

CAMPAIGN FINANCE, FREE SPEECH, AND BOYCOTTS

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Today I'm going to talk about free speech, money and politics, and the right to boycott. This [referring to slides in my PowerPoint] is a picture of my father.¹ He was a sculptor and a very creative thinker, and when I was a youngster, he used to say to me, "Ciara, remember to ask the big questions." The big question that I'm going to ask today is: Will fear of harassment prevent us from having a transparent democracy?

Now I would submit to you that at the heart of campaign finance is a desire for accountability,² and in a democracy, we cannot have accountability without a certain degree of transparency.³ If you look online, you can find a lot of information about people's political speech and their political expenditures and their contributions to candidates.⁴ And whether you think this is a good or a bad thing usually depends on your prior notions about campaign finance. On the good side, having all of this data online really democratizes access.⁵ It means that eve-

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1. *John Torres, Jr. photograph (photographed by Peter A. Juley & Son)*, SMITHSONIAN, available at https://www.si.edu/object/siris_jul_37139 [<https://perma.cc/ZNG6-7ES9>] (last visited Nov. 11, 2017).

2. See generally Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443 (2014); *Campaign Finance and Transparency*, SUNLIGHT FOUND., https://sunlightfoundation.com/policy/municipal_campaign_finance/ [<https://perma.cc/XZW5-YU88>] (last visited Aug. 2, 2017).

3. See Gary D. Bass et al., *Why Critics of Transparency Are Wrong*, BROOKINGS INST. 6 (Nov. 24, 2014), <https://www.brookings.edu/wp-content/uploads/2016/06/critics.pdf> [<https://perma.cc/AX2C-AK5R>].

4. See *About Our Data*, NAT'L INST. ON MONEY IN ST. POLS., <https://www.followthemoney.org/our-data/about-our-data/> [<https://perma.cc/FX8Z-E57S>] (last visited Nov. 11, 2017); *About the Site*, OPEN SECRETS, <https://www.opensecrets.org/about/tour.php> [<https://perma.cc/FM28-NBGS>] (last visited Aug. 2, 2017).

5. See Michael Kang, *Campaign Disclosure in Direct Democracy*, 97 MINN. L. REV. 1700, 1706 (2013).

ryday citizens can look up who's giving money to their senator, to the candidates for president, to candidates for Congress, and it allows for the press to write their follow-the-money stories. On the downside, it could lead to harassment,⁶ which is one of the things I want to focus on today.

I want to pause here. This is Rick Santorum getting glitter-bombed.⁷ I do not endorse harassment of any type, including glitter-bombing Rick Santorum. But the fear of harassment is one of the things that people who object to campaign finance disclosure regimes often point to.⁸ And usually when they are litigating campaign finance disclosure law, saying that it is unconstitutional, one of the things that they will point to is the *NAACP v. Alabama*⁹ line of cases.¹⁰ And they will make the argument that *NAACP* allows for anonymous political spending.¹¹ I think that's wrong on a number of fronts, including that it wasn't a case about campaign finance.

Another reason why I worry about this is I think it's just an ahistorical use of this case. So what did they actually do in the case? The Supreme Court was looking at the NAACP's request to keep their membership list confidential from the state of Alabama in the 1950s.¹² This case, in its time, was rightly decided, and if anything, the Supreme Court underplayed the risk faced by individuals who were known to be members of the NAACP. One of the things that the Supreme Court pointed out is that members of the NAACP faced the threat of physical coercion.¹³

6. *See id.*

7. Elahe Izadi, *A brief history of politicians getting glitter-bombed*, WASH. POST: THE FIX (Mar. 6, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/03/06/a-brief-history-of-politicians-getting-glitter-bombed> [<https://perma.cc/Z8BQ-UQAG>].

8. *See* Kang, *supra* note 5; David M. Primo, *Full Disclosure: How Campaign Finance Disclosure Laws Fail to Inform Voters and Stifle Public Debate*, INST. FOR JUSTICE 7 (Oct. 2011), http://www.ij.org/images/pdf_folder/other_pubs/fulldisclosure.pdf [<https://perma.cc/77NJ-4XG4>].

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

10. *See, e.g.*, Dale E. Ho, *NAACP v. Alabama and False Symmetry in the Disclosure Debate*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405 (2012); Thomas B. Edsall, *In Defense of Anonymous Political Spending*, N.Y. TIMES (Mar. 18, 2014), <https://www.nytimes.com/2014/03/19/opinion/edsall-in-defense-of-anonymous-political-giving.html> [<https://perma.cc/MD4Y-D4LT>].

11. *See, e.g.*, Edsall, *supra* note 10.

12. *Patterson*, 357 U.S. at 466.

13. *Id.* at 462.

The reason why I think that they undersold that is, actually, during the '50s and '60s, you could be killed for your participation in the NAACP. And so what do I mean by that? I mean it literally.

I'm from Florida. This is a Christmas Day bombing in Florida that killed a member of the NAACP and his wife on Christmas Day.¹⁴ That's '51. Then George Washington Lee, who was an NAACP leader in Mississippi, is killed in '55.¹⁵ Thomas Brewer, an NAACP leader, is killed in Georgia in '56.¹⁶ One of the few ones I may mention today that you've already heard of, Medgar Evers, is killed in Mississippi in '63.¹⁷ But the killings go on after that. Vernon Dalmer is killed when his house and car are firebombed in '66.¹⁸ And Wharlest Jackson was also killed in a car bombing in '67.¹⁹

So why doesn't this chapter of dark history explain what the Supreme Court should do in a campaign finance case? Partially, I think—I hope—that this type of racially and politically motivated violence is something that is in our past. But I think what motivated the Supreme Court in looking at campaign finance law is this other different dark chapter in American history. Between *Buckley v. Valeo*²⁰ and the Roberts Court, the approach of the Supreme Court when looking at campaign finance laws was the fear of another Richard Nixon.²¹ And one

14. See Josh Sanburn, *NAACP Bombing Evokes Memories of Civil Rights Strife*, TIME (Jan. 7, 2015), <http://time.com/3658470/naacp-bombing-terrorist-attack-hate-crime/> [<http://perma.cc/5Y89-VNGF>].

15. See David T. Beito & Linda Royster Beito, *The Grim and Overlooked Anniversary of the Murder of the Rev. George W. Lee, Civil Rights Activist*, HIST. NEWS NETWORK (May 5, 2005), <http://historynewsnetwork.org/article/11744> [<https://perma.cc/5MT3-GK5Q>].

16. See *Thomas H. Brewer*, EMORY UNIV.: THE GEORGIA CIVIL RIGHTS COLD CASES PROJECT (Aug. 14, 2014), <https://scholarblogs.emory.edu/emorycoldcases/thomash-brewer/> [<https://perma.cc/9TT7-EYQV>].

17. See David Stout, *Byron De La Beckwith Dies; Killer of Medgar Evers Was 80*, N.Y. TIMES (Jan. 23, 2001), <http://www.nytimes.com/2001/01/23/us/byron-de-la-beckwith-dies-killer-of-medgar-evers-was-80.html> [<https://perma.cc/TUF6-RAT2>].

18. See *Justice Revisited*, NEWSWEEK (Mar. 6, 1994), <http://www.newsweek.com/justice-revisited-186146> [<https://perma.cc/4ZCS-A7MJ>].

19. See *id.*

20. 424 U.S. 1 (1976).

21. See Jeffrey Toobin, *Money Unlimited*, NEW YORKER (May 21, 2012), <http://www.newyorker.com/magazine/2012/05/21/money-unlimited> [<https://perma.cc/28FY-JBYZ>].

of the things that came out in the Watergate hearings around Richard Nixon was his secretive fundraising and his illegal fundraising.²² There was an enormous amount of illegal corporate contributions that came in to his campaign.²³

Now, as a result of Watergate and Nixon, we got the FECA, the Federal Election Campaign Act, in '74.²⁴ There are many different aspects of FECA that Mr. Smith already alluded to, but one additional part of FECA is that it requires disclosure,²⁵ and that part of FECA was also challenged in the *Buckley* case.²⁶ In the *Buckley* case, the Supreme Court distinguishes *NAACP v. Alabama*, finding that there are three governmental interests that justify disclosure of money in politics.²⁷ They are the voter informational interest, the anti-corruption interest, and the anti-circumvention interest.²⁸ They do carve out an exception within *Buckley* itself—*Buckley* is a hundred pages long. It's a long and ornate opinion. There is an exception for minority parties if they would be subject to the type of harassment that the NAACP was subject to back in the '50s.²⁹

Disclosure also is improved at the federal level in BCRA, otherwise known as McCain-Feingold.³⁰ In BCRA, the law covers disclosure of who is funding electioneering communications.³¹ This has been challenged repeatedly,³² and the Supreme

22. See Jill Abramson, *Return of the Secret Donors*, N.Y. TIMES (Oct. 16, 2010), <http://www.nytimes.com/2010/10/17/weekinreview/17abramson.html> [https://perma.cc/TFM9-YU36].

23. See Ciara Torres-Spelliscy, *How Much is an Ambassadorship? And the Tale of How Watergate Led to a Strong Foreign Corrupt Practices Act and a Weak Federal Election Campaign Act*, 16 CHAPMAN L. REV. 71, 84–86 (2012).

24. See Jaime Fuller, *From George Washington to Shaun McCutcheon: A brief-ish history of campaign finance reform*, WASH. POST: THE FIX (Apr. 3, 2014, 9:15 AM), <https://www.washingtonpost.com/news/the-fix/wp/2014/04/03/a-history-of-campaign-finance-reform-from-george-washington-to-shaun-mccutcheon/> [https://perma.cc/YJ4V-X6JX].

25. *Buckley*, 424 U.S. at 7.

26. *Id.* at 11.

27. *Id.* at 66–68, 69–70.

28. *Id.* at 66–68.

29. *Id.* at 123.

30. See Norman J. Ornstein & Thomas E. Mann, *Myths and Realities About the Bipartisan Campaign Reform Act of 2002*, BROOKINGS INST. (May 7, 2002), <https://www.brookings.edu/articles/myths-and-realities-about-the-bipartisan-campaign-reform-act-of-2002/> [https://perma.cc/7RSJ-9HJZ].

31. See *id.*

Court has upheld disclosure both in *McConnell v. FEC*³³ and in *Citizens United v. FEC*,³⁴ eight to one. But the argument that harassment should be the exception that swallows the rule of disclosure has been one that has been litigated again and again and again.³⁵ One of the cases where this came up was a case called *ProtectMarriage.com v. Bowen*.³⁶ This arose out of the Prop. 8 fight in California, and the judge in that case upheld campaign finance disclosure in part because he felt like the plaintiffs who were trying to keep their political contributions secretive were trying to be able to speak; they were spending money to support Prop. 8.³⁷ But they didn't want anyone to respond back to them. The judge in that case also said that disclosure prevents the wolf from masquerading in sheep's clothing.³⁸

Citizens United also made this argument, that to name their donors would subject them to a risk of harassment.³⁹ But the Supreme Court rejected this, noting that their donors had been disclosed in the past and there is no actual evidence of harassment of those donors.⁴⁰

This harassment argument was also brought up in a case called *Doe v. Reed*.⁴¹ *Doe v. Reed* is a case where the fight was whether petition signatures would be disclosed or not.⁴² And again, the argument was if we disclose the signatories, they will be subject to harassment.⁴³ But in *Doe v. Reed*, the Supreme Court once again sides with disclosure,⁴⁴ including Justice Scal-

32. See Katherine Shaw, *Taking Disclosure Seriously*, YALE L. & POL'Y REV.: INTER ALIA (Apr. 3, 2016, 4:30 PM), http://ylpr.yale.edu/inter_alia/taking-disclosure-seriously [<https://perma.cc/4D69-Q222>].

33. 540 U.S. 93, 105, 108, 140 (2003).

34. 558 U.S. 310, 367 (2010); see also Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES (June 21, 2010), <http://www.nytimes.com/2010/01/22/us/politics/22scotus.html?pagewanted=all> [<https://perma.cc/625B-GNMU>].

35. See Kang, *supra* note 5, at 1700.

36. 599 F. Supp. 2d 1197, 1204 (E.D. Cal. 2009).

37. *Id.* at 1217.

38. *Id.* at 1209.

39. *Citizens United*, 558 U.S. at 370.

40. *Id.*

41. 561 U.S. 186, 193 (2010).

42. *Id.* at 191.

43. *Id.* at 193.

44. *Id.* at 199.

ia, who has an oft-quoted concurrence in *Doe v. Reed*.⁴⁵ Justice Scalia says, “[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.”⁴⁶

One of the reasons that I want better disclosure is if we’re going to have corporations in our politics—and I fully expect that we will have that for at least another half century if not longer—then I want to know this as a citizen, I want to know it as a consumer, and I want to know it as an investor. Here’s an example of what informed political spending can do: Target spends in a gubernatorial race in 2010, and when the public learns about this, it is boycotted.⁴⁷ Some of the imagery from that boycott is still available online.⁴⁸

But it’s worth remembering that boycotts are American as apple pie, and they are legal. Some of our Founding Fathers ran boycotts trying to protest slavery.⁴⁹ Benjamin Franklin actually encouraged what we would now call a “boycott.”⁵⁰ Franklin was trying to get people to buy maple syrup as an alternative to slave-grown cane sugar.⁵¹ Boycotts were also instrumental in the Civil Rights Movement.⁵² And finally, in ‘82, the Supreme

45. *Id.* at 228 (Scalia, J., concurring).

46. *Id.*

47. Meena Hartenstein, *Target boycotted for donating \$150,000 to MN right-wing Republican Tom Emmer’s campaign for governor*, N.Y. DAILY NEWS (Aug. 3, 2010), <http://www.nydailynews.com/news/national/target-boycotted-donating-150-000-mn-right-wing-republican-tom-emmer-campaign-governor-article-1.200635> [<https://perma.cc/D4ZF-3WKH>]; Ciara Torres-Spelliscy, *Citizens Get United*, ADVOCATE (Mar. 24, 2011), <http://www.advocate.com/news/news-features/2011/03/24/citizens-get-united> [<https://perma.cc/K2KT-7TEW>].

48. See, e.g., Hartenstein, *supra* note 47.

49. See Theresa J. Lee, *Democratizing the Economic Sphere: A Case for the Political Boycott*, 115 W. VA. L. REV. 531, 555–65 (2012).

50. See LAWRENCE B. GLICKMAN, *BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA* 63 (2009).

51. *Id.*

52. See Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 47–48 (1994); Sascha Cohen, *Why The Woolworth’s Sit-In Worked*, TIME (Feb. 2, 2015), <http://time.com/3691383/woolworths-sit-in-history/> [<https://perma.cc/GY8P-7A38>].

Court recognizes that political boycott is also protected First Amendment activity.⁵³

Now we can see some money in politics. There are really great resources if you're interested in this. Go to followthemoney.org or opensecrets.org. If you look at those sources, you can find publicly traded-company spending in our elections, using their *Citizens United* rights.⁵⁴ Our good friend Chevron was the big spender in 2012.⁵⁵ They were back in the midterm election, though they were no longer the biggest spender.⁵⁶ They were back at the top of the pile in 2016, and they had a lot of company.⁵⁷

Those last couple of slides showing publicly traded company spending in federal elections likely understate the amount of corporate spending that is done at the federal level because we have this dark money problem.⁵⁸ There has been about three-quarters of a billion dollars in dark money spent over the past six years.⁵⁹ This has worried not just election lawyers, but also corporate lawyers. So corporate lawyers have asked the Securities and Exchange Commission for a new rule that would require transparency of corporate political spending,⁶⁰ and over a

53. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 914, 933 (1982); see also GARY MINDA, *BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND* (1999).

54. FOLLOWTHEMONEY.ORG, <https://www.followthemoney.org/> [https://perma.cc/99QV-8TVN] (last visited Aug. 7, 2017); OPEN SECRETS, <https://www.opensecrets.org/> [https://perma.cc/H6VC-VLER] (last visited Aug. 7, 2017).

55. *Top Donors, 2012 Cycle*, OPEN SECRETS, <https://www.opensecrets.org/outsidespending/contrib.php?cmte=C00504530&cycle=2012> [https://perma.cc/T2H5-4DUR] (last visited Aug. 7, 2017).

56. *Top Donors, 2014 Cycle*, OPEN SECRETS, <https://www.opensecrets.org/outsidespending/contrib.php?cycle=2014&cmte=C00504530> [https://perma.cc/6JDR-G7TD] (last visited Aug. 7, 2017).

57. *Top Donors, 2016 Cycle*, OPEN SECRETS, <https://www.opensecrets.org/outsidespending/contrib.php?cycle=2016&cmte=C00504530> [https://perma.cc/9T7B-K6GG] (last visited Aug. 7, 2017).

58. See generally Ciara Torres-Spelliscy, *Dark Money as a Political Sovereignty Problem*, 28 KING'S L.J. 239 (2017).

59. *Political Nonprofits (Dark Money)*, OPEN SECRETS, https://www.opensecrets.org/outsidespending/nonprof_summ.php [https://perma.cc/H859-RNCS] (last visited Aug. 7, 2017).

60. Letter from Comm. on Disclosure of Corporate Political Spending Petition for Rulemaking, to Elizabeth Murphy, Sec'y, U.S. Sec. & Exch. Comm'n (Aug. 3, 2011), available at <http://www.sec.gov/rules/petitions/2011/petn4-637.pdf> [https://perma.cc/Y9G6-L4QF].

million members of the public have written in to the Securities and Exchange Commission asking for them to adopt such a rule.⁶¹ But the SEC is working against the same political background that all of us are working under, which is an increasing polarization on partisan lines.⁶²

My good friends at Pew have found that there used to be a lot more overlap between Republicans and Democrats, but they are pulling farther and farther and farther apart.⁶³ To wit: according to Pew, and this is a couple years ago in 2014, 27% of Democrats see the Republican Party as a threat to the nation's wellbeing; not to be outdone, 36% of Republicans see the Democratic Party as a threat to the nation's wellbeing.⁶⁴ It is as if we can no longer stand one another. And add into this mix a question put to voters on the eve of not this last election but the previous one. Voters were asked, "Would you change your buying behavior based on a corporation's political spending?"⁶⁵ And a staggering 79% said they would.⁶⁶

And of course, there's technology; there's an app for that. If you want to know more about the brands you're buying and the stances that that corporation has taken, there are at least three apps: Buycott, Buypartisan, and 2ndVote.⁶⁷ And this election has not helped our bipartisan problem—or partisan problem, depending on how you want to think of it. My favorite boycott was Trump supporters calling for a boycott of *Hamil-*

61. *Comments on Rulemaking Petition: Petition to require public companies to disclose to shareholders the use of corporate resources for political activities*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/comments/4-637/4-637.shtml> [<https://perma.cc/4SB3-KRJT>] (last visited Nov. 11, 2017).

62. See *Political Polarization in the American Public*, PEW RES. CTR. 6 (June 12, 2014), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2014/06/6-12-2014-Political-Polarization-Release.pdf> [<https://perma.cc/JGN9-FP9H>].

63. See *id.*

64. *Id.* at 11.

65. See Ciara Torres-Spelliscy, *Shooting Your Brand in the Foot: What Citizens United Invites*, 8 RUTGERS U. L. REV. 1295, 1328 (2016).

66. *Id.*

67. See Al Kamen & Colby Itkowitz, *Want to stop enriching people whose politics you hate? There's an app for that.*, WASH. POST (Aug. 12, 2014), https://www.washingtonpost.com/politics/want-to-stop-enriching-people-whose-politics-you-hate-theres-an-app-for-that/2014/08/12/bcf68d42-2251-11e4-86ca-6f03cbd15c1a_story.html [<https://perma.cc/9Z4E-3TGN>].

ton⁶⁸—maybe the rest of us can get tickets. But I think the second part is a little bit more disturbing. This is a real CNN headline: “Trump supporters call to boycott Pepsi over comments the CEO never made.”⁶⁹ So, in this maelstrom, you’re likely to get some innocent companies being targeted with boycotts. From the other side, there has been this effort called “Grab Your Wallet” targeting Trump-branded products and retailers that sell Trump-branded products.⁷⁰ And there’s already a new app for this called “Boycott Trump” if you can’t keep where you need to boycott straight.⁷¹

So I think we’re going to see more fights like the one we just witnessed between Nordstrom and Ivanka Trump,⁷² and if you want to learn more, you can read about it in my book.⁷³

68. See Seth Kelley, *Donald Trump supporters call for ‘Hamilton’ boycott in defense of Mike Pence*, BOS. HERALD (Nov. 20, 2016), http://www.bostonherald.com/entertainment/arts_culture/2016/11/donald_trump_supporters_call_for_hamilton_boycott_in_defense_of [<https://perma.cc/95ZD-ZRA9>].

69. Shannon Gupta, *Trump supporters call to boycott Pepsi over comments the CEO never made*, CNN (Dec. 6, 2016), <http://money.cnn.com/2016/11/16/news/companies/pepsi-fake-news-boycott-trump/index.html> [<https://perma.cc/V9LF-2D4A>].

70. Sarah Halzak, *The woman behind the boycott that is pressuring retailers to dump the Trumps*, WASH. POST (Feb. 13, 2017), <https://www.washingtonpost.com/news/business/wp/2017/02/13/the-woman-behind-the-boycott-that-is-pressuring-retailers-to-dump-the-trumps/> [<https://perma.cc/G9ZR-BWCB>].

71. See Maryam Louise, *Boycott Trump App Ranks Among Top 10 in App Store*, INQUISITR (Dec. 1, 2016), <http://www.inquisitr.com/3758132/boycott-trump-app-ranks-allegedly-among-top-10-in-app-store/> [<https://perma.cc/Y8GU-DZWR>].

72. See Kim Bhasin, *Nordstrom Is Winning the War over Ivanka Trump*, BLOOMBERG (May 7, 2017), <https://www.bloomberg.com/news/articles/2017-03-07/backlash-over-ivanka-trump-didn-t-hurt-nordstrom> [<https://perma.cc/9SLG-7CFT>].

73. CIARA TORRES-SPELLISCY, *CORPORATE CITIZEN? AN ARGUMENT FOR SEPARATION OF CORPORATION AND STATE* (2016).