, THE ELECTRONIC INTIFADA, Dec. 11, 2014, <https://electronicintifada.net/blogs/nora-barrows-friedman/victory-us-student-workers-union-backs-israel-boycott-landslide-vote> [http://perma.cc/GGK7-MNHA].

in severe and ongoing human rights violations as part of the Israeli oppression of the Palestinian people.”<sup>20</sup> The turnout was higher than any previous election held by the local.<sup>21</sup> On their ballots, members were also able to pledge that they would voluntarily “refuse to take part in any research conferences, events, exchange programs, or other activities sponsored by Israeli institutions.”<sup>22</sup>

A group of anti-BDS members of UAW 2865 appealed the chapter’s endorsement of the boycott.<sup>23</sup> In December 2015, the UAW International Executive Board nullified the resolution that called on the parent organization to endorse BDS.<sup>24</sup> Despite admitting that the chapter vote was free and fair, the Executive Board concluded that the resolution violated the International’s constitution by “lead[ing] to a direct economic deprivation for members of the UAW, as well as other organized members by categorically interfering with the flow of commerce to and from earmarked companies,” including “Boeing, Caterpillar, General Electric, Lockheed Martin, Northrop-Grumman, and Raytheon.”<sup>25</sup>

United Electrical, Radio, and Machine Workers of America (UE) became the first national union in the United States to support the boycott of Israel when it endorsed the call for BDS at its August 2015 convention.<sup>26</sup> As of 2014, the UE had 35,900 members.<sup>27</sup> The UE resolution denounced Israeli racism and bombardments of the Gaza Strip and supported an end of U.S. military aid to Israel, citing yearly economic and military packages of \$3 billion.<sup>28</sup> It also called for any peace agreements between Israel and Palestine to include a right to Palestinian self-determination and the right of return for Palestinian refugees.<sup>29</sup> The endorsement of BDS was one of thirty-seven resolutions enacted at UE’s National Convention, others of which followed UE’s long history of left-wing activism in labor, including resolutions on

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20. *Id.*

21. Mario Vasquez, *UAW Overrules Academic Workers BDS Vote Against Israel Despite Finding Strong Turnout, No Misconduct*, IN THESE TIMES, Jan. 6, 2016, <http://inthesetimes.com/working/entry/18731/uaw-university-california-local-2865-boycott-divestment-sanctions-israel>.

22. Barrows-Friedman, *supra* note 19.

23. Colleen Flaherty, *UAW Nullifies California Grad Students’ BDS Vote*, INSIDE HIGHER ED, Dec. 18, 2015, <https://www.insidehighered.com/quicktakes/2015/12/18/uaw-nullifies-california-grad-students-bds-vote> [http://perma.cc/89B4-MG2D].

24. Vasquez, *supra* note 21.

25. *Id.* On appeal, the nullification was not ultimately justified by the economic argument, but rested on a union democracy issue instead – the local could not go against the international policy.

26. UE PALESTINE ISRAEL RESOLUTION (Aug. 20, 2015).

27. UNION FACTS, (last updated Nov 15th, 2016), [https://www.unionfacts.com/union/United\\_Electrical%2C\\_Radio\\_and\\_Machine\\_Workers](https://www.unionfacts.com/union/United_Electrical%2C_Radio_and_Machine_Workers).

28. *Id.*

29. *Id.*

issues relating to police brutality and demanding an end to the embargo of Cuba.<sup>30</sup>

In October 2015, two months after UE endorsed BDS, Israeli legal center Shurat HaDin filed an unfair labor practice charge with the NLRB alleging that the UE decision to endorse BDS violated U.S. labor law by encouraging its members to engage in an illegal secondary boycott.<sup>31</sup> Shurat HaDin describes itself as an organization that “utilizes court systems worldwide to go on the legal offensive against Israel’s enemies.”<sup>32</sup> Nitsana Darshan-Leitner, head of Shurat HaDin, said in a statement that a union encouraging its members to cease doing business with Israelis and Israeli companies” was a “violation of American labor law.”<sup>33</sup> The NLRB first dismissed the complaint in January of 2016 and later upheld its decision, stating that the union’s endorsement of BDS was not a “signal or request” to employees “to engage in a work stoppage against their employers,” which would be illegal.<sup>34</sup> Although it is true that the union’s endorsement of BDS, which raised the ire of the Israeli law firm, was not an explicit request to UE employees to engage in a work stoppage, it is not clear that this activity would not also be protected by the law. The NLRB’s decision in this case raises a potential conflict between labor laws and the protections for political speech and activity afforded by the First Amendment of the constitution.

The International Longshore and Warehouse Union (ILWU) has also indicated sympathy for BDS.<sup>35</sup> In 2010, hundreds of Palestinian solidarity activists organized a protest at the Port of Oakland in response to Israel’s attack on six civilian ships that were attempting to break the blockade of Gaza.<sup>36</sup> ILWU Local 10 honored picket lines for the Block the Boat protest of an Israeli ship attempting to unload goods at the Port of Oakland, and did so again in response to renewed Israeli attacks on Gaza in August 2014. During the second protest, the ship was left at sea for four days.<sup>37</sup> Zim has

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30. Vasquez, *supra* note 21.

31. Charge Against United Electrical, Radio, and Machine Workers of America, National Labor Relations Board Case No. 06-CC-162236 (Oct 13, 2015) (on file with author).

32. SHURAT HADIN, <https://israelawcenter.org/>.

33. Kane, *supra* note 11.

34. NATIONAL LABOR RELATIONS BOARD, DISMISSAL LETTER – NLRB REGION 6, Jan. 12, 2016.

35. The ILWU is the only active union other than UE that survived expulsion from the Congress of Industrial Unions during the Red Scare over refusal to sign anti-communist affidavits. *CIO Anticommunist Drive*, ST. JAMES ENCYCLOPEDIA OF LABOR HISTORY WORLDWIDE: MAJOR EVENTS IN LABOR HISTORY AND THEIR IMPACT, <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/cio-anticommunist-drive>.

36. Ben Norton, *California Leads the Way in the ‘Block the Boat’ Movement*, MONDOWEISS, Oct. 17, 2014, <http://mondoweiss.net/2014/10/california-block-movement/>; David R. Baker, *Oakland protest blocks unloading of Israeli cargo ship*, SF GATE, Aug. 19, 2014, <https://www.sfgate.com/bayarea/article/Oakland-protest-blocks-unloading-of-Israeli-cargo-5694754.php>.

37. *Id.*

approximately \$4 billion in annual revenue and is partially owned by the Israeli government.<sup>38</sup>

The ILWU's actions were part of an expression of strong labor solidarity of dock workers with the plight of communities suffering political repression and violence around the world. South African and Australian dockworkers have also refused to handle Israeli cargo following Israeli incursions into the Gaza Strip, with the Congress of South African Trade Unions calling upon other workers to do the same.<sup>39</sup>

Boycott actions by workers, in the context of current law interpreting and regulating secondary boycott action, demand investigation of the legal limits of worker solidarity action. If workers want to respond to the BDS movement's call for boycott, what legal limits might be imposed on them? What are the legal principles that apply to the actions of workers respond to the call for boycott, including endorsement of the BDS call, engaging in a refusal to handle goods from an Israeli cargo ship, and a hypothetical refusal by workers to participate in the manufacturing of a product known to be used to violate Palestinian human rights?

The Israeli Defense Forces have been known to use militarized Caterpillar D9 bulldozers in demolitions of Palestinians' homes, in the construction of settlements, the West Bank wall, checkpoints, roadblocks, and for crowd control.<sup>40</sup> As a result, Caterpillar has been declared a target of the BDS campaign.<sup>41</sup> The analysis that follows will apply the law of secondary boycotts to a hypothetical situation in which Caterpillar workers answer the BDS call by refusing to work.

## II. THE NLRA LAW OF SECONDARY BOYCOTTS

The right to strike was not always enshrined in labor law. In fact, the common law treated the concerted activities of labor organizations, including primary strikes, akin to those of criminal conspiracies.<sup>42</sup> Courts interpreted the Sherman Act of 1890, crafted primarily to establish and remedy antitrust violations, to apply against trade unions.<sup>43</sup> The ability of workers to bargain

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38. *Id.*

39. Maureen Clare Murphy, *US Trade Unionists: Boycott, Divest from Apartheid Israel*, THE ELECTRONIC INTIFADA, Dec. 15, 2009, <https://electronicintifada.net/content/us-trade-unionists-boycott-divest-apartheid-israel/1010> [<http://perma.cc/262V-4DFU>].

40. Adri Nieuwhof, *How Israel Uses Caterpillar Machinery to Carry out Extrajudicial Executions*, BDS MOVEMENT, Aug. 12, 2014, <https://bdsmovement.net/news/how-israel-uses-caterpillar-machinery-carry-out-extrajudicial-executions> [<http://perma.cc/38WS-XVQR>]; see generally Michele K. Esposito, *Military Dimensions: The Israeli Arsenal Deployed against Gaza*, 38 J. PALESTINE STUDIES 181 (2009).

41. *Id.*

42. See generally Theodore J. St. Antoine, *Secondary Boycott: From Antitrust to Labor Relations Nineteenth Annual Spring Meeting: Labor and Antitrust*, 40 ANTITRUST LAW J. 243 (1970).

43. See generally C. J. Trimm, *Labor Unions and the Anti-Trust Law: A Review of Decisions*, 18 J. POL. ECON 129 (1910).

collectively was thus constrained until the Sherman Act's successor, the Clayton Act, specifically exempted labor unions and agriculture organizations from regulation by the statute.<sup>44</sup> Continuing to interpret the validity of labor strike action through the lens of antitrust enforcement, courts were willing to find that the basic weapon of labor, the primary strike, did not run afoul of antitrust laws because it constituted only an "indirect" restraint on competition.<sup>45</sup> However, if a union persuaded its members and allies to participate in a primary or secondary consumer boycott or secondary employee strike or boycott, the union was guilty of a direct restraint of trade.<sup>46</sup>

Federal law governing labor unions and disputes continued to evolve through the first part of the twentieth century. In 1932, the Norris - La Guardia Act was passed, denying the use of injunctions to settle labor disputes and effectively legalizing the secondary boycott as a labor strategy.<sup>47</sup> For example, in 1939, the Third Circuit denied an employer a temporary injunction against three striking unions despite harm to the employer, holding that a secondary boycott falls within the protections afforded by the Norris-LaGuardia Act.<sup>48</sup> While not all courts took as liberal an approach to boycotts, by the late 1930s and early 1940s, boycotting by unions was broadly accepted by the federal courts as a valid labor strategy.<sup>49</sup>

The National Labor Relations Act, also known as the Wagner Act, was passed in 1935 by President Franklin Roosevelt and a Congress sympathetic to labor unions. The NLRA guaranteed employees the right to organize labor unions, to engage in collective bargaining and to participate in "concerted activity" for "mutual aid and protection."<sup>50</sup> The act also established the National Labor Relations Board to adjudicate labor-management disputes and allegations of unfair labor practices.<sup>51</sup>

While the NLRA contributed to a significant rise in the membership and collective power of unions across the nation,<sup>52</sup> it also ushered in protections for employers against the secondary tactics that had been widely used by

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44. 15 U.S. § 17 (1914).

45. *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 408 (1922).

46. *Loewe v. Lawlor*, 208 U.S. 274, 307 (1908).

47. J. James Miller, *Legal and Economic History of the Secondary Boycott*, 12 LAB. L. J. 754 (1961); 29 U.S.C. § 104 ("no court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts: (a) Ceasing or refusing to perform any work to remain in any relation of employment").

48. *Wilson & Co. v. Birl*, 105 F.2d 948, 952 (1939).

49. Miller, *supra* note 47.

50. NLRA § 7.

51. *Id.*

52. LABOR UNIONS DURING THE GREAT DEPRESSION AND NEW DEAL, LIBRARY OF CONGRESS, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/depw/wii/unions/>.

unions. In particular, section 8(b)(4) of the NLRA made it an unfair labor practice for a labor organization,

to engage in, or to induce or encourage any individual employed by any person engaged in commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services. . . where. . . an object thereof is forcing or requiring any person to cease using selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.<sup>53</sup>

The NLRA does not explicitly distinguish between primary and secondary activity. However, it is an unfair labor practice for a union to strike or refuse to do certain work for an employer to force that employer to cease doing business with another entity.<sup>54</sup> In other words, it is unlawful for a union to strike when it does not have a direct dispute over wages or working conditions with an employer to pressure the primary target of the union campaign.<sup>55</sup>

The Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959 expanded the prohibitions against secondary activities.<sup>56</sup> According to Richard Blum, the Congresses which adopted employer-friendly provisions of the NLRA and Landrum-Griffin Act intended to inhibit the ability of unions to deploy “their most important source of power.”<sup>57</sup> These lawmakers took the position that the sanctions of a secondary boycott should not bear upon the employer “who alone is a party to the dispute,” not upon “some third party who has no concern in it.”<sup>58</sup> The withholding of labor has been described as the ultimate weapon of unions, both because it is often an effective coercive method to use against employers and because there exists a strong tradition of solidarity when it comes to honoring picket lines.<sup>59</sup> Thwarting collaboration across unions and preventing joint work stoppages that go beyond the immediate employer greatly impeded the strength of unions in the United States.<sup>60</sup>

The unyielding prohibition on secondary boycotts also fails to account for the increasingly fissured nature of modern employer-employee relationships. As work continues to be outsourced and distributed among numerous different actors through subcontracting, the use of temporary employment agencies, franchises, and conversion of employees into

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53. 29 U.S.C. § 158(b)(4)(i)(B) (2012).

54. See generally Richard Blum, “*They Outlawed Solidarity!*,” 39 SEATTLE U. L. REV. 909 (2016).

55. *Id.*

56. 29 U.S.C. §§ 401–531 (2012).

57. Blum, *supra* note 54, at 986.

58. *Int’l Bhd. of Elec. Workers v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950).

59. Blum, *supra* note 54, at 986.

60. *Id.*

independent contractors, “fissured workplaces” necessitate that workers who want to influence the conduct of an actor at a point in the supply chain where they lack power, must target a different vulnerable point in the supply chain for their strike or boycott action.<sup>61</sup> International labor solidarity campaigns, which similarly seek to change the actions of an actor often only accessible indirectly, frequently invoke this strategy. For example, workers in the United States have sought to function as labor allies for workers abroad by associating name brands in the U.S. with bad labor practices or staging boycotts to pressure foreign suppliers and manufacturers to change the way they treat their workers.<sup>62</sup> A ban on secondary boycotts unreasonably limits labor’s ability to challenge business practices that involve networks or span an entire industry.

Through prohibitions on secondary pickets and strikes, U.S. labor law significantly and problematically inhibits solidaristic action by a labor organization representing workers of a particular employer to promote the use of union labor or union labor standards by another employer. In addition to the risk of an expedited injunction sought under section 10(1), the amended NLRA gave employers a private right of action for compensatory damages available against unions that violate the secondary boycott provisions.<sup>63</sup> The NLRA further provides that anyone injured in business or property by a secondary boycott may recover damages for costs sustained by the boycott.<sup>64</sup> The availability of court-awarded civil damages for a section 8(b)(4) violation under the Landrum-Griffin Act is an anomaly in a labor law system in which administrative agencies adjudicate most claims and compensatory damages are unavailable, making more potent the threat of 8(b)(4) actions against American unions.<sup>65</sup>

### III. PRIMARY VS. SECONDARY OBJECTIVES

The first step in analyzing potential secondary boycott problem is to identify the primary employer, the entity with whom the union has the dispute, to determine whether the union is coercing a “neutral” entity to force it to cease dealing with a primary entity. Since the passage of the Taft-Hartley Act, the NLRB’s most obstinate problem has been distinguishing between situations where the union’s “sanctions bear . . . upon the employer who alone is a party to the dispute,” and situations where they bear “upon some

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61. *Id.* at 990; *see generally* DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

62. *Id.*

63. *Teamsters, Chauffeurs & Helpers Union Local 20 v. Morton*, 377 U.S. 252, 258 (1964).

64. *See* 29 U.S.C. § 187(b).

65. Michael C. Duff, *ALT-Labor, Secondary Boycotts, and toward a Labor Organization Bargain*, 63 CATH. UNIV. L. REV. 849 (2014); *see* 29 U.S.C. § 160(j) (2006) (allowing the NLRB to provide temporary relief if it finds “just and proper”); Labor Management Relations Act, 29 U.S.C. § 187 (2000).

third party who has no concern” in the dispute, in other words, between lawful primary and unlawful secondary activity.<sup>66</sup>

Under the Truman Administration, the Board favored a geographical approach, whereby a union could entreat employees of either primary or secondary employers not to enter or do work at the primary employer’s own job site.<sup>67</sup> The Board reasoned that “traditional primary strike action” had always included the right “to induce and encourage third persons to cease doing business with the picketed employer” and to “respect a primary picket line *at the Employer’s premises*.”<sup>68</sup> Under Eisenhower, all direct appeals to secondary employees were prohibited.<sup>69</sup> Only “incidental” effects on secondary employers were permissible.<sup>70</sup> A limited exception to this categorical rejection of the legal legitimacy of secondary appeals was recognized to permit picketing at the site of a secondary employer if that was the only way that the union could picket the primary employer’s employees. Still, the union would need to adhere to specific standards and clearly disclose that the dispute is with the primary employer.<sup>71</sup>

Justice Frankfurter in *United Brotherhood of Carpenters and Joiners v. NLRB* discussed what the Court interpreted to be Congress’s intent in passing the anti-secondary boycott legislation. He explained that Congress “aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and . . . dangerous practice of unions to widen that conflict: the coercion of neutral employers.”<sup>72</sup> Congress made a similar statement in explaining the prohibition on secondary boycotts as having been drafted broadly to protect “the helpless victims of quarrels that do not concern them at all.”<sup>73</sup> The discursive effect of this statement is to extract employers from the moral economy into which they are in fact tightly woven and suggests that it is possible for employers to achieve the status of “neutral” parties in a political boycott action involving workers.

The Court has previously held that secondary picketing by labor unions was not protected activity under the First Amendment due to its economically coercive effect.<sup>74</sup> In *International Longshoremen’s Association v. Allied International*, the Supreme Court granted certiorari to determine whether the union members’ refusal to unload cargo shipped from the Soviet Union was

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66. *IBEW Local 501 v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950), *aff’d*, 341 U.S. 694 (1951); *see St. Antoine*, *supra* note 42, at 246.

67. *See St. Antoine*, *supra* note 42, at 247.

68. *Oil Workers Local 346 (Pure Oil Co.)*, 84 NLRB 315, 318–19 (1949) (emphasis in the original).

69. *See St. Antoine*, *supra* note 42, at 247.

70. *See id.*

71. 29 U.S.C. § 158(b)(4)(B) (2000).

72. 357 U.S. 93, 100 (1958).

73. H.R. Rep. No. 245, 80th Cong., 1st Sess., 23 (1947).

74. *Int’l Longshoremen’s Assn. v. Allied Int’l*, 456 U.S. 212, 226 (1982).

an illegal secondary boycott under section 8(b)(4) of the NLRA.<sup>75</sup> The longshoremen's union was protesting the invasion of Afghanistan by the U.S.S.R.<sup>76</sup>

Justice Powell in *Allied International* acknowledged that the longshoreman's refusal to handle Russian goods during the Soviet invasion of Afghanistan was aimed to free them from a "morally repugnant" task, but failed to interpret the employer's contracts involving Russian goods as having moral implications that might be the primary subject of the longshoreman's dispute.<sup>77</sup> This statement suggests that the Court has acknowledged that the labor of a human being is more than "a commodity or article of commerce,"<sup>78</sup> and that work indeed had moral implications. However, the workers' action in *Allied International* was improperly characterized, both by the Court and by counsel for the International Longshoremen's Association as a secondary boycott against the Soviet Union.<sup>79</sup> Instead, it should have instead been recognized as a *primary* action in protest of Allied International's persistent engagement with a boycotted entity, which would no longer fall within the prohibition of section 8(b)(4). Moreover, as discussed in Part IV, political boycotts deserve the protection of the First Amendment and therefore should not be found unlawful under the labor law statute.

*Allied International* also unduly narrowly defined the concept of a labor dispute between the employer and its employees, contributing to its failure to recognize the workers' activity as protected. Section 13 of the NLRA broadly defines the term "labor dispute" to include "any controversy concerning terms or conditions of employment."<sup>80</sup> The Court in *Allied International* held that the Longshoremen's Association had no dispute with Allied International or its sub-contractors and that no labor objective was sought from these businesses; their sole complaint was with the foreign and military policy of the Soviet Union.<sup>81</sup> Contrary to the Court's holding, workers' refusal to work in solidarity with the boycott call should be treated as a labor dispute, not only because objections are expressed in a strike by employees against the employer, but because the dispute centers on the employer's persistence in violating the boycott call.

Although a court is likely to find that BDS has a prohibited secondary object under *Allied International*, which remains binding precedent, properly construed, BDS would not violate section 8(b)(4) and *Allied International*

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75. *Id.*

76. *Id.* at 223.

77. *Id.* at 224.

78. Clayton Antitrust Act, 29 U.S.C §§ 52–53 (2016).

79. 456 U.S. 212.

80. 29 U.S.C. § 113(c) (2016).

81. 456 U.S. 212 at 223.

should be overruled. The labor market is embedded in a “moral economy” in which norms of equity are institutionalized in the market’s formal rules and customs.<sup>82</sup> This notion of a moral economy can be expanded to understand the operation of labor and capital as necessarily having moral and political implications. In this landscape, a company which has been subjected to workers’ calls to comply with BDS or, more specifically, a call not to produce weapons for the Israeli forces, cannot claim to be a “neutral business.” Returning to the Caterpillar example, the corporation and its fleet of militarized bulldozers “have become synonymous with Israel’s destruction and desecration of Palestinian land and homes.”<sup>83</sup> A decision by the workers to strike its employer in order to force it to respect BDS is a demand by workers for the employer to rectify its complicity in violations of human rights and a refusal to themselves be complicit.

#### IV. BDS AND THE FIRST AMENDMENT

The NLRA’s broad ban on secondary activity is at odds with First Amendment protections for political expression and speech. Less than three months after their decision in *Allied International*, the Court ruled on *NAACP v. Claiborne Hardware*, a case involving a consumer boycott challenging race discrimination in employment and commerce.<sup>84</sup> In *Claiborne*, petitioning participants of a boycott of white businesses, which had been organized to demand racial equality and integration, sought review of a judgment by the Supreme Court of Mississippi which held petitioners liable for economic harm resulting from the boycott.<sup>85</sup> The U.S. Supreme Court reversed, finding that the boycotters’ activities were entitled to protection under the First Amendment.<sup>86</sup>

The Court acknowledged that the purpose of the NAACP boycott was to secure compliance by both civic and business leaders with “a lengthy list of demands” for equality and racial justice.<sup>87</sup> This was accomplished through speeches and nonviolent picketing, conduct the Court deemed ordinarily entitled to protection under the First and Fourteenth Amendments.<sup>88</sup> The opinion emphasized the power and sanctity of collective expression in the American political process and repeats the statement that “there are, of

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82. Bruce Western and Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 517 (2011).

83. Nora Barrows-Friedman, *Portland Halts Investment in Caterpillar*, THE ELECTRONIC INTIFADA, Dec. 11, 2014, <https://electronicintifada.net/blogs/nora-barrows-friedman/victory-us-student-workers-union-backs-israel-boycott-landslide-vote> [http://perma.cc/GGK7-MNHA].

84. 458 U.S. 886 (1982).

85. *Id.*

86. *Id.* at 915.

87. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 907 (1982).

88. *Id.*

course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them.”<sup>89</sup> This notably stands in contrast to section 8(b)(4)’s prohibition on political boycott activity.

In addition to affirming the strong First Amendment protections afforded to the protestors in *Claiborne*, the Court engaged in an analysis involving the disruptive effect on local economic conditions that may result from a nonviolent and totally voluntary boycott.<sup>90</sup> The Court balanced the government’s strong interest in economic regulation against incidental effects of that regulation on rights of speech and association, recognizing that these rights might sometimes yield as a result.<sup>91</sup> The Court then analyzed the boycott in this context, carving out an exception for picketing by labor unions as potentially prohibited activity due to “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.”<sup>92</sup> Ultimately, the Court re-defined the purpose of the NAACP boycotters’ campaign, which did not aim to gain economic advantage or to destroy legitimate competition, “but rather to vindicate rights of equality and freedom.”<sup>93</sup> In this case, the right of states to regulate economic activity could not be sustained as a justification for infringement on the rights of people to non-violently stage a “politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself,” even where, as the Court explicitly acknowledged, the petitioners clearly foresaw, and moreover directly intended, that the merchants would sustain economic injury as a result of their campaign.<sup>94</sup>

Unless they are toothless entirely, all boycott actions by definition aim to have economically coercive effects, so economic coercion cannot be the sole means by which to evaluate the legitimacy of a union’s action. An approach that is more consistent with First Amendment doctrine would draw a distinction between boycott activity that aims to have anti-competitive effects, and activity that is appropriately understood as political speech. In *FTC v. Superior Court Trial Lawyers Association*, for example, the Court distinguished respondent criminal defense attorneys’ boycott action from *Claiborne* because the “undenied objective” of the boycott in *FTC* was to “gain an economic advantage for those who agreed to participate.”<sup>95</sup> In

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89. *Citizens Against Rent Control/Coalition for Fair Hous. v. Berkeley*, 454 U.S. 290, 296 (1981).

90. *Claiborne Hardware*, 458 U.S. at 912.

91. *Id.*

92. *Id.*

93. *Id.* at 914.

94. *Id.*

95. 493 U.S. 411, 429 (1990).

contrast, boycotts and work stoppages like those staged by Caterpillar workers would accrue no economic advantage to those participating, further evidence of the political nature of their speech and reason that it should be protected.

While verbal or symbolic endorsement of boycott action, including BDS, would fall squarely within the protections established by the First Amendment, it is less clear that courts are willing to extend this protection for speech that has a greater coercive effect. Even though both the *Allied* and *Claiborne* protests focused on coercive economic actions against employers, the Court's analysis of civil rights protest differed markedly from labor protest. Still, the fact that a boycott campaign like the one invoked by the BDS movement does not seek to destroy legitimate business competition should render it within the protections of the First Amendment, even where there is foreseeable or even intended economic injury, as in the case of *Claiborne*.

In light of the protections of the First Amendment, *Allied International* was wrongly decided. In arriving at a different conclusion than in *Claiborne*, the Court engaged in the very discussion they elsewhere held was beyond the scope of their responsibility:

Were we to hold that the political motivation underlying the work stoppage removes this controversy from the prohibitions of the NLGA, we would embroil federal judges in the very scrutiny of "legitimate objectives" that Congress intended to prevent when it passed that Act. The applicability . . . of all the procedural protections embodied in the Act, would turn on a single federal judge's perception of the motivation underlying the concerted activity.<sup>96</sup>

The adjudication of the validity of the objectives motivating the work stoppage is therefore in itself viewpoint-based discrimination.<sup>97</sup> Not only does the Act "not concern itself with the background or motives of the dispute,"<sup>98</sup> this discrimination clearly violates the First Amendment. Similarly, a work stoppage by Caterpillar's workers, designed to express condemnation of their employer's business relationship with entities that violate human rights, should properly be understood to be political expression protected by the First Amendment, which makes no distinction between objectives of the speech.

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96. *Jacksonville Bulk Terminals v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 719 (1982).

97. *See Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

98. *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 561 (1938).

## CONCLUSION

While verbal or symbolic endorsement of boycott action, including BDS, would fall squarely within the protections established by the First Amendment, the Court should also overcome its hesitation toward extending protection for speech that has a greater coercive effect, including that of a work stoppage. Work stoppages in response to an international call for solidarity like the one made by the Boycott, Divestment and Sanctions movement should not be understood to violate the section 8(b)(4) anti-secondary boycott provisions of the NLRA and are moreover protected political expression under the First Amendment. By recognizing that the actions of both workers and employers have moral implications, the decision to contract with a third party engaged in violations of human rights or other abuses, in the face of calls not to do so, cannot render that employer a hapless victim of economically coercive activities. In light of the analysis above, a boycott designed to express condemnation of an employer's relationship with third parties that engage in human rights abuses should properly be construed as a primary dispute with the employer, not only as a dispute with the third entity, as the Court has done. The First Amendment makes no distinction between political expression rooted in civil rights protest and that expressed by labor, and the Court should not dilute the fundamental protections afforded by the Constitution by imposing this distinction in its interpretation of the law.