NAACP V. ALABAMA AND FALSE SYMMETRY IN THE DISCLOSURE DEBATE

*Dale E. Ho**

* Assistant Counsel, NAACP Legal Defense & Educational Fund, Inc. I offer my deepest gratitude to Daniel Morales and Monica Youn for reviewing earlier drafts of this article and/or discussing with me the substantive issues herein, and for providing helpful suggestions. All errors are my own. The views expressed in this article are my own and should not be attributed to the Legal Defense Fund. I presented an earlier version of this article during the "Accountability After *Citizens United*" symposium held by the Brennan Center for Justice at New York University School of Law on April 29, 2011, and am grateful to the Brennan Center for that opportunity.

INTRODUCTION

In the wake of *Citizens United v. FEC*,[1] the legal fight over campaign finance has largely shifted from direct limits on expenditures to disclosure requirements.[2] Opponents of disclosure requirements have frequently invoked *NAACP v. Alabama ex rel. Patterson*,[3] in which the Supreme Court first addressed the role of anonymity in the context of First Amendment protections. The debate mirrors one of the more interesting legal controversies from the past few decades, namely the struggle over the meaning of the Equal Protection Clause[4] and the Court's landmark school desegregation case, *Brown v. Board of Education*.[5]

According to one reading, *Brown* stands for a neutral principle against all racial classifications, regardless of the classification's purpose or effect (the "anti-classification interpretation").[6] But a competing interpretation of *Brown* holds that it is largely concerned with racial subordination and the state's maintenance of an institutionalized caste system (the "anti-subordination interpretation").[7] Viewed through an anti-subordination lens, the anti-classification interpretation of *Brown* is problematic because it decontextualizes race-based

1. 130 S. Ct. 876 (2010).

2. *See* Adam Liptak, *A Blockbuster Case Yields an Unexpected Result*, N.Y. TIMES (Sept. 19, 2011), http://www.nytimes.com/2011/09/20/us/disclosure-may-be-real-legacy-of-citizens-united-case.html. There are, of course, many different types of "disclosure requirements," ranging from "event-triggered" disclosure (i.e., laws that require disclosure of an entity's identity upon purchasing a political advertisement), to "entity-wide" disclosure (i.e., laws that apply to any contributions made by certain types of entities, such as political parties) as discussed in 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, 1058 (2011), to laws that require disclosure of the names of individuals who sign a petition to place an initiative on a ballot. *See* Doe v. Reed, 130 S. Ct. 2811 (2010). Although each of these types of laws raises distinct issues that ultimately must be addressed specifically, I intend the discussion in this article to concern the applicability of *NAACP v. Alabama* to disclosure rules as a general matter. I acknowledge, however, that these broad strokes may obscure important distinctions among the various types of disclosure rules.

3. 357 U.S. 449 (1958).

4. *See, e.g.*, Pamela S. Karlan, *What Can* Brown® *Do For You?: Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L. J. 1049, 1060–68 (2009).

5. 347 U.S. 483 (1954).

6. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring) (Justice Scalia rejected the plurality's suggestion that "governments may in some circumstances discriminate on the basis of race.").

7. *See, e.g.*, Karlan, *supra* note 4, at 1052–53; Goodwin Liu, *"History Will Be Heard": An Appraisal of the Seattle/Louisville Decision*, 2 HARV. L. & POL'Y REV. 53, 64–65 (2008); Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 91 (2007).

classifications from actual social meanings, and ultimately runs counter to the values that *Brown* embodies. Underlying these competing interpretive approaches is a fundamental difference in how each conceptualizes the purpose of the Equal Protection Clause.

This article argues that a similar fault line underlies the recent debate over the meaning of *NAACP v. Alabama*. From one perspective, *NAACP v. Alabama* stands for a neutral proposition that, because compelled disclosure of a speaker's identity may deter that person (or entity) from speaking, such requirements should generally be viewed with suspicion, regardless of to whom they are applied. I refer to this as the "anti-chilling" interpretation of *NAACP v. Alabama*. This view holds that the principles of *NAACP v. Alabama* apply equally to all speakers, regardless of their relative station in society.

Yet *NAACP v. Alabama* can also be understood from a different perspective which acknowledges its historical context and the fact that the target of disclosure in that case was a protected minority group. While *NAACP v. Alabama* was decided on First Amendment rather than Equal Protection principles,[8] the need to have special protections for minority or disfavored speech fits neatly within one tradition of First Amendment jurisprudence: that society as a whole has an interest in robust political discourse, which suffers when the expression of controversial or dissident views is stifled. Viewed from this framework (the "anti-suppression" interpretation), recent efforts to deploy *NAACP v. Alabama* against contemporary disclosure requirements in order to protect powerful corporate donors run counter to the values that originally animated *NAACP v. Alabama*, and involve the same sort of ahistoricism at work in the anti-classification reading of *Brown*. As in the *Brown* context, this clash of views stems from competing visions about the fundamental values underlying the constitutional provision at stake (in this case, the First Amendment rather than the Equal Protection Clause).

Despite many parallels, there is one crucial difference between these two contexts: in the school integration context, courts have largely embraced the purportedly neutral reasoning underlying the anti-classification reading;[9] at the same time, courts have favored a more context-sensitive "anti-suppression" approach in disputes over disclosure.[10] One of the goals of this article is to suggest an explanation for this divergence.

8. *See Patterson*, 357 U.S. at 466.
9. *See infra* text accompanying notes 126–30.
10. *See infra* text accompanying notes 90–115.

This article is divided into three parts. First, I discuss *NAACP v. Alabama*, describing its historical context, the Court's ruling, the structural values animating the opinion, and what I consider to be its chief doctrinal legacy: the "minor parties" exception to disclosure requirements.

Second, I consider recent disputes over contemporary disclosure requirements. Courts have generally recognized that efforts to draw analogies between *NAACP v. Alabama* and recent controversies over disclosure rest on a false symmetry.[11] This false symmetry obscures fundamental differences between the First Amendment harms inflicted by disclosure requirements as applied to minority or dissident groups, and the costs exacted when such rules are applied in most circumstances.

Third, I consider parallels between the struggle over the proper interpretation of *Brown* and the current debate over how to apply *NAACP v. Alabama*. In particular, I highlight similarities between the anti-classification interpretation of *Brown* advocated by proponents of colorblindness, and the anti-chilling interpretation of *NAACP v. Alabama* put forth by opponents of contemporary disclosure laws. Both interpretations rely on a neutral principles approach that largely ignores social context.

Ultimately, I suggest an answer as to why courts have largely adopted a neutral principles approach in the school integration context, but have rejected a similar framework when considering challenges to disclosure laws. A complete answer to this question deserves a more comprehensive treatment than is possible here, but I offer one simple observation: there appear to be differences in courts' intuitions about the nature of the government regulations at issue in these respective contexts. In the Equal Protection context, courts have generally operated from the principle that racial classifications are inherently odious, and that, regardless of the context, heightened scrutiny of race-based decision-making is warranted. With campaign disclosure rules, however, courts are agnostic or even skeptical of the inherent value of anonymous speech and therefore apply a more context-dependent analysis in determining whether disclosure requirements are appropriate in a particular case. The result is that courts apply a context-neutral "anti-classification" principle in the school integration context, but a context-dependent "anti-suppression" principle in the disclosure context.

11. *See, e.g.*, *infra* text accompanying notes 99–102.

I.
NAACP v. Alabama

A. Background

Although *NAACP v. Alabama* was decided in 1958, litigation was initiated in 1956, when Alabama brought suit against the NAACP and demanded that it turn over its membership lists.[12] 1956 was a tumultuous year for the civil rights movement, particularly in Alabama.[13] It was the year that Autherine Lucy became the first African-American student admitted to the University of Alabama.[14] It was also the year of the Montgomery bus boycott,[15] the single event that, perhaps more than any other, catalyzed the modern civil rights movement.[16] The NAACP played significant roles in both events.[17]

These civil rights milestones in Alabama were not effortless triumphs or inevitable victories. 1956 marked a turning point in many ways, perhaps most significantly as the year in which Southern whites began to respond to the civil rights movement with coordinated campaigns of economic reprisals, physical attacks, and bombings. Whereas previous school desegregation campaigns had ended with acquiescence to a court order, "Autherine Lucy was the first black student in the history of desegregation to be greeted with organized violence."[18] On her first day of class, she was greeted by a mob of 1,000 people who chased her into a classroom, chanting, "Let's kill her, let's kill her."[19] The University of Alabama suspended her as though she were responsible for the riot, and when a judge revoked the

12. *See Patterson*, 357 U.S. at 452.

13. In describing these events, I do not mean to describe with historical precision the details of the events as described in the actual record in *NAACP v. Alabama*, or as otherwise known to the Court. I simply mean to paint a picture of the historical moment in order to conjure the atmosphere in which the case was decided.

14. For an overview of the civil rights movement in Birmingham, Alabama, see DIANE MCWHORTER, CARRY ME HOME 96 (2001).

15. *See* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63, at 143–205 (1988).

16. *See* MCWHORTER, *supra* note 14, at 93–94 (stating that with the Montgomery Bus Boycott, "[t]he modern civil rights movement had been born"); *id.* at 109–10 ("The one certain lesson that the boycott had yielded so far was the impossibility of reasoning with segregationists.").

17. The NAACP sponsored Autherine Lucy and NAACP lawyers handled the legal proceedings. *See id.* at 96. *See also* JACK GREENBERG, CRUSADERS IN THE COURTS 218 (1994). In Montgomery, it was Rosa Parks, the secretary of the Montgomery NAACP chapter, whose famous refusal to give up her seat triggered the bus boycott. The NAACP paid the legal bills associated with the boycott. *See* BRANCH, *supra* note 15, at 186–87. *See also* GREENBERG, *supra*, at 212.

18. MCWHORTER, *supra* note 14, at 99.

19. *Id.* at 98–99

suspension, the school's administration responded by expelling her before she could even enroll.[20] Opponents of integration were now "crowing" that violent resistance to desegregation "worked."[21]

Although Rosa Parks and Martin Luther King, Jr. have now achieved something akin to sainthood status, the Montgomery bus boycott was, if anything, even more contentious than the desegregation of the University of Alabama. Multiple bombings—including a bombing of Martin Luther King, Jr.'s home[22]—and other acts of violence led at least one contemporary commentator to remark that Montgomery was on the verge of a "full scale racial war."[23]

While the battle to desegregate Montgomery's buses eventually succeeded after more than a year of struggle, the implementation of the Supreme Court's integration order was also steeped in violence. Three days after the delivery of the Supreme Court's order to desegregate the buses, a shotgun blast was fired into King's home; two days later, a fifteen year-old black girl waiting for a bus was beaten by five white men.[24] Shotgun snipers fired on integrated buses; on one such occasion, a pregnant black woman was injured and hospitalized.[25] Another wave of bombings followed, stretching from the King family home and several churches in Montgomery[26] to Fred Shuttlesworth's church in Birmingham.[27] Law enforcement offered no remedy; after the acquittal of the suspects of one bombing, there were no further prosecutions of any other bombing suspects.[28]

At the time, local government officials in the South often tacitly approved of or even worked in conjunction with the White Citizens' Council or with the Ku Klux Klan to persecute civil rights activists. In order to facilitate the intimidation of NAACP members by private entities, the governments of at least nine states (Alabama, Arkansas, Florida, Georgia, Louisiana, North Carolina, South Carolina, Tennessee, and Texas) sought to obtain NAACP membership lists.[29] Ironically, the state of Louisiana premised its demand for the NAACP's membership lists on a 1924 anti-Ku Klux Klan law that required cer-

20. *See* BRANCH, *supra* note 15, at 181.
21. *Id.*
22. *Id.* at 164–68, 190–91.
23. *Id.* at 168.
24. *See id.* at 196–98.
25. *See id.* at 198.
26. *See id.* at 198–202.
27. *See* MCWHORTER, *supra* note 14, at 132–35.
28. *See* BRANCH, *supra* note 15, at 202.
29. *See* GREENBERG, *supra* note 17, at 217–19. The NAACP faced at least twenty-five simultaneous lawsuits that sought to bar their activities during this period. *See* BRANCH, *supra* note 15, at 222.

tain organizations to file annual membership lists with the secretary of state. The law had never actually been enforced against the Klan, and was invoked by the state for the first time in 1956—against the NAACP.[30]

Meanwhile, in Alabama, where the NAACP had been operating since at least 1918,[31] it was not until 1956 that Attorney General (and later Governor) John Patterson suddenly brought a suit alleging that the NAACP had failed to comply with a state statute requiring foreign corporations to register with the state before doing business there.[32] This action was largely a response to the Montgomery bus boycott.[33] Non-compliance with the state statute was punishable by the imposition of heavy fines, criminal prosecution of the corporation's officers, and injunctive relief demanding that the corporation cease all activities in the state.[34] The goal, in other words, was to put the NAACP out of business—a goal that Alabama successfully accomplished for a number of years.[35]

The NAACP conceded that it had been active in the state for decades, but argued that its activities did not fall within the requirements for registration under the state statute.[36] Nevertheless, Alabama sought the production of extensive records—including the NAACP's membership lists—to document its uncontested allegation that the NAACP had engaged in extensive activities throughout the state.[37] The NAACP responded by producing all requested records other than its membership lists, but was held in contempt by a state court, which imposed a $100,000 fine[38] (equivalent to over $800,000 today[39]), which was more than enough to put the NAACP out of business in Alabama.

30. *See* Louisiana *ex rel.* Gremillion v. NAACP, 181 F. Supp. 37, 38–39 (E.D. La. 1960). Similar litigation would subsequently ensue over Arkansas' effort to obtain the NAACP's membership lists in that state, reaching the high court several years later. *See* Bates v. City of Little Rock, 361 U.S. 516 (1960).

31. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 464 (1958).

32. *See id.* at 451–52.

33. *See* BRANCH, *supra* note 15, at 187.

34. *Id.* at 452.

35. *See* BRANCH, *supra* note 15, at 222; GREENBERG, *supra* note 17, at 218.

36. *See Patterson*, 357 U.S. at 453.

37. *See id.*

38. *See id.* at 454.

39. Calculated using online tool. *Inflation Calculator*, U.S. BUREAU OF LAB. STATS., http://www.bls.gov/data/inflation_calculator.htm (last visited Oct. 18, 2011).

B. *The Court's Decision in* NAACP v. Alabama

The Supreme Court, however, unanimously held that compelled disclosure of the NAACP's membership lists would violate those members' right to freedom of association. From a purely doctrinal standpoint, the decision marked an important development in First Amendment law. It introduced the notion that private activity can chill speech as effectively as state action. Thus, state laws that do not themselves directly restrain speech, but which enable or create the conditions by which private actors can deter expressive conduct, may also fall within the ambit of First Amendment prohibitions. In some cases, anonymity can therefore be essential to preserving First Amendment freedoms: "[C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as direct government sanctions.[40]

The Court rejected Alabama's argument that whatever chilling effect might result from disclosure of the NAACP membership lists would follow "not from *state* action but from *private* community pressures,"[41] and therefore lay outside of First Amendment concerns. In the Court's view, the "interplay of governmental and private action" was sufficient to implicate the First Amendment.[42]

C. *Two Approaches to* NAACP v. Alabama

Generally speaking, there are two perspectives from which to approach First Amendment controversies like the one presented in *NAACP v. Alabama*: an individual rights-balancing perspective, which focuses on the effect of speech restrictions on the individual speaker; or a structuralist framework, which focuses less on the impact of speech restrictions on the speaker herself and more on the effect that such restrictions have on the polity as a whole.[43] A brief look at *NAACP v. Alabama* through each of these competing frameworks is instructive. Each of these frameworks lends itself to a different interpretation of *NAACP v. Alabama*, which I refer to, respectively, as the "anti-chilling" and "anti-suppression" interpretations of the case.

40. *Patterson*, 357 U.S. at 462.
41. *Id.* at 463 (emphasis in original).
42. *Id.*
43. *See, e.g.*, Samuel Issaacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 717 (1998).

1. The Anti-Chilling Interpretation

From a balancing perspective, a court's task in a First Amendment controversy is to weigh the harm that a given speech restriction has on a speaker's expressive activity against the interests asserted by the state in maintaining its regulation. Viewed in this light, the primary purpose of the First Amendment is the protection of individual autonomy, which may only be compromised where the state puts forth a sufficiently compelling interest and tailors its restrictions appropriately.[44]

Here, the state has an obvious interest in ensuring that its rules on corporate activity are followed. However, not only were the state's chosen means ill-suited to advance that interest,[45] but compelled disclosure also placed unacceptably high costs on the NAACP's members. The Court noted that NAACP members would not merely be subject to public scorn, but that the Association "ha[d] made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members ha[d] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[46] The plaintiffs, in other words, faced more than mere criticism for their beliefs; they faced a choice between self-expression and exposure to significant personal injury. The Court observed that "[u]nder these circumstances," forced disclosure of the membership lists amounted to a "substantial restraint upon the exercise by petitioner's members of their right to freedom of association."[47]

Ultimately, in balancing the state's interest in monitoring corporate activity against the harm that compelled disclosure would bring to NAACP members, the Court came down on the side of the NAACP. Thus, *NAACP v. Alabama* can be read as standing for a broad "anti-chilling" proposition that, when initiated by government action, private activity can deter individual expression in a manner that is relevant for purposes of First Amendment analysis.

2. The Anti-Suppression Interpretation

Viewed from a structuralist perspective, the holding in *NAACP v. Alabama* makes equal sense. In this framework, the primary purpose

44. *See, e.g.*, Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2426–27 (2003).

45. *See Patterson*, 357 U.S. at 464.

46. *Id.* at 462.

47. *Id.*

of the First Amendment is not to protect individuals *per se*, but to "advance collective self-determination."[48] That is to say that the First Amendment is not concerned solely with the individual's interest in self-expression, but also with ensuring that public discourse is robust and uninhibited so that our democratic processes function properly.

To be sure, the structuralist viewpoint does not necessarily deny that the protection of political rights, such as freedom of speech and association, has value for the individual holders of those rights; nor does it deny that these are important ends in themselves. But those individual concerns are not the only, or even the primary concerns of the First Amendment. The paradigmatic articulation of this particular view is found in the Court's proclamation in *New York Times v. Sullivan*[49] that First Amendment freedoms are essential because they ensure that public debate on issues of civic importance is "uninhibited, robust, and wide-open."[50]

NAACP v. Alabama predates *Sullivan* by two years and is largely written using the language of rights balancing. Interestingly though, some elements of structuralist concerns are apparent in the Court's reasoning. In fact, it is possible to come to a more complete understanding of the Court's holding if we acknowledge the structuralist elements of the decision. The Court recognized in *NAACP v. Alabama* that society writ large has an interest in ensuring that the political views held by certain disfavored groups can be expressed, concluding that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[51] The Court continued, "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, *particularly where a group espouses dissident beliefs*."[52]

Thus, *NAACP v. Alabama* is susceptible to a structuralist reading in which the Court's holding can be understood as embracing an "anti-suppression" principle, namely that government should not take measures that inhibit the speech of a disfavored minority group, particularly one that has been effectively locked out of the political process. Although the Court did not discuss the larger social context in its decision, it seems implausible that the violent reprisals that faced civil rights activists at the time were not in the minds of the Justices when

48. Tokaji, *supra* note 44, at 2427–28.
49. 376 U.S. 254 (1960).
50. *Id.* at 270.
51. *Patterson*, 357 U.S. at 460.
52. *Id.* at 462 (emphasis added).

this case was decided. Not only did the case coincide with the tumultuous events of 1956 described above,[53] but it was also the same year the Court decided *Cooper v. Aaron*, ordering the desegregation of Little Rock's Central High School under armed federal watch.[54] The Court was well aware of the hostile and often violent responses to the civil rights movement, and of the special protections that civil rights activists needed during the time.

Crucially, in *NAACP v. Alabama*, the NAACP had made an "uncontroverted showing" of harm.[55] Not only did that fact help tip the scales with respect to the likelihood of injury to the plaintiffs, it also illustrated Alabama's callousness, which acknowledged that such reprisals were likely but argued that they were irrelevant. The state's utter disregard for the welfare of its own citizens likely played a role in the Court's decision that heightened protections were necessary for speakers whom the state itself refused to protect or even sought to persecute.

Indeed, even after the case was decided, Alabama continued to try to put the NAACP out of business. Three years later, the Alabama courts issued an injunction prohibiting the NAACP from conducting business in the state, and it took two more trips to the Supreme Court before the case was finally put to rest.[56] As the Supreme Court wryly observed in a later decision, it was notable that the statute invoked by the state in this case had never once been applied in any other instance to try to oust a corporation from doing business in Alabama.[57]

NAACP v. Alabama is a First Amendment case—not an Equal Protection decision—but it appears to be rooted in part in a concern for anti-discrimination principles. In the Equal Protection context, at least, it has generally been the case that heightened scrutiny is warranted when the state disadvantages an already disfavored minority.[58] Arguably, similar concerns inform certain strands of First Amendment jurisprudence. There is an egalitarian intuition underlying some of our

53. *See supra* text accompanying notes 12–42.

54. 358 U.S. 1 (1958) (forcing the prompt desegregation of Arkansas public schools).

55. *Patterson*, 357 U.S. at 462.

56. *See* U.W. Clemon & Bryan K. Fair, *Making Bricks Without Straw: The NAACP Legal Defense Fund and the Development of Civil Rights Law in Alabama 1940–1980*, 52 ALA. L. REV. 1121, 1150–51 (2001).

57. *See* NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 306 (1964).

58. *See* United States v. Carolene Products, 304 U.S. 144, 152–53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

First Amendment jurisprudence that "all citizens should have an equal opportunity to participate in public discourse."[59] This ideal is threatened when the government inhibits the expression of views by a vulnerable minority group, particularly a group that the state is unable or unwilling to protect.

This is not to suggest that the same standards govern First Amendment and Equal Protection jurisprudence, but in circumstances like these, chilling speech would effectively silence a viewpoint, depriving society of a full range of views. In this sense, *NAACP v. Alabama* follows many decisions from that era that were rooted in the context of the civil rights movement and the Court's heightened concern for racial discrimination.[60]

A related point is that although the polity has an interest in ensuring that its democratically enacted statutes—including those governing corporate behavior—are adhered to, it also has a countervailing democratic interest in ensuring that dissident voices are heard in the political process. That interest is heightened when strict majoritarian rule has prevented a minority group from participating fully in the democratic process. In this sense, a structuralist analysis resolves the "counter-majoritarian difficulty."[61] The state's statutes derive their legitimacy from the fact that they were adopted by the people's democratically elected representatives, but the very legitimacy of those democratic processes is called into question when disfavored minori-

59. Tokaji, *supra* note 44, at 2410.

60. *See, e.g.*, *id.* at 2438–39 (describing what Tokaji calls "the First Amendment Equal Protection cases decided during the Civil Rights Movement"); Chesa Boudin, Note, *Publius and the Petition:* Doe v. Reed *and the History of Anonymous Speech*, 120 YALE L. J. 2140, 2165 (2011) (citing, *inter alia*, Harry Kalven, Jr., THE NEGRO AND THE FIRST AMENDMENT 66–70 (1966)). Indeed,

> many of the cases interpreting the First Amendment's application to the states came out of the civil rights movement in the South . . . . [T]he First Amendment doctrine that follows makes sense only because of the historic processes of expanding democratic inclusion in general, and the Fourteenth Amendment in particular; it is a deeply American story inextricably connected to historic struggles for expansion of democratic rights, popular sovereignty, and broader inclusion in civil society.

Id.

61. *See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Bobbs-Merrill Co. 1962) (coining the term "counter-majoritarian difficulty" to describe the democratic problems raised by judicial review, i.e., that, democracy's legitimacy is premised on implementing majority rule, but judicial review empowers unelected judges to overrule the decisions of the majority's elected representatives).

ties are locked out of that process entirely,[62] as was the case for African-Americans in 1950s Alabama.

To be clear, I do not mean to suggest that viewing First Amendment disputes through a structuralist framework necessarily entails a commitment to an anti-suppression exception to disclosure rules. One could, for instance, maintain that disclosure is *always good* from a structuralist perspective, on the grounds that political speech is only useful or informative if its source is made explicit. On the other hand, one could argue that disclosure is *always problematic* from a structuralist perspective, on the grounds that any regulation of speech risks a reduction in public discourse. While neither unequivocal approach makes for good policy, both are consistent with a structuralist approach to First Amendment controversies that understands the primary purpose of the First Amendment to be the promotion of robust public discourse. In any event, for purposes of this article, I describe an anti-suppression reading of *NAACP v. Alabama* as most consistent with a structuralist approach to First Amendment controversies, because both tend to focus primarily on the harm to discourse, rather than on the harm to individual speakers.

Conversely, although I identify a balancing approach to First Amendment controversies with the anti-chilling interpretation of *NAACP v. Alabama*, I do not mean to suggest that these concepts are identical or interchangeable. A balancing approach could, for instance, incorporate anti-suppression concerns on the theory that disclosure tends to inflict more serious injuries on minority or disfavored speakers. Certainly, the harms experienced by civil rights activists in 1950s Alabama far outstrip those alleged by contemporary opponents of disclosure rules today.[63] But, for purposes of this Article, I identify the anti-chilling reading of *NAACP v. Alabama* with a balancing approach, because both tend to focus primarily on the harm to the speaker, rather than on the harm to public discourse more generally.

NAACP v. Alabama, therefore, is best understood not only from an individual rights perspective, but also as a case that fits within a structuralist approach to First Amendment law. This is not to suggest that the case can be reduced to structuralist concerns, only to note that such concerns are present in its holding. In 1950s Alabama, compelled disclosure of the NAACP's membership lists would have been detri-

62. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 101–04 (1980) (describing judicial review as appropriate "to polic[e] the mechanisms by which the [democratic] system seeks to ensure that our elected representatives will actually represent").

63. *See infra* text accompanying notes 89–95.

mental both to the rights of individual NAACP members and to society's broader interest in open debate on controversial issues. Cries of counter-majoritarianism against judicial intervention ring hollow when the political system itself provides little means for minority participation.

D. The Legacy of NAACP v. Alabama

NAACP v. Alabama can therefore be understood through two different, if overlapping, frameworks. As discussed below, the most important doctrinal innovation arising from *NAACP v. Alabama*'s initial holding is probably the "minor parties" exception to campaign finance disclosure obligations,[64] a rule that is best understood as embodying an anti-suppression imperative.

Before discussing that exception, however, it is useful to discuss disclosure more generally. As a general matter, courts have typically favored disclosure in the campaign finance context. Society certainly has a strong interest in robust public discourse, but "robust" is not necessarily equivalent to "uninhibited," or "limitless." Indeed, "some degree of regulation is necessary for anyone's speech rights effectively to be exercised—without some regulation, after all, competing groups would be hard pressed to determine who gets to use the stage at what times."[65]

The Court has recognized that certain restrictions on speech—such as disclosure obligations—can be justified under some circumstances where they actually serve to enhance, rather than inhibit public debate. For example, as the Court first explained in *Buckley v. Valeo*,[66] disclosure of campaign contributions "can be justified by a governmental interest in provid[ing] 'the electorate with information' about the sources of election-related spending."[67] In its recent decision in *Citizens United v. FEC*, the Court further explained that "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[68] In other words, although disclosure obligations are undoubtedly regulations on speech, they actually can enhance the quality of public discourse by increasing the amount of information

64. *See infra* text accompanying notes 72–76.

65. Tokaji, *supra* note 44, at 2450 (emphasis omitted).

66. 424 U.S. 1 (1976).

67. *See* Citizens United v. FEC, 130 S. Ct. 876, 914 (2010) (citing Buckley v. Valeo, 424 U.S. 1, 66 (1976)).

68. *Id.* at 916.

available to the public.[69] The Court in *Citizens United* held that this "informational interest alone [wa]s sufficient to justify" the disclosure obligations at issue in that case.[70] In the Court's view, any costs of disclosure in terms of chilled speech may often or even usually be subsumed by the subsidiary benefits that disclosure has on public discourse.[71]

Yet this analysis can only be true where disclosure actually results in *more* public information. Where disclosure results in the complete silencing of a viewpoint, the calculus necessarily shifts. Thus *Buckley* also made clear that, while disclosure obligations in the campaign finance context may be valid as a general matter, this is not necessarily the case where "minor parties" are involved.[72] Citing *NAACP v. Alabama*, the Court held that minor parties may in some circumstances be exempt from disclosure obligations because minor parties

> are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances fears of reprisal may deter contributions to the point where the movement cannot survive. The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena.[73]

Although the Court did not find that such an exemption was applicable in *Buckley*, only a few years later, the Court applied the minor parties exception to members of the Socialist Workers Party (SWP) in *Brown v. Socialist Workers '74 Campaign Committee*.[74] There, the Court noted that SWP members had been subjected to both private and government-based harassment, and noted the severity of that harassment (including shots fired at an SWP office, harassment from police, and the loss of employment for twenty-two SWP members because of their party membership).[75] Crucially, however, the Court's ruling was not based solely on the severity of that harassment and the costs that such harassment placed on the autonomy of individual SWP members

69. *See, e.g.*, California Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1105 (9th Cir. 2003).

70. *Citizens United*, 130 S. Ct. 876, at 915–16.

71. There are, of course, other views. *See, e.g.*, BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS (2002) (arguing in favor of anonymity in donations as a means of broadening participation in public discourse); Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837 (1998) (same).

72. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 70–74 (1976).

73. *Id.* at 71.

74. 459 U.S. 87, 98 (1982).

75. *See id.,* at 99.

alone. Instead, its holding was premised on the notion that the "potential for impairing First Amendment interests is substantially greater" where a minor party is involved, because disclosure in this particular context risks chilling a dissident voice entirely, and thus depriving society of a point of view altogether.[76]

What this discussion should reveal is that the legacy of *NAACP v. Alabama* can best be understood as embodying an anti-suppression, rather than an anti-chilling, principle. After all, if the case merely embodied a context-neutral anti-chilling imperative, its holding—that disclosure sometimes creates a risk of harm so severe as to implicate First Amendment freedoms—should be applied equally to minor and major parties. If that were the case, the sole questions would be the nature of the injury with which a speaker is threatened, and whether those threatened injuries pose an unacceptable risk to the speaker's autonomy. But courts ask other questions as well, such as the identity of the speaker and that person or party's relative status in society, because the ultimate concern is ensuring that a viewpoint does not disappear from public debate.

Thus, the minor parties exception illustrates that *NAACP v. Alabama* stands for a proposition more nuanced than a simple anti-chilling imperative. Of course, the nature of a threat plainly matters, insofar as its severity bears upon whether disclosure will result in chilling of speech at all. But it is the context in which the threat takes place that is ultimately dispositive. Who receives the threats (e.g., whether it is a major party, with a strong presence in public debate, or a minor party that is relatively powerless in comparison) is ultimately a decisive question. Who makes the threat (e.g., whether the government cannot control or even participates in the harassment) is another important factor.

Ultimately, the chief legacy of *NAACP v. Alabama*—the minor parties exception to disclosure rules—operates within an analytical framework that demands attention to social context. And the values that the decision embodies are not limited to individual autonomy, but rather concern our capacity for collective self-governance.

II.
NAACP v. Alabama and Recent Challenges to Disclosure

Over fifty years later, *NAACP v. Alabama* is enjoying something of a renaissance; it is regularly invoked in efforts to shield speakers

76. *Id.* at 92.

from disclosure requirements. Most of these efforts, however, have been unsuccessful. As we shall see, courts have largely rejected attempts by plaintiffs challenging disclosure rules to analogize their own situations to that of the plaintiffs in *NAACP v. Alabama*. While these decisions are often framed largely in balancing terms, they, like *NAACP v. Alabama* itself, can be understood more fully when read through a structuralist prism. Particularly when considering as-applied challenges, courts have incorporated structuralist concerns into their decision-making, adopting a context-sensitive mode of inquiry that recognizes that symmetrical application of *NAACP v. Alabama*'s holding to powerful or majority speakers is not always appropriate.

A. *Facial Challenges to Disclosure Rules: Guidance from* Citizens United

Before turning to specific cases where plaintiffs have invoked *NAACP v. Alabama*, it is worth starting with a brief discussion of the Supreme Court's guidance in *Citizens United* as to the facial validity of disclosure rules. As we know, many forms of direct restrictions on speech—which, under the Court's current jurisprudence, include many types of limits on campaign contributions—are clearly vulnerable to facial challenges under the First Amendment. *Citizens United*, however, makes clear that disclosure rules are generally on safe ground in facial challenges (with one exception for rules requiring disclosure for *de minimis* campaign contributions).[77] This is because of the simple reason that the burdens imposed by disclosure rules are, generally speaking, not as heavy as those imposed by direct regulations on speech.[78]

However, given that some commentators have questioned the facial validity of disclosure rules as a general matter,[79] this point requires some emphasis. Although private activity in response to disclosure can *in some contexts* effectively chill speech, this is certainly not the case in *all* or even most instances. The reactions of pri-

77. *See infra* note 87.

78. *See Citizens United*, 130 S. Ct. at 915 ("[D]isclosure is a less restrictive alternative to more comprehensive regulations of speech.").

79. *See, e.g.*, Steve Simpson, Doe v. Reed *and the Future of Disclosure Requirements*, 2010 CATO SUP. CT. REV. 139, 160–62 (2010) (arguing that, as abridgements of speech, disclosure laws violate the First Amendment); Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, 2002 CATO SUP. CT. REV. 57, 74–83 (2002) (arguing that anonymity is a component of free speech); David Marston & John Yoo, Op-Ed., *Political Privacy Should Be a Civil Right*, WALL ST. J., April 27, 2011, at A17 (characterizing a disclosure law as "the latest salvo in the Obama Administration's war on the First Amendment rights of political opponents").

vate actors in response to disclosure are contingent and attenuated, such that ruling in broad strokes appears to be inappropriate. These sorts of challenges are therefore best suited to as-applied rather than facial claims.

Thus, although the Supreme Court aggressively moved to strike down limits on independent campaign expenditures in *Citizens United*,[80] the Court voted 8-1 in favor of upholding disclosure obligations on such expenditures, making clear that, as a general matter, disclosure rules will not be considered as burdensome as direct regulations. As the majority opinion noted, "Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'"[81] In other words, unlike direct restrictions, compelled disclosure will not *necessarily* result in less speech or harm public discourse in all cases.

It is worth noting that the disclosure rules at issue in *Citizens United* were quite broad. They required not only that Citizens United be identified as the funder of *Hillary: The Movie*, but also that certain funders of Citizens United themselves be identified.[82] The Court did not consider these wide-sweeping disclosure obligations to be facially problematic.[83]

Again, *NAACP v. Alabama* is instructive. Obviously, if the state of Alabama had tried to ban the NAACP outright, *NAACP v. Alabama* would have been a much easier case (and a less interesting one). Of course, the intent of the state was to eliminate the NAACP from civic life, and it was largely effective in doing so for a number of years, but that fact tells us nothing about the *facial* validity of disclosure rules. Universally compelled disclosure of all private organizations' membership lists in 1956 would not have had the same practical effect on all such organizations—members or funders of white Citizens' Councils, for instance, probably had little to fear about the disclosure of their identities. Indeed, *NAACP v. Alabama* was itself not a facial challenge. The NAACP did not argue that compelled disclosure of an organization's membership lists is unconstitutional *per se*. Rather, to shield itself from disclosure, the NAACP made a particularized show-

80. 130 S. Ct. 876 (2010).

81. *Id.* at 914 (quoting Buckley v. Valeo, 424 U.S. 1, 64 (1976) and McConnell v. FEC, 540 U.S. 93, 201 (2003)) (internal citations omitted); *see also Citizens United*, 130 S. Ct. at 915 ("The court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech.").

82. *See Citizens United*, 130 S. Ct. at 913–14.

83. *See id.* at 913–16.

ing that its members specifically would be subject to threats and harassment in the event of forced disclosure.[84]

To win a facial challenge to a disclosure rule, a plaintiff would have to show that disclosure places an impermissible burden on speakers or contributors in many if not most circumstances, which would seem nearly impossible to demonstrate. Ultimately, if disclosure truly presented a substantial risk of retaliation in a wide variety of contexts, we would expect there to be more empirical examples of such reprisals. After all, there are many disclosure rules currently in place at the federal and state levels. As one commentator suggested: "Given the public availability of contributor information, it would appear to be a relatively simple task to survey a statistically valid sample of contributors to determine if they have experienced any form of retaliation as a result of the disclosure of their identities."[85]

While there have been some studies touted as purportedly showing that individuals might think twice about contributions under a particular disclosure regime, such studies generally do not reveal whether individuals would in fact refrain from donating in response to a disclosure obligation, or even whether or not contributors were aware of existing disclosure rules.[86] Thus, it is hardly surprising that courts in recent years have uniformly rejected facial challenges to disclosure rules, with the exception of those that impose disclosure obligations for de minimis contributions.[87]

B. As-Applied Challenges to Disclosure Rules

If facial challenges are unlikely to succeed, what about as-applied challenges, like *NAACP v. Alabama* itself? Although as-applied challenges remain available if a group can show a "reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed,"[88] such instances are likely to be uncommon. Citizens United, for instance, "offered no evidence" that it or its members faced "threats or reprisals."[89]

However, there have been a number of recent controversies where plaintiffs have invoked the specter of harassment and intimidation, particularly in the same-sex marriage context. Although recent

84. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

85. Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 273 (2010).

86. *Id.* at 277–78.

87. *See* Torres-Spelliscy, *supra* note 2, at 1084–96.

88. Citizens United v. FEC, 130 S. Ct. 876, 914 (2010).

89. *Id.* at 916.

challenges to disclosure rules have been largely unsuccessful, a brief look at how courts have applied *NAACP v. Alabama* in these cases is instructive, as it demonstrates that courts typically approach these disputes with an eye towards structuralist concerns.

1. ProtectMarriage.com v. Bowen

ProtectMarriage.com v. Bowen[90] provides an instructive example. There, supporters of Proposition 8, the anti-gay marriage ballot initiative in California, challenged the state's Political Reform Act of 1974,[91] which requires the disclosure of the names of contributors of more than one hundred dollars to a ballot measure. The plaintiffs, who had donated to the pro-Proposition 8 campaign, invoked *NAACP v. Alabama* to support their claim to anonymity, alleging that supporters of Proposition 8 had endured "nothing short of domestic terrorism," and "live in constant threat of . . . physical harm."[92] Here, in the plaintiffs' own words, are some examples of the harms and threats they had endured:

- "back window of car broken[;]"
- "home egged and floured multiple times[;]"
- "bumper sticker ripped off of car[;]"
- "feared physical violence would erupt at sign-waving events[;]"
- "people made obscene gestures and yelled at people" participating in a rally;
- "openly gay members of declarant's country club give him looks of disdain and do not greet him as he passes, unlike formerly warm greetings . . . ."[93]

Overall, the *ProtectMarriage.com* plaintiffs set the bar very low for what amounts to "domestic terrorism" these days. Judicial intervention is probably not necessary to prevent awkward silences at the country club. To be fair, however, the plaintiffs also alluded to other more serious events, including an apparent death threat received by the mayor of Fresno after participating in a pro-Propostion 8 rally.[94] Including bumper sticker thefts and impolite exchanges at the country club in their examples of reprisals, rather than simply allowing the more serious incidents to stand on their own merit, was probably a strategic error. It is possible that the plaintiffs simply concluded that

90. 599 F. Supp. 2d 1197, 1199 (E.D. Cal. 2009).

91. Political Reform Act of 1974, CAL. GOV'T CODE §§ 81000–91014 (West 2011).

92. Plaintiffs' Memorandum in Support of Motion for Summary Judgment at n.31, ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197 (E.D. Cal. 2009).

93. *Id.*

94. *See id.* at 28 (describing the mayor of Fresno receiving a death threat after participating in a pro-Proposition 8 rally).

they had insufficient evidence of more serious incidents, leading them to argue that they only needed to show "that threats, harassment, and reprisals *exist*, not that they [are] *severe*."[95] In any event, given that the vast majority of incidents that the plaintiffs cited were relatively minor, the court concluded that they had failed to establish the requisite "reasonable probability"[96] of harm.

While they were ultimately unsuccessful, the plaintiffs' more serious allegations demonstrate that their claims were far from implausible from a balancing perspective. To be sure, the harms alleged did not rise to the level of the harms experienced by civil rights advocates in 1950s Alabama. But it is difficult to know precisely where the line should be drawn, and it would set an almost impossible burden to require that a speaker must face injuries rising to the level of bombings before the First Amendment protects her from disclosure. "The civil rights movement was arguably a unique event in our nation's history for which there is no current parallel with respect to the heated emotions and entrenched opposition that arose."[97] Even if the harms alleged by the *ProtectMarriage.com* plaintiffs pale in comparison to those faced by civil rights activists in the South during the 1950s, one death threat and repeated property damage are nonetheless significant and traumatic events.

This is particularly the case when compared to the State's asserted interest. Although the state certainly has an interest in making information available concerning political donations, the amounts at issue here were relatively small, as the statute at issue required disclosure of contributors who made donations above $100.[98] It is therefore not entirely clear why, from a purely balancing perspective, the plaintiffs' claims should have been dismissed.

Ultimately, it seems that a more complete understanding of the court's ruling is possible through a structuralist analysis. At first glance, one might think that a structuralist framework would require a finding *for* the plaintiffs. After all, the dispute over same-sex marriage is controversial, and the societal interest in ensuring that a wide array of views is expressed to ensure vigorous public debate in this context is no less strong than it was in *NAACP v. Alabama*.

As the court observed, however, successful plaintiffs challenging disclosure rules in the past have always been members of "groups

95. Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 20, ProtectMarriage.com v. Bowen (E.D. Cal. 2009) (emphasis added).

96. ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1216 (E.D. Cal. 2009).

97. Mayer, *supra* note 85, at 274.

98. Political Reform Act of 1974, CAL. GOV'T CODE § 84211 (West 2011).

seeking to further ideas historically and pervasively rejected and vilified by both this country's government and its citizens," indicating that "minor status is a necessary element" of a successful claim.[99] Here, unlike in *NAACP v. Alabama*, where the plaintiffs held "dissident" views,[100] the *ProtectMarriage.com* plaintiffs held the *majority* view—a view that prevailed in the actual referendum at issue. Although they continued to cite *NAACP v. Alabama* in subsequent filings, the plaintiffs themselves acknowledged during oral argument for their preliminary injunction request that they "could not in good conscience analogize their current circumstances to those of . . . the Alabama NAACP *circa* 1950."[101] Indeed, as the district court noted in rejecting the plaintiffs' request for a preliminary injunction, proponents of Proposition 8 raised nearly thirty million dollars and had the support of over seven million voters, or over fifty-two percent of the electorate.[102]

One way of getting at this issue is to ask whether, in this particular case, society's interest in robust political discourse would be harmed by disclosure in a manner similar to the risk that was present in *NAACP v. Alabama*. I do not intend to comment on the *value* of the ideas at issue in either case, but rather to highlight what I think is a crucial distinction: whether or not society will be deprived of a particular viewpoint as a result of disclosure requirements. In *ProtectMarriage.com*, the answer seems to be no, given the relative status and popularity of the Proposition 8 proponents. We are not dealing with a "discrete and insular minority."[103]

This is why a balancing approach alone may not fully explain the court's decision; after all, it may have been the case that at least some pro-Proposition 8 speakers would be chilled by the application of California's disclosure requirements. From a structuralist perspective, though, resolution of this case seems to be a simpler matter. There appeared to be little risk that application of disclosure requirements in this context would deprive society of a robust debate by silencing a particular point of view. Nor, relatedly, was there any answer to the counter-majoritarian question that is raised whenever courts are invited to strike down legislation. After all, what special need is there for judicial intervention to strike down (or more properly, restrict the

99. *ProtectMarriage.com*, 599 F. Supp. 2d at 1215.
100. 357 U.S. 449, 462 (1958).
101. *ProtectMarriage.com*, 599 F. Supp. 2d at 1214.
102. *Id.* at 1215.
103. United States v. Carolene Products, 304 U.S. 144, 152–53 n.4 (1938).

application of) a democratically enacted statute as applied to the majority itself?

2. Doe v. Reed

Doe v. Reed[104] presented perhaps an even more challenging case. Ultimately, the plaintiffs in *Doe* were unsuccessful, but various courts' treatment of their claims revealed that, even where the balancing of interests does not decisively tilt toward the state, as-applied challenges to disclosure rules are difficult to mount because the structural concerns underlying *NAACP v. Alabama* are simply not present in most contemporary contexts.

The *Doe* plaintiffs arguably had a stronger claim than did the *ProtectMarriage.com* plaintiffs, at least from a balancing perspective.[105] For one, they were not campaign contributors, but had merely signed a petition to place a referendum on the statewide ballot.[106] Moreover, unlike the *ProtectMarriage.com* plaintiffs, who submitted evidence in broad strokes about retaliation against anti-same-sex marriage activists generally, the plaintiffs in *Doe* alleged that disclosure of their identities directly exposed them individually to harassment, including from at least one organized group that sought to publish contributors' names on a website and encouraged people to have "uncomfortable conversation[s]" with them.[107]

Nevertheless, the Court not only rejected the plaintiffs' facial challenge to the disclosure statute, it also did not express much optimism about the plaintiffs' likelihood of success on their as-applied claims.[108] For instance, as Justice Sotomayor opined in her concurrence, an as-applied challenge can succeed only in "the rare circumstance in which disclosure poses a reasonable probability of serious and widespread harassment that the [s]tate is unwilling or unable to control."[109] On remand, the district court ultimately found for the state. As in *ProtectMarriage.com*, there was only "minimal testi-

104. 130 S. Ct. 2811 (2010).

105. On the other hand, one could argue that the *Doe* plaintiffs had a more difficult case than did the *ProtectMarriage.com* plaintiffs. The *Doe* plaintiffs had not contributed to a campaign, but had signed a referendum petition, which is arguably a form of legislating not entitled to the same level of First Amendment protection accorded to speech. *See* Boudin, *supra* note 60, at 2142.

106. *Reed*, 130 S. Ct. at 2815.

107. *Id.* at 2825 (Alito, J., concurring).

108. *Id.* at 2821.

109. *Id.* at 2829 (Sotomayor, J., concurring). Justice Stevens expressed similar views in his concurrence, joined by Justice Breyer. *Id.* at 2831–2832 (Stevens, J., concurring) (noting the plaintiffs were "unlikely" to succeed because their alleged injury from compelled disclosure was "speculative").

mony" concerning harassment, which the court determined "cannot be characterized as 'serious and widespread.'"[110]

However, there were important differences between this case and *ProtectMarriage.com*. Here, the state could not rely on the anti-corruption and public information interests typically used to justify disclosure requirements in the campaign contribution context. Instead, it asserted the more limited interest of requiring disclosure so as to permit private organizations to verify the validity of petition signatures, a goal that the state had many other means to advance.[111]

Arguably, then, the balancing of interests was not tilted decisively in the state's favor. Nevertheless, the district court found for the state because it was impossible for the *Doe* plaintiffs to claim that the structural interests underlying the exception to disclosure rules were on their side. As the court noted, this was not a situation "similar to the NAACP in the 1950s," where a disfavored group was "forced to retreat from the marketplace of ideas, which would materially diminish discourse."[112] Although the plaintiffs had some testimony of harassment, it was not of the kind that the state was unable or unwilling to prevent, as all of the plaintiffs indicated that police involvement had been entirely sufficient or even unnecessary.[113] Thus, the court found that this situation was "quite different" from cases "wherein the government was actually involved in carrying out the harassment, which was historic, pervasive, and documented."[114]

Ultimately, this scenario was simply not the kind with which *NAACP v. Alabama* was concerned. The plaintiffs' most provocative allegations involved the threat that the names and personal information of petition signers would be posted on the Internet for "uncomfortable conversations."[115] While this undoubtedly raises some privacy concerns, the purpose of *NAACP v. Alabama* was to promote discourse, not to prevent people from talking to each other—regardless of how uncomfortable those conversations may be.

---

110. Doe v. Reed, No. C09-545 BHS, 2011 WL 4943952, at *18 (W.D. Wash. Oct. 17, 2011).

111. The majority gave short shrift to the fact that state statutes provided for many other means to satisfy that interest; for instance, with various criminal and civil regulations governing the initiative process, and, most notably, with a separate independent canvassing and verification procedure that did not entail disclosure of the identity of petition signatories to the general public. *See* 130 S. Ct. at 2842 (Thomas, J., dissenting).

112. *Reed*, 2011 WL 4943952, at *8–9.

113. *Id.* at *18.

114. *Id.*

115. *Id*.

3. Economic Reprisals: The Case of Target Corporation

One more example is notable, though it has yet to become the subject of litigation. Some commentators have argued against disclosure requirements applied to corporate contributors, pointing to economic forms of retaliation, such as consumer boycotts, which corporate donors could face as a result of disclosure. These observations are challenging because, while the harassment alleged by anti-same-sex marriage advocates seems to be quite different in kind from that experienced by the NAACP in the 1950s, the threatened economic reprisals in these situations (consumer boycotts) are actually quite similar in nature, at least on the surface, to some of the economic harms alleged in *NAACP v. Alabama* and *Socialist Workers* (*i.e.*, employer blacklists).

For example, the Minnesota-based retail company, Target, was recently the subject of a consumer boycott in response to $150,000 in campaign contributions made to a Minnesota gubernatorial candidate opposed to same-sex marriage.[116] The boycott ultimately led Target to change its process for approving political donations,[117] prompting a spokesperson for the U.S. Chamber of Commerce to complain that "[m]andatory disclosure laws, like breaches in privacy laws, can squelch speech," and that disclosure requirements have been used to "harass[ ] the business community."[118] Similarly, David Marston and John Yoo have recommended that proponents of disclosure obligations "revisit *NAACP v. Alabama*," arguing that such rules raise "the specter of retaliation . . . and harassment" against corporate donors.[119]

As of this writing, disclosure rules applied to corporate donors have not been challenged on this basis,[120] so it is not yet clear how courts will view claims in this context. For instance, courts could hold that these situations are indeed analogous, finding that a consumer boycott is essentially the inverse of an employer blacklist, and that the

116. Brian Montopoli, *Target Boycott Movement Grows Following Donation to Support "Antigay" Candidate*, CBSNEWS.COM (July 28, 2010), http://www.cbsnews.com/8301-503544_162-20011983-503544.html.

117. *See* Jim Spencer, *U.S. Chamber Fights Donation Disclosure Rules*, STAR TRIB. (May 7, 2011), http://www.startribune.com/local/121409069.html.

118. *Id.*

119. *See* Marston & Yoo, *supra* note 79.

120. The Minnesota disclosure statute is currently the subject of ongoing litigation before the *en banc* Eighth Circuit, after a three-judge panel had previously sustained the law. *See* Minnesota Citizens Concerned for Life, Inc. v. Swanson, 640 F.3d 304 (8th Cir. May 16, 2011), *reh'g en banc granted, opinion vacated*, 640 F.3d 304. The precise issue on appeal, however, is whether the Minnesota statute should be construed as directly limiting corporate expenditures, or as only imposing certain disclosure requirements.

threat of such boycotts is a sufficient reason to exempt corporations from disclosure.

Alternatively, courts could attempt to distinguish such claims from *NAACP v. Alabama* on a number of grounds, some more convincing than others. First, courts could dismiss such a claim based on the *nature* of the harm, holding that economic harms alone are insufficient to trigger an exception to otherwise valid disclosure rules. The types of injuries faced by civil rights activists in 1950s Alabama, for instance, involved much more than purely economic harms.[121] There is no legal basis, however, for a bright line rule based on the economic nature of a threatened reprisal, and the distinction seems unsatisfactory. Some forms of economic coercion, such as employer blacklists, could, by themselves, be so punitive so as to constitute a significant burden on a speaker's expressive freedoms.

Alternatively, a court could acknowledge that economic injuries alone can be sufficient to trigger First Amendment concerns, but could attempt to distinguish between consumer boycotts and employer blacklists based on the *degree* of injury inflicted. For instance, a court could reason that economic blacklists are inherently more coercive than consumer boycotts, and thus, place more of a burden on expression and autonomy than the former.[122]

But if the purpose of a boycott is in fact to change corporate behavior, and if at least some boycotts are successful, then this is not the sort of categorical distinction that should be decisive from a strict balancing perspective. Focusing on the degree of harm seems to reduce the question to whether or not an economic embargo is *successful*; if that is the case, then it would seem to be irrelevant as to whether or not the target of that embargo is an individual seeking employment or a large corporation seeking customers. In either instance, a success-

121. Martin Luther King, Jr. rejected arguments that the Montgomery bus boycott amounted to the same sort of improperly coercive tactics as the threats facing civil rights activities at the time: "There will be no crosses burned at any bus stops in Montgomery . . . . There will be no white persons pulled out of their homes and taken out on some distant road and murdered." BRANCH, *supra* note 15, at 140 (internal quotation marks omitted).

122. As an empirical matter, some have argued that consumer boycotts are typically ineffective at forcing corporations to change their behavior. Thus, although potentially harmful to a corporation's bottom line, a consumer boycott does not typically result in the same kind of forced choice between expression and survival brought about by an employer blacklist. *See, e.g.*, Philippe Delacote, *Are Consumer Boycotts Effective?*, *available at* http://www.iamz.ciheam.org/GTP2006/FinalpapersGTP2006/19final.pdf (last visited Jan. 25, 2012) (concluding that under ordinary circumstances, consumer boycotts to express disapproval of a corporation's environmental practices are ineffective).

ful economic embargo seeks to coerce the speaker into, at best, changing its practices or at least keeping silent. Thus, if a corporation ceases donations to a particular political cause because a public boycott threatens its continuing viability, it appears analogous—purely on balancing terms—to a scenario where an employee resigns from a political party because of the coercive pressure of an economic blacklist. The harm to autonomy seems to be the same.

The difference, then, does not seem to be the nature or the magnitude of the harm exacted on the *speaker*. Rather, the distinction appears to lie in the effect on *public discourse*. Under ordinary circumstances, boycotts of large corporations in response to their support for certain political causes do not amount to the type of "chilling" of speech that should concern us. In fact, public criticism in the form of consumer boycotts are themselves protected forms of expression.[123]

Courts could therefore hold that there is a difference between an employer blacklist and "legal forms of political protests—boycotts, pickets, angry emails and telephone calls and so on—that are themselves constitutionally protected and even celebrated as demonstrating political engagement and a healthy democracy."[124] As the Supreme Court has held, "[S]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[125] While it is true that a consumer boycott might encourage a business to change its practices, changing a business's practices was, of course, precisely the point of the Montgomery bus boycott. Thus, courts could reason that, if anything, disclosure leading to more informed consumer decisions could be understood as promoting additional expressive activity.

Once again, a balancing approach fails to capture the full range of interests in play; only a structuralist inquiry, which focuses on the quality of public discourse, rather than the injuries to speakers, seems capable of resolving these questions. This analysis, however, recognizes that there may very well be situations where corporate donors could be subjected to forms of economic pressure that would be sufficient to trigger First Amendment concerns. Wherever (1) the views expressed are disfavored, and (2) sufficient private pressure can be

123. *See* ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1218 (E.D. Cal. 2009) ("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 without resort to non-violent means.").

124. Mayer, *supra* note 85, at 276.

125. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982).

brought to bear such that revealing the speaker's identity would chill speech and cause those ideas to disappear entirely from debate, the speaker—whether an individual or a corporate donor—could theoretically be entitled to protection from disclosure. Context appears to be crucial in determining whether protection from disclosure is in fact appropriate in a given case.

III.
False Symmetry

As the discussion above demonstrates, most efforts to deploy *NAACP v. Alabama* during contemporary disputes over disclosure rely on a kind of false symmetry: the notion that, because the structure of the threatened harm is the same (i.e., disclosure leads to public condemnation, which may encumber expression), the situation of contemporary donors subject to campaign disclosure requirements is similar to that of civil rights activists in the 1950s. Courts have generally recognized this as a strained analogy and have rejected these claims. In so doing, they have adopted a context-sensitive, anti-suppression interpretation of *NAACP v. Alabama*.

Analytically, however, there are interesting parallels between the reliance on *NAACP v. Alabama* by opponents of disclosure, and the manner in which opponents of race-conscious school assignment policies have deployed *Brown v. Board of Education*. Courts, however, have been much more receptive in the latter context. The question, then, is why?

As I argue below, one possible explanation for this dissonance may be that fact that courts have generally been hostile towards racial classifications (and, therefore, laws invoking such classifications have been treated as inherently suspect, regardless of context), but are agnostic or even skeptical about the value of anonymous speech, and thus tend to take a more nuanced approach to the context in which disclosure rules are applied.

A. Comparisons to the Equal Protection Context

Just as there are two possible interpretations of *NAACP v. Alabama*, there are two competing ways of reading *Brown v. Board of Education*. The first is an "anti-classification" interpretation, according to which the case's central holding is that the act of classifying an individual according to his or her race is suspect, regardless of the motives, effects, or social meaning of that classification.[126] This read-

126. *See* Karlan, *supra* note 4, at 1061–67.

ing of *Brown* shares two features with the anti-chilling interpretation of *NAACP v. Alabama*: both approaches take individual autonomy as the value that the constitutional provisions at issue are meant to protect, and both employ the same kind of formal, symmetrical reasoning.

For instance, as discussed previously, in the anti-chilling interpretation of *NAACP v. Alabama*, the chief purpose of the First Amendment is to protect the individual right to self-expression. Any disclosure rules that threaten freedom of expression are therefore suspect, regardless of the station of the speaker or, perhaps, even of the nature of the harm threatened. The rule that disclosure should not be required where it may result in harassment, which was originally formulated to protect the reviled civil rights activities of the 1950s, applies equally to those on the winning side of a multi-million dollar political campaign in the 2000s.

Similarly, under the anti-classification reading of *Brown*, the most important goal of the Equal Protection Clause is to protect the individual's right to be free from racial classifications. Because autonomy is the fundamental value at issue, any racial classification—regardless of its purpose or broader social meaning—is suspect. The key is the formal invocation of race, rather than the social context that would give that invocation a particular meaning. Thus, as the Supreme Court held in *Parents Involved in Community Schools v. Seattle School District No. 1*,[127] *Brown*'s prohibition on racial classifications, originally articulated in the context of the racially segregated schools of the Jim Crow era, applies to race-conscious school integration programs designed to increase diversity today.

Both of these approaches are vulnerable to the charge that, in applying the holdings of these cases in a formally symmetrical manner without paying attention to social context, they distort the original purposes of these decisions. Although the anti-classification reading of *Brown* has largely been embraced by the current members of the Supreme Court, it is not without its critics, particularly those who argue that the case embodies an "anti-subordination" principle.

The anti-subordination interpretation holds that *Brown* should be understood as holding that racial classifications are often impermissible, not because they impinge on individual autonomy, but because in some circumstances they serve to subordinate an entire group of people within an institutionalized caste system.[128] From this perspective, *Parents Involved* employs a false symmetry between different types of

127. 551 U.S. 701 (2007).

128. For a broader discussion on this issue, refer to the articles cited *supra* note 7.

racial classifications, and its failure to engage with the historical context in which *Brown* arose obscures crucial dissimilarities between contemporary school assignment programs designed to promote diversity and the segregated schools of the Jim Crow South.[129]

Of course, all legal analysis involves a degree of decontextualization and abstraction. Still, from the anti-subordination perspective, the anti-classification interpretation decontextualizes *Brown* from the very social circumstances that gave it meaning. It compels the rather untenable conclusion that, in the Jim Crow South, white schoolchildren suffered from harms equal to those endured by African-American schoolchildren (or rather, would have suffered equal harms had segregated schools been, in fact, materially equal). This sort of reasoning invokes Herbert Wechsler's stunning assertion that Charles Hamilton Houston "did not suffer more than I" when the two were forced to travel to Union Station in order to dine together while in Washington, D.C., because there were no other integrated restaurants in the city.[130]

Wechsler was correct that the formal nature of the harm was the same (i.e., classification and deprivation of opportunity based on race)—but the essential nature of the harm was obviously quite different for Houston given the social context. This is not to suggest that race-based classifications are not in some sense inherently problematic regardless of to whom they are applied, but simply to acknowledge that the context in which those classifications occur is quite important. Ignoring this context obscures that point, and makes it difficult to engage in a clear appraisal of the actual injury. Put another way, both Wechsler and Houston had an autonomy interest in being free from racial classifications, but the guarantee of equal protection is not reducible to that interest. There is a separate value at stake as well, namely, an egalitarian concern that society should not subordinate members of any particular group on the basis of race.

It is possible to engage in a similar critique of the anti-chilling interpretation of *NAACP v. Alabama*. In making a blanket argument against the application of disclosure rules to ordinary corporate contributors, the U.S. Chamber of Commerce similarly ignores social context and draws an equivalence between all efforts by private actors to exert pressure in response to another's speech. When opponents of disclosure claim that *NAACP v. Alabama* stands merely for the proposition that judicial intervention is warranted whenever the private condemnation of others could chill speech, they ignore the chief leg-

129. *See* Karlan, *supra* note 4, at 1065–66.

130. *Id.* at 1059 (quoting Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959)).

acy of *NAACP v. Alabama* and subsequent decisions concerning anonymity[131]—a concern for the expression of dissident groups, because such expression is essential to robust public discourse.

Indeed, similar formalistic arguments were made at the time of the Montgomery bus boycott, when opponents claimed that the boycott was no better than the coercive tactics used by southern whites opposing integration, such as employment blacklists.[132] Most fair observers would be "at a loss to find any principled analogy between two such greatly diverging sets of circumstances."[133] From an anti-suppression perspective, these arguments misconstrue the purpose of *NAACP v. Alabama*, as instantiated in the minor parties exception to disclosure rules.

Perhaps recognizing this dissonance, Marston and Yoo back away from a direct analogy between contemporary corporate campaign donors and the NAACP of the 1950s, and instead resort to the slippery slope, arguing that if we accept efforts to "reduc[e] the free-speech rights of business today, it will be far easier to limit the same rights of other Americans tomorrow."[134] As we have seen, however, context matters: the *identity* of the party subject to disclosure and its relative position in society are relevant factors.

Traditionally, we have subjected more powerful speakers to disclosure requirements, while at the same time exempting relatively powerless speakers from such requirements in order to shield them from reprisals. This is the very point of the minor parties exception, which we have managed to maintain without slipping down the slippery slope. As-applied challenges to disclosure rules have been successful when raised by groups with relatively "small constituencies and promoting historically unpopular and almost universally-rejected ideas . . . ."[135] The U.S. Chamber of Commerce, with its three hundred thousand members representing three million businesses and $140 million in annual contributions,[136] probably does not need the special protection of anonymity in order for its voice or views to be heard.

131. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 74 (1976) (setting forth the "minor parties" exemption from disclosure rules, because of the unique burdens that members of such parties face as a result of compelled disclosure); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 96–98 (1982) (applying that exception to members of the socialist party).

132. *See* BRANCH, *supra* note 15, at 138.

133. *See* ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1217 (E.D. Cal. 2009).

134. Marston & Yoo, *supra* note 79.

135. *ProtectMarriage.com*, 599 F. Supp. 2d at 1216.

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

Recognition of that fact does not mean that we will, or should, be deaf to pleas for anonymity in other circumstances where such protections are in fact appropriate. Indeed, if circumstances changed, some exceptions to contribution disclosure rules as applied to corporate contributors could be appropriate. But there is no indication that we are approaching such a situation today.

Ultimately, even when the speaker is relatively powerful, disclosure requirements may sometimes provoke responses that may chill speech, imposing some costs on the autonomy of the speaker. But if the anti-suppression interpretation of *NAACP v. Alabama* is correct, then this injury to autonomy is not by itself sufficient to trigger constitutional concerns. If the viewpoints of a chilled speaker continue to have wide expression through other outlets, then there is likely no substantial harm to public discourse, and accordingly, no need for judicial intervention under the First Amendment.

B. Explaining the Dissonance Between the Debates Over Disclosure and School Integration

Why has autonomy become the paramount value underlying the Court's equal protection decisions in the area of school assignments, but not in the Court's First Amendment decisions in the area of disclosure?[137] Why have courts looked to social context and determined that there is a false symmetry between civil rights activists in the 1950s South and wealthy corporate donors faced with disclosure rules today, while rejecting such a contextual approach in the school integration context, where voluntary school integration programs to enhance diversity today have been likened to the segregated schools of the Jim Crow South?

While I do not attempt a comprehensive answer to this complicated question, one possible explanation may lie in differing intuitions about the inherent harm of racial classifications, as compared to the value (or lack thereof) of anonymous speech. Courts have been reflexively skeptical of racial classifications. For instance, in striking down the University of Michigan's race-conscious undergraduate admissions program in *Gratz v. Bollinger*,[138] a majority of the Supreme Court endorsed Justice Stevens' earlier pronouncement that "racial

137. This is a somewhat surprising result, given that the First Amendment actually contains the word "freedom," but the Fourteenth Amendment does not. *Compare* U.S. CONST., amend. I ("Congress shall make no . . . abridging the freedom of speech . . . .") *with* U.S. CONST., amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

138. 539 U.S. 244 (2003).

classifications are simply too pernicious to permit any but the most exact connection between justification and classification."[139] Any racial classification—regardless of purpose or context—has been treated by the current Court as presumptively suspect.

Courts, however, are not reflexively dubious of disclosure; if anything, their skepticism runs in the other direction, against anonymity. The clearest example of this posture can be found in Justice Scalia's concurring opinion in *Doe v. Reed*,[140] where, after a long paean to *viva voce* voting,[141] Justice Scalia concluded that "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed . . . a society which campaigns anonymously . . . [while] hidden from public scrutiny and protected from the accountability of criticism . . . does not resemble the Home of the Brave."[142] Justice Scalia goes further than I would; while I view anonymity as necessary or even valuable in limited circumstances, Justice Scalia seems to regard anonymity as inappropriate in most or even all circumstances. The degree of Justice Scalia's hostility towards proponents of anonymity is striking and, I think, indicative of a broadly shared skepticism of anonymous speech.

At this point, it is helpful to step back for a moment in order to place the debate over disclosure within a broader context. Notwithstanding the discussion above, it is not entirely obvious at first glance that a structuralist analysis would presumptively favor disclosure, as I noted previously.[143] Disclosure may well increase the amount of information for public discourse, but it will also chill speech in at least some circumstances. Indeed, that appears to be the goal for some proponents of disclosure. For instance, the stated goal of some supporters of the DISCLOSE Act,[144] which imposes a range of disclosure obligations on parties such as federal contractors, is actually to deter some speech.[145] These supporters hope that transparency will cause the supporters of one candidate, or one side of an issue, to refrain from saturating the airwaves.[146]

139. *Id.* at 290 (quoting Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting) (internal quotation marks and alterations omitted).

140. 130 S. Ct. 2811, 2832 (2010).

141. *Id.* at 2834–36 (Scalia, J., concurring).

142. *Id.* at 2837 (Scalia, J., concurring).

143. *See supra* text accompanying notes 64–73.

144. Democracy is Strengthened by Casting Light on Spending in Elections Act, H.R. 5175, 112th Cong. (2010).

145. *See* Simpson, *supra* note 79, at 142 (referring to Senator Chuck Schumer's statement that the DISCLOSE Act's "deterrent effect should not be underestimated").

146. The structural justification for this goal is the concept of the "heckler's veto"—a scenario in which a single speaker floods the space for discourse with a single voice,

Both this interest in leveling the playing field as well as the informational interest served by publicizing a speaker's identity discussed earlier[147] must be evaluated in the context of what is lost when anonymity is unavailable. That is, although compelled disclosure can serve a useful purpose under some circumstances by increasing the amount of information available to the public, it is also true that compelled disclosure may inhibit some speakers from expressing their views, thus exacting a reciprocal informational cost, such that "the quality and nature of the debate in the public sphere will inevitably be debased."[148] In other words, the opponents of disclosure have a very real point that there is a risk to public discourse here.

That is not the end of the story, however. From a structuralist perspective, the loss of some speech is not always problematic. If the goal of laws governing speech is to enhance public discourse, it is appropriate to ask whether or not the speech deterred by a given regulation is likely to contribute to the quality of that discourse. The question, in other words, is this: what is the quality of the speech that we risk losing by forgoing anonymity?

Undoubtedly, anonymous speech has served an important role throughout American political history, dating back to the pre-Revolutionary Era and continuing through the Federalist Papers and the years following Independence.[149] While anonymity has been an invaluable tool for enabling the expression of controversial ideas at contentious moments, Justice Scalia correctly observed that anonymity does not appear to have been a preferred mode of political advocacy for most of the nation's history.[150] While it seems unlikely that Justice Scalia would have much sympathy for the notion that disclosure is necessary to "level" the playing field, Justice Scalia appears to have even less sympathy for the notion that the protections of anonymity enjoy an

---

thus drowning out the views of others and therefore inhibiting any actual discourse on an issue. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD PILDES, THE LAW OF DEMOCRACY 332 (3d ed. 2007). In such situations, one could argue that a moneyed speaker—the "heckler"—cannot invoke a right to drown out the speech of others, and that reasonable measures that have the effect of deterring some speech may be desirable in order to create a space where multiple views and ideas can be heard.

147. *See supra* text accompanying notes 65–71.

148. William V. Luneberg, *Anonymity and Its Dubious Relevance to the Constitutionality of Lobbying Disclosure Regulation*, 19 STAN. L. & POL'Y REV. 69, 84 (2008).

149. *See generally* Boudin, *supra* note 60, at 2152–56 (describing history of anonymous speech in America).

150. Doe v. Reed, 130 S. Ct. 2811, 2833–36 (Scalia, J., concurring).

exalted place in the history of American political discourse, and that judicial intervention is necessary to maintain those protections.

Leaving historical questions aside, it is unclear whether, as a general matter, anonymity should be considered a preferred mode of social interaction. The answer to this question is by no means obvious. Some social scientists, for example, have posited a link between anonymity and certain forms of benevolence, such as charitable giving.[151] But there is also a wealth of social science research suggesting that anonymity is not a condition that encourages people to engage in discussion in a thoughtful manner or to behave in a reasonable way.[152] Social scientists have long studied the connection between anonymity and anti-social or unethical behavior, and "it is generally believed . . . that anonymous people tend to choose selfish strategies motivated by self-interest," and "that socially unacceptable behavior . . . (e.g., stealing money) occurs more frequently among anonymous people in a group."[153] Some psychologists have also suggested that anonymity facilitates aggressive behavior,[154] while others have posited that non-anonymous interactions promote individual accountability, enhancing work performance and reducing anti-social behavior.[155]

None of the research suggesting a link between anonymity and anti-social behavior would come as a surprise to anyone who has read the anonymous messages posted in response to an article on Politico.com or Slate.[156] It is probably not controversial to suggest that, particularly in our wired world, anonymity does not necessarily encourage the most enlightened commentary. We have little reason to think that anonymity should be the preferred state of human interactions, political or otherwise. Rather, openness and accountability may be preferable to anonymity in many, if not most, circumstances.

---

151. *See* Tatsuya Nogami, *Reexamination of the Association Between Anonymity and Self-Interested Unethical Behavior in Adults*, 59 PSYCHOL. REC. 259, 259 (2009).

152. *Id.* (citing, *inter alia*, David DeCremer & Müriel Bakker, *Accountability and Cooperation in Social Dilemmas: The Influence of Others' Reputational Concerns*, 22 CURRENT PSYCHOL. 155 (2003); Tom Postmes & Russell Spears, *Deindividuation and Antinormative Behavior: A Meta-Analysis*, 123 PSYCHOL. BULL. 238 (1998)). Nogami also discusses the connection between anonymity and antisocial and/or unethical behavior. *See also* Patricia A. Ellison et al., *Anonymity and Aggressive Driving Behavior: A Field Study*, 10 J. SOC. BEHAV. & PERSONALITY 265 (1995).

153. *See* Nogami, *supra* note 151, at 259.

154. *See* id.

155. *See* Bernard Guerin, *Social Behaviors as Determined by Different Arrangements of Social Consequences: Social Loafing, Social Facilitation, Deindividuation, and a Modified Social Loafing*, 49 PSYCHOL. REC. 565 (1999).

156. *See* Farhad Manjoo, *Troll, Reveal Thyself*, SLATE (Mar. 9, 2011), http://www.slate.com/articles/technology/technology/2011/03/troll_reveal_thyself.html (referring to the web comic Penny Arcade's version of the "online disinhibition effect").

Thus, if the goal in formulating speech regulations is to ensure that they promote reasoned public discourse, it may be the case in most circumstances that providing additional information to the public through disclosure rules outweighs the loss of some anonymous speech. Ultimately, anonymity is not necessarily an inherent good in itself, but something that may be valuable only when it serves an instrumental function, such as when it serves to "protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."[157] As the Court has explained, "anonymity is a shield from the tyranny of the majority."[158] It is not the sort of protection, however, that the majority itself needs.

This appears to be the key to the dissonance in the way that courts have approached school integration versus campaign disclosure. While courts have largely accepted the proposition that there is something categorically suspect about racial classifications, they appear to be skeptical about the notion that compelled disclosure is inherently problematic. Thus, rather than embracing a categorical presumption that laws which destroy anonymity are problematic (akin to the categorical presumption that racial classifications are inherently suspect), courts have adopted a more nuanced, context-sensitive inquiry that attends to the effect that a particular disclosure law, as applied to a particular speaker, has on public discourse. Unlike in the equal protection cases, courts have here decided that context—including *who* is regulated and the relative status of that person or entity in society—is relevant to the inquiry.

Tellingly, in a recent article touting the importance of anonymity, the first three rationales for protecting anonymous speech were that anonymity is necessary to (1) prevent persecution; (2) prevent disenfranchisement; and (3) encourage pluralism.[159] All of these rationales, of course, only make sense where anonymity is a special protection for the unpopular ideas of a minority group. They are less compelling in a broader context. Where anonymity is unnecessary to ensure that there is adequate participation by dissident voices in the marketplace of ideas, it may serve at best to conceal valuable information that citizens would deem useful when evaluating issues and candidates; at

157. McIntyre v. Ohio Elections Commission, 514 U.S. 334, 357 (1995).

158. *Id.* I note that Justice Scalia, in his *Doe* concurrence, went so far as to reject the holding of *McIntyre* as well. In citing Justice Scalia's concurrence, I do not mean to suggest that Justice Scalia would concur with my analysis suggesting that anonymity is appropriate for minority speakers in some instances. Instead, I use the Justice's views of anonymity as an exemplar of judicial skepticism towards the value of anonymous speech.

159. *See* Turley, *supra* note 79, at 75–76.

worst, it may give freedom to our worst impulses to distort, malign, and slander without repercussions.

Conclusion

If *NAACP v. Alabama* continues to have enduring force, it is through the anti-suppression principle that anonymity may be an essential tool for protecting vulnerable minorities from repression at the hands of a hostile majority. These protections benefit not only minority speakers themselves but society as a whole by ensuring that the polity has access to disfavored views. Courts have recognized that applying this rule requires attention to social context because the protections of anonymity are usually unnecessary for individuals or groups other than disfavored minorities.

In so doing, courts have operated from the assumption that individual autonomy is not the sole value that the First Amendment protects. Indeed, if autonomy were the only concern here, then the pro-Proposition 8 advocates in *ProtectMarriage.com* may have been entitled to protection from disclosure. That the court held that they were not indicates an understanding that the First Amendment is about more than individual expression. This is not to say that the individual's right to expression is not important in itself. Judicial intervention in the disclosure context is more likely to be triggered, however, when there is a threat not only to the individual, but to public discourse more broadly.

This is a very different framework from the one generally employed by courts when confronted with equal protection controversies about the meaning of *Brown* in contemporary times. There, courts have applied a rule of formal symmetry detached from social context: racial classifications, whether invoked against the minority or the majority, are deemed presumptively suspect. The individual right to be free of racial classifications prevails regardless of social context. Individual autonomy appears to be the fundamental value at stake; broader social concerns such as substantive equality are treated as relatively less important.

Ultimately, although I posit one possible reason for this dissonance, a full explanation is beyond the scope of this brief article. My principal observation is simply that, in the contemporary dispute over disclosure, unlike in the school integration context, courts have applied a context-sensitive framework that takes note of social status. This approach reflects the recognition that applying *NAACP v. Ala-*

bama's holding in a formally symmetrical manner to the relatively powerful—or even the merely average—without regard to context may undermine rather than affirm the values underlying that decision.