

THE CEO AND THE HYDRAULICS OF CAMPAIGN FINANCE DEREGULATION

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In the Supreme Court's most recent campaign finance case, *McCutcheon v. FEC*, a bare majority of the Court struck down aggregate contribution limits for individuals.¹ Whereas an individual's total campaign contributions in a given two-year federal election cycle were previously limited to \$123,200, individuals may now give as much as \$3.6 million.² *McCutcheon* has been praised for pushing campaign cash away from "shadow money" nonprofits and into the sunshine of disclosure, because it clears the way for donors to give large amounts to an unlimited number of candidates—a type of spending that is subject to disclosure obligations, unlike donations to 501(c) nonprofit groups.³ According to this line of thinking, deregulation not only increases the total amount of speech in the marketplace of ideas, but also tends to increase *transparent* speech. Chief Justice Roberts, writing for the plurality in *McCutcheon*, conveyed this idea when he wrote that aggregate limits "may in fact encourage the movement of money away from entities subject to disclosure."⁴ Indeed, Professors Samuel Issacharoff and Pamela S. Karlan made just this contention fifteen years ago.⁵

Though the phrase "hydraulic effects" appears nowhere in *McCutcheon*'s plurality, concurring, or dissenting opinions, the case should be understood as endorsing a particular view of how political money is like water. As Professors Issacharoff and Karlan famously put it: "[E]very reform effort to constrain political actors produces a corresponding series of

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¹ *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) [<http://perma.cc/BF84-E566>]. Federal law continues to prohibit corporations and unions from making these kinds of contributions. See 2 U.S.C. § 441b(a) (2012) [<http://perma.cc/9V2Y-2Y3W>].

² *McCutcheon*, 134 S. Ct. at 1443 (addressing previous limit); *id.* at 1473 (Breyer, J., dissenting) (observing new limit on spending in election cycle).

³ Nathaniel Persily, *Bringing Big Money Out of the Shadows*, N.Y. TIMES (Apr. 2, 2014), <http://www.nytimes.com/2014/04/03/opinion/bringing-big-money-out-of-the-shadows.html> ("A world in which individuals can give limited, disclosed amounts of money to an unlimited number of politicians is preferable to one in which large chunks are given only to 'super PACs' and other unaccountable outside groups.") [<http://perma.cc/5J43-NAVX>].

⁴ *McCutcheon*, 134 S. Ct. at 1460.

⁵ Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1717–18, 1729 (1999) [<http://perma.cc/SA3X-9ZMW>].

reactions by those with power to hold onto it,”⁶ and “[t]he price of apparent containment may be uncontrolled flood damage elsewhere.”⁷ In other words, regulations that limit or reduce certain types of election-related spending simply channel the money in other directions.

Unfortunately, the “deregulate and disclose” approach of the Roberts Court is unlikely to solve the hydraulics problem that frustrates courts and law professors. Wealthy Americans are unlikely to respond to *McCutcheon* as the Chief Justice leads us to believe, by directing a greater proportion of their cash away from “shadow money” and into the sunlight of candidate contributions.

An important piece of evidence emerged within days of the *McCutcheon* opinion. On April 3, Brendan Eich resigned after only two weeks as CEO of Mozilla, after public controversy developed over the fact that, six years earlier, he gave \$1000 to support Proposition 8 in California, which banned same-sex marriage.⁸ Mr. Eich now stands as the first CEO in America to have been forced out of his job because of a publicly-disclosed campaign contribution.⁹ The story of Brendan Eich teaches that campaign donations by corporate CEOs (and, importantly, those aspiring to be CEOs) will be scrutinized by customers, employees, business partners, and shareholders, even many years after they are made, and that publicly disclosed donations may ruin a donor’s future employment prospects as chief executive.¹⁰ For this reason, CEOs and aspiring CEOs should rationally prefer to give in secret, and the premise of the Chief Justice—that allowing the wealthy to greatly increase the amount they can give directly to candidates will cause them to rechannel their funds away from “shadow money” organizations toward transparent, disclosing organizations—is likely wrong.

The Brendan Eich story also suggests that the scope of the problem of hydraulic effects—and thus the risks of deregulation—may be greater than courts and scholars have acknowledged. Part I of this Essay argues that an increasingly politicized retail economy is a consequence of these hydraulic effects. Part II explores how political expression and political power are likely to be affected by this development. Part III argues that courts should

⁶ *Id.* at 1705.

⁷ *Id.* at 1713.

⁸ Nick Bilton & Noam Cohen, *Mozilla’s Chief Felled by View on Gay Unions*, N.Y. TIMES (Apr. 3, 2014, 4:07 PM), <http://bits.blogs.nytimes.com/2014/04/03/eich-steps-down-as-mozilla-chief> [<http://perma.cc/MGX6-JPTT>].

⁹ Mr. Eich’s resignation was reportedly voluntary; in public statements, Mozilla denied that its board of directors had asked him to step down as CEO. *FAQ on CEO Resignation*, MOZILLA BLOG (Apr. 5, 2014), <https://blog.mozilla.org/blog/2014/04/05/faq-on-ceo-resignation/> [<http://perma.cc/5GSV-TX4R>].

¹⁰ See Kara Swisher, *Mozilla Co-Founder Brendan Eich Resigns as CEO, Leaves Foundation Board*, RE/CODE (Apr. 3, 2014), <http://recode.net/2014/04/03/mozilla-co-founder-brendan-eich-resigns-as-ceo-and-also-from-foundation-board/> [<http://perma.cc/CUQ7-QR7Z>].

not overreact to consumer activism by setting generous disclosure exemption standards based on economic reprisal.

I. UNCONTROLLED FLOOD DAMAGE: PUNISHING DONORS AT THE CASH REGISTER

Increasingly, it appears that ordinary Americans believe they have lost the ability to command the attention of candidates and elected officials because they cannot compete with the significant election-related spending of the so-called “donor class.”¹¹ This is an elite group of wealthy individuals—according to the Sunlight Foundation, 31,385 people—who, in 2012, donated more than one-quarter of the money spent on federal elections.¹² The donor class, as it happens, is heavily populated by business leaders and CEOs.

In 2012, nearly 5700 donors in the top group of individual election spenders—individuals who contributed a median amount of \$26,584 each—were identified on FEC disclosure forms as “CEO,” “President,” “Chairman,” “Executive,” or “Owner” of a business entity.¹³ One study found “phenomenally high” rates of political donations between 1979 and 2012 by individual corporate officers and directors at Fortune 500 companies—approximately 83%.¹⁴ Some business leaders have their own Super PACs.¹⁵ In other words, business executives are among the most active campaign finance donors and spend, on average, significantly more money to influence elections than ordinary Americans do. Economists like Thomas Piketty have pointed out that corporate CEOs, who come by their wealth through enormous and controversial executive compensation

¹¹ See, e.g., Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259, 1262, 1290 (2012) (“Individuals with family incomes over \$100,000 represented 11% of the population in 2004, cast 14.9% of the votes, and were responsible for approximately 80% of contributions over \$200.”) [<http://perma.cc/QN39-PQQW>].

¹² See Lee Drutman, *The Political 1% of the 1% in 2012*, SUNLIGHT FOUND. (June 26, 2013), http://sunlightfoundation.com/blog/2013/06/24/1pct_of_the_1pct/ [<http://perma.cc/4F7J-JZKN>]. In fact, only 591 individuals donated the maximum of \$46,200 to candidates for federal office in 2012. See *McCutcheon vs FEC*, CTR. FOR RESPONSIVE POLITICS, http://www.opensecrets.org/overview/mccutcheon_about.php (last visited June 25, 2014) [<http://perma.cc/U2W5-NQKK>].

¹³ See Drutman, *supra* note 12.

¹⁴ See Adam Bonica, *Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives* 14 (December 3, 2013) (working paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2313232 (noting that many of those who did not contribute were foreign nationals and thus prohibited by law from making contributions) [<http://perma.cc/JR9-QAWA>]. The “lifetime average” of those who made donations was an astonishing \$197,435 per individual. *Id.*

¹⁵ See generally Michael Beckel, *The Rise of the Vanity Super PACs*, SLATE (February 5, 2014), http://www.slate.com/articles/news_and_politics/politics/2014/02/thomas_steyer_michael_bloomberg_and_jonathan_soros_give_big_to_super_pacs.html (discussing, among others, Michael Bloomberg’s Super PAC) [<http://perma.cc/JFM2-8BRJ>].

arrangements, are a primary vector of income inequality in the U.S.¹⁶ The “Chief Executive Donor” is one of the most significant beneficiaries of campaign finance deregulation.

In a recent survey, 26% of Americans said they were less likely to vote because “big donors to Super PACs have so much more influence over elected officials than average Americans.”¹⁷ The survey found that nearly half of Americans with annual household incomes less than \$35,000 believe that their votes “don’t matter very much” because of the influence of high-spending donors.¹⁸ More than 40 million American households have annual incomes of less than \$35,000.¹⁹ One commentator noted that a worker earning the federal minimum wage of \$7.25 an hour would have to work full-time for more than eight years to earn the federal contribution limit of \$123,200, which the *McCutcheon* plurality threw out as too low.²⁰ Just a few weeks ago, a U.S. District Court judge, applying *Citizens United v. Federal Election Commission*²¹ and *McCutcheon* in a challenge to New York’s campaign finance laws, noted his disagreement with those cases and observed that “today’s reality is that the voices of ‘we the people’ are too often drowned out by the few who have great resources.”²²

One unintended consequence of *Citizens United* and *McCutcheon* may be that by disempowering the ordinary American through campaign finance deregulation, the Supreme Court is causing “uncontrolled flood damage elsewhere”²³: It is emboldening ordinary Americans to express their political voice economically, through acts that hold wealthy donors, rather than elected officials, accountable. Citizens are increasingly engaging in

¹⁶ THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 332–33 (2014) [<http://perma.cc/3GYC-JJ7V>].

¹⁷ *National Survey: Super PACs, Corruption, and Democracy*, BRENNAN CTR. FOR JUSTICE (April 24, 2012), <http://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy> [<http://perma.cc/HQ9S-46HV>]. This opinion was more likely to be voiced by those with an annual household income less than \$35,000 (34%). *Id.*

¹⁸ Forty-eight percent of respondents in this income range said they believed “that their votes don’t matter very much because big donors to Super PACs have so much more influence.” *Id.*

¹⁹ See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 453 (2012), available at <http://www.census.gov/compendia/statab/2012edition.html> [<http://perma.cc/SJX7-VJLA>]. Commentators have been quick to link the *McCutcheon* decision with political opposition to raising the minimum wage. See, e.g., Joseph Hines, *How McCutcheon Will Make Raising the Minimum Wage Even Harder*, POLICYSHOP (Apr. 3, 2014), <http://www.demos.org/blog/4/3/14/how-mccutcheon-will-make-raising-minimum-wage-even-harder> [<http://perma.cc/CMY4-N9QN>].

²⁰ See LeeAnn Hall & Rhana Epting, *The Triple-Play Against Low Wage Workers: McCutcheon, McConnell, McDonalds*, ROLL CALL (April 30, 2014), http://www.rollcall.com/news/the_triple_play_against_low_wage_workers_mccutcheon_mcconnell_mcdonalds-232524-1.html [<http://perma.cc/YZ94-MFCL>].

²¹ 558 U.S. 310 (2010) [<http://perma.cc/S2SN-KETT>].

²² N.Y. Progress & Prot. PAC v. Walsh, No. 13 Civ. 6769(PAC), 2014 WL 1641781, at *1 (S.D.N.Y. April 24, 2014) [<http://perma.cc/JK4F-NTMX>].

²³ Issacharoff & Karlan, *supra* note 5, at 1713.

consumer protests, boycotts, and other forms of pressure directed at businesses and, as in the case of Brendan Eich, at specific Chief Executive Donors in response to their disclosed political donations.

Big businesses and their leaders—particularly publicly-held companies and those that transact directly with the public—are vulnerable to consumer action. In 2010, after *Citizens United* was decided, Target Corp. was boycotted in connection with its \$150,000 donation to a Minnesota group that supported a gubernatorial candidate who opposed same-sex marriage.²⁴ Target responded to the controversy almost immediately by issuing a public apology.²⁵ In 2011, Starbucks Corporation signed on to a brief filed in federal court opposing the Defense of Marriage Act and, in 2012, made public statements in support of a bill in Washington State to legalize same-sex marriage.²⁶ A few months later, opponents of same-sex marriage began a boycott of Starbucks and at the company’s annual stockholder meeting in 2012, a stockholder alleged that the boycott had depressed the company’s first quarter sales and earnings.²⁷

Why was Starbucks Corporation speaking out about same-sex marriage in the first place? Many public-facing companies have, in recent years, taken partisan positions on political issues that have little relevance to their operations or profitability. For example, in addition to staking out a position on same-sex marriage, Starbucks has declared a commitment to “championing progressive climate change policy.”²⁸ In 2013, the CEO of Panera Bread blogged about a week-long experiment in which he ate for \$4.50 per day, the average amount allocated to recipients of federal food aid, to protest proposed cuts to the Supplemental Nutrition Assistance Program by Congress.²⁹

For-profit businesses and their leaders make political stands like these to engage in “purpose” or “cause” marketing—a response to growing consumer demand to know “what a company stands for.”³⁰ Consumers

²⁴ Andrew Stern, *Target Corp Targeted For Political Donation*, REUTERS (Aug. 3, 2010, 4:09 PM), <http://www.reuters.com/article/2010/08/03/usa-elections-contributions-idUSN0316847320100803> [<http://perma.cc/YX5E-B426>]. There is no evidence that the boycott affected the company’s stock price.

²⁵ See Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, WALL ST. J. (August 7, 2010, 12:01 AM), <http://online.wsj.com/news/articles/SB10001424052748703988304575413650676561696> [<http://perma.cc/C8RJ-B2VG>].

²⁶ Aaron Smith, *Starbucks CEO Holds His Ground on Gay Marriage*, CNN MONEY (Mar. 28, 2013, 11:36 AM), <http://money.cnn.com/2013/03/26/news/companies/starbucks-gay-marriage/> [<http://perma.cc/954K-674H>].

²⁷ *Id.*

²⁸ STARBUCKS, STARBUCKS GLOBAL RESPONSIBILITY REPORT 18 (2013), available at <http://globalassets.starbucks.com/assets/98e5a8e6c7b1435ab67f2368b1c7447a.pdf> [<http://perma.cc/VSS5-5BY5>].

²⁹ Julie Jargon, ‘A Lot of Carbs’: Panera Bread CEO Learns to Live on \$4.50 a Day, WALL ST. J. (Sept. 17, 2013, 6:20 PM), <http://blogs.wsj.com/corporate-intelligence/2013/09/17/a-lot-of-carbs-panera-ceo-learns-to-live-on-4-50-a-day/> [<http://perma.cc/CK6G-ZGUN>].

³⁰ Stuart Elliott, *Selling Products by Selling Shared Values*, N.Y. TIMES (Feb. 13, 2013),

actively monitor news about corporate political activity, and engage with companies and other consumers about it online. They also use that information to decide what to buy. In a 2013 study, forty-two percent of Americans reported boycotting a company's products or services in the preceding twelve months.³¹ Nearly a third of consumers reported that they had researched a company's "business practices or support of social and environmental issues" in the last year.³² A smart phone app allowing consumers to learn about the political affiliations of consumer product manufacturers with a scan of the bar code cannot be far off.

Thus, as campaign finance deregulation proceeds under the Roberts Court, we should expect to see second-order "hydraulic effects" play out that are quite different from the ones described so far by election law scholars—like Issachoroff and Karlan—and Supreme Court case law to date. Like first-order hydraulic effects, in which the wealthy seek the path of least resistance for their election-related cash, these second-order effects involve those with power taking steps to hold onto it. But in second-order hydraulic effects, the actors are ordinary citizens who, because of their modest financial circumstances, lack influence in campaign finance and see consumer action as a more practical and promising mode of political participation.

II. THE CONSEQUENCES OF CONSUMER ACTIVISM ON POLITICAL SPEECH AND POLITICAL POWER

I have argued that one consequence of campaign finance deregulation is the politicization of the retail economy, through a process that could be called the hydraulics of campaign finance *de*-regulation. Ironically, the politicization of the retail economy leads to many of the same problems that were theorized to have been caused by first-order hydraulic effects. For example, the politicization of retail transactions probably reduces the amount and authenticity of speech produced by businesses, business leaders, and aspiring business leaders. Some individuals will feel so worried about the unpredictable future effects of disclosed campaign donations on their careers that they will not make political donations. At the time that Brendan Eich made his \$1000 donation to support Proposition 8, the movement to oppose same-sex marriage had significant public support; Proposition 8 won the majority vote of Californians.³³ Mr. Eich did not

<http://www.nytimes.com/2013/02/14/business/media/panera-to-advertise-its-social-consciousness-advertising.html> [<http://perma.cc/PF9G-2HQJ>].

³¹ CONE COMM'NS, 2013 CONE COMMUNICATIONS SOCIAL IMPACT STUDY 19 (2013), available at http://www.conecomm.com/stuff/contentmgr/files/0/e3d2eec1e15e858867a5c2b1a22c4cfb/files/2013_cone_comm_social_impact_study.pdf [<http://perma.cc/5XCT-KVGL>].

³² *Id.*

³³ Chris Cillizza & Sean Sullivan, *How Proposition 8 Passed in California—and Why It Wouldn't Today*, WASH. POST (Mar. 26, 2013), <http://www.washingtonpost.com/blogs/the->

foresee that a mere six years later, public sentiment on same-sex marriage would have changed so much that his donation would cost him his job. Some will likely conclude that if donations can have significant, unforeseeable consequences in the future, they should be avoided altogether.

Moreover, the marketplace of ideas may be distorted when a large, for-profit company spends money to engage in “cause” marketing and to promote its CEO as a champion of the cause. If the company is taking a political position for marketing purposes, it is not advancing a policy preference relevant to the company’s operations, but rather pandering to the political views of the majority of its consumer base. Critics of corporate political speech often argue that it distorts the marketplace of ideas by amplifying the speech of corporate insiders; perhaps, instead, corporate political speech amplifies the viewpoint of the typical customer, creating a sort of company-consumer echo chamber that drowns out minority voices—and ensures that corporate leaders will be careful not to endorse minority viewpoints on any subject.

Significantly, the politicization of the retail economy heightens the “single issue advocacy” problem associated with outside spenders like Super PACs that are critiqued for contributing to “the polarizing, attack orientation of contemporary political advertising.”³⁴ Consumer protests and boycotts tend to rally participants around a single issue—even more so than Super PACs—and they not only accentuate attack-style politics but take them to a new level, literally attacking donors for associating with a cause.

The politicization of consumer transactions is worrisome because it may reflect a sense among voters that the electoral process is completely broken. This is not a concern about voter turnout, which has remained essentially the same in federal elections for years.³⁵ Rather, the concern is that voters feel their fundamental relationship with power has changed. The politicization of consumer transactions is about holding donors, rather than elected officials, accountable for corruption or the appearance of corruption. It takes for granted what the Supreme Court denies—that politicians are strongly influenced by electoral spending, even (or perhaps especially) by secret, outside spending—and gives the masses a mechanism to punish the beneficiaries of this corrupt system.³⁶

fix/wp/2013/03/26/how-proposition-8-passed-in-california-and-why-it-wouldnt-today/ [<http://perma.cc/HHE2-N9J4>].

³⁴ Issacharoff & Karlan, *supra* note 5, at 1715.

³⁵ See *Voter Turnout*, CENTER FOR VOTING AND DEMOCRACY, <http://www.fairvote.org/research-and-analysis/voter-turnout/> (last visited, June 27, 2014) [<http://perma.cc/7HWR-MS89>].

³⁶ See *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010) (“[i]ngratiation and access are not corruption”); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (“Campaign finance restrictions that pursue [objectives other than quid pro quo corruption] impermissibly inject the Government ‘into the debate over who should govern.’”) (quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011)).

On the other hand, consumer action is counter-majoritarian in a way that might, in some circumstances, offset the concentration of influence in the very wealthy. Corporations and their leaders are risk averse. They have shown a willingness to change their behavior in the face of consumer action by vocal minority groups of customers. Using tools like the Internet, consumer activists can leverage a small amount of public interest into a controversy with measurable economic consequences for their targets; in the face of such risks, companies and CEOs have sometimes folded quickly. Consumer activism thus holds the promise of restoring to ordinary Americans some of the political influence lost (or felt to be lost) through deregulation to the business-donor class.

What is more, the politicization of the retail marketplace encourages a rich form of civic participation. If Americans can effectively communicate political preferences through easy, everyday activities, like shopping online, they will engage in more political expression, perhaps even making it a part of daily life. This may be a sort of public dialogue that government should encourage, or at least not stifle.

III. HYDRAULIC EFFECTS AND ECONOMIC REPRISAL

Whether second-order hydraulic effects are good or bad for expression or democracy, the judicial branch stands in a unique position to repress them. The First Amendment has become a potential judicial tool for defeating not only spending limits but also campaign finance disclosure. And without effective and swift disclosure, consumer activism is disarmed. The mechanism of consumer disarmament, if it comes, will be the judge-made concept of “economic reprisal.” This is the idea that disclosure exemptions should be available to political donors who are threatened with economic pressure by private actors, such as consumer boycotts, if that economic pressure would chill the donor’s political speech.

Economic reprisal emerged as an idea from a series of civil rights-era cases concerning the First Amendment associational rights of NAACP members who were targeted by hostile state governments in the South. In 1958, in *NAACP v. Alabama ex rel. Patterson*, the Supreme Court invalidated a judgment of civil contempt against the NAACP for its refusal to comply with a court order to disclose its membership rolls to the state, holding that the order violated the First Amendment associational rights of the NAACP’s members.³⁷ The Court found that the NAACP had made “an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”³⁸

³⁷ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) [<http://perma.cc/5492-J5X6>].

³⁸ *Id.* at 462.

The Court expressly stated that it was “not sufficient” that the “repressive effect” of the disclosure of the NAACP’s membership rolls “follows not from *state* action but from *private* community pressures.”³⁹ “The crucial factor,” the Court wrote, “is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.”⁴⁰ Although the Court did not contemplate it at the time, this analysis could describe a forced CEO resignation (based on private community pressures) following the compelled disclosure of the CEO’s campaign donations.

Economic reprisal was reimagined as a potentially potent tool against campaign finance disclosure in 1976 in *Buckley v. Valeo*.⁴¹ In *Buckley*, disclosure opponents argued that compelled disclosure of the identities of contributors to minor party candidates would chill speech based on “fears of reprisal.”⁴² The *Buckley* Court upheld the challenged disclosure laws as applied to minor party candidates and their supporters, but only because it found no evidence of public hostility of the magnitude present in *NAACP v. Alabama*.⁴³ The *Buckley* Court was careful to leave the door open to disclosure exceptions in cases of reprisal, and it articulated a standard for such a case: disclosure can be defeated if a politically-active spender shows “a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties.”⁴⁴

In 1982, the Supreme Court applied the *Buckley* exemption standard to an Ohio campaign finance disclosure law and granted a disclosure exemption to the Socialist Workers’ Party.⁴⁵ The Ohio law had required political parties to disclose the names and addresses of their contributors. In *Brown*, the Supreme Court found sufficient proof of “specific incidents of private and government hostility toward the SWP and its members within the four years preceding the trial” to establish a reasonable probability that disclosure would subject SWP members to threats, harassment, and

³⁹ *NAACP*, 357 U.S. at 463 (emphasis in the original).

⁴⁰ *Id.*

⁴¹ 424 U.S. 1 (1976) [<http://perma.cc/C2HX-AZMP>].

⁴² *Id.* at 69–74.

⁴³ *Id.* at 74.

⁴⁴ *Id.* at 71, 74 (“There could well be a case, similar to those before the Court in *NAACP vs. Alabama* and *Bates*, where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act’s requirements cannot be constitutionally applied.”).

⁴⁵ *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 100 (1982) [<http://perma.cc/4D34-BQTT>]. A few months before *Brown*, the U.S. Court of Appeals for the Second Circuit granted an as-applied disclosure exemption to a group supporting candidates of the Communist Party, U.S.A. See *FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416 (2d Cir. 1982) [<http://perma.cc/7VUF-NM3J>].

reprisals.⁴⁶ In addition to “threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members’ property, police harassment of a party candidate, and the firing of shots at an SWP office,” “[t]here was also evidence that in the 12-month period before trial 22 SWP members, including 4 in Ohio, were fired because of their party membership.”⁴⁷ Because campaign finance disclosure made it possible for private actors to target members of the Socialist Workers Party in a way that, in part, made it “difficult for them to maintain employment,” the Court held that the party’s members should be exempt from disclosure.⁴⁸

Since *Brown*, only one court has exempted campaign donors from disclosure based on threats, harassment, and reprisal, and the case did not involve consumer boycotts or forced resignations.⁴⁹ But since that 2004 case, disclosure opponents have been increasingly aggressive about making economic reprisal arguments, and a number of recent cases have concerned or discussed California’s Proposition 8, the campaign that led to Eich’s resignation.⁵⁰ In recent cases, some Supreme Court justices have indicated that they believe disclosure exemptions should be granted generously.

Proposition 8 was a 2008 California ballot initiative in which a majority of California voters voted to amend California’s constitution to prevent the state from recognizing same-sex marriages. California disclosure laws compelled the disclosure of the name, address, and employer of anyone who spent more than \$100 to support or oppose the ballot initiative.⁵¹ Evidence emerged in a series of cases about Proposition 8 that two individual donors who supported the ballot initiative were forced to resign from their jobs after their donations were publicly disclosed, and one donor took a “voluntary leave of absence” from her job after protesters appeared at her workplace, a restaurant.⁵² In his dissent in *Citizens United*, Justice Thomas described these events in detail and argued that they amounted to “intimidation tactics” that chilled political speech protected by

⁴⁶ *Brown*, 459 U.S. at 99–100.

⁴⁷ *Id.* at 99.

⁴⁸ *Id.*

⁴⁹ See *Averill v. City of Seattle*, 325 F. Supp. 2d 1173, 1178 (W.D. Wash. 2004) (allowing donors to a candidate to remain anonymous because they espoused political views that were “virtually identical” to those of a group, the Freedom Socialist Party, the court found had been subject to threats, harassment, and reprisal) [<http://perma.cc/N4MG-QTU5>].

⁵⁰ See, e.g., *Bailey v. Maine Comm’n on Governmental Ethics and Election Practices*, 900 F. Supp. 2d 75, 84–85 (D. Maine 2012) (rejecting as-applied exemption to campaign finance disclosure law) [<http://perma.cc/E8NQ-G6YQ>]; *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 935 (E.D. Cal. 2011) (same) [<http://perma.cc/8FLF-8P8L>].

⁵¹ CAL. GOV’T CODE § 84211(f) (West 2005) [<http://perma.cc/BY3B-Z8D3>].

⁵² *Citizens United v. FEC*, 558 U.S. 310, 482 (Thomas, J., concurring in part and dissenting in part); *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1200–01 (E.D. Cal. 2009) [<http://perma.cc/7CQQ-8S97>].

the First Amendment.⁵³

A few months after it decided *Citizens United*, the Supreme Court upheld the Washington Public Records Act in a facial challenge involving another referendum about same-sex marriage, but left open the possibility that the law, which compelled disclosure of the names and addresses of persons who signed referenda petitions, could fail in an as-applied challenge.⁵⁴ In a series of concurrences (and one dissent), the justices expressed radical disagreement over the proper standard for granting as-applied disclosure exemptions. Justice Scalia's concurrence revealed his skepticism that any constitutional basis exists for courts to grant exemptions to state disclosure laws in cases of alleged threats and intimidation. "[H]arsh criticism," he wrote, "short of unlawful action, is a price our people have traditionally been willing to pay for self-governance."⁵⁵ Justice Sotomayor wrote that those seeking exemptions to referendum disclosure laws "bear a heavy burden."⁵⁶ Such exemptions, she argued, should be available only in the "rare circumstance" where "disclosure poses a reasonable probability of serious and widespread harassment that the State is unwilling or unable to control."⁵⁷ Justice Stevens argued that the exemption standard should require "a significant threat of harassment directed at those who sign the petition that cannot be mitigated by law enforcement measures," and cautioned against granting a reprisal exemption based upon "an indirect and speculative chain of events," a description that could apply to a forced CEO resignation.⁵⁸

In Justice Alito's view, however, courts should be generous in granting as-applied exemptions. This generous standard would require speakers to show "'only a *reasonable probability*' that disclosure will lead to threats, harassment, or reprisals"; Justice Alito argued that the burden should be met "without clearing a high evidentiary hurdle."⁵⁹ Justice Thomas, writing in dissent, observed that as-applied exemptions will involve "[s]ignificant practical problems," mainly because the exemption standard is so unclear.⁶⁰

After *NAACP, Brown, and Reed*, it is clear that a campaign donor may be exempted from campaign finance disclosure laws in cases of threats,

⁵³ *Citizens United*, 558 U.S. at 482–83 (Thomas, J., concurring in part and dissenting in part). Justice Thomas, alone among the current members of the Supreme Court, believes that the U.S. Constitution protects a right to anonymous political spending. *See id.* at 480.

⁵⁴ *Doe v. Reed*, 561 U.S. 186, 205–06 (2010) (Alito, J., concurring) [<http://perma.cc/ZVD7-WQ73>].

⁵⁵ *Id.* at 234 (Scalia, J., concurring).

⁵⁶ *Id.* at 214 (Sotomayor, J., concurring). Justices Ginsburg and Stevens joined in Justice Sotomayor's opinion.

⁵⁷ *Id.* at 215.

⁵⁸ *Id.* at 218–19 (Stevens, J., concurring). Justice Breyer joined in Justice Stevens's opinion.

⁵⁹ *Id.* at 204 (Alito, J., concurring).

⁶⁰ *Id.* at 241 (Thomas, J., dissenting). As it happens, there was no allegation in the case that any member of the Washington group had been fired or forced to resign because of a disclosed political donation.

harassment and reprisal—and that “private hostility and harassment” that make it “difficult” for donors to “maintain employment” may justify an exemption.⁶¹ What remains to be decided is whether consumer protests and boycotts, and “forced resignations” of business leaders, amount to economic reprisal of the sort that will justify an exemption.

Justice Thomas’s point in *Doe v. Reed* about practical problems with the as-applied exemption apparatus is a significant one. The current exemption regime requires courts to grant exemptions on a fact-intensive, case-by-case basis. Because this is true, there is potential for different courts to come to different outcomes on similar facts, which is likely to encourage exemption demands. Notably, the as-applied exemption mechanism is likely to frustrate disclosure during the precise timeframe when voters need disclosure information, in the weeks or months before an election. In fact, demands for exemption could be strategically timed to defeat pre-election disclosure. Economic reprisal arguments premised on consumer boycotts and forced CEO resignations provide the business-donor with a potent lever to protect his political influence.

Ultimately, courts should find that a CEO’s forced resignation is not economic reprisal of a magnitude that would justify a disclosure exemption. Today more than at any time in the past, the American CEO resides in a fishbowl. Her paycheck and retirement benefits are often a matter of public record, as are her trading activities in her company’s stock and even life insurance premiums paid by the company on her behalf. Controversy over such matters can lead to a CEO’s ouster. A CEO’s use of any social media is scrutinized by the government and the public and may give rise to a securities action against the company, with career risks for the CEO.⁶² A CEO’s purchase of a home, country club dues, personal security expenses, and use of the corporate jet have all been put under the microscope and shown to correlate with firm performance.⁶³ Even the “facial characteristics” of CEOs have been studied in relation to CEO

⁶¹ *Brown v. Socialist Workers '74 Campaign Comm.* (Ohio), 459 U.S. 87, 99 (1982).

⁶² In 2013, Netflix CEO Reed Hastings precipitated an SEC investigation of Netflix when he made an observation about the company on his personal Facebook page. See Press Release, U.S. Sec. and Exch. Comm’n, SEC Says Social Media OK for Company Announcements if Investors Are Alerted (April 2, 2013), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171513574#U1rrAvidVHU> [<http://perma.cc/W36W-RF54>].

⁶³ See, e.g., Yaniv Grinstein et al., *The Economic Consequences of Perk Disclosure* (Johnson School Research Paper Series No. 06-2011, April 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1108707 [<http://perma.cc/YR3Q-8MU3>]; Crocker H. Liu & David Yermack, *Where Are the Shareholders’ Mansions: CEOs’ Home Purchases, Stock Sales, and Subsequent Company Performance* (October 17, 2007) (working paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=970413 [<http://perma.cc/D8VK-PC4Y>]; David Yermack, *Flights of Fancy: Corporate Jets, CEO Perquisites, and Inferior Shareholder Returns* (AFA 2005 Philadelphia Meetings Working Paper, March 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=529822 [<http://perma.cc/JQ8W-D9D8>].

compensation.⁶⁴ A recent study suggested that public disclosure of a CEO's divorce can cause the company's stock price to fall if the CEO lacked a prenuptial agreement—suggesting that the terms of the CEO's most intimate relationships may be a proper subject of investor scrutiny.⁶⁵ In such a climate of inquisition, disclosure of a CEO's campaign donations hardly stands out as invasive.

It is clear, moreover, that an individual who is pressured to resign from a corporate executive office because of a disclosed campaign donation is unlikely to remain unemployed for long and, as Richard Briffault has noted, is likely to be wealthy and thus less vulnerable to economic pressure.⁶⁶ The paradigm of economic reprisal from *NAACP v. Alabama*—an anonymous, blue-collar worker fired by employers who disagree with the worker's political views—is not implicated in such cases.

In February 2014, ExxonMobil CEO Rex Tillerson made headlines by signing onto a lawsuit to stop construction of a water tower in the Dallas suburb where he has a home.⁶⁷ The lawsuit specifically objected to the tower because it might be used to supply water for fracking, a controversial and profitable process for harvesting natural gas that ExxonMobil uses.⁶⁸ Tillerson and ExxonMobil became the focus of negative attention by the national media; Tillerson was labeled a hypocrite by a commentator in *Forbes*.⁶⁹ In April, a few weeks after Brendan Eich's resignation from Mozilla, Tillerson quietly dropped out of the water tower dispute.⁷⁰ Was Tillerson's speech chilled, or his right to petition the government infringed, by the controversy? So far, the First Amendment has not been found to

⁶⁴ John R. Graham et al., *A Corporate Beauty Contest* (March 15, 2010) (Working Paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1571469 (a CEO's subjective "look of competence" affects CEO compensation but is not associated with superior performance) [<http://perma.cc/5HQJ-GP5F>].

⁶⁵ See David F. Larcker et al., *Separation Anxiety: The Impact of CEO Divorce on Shareholders*, STAN. CLOSER LOOK SERIES, 1 (October 1, 2013), available at http://public-prod-acquia.gsb.stanford.edu/sites/default/files/36_Divorce.pdf (observing, inter alia, that the announcement of CEO Rupert Murdoch's divorce, which involved a prenuptial agreement, caused News Corporation's stock to trade 1.4% higher, while CEO Harold Hamm's divorce, which did not involve a prenuptial agreement, caused Continental Resources' stock to fall 2.9%) [<http://perma.cc/R4UZ-UBCB>].

⁶⁶ See Richard Briffault, *Two Challenges For Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RTS. J. 983, 1005 (2011) [<http://perma.cc/6D65-CDHC>].

⁶⁷ Nicholas Sakelaris, *Exxon CEO, Dick Armev Sue to Stop Water Tower in Bartonville*, DALL. BUS. J. (Feb. 24, 2014, 12:02 PM), <http://www.bizjournals.com/dallas/news/2014/02/24/exxon-ceo-dick-armev-sue-to-stop-water-tower-in.html> [<http://perma.cc/M84C-RMGW>].

⁶⁸ *Id.*

⁶⁹ See Rick Ungar, *Exxon CEO Profits Huge as America's Largest Natural Gas Producer—But Frack in His Own Backyard and He Sues!*, FORBES (February 22, 2014, 3:34 PM), <http://www.forbes.com/sites/rickungar/2014/02/22/exxon-ceo-profits-huge-as-americas-largest-natural-gas-producer-but-frack-it-in-his-own-backyard-and-he-sues/> [<http://perma.cc/LYR7-M4YL>].

⁷⁰ Nicholas Sakelaris, *Rex Tillerson Drops out of Water Tower Lawsuit in Bartonville*, DALL. BUS. J. (Apr. 21, 2014, 11:32 AM), <http://www.bizjournals.com/dallas/news/2014/04/21/rex-tillerson-dropsout-of-water-tower-lawsuit-in.html> [<http://perma.cc/P9PM-SYCA>].

protect CEOs under these circumstances, and it should not be read so broadly as to do so.

As second-order hydraulic effects play out, they will force the Supreme Court to confront its own value judgments about expression. Under *Buckley*, money is speech and spending money is an act of political expression.⁷¹ But is money speech only for the wealthy in the ways that wealthy people spend money—committing lavish funds to support a candidate or cause in an election? Or is money speech for ordinary Americans too, in the ways that ordinary Americans spend their money—buying groceries from companies that share their values? Is the former laudable for increasing speech, and the latter deplorable for reducing it? Or is consumer action itself a valuable contribution to the marketplace of ideas? If the Supreme Court tries to contain this hydraulic problem by finding that consumer pressure on businesses constitutes economic reprisal, and thus justifies exemptions from disclosure, significant swathes of election-related spending by for-profit businesses and their leaders will go dark.

⁷¹ See *Buckley v. Valeo*, 424 U.S. 1, 19–20 (1976). Not all Supreme Court justices have subscribed to this view. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (“Money is property; it is not speech.”) [<http://perma.cc/94YV-89BV>].