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Elian Dashev

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ECONOMIC BOYCOTTS AS HARASSMENT: THE THREAT TO FIRST AMENDMENT PROTECTED SPEECH IN THE AFTERMATH OF *DOE V. REED*

*Elian Dashev**

The recent U.S. Supreme Court case of Doe v. Reed *called into question the effectiveness and, potentially, the legitimacy of the economic boycott as a tool to counteract the influence of Major Political Players in the electoral process—despite the protection that such boycotts have been afforded historically under the First Amendment. The holding in the case was very narrow: the Court deemed constitutional as a general matter the compelled disclosure of the names of the supporters of a referendum. However, in dicta, the Court acknowledged that disclosure could be subject to an as-applied challenge if there were a reasonable probability that disclosure would subject the signatories to "threats, harassment, or reprisals." Indeed, included in the plaintiffs' allegations of retaliation was a fear of economic boycotts. This Note argues that the Court should not allow Major Political Players to use economic boycotts, whether threatened or actual, as a justification for exemptions from disclosure requirements in as-applied challenges. To do so would undermine the fundamental First Amendment goals that are critical to our democracy and that outweigh any competing claims of harassment.*

First, this Note illustrates how the economic boycott has increasingly become an effective and popular weapon in the arsenal of dissent to counteract the political influence of individuals, large corporations, special interest groups, and issue-based organizations

* J.D. Candidate, 2012, Loyola Law School Los Angeles; B.A., 2007, University of Pennsylvania. I am extremely grateful to Professor Rick Hasen for his invaluable mentorship and support throughout the development of this Note. His thoughtful contributions infinitely strengthened this piece. I would also like to thank Associate Professor Justin Levitt for his time and insight, especially early on; Joshua Rich; and the entire *Loyola of Los Angeles Law Review* team for their comments and suggestions. And finally, a very special thanks to my Mom and Dad for their unwavering encouragement, love, and patience.

that have access to large accumulations of wealth. Then, this Note reviews key Court rulings on the economic boycott as a protected First Amendment activity and on the establishment of the as-applied challenge and the harassment exemption. It also looks at the existing tension between the Court's embrace of compelled disclosure and the Court's protection of anonymous speech. This Note then examines the various opinions in Doe v. Reed *and their potential to undermine the speech protection of economic boycotts in the context of elections. It considers how these opinions could have the effect of silencing speech and erecting barriers to dissent, and suggests that Major Political Players should not have the right to seek the protection from disclosure that is intended for politically persecuted groups. Finally, this Note argues that economic boycotts advance the core democratic and First Amendment values of truth-seeking and dissent and, in so doing, trump any disclosure exemptions that Major Political Players may claim.*

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> *"Acceptance of a right to boycott as a political act must entail the rejection of the right to be free of political consumer boycotts."*[1]

I. INTRODUCTION

On the morning of October 21, 2010, word began to spread that American Crossroads, the conservative political action committee (PAC) founded by Republican heavyweights Karl Rove and Ed Gillespie, had raised $23 million in its first seven months of operation leading up to the 2010 midterm elections.[2] One of the disclosed donors was billionaire Robert Rowling, chief executive officer of TRT Holdings, the parent company of Gold's Gym, and a known supporter of anti-gay politicians.[3] The filings revealed that Mr. Rowling had made contributions totaling more than $2 million from his corporate and personal accounts.[4] Four days later, on October 25, four Gold's Gym franchises in San Francisco, a city known to have a large and politically active gay population, announced their decision to sever their twenty-two-year partnership with the brand[5] after more than two thousand people signed an online petition to the head of public relations for Gold's Gym condemning Rowling's actions and demanding an official response from the chain.[6]

1. Michael C. Harper, *The Consumer's Emerging Right to Boycott:* NAACP v. Claiborne Hardware *and Its Implications for American Labor Law*, 93 YALE L.J. 409, 424–25 (1984). The article suggests that "boycotts aimed solely at private decisionmaking should share the status of other political acts such as electoral voting, contributing money and time to an election or referendum campaign." *Id.* at 422.

2. Jeanne Cummings, *Texas Builder Gives Crossroads $7M*, POLITICO (Oct. 20, 2010, 8:53PM), http://www.politico.com/news/stories/1010/43937.html; Lucy Madison, *Texas Builder Bob Perry Gave $7 Million to American Crossroads, Reports Show*, CBS NEWS (Oct. 21, 2010, 12:39 PM), http://www.cbsnews.com/8301-503544_162-20020320-503544.html?tag=content Main;contentBody.

3. Cummings, *supra* note 2; Madison, *supra* note 2.

4. Cummings, *supra* note 2.

5. Justin Elliot, *Donations to Rove-Tied Group Sparks Gold's Gym Revolt*, SALON.COM (Oct. 25, 2010, 2:19 PM), http://www.salon.com/news/politics/war_room/2010/10/25/san_ francisco_gold_s_american_crossroads.

6. Michael Jones, *Tell Gold's Gym: Stop Supporting Anti-gay Politicians*, CHANGE.ORG (Oct. 25, 2010), http://www.change.org/petitions/tell-golds-gym-stop-supporting-anti-gay-politicians.

Just a few months earlier, Target stores were themselves the targets of similar movements after the company disclosed that it had donated $150,000 to anti-gay politicians via MN Forward, a conservative pro-business PAC based in Minnesota and heavily backed by corporate donors.[7] Despite a public statement from Target's Chief Executive Officer, Gregg Steinhafel, describing the brand's support for the lesbian, gay, bisexual, and transsexual community as "unwavering,"[8] protests and online movements surged, urging Target customers to express their criticism and disapproval of the donation by boycotting Target stores.[9] In a weekly report published by Brandweek, a trade magazine on marketing and branding, the author noted that Target had lost one-third of its "buzz score"[10] over the following weeks.[11]

The economic boycott, which the U.S. Supreme court has long considered protected First Amendment activity,[12] has increasingly become an effective and popular weapon in the arsenal of dissent to counteract the political influence of individuals, large corporations, special interest groups, and issue-based organizations with access to large accumulations of wealth ("Major Political Players"). Individually unable to financially counteract large donations and organized political support, consumers and other stakeholders

7. Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, WALL ST. J., Aug. 7, 2010, at A2.

8. Emily Friedman, *Target, Best Buy Angers Gay Customers by Making Contribution to GOP Candidate*, ABC NEWS (July 28, 2010), http://abcnews.go.com/Business/target-best-buy-fire-campaign-contributions-minnesota-candidate/story?id=11270194.

9. Eliza Newlin Carney, *New Spending Rules Mean New Backlash*, NAT'L JOURNAL (Dec. 16, 2010, 9:55 AM), http://www.nationaljournal.com/columns/rules-of-the-game/new-spending-rules-mean-new-backlash-20100830?mrefid=site_search.

10. *Soda Brands Lose Fizz*, BRANDWEEK (Sept. 3, 2010), http://web.archive.org/web/20100907030059/http://www.brandweek.com/bw/content_display/news-and-features/direct/e3i70ba82a0840c6bbf6596a26035616cbe (explaining that *Brandweek* calculates a buzz score by weighing positive and negative perceptions of a certain brand).

11. *Id.* (reporting that, although the buzz score recovered slightly in the middle of August, the score sunk again due to a rash of major newspaper op-eds, blog posts, and publicity surrounding televised boycott ads from MoveOn.org, the progressive advocacy group that partnered with gay-rights advocates to organize a movement against Target, in which the organization collected close to 300,000 petition signatures from outraged customers); *see also*, Carney, *supra* note 9 (discussing the negative effects that Target has suffered since the disclosure).

12. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911–12 (1982). *See generally* Harper, *supra* note 1, at 422 (advocating for a consumer right to boycott guaranteed by the Constitution and tracing the derivation of the right).

sometimes choose to wield their combined financial clout in the form of actual or threatened boycotts to discourage what they consider to be unpopular political positions. State and federal laws assist consumers and stakeholders with this goal by requiring the disclosure of identifying information about campaign donors and signers of ballot initiatives and referenda.[13]

The recent Supreme Court case of *Doe v. Reed*[14] called into question the effectiveness, and potentially the legitimacy, of the economic boycott in counteracting the influence of Major Political Players in the electoral process. Citing various forms of harassment, including fear of economic boycotts, the plaintiffs in *Doe*, Washington state residents, sought an exemption from the state-mandated disclosure requirements by claiming that it was a violation of the First Amendment to compel the disclosure of the identities of those who signed the ballot initiative.[15] The majority's holding, written by Chief Justice Roberts, was very narrow: compelled disclosure in a referendum context was *as a general matter* constitutional.[16] However, in dicta, the Court went on to say that disclosure of the names of the initiative's supporters could be subject to an as-applied challenge if there was a reasonable probability that disclosure would subject the signatories to threats, harassment, or reprisals.[17] Since this case was a facial challenge, the Court did not reach the question of what types of activity might be sufficient to successfully override any state interest in compelled disclosure.[18] In five concurring opinions and one dissent, however, six of the Justices weighed in on the subject, with views so disparate that there is no clear indication as to how the Court will evaluate such claims in the future. This lack of clear direction leaves open the possibility of

13. *See* Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 261 (2010). This Note will use the term "ballot initiatives" to mean both ballot initiatives and referenda.

14. 130 S. Ct. 2811 (2010).

15. *Id.* at 2815.

16. *Id.* at 2821.

17. *Id.* at 2820–21 (explaining that those resisting disclosure need only show "a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties" (quoting Buckley v. Valeo, 424 U.S. 1, 74 (1976) (per curiam))).

18. *Id.* at 2817.

exposing historically protected First Amendment activity to legal challenge.

This Note argues that the Court should not allow Major Political Players to use threatened or actual economic boycotts as justification for exemptions from disclosure requirements in as-applied challenges because economic boycotts advance historically recognized First Amendment goals that are critical to our democracy and that outweigh any competing claims of harassment. By rejecting "economic boycott as harassment" claims, the Court would reaffirm the economic boycott as protected First Amendment speech in general and, more specifically, as a critical tool for debate and dissent in the context of the electoral process. It is not this Note's position that harassment claims are never justified; they may be persuasive when they are brought by minority or fringe groups or in situations where ordinary individuals are targeted.[19] This Note, however, focuses on the ramifications of preventing economic boycotts from countering large-scale influence on the political process.

Part II reviews key Supreme Court rulings upholding the economic boycott as protected First Amendment activity, the establishment of the as-applied challenge and the harassment exemption, and the existing tension between the Court's embrace of compelled disclosure and its protection of anonymous speech. Part III examines the various opinions in *Doe v. Reed* and their potential to undermine the economic boycott as protected speech in the context of elections. It considers how these opinions could have the effect of silencing speech and erecting barriers to dissent, and suggests that Major Political Players should not have the right to seek the exemption from disclosure that was originally created for politically persecuted groups. Part IV analyzes how economic boycotts advance the core democratic and First Amendment values of truth-seeking and dissent and, in so doing, how they trump any disclosure exemptions that Major Political Players may claim.

19. *See infra* Part IV.B.

II. THE JURISPRUDENCE OF THE ECONOMIC BOYCOTT AND THE HARASSMENT EXCEPTION

Over the last fifty years, the debate over compelled disclosure of names, addresses, donation amounts, and other personal information related to political donations or ballot initiatives has garnered impassioned advocates and equally strong opponents. Federal campaign-finance law requires such disclosure, and most states authorize such disclosure in connection with government records and documents.[20] The public policy behind disclosure has remained the same over time—it is intended to curb the influence of money and special interests in elections while cleansing potentially corrupt political practices and providing information to the electorate.[21] Dating back to the 1890s, disclosure has been used not only for monitoring the role money plays in elections, but also for ensuring transparency in government[22] and helping voters to make informed decisions.[23]

Those in support of disclosure claim that the resulting transparency adds to the democratic marketplace by allowing the free and open exchange of ideas and provides a deterrent to excessively large campaign contributions and undue influence.[24] Opponents, however, argue that compelled disclosure is an unconstitutional burden since it not only infringes on one's right to privacy and results in the chilling of speech, but it also triggers acts of retaliation or harassment by those of different ideological or political persuasions.[25] Since both sides of the debate have legitimate claims to constitutional safeguards, the Court has increasingly had to consider the question of which claim should be given more weight in a particular case. Various as-applied challenges to disclosure laws over the past sixty years reflect the balancing of the stated

20. Mayer, *supra* note 13, at 261–62.

21. Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 273 (2010).

22. *Id.* at 274.

23. Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process*, 47 HARV. J. ON LEGIS. 75, 82 (2010).

24. *Id.* at 101; *see* Trevor Potter, *Campaign Finance Disclosure Laws*, *in* THE NEW CAMPAIGN FINANCE SOURCEBOOK 123, 136 (2005).

25. Mayer, *supra* note 13, at 271–73.

government interests behind disclosure with the First Amendment protections at stake.[26]

A. The Economic Boycott as Protected First Amendment Activity

As early as 1940, in *Thornhill v. Alabama,*[27] the Supreme Court considered the constitutionality of a statute broadly prohibiting picketing in a labor dispute. In that case, the plaintiff was picketing against an ex-employer and was convicted of violating a state code.[28] The code prohibited loitering and picketing around the premises of a business for the express purpose of advising current and prospective customers of the business's practices and affiliations and encouraging those customers not to patronize the business.[29] The plaintiff charged that the statute deprived him of his right to free speech, assembly, and right to petition for redress.[30] The Court agreed and held that the statute was unconstitutional on its face because it was a "sweeping proscription of the freedom of discussion"[31] that prohibited "every practicable, effective means . . . [to] enlighten the public . . . with respect to a matter which is of public concern."[32] The Court found that safeguarding such means was essential, even if the means risked injury to a business establishment.[33]

Several decades later, in *NAACP v. Claiborne Hardware,*[34] the Court upheld the constitutionality of boycotts as retaliation against businesses that engaged in race discrimination.[35] In 1966, a Mississippi branch of the NAACP participated in a seven-year boycott of white merchants in the area, demanding racial equality, justice, and integration.[36] The defendants stood in front of stores and encouraged African American customers not to patronize the

26. *See infra* Part II.B–C.
27. 310 U.S. 88 (1940).
28. *Id.* at 91–92.
29. *Id.* at 99.
30. *Id.* at 92–93.
31. *Id.* at 105.
32. *Id.* at 104.
33. *Id.* at 104–05.
34. 458 U.S. 886 (1982).
35. *Id.* at 911–12.
36. *Id.* at 889, 893, 907.

businesses.[37] The Supreme Court of Mississippi upheld a chancery court's ruling that the boycott was unlawful according to the common law and confirmed that the defendants were jointly and severally liable for any business losses over the period.[38] The Court reversed the state court's holding.[39] Drawing on its decision in *NAACP v. Alabama ex rel. Patterson*[40] (*Patterson*) discussed below, the Court recognized the "importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues."[41] Following this precedent, the Court held that the boycott in *Claiborne Hardware* clearly involved First Amendment activity and thus deserved protection.[42]

B. Precursors to the As-Applied Challenge: The Rights to Private Association and Anonymous Speech

In 1958, at the height of the civil rights movement, the Supreme Court decided the landmark case of *Patterson*. The Court addressed whether the state of Alabama could constitutionally compel the NAACP to supply the state with a complete list of its members' and agents' names and addresses to determine if the NAACP complied with Alabama business law.[43] The civil rights group claimed that it was constitutionally protected from turning over the list on the grounds that compelling the identification of its members would infringe on their freedom of association under the Due Process Clause of the Fourteenth Amendment.[44] The Court unanimously decided in favor of the plaintiffs by upholding the right of the members to "pursue their lawful private interests privately."[45] Uncontroverted evidence of extreme intimidation and violence against NAACP members persuaded the Court to rule in the plaintiffs' favor. The NAACP detailed numerous instances in which

37. *See id.* at 889–90, 893.

38. *Id.* at 894–95.

39. *Id.* at 934.

40. 357 U.S. 449 (1958).

41. *Claiborne Hardware*, 458 U.S. at 908 (quoting Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981)).

42. *Id.* at 911–12.

43. *Patterson*, 357 U.S. at 451.

44. *Id.* at 460.

45. *Id.* at 466.

members faced "economic reprisal, loss of employment, threat of physical coercion, and . . . public hostility."[46] Acknowledging the organization's "dissident beliefs,"[47] the Court reasoned that subjecting the NAACP to compelled disclosure would threaten the "effective advocacy of both public and private points of view, particularly controversial ones, [which] is undeniably enhanced by group association."[48] It concluded that these disclosure requirements did not have a "substantial" bearing on the state's interests and therefore were not justified.[49]

The Court reinforced this holding two years later in *Bates v. City of Little Rock*[50] and *Talley v. California*.[51] In *Bates*, the Court confronted a situation in Arkansas that was almost identical to the one in Alabama: amid a racially charged climate, county administrators demanded that the Little Rock branch of the NAACP produce lists of its members in compliance with the local tax ordinance.[52] The NAACP refused, asserting the right of its members to associate anonymously, and the Court again unanimously upheld this right based on "substantial uncontroverted evidence . . . [of] harassment and threats of bodily harm" to the members.[53] This time the Court invoked the First Amendment right of peaceable assembly, a notion that the Court did not rely on in *Patterson*, when it stated that "compulsory disclosure of the membership lists . . . would work a significant interference with the freedom of association of their members."[54]

In *Talley*, an individual plaintiff was charged with violating a Los Angeles city ordinance that broadly restricted the distribution of any handbill that did not identify the name and address of the individual who had created or circulated it.[55] Talley, on behalf of the National Consumers Mobilization, distributed pamphlets urging

46. *Id.* at 462.
47. *Id.*
48. *Id.* at 460.
49. *Id.* at 464–65.
50. 361 U.S. 516, 523 (1960).
51. 362 U.S. 60, 65 (1960).
52. *Bates*, 361 U.S. at 517–18.
53. *Id.* at 523–24.
54. *Id.* at 522–23.
55. *Talley*, 362 U.S. at 60–61.

consumers to boycott businesses that did not offer equal opportunity employment to "Negroes, Mexicans, and Orientals."[56] Although the ordinance did not specifically target a civil rights group such as the NAACP, Talley's pamphlet did address civil rights issues.[57] The Supreme Court relied on both *Patterson* and *Bates* in voiding the ordinance, reasoning that the "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."[58] Recognizing the fundamental role that anonymous literature had played in "criticiz[ing] oppressive practices and laws," the Court held that validating the ordinance would abridge the plaintiff's freedoms of speech and the press.[59]

C. Protecting Minor Parties: Buckley*'s Reasonable Probability Test and the* Socialist Workers' Party *Exception*

The Court relied heavily on its decisions in civil rights cases from the previous decade when, in the 1976 case *Buckley v. Valeo*,[60] it confronted the issue of compelled disclosure in the realm of campaign finance law.[61] Although the Court in *Buckley* primarily addressed the constitutionality of spending ceilings for political contributions, its decision was also instrumental in establishing the tenets of disclosure jurisprudence that courts consistently defer to today.[62] The Court in this case upheld the Federal Election Campaign Act (FECA) disclosure requirements,[63] while it acknowledged that

56. *Id.* at 61.

57. *See id.* at 61, 64–65.

58. *Id.* at 65.

59. *Id.* at 64–65.

60. 424 U.S. 1 (1976) (per curiam).

61. *Id.* at 25, 64, 71. "There could well be a case, similar to those before the Court in [*Patterson*] 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." *Id.* at 71.

62. *See* Citizens United v. FEC, 130 S. Ct. 876, 898, 908 (2010); Doe v. Reed, 130 S. Ct. 2811, 2818 (2010); McConnell v. FEC, 540 U.S. 93, 120–22 (2003); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

63. The FECA required political committees, parties, and candidates to register with the FEC and disclose their contributors and the size of the contributions. 2 U.S.C. § 432 (2006). It also compelled groups to disclose the recipient and size of the expenditure. *Id.* § 433. An expenditure is defined as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." *Id.* § 431(9)(A).

there is a critical exception when a court might consider disclosure to be unconstitutional.[64] Drawing on *Patterson* and *Bates*,[65] the Court suggested that minor political parties and their contributors that could prove a "reasonable probability that the compelled disclosure . . . will subject them to threats, harassment, or reprisals from either Government officials or private parties"[66] could gain an exemption from disclosure. It characterized "minor parties" as those with a small political base whose unconventional or unpopular ideas had "little or no chance of winning."[67] The Court reasoned that minor parties were unlikely to have a firm financial base; therefore, compelled disclosure could threaten their very survival.[68] Although the Court did not carve out an absolute exemption for all minor parties, it set forth the burden of proof that a party must overcome to bring a successful as-applied challenge on such grounds.[69]

Six years after *Buckley*, the Court applied that test for the first time in *Brown v. Socialist Workers '74 Campaign Committee*[70] (*Socialist Workers' Party*), in which members of the Socialist Workers' Party (SWP) in Ohio challenged the constitutionality of the state's campaign-finance reporting and disclosure laws.[71] Based on evidence of the SWP's sixty-person membership, mediocre success at the polls, and miniscule campaign contributions,[72] the Court characterized the SWP as a minor party.[73] Like the NAACP, the SWP had presented a robust factual record that showed that government officials and private citizens had harassed members; the harassment included destruction of property, the firing of gunshots at an SWP headquarters, threatening phone calls, hate mail, and loss of employment.[74] The Court found that the harassment was "ingrained

64. *Buckley*, 424 U.S. at 71.

65. *Id.*

66. *Id.* at 71–72, 74.

67. *See id.* at 68–72. For instance, the Court considered independent and new political parties to be "minor parties." *See id.* at 87–88.

68. *Id.* at 71.

69. *Id.* at 74.

70. 459 U.S. 87 (1982).

71. *Id.* at 89.

72. *Id.* at 88–89.

73. *Id.* at 98–102.

74. *Id.* at 98–100. Twenty-two of the sixty SWP members had been fired from their jobs based on their affiliation with the SWP. Citing the district court decision, the Court recognized

and likely to continue."[75] Similar to the way it viewed the NAACP, the Court viewed the SWP as a historically persecuted and vulnerable group.[76] Notwithstanding the Court's otherwise strong affirmation of disclosure requirements, the Court upheld the challenge, maintaining that disclosure would infringe the First Amendment rights of both members and supporters of the SWP.[77]

D. The Conflict Between Anonymous Speech and Compelled Disclosure in the Electoral Process

Thirty-five years after its decision in *Talley*, the Court reexamined the issue of anonymous speech in *McIntyre v. Ohio Elections Commission*.[78] The case centered on Margaret McIntyre, who authored leaflets expressing her opposition to a proposed school-tax referendum and publicly distributed them at a public meeting and on car windshields in a school parking lot.[79] McIntyre's name appeared on some pamphlets, but on others, she credited the bills to "Concerned Parents and Tax Payers," a fictitious organization.[80] McIntyre was subsequently charged with violating an Ohio election statute that forbade anonymous publication designed to promote or defeat a ballot issue, and she was fined $100.[81] The Court struck down Ohio's identification requirement and reaffirmed the notion that the First Amendment protects a person's decision to remain anonymous.[82] The Court held that the "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry."[83] The Court characterized McIntyre's advocacy as "[u]rgent, important, and effective speech," which deserved even more protection since it occurred during a controversial referendum

that "private hostility and harassment toward SWP members make it difficult for them to maintain employment." *Id*. at 99.

75. *Id.* at 101.

76. *See id.* at 99–101.

77. *Id.* at 101–02.

78. 514 U.S. 334 (1995).

79. *Id.* at 337.

80. *Id.* at 337, 341–42.

81. *Id.* at 338–39 & n.3.

82. *Id.* at 357.

83. *Id.* at 342.

vote.[84] While the Court in *Buckley* emphasized the informational value that disclosure served in helping voters evaluate candidates,[85] the Court in *McIntyre* concluded that knowing the name and address of a private citizen added little to the "ability to evaluate the document's message."[86]

However, in 2009, a California federal district court decided a controversial case that represented a shift away from protecting anonymity and toward compelling disclosure; this foreshadowed many of the issues that the Supreme Court would address only a year later in *Doe v. Reed*. The district court case, *ProtectMarriage.com v. Bowen*[87] dealt with the backlash that supporters of Proposition 8, an anti-gay marriage ballot initiative, received.[88] Proposition 8 sought to amend the state constitution to define and recognize marriage as a union between a man and a woman.[89] The plaintiffs, who comprised a number of ballot committees that were formed to support the passage of Proposition 8, challenged the constitutionality of California's Political Reform Act of 1974.[90] The Act required the plaintiffs to disclose personal information about their donors, including the donors' names, street addresses, occupations, employers, and amounts contributed.[91] The plaintiffs sought to enjoin a second round of disclosure based on the *Buckley/SWP* exemption,[92] maintaining that they had sustained extensive economic injury from boycotts.[93]

84. *Id.* at 347.

85. Buckley v. Valeo, 424 U.S. 1, 81 (1976) (per curiam).

86. *McIntyre*, 514 U.S. at 348–49.

87. 599 F. Supp. 2d 1197 (E.D. Cal. 2009).

88. *See infra* notes 249–51 and accompanying text.

89. *See ProtectMarriage.com*, 599 F. Supp. 2d at 1199.

90. *Id.*

91. *Id.*

92. Although the Court in *Buckley* originally articulated the harassment exemption, this Note will refer to the exemption as the "*Buckley/SWP* exemption." While *Buckley* is best known for its holding regarding the constitutionality of independent expenditures and contributions, the holding in *Socialist Workers' Party* was limited to whether the SWP was entitled to an exemption from disclosure. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 88 (1982); *Buckley*, 424 U.S. at 12–14.

93. *See ProtectMarriage.com*, 599 F. Supp. 2d at 1200–04. The author of one anonymous declaration that was submitted to the court recounted how his business had been the target of numerous boycotts and pickets, several of which were orchestrated through Facebook; how negative reviews of his store had been posted on Yelp.com; and how patrons had visited his place of business to express their disapproval of his position. *Id.* at 1201. Another donor complained of

Judge England rebuked the plaintiffs for relying on the *Buckley/SWP* exemption to justify an exemption from disclosure for an anti-gay movement that enjoyed widespread popular support.[94] He noted that the plaintiffs' ballot initiative was "successful at the polls, [had] evidenced a very minimal effect on [the plaintiffs'] ability to sustain their movement, and [was] unable to produce evidence of pervasive animosity even remotely reaching the level of that present in" *Socialist Workers' Party*.[95] He concluded that the supporters of Proposition 8, as "backers of a historically non-controversial belief,"[96] could not be considered a minor party for purposes of the as-applied challenge.[97] He further declared that the threats and harassment that the plaintiffs suffered did not compare to the violent, ongoing, and pervasive harassment that was present in *Patterson* and *Socialist Workers' Party*.[98] In *ProtectMarriage.com*, the harassment was comparatively benign, occurred over the course of only a few months, and targeted only a small segment of supporters.[99] The court also noted that numerous acts about which the plaintiffs were complaining, including economic boycotts, were fundamental, lawful, and historical means of voicing dissent.[100] The judge further chastised,

> Plaintiffs' exemption argument appears to be premised, in large part, on the concept that individuals should be free from even legal consequences of their speech. That is simply not the nature of their right. Just as contributors to Proposition 8 are free to speak in favor of the initiative, so

receiving an e-mail threatening damage to his company's reputation based on his support of Proposition 8. *Id.* at 1202.

94. *Id.* at 1215–16.

95. *Id.* at 1214.

96. *Id.* at 1219.

97. *Id.* at 1215–16 (explaining that the plaintiffs were part of a larger group of proponents of the initiative that garnered nearly $30 million in funding and had convinced more than seven million California residents to vote in favor of Proposition 8 on Election Day).

98. *Id.* at 1216.

99. *Id.* at 1214 ("[T]his Court must now evaluate whether *Brown* can properly be applied to groups that were successful at the polls, that have evidenced a very minimal effect on their ability to sustain their movement, and that are unable to produce evidence of pervasive animosity even remotely reaching the level of that present in *Brown*.").

100. *Id.* at 1218 (citing Thornhill v. Alabama, 310 U.S. 88 (1940) and NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)).

are opponents free to express their disagreement through proper legal means.[101]

III. *DOE V. REED*: THE THREAT TO THE ECONOMIC BOYCOTT AS PROTECTED FIRST AMENDMENT ACTIVITY IN THE ELECTORAL PROCESS

Over the last thirty-five years, courts have issued seemingly conflicting opinions—some that embrace compelled disclosure and others that protect anonymity in the electoral process.[102] Furthermore, courts have not reconsidered or clarified the harassment exemption by applying the as-applied challenge or by crafting of specific rules.[103] To date, *Socialist Workers' Party* remains the only case in which the Supreme Court has granted an as-applied challenge that was based on claims of harassment.[104]

In June 2010, the Supreme Court decided *Doe v. Reed*,[105] a decision that observers thought might bring some clarity to a field filled with uncertainty.[106] In this case, the Court, like the federal district court in *ProtectMarriage.com,* moved away from protecting anonymity and held that the compelled disclosure of signatory information on referendum petitions was constitutional.[107] However, although Justice Stevens began his concurrence by observing that

101. *Id.* at 1217.

102. *See supra* Part II.D.

103. *See* Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After* Citizens United *and* Doe v. Reed, 27 GA. ST. U. L. REV 1057, 1100 (2011).

104. *Id.* at 1096.

105. 130 S. Ct. 2811 (2010).

106. *See also* Richard L. Hasen, *Show Me the Donors,* SLATE (Oct. 14, 2010, 4:06 PM), http://www.slate.com/id/2271187/ (examining the current state of campaign finance disclosure and its effectiveness); Dale A. Oesterle, Doe v. Reed *a Disappointment on Several Fronts*, ELECTION L. @ MORITZ (July 2, 2010), http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=7425 (criticizing the *Doe* decision for several reasons, including that it failed to answer the critical question regarding the challenge to the specific referendum at issue); *see generally* Richard Briffault, *Two Challenges for Campaign Finance Disclosure After* Citizens United *and* Doe v. Reed, 19 WM. & MARY BILL RTS. J. 983 (2011) (examining the results of the *Citizens United* and *Doe* decisions on disclosure law going forward).

107. *Doe*, 130 S. Ct. at 2815.

"[t]his is not a hard case,"[108] the decision, with five concurrences and one dissenting opinion, raised more questions than it answered.[109]

A. The Decision in Doe v. Reed*: A Facial Challenge*

Doe v. Reed centered on Washington State Referendum-71 ("R-71"), which sought to revoke the state's then-recent extension of rights and benefits to same-sex couples.[110] In order to verify that a sufficient number of registered voters wished to see the measure placed on the ballot, the state required proponents to turn over the signed petitions that included the names and addresses of the signatories to the secretary of state, who deemed the petitions public records under Washington's Public Records Act (PRA) and thus subject to the state's disclosure requirements.[111] Soon after the proponents submitted the R-71 petitions to the secretary of state's office, demands for copies began to trickle in.[112] WhoSigned.org and KnowThyNeighbor.org, two of the groups seeking access to the records, planned on posting the signatories' names and addresses in a searchable online database.[113] In response, Protect Marriage Washington, the organization sponsoring R-71, filed a complaint in the U.S. District Court for the Western District of Washington to enjoin the secretary of state from publicly releasing the names and addresses of the signers.[114]

108. *Id.* at 2829 (Stevens, J., concurring).

109. Adam Liptak, *Secrecy Rejected on Ballot Petitions*, N.Y. TIMES, June 25, 2010, at A22. ("The near-unanimity of the decision masked a deep division on a more focused question that the justices left for another day: Are there good reasons to protect the identities of people who signed petitions concerning a measure opposing gay rights and say they fear harassment and retaliation should their names be posted on the Internet?"); Eliza Newlin Carney, *Campaign Finance Fight Moves to Disclosure*, NAT'L JOURNAL (Dec. 18, 2010, 9:22 PM), http://nationaljournal.com/columns/rules-of-the-game/campaign-finance-fight-moves-to-disclosure-20100503 ("The intensifying debate has raised questions that to go the heart of American political engagement. How much secrecy is too much? How much transparency treads on privacy and free speech?"); *see* Daniel Schuman, *The Ticking Time Bomb in the Supreme Court's* Doe v. Reed *Opinion*, SUNLIGHT FOUND. (June 25, 2010, 8:02 PM), http://sunlightfoundation.com/blog/2010/06/25/the-ticking-time-bomb-in-the-supreme-court%E2%80%99s-doe-v-reed-opinion/.

110. *Doe*, 130 S. Ct. at 2816.

111. *Id.* at 2815–16.

112. *Id.* at 2816 (explaining that Protect Marriage Washington submitted 137,000 signatures on July 25, 2009, and by August 20, 2009, the secretary of state had already received several requests for copies).

113. *Id.*

114. *Id.*

The plaintiffs asserted two claims. The first, a broad facial challenge, alleged that the application of Washington's PRA to referendum petitions in general violated the First Amendment.[115] The second, as-applied claim asserted that the application of the PRA in the specific case of R-71 was unconstitutional based on *Buckley*.[116] The plaintiffs alleged that there would be a reasonable probability that the disclosure would subject R-71 signers to threats, harassment, and reprisals.[117] Because the district court found for the plaintiffs on the first claim, it never reached the second claim; therefore, only the broad facial challenge to R-71 reached the Ninth Circuit and the claim regarding the as-applied exemption was never heard.[118]

The State of Washington offered two compelling state interests justifying disclosure: first, to preserve the integrity of its referendum process by combating fraud and fostering government transparency and accountability; and second, to provide the electorate with information as to who was supporting the petition so that voters could make an informed decision.[119] The plaintiffs argued that publishing the signers personal information online would "effectively become a blueprint for harassment and intimidation."[120] But the plaintiffs' argument was only based on specific harm that disclosure would impose on R-71 signers. They did not offer sufficient evidence to convince a majority of the Justices that disclosure would also impose severe burdens on signers of typical ballot initiatives that, unlike R-71, are usually not controversial.[121] Determining that the anticorruption interest was sufficient to justify disclosure under the PRA, the Court did not address the question of the informational interest.[122]

In an 8–1 majority opinion, which only took up a fifth of the entire length of the Court's decision,[123] Chief Justice Roberts

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 2816, 2820–21.

119. *Id.* at 2819.

120. *Id.* at 2820.

121. *Id.* at 2821 (referring to referenda relating to taxes, revenue, or the budget as "typical").

122. *Id.* at 2819 (Chief Justice Roberts stated, "[W]e need not, and do not, address the State's 'informational' interest.").

123. The majority opinion written by Chief Justice Roberts totaled seven pages. The other six opinions totaled twenty-six pages in length.

acknowledged that individuals express some form of a political view when they commit their names to a petition for a ballot initiative.[124] He reasoned that since such activity is expressive, petition signing constituted political speech protected by the First Amendment.[125] Nonetheless, the Court rejected the facial challenge, upholding the disclosure requirement of the PRA in the context of ballot initiatives in general, pointing out that "the PRA is not a prohibition on speech, but instead a *disclosure* requirement . . . [which] may burden the ability to speak, but . . . do[es] not prevent anyone from speaking."[126]

As *Buckley* allowed,[127] the plaintiffs in *Doe* cited examples in their briefs from the history of Proposition 8 in California, to argue that they would be subject to harassment in the form of economic boycotts if their names were disclosed.[128] Since the narrower claim that R-71 signatories were likely to be targets of harassment was not before the Court, the Court did not have to decide what precise activity would constitute sufficient grounds to justify an as-applied challenge to disclosure. However, the majority noted that the plaintiffs' right to bring such a challenge based on the *Buckley/SWP* exemption remained available, thus opening the door for the other Justices to opine on the merits of that challenge.[129]

B. The Various Opinions in Doe*: Perspectives on the As-Applied Challenge*

Despite the fact that the plaintiffs cited the threat of economic boycotts in *Doe* as one type of harassment giving rise to their claim

124. *Doe*, 130 S. Ct. at 2818.

125. *Id.* This reasoning was in tension with the reasoning in earlier Supreme Court decisions that rejected ballot voting as a form of individual expression. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363 (1997) (holding that Minnesota's anti-fusion laws prohibiting candidates from appearing on a ballot as a candidate of more than one political party did not violate the First and Fourteenth Amendments); Burdick v. Takushi, 504 U.S. 428, 430, 437–38 (1992).

126. *Doe*, 130 S. Ct. at 2818 (quoting Citizens United v. FEC, 130 S. Ct. 876, 914 (2010)) (internal quotation marks omitted).

127. Buckley v. Valeo, 424 U.S. 1, 74 (1976) ("New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.").

128. Petitioners' Brief at 11, Doe v. Reed, 130 S. Ct. 2811 (2010) (No. 09-559), 2010 WL 711186, at *11 ("Boycotts were threatened: 'We shall boycott the businesses of EVERYONE who signs your odious, bigoted petition.'").

129. *Doe*, 130 S. Ct. at 2821 ("[W]e note—as we have in other election law disclosure cases—that upholding the law against a broad-based challenge does not foreclose a litigant's success in a narrower one.").

for exemption from disclosure, only Justice Alito addressed this claim directly. The divergent views of the remaining Justices as to what type of activity could constitute harassment, and what type of plaintiff might be eligible to bring such claims, have sent conflicting and confusing signals regarding whether such boycotts will remain protected First Amendment activity. During oral arguments in *Doe*, Justice Kennedy asked both sides why, if *Claiborne Hardware* upheld a boycott as protected First Amendment activity, that case could be used as justification for granting an as-applied exemption.[130] The plaintiffs' attorney offered no response to this direct question;[131] not one of the Justices in any of the seven opinions comprising this case addressed the conflict inherent in these two positions.

1. The Economic Boycott as Harassment: The Threat to "Uninhibited, Robust, and Wide-Open" Debate[132]

None of the Justices made any mention whatsoever of the effect that disclosure exemptions would have on stifling historically protected speech. However, the views of some of the Justices are instructive as to how they would evaluate future claims of harassment and, by extension, whether they would consider economic boycotts as harassment that results in the suppression of speech in the marketplace.

Justices Alito and Thomas were strongly in favor of granting exemptions based on fear of harassment, albeit on vastly different grounds. Justice Alito's concurring opinion was the most specific on this point. He noted that the plaintiffs' reliance on evidence of boycotts and blacklists of businesses that similarly situated plaintiffs faced in the Proposition 8 controversy in California provided a strong case for an exemption, stating, "[I]f the evidence relating to Proposition 8 is not sufficient to obtain an as-applied exemption in this case, one may wonder whether that vehicle provides any meaningful protection for the First Amendment rights of persons

130. Transcript of Oral Argument at 13–14, 38–39, Doe v. Reed, 130 S. Ct. 2811 (2010) (No. 09-559), 2010 WL 1789917, *13–14, *38–39.

131. *Id.*

132. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (capitalization altered from original).

who circulate and sign referendum and initiative petitions."[133] Although he did not address boycotts directly, Justice Thomas went even further in his dissent, making the case that subjecting ballot initiatives to disclosure is always unconstitutional.[134] In one of several rationales, Justice Thomas relied on *Patterson* and *Socialist Workers' Party* to point out that signing a referendum petition is an act of political association that the First Amendment protects.[135]

On the polar opposite side of the issue was Justice Scalia, who doubted that petition signing constituted an act that "fits within freedom of speech at all" but contended, for the sake of argument, that the First Amendment would not prohibit disclosure.[136] Making a strong case for allowing differing opinions into the marketplace, he admonished that democracy requires "civic courage"[137]:

> [H]arsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.[138]

Justice Sotomayor also favored disclosure in this case; in a concurring opinion that Justices Stevens and Ginsburg joined, she imagined a very high bar for plaintiffs who seek to qualify for an as-applied exemption.[139] Citing *Patterson*, she suggested that, barring application of a facially neutral petition in a discriminatory manner, exemptions should be limited to "the rare circumstance in which disclosure poses a reasonable probability of *serious* and *widespread* harassment that the State is *unwilling* or *unable* to control."[140] In a

133. *Doe*, 130 S. Ct. at 2823–24 (Alito, J., concurring).
134. *Id.* at 2837 (Thomas, J., dissenting).
135. *Id.* at 2839.
136. *Id.* at 2832 (Scalia, J., concurring) (internal quotation marks omitted).
137. *Id.* at 2837.
138. *Id.*
139. *Id.* at 2829 (Sotomayor, J., concurring).
140. *Id.* (emphasis added).

separate concurrence, Justice Stevens, joined by Justice Breyer, noted that he would "demand strong evidence before concluding that an indirect and speculative chain of events imposes a substantial burden on speech."[141] Like Justice Sotomayor, he also suggested a stringent burden of proof: absent "rare" situations like those in *Bates* or *Socialist Workers' Party*, where the individual threat level is not so high but disclosure requirements would threaten the ability of a group to place a matter on the ballot, "a significant threat of harassment . . . that cannot be mitigated by law enforcement measures" should be required to succeed in an as-applied challenge.[142]

The Court now appears to be divided on the issue of whether exemptions from disclosure are merited based on fear of economic boycotts. Although the plaintiffs in *Doe* are distinguishable from companies like Target and Gold's Gym (who may seek such exemptions), both Justices Alito and Thomas appear to be open to granting exemptions to even Major Political Players. Justice Alito, relying on *Buckley*'s more relaxed "reasonable probability" standard, was prepared to accept the plaintiffs' speculative evidence of harassment.[143] Justice Thomas, in noting the need to protect privacy of association, observed that "signing a referendum petition is a paradigmatic example of 'the practice of persons sharing common views banding together to achieve a common end,'"[144] and he pointed out that a referendum supported by only one person would be of no effect. However, he neglected to address the fact that the same rationale can just as easily be applied to the need of individuals to band together in boycotts to effectuate their goals.

On the other hand, one could extrapolate from the opinions of Justices Scalia, Sotomayor, and Stevens that they, along with Justice Ginsburg, would be hard-pressed to grant exemptions based on fear of economic boycotts but instead would favor allowing this speech to enter the marketplace.[145] Although neither Justice Sotomayor nor

141. *Id.* at 2831 (Stevens, J., concurring).

142. *Id.*

143. *See id.* at 2823–24 (Alito, J., concurring).

144. *Id.* at 2839 (Thomas, J., dissenting) (quoting Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981)).

145. *See id.* at 2836–37 (Scalia, J., concurring); *id.* at 2829 (Sotomayor, J., concurring) ("I find it difficult to see how any incremental disincentive to sign a petition would tip the constitutional balance.").

Justice Stevens addressed what form of activity would constitute "serious and widespread harassment" or a "significant threat" of harassment, their reliance on *Patterson* and *Socialist Workers' Party* suggests that they likely envisioned applying the exemption only to persecuted social groups or fringe political parties that suffered extreme harassment over extended periods of time.[146] Each of these four Justices seemed intent on discouraging any regulation of speech, except in the narrowest of circumstances.[147] As Justice Sotomayor acknowledged, "[O]penness in the democratic process is of 'critical importance.'"[148]

2. The Threat to an Informed Electorate: Strengthening Legal Barriers to Dissent

If the Court deems the threat of an economic boycott to be sufficient grounds for an as-applied exemption from disclosure requirements, it risks undermining the value of an economic boycott as an expression of dissent. Although the Justices in *Doe* encountered facts that were almost identical to those of the Proposition 8 controversy in California, none of the Justices voiced the clear sentiment that Judge England expressed in *ProtectMarriage.com*. He explained:

> [T]he Court simply cannot ignore the fact that numerous of the acts about which Plaintiffs' complain are mechanisms relied upon, both historically and lawfully, to voice dissent. The decision and ability to patronize a particular establishment or business is an inherent right of the American people, and the public has historically remained free to choose where to, or not to, allocate its economic resources. As such, individuals have repeatedly resorted to boycotts as a form of civil protest intended to convey a powerful message.[149]

146. *See id.* at 2829 (Sotomayor, J., concurring) ("Case-specific relief may be available . . . in the rare circumstance in which disclosure poses a reasonable probability of serious and widespread harassment . . . ."); *id.* at 2831 (Stevens, J., concurring).

147. *See id.* at 2821 (majority opinion); *id.* at 2823 (Alito, J., concurring); *id.* at 2829 (Sotomayor, J., concurring).

148. *Id.* at 2828 (Sotomayor, J., concurring) (citing Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975)).

149. ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1218 (E.D. Cal. 2009).

These "powerful messages" that protest the behavior of Major Political Players are in danger of being stifled if economic boycotts are deemed to be harassment.

WhoSigned.org explained that it requested disclosure of the R-71 signatures because it wanted to engage the signers in "uncomfortable" conversations about the issue of gay marriage addressed in the ballot initiative[150] (i.e., to engage in debate on the subject). At least one scholar has observed that, in his majority opinion in *Doe*, Chief Justice Roberts left the door open for an as-applied challenge based on the reasonable probability of harassment resulting from the "controversialness [sic] of the issue"[151] rather than from the vulnerability of a group, as was the case in *Patterson* and *Socialist Workers' Party*. Examining the various opinions in *Doe* reveals some disagreement on the topic of controversial ballot initiatives. However, while one may argue that controversial petitions inherently are more likely to lead to harassment, it is inarguable that they are also more likely to benefit from debate, an exercise that would be stifled by granting such exemptions from disclosure.

In disallowing the plaintiffs' facial challenge, Chief Justice Roberts alluded to a distinction that could be made between protection from disclosure in "typical" referendum petitions, such as those involving "tax policy, revenue, budget, or other state law issues[,]" and in "controversial" ones such as the R-71 petition.[152] He

150. Press Release, KnowThyNeighbor.org, KnowThyNeighbor.org Partners with WhoSigned.org in Washington State (June 1, 2009), *available at* http://knowthyneighbor.blogs.com/home/2009/06/knowthyneighbororg-partners-with-whosignedorg-in-washington-state.html ("WhoSigned.org expects Washington State's pro-equality citizens to use its online tools to find the names of people they know, and talk with those people about the real world impact of their actions. 'Conversations like these can be uncomfortable, but they are necessary for people to understand how vital these basic rights and protections are for gay and straight families alike.'"); *see also* Press Release, KnowThyNeighbor.org, Names of Arkansas Anti-Gay Petition Signers Posted Online (Apr. 28, 2009), *available at* http://knowthyneighbor.blogs.com/home/2009/04/press-release-names-of-arkansas-antigay-petition-signers-posted-online.html (announcing the release of signatures on similar petitions in Arkansas and stating that KnowThyNeighbor.org "expect[ed] that many petition signers will be confronted about their actions as their names are discovered on the website by family members, friends, coworkers, customers, and acquaintances").

151. Monica Youn, Remarks at the Brennan Center for Justice Accountability After *Citizens United*—Panel Three (Apr. 29, 2011), *available at* http://www.brennancenter.org/content/pages/accountability_after_citizens_united_panel_three_questions_and_answers_tran (transcript and video).

152. *Doe*, 130 S. Ct. at 2821.

observed that burdens imposed by typical petitions are not "remotely like the burdens plaintiffs fear in this case."[153] Justice Alito echoed this observation, noting that the plaintiffs had provided no evidence that disclosure would discourage signers of typical petitions from participating in the electoral process.[154] Justice Sotomayor disagreed with Justice Roberts's distinction and instead argued that a state's interest in protecting the integrity of the electoral process remained undiminished despite the fact that the referendum involved a controversial subject and the fact that signers feared harassment from non-state actors.[155] Although Justice Thomas also disagreed with the Chief Justice's distinction, he drew the opposite conclusion that the combination of Washington's disclosure laws and the difficulty in predicting which ballot initiatives would prove controversial was a recipe for the unconstitutional chilling of speech.[156]

It is also worth noting that in examining Washington's justification for the PRA, Chief Justice Roberts was able to avoid discussion of the state's interest in having an informed electorate because he relied on the state's interest in preserving the integrity of elections.[157] The other Justices exhibited conflicting points of view on the state's informational interest. Justice Sotomayor referred to the need for disclosure to enable the electorate to make informed decisions.[158] On the other hand, Justice Alito was openly hostile to the value of informing voters about who financed a referendum and how to contact the referendum's supporters, given that those supporters feared retaliation and recrimination.[159] He suggested that disclosing this information would constitute "a means of facilitating harassment that impermissibly chills the exercise of First Amendment rights."[160] Justice Thomas asserted that "[p]eople are intelligent enough to evaluate the merits of a referendum without knowing who supported it."[161]

153. *Id.*
154. *Id.* at 2822 (Alito, J., concurring).
155. *Id.* at 2829 (Sotomayor, J., concurring).
156. *Id.* at 2846 (Thomas, J., dissenting).
157. *Id.* at 2819–20 (majority opinion).
158. *Id.* at 2828 (Sotomayor, J., concurring).
159. *Id.* at 2824–25 (Alito, J., concurring).
160. *Id.* at 2825.
161. *Id.* at 2843 (Thomas, J., dissenting).

One may argue that the members of KnowThyNeighbor.org and WhoSigned.org were a bit disingenuous in stating that their objective in seeking disclosure was to engage the signers of R-71 in "uncomfortable conversations." It may be that their request for disclosure was really prompted by a need for information necessary to implement organized responses to the signatories, including boycotts. Undoubtedly, the Internet has fundamentally changed the ease with which we can access information about our opponents and physically confront them.[162] However, as much as one has the right to make political donations or sign one's name to a petition without being harassed via illegal activities, one also has the right to express opposition to another's political view through constitutionally protected speech such as economic boycotts.

3. The Co-option of the Minor Party Interest by Major Political Players

The plaintiffs in *Doe* relied on the *Buckley/SWP* exemption that the Court originally developed for minor parties to justify the plaintiffs' claim for an exemption from disclosure,[163] despite the world of difference between being an African American in the 1950s and a heterosexual adult representing a mainstream view in 2010. However, the Court ignored the distinction by allowing the *Buckley/SWP* exemption to guide any future as-applied challenge by the plaintiffs and signaling the Court's openness to apply this test to Major Political Players.[164]

In his concurrence, Justice Alito embraced this idea, comparing the right to private association that the plaintiffs raised in *Doe* to the same rights that the NAACP and the SWP claimed.[165] This comparison mischaracterizes not only the rationale behind the *Buckley/SWP* exemption, but also the nature, context, and likelihood of the harm present in *Patterson* and *Socialist Workers' Party*.[166]

162. *See generally* Briffault, *supra* note 21 (discussing the effect of the Internet and social media on campaign finance and disclosure regulations).

163. Noveck, *supra* note 23, at 97 (explaining that the *Buckley/SWP* exemption "to disclosure requirements would only be necessary for small or fringe groups and that disclosure of contributors to major parties was constitutionally sound").

164. *See Doe*, 130 S. Ct. at 2821.

165. *Id.* at 2824–25 (Alito, J., concurring).

166. *See* Youn, *supra* note 151 (discussing how *Patterson* has been de-contextualized and distorted in the current debate on campaign finance disclosure).

When forging the as-applied standard for exemptions from disclosure, the Court in *Buckley* and *Socialist Workers' Party* was heavily influenced by what had happened the previous decade in *Patterson* and *Bates*.[167] By the time that the Court decided *Patterson*, the plaintiffs and other African Americans had already suffered years of harassment.[168] Despite their nonviolent attempts to end segregation in the South, African Americans were terrorized by the use of lynch mobs, rapes, fire hoses, police dogs, and other acts of violence.[169] For example, in the middle of the night on June 29, 1958, the day before the Court rendered its decision in *Patterson*, a bomb exploded at Bethel Baptist Church in Birmingham for the second time in two years.[170] Its pastor, Fred Shuttlesworth, an active member of the civil rights movement and of the NAACP's Alabama chapter, had been the target.[171] In the case of NAACP members in Alabama and Arkansas in the fifties and sixties, the Court found that disclosure of their association with the NAACP posed "existential threats"[172] to

167. *See supra* note 61 and accompanying text; *see also* Buckley v. Valeo, 424 U.S. 1, 70–71 (1976) (reasoning that the government's interest in disclosure is greatly diminished in the context of minor parties because minor party candidates' ideological positions are generally more discernable and minor parties have less chance of winning, so the risk of corruption is lower).

168. In 1955, E. Frederick Morrow, the first African American White House staff member, submitted a file memo to the Eisenhower administration warning that "we are on the verge of a dangerous racial conflagration in the Southern section of the country." Memorandum of Record from E. Frederick Morrow, Admin. Officer, Special Projects Grp., White House (Nov. 22, 1955) (on file with the Dwight D. Eisenhower Library), *available at* http://web.archive.org/web/20040501070811/http://eisenhower.archives.gov/Dl/Civil_Rights_Emmett_Till_Case/EmmettTillCase.html (follow "Page 1" hyperlink under "Memorandum for the Record, E. Frederick Morrow re: Emmett Till, November 22, 1955"). He noted, "a frightening power has been built in Mississippi by the anti-desegregation White Citizens Councils, and their principal method is one of economic terrorism. These Councils are fanning out throughout the South, and they have created a climate of fear and terrorism that holds the entire area in a vise." *Id.* (follow "Page 2" hyperlink under "Memorandum for the Record, E. Frederick Morrow re: Emmett Till, November 22, 1955").

169. *See generally Civil Rights Movement Timeline 1961*, CIVIL RIGHTS MOVEMENT VETERANS, http://www.crmvet.org/tim/timhis61.htm (last visited Sept. 24, 2011) (giving a history and timeline of the Southern Freedom Movement in 1961).

170. Glenn T. Eskew, *"The Classes and the Masses": Fred Shuttlesworth's Movement and Birmingham's Black Middle Class*, *in* BIRMINGHAM REVOLUTIONARIES: THE REVEREND FRED SHUTTLESWORTH AND THE ALABAMA CHRISTIAN MOVEMENT FOR HUMAN RIGHTS 31, 39–40 (Marjorie L. White & Andrew M. Manis eds., 2000).

171. *Id.* at 33, 37, 39–40.

172. *See* Paul Barton, *Midterm Money Rush: The Secret Outsiders*, CAP. NEWS CONNECTION (Oct. 21, 2010), http://www.capitolnewsconnection.org/news/midterm-money-rush-secret-outsiders.

their lives and livelihoods as African Americans living in a racist society.

The Court more appropriately applied the disclosure exemption several years later in *Socialist Workers' Party*, where the plaintiffs were members of a political party with a sixty-person membership roll, and, consequently, the Court was concerned with the risk of silencing a fringe group.[173] But in *Doe*, the plaintiffs were supporters of a popular cause, were never subjected to any government discrimination or hostility or severe and widespread harm, and were not members of a demographic minority. Rather, the petition signers endured harassment only while the petition was being circulated over a period of two months. Furthermore, the record of harassment against R-71 supporters included the relatively minor offenses of name-calling, threats to withdraw donations to a pastor's church, argumentative phone calls, and a threatening blog post directed toward the family of the petition's campaign manager.[174] As a result, the plaintiffs primarily relied on the evidence of more egregious harassment against supporters of Proposition 8 in California.[175] Although courts may consider evidence of harassment of similarly situated groups when they apply the *Buckley/SWP* exemption, the plaintiffs in *Doe* offered evidence of harm that was far less grievous than that in *Patterson* and *Socialist Workers' Party*. Therefore, the Court likely did not intend to apply an exemption that is "historically reserved for small groups [that] promot[e] ideas almost unanimously rejected" and that are vulnerable to serious retaliation to the plaintiffs in *Doe*, who offered little evidence of chilled speech or harassment.[176]

If the Court were to broadly construe the *Buckley/SWP* exemption to apply to *any* group that shows a reasonable threat of harassment or intimidation, that would be a welcome development for Major Political Players. Bruce Josten, the executive vice president of government affairs for the U.S. Chamber of Commerce,

173. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 88, 91, 98 (1982).

174. GAY & LESBIAN ADVOCATES & DEFENDERS, CLAIMS OF HARASSMENT AND INTIMIDATION DOCUMENT REVIEW 21, 22, 66 (Apr. 5, 2010), *available at* http://www.glad.org/uploads/docs/cases/doe-v-reed/doe-v-reed-compiled-analysis.pdf.

175. *See* Petitioners' Brief at 2–6, 10, *supra* note 128.

176. ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1205 (E.D. Cal. 2009); *see also* Youn, *supra* note 151 (discussing how the exemption was originally intended to protect harassed minority groups).

made clear the Chamber's intent to seize on this exemption when ABC News pressed him on why the Chamber refused to open its books regarding political contributions if it had nothing to hide.[177] Josten pointed to the harassment that corporations like Target and individuals like the supporters of Proposition 8 incurred. Using the language of the *Buckley/SWP* exemption, he explained, "[The Chamber is] not going to subject its contributors to harassment, to intimidation, and to threats and to invasions of privacy at their houses and at their places of business, which is what has happened every time there's been disclosure here."[178] It therefore appears that opponents of disclosure are preparing for the day when their best or only chance at remaining anonymous is to rely on the *Buckley/SWP* exemption—an exemption that was previously available only to minor parties. By failing to address this point in *Doe*, a case so drastically different from *Patterson* and *SWP*, the Court has unhooked this exemption from its theoretical moorings, signaling to Major Political Players that they may continue to attempt to skirt disclosure in this manner.

IV. THE ECONOMIC BOYCOTT AS "PROPER LEGAL MEANS"[179]: WHY ECONOMIC BOYCOTTS SHOULD NOT BE CONSIDERED HARASSMENT IN CLAIMS FOR AS-APPLIED EXEMPTIONS

As Justice Kennedy stated in his majority opinion in *Citizens United v. FEC*,[180] "disclosure permits citizens and shareholders to react to the speech of corporate entities in a *proper* way."[181] Likewise, the economic boycott as a response to the speech of Major Political Players is a "proper legal means" of voicing dissenting opinions and the linchpin of why the boycott should therefore not be used as a justification for exemption from generally applicable disclosure rules. With the role of money in politics continuing to

177. Jake Tapper, *Chamber of Commerce: The White House Wants Our Donor Lists So Its Allies Can Intimidate Our Donors*, ABC NEWS (Oct. 13, 2010, 11:10 AM), http://abcnews.go.com/blogs/politics/2010/10/chamber-of-commerce-the-white-house-wants-our-donor-lists-so-its-allies-can-intimidate-our-donors/.

178. *Id.*

179. *ProtectMarriage.com*, 599 F. Supp. 2d at 1217.

180. 130 S. Ct. 876 (2010).

181. *Id.* at 916 (emphasis added).

increase and the 2012 election gearing up to be one of the most contentious and expensive in history,[182] one issue likely to arise with greater frequency will be whether Major Political Players should be held accountable for their election-related spending.

During the 2010 midterm elections, thirty-seven states decided 160 ballot initiatives, most of which tackled hot-button issues such as the legalization of marijuana, affirmative action, abortion, and prenatal rights.[183] In the aftermath of New York's passage of a same-sex marriage bill, many expect other states to also place same-sex marriage measures on the ballot in 2012.[184] Recently, Minnesota[185] announced that it would compel disclosure of corporate donors who are involved in the movement to place an initiative on the 2012 ballot that bans same-sex marriage, despite claims that the donors could subsequently be subject to harassment.[186]

Because it is probable that the collective citizenry will use economic boycotts to respond to some of these measures, one cannot ignore or minimize the pressing need for a determination regarding the lawfulness of this form of protest. Dissenting in *Doe*, Justice Thomas bemoaned the "elusive" standard of the *Buckley/SWP* exemption.[187] He worried that the Court's failure to articulate the evidence that is required to sustain an as-applied challenge would leave "a vacuum to be filled on a case-by-case basis. This will, no doubt, result in the 'drawing of' arbitrary and 'questionable' 'fine distinctions' by even the most well-intentioned district or circuit

182. *The High Price of Anonymous Cash in American Political Campaigns*, BLOOMBERG (June 5, 2011, 9:01 PM), http://www.bloomberg.com/news/2011-06-06/the-high-price-of-anonymous-cash-in-american-political-campaigns.html.

183. *Voters to Decide on 160 Ballot Questions in 37 States*, FOXNEWS.COM (Nov. 2, 2010), http://www.foxnews.com/politics/2010/11/02/voters-decide-ballot-initiatives-states/.

184. Nate Silver, *The Future of Same-Sex Marriage Ballot Measures*, N.Y. TIMES FIVETHIRTYEIGHT BLOG (June 29, 2011, 10:35 AM), http://fivethirtyeight.blogs.nytimes.com/2011/06/29/the-future-of-same-sex-marriage-ballot-measures/.

185. Minnesota was a political hotbed in 2010 for corporate donations to the socially conservative PAC MN Forward. Minnesota was the main site for boycotts against Target and Best Buy, which are both headquartered in the state. Other corporations based in Minnesota that donated to MN Forward included 3M, Regis, Polaris, Securian, and Hubbard Broadcasting. Jim Spencer, *U.S. Chamber Fights Donation Disclosure Rules*, STAR TRIBUNE (May 7, 2011, 5:21 PM), http://www.startribune.com/local/121409069.html.

186. Jillian Rayfield, *NOM Loses Bid to Keep Anti-gay Marriage MN Donors Concealed out of 'Harassment' Fears*, TPM MUCKRAKER (July 6, 2011, 6:00 AM), http://tpmmuckraker.talkingpointsmemo.com/2011/07/nom_loses_bid_to_keep_anti-gay_marriage_mn_donors.php.

187. Doe v. Reed, 130 S. Ct. 2811, 2845 (2010) (Thomas, J., dissenting).

judge."[188] With no specific guidance from the Supreme Court as to what constitutes harassment, lower courts are at risk of overcrowding by those who seek to avoid disclosure by resorting to as-applied challenges that are based on behavior that has enjoyed constitutional protection for decades.

The question at issue is why economic boycotts are so important as a protected First Amendment activity that the right to boycott cannot be sacrificed. The answers lie in an examination of the economic boycott's role in advancing the core democratic principles of promoting diverse viewpoints in the marketplace and encouraging dissent. Both principles have long been considered fundamental to the functioning of democratic institutions.

A. The Economic Boycott in the Marketplace of Ideas

Historically, the exchange of competing ideas in the search for truth has been one of the most important goals served by the First Amendment, which is designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources'"[189] and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[190] The Framers of the Constitution, the most distinguished philosophers, and Supreme Court Justices have paid homage to the idea that more speech, not less, increases discussion about issues of public concern and therefore promotes the kind of free and open debate that the First Amendment not only fosters but demands.[191]

Alexander Hamilton discussed the benefits of diverse opinions when he urged that "differences of opinion, and the jarring of parties in [the legislative] department of the government . . . often promote deliberation and circumspection; and serve to check the excesses of

188. *Id.* (quoting Citizens United v. FEC, 130 S. Ct. 876, 888 (2010)).

189. New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

190. *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)) (internal quotation marks omitted).

191. *See* Charles Fried & Cliff Sloan, *Free Speech Worth Paying for*, N.Y. TIMES, Mar. 25, 2011, at A23.

the majority."[192] The English philosopher John Stuart Mill, a vigorous defender of free speech, echoed the same belief when he railed against the "tyranny of the majority," arguing that society must safeguard minority views against the prevailing opinions of the majority and that the free flow of ideas is a necessary condition of progress and debate.[193] To Mill, the "peculiar evil of silencing the expression of an opinion is, that it is robbing the human race."[194] It was Mill's embrace of the notion that unpopular ideas needed to be heard—not to benefit the holder of the opinion, but for the benefit of the greater society[195]—that influenced Oliver Wendell Holmes' "marketplace of ideas" metaphor "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[196] Justice Brandeis took the theory a step further when he suggested that the remedy for speech that is threatening or inconvenient is "more speech, not enforced silence."[197]

Fast forward to *Buckley* and *Citizens United*, where the Court construed the concept that "more speech is better"[198] first to allow unlimited expenditures by candidates[199] and then to give corporations unfettered influence in elections by allowing them to expend unlimited sums of money to advocate for candidates.[200] In *Buckley*, the Court affirmed that "restrict[ing] speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[201] The argument that free speech should not be restrained was also decisive in *Citizens United*, when the Court struck down limits on corporate spending in elections, holding that corporate political expenditures is a form of First

192. CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 146 (2003) (alteration in original) (quoting THE FEDERALIST NO. 70, at 426–27 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (internal quotation marks omitted).

193. JOHN STUART MILL, ON LIBERTY 10–11 (1986).

194. *Id.* at 23.

195. *Id.* at 23–30.

196. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

197. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

198. *See* Richard L. Hasen, *Rich Candidate Expected to Win Again*, SLATE (Mar. 25, 2011, 7:08 AM), http://www.slate.com/id/2289193/ (describing how the Court appears to apply the "more speech is better" justification inconsistently).

199. *See* Buckley v. Valeo, 424 U.S. 1, 14–15, 58–59 (1976).

200. *See* Citizens United v. FEC, 130 S. Ct. 876, 886, 896–99 (2010).

201. *Buckley*, 424 U.S. at 48–49.

Amendment–protected speech.[202] Writing for the majority, Justice Kennedy observed that "it is our law and our tradition that more speech, not less, is the governing rule."[203] To the Court, if one of the main goals of the First Amendment is to encourage as many points of view as possible, the corporate identity of the speaker does not justify a restriction on its right to speak.[204]

Given this line of precedents, coupled with cases that grant the status of protected speech to economic boycotts, the Court should not allow Major Political Players to use the fear of economic boycotts to justify exemptions from disclosure requirements, because boycotts inject more speech into the marketplace. Characterizing economic boycotts as harassment would silence speech by impeding access to the information that those who organize boycotts need. That, in turn, would result in fewer diverse viewpoints entering the public arena and the cessation of valuable public dialogue.

If the search for truth is a primary goal of the First Amendment, it follows that "[a]ll viewpoints must have an equal opportunity to compete in the intellectual marketplace, free from selective governmental regulation."[205] The economic boycott is a way for the weaker voices to be heard. If an individual disagrees with the way the Koch brothers, George Soros, Target, or other individuals or entities with vast financial resources and great access to tools of communication choose to spend their money, she can do little about it on her own. As the Court pointed out in *Patterson*, "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[206] The very idea that a group of people object enough to the financing of a candidate or message to band together for the purpose of making their views known sends a strong message in itself.

Unequal wealth in this country has led to unequal political influence. Major Political Players have the ability to hire lobbyists, finance think tanks, and direct cash to groups with sympathetic views. In the aftermath of *Citizens United*, if the Court extends a

202. *Citizens United*, 130 S. Ct. at 913.

203. *Id.* at 911.

204. *Id.* at 912–13.

205. MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 102 (2001).

206. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

right of anonymity to corporate speech by allowing economic boycotts to serve as the basis of an exemption from disclosure, it would "result in a debate that bears the imprint of those forces that dominate the social structure."[207] The politically powerful would effectively continue to receive a free pass to exert disproportionate leverage over important social issues and political policy, thereby further distorting social power by silencing opposing points of view and impoverishing debate. As Justice Stevens argued in his dissent in *Citizens United*, corporate political expenditures "on a scale few natural persons can match" have the effect of "drowning out of noncorporate voices."[208]

I am not suggesting here the equality rationale that the Court rejected in *Buckley*[209] and *Citizens United*.[210] The *Buckley* admonishment against equalizing speech is consistent with the Court's rejection of the economic boycott as harassment. The Court issued the admonishment in the context of striking down expenditure limits as an infringement on core political speech. There is no indication that this measure was intended to restrict citizens' private actions to hold such expenditures to a minimum or to hold businesses accountable for such expenditures. Nor am I suggesting that the government should be called on to "equalize" voices by increasing its funding of disadvantaged parties, a concept that was squarely rejected in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.[211] The economic boycott is a purely private action that the Court should not regulate in the electoral context because doing so would only serve to make it much more difficult for private citizens to be heard at all.

207. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV 1405, 1412 (1986).

208. *Citizens United*, 130 S. Ct. at 974 (Stevens, J., concurring in part and dissenting in part).

209. Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (rejecting the government's argument that limiting independent expenditures would promote the government's interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections").

210. The equality rationale was first introduced in *Buckley v. Valeo* to justify limitations on campaign expenditures. The government argued that limiting independent expenditures would promote the government's interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections." *Id.* at 48. Most recently, the equality rationale was rejected in *Citizens United*, in which the Court referred to this concept as the "antidistortion rationale." *Citizens United*, 130 S. Ct. at 903. *See generally* Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989 (2011) (discussing the role of the equality rationale in campaign finance law).

211. 131 S. Ct. 2806, 2825–26 (2011).

Finally, speakers—petition signers and donors to a ballot initiative—are not the only group in the electoral process to whom the First Amendment applies.[212] Protecting the right of the listener to receive information and respond accordingly is fundamental to the concept of uninhibited discourse and debate: inherent in the idea of a debate is that at least *two* sides are exchanging ideas. If a business is going to make a campaign donation or organize support for a ballot initiative, then it must be prepared to deal with any lawful ramifications, including economic boycotts. In this context, the economic boycott is a constitutionally protected, organized response by consumers to constitutionally protected electoral "speech" by the businesses that they are boycotting. Allowing Major Political Players to rely on threats of economic boycotts as a justification for exemptions from disclosure in this context would victimize the listener by removing his ability to respond in the most effective manner.

B. Dissent and First Amendment Protection: Speaking Truth to Power[213]

In *Doe,* the Court cited the fear of economic boycotts as evidence of harassment that could justify exemptions from disclosure. But allowing this claim would defy one of the primary goals of the First Amendment—enabling dissent—and would do so in the most critical aspect of democracy: the electoral process. While the marketplace-of-ideas metaphor allows more speakers, viewpoints, and opinions to join the conversation in a search for truth, the value of dissent is premised on the idea that criticism is

212. *See* Note, *Overbreadth and Listeners' Rights*, 123 HARV. L. REV. 1749, 1761–66 (2010) (examining the Supreme Court's treatment of the right to open discourse); *see also* Leading Cases, *Freedom of Speech and Expression—Public Disclosure of Referendum Petitions*, 124 HARV. L. REV. 269, 276 (2010) ("[A]udience interests must be given preeminent weight in cases of explicitly political debate because the paramount concern here is that citizens be able to make wise, well-informed choices about matters of shared public concern." (quoting Paul G. Stern, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 YALE L.J. 925, 939 (1990))).

213. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1746–47 (2005) (explaining that the conventional understanding of dissent is that dissenters "speak truth to power" by either attempting to persuade the majority or merely speaking critically of the state).

crucial to promoting a better democracy and assisting with self-governance.[214]

In discussing the economic boycott in *Claiborne Hardware*, the Court emphasized the need for debate on public issues and deferred to the idea that "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'"[215] "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."[216] In one of his many essays examining the relationship between self-government and free speech, Alexander Meiklejohn wrote,

> [C]onflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant. If they are responsibly entertained by anyone, we, the voters, need to hear them . . . . To be afraid of ideas, any idea, is to be unfit for self government.[217]

Cass Sunstein has argued that "at its core, [free speech] is designed to protect political disagreement and dissent."[218] In the electoral context, economic boycotts accomplish these objectives by challenging the status quo through active protest. They call attention to political behavior that might otherwise go unnoticed, and they hold parties accountable for their political activities, thereby promoting a more stable democracy.

Just as flag burning and antiwar protests are considered protected speech because of their value as expressions of dissent, the economic boycott has a similar value in the electoral process: all of these activities are geared at changing social or political viewpoints.[219] First Amendment scholar Steven Shiffrin, who defines dissent as "speech that criticizes existing customs, habits, traditions,

214. SUNSTEIN, *supra* note 192, at 98; *see also*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 36–37 (Lawbook Exchange, Ltd. 2000) (1948) (explaining that if legislators, judges, and the public did not have the right to criticize government policy, "the whole program of representative self-government would be broken down").

215. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)).

216. *Id.* (alteration in original) (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)) (internal quotation marks omitted).

217. MEIKLEJOHN, *supra* note 214, at 27.

218. SUNSTEIN, *supra* note 192, at 98.

219. STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 96–100 (1990).

institutions, or authorities,"[220] theorizes that "[t]he political bias of a dissent-centered conception of the First Amendment is for those who wish to challenge the status quo and for those who believe that society stagnates and furthers injustice when it is not open to challenge."[221] In this regard, the boycotters are speaking critically to those with more powerful economic voices; they are "speaking truth to power." Their message is no different from messages that lobbyists deliver: if we agree with what you are doing, we will support you financially; if we disagree, we will withdraw our support. For that matter, the boycotters' message is simply the inverse of that of the Major Political Players. Whereas the Major Political Players use their financial power to support a proposed governmental policy or candidate with which or whom they agree, the boycotters withhold their financial support to show that they disagree with these players. Both the Major Political Players and the boycotters use their economic clout to influence decision making. If, as Shiffrin posits, certain social beliefs may "more likely be testimony to . . . the interests of those in power than to their 'truth,'"[222] then the "clashing of opinions"[223] is critical to allow the citizenry to make the best decisions possible.

Likewise, economic boycotts in the electoral process attempt to influence decision making by forcing valuable information about their targets into the sunlight.[224] If, as Justice Brennan stated, the right of the collective citizenry to engage in "uninhibited, robust, and wide-open" debate is inherent in the doctrine of free speech in a democracy,[225] then citizens must have access to as much information as possible.[226] In the case of campaign donations or ballot initiatives, this information would include the identification of the sponsor or sponsors of the speech, so that voters can adequately assess a sponsor's motivation.[227] Disclosure ensures that interested parties get

220. STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA xi (2000).

221. *Id.* at 129.

222. *Id.* at 92.

223. SUNSTEIN, *supra* note 192, at 146.

224. *See* Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY, Dec. 20, 1913, at 10 ("Sunlight is said to be the best of disinfectants.").

225. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

226. *See* Leading Cases, *supra* note 212, at 276.

227. *Cf.* Buckley v. Valeo, 424 U.S. 1, 66–67 (1976) (explaining that disclosure regarding campaign contributions provides the public with information needed to evaluate candidates).

this information;[228] economic boycotts ensure that the information will be thrust into the public eye.[229]

Additionally, economic boycotts inform the business being boycotted that not only does a segment of the community disagree with its political activity but the segment holds the business accountable for its actions. The boycott of Target demonstrates the effectiveness of the economic boycott in forcing a corporation to make changes in its political policies and donations.[230] Within three weeks of learning of the company's donation to MN Forward, nearly 62,000 people became fans of a Facebook group urging users to boycott Target.[231] A YouTube video featuring a Target customer with a gay son became extremely popular, with almost 200,000 views by the beginning of August.[232] As a result, in early 2011, Target announced that it had adopted new guidelines for making political donations, including the establishment of a new policy committee that would oversee the company's political activities and be responsible for "balancing [its] business interests and other considerations that may be important to [its] team members, guests or other stakeholders."[233] The Target boycott also influenced an investor in another major company to propose a shareholder-protection initiative.[234] NorthStar Asset Management, an investment firm that owns shares of Home Depot, took notice of the $1.3 billion loss that Target faced immediately after its donation in August 2010.[235] Fearing a similar backlash to Home Depot's political

228. *Cf. id.*

229. Brandeis, *supra*, note 224, at 10.

230. *See* Jennifer Martinez & Tom Hamburger, *Target Faces Investor Backlash*, L.A. TIMES, Aug. 20, 2010, at A1, *available at* http://articles.latimes.com/2010/aug/19/nation/la-na-target-shareholders-20100820.

231. Steve Karnowski, *Target Pulls Olive Branch to Gay Rights Group,* MSNBC (Aug. 16, 2010, 7:02 PM), http://www.msnbc.msn.com/id/38729241/ns/business-consumer_news/.

232. Doug Grow, *Meet the Woman Fighting Target's Anti-gay Donation*, SALON.COM (Aug. 3, 2010, 4:01 PM), http://www.salon.com/news/feature/2010/08/03/randi_reitan_atrget. The video—which follows a woman into a Target store where she purchases items only to immediately return them, cuts up her Target credit card in front of the employees, and explains why she will no longer patronize the chain—also aired on *Countdown with Keith Olbermann*.

233. *Civic Activity*, TARGET.COM, http://hereforgood.target.com/learn-more/civic-activity/ (last visited Sept. 7, 2011); *accord* Editorial, *Target's Turnaround*, L.A. TIMES, Feb. 22, 2011, at A14.

234. Andy Kroll, *Citizens United: The Shareholders Strike Back*, MOTHER JONES (June 1, 2011, 3:00 AM), http://motherjones.com/politics/2011/05/citizens-united-home-depot-elections.

235. *Id.*

spending, the fund introduced a shareholder resolution that would force Home Depot to disclose all political donations.[236] While Home Depot's management rejected the resolution, proponents of disclosure lauded the move as a "good first step" toward raising awareness and demanding change.[237]

The economic boycott is also a necessary recourse that the public takes when the government has become unresponsive to the will of the people. Despite the fact that a large, bipartisan majority of the public disagrees with the holding in *Citizens United*,[238] it is now the law of the land. To date, due to partisan disagreement,[239] Congress has been unwilling or unable to close the floodgates of corporate money flowing into elections. As a result, the economic boycott is becoming one of the few ways in which people can voice their disapproval of this specific law and policy while they subsequently send a public message of dissatisfaction to elected officials that the representatives must pass legislation or "fix" the problem in another way.

The economic boycott as a tool of dissent must also be protected because it promotes political stability. When dissenters, boycotters, or dissidents voice their views outside of a Target or Best Buy or organize an Internet campaign to boycott a business, they do not always expect to effect change; sometimes they are just "letting off steam." By taking action and making their voices heard, they are expressing their rejection of the current state of affairs and forcing their views into the political discourse, engaging in participatory democracy. In nondemocratic societies, dissent is more likely to be suppressed, "driv[ing] opposition underground, leaving those suppressed either apathetic or desperate. [Suppression] thus saps the

236. *Id.*

237. *Id.*

238. Dan Eggen, *Poll: Large Majorities Opposes Supreme Court Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010, 4:38 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151_pf.html (85 percent of Democrats, 76 percent of Republicans, and 80 percent of all respondents "oppose" *Citizens United*, and 65 percent of respondents "strongly oppose" the ruling); *see* PUB. CITIZEN, 12 MONTHS AFTER: THE EFFECT OF *CITIZENS UNITED* ON ELECTIONS AND THE INTEGRITY OF THE LEGISLATIVE PROCESS 17–31 (Jan. 2011), *available at* http://www.citizen.org/documents/Citizens-United-20110113.pdf.

239. Michael Waldman, *Why Is GOP Fighting Disclosure?*, POLITICO (June 10, 2011, 10:08 AM), http://www.politico.com/news/stories/0611/56693.html.

vitality of the society and makes resort to force more likely."[240] In exchange for our privilege of self-governance, "we agree to accept the results of the self-governing process, even if our idea is rejected."[241] It is our right to dissent, but it is our responsibility to give deference to the process that ensures this right.

Finally, Shiffrin theorizes that in a democracy "it is not enough to tolerate dissent; dissent needs to be institutionally encouraged."[242] He posits that one of the conditions for encouraging dissent is holding legal barriers to a minimum.[243] In keeping with this idea, the Court should promote dissent by insisting on disclosure and rejecting the Major Political Players' claims that economic boycotts are harassment.

C. Balancing the Equities

The U.S. Chamber of Commerce has been the most outspoken opponent of disclosure for corporations.[244] Its logic has remained consistent: if you force our association and similar groups or businesses to disclose, then we will be vulnerable to retaliation, and you will risk chilling our speech and hurting society as a whole.[245] The Chamber claims that compelled disclosure will result in harassment such as economic boycotts, citing the Target example as a reason why President Obama must not sign the proposed executive order that would require strict federal disclosure rules for government contractors.[246] But if economic boycotts are protected First Amendment speech, and the Court has adhered to a long line of precedent that gives priority to more speech in the marketplace, why would the Court undermine the value of economic boycotts as expressive activity by allowing them to be deemed harassment and grounds for exemptions from disclosure? The answer would have to rest in a determination by the Court that, on balance, the harm that

240. Thomas Emerson, *Toward a General Theory of First Amendment,* 72 YALE L.J. 877, 884 (1963).

241. *Introduction* to FRANK LOWENSTEIN ET AL., VOICES OF PROTEST: DOCUMENTS OF COURAGE AND DISSENT 16 (Frank Lowenstein et al. eds, 2007).

242. SHIFFRIN, *supra* note 220, at xiii.

243. *Id.* at 112–13.

244. *See supra* Part III.B.3.

245. *See supra* Part III.B.3.

246. Eric Lichtblau, *Lobbyist Fires Warning Shot over Donation Disclosure Plan*, N.Y. TIMES, Apr. 26, 2011, at A17.

disclosure causes, either in terms of its chilling effect on political activity or infringing on rights of privacy, outweighs the state interests that such disclosure serves. A plethora of scholarship has been devoted to this subject, but here I will attempt to analyze why I believe that, in the case of Major Political Players, the value of economic boycotts trumps either of the so-called harms that they may inflict.

The petitioners in both *ProtectMarriage.com* and *Doe v. Reed* argued that disclosure would undermine participation in the political process. As discussed above, Justice Alito was convinced that this was true in *Doe*, concluding that "[t]he widespread harassment and intimidation suffered by supporters of California's Proposition 8 provides strong support for an as-applied exemption in the present case."[247] Admittedly, instances of individuals who contribute small amounts to campaigns or ballot initiatives and as a result suffer retaliation in the form of economic boycotts give rise to troubling questions.[248] This was the case for Marjorie Christofferson, whose family owns the popular Los Angeles restaurant El Coyote, and who donated $100 in 2008 to support the passage of Proposition 8.[249] After Christofferson's contribution was publicly disclosed, opponents of Proposition 8 relied on the Internet to quickly organize boycotts of the restaurant and discredit it in an effort to discourage people from patronizing it.[250] Business declined more than 30 percent, forcing management to cut employees' hours and close the restaurant at lunch.[251] The Court cited instances such as this in both *ProtectMarriage.com* and *Doe*.[252]

It is difficult to argue that small donors or ordinary signatories to ballot initiatives individually pose a compelling need for disclosure

247. Doe v. Reed, 130 S. Ct. 2811, 2823 (2010) (Alito, J., concurring).

248. *See* Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword*, N.Y. TIMES, Feb. 8, 2009, at B3; *see generally* Briffault, *supra* note 21, at 275 (discussing harassment of those who made contributions to Prop. 8 campaign).

249. Steve Lopez, *Prop 8 Stance Upends Her Life*, L.A. TIMES, Dec. 14, 2008, at B1; *see supra* Part II.D.

250. Tami Abdollah & Cara Mia DiMassa, *Prop. 8 Foes Shift Attention*, L.A. TIMES, Nov. 14, 2008, at A1.

251. Lopez, *supra* note 249.

252. *See* ProtectMarriage.com v. Bowen, 599 F. Supp. 2d. 1197 (E.D. Cal. 2009) (detailing specific instances of harassment of Prop. 8 supporters); *see also Doe*, 130 S. Ct. at 2820 (acknowledging that public disclosure of campaign contributions can lead to intimidation and harassment).

when the harm to them can be very great and the benefit to society of knowing their identities is quite miniscule in terms of advancing any substantial state interests. In these cases, disclosure does not help the public identify or evaluate the special interests that are trying to influence an election, nor does it help the public better understand the motivations of these parties. Instead, for a regular individual such as Christofferson who works at or owns a small business, disclosure could lead to a boycott that has the potential to be catastrophic, decimating the business and stripping the individual of her livelihood. Threats of boycotts in these situations could clearly discourage political involvement, thus stifling First Amendment objectives. To avoid this possibility, one suggestion that appears to have gained traction is that both the federal and state governments could raise the financial threshold that is applicable to compelled disclosure.[253] Currently, federal law mandates disclosure for donations of $200 or more, and many state laws have threshold requirements as low as $20–$100.[254] This would address the privacy and harassment concerns by automatically exempting ordinary, small donors.

But one should not conflate the impact that economic boycotts can have on regular individuals with their impact on Major Political Players, such as Target or a business that the Koch brothers own, which are far better situated to withstand any potential economic pressure. A higher monetary threshold for disclosures would isolate these wealthier donors, whose contributions have a greater impact and whose motives should be more closely scrutinized. When "big fish" are allowed to go unchecked in their quest to avoid disclosure, they are able to exert undue influence in the electoral process. The unrestricted dollars that Major Political Players contribute to the coffers of issue groups or candidates have exacerbated this

253. For further discussion, see Briffault, *supra* note 21, at 300–02; *see also* William McGeveran, *Mrs. McIntyre's Persona: Bringing Privacy Theory to Election Law,* 19 WM. & MARY BILL RTS. J. 859, 881–82 (2010–2011) (discussing raising thresholds for "big fish" and other methods to advance disclosure goals); E. Rebecca Gantt, Note, *Toward Recognition of a Monetary Threshold in Campaign Finance Disclosure Law*, 97 VA. L. REV. 385, 418–25 (2011) (arguing for a substantive monetary threshold).

254. *See* Briffault, *supra* note 106, at 1003–04 (citing *ProtectMarriage.com*, 599 F. Supp. 2d at 1221 n.10.

problem.[255] For example, last November three oil companies contributed more than $8 million to support Proposition 23 in California, which sought to suspend existing and proposed regulations to address global warming,[256] and which would have directly benefitted the companies' businesses if it had been successful. Further emboldened by the ruling in *Citizens United*, corporations and independent associations representing special interests spent upward of $305 million in the 2010 elections,[257] and large corporations, such as Prudential Financial, Dow Chemical, Goldman Sachs, and Chevron Texaco, were among those that contributed more than $1 million to the U.S. Chamber of Commerce to support various issue campaigns.[258]

Compounding these large expenditures has been the trend of Major Political Players concealing their identities and thus attempting to avoid accountability for their actions[259] by funneling their money through third-party, nonprofit PACs that are organized under section 501(c) of the Internal Revenue Code.[260] If the Court allows these organizations to continue in this manner, Major Political Players will continue to influence elections and campaigns while they remain hidden from the public eye. This secrecy poses a serious threat to the decision-making ability of the electorate, who have a right to know who is supporting a political cause and who would stand to benefit from the outcome. Even scholars who argue in favor of affording more weight to privacy and anonymity in this process acknowledge the "importance of scale"[261] and recognize the value

255. *See* PUB. CITIZEN, *supra* note 238 (situating *Citizens United* in the history of spending in the political process and discussing the explosion in corporate spending post-*Citizens United*).

256. Margot Roosevelt, *Billionaire Koch Brothers Back Suspension of California Climate Law*, L.A. TIMES BLOG (Sept. 2, 2010, 11:16 PM), http://latimesblogs.latimes.com/greenspace/2010/09/koch-brothers-global-warming-prop-23-climate-change.html.

257. J. Crewdson et al., *Secret Donors Multiply in U.S. Election Spending*, BLOOMBERG (May 19, 2011, 3:01 AM), http://www.bloomberg.com/news/2011-05-19/secret-donors-multiply-in-u-s-with-finances-dwarfing-watergate.html.

258. Eric Lipton, et al., *Top Corporations Aid U.S. Chamber of Commerce Campaign*, N.Y TIMES, Oct. 21, 2010, at A1.

259. Hasen, *supra* note 106; *see* Michael Luo & Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. TIMES, Sept. 20, 2010, at A1.

260. 26 U.S.C. § 501(c) (2006) (allowing organizations to accept unlimited donations while not requiring disclosure of their donors so long as their "primary purpose" is not to influence elections); *see* Luo & Strom, *supra* note 259.

261. McGeveran, *supra* note 253, at 880.

that is gleaned by exposing these groups, whose "large donations . . . effectively bankroll a candidate or ballot initiative."[262]

This argument of scale can also be used to distinguish the Court's upholding of anonymity in *McIntyre* while rejecting it in *Doe*. In *McIntyre*, the speech of one individual might have been silenced if she had been forced to identify herself.[263] Major Political Players can and do make the same argument that compelled disclosure will chill their speech. On balance, however, large corporations and wealthy individuals are far better equipped to defend themselves against the consequences of their participation in the process, and I argue that the right of the electorate to know about large donations outweighs any such claim that Major Political Players might make. First, the state's interest in informing voters of who is supporting candidates or initiatives is far more compelling in light of the political clout that Major Political Players wield, and the economic boycott is an effective tool for exposing and criticizing those with disproportionately powerful voices. Second, in situations where Major Political Players are supporting a view that the general public commonly holds, which was the case in both *ProtectMarriage.com* and *Doe*, reliance on a harassment claim that is historically reserved for minor parties is disingenuous at best. Third, the First Amendment does not guarantee the right to be free of criticism for speech. If Major Political Players inject themselves into the political process in ways that can influence entire elections, they must exhibit "civic courage" and be willing to face the consequences of their actions. As Justice Stevens pointed out in his concurring opinion in *Doe*, "The right [of freedom of speech] . . . is the right to speak, not the right to speak . . . anonymously."[264]

262. *Id.*

263. *See supra* notes 78–86 and accompanying text.

264. Doe v. Reed, 130 S. Ct. 2811, 2831 n.4 (2010) (Stevens, J., concurring).

V. CONCLUSION

This Note has the limited goal of exploring a question that the Supreme Court has not answered: can Major Political Players that have made large donations or lent organized support to ballot initiatives use threats of economic boycotts, which are protected First Amendment activity, as justification for exemptions from disclosure? As a result of *Citizens United*, Americans go into the 2012 voting cycle facing unlimited campaign spending on ads that were paid for by PACs and nonprofits about whom we will know little other than the name that they use for advertising. Voters will be making decisions on critical issues, including the election of a president, "knowing less about those trying to shape their views . . . than they have since secret money helped finance the Watergate burglary and re-elect President Richard Nixon in 1972."[265] Data from the Center for Responsive Politics show that outside conservative and overwhelmingly Republican organizations outspent liberal, Democrat-leaning groups by about two to one in general, and by seven to one when donors were kept secret.[266]

There has been plenty of push back from the Democratic Obama administration in an effort to curtail the effects of *Citizens United*. In March 2011, the U.S. Securities and Exchange Commission agreed with NorthStar Asset Management, a Home Depot shareholder, that Home Depot must include on its ballot a proposal requiring the board to disclose its policies on electioneering contributions and consult with its shareholders on such policies.[267] This was a sharp reversal of existing corporate law rules, which had previously considered corporate political speech decisions as ordinary business decisions that did not require input from shareholders.[268] In April 2011, a draft executive order was leaked; it required any government contractor to disclose political contributions exceeding $5,000 that its executives made to organizations that engage in political advertising, including

265. Crewdson et al., *supra 257*.

266. *Id.*

267. Robert J. Jackson, Jr., *SEC Strengthens Shareholders' Role in Corporate Political Speech Decisions*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (May 15, 2011, 11:04 AM), http://blogs.law.harvard.edu/corpgov/2011/05/15/sec-strengthens-shareholders%E2%80%99-role-in-corporate-political-speech-decisions/.

268. *Id.*

501(c) organizations and the U.S. Chamber of Commerce.[269] In May 2011, it became known that the Internal Revenue Service (IRS) sent letters to five donors to nonprofit advocacy groups that were organized under section 501(c) of the Internal Revenue Code; the letters stated that the donors could be liable for gift taxes on their donations.[270] The IRS dropped that effort in July 2011 under pressure from conservative groups, who argued that the decision to audit those donors was politically motivated and potentially in violation of the First Amendment.[271] A *Wall Street Journal* op-ed denounced the leaked executive order as an effort to "veto the Supreme Court" decision in *Citizens United* and to "suppress corporate political activity," invoking the *Patterson* decision and its warning of the potential for economic retaliation, and also pointing to the harassment that supporters of Proposition 8 faced.[272] "[I]f the president succeeds in reducing the free-speech rights of business today, it will be far easier to limit the same rights of other Americans tomorrow," the op-ed threatened.[273] But none of these "remedies" are aimed at individuals like Margaret McIntyre or Marjorie Christofferson. It is important not to lose sight of the fact that the businesses that complain about forced disclosure are, for the most part, Fortune 500 companies that are looking to influence elections and campaigns while they stay hidden from the public eye and insulated from any consequences.

In a society that has become increasingly politically polarized, it is imperative that the Supreme Court set guideposts for the battles to come over the use of the economic boycott in the electoral process. If, in fact, our elections are to be fair and open, and if they are to embody the historically enunciated First Amendment goals encouraging free speech and open debate, the Court should take an active role both in determining what activity constitutes harassment and in curtailing claims that do not merit that designation. While the

269. *See* David Marston & John Yoo, *Political Privacy Should Be a Civil Right*, WALL ST. J., Apr. 27, 2011, at A17.

270. Stephanie Strom, *I.R.S. Drops Audits of Political Donors*, N.Y. TIMES, July 7, 2011, at B1, *available at* http://www.nytimes.com/2011/07/08/business/irs-drops-audits-of-donors-to-political-groups.html?_r=1&ref=politics.

271. *Id.*

272. Marston & Yoo, *supra* note 269.

273. *Id.*

Court's embrace of compelled disclosure in both *Citizens United* and *Doe* indicates its willingness to increase the information that is available to the electorate, the Court must now go one step further: it must preclude Major Political Players from impeding the right of the citizenry to engage in economic boycotts by turning such activity into claims for harassment.[274]

274. Shortly before this Note went to press, two district courts held in *Doe v. Reed*, No. C09-5456BHS, 2011 U.S. Dist. LEXIS 119814 (W.D. Wash. Oct. 17, 2011), and in *ProtectMarriage.com v. Bowen*, No. 2:09-cv-00058-MCE-DAD, 2011 U.S. Dist. LEXIS 128229 (E.D. Cal. Nov. 4, 2011), that plaintiffs' evidence of harassment was insufficient to justify exemptions to the disclosure of the petition signers' and the contributors' identities, respectively. *Doe*, 2011 U.S. Dist. LEXIS 119814, at *49–50; *ProtectMarriage.com*, 2011 U.S. Dist. LEXIS 128229, at *106–10. As a result, the courts in both cases denied summary judgment for the plaintiffs. *Doe*, 2011 U.S. Dist. LEXIS 119814, at *51; *ProtectMarriage.com*, 2011 U.S. Dist. LEXIS 128229, at *110. These holdings are consistent with the thesis of this Note, although they do not directly discuss the issue of economic boycotts as First Amendment activity. Also just before publication, I became aware of two recent articles that cover some of the same territory that the reader may be interested in. Richard Briffault, *Two Challenges for Campaign Finance Disclosure After* Citizens United *and* Doe v. Reed, 19 WM. & MARY BILL RTS. J. 983 (2011); Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After* Citizens United *and* Doe v. Reed, 27 GA. ST. U. L. REV. 1057 (2011).