

NOTES

WHO WANTS TO KNOW—AND WHY?: THE SUPREME COURT'S SECRET PURPOSIVIST TEST FOR EXEMPTIONS FROM ASSOCIATION MEMBERSHIP DISCLOSURE LAWS

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In the recent case Doe v. Reed, the Supreme Court announced the test for associations to get exemptions for their members from membership disclosure laws under the First Amendment. The Doe test requires an organization to “show ‘a reasonable probability that the compelled disclosure of personal information will subject [its members] to threats, harassment, or reprisals from either Government officials or private parties.’” However, the Court’s stated test is inconsistent with its membership disclosure cases, including Doe’s own dicta. In response to this inconsistency, this Note identifies the secret two-part purposivist test the Court has actually applied in its eighty years of membership disclosure case law—one that focuses only on “Government officials.” Under its actual test, the Supreme Court asks (1) whether the association deserves judicial protection from the disclosure law at issue because the government has targeted it, and (2) whether the association’s activities are economic or criminal such that disclosure is outside the realm of paradigmatic—and therefore deeply felt—First Amendment harm. This Note then argues that the Supreme Court’s secret test is more consistent with existing doctrine than its announced Doe test, once the private parties that target associations are understood to be like a hostile audience.

INTRODUCTION

As the Internet has facilitated swifter transmission of increasingly permanent records,¹ an individual’s membership in an association can

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¹ See, e.g., *Doe v. Reed*, 130 S. Ct. 2811, 2825 (2010) (Alito, J., concurring) (discussing the ease with which people can build dossiers on persons using Internet materials); *id.* at 2846 (Thomas, J., dissenting) (discussing how the Internet’s “broad dissemination”

cause that individual more trouble than ever.² The individual has less power to control his or her reputation, and ill will toward the association may attach to the individual. Therefore, each member might prefer to keep his or her membership private.

Each member's desire to hide his or her membership is counter-balanced by two competing interests. First, the numerous laws requiring organizations to disclose members' names³ are usually both democratically legitimate and facially constitutional because the requested information is valuable to the polity. Second, a member's unwillingness to reveal his or her membership likely disadvantages the association because, among other reasons, it harms outsiders' perceptions of the group.⁴

In the recent case *Doe v. Reed*, the Supreme Court announced the test for associations to get exemptions for their members from such membership disclosure laws under the First Amendment. The *Doe* test requires an organization to "show 'a reasonable probability that the compelled disclosure of personal information will subject [its members] to threats, harassment, or reprisals from either Government officials or private parties.'"⁵ However, the Court's stated test is

increases the chilling effect of disclosure); *Teens*, WASH. STATE OFFICE OF THE ATT'Y GEN., <http://www.atg.wa.gov/InternetSafety/Teens.aspx> (last visited Mar. 22, 2012) (instructing teenagers that information disclosed on the Internet "is permanent").

² See, e.g., András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC. 586, 605–07 (2011) (finding that resumes including membership in gay rights organizations were less likely to prompt callbacks); *Teens*, *supra* note 1 ("Perhaps an old relationship that you do not want to be associated with any longer remains online for anybody to see.").

³ See, e.g., 2 U.S.C. § 434(b) (2006) (requiring the disclosure of names of individuals who gave more than \$200 to or took more than \$200 from political committees); 13 U.S.C. § 223 (2006) (requiring owners of hotels or apartment houses to disclose the names of tenants to the Census); DEL. CODE ANN. tit. 8, § 102(a)(5) (2011) (requiring corporations to disclose "[t]he name . . . of the incorporator or incorporators"); N.Y. PUB. HEALTH LAW § 2807-m(5-a)(b)(G)(II) (McKinney 2012) (requiring teaching hospitals receiving certain state funds to disclose the names of their clinical researchers); SEC Form 8-K, at 15–16 (2011), available at <http://sec.gov/about/forms/form8-k.pdf> (last visited Mar. 22, 2012) (requiring corporations to disclose the names of new directors and departing directors); Internal Revenue Commission Form 990, at 7, available at <http://www.irs.gov/pub/irs-pdf/f990.pdf> (requiring tax-exempt organizations to disclose the names of "Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors").

⁴ See *infra* notes 183–88 and accompanying text (describing how members' unwillingness to reveal their membership in an organization weakens that organization).

⁵ 130 S. Ct. at 2820 (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam)). Because the *Doe* test is primarily a quote from *Buckley*, I refer to it as the *Buckley* test when chronologically appropriate.

As a matter of procedure, an individual can sue to prevent disclosure of his or her own name, as the John Doe plaintiffs joining Protect Marriage Washington (PMW) attempted to do. However, the cases in this Note suggest that more often the association or its leader sues on the members' behalf.

inconsistent with its membership disclosure cases, including the Justices' intimations about the plaintiffs' as-applied challenge in *Doe* itself. In response to this inconsistency, this Note identifies the secret two-part purposivist test the Court applies in practice.⁶

This Note analyzes key cases in the development of freedom of association and membership disclosure laws to show how the Court's actual test better describes its rulings than its announced test. Under its actual test, the Supreme Court asks (1) whether the association deserves judicial protection from the disclosure law at issue because the government has targeted it, and (2) whether the association's activities are economic or criminal such that disclosure is outside the realm of paradigmatic—and therefore deeply felt—First Amendment harm.⁷

Part I explains that the Court's test announced in *Doe* does not match what the Justices said in *Doe* about the plaintiffs' chances for success on remand, given *Doe*'s facts. Part II describes how the Court has granted exemptions when the government targets associations, unless the Court believes the association's activity is primarily commercial or criminal. Part III argues that, although an association may seek an exemption from disclosure to attract members, anonymity harms the association's reputation. Further, exemptions are doctrinally inappropriate for associations showing a probability of only private harm. Therefore, the secret test requiring government targeting is more doctrinally sound. Part III concludes with a policy argument for the Court's secret test: The test's predictability discourages associations from fighting their political battles in court and shines light on unconstitutional government conduct.

I

“DOE!”: *DOE* IS INCONSISTENT WITH ITS STATED TEST

The Court's *Doe* test for exemptions from membership disclosure laws is derived from *Buckley v. Valeo*,⁸ which said that minor political parties could get exemptions from requirements to disclose the identities of individuals who contributed money to, or received money from,

⁶ In so doing, this Note “take[s] what they say and compare[s] it with what they *do*.” KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 7 (11th ed. 2008).

⁷ See Jed Rubenfeld, *The Paradigm-Case Method*, 115 *YALE L.J.* 1977, 1986–88 (2006) [hereinafter Rubenfeld, *Paradigm*] (describing paradigmatic cases as “exemplary holdings around which the rest of the case law is organized”); Jed Rubenfeld, *The First Amendment's Purpose*, 53 *STAN. L. REV.* 767, 792 (2001) [hereinafter Rubenfeld, *Purpose*] (explaining how paradigmatic cases have defined the scope of the First Amendment). For a discussion of how the First Amendment provides less protection for criminal and business activity, especially in the disclosure context, see *infra* Part II.B.

⁸ 424 U.S. 1 (1976) (per curiam).

these parties. The test requires parties to show “a reasonable probability that the compelled disclosure of [the identities of group members] will subject them to threats, harassment, or reprisals from *either* Government officials *or* private parties.”⁹ The *Doe* Court adopted this test more broadly for all associations.¹⁰ However, the *Doe* test fails to explain what the Justices said in *Doe*. The plaintiffs in *Doe* showed private harassment but not public harassment.¹¹ This private harassment should have been sufficient for an exemption from disclosure under the announced *Doe* test. But, while ruling against the *Doe* plaintiffs quasi-facially, a majority of the Court strongly suggested that the plaintiffs should lose on their as-applied challenge.¹²

In *Doe*, Protect Marriage Washington (PMW)—an association that sponsored a referendum petition to eliminate a Washington state law allowing same-sex civil unions—and two anonymous signatories sued to prevent the State of Washington from releasing the signatories’ identities under Washington’s Public Records Act.¹³ The district court granted a preliminary injunction barring the release of any petition signatures on any referendum petitions without ruling on PMW’s as-applied challenge, in which PMW argued that the Public Records Act was unconstitutional as specifically applied to its petition.¹⁴ The Ninth Circuit used a lower level of scrutiny for the Public Record Act’s burden on referendum petitioning and reversed.¹⁵

On appeal to the Supreme Court, PMW argued that reprisals were likely even though the as-applied challenge was not before the

⁹ *Id.* at 74 (emphases added). *Buckley* was a challenge to numerous portions of the recently enacted Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended by the Federal Election Campaign Act Amendments of 1974, including the requirement to disclose certain campaign contributors and persons to whom certain expenditures were made.

¹⁰ See *Doe*, 130 S. Ct. at 2820 (explaining that the test in *Buckley* is for “those resisting disclosure . . . under the First Amendment”).

¹¹ See *infra* notes 17–19, 38–39 and accompanying text (describing plaintiffs’ showing of harassment).

¹² See *infra* notes 25–26 and accompanying text.

¹³ WASH. REV. CODE ANN. § 42.56.001–.904 (West Supp. 2012). PMW is an association that includes the signatories as members. PMW’s counsel explained at oral argument: “The petition signers are associating with the referendum committee” Oral Argument at 10, *Doe*, 130 S. Ct. 2811 (No. 09-559).

¹⁴ *Doe v. Reed*, 661 F. Supp. 2d 1194, 1202–05 (W.D. Wash.) (“[I]t is likely that the Public Records Act is not narrowly tailored to achieve the compelling governmental interest of preserving the integrity of the referendum process.”), *rev’d*, 586 F.3d 671 (9th Cir. 2009), *aff’d*, 130 S. Ct. 2811 (2010).

¹⁵ The Ninth Circuit held that the Public Records Act only “has an incidental effect on referendum petition signers’ speech,” *Doe*, 586 F.3d at 678, and that the State’s “informational interest” and interest in preserving the integrity of the election process were each important enough for the law to survive intermediate scrutiny, *id.* at 679–80.

Court.¹⁶ PMW's evidence came from a similar petition campaign to eliminate same-sex marriage in California.¹⁷ After California disclosed donors' names, donors had their "car windows broken, homes vandalized, and cars spray-painted" and suffered "boycotts and blacklists of businesses owned by, or employing" donors, "forced [employment] resignations," and "death threat[s]."¹⁸ Opponents displayed maps online showing donors' locations.¹⁹ Amici for PMW noted three other recent disclosures of petition signatories' names that preceded intimidation and physical altercations.²⁰

While PMW's signatories did not face the same intimidation as the California donors,²¹ PMW's opponents who sought the signatories' names used intimidating language, and PMW took these threats seriously. The requesting organizations planned to publish the signatories' names online so that civil union supporters could "have a 'personal and uncomfortable conversation' with any person who signed the petition."²² After PMW's campaign manager and his family received threats, he "made his children sleep in an interior living room because he feared for their safety if they slept in their own bedrooms."²³ If the Justices had applied the test announced in *Buckley* that responded to potential private harm, then the *Doe* Court would have granted PMW an exemption or at least suggested that PMW should win on remand.

¹⁶ Oral Argument, *supra* note 13, at 61 (statement of Justice Ginsburg) ("You [PMW] put it in your pleading, but it wasn't reached by the [district] court."); *see also* Petitioners' Brief at 11–12, 28–29, 31–35, 54–56, *Doe*, 130 S. Ct. 2811 (No. 09-559) (noting that the district court did not reach the *Buckley* "reasonable-probability test," but arguing that the Court should strongly reaffirm the *Buckley* test and that, without an injunction, PMW "would have suffered the irreparable injury of a reasonable probability of threats, harassment, and reprisals").

¹⁷ The *Buckley* Court anticipated that newly formed groups like PMW would have to use such analogy to show disclosure was dangerous to them. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam) ("New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.").

¹⁸ Petitioners' Brief, *supra* note 16, at 3–5.

¹⁹ Reply Brief at 22–23, *Doe*, 130 S. Ct. 2811 (No. 09-559).

²⁰ Brief of Amicus Curiae Alliance Defense Fund in Support of Petitioners at 11–13, *Doe*, 130 S. Ct. 2811 (No. 09-559).

²¹ *But see supra* note 17 (noting that the Supreme Court's standard for new organizations like PMW requires reasoning by analogy).

²² *Doe v. Reed*, 661 F. Supp. 2d 1194, 1199 (W.D. Wash.), *rev'd*, 586 F.3d 671 (9th Cir. 2009), *aff'd*, 130 S. Ct. 2811 (2010).

²³ Brief of Appellees at 48, *Doe*, 586 F.3d 671 (No. 09-35818). PMW also alleged that someone took pictures of the campaign manager's house while his daughter played outside. Plaintiffs' Notice of Motion and Motion for Temporary Restraining Order and Preliminary Injunction, and Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 5, *Doe*, 661 F. Supp. 2d 1194 (No. C09-5456BHS).

Instead, eight Justices affirmed the Ninth Circuit, holding that disclosing any petition signatures under the Public Records Act would not violate the First Amendment.²⁴ This left for remand the issue as to whether PMW could show that *its* petition signatures should not be disclosed. Importantly, eight Justices “agreed that as-applied exceptions” to the State’s disclosure regime “might be permissible upon demonstration of particularized threats of retaliation and reprisal.”²⁵ Of those eight, however, only Justice Alito suggested that the *Doe* plaintiffs should win on remand.²⁶

Indeed, in separate concurrences, a majority of Justices expressed doubts about PMW’s as-applied case.²⁷ In his concurring opinion, Justice Stevens articulated a test that focuses on problems with the government: “For an as-applied challenge to a law such as the PRA to succeed, there would have to be a significant threat of harassment directed at those who sign the petition that cannot be mitigated by law enforcement measures.”²⁸ Stevens’s use of the word “mitigate[],” rather than “prevent” or “halt,” indicates that the harassment can be dealt with by normal ex post sanctions.²⁹ There are two conceivable circumstances when law enforcement could not mitigate the threat of harassment as much as it normally would. First, the government may not be evenhandedly protecting the association members from private harassment or may itself be harassing the association’s members.³⁰

²⁴ Six of those eight Justices joined the majority opinion that expressly adopted the *Buckley* test. *Doe*, 130 S. Ct. at 2820. Only Justice Thomas called for broader anonymity rights. *Id.* at 2847 (Thomas, J., dissenting) (arguing that petition signatories should be able to get anonymity through a facial challenge). Justice Thomas has repeatedly argued for a broad right to anonymity. *See, e.g.,* *Citizens United v. FEC*, 130 S. Ct. 876, 982 (2010) (Thomas, J., concurring in part and dissenting in part) (arguing for a right to anonymous speech).

²⁵ Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 173 n.182 (2010).

²⁶ *Doe*, 130 S. Ct. at 2823 (Alito, J., concurring) (“The widespread harassment and intimidation suffered by supporters of California’s Proposition 8 provides strong support for an as-applied exemption in the present case.”); *see also* *Doe v. Reed*, 132 S. Ct. 449 (2011) (Alito, J., dissenting from denial of injunction) (arguing that denying an injunction on PMW’s as-applied challenge “reveals that th[e] assurance [of an as-applied remedy] was empty”).

²⁷ *See* Rick Hasen, *Initial Thoughts on Doe v. Reed*, ELECTION LAW BLOG (June 24, 2010, 11:22 AM), <http://electionlawblog.org/archives/016266.html> (“[T]here appears to be a majority to read as applied exemptions narrowly . . .”).

²⁸ *Doe*, 130 S. Ct. at 2831 (Stevens, J., concurring).

²⁹ *See infra* Part III.A.2 (discussing the doctrinal normalcy of ex post punishment for private harms, even when the criminal is motivated by his or her target’s speech).

³⁰ The response to the civil rights movement provides the easiest context in which to imagine private and government hostility. For an example of discriminatory refusal to provide law enforcement resources to blacks, *see* Brief for Petitioner at 16–17, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (No. 91), which describes how blacks were

Second, the private harassment may overmatch police resources. However, such situations would be either doomsday scenarios in which the marginal harassment caused by disclosure is essentially irrelevant,³¹ or, more likely, the result of deliberate failures by high-level officials to allocate resources or request help from other governmental bodies.³² Given the reasoning above, under Stevens's test, associations would receive the remedy of exemption only if they could not trust the government to enforce their rights evenhandedly.

PMW could not show that disclosure of their signatories was based on or would lead to government animus. Originally, petition signatures were not subject to public disclosure in Washington.³³ Washington citizens then passed the Public Records Act³⁴ in 1972 by referendum.³⁵ More than a quarter century after the Act's passage, in 1998, Washington declared petitions subject to disclosure under the Public Records Act.³⁶ In 2006, the Secretary of State began disclosing

“refused official protection.” For an example of law enforcement hostility toward blacks, see *Williams v. Wallace*, 240 F. Supp. 100, 104–05 (M.D. Ala. 1965).

³¹ The historical unlikelihood of such an impossible-to-normalize private harassment scenario and the First Amendment issues relating to the threat of societal collapse are discussed *infra* note 52.

³² For an example of state and local officials' ability to draw on others when faced with extraordinary private hostility that outstrips their resources, see ROBERT DALEK, *FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES, 1961–1973*, at 217–18 (1998), which describes how Alabama Governor George Wallace could call on federal help, and ROBERT FREDRICK BURK, *THE EISENHOWER ADMINISTRATION AND BLACK CIVIL RIGHTS 175* (1984), which describes how President Eisenhower sent federal troops to desegregate Little Rock's Central High School after the mayor pled for assistance. For an example of the deliberate underallocation of police resources, compare Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844, 1854–55 (1994), which explains how segregation can lead to an “unequal distribution of political influence and economic resources,” including “inadequate police protection.” For a modern allegation of deliberate resource underallocation, see *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011). *Starr* allowed a prisoner to sue a sheriff for inadequate supervision after being made aware that, among other things, there was not “reasonable security” while “Hispanic inmate gangs [were] attacking African Americans.” *Id.* at 1209.

³³ See *Doe*, 130 S. Ct. at 2826 (Alito, J., concurring) (citing Op. Att'y Gen. of Wash. 55-57 No. 274, at 1–2 (May 28, 1956), available at <http://www.atg.wa.gov/AGOOpinions/opinion.aspx?section=topic&id=10488>) (noting that petition signatures were not disclosed before the Public Records Act). *Contra* Op. Att'y Gen. of Wash. 53-55 No. 152, at 2 (Oct. 23, 1953), available at <http://www.atg.wa.gov/AGOOpinions/opinion.aspx?section=topic&id=13390> (holding that any citizen can “copy or photograph the signatures” on petitions calling for special elections). Apparently no one involved in *Doe* considered this 1953 attorney general opinion.

³⁴ See WASH. REV. CODE ANN. § 42.56.001 (West 2006) (describing the reformatting of a previous version of the Public Records Act in 2006).

³⁵ Brief for Respondent Sam Reed at 6, *Doe*, 130 S. Ct. 2811 (No. 09-559).

³⁶ Brian Zylstra, *The Disclosure History of Petition Sheets*, FROM OUR CORNER, WASH. OFFICE OF THE SECRETARY OF STATE BLOG (Sept. 17, 2009), <http://blogs.sos.wa.gov/FromOurCorner/index.php/2009/09/the-disclosure-history-of-petition-sheets/> (describing the history of petition signatory disclosure).

the petition sheets as digital files instead of as expensive photocopies.³⁷ None of these changes resulted from targeting by the government, as evidenced by the lack of such allegations in *Doe*.

As a result, the petitioners were unable to plead any governmental targeting.³⁸ Immediately after pleading evidence of private harassment, PMW discussed insubstantial government misconduct in California: The police refused to help a same-sex marriage opponent whose yard sign was stolen, and another person “did not report yard-sign theft believing police would provide no assistance.”³⁹ Given that yard-sign vandalism generally goes unpunished, the failure to solve those cases does not show a reasonable probability of government harassment.

In *Doe*, strict government neutrality combined with private harassment failed to move the Court. The State was neutral toward both PMW and petitioning in general.⁴⁰ Moreover, no other governmental body appeared likely to suppress the petitioners.⁴¹

One could argue that PMW failed to satisfy the announced test’s requirements or that the *Doe* test imposes a stricter burden on associations than the Court stated.⁴² Indeed, one scholar has argued

³⁷ *Id.* (listing eight petitions with records distributed between 2006 and 2009). Before digital distribution, “nobody followed through on a public records request for such documents because it was too expensive.” *Id.*

³⁸ *E.g.*, Reply Brief at 1, *Doe*, 130 S. Ct. 2811 (No. 09-559) (“Washington facilitates intimidation by mandating public disclosure of petition signers despite an absent or weak anti-corruption (or other) interest.”); *id.* at 21 (“[C]onfrontations [with private persons requesting disclosure] chill speech and political participation.”); Reply to Opposition to Petition for Writ of Certiorari at 8–9, *Doe*, 130 S. Ct. 2811 (No. 09-559) (analogizing Washington to West Virginia, where the chilling effect of police receiving a police-restricting petition was “self-evident,” without showing the potential for government intimidation in Washington); Petition for Writ of Certiorari at 21–22, *Doe*, 130 S. Ct. 2811 (No. 09-559) (analogizing the situation in Washington to that surrounding the California petition opposing same-sex marriage where the retaliation was all private).

³⁹ Petitioners’ Brief, *supra* note 16, at 6.

⁴⁰ The government neutrality toward the group at issue contrasts with the government’s bias in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). See *infra* notes 67–71 and accompanying text. The government neutrality toward petitioning in general contrasts with *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999). See Al Knight, *A Victory for Political Speech*, DENVER POST, Jan. 14, 1999, at B-07 (noting that the Colorado disclosure law struck down in *American Constitution Law Foundation* largely targeted a particular antitax ballot initiative sponsor).

⁴¹ See *infra* notes 102–06 and accompanying text (describing how FBI suppression of the Socialist Party functioned as government targeting, resulting in the granting of an exemption from Ohio’s state disclosure law).

⁴² Still another possibility is that direct democracy groups do not have the same First Amendment rights that run-of-the-mill associations have. See *Doe*, 130 S. Ct. at 2832 (Scalia, J., concurring) (“I doubt whether signing a petition that has the effect of suspending a law fits within ‘the freedom of speech’ at all.”); see also Chesa Boudin, Note, *Publius and the Petition: Doe v. Reed and the History of Anonymous Speech*, 120 YALE L.J. 2140, 2142 (2011) (“[S]ignatures used in direct democracy proceedings should not be

that the Court found “that the speculative risk of harassment was minor” in *Doe*.⁴³ But, as discussed above, PMW presented evidence of actual harassment, reprisals, and threats from private parties. Few circumstances better suit a test requiring a reasonable probability of retribution. Still another alternative is that the word “harassment” only refers to dire circumstances. Examining the only case in which the Court granted an exemption explicitly premised on the test announced in *Buckley*,⁴⁴ Professors Stone and Marshall argue that the Court’s standard is in fact more stringent than articulated. Stone and Marshall say that the standard is based on “whether there is a realistic possibility that disclosure could eventually cripple the organization or drive it out of existence.”⁴⁵ Stone and Marshall’s test, however, assumes that the Court’s discussion of “crippling” is the threshold for harassment rather than merely its proof.⁴⁶ More importantly, it is inconsistent with the cases discussed in Part II.B.2—*New York ex rel. Bryant v. Zimmerman*⁴⁷ and *Communist Party of the United States v. Subversive Activities Control Board*⁴⁸—in which the Court held that the government can use disclosure requirements to punish or restrict certain organizations, even fatally. None of these alternatives seems to explain the problematic application of the *Doe* test to the *Doe* facts.

In light of inconsistencies between *Doe*’s stated test and its result, Part II expands on Justice Stevens’s insight and argues that a two-part purposivist test emerges when the Court’s association membership disclosure cases are put together. First, the Court decides whether the government created or applied the relevant disclosure rule to undermine an association. Second, if the Court determines there is such government targeting, it considers the association’s nature. Restrictions on groups that are primarily criminal or commercial in nature

considered petitions or speech at all . . .”). But the Court did use a First Amendment framework. *Doe*, 130 S. Ct. at 2817 (“The compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment.”).

⁴³ Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 254 (2010); *see also* *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1215–20 (E.D. Cal. 2009) (holding that the facts in the California petitioners’ exemption attempt “could not be more distinguishable from those in which” associations did get an exemption).

⁴⁴ *Brown v. Socialist Workers*, 74 Campaign Comm. (Ohio), 459 U.S. 87 (1982); *see infra* note 99 and accompanying text (explaining that *Brown* was the only such case).

⁴⁵ Geoffrey R. Stone & William P. Marshall, *Brown v. Socialist Workers: Inequality as a Command of the First Amendment*, 1983 SUP. CT. REV. 583, 611–12. Stone and Marshall argue against a still stricter standard that would require those seeking an as-applied exemption to make an “actual finding or showing.” *Id.*

⁴⁶ *Id.* at 610–11.

⁴⁷ 278 U.S. 63 (1928).

⁴⁸ 367 U.S. 1 (1961).

are acceptable regulatory actions rather than prohibitory suppression of speech.

II THE SECRET TEST

The secret test this Note identifies is purposivist because it requires the Court to assess “the likelihood that the regulation reflects a governmental motive to burden disfavored speech or speakers.”⁴⁹ Although few cases involve exclusively governmental harassment⁵⁰ or private harassment with clearly neutral governmental action as did *Doe*,⁵¹ the striking contrast between the failed challenge in *Doe* and the successful challenges discussed in Part II.A suggests that government targeting is the key variable in determining whether to grant an

⁴⁹ Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 2 (2011). For more on purposivism and the First Amendment, see generally Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996), and Rubinfeld, *Purpose*, *supra* note 7.

⁵⁰ The case that appears to be closest to targeting-only is *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995). The decision to prosecute Mrs. McIntyre for violating an anonymous handbill ordinance appeared to be “in retaliation for her opposition to the school levy.” *McIntyre v. Ohio Elections Comm’n*, 618 N.E.2d 152, 157 (Ohio 1993) (Wright, J., dissenting), *rev’d*, 514 U.S. 334 (1995). The school board waited until “the levy was safely passed” before pursuing charges against McIntyre. *Id.* *McIntyre* is omitted from this Note because the case was a facial challenge and McIntyre was an association of one person. See *McIntyre*, 514 U.S. at 336–37.

⁵¹ The clearest evidence of the absence of such a case is that PMW and its supporting amici cited none. The best non-*Doe* example of a Supreme Court disclosure case with government neutrality is *Buckley v. Valeo*, 424 U.S. 1 (1976). *Buckley* was a challenge to numerous portions of the recently enacted Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended by the Federal Election Campaign Act Amendments of 1974, including the requirement to disclose certain campaign contributors. The challengers asserted fears of private harassment. They argued that the “intru[sion] on protected rights of associational privacy” would be caused by “the fear of harassment in their business and employment relationships.” Brief of the Appellants at 34, *Buckley*, 424 U.S. 1 (Nos. 75-436, 75-437). With regard to government targeting, the challengers asserted only that Congress was self-dealing in the Act through its control over the Federal Election Commission. See Reply Brief of the Appellants at 112–14, *Buckley*, 424 U.S. 1 (Nos. 75-436, 75-437). The Court upheld the Act’s disclosure requirements subject to the exemption discussed in this Note. *Buckley*, 424 U.S. at 74, 84. There are also lower court cases without government targeting (and sometimes without threat of private retribution) where the plaintiffs failed to get exemptions from membership disclosure. *E.g.*, *Shepherdstown Observer, Inc. v. Maghan*, 700 S.E.2d 805 (W. Va. 2010) (upholding disclosure where a newspaper wanted petition signatory names but the government refused to disclose them); see, e.g., *Nat’l Org. for Marriage v. McKee*, 765 F. Supp. 2d 38, 53 n.85 (D. Me. 2011) (“[P]laintiffs have not made a colorable claim that their First Amendment rights of free association are threatened by harassment that might follow disclosure.” (quoting *Nat’l Org. for Marriage v. McKee*, 666 F. Supp. 2d 193, 206 n.74 (D. Me. 2009))), *aff’d*, 669 F.3d 34 (1st Cir. 2012).

exemption.⁵² Part II.A presents three key cases in which associations received exemptions from disclosing their members' identities. In each of these cases, government targeting was the key concern for the Court, the litigants, or both.

Part II.B explains the second prong of the Court's purposivist test: Even if the Court finds government targeting, associations that the Court sees as primarily economic or criminal do not get First Amendment protection from disclosure rules.

A. Key Examples Show Government Targeting Is the Impetus for Exemptions

1. Patterson

Although it was not the first disclosure exemption case,⁵³ *NAACP v. Alabama ex rel. Patterson*⁵⁴ is the paradigmatic disclosure exemption case. The centrality of government targeting in *Patterson* is the foundation of the secret test's purposivism.

In *Patterson*, plaintiffs presented unusually clear evidence of government targeting. When Alabama Attorney General John Patterson⁵⁵ sued to eject the NAACP for not registering under the state's corporation laws,⁵⁶ the case came before Judge Walter B.

⁵² It may be that the threat of truly extreme private harm would force the Court to create an exemption, but that would require circumstances more dire than those that have occurred in the last eighty years. See *supra* note 51 (describing the lack of a past disclosure case with a neutral government but with private harassment that is so severe as to require remediation through exemption from disclosure). This concession is the same as the broader First Amendment concern that all rules protecting expressive rights might collapse when judges face unprecedented security threats. See Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 741 (2002) (arguing that more rights are granted when the country feels safe); cf. Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 665–68 (2009) (explaining that only two cases used the rights-expanding *Brandenburg* test, “[i]n part . . . because national politics were relatively calm”). In other words, the secret test discussed in this Note represents the test applied to both expected extraordinary circumstances and normal circumstances but, like any other rule, could fall to fear-induced judicial action when confronted with unexpected and extraordinary circumstances.

⁵³ See *infra* notes 72–97, 139–49 and accompanying text (discussing earlier cases).

⁵⁴ 357 U.S. 449 (1958).

⁵⁵ After the suit against the NAACP, Patterson “received an endorsement from the Ku Klux Klan,” defeating relative racial moderate George Wallace in a gubernatorial primary. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 456 (2005). Testifying in support of an NAACP registration law in Virginia, Patterson “conceded that he was hostile to the N.A.A.C.P.,” suing the NAACP but not the Ku Klux Klan. *NAACP v. Patty*, 159 F. Supp. 503, 517 (E.D. Va. 1958), *vacated sub nom. Harrison v. NAACP*, 360 U.S. 167 (1959).

⁵⁶ *Patterson*, 357 U.S. at 452–53.

Jones, “a vocal defender of segregation.”⁵⁷ In response to Alabama’s motion for production of the NAACP’s records, Judge Jones required disclosure of membership lists.⁵⁸ The NAACP refused to disclose and was held in contempt. The Alabama Supreme Court refused to hear the NAACP’s appeal of the contempt citation.⁵⁹

The U.S. Supreme Court held that the contempt citation was unconstitutional because Jones’s order created a “likelihood of a substantial restraint upon the exercise by petitioner’s members of their right to freedom of association” without “showing a controlling justification for the deterrent effect.”⁶⁰ The Court’s unanimous opinion did not explicitly acknowledge that its central concern was the government’s motive. Instead, the opinion pointed to concerns about private harm resulting from disclosure.⁶¹

But, behind the scenes, the Justices viewed the case as a transparent attempt to destroy the NAACP in Alabama.⁶² The State’s actions were widely seen as part of an “effort to crush” the NAACP.⁶³

Courts and scholars acknowledge that governmental antipathy was key to *Patterson*’s result. Even when the Arkansas Supreme Court disingenuously distinguished Arkansas’s similar attempt to expel the NAACP, it acknowledged that the government’s “prime

⁵⁷ Tony A. Freyer & Paul M. Pruitt, Jr., *Reaction and Reform: Transforming the Judiciary Under Alabama’s Constitution, 1901–1975*, 53 ALA. L. REV. 77, 104 (2001) (citing MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961*, at 283 (1994)). On remand, the NAACP unsuccessfully petitioned to compel Jones to recuse himself. *Ex parte NAACP*, 109 So. 2d 140 (Ala. 1959).

⁵⁸ *Patterson*, 357 U.S. at 453.

⁵⁹ *Id.* at 453–54. Despite the Court’s ruling in *Patterson*, the Alabama judicial system and a succession of attorneys general remained committed to enjoining the NAACP. 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) (describing the procedural history of *Patterson* after the first Supreme Court ruling).

⁶⁰ *Patterson*, 357 U.S. at 462, 466.

⁶¹ *See id.* at 463 (“The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.”).

⁶² MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 336 (2004). The difference between this case and other cases also can be seen by inference. Harlan, the author of *Patterson*, objected to ruling for the NAACP in a conference about a later case because that subsequent case was not “a plot to destroy [the] NAACP.” John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485, 527 (2010) (quoting William Brennan, Notes from the Conference, *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963) (Brennan Papers, Box 409)).

⁶³ Joseph B. Robison, *Protection of Associations from Compulsory Disclosure of Membership*, 58 COLUM. L. REV. 614, 616 (1958); *see also* SAMUEL WALKER, *THE RIGHTS REVOLUTION* 99 (1998) (“There was no secret about the real purpose of disclosing the Alabama NAACP membership list.”).

purpose” in *Patterson* “was to obtain information whereby Alabama could force the NAACP out of the State.”⁶⁴ Professor Kalven has described his “special” interest in *Patterson* and related cases as “exploring the limits of judicial realism to determine to what extent the Court may second guess the motivation of the South.”⁶⁵ Modern scholars also see *Patterson* as a case about impermissible government motive.⁶⁶

The NAACP’s argument in *Patterson* also suggests that it viewed government motive as the critical factor. The NAACP focused on government motive and even suggested that public officials *caused* private hostility. Before presenting its legal argument, the NAACP discussed “[t]he Climate in Alabama”: “This case *cannot be properly considered without being viewed against the background and setting in which it arose*. Alabama officials in responsible positions have set the tone and pattern” for Alabama’s response to desegregation.⁶⁷ The NAACP linked private “economic reprisals” to government action because the reprisals “accompanied legislation intended to punish financially those persons who advocate orderly [sic] compliance with the law.”⁶⁸ The NAACP also explained that private “[t]hreats and actual acts of violence” stemmed from bigoted law enforcement: Blacks were “refused official protection” while, at the same time, “state officials [were] quick to curb” black protests for equality.⁶⁹ The State’s lawsuit was part of this pattern of suppression.⁷⁰ Only in the context of “open opposition by state officials and an atmosphere of

⁶⁴ *Bates v. Little Rock*, 319 S.W.2d 37, 43 (Ark. 1958), *rev’d*, 361 U.S. 516 (1960).

⁶⁵ HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 66 (1965).

⁶⁶ *E.g.*, Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J.L. & PUB. POL’Y 91, 94 (1987) (“Alabama wanted to bust up the NAACP. . . . *The Court replied* that association is protected as an implicit constitutional right” (emphasis added)); Adam M. Samaha, *Litigant Sensitivity in First Amendment Law*, 98 NW. U. L. REV. 1291, 1340–41 (2004) (arguing that the results of *Patterson* and other cases “were surely fueled by extraordinary if unspoken federal judicial doubt about the states’ legislative and/or enforcement aims”). The Warren Court’s willingness to expand rights in response to segregationist government is well known. *See, e.g.*, Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 60 (describing how Warren Court doctrine was driven by “concern over racial injustice and state institutional failure”).

⁶⁷ Brief for Petitioner, *supra* note 30, at 12 (emphasis added).

⁶⁸ *Id.* at 15–16; *see also* Motion and Brief of Amici Curiae at 31, *Patterson*, 357 U.S. 449 (No. 91) (“[P]unishment is imposed by agencies of the respondent itself. Under local laws adopted by the State legislature, the boards of education of two Alabama counties are authorized to discharge public school teachers who belong to organizations advocating racial integration.” (citation omitted)).

⁶⁹ Brief for Petitioner, *supra* note 30, at 16–17.

⁷⁰ *See id.* at 34 (stating that the lawsuit was intended to restrain the activities of the NAACP and to “secure its ouster from the state”); *see also id.* at 20 (“The truth is that Alabama seeks, in these proceedings, to silence petitioner and its members.”).

violent hostility” could “the unconstitutionality and illegality of [Judge Jones’s] proceedings . . . be unmistakably revealed.”⁷¹

2. Rumely

Other cases are consistent with *Patterson*’s focus on government targeting. An earlier case, *United States v. Rumely*,⁷² shows that the Court’s concern with government targeting extends beyond the extreme facts in *Patterson*. In *Rumely*, legislative, rather than judicial, action targeted an association,⁷³ and the Court used purposivism prior to and outside of its clear sympathy for the civil rights movement.

The New Deal Congress had a longstanding grudge against conservative Dr. Edward A. Rumely, who organized opposition to its agenda. Rumely had already been a difficult witness in a 1938 congressional lobbying investigation.⁷⁴ Congressman Adolph Sabath, the floor leader for the Special Committee resolution at issue in *Rumely*,⁷⁵ had sniped at Rumely for years⁷⁶ and had doggedly demanded

⁷¹ *Id.* at 17. Amici similarly argued that the protection of anonymity is required by the “unfriendl[iness of] government.” Motion and Brief of Amici Curiae, *supra* note 68, at 32.

⁷² 345 U.S. 41 (1953). The only citation in *Patterson* supporting the idea that privacy may “be indispensable to preservation of freedom of association” was to Justice Douglas’s concurrence in *Rumely*. *Patterson*, 357 U.S. at 462 (citing 345 U.S. at 56–58 (Douglas, J., concurring)).

⁷³ See *Rumely*, 345 U.S. at 43 (arguing that construing “a resolution of the House of Representatives . . . is much the same” for the Court as “constru[ing] a statute”).

⁷⁴ In 1938, Rumely refused to disclose donors after being served with a subpoena and asked to give up the names of donors who had given over \$100. 83 CONG. REC. app. at 1192 (1938) (statement of Sen. Theodore Green). Rumely allegedly escaped a contempt citation only by Senate filibuster. 93 CONG. REC. 5263 (1947) (statement of Sen. George Aiken).

⁷⁵ See 95 CONG. REC. 11,385–87 (1949) (statement of Rep. Sabath) (introducing the resolution and advocating for it); *id.* at 11,389 (describing Sabath calling for a vote on the resolution and the resolution passing).

⁷⁶ For instance, in 1938, Sabath revised and extended his remarks to attack Rumely for his “lavishly financed propaganda bureau” and noted that Rumely was “sentenced to the penitentiary for disloyalty” during World War I. 83 CONG. REC. app. at 1547 (1938) (statement of Rep. Sabath); see also *Rumely v. McCarthy*, 250 U.S. 283, 284, 289 (1919) (affirming dismissal of Rumely’s writ of habeas corpus after he was held to await an indictment under the Trading with the Enemy Act). In 1945, Sabath inserted Rumely’s name into the *Congressional Record* as part of a list of “Nazi and Fascist misled men and women . . . who now continue their activities and propaganda of un-Americanism and subversion” and whom he hoped the House Un-American Activities Committee would “investigate instead of the nonexistent communistic activities.” 91 CONG. REC. 7888–89 (1945) (statement of Rep. Sabath). Other Democrats also regularly attacked Rumely. For instance, then-Senator Truman inserted an article in the *Congressional Record* criticizing Rumely for being involved with a “propaganda magazine.” 83 CONG. REC. app. at 2121–22 (1938) (statement of Sen. Harry Truman).

lobbying investigations⁷⁷ to prevent business organizations from blocking the New Deal agenda.⁷⁸

Under protest, Rumely registered the Committee for Constitutional Government, Inc. (CCG), pursuant to the Lobbying Act of 1946.⁷⁹ Three years later, the House of Representatives created a special committee to examine “all lobbying activities.”⁸⁰ The Special Committee demanded the names of the bulk-book buyers who had provided CCG’s funding in order to investigate a claim that CCG used pretextual book sales to avoid disclosing contributions under the Lobbying Act.⁸¹ Rumely provided Congress all requested records except those names.⁸² Rumely was convicted under a statute

⁷⁷ In addition to his resolution that passed in 1949, Sabath introduced numerous other resolutions to investigate lobbying. *See, e.g.*, 95 CONG. REC. 11,385–86 (1949) (statement of Rep. Sabath) (discussing his introduction of previous resolutions).

⁷⁸ *See* 95 CONG. REC. 6431 (1949) (statement of Rep. Sabath) (“[M]any more millions have been spent on the part of many corporations and businesses who are endeavoring to . . . stop legislation which they are opposed to. . . . I have attacked these professional lobbyists for years. . . . This committee will recommend ‘teeth’ that can properly be enacted into law thereby eliminating these abuses.”).

⁷⁹ *Rumely v. United States*, 197 F.2d 166, 169 (D.C. Cir. 1952) (noting that Rumely started filing reports pursuant to the Lobbying Act in 1946, filed the reports annually, and each year used language like “I protest”), *aff’d*, 345 U.S. 41 (1953).

⁸⁰ 95 CONG. REC. 11,385 (1949) (reciting text of H.R. Res. 298, 81st Cong. (1949) (enacted)).

⁸¹ *See Rumely*, 345 U.S. at 50–53 (Douglas, J., concurring) (describing the request’s stated rationale as an attempt to determine whether there were subterfuges to get around the Lobbying Act). The Special Committee did investigate agencies of the Truman Administration and other organizations, including the liberal Americans for Democratic Action. *See* Brief for the United States at 43–44, *Rumely*, 345 U.S. 41 (No. 87). Additionally, the Special Committee cited William L. Patterson, the National Executive Secretary of the Civil Rights Congress, for contempt the same day it cited Rumely. However, at least some congressmen recognized that the citation votes were partisan. *See, e.g.*, 96 CONG. REC. 13,909 (1950) (statement of Rep. Marcantonio) (“Part of this House has decided today to apply [the First Amendment] to Mr. Rumely, I think only because of his political beliefs being of the extreme right . . .”). For instance, two of Rumely’s vocal defenders, Republican Representatives Charles Halleck and Clarence Brown, voted to cite Patterson but not Rumely. 96 CONG. REC. 13,887–88, 13,892–93, 13,903 (1950). Additionally, Mississippi Democrat John Rankin voted to cite Patterson but not Rumely, noting that the CCG “was for constitutional government; and this outfit, this Civil Rights Congress, this Communist outfit, is for the overthrow of Government.” 96 CONG. REC. 13,893, 13,902–03 (1950).

⁸² *Rumely*, 197 F.2d at 170, 172 (“Rumely gave the investigators access to all records, etc., for all purposes except [the names of all purchasers of books or pamphlets] Over and over again Rumely asserted before the Committee that he had given, and was willing to give, all records except the names and addresses of the purchasers of the books.”). Rumely’s response—turning over everything but the members’ names—was much like the NAACP’s response in *Patterson*. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 454 (1958) (noting that the NAACP “produced substantially all the data . . . except its membership lists”). Here, Rumely’s purchasers were legally equivalent to the NAACP members. *See Brown v. Socialist Workers ’74 Campaign Comm.* (Ohio), 459 U.S. 87, 111

punishing congressional witnesses for withholding information.⁸³ The D.C. Circuit reversed his conviction.⁸⁴

The Supreme Court affirmed the D.C. Circuit, choosing not to reach any constitutional issue⁸⁵ even though the D.C. Circuit had recognized First Amendment problems in the Committee's activity.⁸⁶ Instead, Justice Frankfurter, relying on an ugly sleight of hand, argued that CCG's distribution of books and pamphlets did not fit within the definition of "lobbying activities" in the Committee's authorizing resolution.⁸⁷ Although Frankfurter's opinion was cosmetically minimalist, *Rumely* broke new ground substantively. At the time, it was considered to be "[o]f profound significance as the first case in many years to limit legislative inquiries."⁸⁸

The Court's shift was prompted in part by growing concern with legislative committees' motives.⁸⁹ Moreover, the Justices were aware of Congress's specific animosity toward Rumely. Justice Douglas's concurrence recognized the investigation's political nature,⁹⁰ noting that a leading Republican had "signed the minority report" and that congressmen had "ple[d] long and earnestly" for Frankfurter's narrow construction of the Committee's power.⁹¹ Douglas viewed the Rumely

(1982) (O'Connor, J., concurring in part and dissenting in part) (discussing equivalence between "members" and "contributors").

⁸³ See *Rumely*, 197 F.2d at 168–69.

⁸⁴ *Id.* at 178.

⁸⁵ See *Rumely*, 345 U.S. at 48 ("Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication.").

⁸⁶ See Comment, *Limits on Congressional Inquiry: Rumely v. United States*, 20 U. CHI. L. REV. 593, 596 (1953) ("*Rumely* [197 F.2d 166 (D.C. Cir. 1952)] recognizes the fact that publicity can realistically inhibit freedom of speech even though the inhibition springs from community reaction rather than the threat of legal liability.").

⁸⁷ See *Rumely*, 345 U.S. at 44–45, 47–48 ("[T]he phrase 'lobbying activities' . . . does not reach . . . attempts 'to saturate the thinking of the community.'" (quoting 96 CONG. REC. 13,883 (1950) (statement of Rep. Buchanan))). For an explanation of CCG's distribution of books to targeted individuals and Congress, see *Rumely*, 197 F.2d at 169–70. Frankfurter's assertion that CCG was not "lobbying" as defined by the resolution was recognized as bizarre at the time. See Comment, *Lobbying Investigation Unconstitutional*, 5 STAN. L. REV. 344, 345 (1953) ("Congress intended a broader view of lobbying.").

⁸⁸ John P. Frank, *Fred Vinson and the Chief Justiceship*, 21 U. CHI. L. REV. 212, 235 (1954).

⁸⁹ Cf. *Rumely*, 345 U.S. at 44. ("[W]e would have to be that 'blind' Court . . . not to know that there is wide concern, both in and out of Congress, over some aspects of the exercise of the congressional power of investigation.").

⁹⁰ Indeed, in its *Patterson* brief, Alabama argued that Douglas's *Rumely* concurrence was about smoking out bad government motive. Brief and Argument for Respondent at 28, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (No. 91) ("[I]t is clear that the opinion is concerned with the possibility of harassment of the press by public officials under the guise of obtaining information.").

⁹¹ *Rumely*, 345 U.S. at 55 (Douglas, J., concurring).

prosecution as government persecution. He argued that the Committee's investigation would lead to government harassment of its opponents.⁹² Indeed, in a later case, Justices Black and Douglas explained that *Rumely* stood for the proposition that "First Amendment rights are beyond abridgment . . . by suppression or impairment through harassment, humiliation, or exposure by government."⁹³ A contemporary scholar quickly noted that the case was driven by concern about motive—that requiring more specific justifications for congressional investigations "may well [have been] an unconscious attempt on the part of the Supreme Court to provide some degree of protection to those who are called before investigating bodies, particularly where minority or unpopular ideas are involved."⁹⁴

Others at the time, including Rumely's attorney, congressional Republicans, and the press, also noted the partisan nature of the investigation. Rumely's Supreme Court brief referred to the "ruthless prosecution," "partisan political inquisition," and "politically biased trial" stemming from "the ever growing intolerance of criticism, characteristic of those entrenched in political power."⁹⁵ Shortly after the Supreme Court's decision, Republican Representative Clare Hoffman noted critical press coverage and contended that the "Buchanan committee was pillorying" Rumely.⁹⁶ The outrage of contemporaries of the investigation is evidence of its partisan nature. Justice Douglas's concurrence shows that he and Justice Black were aware of the committee's problematic targeting. Frankfurter hints that he knew as well.⁹⁷ Even before *Patterson*, government targeting drove the decision to grant an exemption for CCG's contributors from congressional disclosure.

⁹² *Id.* at 57–58 (discussing "the menace of the shadow which government will cast over literature that does not follow the dominant party line").

⁹³ *Bates v. Little Rock*, 361 U.S. 516, 528 (1960) (Black & Douglas, JJ., concurring).

⁹⁴ Willard I. Ross, Note, *Criminal Law: Self-Incrimination—Harmless Questions Forming Linkage to a Crime*, 4 HASTINGS L.J. 194, 196 (1953) (citing *Rumely v. United States*, 197 F.2d 166 (D.C. Cir. 1952)). At least one modern scholar agrees that the Rumely investigation was hostile. See Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 415, 455 (2005) (describing the investigation of Rumely as "legislative hysteria").

⁹⁵ Brief for the Respondent at 57, *Rumely*, 345 U.S. 41 (No. 87).

⁹⁶ 99 CONG. REC. app. at 1405 (1953) (statement of Rep. Hoffman). Hoffman inserted an editorial in the *Congressional Record* that asserted: "That these books evoked a hostile response from the New Dealers on the committee headed by the late Representative Frank Buchanan is obvious." *Id.*

⁹⁷ See *supra* note 89 (quoting Frankfurter's discussion of widespread discontent with congressional inquiries). Additionally, if Frankfurter did not believe rights were jeopardized, it is unclear why he would take pains to construe the resolution strangely.

3. Brown

Even in *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*,⁹⁸ the only case in which the Supreme Court granted an exemption based on the *Buckley* test,⁹⁹ the Court relied on government targeting. *Brown* is especially interesting because it shows that the Court responds to invidious targeting even when it is done by a government agency other than the agency demanding disclosure.

In *Brown*, the Socialist Workers Party of Ohio (SWP) challenged an Ohio election law that required disclosure of all committee contributors who donated more than twenty-five dollars at one time.¹⁰⁰ Both the SWP and Ohio agreed that the *Buckley* test—with its “either Government . . . or private” language—was the proper standard for an exemption.¹⁰¹

However, both parties’ arguments and the Court’s opinion centered on state harassment. The SWP based its argument against disclosure under the Ohio law on the FBI’s nationwide monitoring of the SWP.¹⁰² The SWP agreed that the FBI’s monitoring was the most important fact in the case, noting that they had lost only one disclosure case and that was because a judge did not recognize the FBI’s conduct.¹⁰³ Even some of the seemingly private harassment in *Brown*,

⁹⁸ 459 U.S. 87 (1982).

⁹⁹ In *Doe*, Justice Alito listed cases that cited the *Buckley* exception. *Doe v. Reed*, 130 S. Ct. 2811, 2822 (2010) (Alito, J., concurring). Of those cases, *Brown* was the only one to grant an exemption. See *Brown*, 459 U.S. 87.

¹⁰⁰ *Brown*, 459 U.S. at 89 & n.2.

¹⁰¹ See Brief for Appellants at 20–25, *Brown*, 459 U.S. 87 (1982) (No. 81-776) (conceding that the *Buckley* test applied but contending that the appellees did not meet their evidentiary burden); Motion To Affirm at 4, *Brown*, 459 U.S. 87 (No. 81-776) (“That [the *Buckley* test] is the legal standard to be applied to the facts in this case has never been in dispute.”).

¹⁰² At oral argument, Ohio’s Assistant Attorney General explained: “Of the 127 exhibits admitted into evidence at trial on this case, 121 of those exhibits pertained solely to FBI activities” Transcript of Oral Argument at 7, *Brown*, 459 U.S. 87 (No. 81-776).

¹⁰³ Brief for Appellees at 62–63, *Brown*, 459 U.S. 87 (No. 81-776) (“[T]he two judge majority somehow did not find as a fact that the SWP had ever been the subject of FBI or other federal surveillance or harassment. This startling judicial myopia might itself account for the aberational [sic] decision reached in the Oregon case.” (citation omitted)).

The SWP even reached the second stage of the two-part test in this Note. See Brief for Appellees, *supra*, at 31–32 (noting that the government publicly suggested “that the SWP is some kind of criminal conspiracy,” but that when prompted by a trial court, “the Government [came] forward with absolutely” no evidence of illegal behavior) (alteration in original) (citations and internal quotation marks omitted)); *infra* Part II.B.2 (explaining that the Court denies exemptions to associations that have been targeted if it finds them to be primarily criminal).

such as employment and housing discrimination, was directly attributable to government targeting.¹⁰⁴

Ohio argued in defense of disclosure that the SWP was not being harassed in Ohio presently and, regardless, that the FBI had already stopped targeting the SWP and was barred by a new federal law from so doing.¹⁰⁵ Unlike in *Doe*, however, the Court accepted evidence of harassment in other states and concluded “that hostility toward the SWP is ingrained and likely to continue.”¹⁰⁶ The Court intuited that, because of the FBI’s attempt to harm the SWP nationally, Ohio’s state law requiring disclosure would further enable government targeting—even if not by Ohio. *Brown* shows that, in membership disclosure exemption cases, one agency’s impermissible motive taints all others.

Patterson, *Rumely*, and *Brown* exemplify the Court’s approach to government targeting. While the contrast between *Doe* and these cases implies that government targeting is necessary, targeted associations may still be denied exemptions from membership disclosure in the actual test’s second step, which is explained in the following Section.

B. Certain Groups Do Not Get Exemptions from Membership Disclosure when Targeted by Government

Even though the Court requires government targeting when granting exemptions from membership disclosure laws, the Court denies exemptions when it believes that targeted associations engage in primarily economic or criminal activity.¹⁰⁷ These two exceptions to exemption—economic regulation¹⁰⁸ and speech used to commit

¹⁰⁴ *Brown*, 459 U.S. at 114 n.9 (O’Connor, J., concurring in part and dissenting in part) (describing allegations that the FBI warned landlords about the SWP and its members); Brief for Appellees, *supra* note 103, at 44 (claiming that the federal government caused three SWP members to lose their jobs).

¹⁰⁵ See Transcript of Oral Argument, *supra* note 102, at 50–51; see also Reply Brief for Appellants at 3–5, *Brown*, 459 U.S. 87 (No. 81-776) (noting the conclusion of FBI and CIA harassment years earlier and the new law preventing future harassment).

¹⁰⁶ *Brown*, 459 U.S. at 99–101.

¹⁰⁷ The theory that different rights of association inhere to different types of associations is almost as old as the freedom of association. See, e.g., CHARLES E. RICE, FREEDOM OF ASSOCIATION (1962) (considering the freedom of association for religious associations, labor associations, political parties and pressure groups, and subversive associations).

¹⁰⁸ See, e.g., Posner, *supra* note 52, at 751 (discussing the argument that FDA and SEC regulations are better than other forms of censorship); Rubinfeld, *Paradigm*, *supra* note 7, at 1982–83 (“[T]here are particular measures—say, laws banning nonobscene pornography—that we believe to fall within the ambit of [the First Amendment]. . . . Thus, the freedom of speech was and is understood not to prohibit . . . the sale of flour in ten-pound bags . . .”).

crime¹⁰⁹—make doctrinal sense because they are both areas where First Amendment protection is sometimes limited.

1. *Groups Seen as Primarily Engaged in Economic Activity Do Not Get Exemptions*

The Court denies exemptions from membership disclosure laws to associations it sees as primarily engaging in economic activity, even if those associations show government targeting.¹¹⁰ This Subsection gives two examples: (1) the Court's contrasting treatment of two agribusiness lobbyists in a case decided only fifteen months after the Court gave an exemption to Rumely, an ideological lobbyist, and (2) the Court's upholding of intrusive membership disclosure regulations of bank records.

The federal government¹¹¹ and state governments¹¹² have far-reaching power to require disclosure, especially of business-related information. These laws, including disclosure of membership lists, have been immune from constitutional attack.¹¹³ The question, then, is when the Court understands a law to be a legitimate use of regulatory power as opposed to an unconstitutional rights infringement.

In the membership disclosure context, the boundary line for a commercial association is neither the corporate form¹¹⁴ nor commercial speech.¹¹⁵ Both corporate form and commercial speech roughly

¹⁰⁹ See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1783–84 (2004) (“[M]uch the same degree of First Amendment irrelevance holds true for . . . the pervasive and constitutionally untouched law of fraud . . . and that vast domain of criminal law that deals with conspiracy and criminal solicitation.”); see also Posner, *supra* note 52, at 746 (listing crimes conducted by speech).

¹¹⁰ *But see* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (“Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . .”).

¹¹¹ See United States v. Darby, 312 U.S. 100, 125 (1941) (allowing Congress to require recordkeeping in order to show compliance with a valid law); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 116 (2d Cir. 2001) (“Innumerable federal and state regulatory programs require the disclosure of product and other commercial information.”).

¹¹² See *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 116 (describing Vermont's ability to force commercial speakers to divulge accurate information).

¹¹³ See, for example, the disclosure laws listed in note 3, *supra*.

¹¹⁴ The corporate form makes for an especially tempting target for limitations based on the State's power to regulate, but case law repudiates such a limit. The NAACP, after all, was admittedly a foreign corporation in Alabama. See *Patterson*, 357 U.S. at 464–65 (noting that the NAACP admitted its corporate activities in Alabama).

¹¹⁵ Pamphleteering cases, roughly contemporaneous with *Patterson*, show that the Court protected political speakers more than business speakers. Compare *Talley v. California*, 362 U.S. 60 (1960) (finding a fine for the distribution of anonymous antidiscrimination handbills unconstitutional), with *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (upholding a law prohibiting distribution of handbills for advertising), *overruled by* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (finding commercial

approximate economic activity, but neither category is coextensive with the Court's treatment of associations. Rather, in this purposivist model, laws are facially upheld based on intent—whether they are trying to regulate economic activity or speech.¹¹⁶

The examples below show that the Court's deference to Congress's and states' economic regulatory power also applies when it considers exemptions from disclosure. Although the Court wants to protect associations from harm, it also wants to allow for the exercise of legitimate regulatory power.¹¹⁷ Therefore, it does not grant exemptions when it believes the association being affected by disclosure is commercial.

One example of the Court's differential treatment of commercial and noncommercial associations can be seen by comparing *United States v. Harriss*¹¹⁸ with *Rumely*. In *Harriss*, the Court offered business lobbyists significantly less protection than it had offered Rumely only one year earlier. In *Rumely*, Justice Douglas and the lower court saw Rumely as a book peddler, someone trafficking in ideas.¹¹⁹ Even

speech constitutionally protected). Although *Valentine* has been overruled, speech based in commerce is still seen as having “less” First Amendment protection. See *United States v. Williams*, 553 U.S. 285, 298 (2008) (noting the “less privileged First Amendment status of commercial speech” (citing *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562–63 (1980))); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U. L. REV. 1212, 1220 (1983) (“The holding of *Valentine*, in all likelihood, survives. Commercial speech is within the protection of the first amendment, but it receives less than full protection.”).

¹¹⁶ Securities regulation is the paradigmatic facially acceptable commercial disclosure law, invincible against First Amendment challenge because it is motivated by concerns about fraud rather than attempts to limit unpopular messages. Shiffrin, *supra* note 115, at 1265–66 (“Nonetheless, it is unlikely that SEC regulation of such statements has been infected with the same kind of bias we ordinarily worry about when the government regulates political speech.”). For a discussion of the exemption of securities regulation from First Amendment scrutiny, see, for example, Reza R. Dibaj, *The Political Economy of Commercial Speech*, 58 S.C. L. REV. 913 (2007); Lloyd L. Drury, III, *Disclosure Is Speech: Imposing Meaningful First Amendment Constraints on SEC Regulatory Authority*, 58 S.C. L. REV. 757 (2007); Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5 (1989); see also Brief of the SEC, Respondent at 46, *Full Value Advisors v. SEC*, 633 F.3d 1101 (D.C. Cir. 2011) (No. 10-153), which cited *Doe* while arguing that SEC disclosure requirements are different from other disclosure requirements.

¹¹⁷ Justice Stone's famous footnote four in *Carolene Products* sits on the horns of this dilemma. Compare *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (calling for deferential “rational basis” review for “regulatory legislation affecting ordinary commercial transactions”), with *id.* at 152 n.4 (suggesting a “narrower scope” of validity for legislation prohibited by the Bill of Rights, including when incorporated against the states).

¹¹⁸ 347 U.S. 612 (1954).

¹¹⁹ Justice Douglas explained that the CCG “represents a segment of the American press.” *United States v. Rumely*, 345 U.S. 41, 56 (1953) (Douglas, J., concurring). The D.C. Circuit said, “The Committee for Constitutional Government, Inc., publishes and distributes books and pamphlets, usually pertaining to national affairs and issues.” *Rumely v.*

though Rumely received money, his primary goal was “to influence public opinion through books and periodicals.”¹²⁰ By contrast, because the organization in *Harriss* was a business lobby engaged in paid communication, the Supreme Court upheld the disclosure requirements.¹²¹

In *Harriss*, as in *Rumely*, Congress demanded that lobbyists disclose their sponsors.¹²² Its motive, as in *Rumely*, was to expose lobbying.¹²³ However, the defendants in *Harriss* were lobbyists for the National Farm Committee, an association organized purely for financial gain that sought “to influence the passage of legislation which would cause a rise in the price of agricultural commodities and commodity futures and the defeat of legislation which would cause a decline in those prices.”¹²⁴ The Court was unmoved by the possibility that Congress had an impermissible motive to restrict business lobbying. Justice Douglas later emphasized that commercial lobbyists were like businesses, comparing compelled registration of “lobbyists who receive fees for attempting to influence the passage or defeat of legislation in Congress” to compelled registration of public utility holding companies.¹²⁵

United States, 197 F.2d 166, 169 (D.C. Cir. 1952), *aff'd*, 345 U.S. 41. A Republican defender of Rumely argued that the “fundamental question” behind Rumely’s citation was whether Americans had a First Amendment right “to purchase whatever products of a free press they please, so long as that product is not of an indecent, salacious, or subversive nature.” 96 CONG. REC. 13,890 (1950) (statement of Rep. Martin).

¹²⁰ *Rumely*, 345 U.S. at 46.

¹²¹ *Harriss*, 347 U.S. at 623–25 (holding that limiting the contested provisions to lobbyists who “engage themselves for pay or for any other valuable consideration for the purpose of attempting to influence legislation through direct communication with Congress” allows the statute to survive the First Amendment challenge).

¹²² The Court stated:

Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much.

Id. at 625.

¹²³ As then-Senator Kennedy acknowledged, “The single dominant theme recurring in all statutes, reports, articles, books and discussions of lobbying is that the spotlight of publicity is a pressure so strong as to compel lobbyists to engage in only the more desirable forms of lobbying.” John F. Kennedy, *Congressional Lobbies: A Chronic Problem Re-explained*, 45 GEO. L.J. 535, 537 (1957).

¹²⁴ *Harriss*, 347 U.S. at 615. More unsavory still, one of the lobbyists appears to have been a censured commodities trader himself. See Moore v. Brannan, 191 F.2d 775, 775 (D.C. Cir. 1951) (per curiam) (holding that one of the *Harriss* lobbyists “knowingly made false reports concerning market information that tended to affect the price of lard [and] attempted to manipulate the price of lard”).

¹²⁵ Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 173–74 (1961) (Douglas, J., dissenting).

*California Bankers Ass'n v. Schultz*¹²⁶ similarly emphasized that the Court will not grant membership disclosure exemptions when it sees the group's activity as transactional.¹²⁷ In *California Bankers Ass'n*, the Court upheld the Bank Secrecy Act of 1970¹²⁸ despite "the impressive sweep of the authority [it] conferred."¹²⁹ The Act required domestic banks to retain their customers' records to facilitate tax, criminal, and regulatory investigations,¹³⁰ possibly forcing banks to reveal their depositors. The names of associations' members and contributors would also be revealed if associations' bank records were disclosed. Two main litigants argued these issues: (1) the California Bankers Association (CBA), an unincorporated association that sued on behalf of its member banks and their depositors,¹³¹ and (2) the ACLU, which challenged the Act on First Amendment grounds for potentially disclosing its members.¹³²

With regard to the CBA's arguments, the Court held that Congress can compel banks to keep records of its customers' activities.¹³³ The Court relied on Congress's expansive Commerce Clause power and the banks' commercial nature. As the Court noted: "The plenary authority of Congress over both interstate and foreign commerce is not open to dispute"¹³⁴

Relying on *Patterson, Rumely*, and related cases, the ACLU asserted a First Amendment right to protect the identities of its

¹²⁶ 416 U.S. 21 (1974). The next year, the Court struck down another challenge to a bank disclosure requirement in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975). In *Eastland*, the request for bank records of the unpopular group came from a Senate subcommittee rather than an act of Congress. 421 U.S. at 492–94. The Court gave short shrift to the group's rights, dismissing the case because the Senators were immunized by the Speech or Debate Clause. *Id.* at 516–17.

¹²⁷ *But cf.* *Roberts v. Pollard*, 393 U.S. 14 (1968) (per curiam), *aff'g* 283 F. Supp. 248, 258–59 (E.D. Ark.) (denying an attempt by Democratic elected officials to inspect the Arkansas Republican Party's bank records).

¹²⁸ Pub. L. No. 91-508, tit. 1–2, 84 Stat. 1114 (codified as amended at 12 U.S.C. §§ 1829b, 1951–1959 and 31 U.S.C. §§ 5311–5332 (2006)).

¹²⁹ *Cal. Bankers Ass'n*, 416 U.S. at 29–30.

¹³⁰ *Id.* at 26–28.

¹³¹ *Id.* at 44–45. Interestingly, the Court grumbled about CBA's standing to sue on behalf of its members and, in turn, their depositors. *Id.* at 44 ("We entertain serious doubt as to the standing of the plaintiff . . . to litigate the claims which it asserts here."). This is a far cry from its earlier solicitude for the NAACP's ability to sue on behalf of its members. *See* *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458–60 (1958) (giving the NAACP standing "to assert here constitutional rights pertaining to the members, who are not of course parties to the litigation" without citing precedent directly on point). The largest apparent difference between the two sets of contributors appears to be the banks' commercial nature, again demonstrating how this distinction affects the Court's behavior.

¹³² *Cal. Bankers Ass'n*, 416 U.S. at 43, 55.

¹³³ *Id.* at 46–49.

¹³⁴ *Id.* at 46.

members and contributors.¹³⁵ The Court declined to address this argument on the ground that it was premature,¹³⁶ and only one of the three dissenting opinions directly discussed First Amendment precedent.¹³⁷ Thus, the Court either did not view the Act as targeting the ACLU or implicitly found that the First Amendment did not apply to the bank regulation. Ultimately, neither the clear targeting in *Harris* nor the possible as-applied targeting in *California Bankers Ass'n* triggered an exemption from disclosure requirement rules. Especially when compared with *Rumely* and *Patterson*, this outcome shows that the Court treats economic organizations differently from other associations for disclosure purposes.

2. *Groups Seen as Primarily Engaged in Criminal Activity Do Not Get Exemptions*

Just as the Supreme Court does not grant exemptions from membership disclosure laws for associations engaged in economic activity because of the government's power to regulate the economy, the Court also rejects exemptions for associations that engage in criminal activity in deference to the government's power to police crime.¹³⁸

The Supreme Court's first group disclosure ruling, *New York ex rel. Bryant v. Zimmerman*,¹³⁹ upheld membership disclosure of a criminal association despite government targeting. In *Bryant*, a Klansman was convicted under a state law requiring oathbound associations to disclose their membership even though the "statute appears to have been an attempt indirectly to outlaw the Klan."¹⁴⁰ Indeed, the New

¹³⁵ See *id.* at 55–56 & 56 n.25 (describing the ACLU's argument and reliance on specific cases).

¹³⁶ See *id.* at 56–57 (holding that "the ACLU's challenge is . . . premature"). An associational challenge to another part of the statute was also thrown out because the ACLU did not make a strong enough showing that reporting regulations formulated pursuant to the Bank Secrecy Act would require reporting the organization's financial activities. *Id.* at 75–76.

¹³⁷ *Id.* at 79–91 (Douglas, J., dissenting) (paralleling bank records to bookstore records but mostly focusing on the Fourth Amendment); *id.* at 91–93 (Brennan, J., dissenting) (discussing only the Fourth Amendment issue); *id.* at 93–99 (Marshall, J., dissenting) (raising First Amendment association issues but only after Fourth Amendment issues).

¹³⁸ This is why Professor Rosenthal is wrong when he suggests that purposivism might limit terrorism investigations. See Rosenthal, *supra* note 49, at 8, 34–41. The application of First Amendment doctrine always requires a determination as to whether the defendant is engaged in activity protected by the First Amendment.

¹³⁹ 278 U.S. 63 (1928).

¹⁴⁰ Note, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084, 1090 n.51 (1961); see also HARRY KALVEN, JR., A WORTHY TRADITION 258 (1988) ("[T]he chilling impact of the disclosure in *Bryant* is justified . . . as the very point of the statute."); Robison, *supra* note 63, at 629 ("It was generally accepted that the purpose and effect of the law was to 'outlaw' the Klan.").

York legislature's targeting was obvious because the statute excepted "labor union[s]" and "benevolent order[s]."¹⁴¹ The Supreme Court approved the targeted disclosure requirement, citing the lower court's recognition that benevolent orders had "already received legislative scrutiny and been granted special privileges."¹⁴² The *Bryant* Court also discussed a congressional report available to the New York legislature that showed that the Klan "was taking into its own hands the punishment of what some of its members conceived to be crimes."¹⁴³ At the time, the Court did not have to contend with First Amendment precedent,¹⁴⁴ and concluded that the special targeting of the Klan was justified because the Klan's "secrecy" was "a cloak for acts and conduct inimical to personal rights and public welfare."¹⁴⁵ Its violent and criminal nature made the difference.

In *Patterson*, Justice Harlan affirmed that the central concern in *Bryant* was violence. Because *Bryant* came first and approved a law requiring disclosure harmful to an organization, it was seen as a serious doctrinal roadblock to finding for the *Patterson* plaintiffs.¹⁴⁶ Harlan distinguished *Bryant* from *Patterson* because "[*Bryant*] was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, which the Court assumed was before the state legislature when it enacted the statute, and of which the Court itself took judicial notice."¹⁴⁷ That Harlan chose to distinguish rather than to overrule *Bryant* meant that the crime exception—permitting the government to require criminal organizations to disclose their members' identities even if such disclosure

¹⁴¹ N.Y. CIV. RIGHTS LAW § 53 (McKinney 2011).

¹⁴² *Bryant*, 278 U.S. at 75–77 (quoting *People ex rel. Bryant v. Zimmerman*, 210 N.Y.S. 269, 279 (App. Div. 1925) (Sears, J., concurring)).

¹⁴³ *Id.* at 76–77. There was evidence that the Klan was actually dangerous at the time. See *People ex rel. Bryant v. Sheriff*, 206 N.Y.S. 533, 535 (Sup. Ct. 1924) (asserting that the Klan was "doing things calculated to strike terror"), *aff'd sub nom. People ex rel. Bryant v. Zimmerman*, 210 N.Y.S. 269 (App. Div. 1925), *aff'd*, 150 N.E. 497 (N.Y. 1926), *aff'd*, 278 U.S. 63 (1928); William E. Nelson & Norman R. Williams, *Suburbanization and Market Failure: An Analysis of Government Policies Promoting Suburban Growth and Ethnic Assimilation*, 27 *FORDHAM URB. L.J.* 197, 217–19 (1999) (noting that the New York statute was in response to the Klan's "rising activity," including a kidnapping). This evidence makes the Court's decision to allow the legislature to suppress the Klan more palatable.

¹⁴⁴ See *KALVEN*, *supra* note 140, at 257 (noting that the plaintiff did not use the First Amendment but rather "a right of association," first under the privileges and immunities clause, and then under the due process clause").

¹⁴⁵ *Bryant*, 278 U.S. at 75.

¹⁴⁶ See *KALVEN*, *supra* note 65, at 91 (noting that after *Bryant*, Southern states asked how the Court could "deny the state the power to treat Negro activists in a similar way").

¹⁴⁷ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 465 (1958). Harlan was technically inaccurate when he said the *Bryant* Court took judicial notice. Instead, the *Bryant* Court approved the lower court's judicial notice. See *Bryant*, 278 U.S. at 75–76.

would be fatal—continued to have vitality. Although many have criticized Harlan's violence distinction,¹⁴⁸ the Supreme Court and lower courts continue to use it and thereby apply *Bryant*, especially when dealing with the Klan.¹⁴⁹

Indeed, when the Court upheld a requirement that the Communist Party disclose its members in *Communist Party of the United States v. Subversive Activities Control Board*, the Court inverted Harlan's distinction to justify relying on *Bryant* instead of *Patterson* and related cases.¹⁵⁰ In *Communist Party*, a federal statute required "Communist-action organizations" to disclose the names and

¹⁴⁸ *E.g.*, *Courier-Journal v. Marshall*, 828 F.2d 361, 366 (6th Cir. 1987) ("Evidently, the Court's decision to distinguish, rather than overrule, *Bryant* was founded on a belief that the facts of the two cases were simply not on all fours."); *People v. Talley*, 332 P.2d 447, 452 (Cal. App. Dep't Super. Ct. 1958) (Swain, J., concurring) (complaining that *Bryant* and *Patterson* were at odds, only explainable by moral characterizations of the groups), *rev'd*, 362 U.S. 60 (1960); *KALVEN*, *supra* note 65, at 94 ("[T]he Court is surprisingly inept in distinguishing *Bryant v. Zimmerman*."); Aviam Soifer, *Freedom of Association: Indian Tribes, Workers, and Communal Ghosts*, 48 MD. L. REV. 350, 361 (1989) (declaring *Patterson's* distinction "unsatisfactory").

¹⁴⁹ *E.g.*, *United States v. Apker*, 705 F.2d 293, 305 (8th Cir. 1983) (suggesting that *Bryant* may apply to discovery of a Hell's Angels membership list); *Shelton v. United States*, 404 F.2d 1292, 1299 (D.C. Cir. 1968) (applying *Bryant* to affirm a House Un-American Activities contempt citation of a Klansman who would not produce records); *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330, 336–38 (E.D. La. 1965) (applying *Bryant* instead of *Patterson* because "the defendants admit that [their] methods are lawless"); *State ex rel. Gremillion v. NAACP*, 181 F. Supp. 37, 38–39 (E.D. La. 1960) (per curiam) (applying *Patterson* instead of *Bryant* because the NAACP was not "dedicated to 'unlawful intimidation and violence'" (quoting *Patterson*, 357 U.S. at 465)), *aff'd*, 366 U.S. 293 (1961); *NAACP v. Patty*, 159 F. Supp. 503, 526 (E.D. Va. 1958) (choosing not to apply *Bryant* because the statute requiring NAACP membership disclosure was "not aimed . . . at curbing the activities of an association likely to engage in violations of the law"), *vacated sub nom. Harrison v. NAACP*, 360 U.S. 167 (1959); *Lefkowitz v. Indep. N. Klans, Inc.*, 389 N.Y.S.2d 44, 45 (App. Div. 1976) (upholding the same law at issue in *Bryant*); Soifer, *supra* note 148, at 360 ("This all-but-forgotten decision [*Bryant*] has never been expressly repudiated."); *cf. Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1283 n.7 (7th Cir. 1993) (distinguishing the Boy Scouts oath from the Klan oath using the distinction of violence).

Some modern sources consider *Bryant* dead. *See, e.g., Courier-Journal*, 828 F.2d at 365 (arguing that *Brandenburg v. Ohio*, 395 U.S. 444 (1969), "at least severely limit[ed] *Bryant*"). *But see* Robin D. Barnes, *Blue by Day and White by [K]night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079, 1147–50 (1996) (discussing *Courier-Journal* and arguing that disclosure was justified because police violence threatened "equal justice under the law"). *Bryant's* desuetude may reflect that the Klan and similar groups are no longer considered dangerous. *Cf. Ex parte Lowe*, 887 S.W.2d 1, 3–4 (Tex. 1994) (per curiam) (rejecting a per se Ku Klux Klan exception to the *Patterson* line of cases because the modern Klan's "bias and prejudice" alone were not illegal).

¹⁵⁰ *See Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 101–02 (1961) (focusing on the dangerous nature of the Klan in *Bryant* to distinguish it from *Patterson* and other recent association cases).

addresses of all members and officers.¹⁵¹ Writing for five Justices over four separate dissents, Justice Frankfurter upheld the statute as well as the Subversive Activities Control Board's decision to force the Communist Party to register. Frankfurter wrote that private targeting was of no constitutional concern because Communist-action groups represent a "foreign incursion," and "the existence of an ugly public temper does not, as such and without more, incapacitate government to require publicity demanded by rational interests high in the scale of national concern."¹⁵²

In *Communist Party*, the government's targeting motive was exceedingly clear.¹⁵³ However, Frankfurter asserted that the Act at issue "is a regulatory, not a prohibitory statute" because "[i]t does not make unlawful pursuit of the [political] objectives" defined in the statute.¹⁵⁴ The dissenters more realistically explained that the disclosure requirement was meant to punish the Communists with private harassment, and therefore Frankfurter's distinction was only formal.¹⁵⁵

Although Frankfurter argued that the statute did not prohibit Communist ideology, he also suggested that Congress has plenary power to regulate Communist-action groups because they are foreign-controlled.¹⁵⁶ Plenary power suggests that Congress has prohibitory

¹⁵¹ *Id.* at 8–9. "Communist-front organizations" only had to disclose officers. *Id.* at 9.

¹⁵² *Id.* at 95, 102.

¹⁵³ See *id.* at 77 (admitting that "a major purpose of the enactment was to regulate Communist-action organizations by means of the public disclosure effected by registration"); *id.* at 84 (admitting that the Act probably did not refer to the Communist Party by name "in part [because of] constitutional scruples against outlawing of the Party by 'legislative fiat'"); see also *id.* at 143 (Black, J., dissenting) (noting "a pattern of suppression by the Government").

In fact, the Act's targeting was so clear that defendants argued it was a bill of attainder, but Justice Frankfurter argued that the Court lacked the power to scrutinize unconstitutional legislative intent. *Id.* at 82–86 (majority opinion) ("So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." (quoting *Barenblatt v. United States*, 360 U.S. 109, 132 (1959) (internal quotation marks omitted))).

¹⁵⁴ *Id.* at 56.

¹⁵⁵ Justice Black explained simply that the government was "banning . . . an association because it advocates hated ideas" through a combination of official punishments—"fines, forfeitures and lengthy imprisonments"—and private punishments made possible by deliberate disclosure—"overhanging threats of disgrace [and] humiliation" that make it "impossible for the Party to continue to function." *Id.* at 137–38 (Black, J., dissenting). Chief Justice Warren dissented because the statute was "as prohibitory as any criminal statute" and the Communist Party's advocacy of force was "an abstract doctrine" at most. *Id.* at 132 (Warren, C.J., dissenting).

¹⁵⁶ *Id.* at 95–96 (majority opinion) ("Means for effective resistance against foreign incursion . . . may not be denied to the national legislature. 'To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated.'")

power.¹⁵⁷ If so, the greater power includes the lesser power, and Congress could require disclosure instead.

This conclusion, allowing disclosure as an exercise of a plenary power, echoes the discussion in Part II.B.1 about economic power.¹⁵⁸ Frankfurter embraced precisely this analogy and said that it controlled the case.¹⁵⁹ He upheld disclosure requirements for Communist organizations by comparing the regulation to securities regulation, lobbyist regulation, and election regulation.¹⁶⁰ This comparison makes explicit that groups seen as criminal¹⁶¹ are treated like groups seen as commercial. Neither can get exemptions from disclosure without encroaching on necessary legislative power to protect citizens.

Beyond revealing this parallel, *Communist Party* is important because it expands the “criminal exception” beyond its use in *Bryant* and emphasizes how discretionary judicial notice informs this purposivist test.

Communist Party reveals that the crime exception is broader than the violence limits suggested by *Bryant*.¹⁶² Frankfurter did not

(quoting *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889)).

¹⁵⁷ See *Champion v. Ames (Lottery Case)*, 188 U.S. 321, 356–59 (1903) (“[T]he power of Congress to regulate commerce among the States is plenary . . . ‘Congress . . . may enact such legislation as shall declare void and prohibit the performance of any contract . . . to . . . regulate to any substantial extent interstate commerce.’” (quoting *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 228 (1899))).

¹⁵⁸ See *supra* notes 110–17 and accompanying text (explaining how the Court treats economic associations differently because of the need to allow for legitimate exercises of economic regulatory power); see also *United States v. Darby*, 312 U.S. 100, 113, 125 (1941) (holding that Congress can prohibit the interstate shipment of goods and therefore can demand records).

¹⁵⁹ See *Communist Party*, 367 U.S. at 73–77 (explaining that *Electric Bond & Share Co. v. SEC*, 303 U.S. 419 (1938), controls the instant case); see also KALVEN, *supra* note 140, at 270–71 (noting that “Frankfurter relies heavily” on *Electric Bond & Share*, which makes him “nicely consistent” when paralleling “a case involving economic liberties” and “a case involving political liberties”). Even Justice Douglas in dissent found these comparisons compelling. *Communist Party*, 367 U.S. at 173–74 (Douglas, J., dissenting) (analogizing the case to many of the same cases as Frankfurter and concluding that “the exercise of First Amendment rights often involves business or commercial implications which Congress in its wisdom may desire to be disclosed,” and that therefore “a group operating under the control of a foreign power” may also be required to disclose).

¹⁶⁰ See *Communist Party*, 367 U.S. at 73–79 (comparing the Act to securities regulation); *id.* at 101 (“Certainly, as the *Burroughs* and *Harriss* cases abundantly recognize, secrecy of associations and organizations, even among groups concerned exclusively with political processes, may under some circumstances constitute a danger which legislatures do not lack constitutional power to curb.”). See *supra* note 116 for more on securities regulation.

¹⁶¹ But see KALVEN, *supra* note 140, at 274 (“[T]he Act is not keyed to the premise that a Communist-action or a Communist-front group is a criminal enterprise, a criminal conspiracy.”).

¹⁶² See *supra* notes 143–45 and accompanying text (describing the concern about Klan violence).

require evidence that “Communist-action groups” were violent when determining that they could be regulated.¹⁶³ *Communist Party*, then, holds that anything that could be considered criminal—including non-violent criminal activity and possibly even disfavored activity that could not be criminalized¹⁶⁴—may disallow exemptions, even for government-targeted associations.¹⁶⁵

Second, Frankfurter’s declaration that a political party was a foreign incursion shows how unstated purposivism gives judges broad discretion to determine which associations are engaged in economic or criminal activity and therefore cannot get exemptions.¹⁶⁶ This is the flip side of the Court’s ability to protect associations’ rights when it feels there is government targeting. In the criminal cases, this purposivism is at least nominally based on evidence such as legislative¹⁶⁷ and lower court or agency factfinding.¹⁶⁸ Still, judges’ discretion to

¹⁶³ See *Communist Party*, 367 U.S. at 55 (acknowledging the lower court’s finding that the Communist Party only “advocate[d] the overthrow of the Government of the United States by force and violence *if necessary*” (emphasis added)). Despite the potential of violence, Frankfurter held *Patterson* inapplicable because of the “threat[]” from Communism and its “methods of infiltration and secretive and coercive tactics.” *Id.* at 93–94. Frankfurter may go even further than this Note, as he seems to suggest that bad behavior that is not technically illegal—“methods of sabotage and espionage carried out in successful evasion of existing law”—may be a legitimate justification for requiring disclosure despite targeting. See *id.* at 94.

¹⁶⁴ KALVEN, *supra* note 140, at 274 (arguing that because the Act sanctions “disfavored political groups, not reachable by criminal law,” it is not premised on the idea that the Communist Party “is a criminal enterprise, a criminal conspiracy”); see also *id.* at 283–84 (arguing that *Bryant* and *Communist Party* show that the government can compel “groups whose characteristics fall somewhat short of those required for the imposition of criminal sanctions” to disclose their members).

¹⁶⁵ See *Communist Party*, 367 U.S. at 183–84 (Douglas, J., dissenting) (arguing that the statute creates precedent for “allowing the registration device to be used as a mechanism for compulsory disclosure of criminal activities”); *Marshall v. Bramer*, 110 F.R.D. 232, 234 (W.D. Ky. 1985) (“The Supreme Court has consistently recognized that there is a stronger interest in disclosing the members of an organization engaged in illegal activities, than in disclosing the members of an organization engaged in peaceful or legal activities.”), *aff’d on other grounds*, 828 F.2d 355 (6th Cir. 1987).

¹⁶⁶ Cf. *Communist Party*, 367 U.S. at 133–35 (Warren, C.J., dissenting) (noting that the majority was affirming a court of appeals decision that upheld a board decision even though the court of appeals admitted that the board’s finding was based on insufficient evidence).

¹⁶⁷ E.g., *id.* at 88 (majority opinion) (noting Congress’s study of the Communist Party while describing legislatures’ ability to act against known dangers); *id.* at 102 (noting Congress’s “legislative findings, based on voluminous evidence collected during years of investigation”); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 75–77 (1928) (noting the evidence available to the New York legislature, including a congressional report).

¹⁶⁸ *Communist Party*, 367 U.S. at 55 (relying on the findings of the court of appeals); *Bryant*, 278 U.S. at 75–76 (relying on lower courts’ determination that the Klan was criminal while other oathbound organizations were not); see also *Communist Party*, 367 U.S. at 146 (Black, J., dissenting) (attacking the majority for relying on “administrative factfindings of an agency which is not a court”).

determine government targeting and whether a group is economic or criminal means that the level of protection from membership disclosure is unstable.¹⁶⁹

Taken together, *Patterson* and *Communist Party* suggest that courts have broad discretion to determine which groups are targeted and which groups are criminal. Historically, the Court has used this power to defend unpopular organizations but not those it deems to be threatening.¹⁷⁰ Despite the troubling normative implications of limited judicial sympathy for certain unpopular groups, the next Part will argue for the actual test.

III

DOCTRINAL AND NORMATIVE ARGUMENTS FOR THE SECRET TEST

Part III makes three arguments in favor of the secret test. First, it argues that granting exemptions for purely private harassment would raise the First Amendment problems shown in Justice Black's dissent in *Feiner v. New York*.¹⁷¹ Second, it argues that associations should rely on criminal laws that already exist to respond to private threats, harassment, and reprisal. Finally, this Part makes a normative argument that the secret test, if understood and adopted by lower courts and litigants, would channel political conflicts into political fora.

¹⁶⁹ See, e.g., Posner, *supra* note 52, at 741 (“[J]udges who in the 1950s believed that the nation was endangered by Communist advocacy of violent revolution did not think themselves compelled by the vague language of the First Amendment When the danger posed by subversive speech passes, the judges become stricter in their scrutiny of legislation punishing such speech.”); cf. Dan M. Kahan et al., “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1755706 (implying that judges’ cultural-cognition biases are the bases of factual determinations that behavior by certain individuals is protected speech, while the same behavior is held to be regulable when done by others). Professor Blasi’s essay on “pathological periods” in First Amendment history is in agreement with this reading. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 450–51, 509 (1985) (noting that changes in societal attitudes may influence judges, and that these shifts in attitude should be “of major concern”). Professor Blasi also notes that these pathologies are particularly likely to strike at the freedom of association. *Id.* at 495–98.

¹⁷⁰ See Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 649 n.45 (2002) (“One way to understand *Zimmerman* and *Communist Party of the United States*, especially in light of *Patterson*, is that while the Court protected associations with political viewpoints, it was unwilling to protect associations engaged in violence.”); cf. KALVEN, *supra* note 65, at 174 (contrasting earlier Jehovah’s Witness cases with Communist cases and concluding that “[i]t was a sign of how tolerant toward a sharply dissident minority our society could be if the minority was small and eccentric”).

¹⁷¹ 340 U.S. 315 (1951).

A. Doctrinal Coherence—Three Actors and Time

1. *The Hostile Audience, the Suppressive State, and the Commons-Association: Three Actors and a Black Dissent*

In *Feiner*, a speaker on a Syracuse street stood before a racially mixed crowd and urged blacks to “rise up in arms and fight for equal rights.”¹⁷² Fearing disorder, the police asked *Feiner* to stop and eventually arrested him.¹⁷³ The Supreme Court upheld the conviction. Emphasizing the danger of violence, the Court concluded that the arrest was constitutional because the police had the power to prevent a riot.¹⁷⁴

However, it is Justice Black’s dissent in *Feiner*, “now an established part of the Tradition,”¹⁷⁵ that has doctrinal force. Black explained that the police empowered the hostile audience to veto the speaker. Because the police were responding to the audience’s hostility to the speech’s content, the police discriminated against the speaker in obvious violation of the First Amendment.¹⁷⁶

Black’s analysis of this problem in *Feiner* took two steps: (1) Was the audience’s response counterspeech or violence? (2) If it were violence, then the State should have moved against the violent audience. The result is that Black would allow the police to move against the audience, not the speaker, and only when the audience becomes criminal.

First, Black disparaged the mob’s dangerousness.¹⁷⁷ But more importantly, Black explained that, if the audience were likely to break laws by becoming violent, the government must referee and protect the noncriminal party: “[A]ssuming that the ‘facts’ did indicate a

¹⁷² *Id.* at 317.

¹⁷³ *Id.* at 318.

¹⁷⁴ *See id.* at 320 (“[W]hen as here the speaker passes the bounds of [argument or persuasion and undertakes incitement to riot, [the police cannot be] powerless to prevent a breach of the peace.”).

¹⁷⁵ Owen M. Fiss, Essay, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416–17 (1986).

¹⁷⁶ The police stopped *Feiner* from speaking in response to the hostile audience, which raises the “heckler’s veto”: “If the police restore order at the expense of the speaker, they arm the audience with a heckler’s veto, and hence by a circuitous route the law collaborates in the *content* regulation sought by the hostile audience.” KALVEN, *supra* note 140, at 78. But in most circumstances, the hecklers also have a right to speak, *see infra* note 197, and a lesser right to know, *see infra* note 190. These rights also help explain why private counterspeech combined with private or government outing alone would not be doctrinally sufficient to trigger exemptions from membership disclosure.

¹⁷⁷ “[I]t seems far-fetched to suggest that the ‘facts’ show any imminent threat of riot or uncontrollable disorder. It is neither unusual nor unexpected that some people at public street meetings mutter, mill about, push, shove, or disagree, even violently, with the speaker.” *Feiner*, 340 U.S. at 325–26 (Black, J., dissenting).

critical situation, . . . [the police] must make all reasonable efforts to protect [the speaker].”¹⁷⁸ Under this analysis, the government does not move against the speaker for his speech or the audience’s response to the speech. And the State should only move against the audience if its behavior would be criminal outside the context of the speech.

Association cases feature the same three actors present in *Feiner*: the speaker, the audience, and the State. The speaker is an association. An association, however, can only exist, act, and “speak” through its constituent members, with whom its goals may be in conflict.¹⁷⁹ The hostile audience is the private citizenry who may subject the association’s members to threats, harassment, or reprisals. As shown by the cases above, a variety of actors, including law enforcement, legislators, and the judiciary, function as the State.

There are two ways in which the State can suppress associations’ messages. The first is obvious. It can silence the speaker entirely. Associations seeking exemptions from membership disclosure argue that this is what would occur if such exemptions were not granted: Their members would abandon them if the members’ identities were disclosed, and the associations would be left without a voice.¹⁸⁰ The second form of state interference is subtle and counterintuitive. When an exemption from disclosure is granted, it harms the association’s reputation and weakens its messages as a result. Because there are incentives for each individual member to avoid disclosure, the association would be hard-pressed not to request an exemption that its members thought they could get. Some members object to disclosure because they find compulsion offensive.¹⁸¹ More pragmatically, if members can avoid being linked to an association, they can have their cake and eat it too. They get the benefits of using the association’s

¹⁷⁸ *Id.* at 326; *see also id.* at 331 (Douglas, J., dissenting) (“[Against] an unsympathetic audience and the threat of one man to haul the speaker from the stage . . . speakers need police protection.”). As in *Brown*, *see supra* notes 105–06 and accompanying text, there is concern here, too, about the motive of a government body different from that acting directly on the speaker. *Feiner*, 340 U.S. at 331 (Douglas, J., dissenting) (“Police censorship has all the vices of the censorship from city halls which we have repeatedly [sic] struck down.”); *see also id.* at 328 (Black, J., dissenting) (arguing that under the majority’s test, “the policeman’s club can take heavy toll of a current administration’s public critics”).

¹⁷⁹ *But see* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 459 (1958) (“[The NAACP] and its members are in every practical sense identical.”).

¹⁸⁰ *See, e.g., id.* at 463 (“[Disclosure] may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.”). The Court recognized that compelled disclosure is a harm to members. *Id.* at 458.

¹⁸¹ *See* McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 355 (1995) (finding “compelled self-identification” with political viewpoints to be “particularly intrusive”).

resources without any possible responsibility for the association's speech.¹⁸² Even if the association has a popular message, a member may still want anonymity to avoid any negativity toward the association. The result is a sort of tragedy of the commons. Each member's individual best interest is to be disassociated from the association, without regard to the association's need for credibility.

The potential reputational harms to an "anonymous" association are numerous. Listeners distrust anonymous entities, knowing that the people who speak for them do not have to protect their individual reputations.¹⁸³ Listeners might also distrust an organization that has received an exemption from disclosure because it has received a special privilege.¹⁸⁴ These reputational harms weaken an association's message to its members, potential members, and audience. A group that is unwilling to disclose its members may communicate that its

¹⁸² Cf. Recent Case, *Church of the American Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004), 117 HARV. L. REV. 2777, 2777 (2004) (arguing with respect to masks that "anonymity . . . offer[s] security against reprisal").

¹⁸³ Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1588 (2007) ("Any regulation of anonymous speech should begin with the presumption that information consumers are likely to discount unattributed speech . . ."); Greg Sargent, *Yes, Voters Do Care About Secret Cash Funding Elections!*, PLUM LINE (Oct. 14, 2010, 3:24 PM), http://voices.washingtonpost.com/plum-line/2010/10/yes_voters_do_care_about.html (reporting on a national poll that showed that a majority of respondents is "less likely to vote for a candidate if they know the ads supporting that candidate are paid for [by] anonymous corporations and wealthy donors" and a larger majority of respondents does not believe that "the anonymous groups running ads hold the voters [sic] best interest in mind"); see also *McIntyre*, 514 U.S. at 348 n.11 (asserting that readers "evaluate" a speaker's "anonymity along with its message" (quoting *People v. Duryea*, 351 N.Y.S.2d 978, 996 (Sup. Ct. 1974))); cf. JEREMY BENTHAM, AN ESSAY ON POLITICAL TACTICS (1843), reprinted in THE COLLECTED WORKS OF JEREMY BENTHAM: POLITICAL TACTICS 30 (Michael James et al. eds., 1999) ("Suspicion always attaches to mystery. . . . For why should we hide ourselves if we do not dread being seen?"); *Green Blackboards (and Other Anomalies)*, PENNY ARCADE (Mar. 19, 2004), <http://penny-arcade.com/comic/2004/03/19> (arguing that anonymity leads to useless and profane discourse). The foundations of modern First Amendment law have their origins in Justice Holmes's dismissive attitude toward "poor and puny *anonymities*." *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting) (emphasis added); see also KALVEN, *supra* note 140, at 143 ("[I]t seems that Abrams moved Holmes because he was so trivial a critic.").

Courts have upheld as legitimate the fears that anonymous speakers may be more prone to commit violent or criminal acts. See, e.g., *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 203–05 (2d Cir. 2004) (describing the fear of violence that led to a New York anti-mask law); *id.* at 209 (noting that a countervailing interest to anonymous speech is "the state's interest in safety, and its right to regulate conduct that it legitimately considers potentially dangerous").

¹⁸⁴ Cf. Newt Gingrich, *Do You Have Your "Pelosi Waiver" from ObamaCare?*, HUMAN EVENTS (May 25, 2011), <http://www.humanevents.com/article.php?id=43702> ("I asked if they agreed with this principle: 'If a waiver is given to some people, it ought to be available for everyone.' Virtually every hand went up in agreement in every meeting.").

members should be fearful, discouraging robust discussion.¹⁸⁵ As Justices Scalia,¹⁸⁶ Sotomayor,¹⁸⁷ Stevens, and Ginsburg explained in *Doe*, the First Amendment requires participants to develop “civic courage.”¹⁸⁸ Because a governmental grant of anonymity raises doubts about the veracity and vitality of the message and messengers, such a remedy is second-best.

Viewing these reputational harms through the lens of *Feiner* explains why the secret test is doctrinally better than the *Doe* test. When courts or administrative agencies¹⁸⁹ step into a content-neutral web of disclosure and grant exemptions because of fear of private threats, harassment, or reprisal, the State causes reputational harm to a specific association, and thereby represses the association’s speech in response to a hostile audience. It might have been better if, instead of dragging *Feiner* down from his box, the police gave him a special

¹⁸⁵ Scholars argue that it was not until gay Americans started coming out that they were able to assert their rights successfully. See, e.g., Nancy J. Knauer, *LGBT Elder Law: Toward Equality in Aging*, 32 HARV. J.L. & GENDER 1, 2–29 (2009) (describing how a generation used to being closeted still remains afraid to assert its own identity and how a younger generation that left the closet sparked the gay rights movement).

¹⁸⁶ *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring) (“There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”).

¹⁸⁷ *Id.* at 2828–29 (Sotomayor, J., concurring) (“For persons with the ‘civic courage’ to participate in this process . . . the State’s decision to make accessible what they voluntarily place in the public sphere should not deter them from engaging in the expressive act of petition signing.”).

¹⁸⁸ See generally Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988) (describing the importance of the idea of “civic courage” to the First Amendment).

A final, more speculative explanation for the secret test’s emphasis on state neutrality is how the Justices’ backgrounds may affect how they view civic courage. Generally, they seem to believe that, in the speech context, the chips fall where they may. Cf. Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1356 (1992) (“To the extent that compensation for injuries caused by others remains our baseline, and especially when a wide variety of nonphysical harms are compensated pursuant to that baseline, the exclusion of a host of harms in the name of the First Amendment represents an anomaly.”). Perhaps this is because their jobs involve contentious debate. Additionally, many of the Justices are middle-class or wealthier and have backgrounds in government and law enforcement, which gives them faith in the neutrality of government actors. See Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970) (describing how most appellate judges identify with the policeman rather than the criminal suspect because “of their middle-class backgrounds”). Moreover, Justices are encouraged to view themselves as neutral government arbitrators. Therefore, Justices may be particularly desensitized to ideological conflict but also especially offended when they see violations of governmental neutrality.

¹⁸⁹ See Socialist Workers Party, No. AO 2009-01, 2009 WL 961212 (FEC Mar. 20, 2009), available at <http://saos.nictusa.com/aodocs/AO%202009-01%20final.pdf>, for an example of an administrative agency granting an exemption from membership disclosure.

mask and voice distorter. But the State would still be acting to repress the speaker by muffling his message instead of moving against the audience if the audience were criminal, or staying out of the channels of communication if the audience were not criminal. By contrast, when an exemption is granted because of State harassment, the association is trading up from a more direct unconstitutional suppression to an indirect, but still harmful, dampening.

A reasonable objection to this analysis is that the association is most qualified to balance its own interests. Therefore, if, in response to private threats, harassment, or reprisal, an association decides that it prefers the costs and benefits of exemption from disclosure, a judge should not disagree. However, three factors counsel strongly for a presumption against exemptions, one from each of the participants in the disclosure trioka: audience, speaker, and State. First, the polity has strong and legitimate interests in knowledge.¹⁹⁰ Indeed, if an association is seeking an exemption, then presumably the disclosure law is facially valid, which almost certainly means the polity's knowledge interests were sufficient to justify the law in the first place.¹⁹¹ Second, an association is likely to weigh the benefits and costs of disclosure improperly because the dynamics lead each member to consider the benefits of avoiding notice without considering the association's interests and its role in public dialogue.¹⁹² An association can hardly ignore its members, even when they are wrong, because members and their resources form the association. Finally, the State would be suppressing the power of a message because its content is unpopular. Given the First Amendment case law supporting the interests of disclosure and of robust dialogue with many strong participants and the case law opposing the paradigmatic harm of state suppression, the State should not distort an association's message with a stigmatizing hood of exemption from disclosure except to remedy the worse and more direct harm of State threats, harassment, or reprisal.

¹⁹⁰ See, e.g., *FEC v. Akins*, 524 U.S. 11, 15, 21 (1998) (finding that a "group of voters" suffered an injury-in-fact when they were unable to obtain the names of members of a committee); *Buckley v. Valeo*, 424 U.S. 1, 28, 66–68 (1976) (per curiam) (upholding disclosure requirements because, among other things, such requirements "provide[] the electorate with information" and "are an essential means of gathering the data necessary to detect violations").

¹⁹¹ See, e.g., *Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 440 (1938) ("Congress cannot be denied the power to demand the information which would furnish a guide to the regulation necessary or appropriate in the national interest."); cf. Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 147 (1991) ("[P]rivacy claims [would] predictably lose in most cases after litigation . . .").

¹⁹² See *supra* notes 180–82 and accompanying text (explaining why members are each incentivized to seek anonymity).

1. *Crime and Time: How the Doe Test Is Out of Step with the Normal Sequence of Law*

Although the above discussion frames the hostile audience doctrine as it relates to the three actors, the fourth dimension also explains the secret test's doctrinal acceptability. In exemption cases, associations instigate proceedings from an *ex ante* perspective.¹⁹³ Because the association is trying to prevent harms from future disclosure, it is arguing that it should deny information to the polity as a form of *ex ante* enforcement against its opponents.

But *ex post* enforcement of law is the normal order of things,¹⁹⁴ and nothing about the association disclosure context suggests that it should be otherwise.¹⁹⁵ Private suppression of speech does not offend First Amendment doctrine.¹⁹⁶ Indeed, particularly given that the

¹⁹³ It is for this reason that the *Doe* test is based on “a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties.” *Doe v. Reed*, 130 S. Ct. 2811, 2820 (2010) (alteration in original) (emphases added) (quoting *Buckley*, 424 U.S. at 74).

¹⁹⁴ Cf. PHILIP K. DICK, *The Minority Report*, in 4 THE COLLECTED STORIES OF PHILIP K. DICK 71 (1987) (showing the absurdity and danger of a world where “precrime” is punished).

¹⁹⁵ Cf. Transcript of Oral Argument, *supra* note 102, at 28 (discussing “a certain percentage of abnormal people in a large country like this who will do abnormal things”). This assumption equates violence that targets speech with violence caused by an abnormality in the assailant.

¹⁹⁶ See Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 127 (2004) (arguing that the inability to enjoin private censorship is “a central element in the Supreme Court’s constitutional jurisprudence, leaving expressive freedom unprotected from private suppression”).

The employment context provides an example. A private employer does not violate his or her employee’s First Amendment rights by firing the employee because of the employee’s speech or association membership. See, e.g., *Edmonson v. Shearer Lumber Prods.*, 75 P.3d 733, 739 (Idaho 2003) (holding that an employee has no wrongful termination action when terminated “because of the exercise of the employee’s constitutional right of free speech”); David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 34 n.203 (1998) (listing relevant cases). Analogous rights could be created by statute, see, e.g., S.C. CODE ANN. § 16-17-560 (2003) (making it unlawful to fire an employee “because of political opinions or the exercise of political rights and privileges guaranteed to every citizen by the Constitution”), as they were for other claims not based on the employee’s speech, see, e.g., 42 U.S.C. § 2000e-2 (2006) (making unlawful, among other things, the firing of an employee “because of such individual’s race, color, religion, sex, or national origin”).

Associations press claims for exemption based on terminations of group members. See *Brown v. Socialist Workers ’74 Campaign Comm.* (Ohio), 459 U.S. 87, 99 (1982) (discussing evidence that at least twenty-two Socialists were fired because of party affiliation); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (acknowledging the NAACP’s showing that past membership disclosure has resulted in “loss of employment”); *supra* note 18 and accompanying text (describing allegations of forced

private reaction feared by associations may only be counterspeech,¹⁹⁷ the ex ante decision to hide the association from riposte actually may be a prior restraint.¹⁹⁸ This does not mean that the law never acts to protect an association before threats, harassment, and reprisal cause, for instance, physical harm to its members. Instead, the same criminal statutes that address threats, harassment, and reprisal would apply regardless of whether those crimes against an association were motivated by that association's speech.¹⁹⁹

In *Doe*, Justice Stevens's test appears to reach the same result. He would give exemptions if there were "a significant threat of harassment directed at those who sign the petition that cannot be mitigated by law enforcement measures."²⁰⁰ The key word is "mitigated"—not "prevented." This suggests dealing with potential private threats through ordinary criminal law processes.

Practically, this means that risk will fall on the association just as risk falls on the potential victim of any crime. Even Justice Black's dissent in *Feiner* recognized that the police cannot prevent all private harm.²⁰¹ But the question is whether law enforcement—and by

employment resignations in *Doe*). *But see supra* note 104 and accompanying text (attributing some firings in *Brown* to the government). If courts were taking these threats seriously and justifying exemptions based on this kind of private harassment, they would be allowing members of associations to have a legal benefit—avoiding the harms of disclosure—just because they were in an association.

¹⁹⁷ "[T]he remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

¹⁹⁸ *Cf.* Ariel L. Bendor, *Prior Restraint, Incommensurability, and the Constitutionalism of Means*, 68 *FORDHAM L. REV.* 289, 291 (1999) ("Because of this general constitutional prohibition against prior restraints, restrictions of speech ordinarily must be enforced by the imposition of *ex post* criminal or civil sanctions.").

¹⁹⁹ *See, e.g., Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring) ("There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance."). This is most obvious when the crime is violence. *See KALVEN, supra* note 140, at 108–09 ("Had others reacted violently to Cohen's jacket, they—the violent and lawless—would have been guilty of a breach of peace, not Cohen himself."); Fiss, *supra* note 175, at 1417 ("[A]lthough the doctrine of the heckler's veto welcomes the strong arm of the law, it does so only on rare occasions, when violence is about to break out, and then only to divert the police action away from the speaker and toward the mob."). But normal laws protect speakers from more than violence, as harassment laws make evident. *See, e.g., N.Y. PENAL LAW* § 240.25 (McKinney 2010). The line between what is mere animus and what is criminal behavior may be unclear. *See, e.g., Matthew J. Gilligan, Note, Stalking the Stalker: Developing New Laws To Thwart Those Who Terrorize Others*, 27 *GA. L. REV.* 285, 335–37 (1992). But again, it is not clear why there would be unique prophylactic judicial action only if the harasser were motivated by an association's message.

²⁰⁰ *Doe*, 130 S. Ct. at 2831 (Stevens, J., concurring).

²⁰¹ *See Feiner v. New York*, 340 U.S. 315, 326 (1951) (Black, J., dissenting) (implying that there may be situations where "all reasonable efforts to protect" the speaker fail, in which the police "can interfere" with the speaker to "preserv[e] order"). This concession is especially serious because dissents have more poetic license, *see Kenji Yoshino, Suspect*

extension the judiciary and the legislature²⁰²—will respond to these harms regardless of the public’s opinion of the victim. If the government is truly neutral, then there should be no doctrinal need for special rules to prevent private harm. By contrast, if the government cannot be trusted, then the First Amendment gives special protection to the association from the unique harm of state suppression.

Although the First Amendment doctrine discussed above argues for the intellectual coherence of the secret test, it does not prove that the secret test is desirable. The next Subsection gives one argument for the desirability of the secret test.

A. *Clarity: One Argument for the Secret Test*

Part II explained how this Note’s test is compatible with the Court’s rulings in the key disclosure cases, and Part III.A explained how it is compatible with First Amendment doctrine. Despite the historical and doctrinal approval of a test based on governmental targeting, there is no question that the possibility that private harm could extinguish an association is a serious concern. There are many pragmatic arguments for and against such a test. This Subsection presents the test’s strongest feature: its clarity.

A test that hinges on a bare minimum of government impropriety is clearer than one that is based on a probability of private or public harm.²⁰³ This clarity has three major effects: (1) It becomes a useful predictive tool²⁰⁴ that (2) makes clear when groups should go to court and (3) forces every arm of the government to maintain neutrality.

First, application clarity hinges on a more widespread understanding of the Court’s secret test. Lower courts often follow the text of the Supreme Court’s opinions—including the announced *Doe*

Symbols: The Literary Argument for Heightened Scrutiny for Gays, 96 COLUM. L. REV. 1753, 1758 n.13 (1996) (explaining that dissents are more “literary” because the judge knows his or her opinion is not binding), and because Justice Black took a very hard line on the First Amendment, see Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960) (“Neither as offered nor as adopted is the language of th[e] [First] Amendment anything less than absolute.”).

²⁰² Samaha, *supra* note 66, at 1341 (“[The results of *Patterson* and related cases] were surely fueled by extraordinary if unspoken federal judicial doubt about the states’ legislative and/or enforcement aims.”).

²⁰³ In some ways, this should be a surprising claim because of widespread doubt about the difficulty of understanding collective motive. See, e.g., Kagan, *supra* note 49, at 438 (“It has become a commonplace among both judges and scholars that the search for legislative intent—indeed, the very notion of legislative intent—raises grave problems.”); Posner, *supra* note 52, at 751 (“[A purposivist argument] underestimates the difficulty of discerning legislative motive.”).

²⁰⁴ Indeed, I began assembling this Note before *Doe* was decided and used this test to predict its outcome.

test—rather than the opinions’ underlying pattern that informed this Note’s two-part test.²⁰⁵ Moreover, lower courts may be less comfortable making a judgment about government targeting than the Supreme Court, given the issues involved in investigating motive.²⁰⁶ As the Court continues applying this secret test, however, lower courts will learn to hum along with the “music,” and not the announced test’s “words.”²⁰⁷ Assuming lower courts become comfortable and consistent in applying the test, associations can better weigh legal challenges.²⁰⁸

Associations’ certainty about their disclosure rights would eliminate the incentives for associations to spend time, energy, and money litigating about their opponents’ potential threats. Predictive clarity, conclusively denying hope of success on challenges of purely private harassment, should prevent doomed legal challenges. Groups, often with a clear mission to attack disclosure systems,²⁰⁹ launch numerous

²⁰⁵ See, e.g., *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010) (enjoining a Colorado campaign finance disclosure law as it applied to a municipal petition because the burdens were too high for such a small group); *Doe v. Reed*, 661 F. Supp. 2d 1194 (W.D. Wash.) (holding that the disclosure of PMW’s signatories violated the First Amendment), *rev’d*, 586 F.3d 671 (9th Cir. 2009), *aff’d*, 130 S. Ct. 2811 (2010). Lower courts have, however, also understood and applied the Court’s actual test correctly, upholding disclosure laws where there was no government targeting. See *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010) (upholding Washington’s campaign disclosure law).

²⁰⁶ See *supra* note 203 and accompanying text (arguing that the difficulty in applying purposivist tests is the unintelligibility of an actor or group actor’s motive).

²⁰⁷ See Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1263, 1271, 1277 (1947) (arguing that in statutory interpretation courts should “use their imagination” to apply “what a legislature really meant but imperfectly said,” but that a lower court’s duty is “usually to learn, ‘not the congressional intent, but the Supreme Court’s intent’” (quoting Stanley S. Surrey, *The Supreme Court and the Federal Income Tax: Some Implications of the Recent Decisions*, 35 ILL. L. REV. 779, 808 (1941))).

The secret test could be cemented if the Court formally adopted it. However, the Court may feel uncomfortable admitting that it makes discretionary and intuitive choices and encouraging lower courts to do the same. See *supra* notes 166–69 and accompanying text (discussing the dangers of broad discretion).

²⁰⁸ A better understanding might also be useful for legislatures. For an example of congressional confusion on the issue discussed in this Note, compare H.R. REP. NO. 111-492, at 29 (2010), asserting Supreme Court approval of the constitutionality of a bill, with *id.* at 90 (minority views), citing *Patterson* and asserting constitutional concerns with the same bill.

²⁰⁹ For instance, the cases mentioned *infra* note 210 include cases brought by the National Organization of Marriage (NOM), which has “been leading the fight against disclosure,” Mark Ladov, *More Secret Spending in the Fight Against Equality*, BRENNAN CTR. FOR JUSTICE (June 23, 2011), http://www.brennancenter.org/blog/archives/more_secret_spending_in_the_fight_against_equality/, and a case litigated by the Institute for Justice, which opposes all campaign finance disclosure, see *Mississippi Citizens Join Together, File First Amendment Lawsuit Challenging Statewide Speech Regulations*, INST. FOR JUSTICE (Oct. 20, 2011), <http://www.ij.org/about/4110>.

failed challenges²¹⁰ without alleging government targeting.²¹¹ Clarity should push ideological opponents of disclosure to stop litigating policy preferences and should eliminate as-applied challenges from associations that, in good faith, believe that courts give exemptions for private harassment.

Requiring a threshold of government targeting thus encourages making political arguments through the political, rather than judicial, processes.²¹² Just as allowing a hostile audience to get the State to stop a person's or association's unpopular speech is "perverse" because it "encourages [the audience] to cultivate a reputation for hypersensitivity,"²¹³ so too does giving associations a special exemption for private harassment encourage them to bemoan the incivility of their opponents and the injustice of having to stand by their speech. Indeed, the Court's stated version of the test encourages associations to run to court alleging that their political opponents are going to harm them.²¹⁴ This is counterproductive not only because the exemption undermines

²¹⁰ See, e.g., *Nat'l Org. for Marriage v. Daluz*, 654 F.3d 115 (1st Cir. 2011) (denying a challenge to PAC disclosure requirements); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011) (same); *Justice v. Hosemann*, No. 3:11-CV-138-SA-SAA, 2011 WL 5326057, at *1 (N.D. Miss. Nov. 3, 2011) (denying an exemption for membership disclosure for "a group of like-minded friends and neighbors" under Mississippi campaign finance law); *Citizens in Charge v. Brunner*, No. 2:10-cv-95, 2010 WL 519814, at *3-5 (S.D. Ohio Feb. 10, 2010) (denying an attempt to block the circulation of petitions with signatories' names in Ohio).

²¹¹ The plaintiffs in all cases cited in note 210, *supra*, relied on general First Amendment complaints. See *McKee*, 649 F.3d at 51 ("NOM has framed its First Amendment challenges to Maine's election laws as overbreadth claims . . ."); *Daluz*, 654 F.3d at 117 (noting that NOM's challenge was based on "vagueness and First Amendment overbreadth grounds"); *Justice*, 2011 WL 5326057, at *5, *7 (arguing for strict scrutiny and a lower governmental interest on ballot questions); *Citizens in Charge*, 2010 WL 519814, at *3 (arguing that the "act of signing a petition is 'core political speech,' the anonymity of which is protected by the First Amendment"). The courts' opinions showed no evidence of any government targeting.

²¹² This criticism of too much judicial interference in political processes does not reach Frankfurter's level of judicial abstinence, which would abstain from remedying much government suppression. Compare *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1942) ("If there is any fixed star in our constitutional constellation, it is that *no official, high or petty*, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (emphasis added)), *overruling* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (Frankfurter, J.), *with id.* at 667 (Frankfurter, J., dissenting) (describing the Court's "duty of deference" to legislatures even on "legislation [that] relates to civil liberties" and arguing that his "attitude of judicial humility . . . is not an abdication of the judicial function").

²¹³ Richard A. Posner, *The Speech Market and Legacy of Schenk*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 120, 145 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

²¹⁴ See Kreimer, *supra* note 191, at 24-25, 109, 147 (arguing that the Court's announced test for exemptions from disclosure pushes litigants into protracted litigation).

the association's reputation,²¹⁵ but also because it diverts the association's resources from promoting its message. Turning a political dispute into an issue about legal rights diminishes the dignity of the participants and of the legal system—even if legal dispute resolution were necessary.²¹⁶ In other words, the possibility of exemptions based on the probability of private harassment encourages associations to flop like a soccer player.²¹⁷ It encourages litigants to make efforts to show how injured they are rather than to kick their dialogue forward and pursue their true goals. And it makes the referees look foolish and activist.

By contrast, the secret test switches from *fútbol* to football and says: "Don't flinch. Don't foul. And hit the line hard."²¹⁸ In life, people will disagree, sometimes passionately. And the way to resolve those disagreements is through "uninhibited, robust, and wide-open" debate.²¹⁹ This give-and-take is central to the First Amendment, not a threat to it. So understood, the referee should be trusted to stop the "game" only when there is a genuine foul. But when the referee cannot be trusted—when there is even a negligible quantum of government interference—the exemption, and presumably other remedies to First Amendment harm, spring into action.

The clarity offered by a test that smokes out government targeting of any level of severity, from all government actors, has a final benefit: It shines a spotlight on and attempts to mitigate government malfeasance. As the branch of the government most insulated from political pressure, the Court is in the best position to check other governmental bad actors, and it should be no surprise that the disclosure exemption is such a remedy.²²⁰ If a legislature deliberately seeks

²¹⁵ See *supra* notes 183–88 and accompanying text (discussing reputational harms and harms to discourse from unwarranted exemptions from disclosure).

²¹⁶ Many criticize the judiciary for resolving certain political disputes. See, e.g., Akhil Reed Amar, *Should We Trust Judges?*, L.A. TIMES, Dec. 17, 2000, at M1 (arguing that *Bush v. Gore* is unworthy of respect and judges cannot be trusted to be legalistic).

²¹⁷ Soccer players "flop" when they act as though they have been fouled by an opposing player in order to draw the referee's (State's) attention and punish their opponents. See George Vescey, *Sports of the Times; In Soccer, Flopping Is an Art Form*, N.Y. TIMES, July 10, 1998, <http://www.nytimes.com/1998/07/10/sports/sports-of-the-times-in-soccer-flopping-is-an-art-form.html>. Of course, flopping is by no means limited to soccer. See, e.g., Bryan Hoch, *Jeter Admits Disputed HBP Hit His Bat*, MLB.COM (Sept. 16, 2010), http://mlb.mlb.com/news/article.jsp?ymd=20100915&content_id=14723336&.

²¹⁸ BOB DOLE, GREAT PRESIDENTIAL WIT (. . . I WISH I WAS IN THE BOOK) 15 (2001) (quoting Theodore Roosevelt).

²¹⁹ N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

²²⁰ The Court has a history of fashioning remedies to protect private citizens from unconstitutional government misconduct. E.g., *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (*Bivens* action); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule).

to suppress an association, an exemption will be granted. If a law is neutral but law enforcement abuses disclosure to target group members, an exemption will be granted.²²¹ If courts are hostile to an organization as in *Patterson*, an exemption will be granted.

As important as the mitigating function of the remedy is, however, granting exemptions should also encourage more corrective action. When a court grants an exemption, it sends a signal to the polity that the government is unconstitutionally targeting a particular group of people. Supporters for constitutional rights should then work to eliminate this invidious and institutionalized prejudice that the court has flagged.

This Subsection is only one argument for favoring the secret test over the *Doe* test. Many arguments could be made for preferring either test. Ultimately, judgment about the merits of the Court's actual test will be determined as more data comes in, as the Court continues to apply the test in secret.

CONCLUSION

This Note has unearthed the Court's hidden jurisprudence at the intersection of disclosure regimes, anonymous speech, and the right to association. The Court's two-part test focuses on government targeting, the nature of associations, and judicial discretion, lending weight to purposivist theory and discussing what judges really do and really mean.

The centrality of the government in purposivist theory may leave a reader uneasy about the chilling effect of private reprisal on associations. Similarly, many may blanch at the idea of judges overruling democratic processes, making decisions based on facts outside the record,²²² and using their gut reactions. Indeed, such disquiet may be why the Supreme Court continues to recite a test that purports to have a specific evidentiary standard and to offer protection from private harassment.

This Note has tried to answer these doubts. But if they still linger, it should be no surprise that, on this topic about how people can best come together to speak, there is likely more to be said.

²²¹ Cf. *supra* notes 98–106 and accompanying text (discussing *Brown*).

²²² See, e.g., Pieter S. de Ganon, Note, *Noticing Crisis*, 86 N.Y.U. L. REV. 573, 607–08 (2011) (opposing judicial notice of crises).