Fifty Plus Years After the Start of the Civil Rights Movement: A Contextual Analysis of the Freedom of Association for the National Association for the Advancement of Colored People's Pursuit of Reforming the Law

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I. Introduction

This Article addresses whether a state may restrict the freedom of association of members of the National Association for the Advancement of Colored People (NAACP) and their ability to challenge a state's policy of racial segregation or discrimination by requiring disclosure of its membership list. Because there were many good reasons supporting the freedom of association among NAACP members who pursued the common political goal of ending state-sponsored racial segregation or discrimination, courts properly regarded laws authorizing state officials to demand the membership list of the NAACP as unconstitutional violations of the freedom of association.[1] Becoming a member of the NAACP, similar to connecting with a church, was an

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[1] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958); *see also* Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 557-58 (1963) (holding state legislative committee not entitled to compel a private association's president to produce records of its association's members).

associational right that the First Amendment protected.[2] "Joining a group is often as vital to freedom of expression as utterance itself."[3] Hated organizations, if required to disclose their membership lists, were substantially certain to lose members as well as experience public resentment and opposition.[4] There was a reasonable presumption that a governmental regulation requiring the disclosure of NAACP members' names during the civil rights movement would have acted as a deterrent to the freedom of association.[5]

In this Article, I will focus most of my discussion on the historical role of the freedom of association during the American civil rights movement and the struggle for racial equality. This Article is divided into three parts involving the freedom of association. Part II illustrates how violence and intimidation were significant tools for controlling race relations between blacks and whites in the United States. From a contextual perspective, Part III contends that the challenge of the civil rights movement to democracy's tolerance of racial discrimination inspired the Supreme Court to upgrade the freedom of association. Part IV presents a discussion of how the freedom of association cases, protecting the NAACP's right not to disclose its membership lists, proved to be a lifeline for the NAACP and its local branches during the civil rights movement.

II. Violence and Intimidation Were Significant Tools for Controlling Race Relations Between Blacks and Whites in the United States

While teaching my First Amendment class at the Thurgood Marshall School of Law at Texas Southern University, I tell my students that laws regulating our legal right to freely associate with each other do not exist in an abstract vacuum. During a significant portion of the twentieth century, race-based violence was utilized to regulate social

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2 William O. Douglas, *The Right of Association*, 63 Colum. L. Rev. 1361, 1374 (1963).

3 *Id.*

4 *Id.*

5 *See* Recent Statute, *Constitutional Law—Freedom of Speech and Press—Federal Statute Authorizes Post Office to Detain Communist Political Propaganda Unless Addressee Requests Delivery—76 Stat. 840 (1962), 39 U.S.C. § 4008 (Supp. IV, 1963)*, 77 Harv. L. Rev. 1165, 1167 (1964).

relationships between blacks and whites in America.[6] A 1947 *Report of the President's Committee on Civil Rights* revealed that the persistent manipulation of violence by private citizens and public officials to oppress and dominate African Americans with scare tactics undermined America's democratic values.[7] Because of the pervasive nature of the violence against African Americans in the 1947 *Civil Rights Report* and the systematic failure of local authorities to protect them, the drafters argued that Congress should use its federal authority to prosecute violent hate crimes against racial minorities.[8]

The Supreme Court held in *Brown v. Board of Education* that racial segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment.[9] The *Brown* decision was the first time since the enactment of the Civil Rights Amendments in the 1860s that white Southerners were confronted with a challenge to racial segregation as a right exempted from meaningful constitutional review.[10] The Southern white community's opposition to the holding in the *Brown* decision included violence by white students directed at black students who attempted to integrate public schools.[11] Inspired by their hate and contempt for the *Brown* decision, white Southerners, for the first time since they organized and supported the Ku Klux Klan to deny blacks their constitutional rights, developed a comprehensive plan of intimidation to deny blacks the right to attend integrated public schools.[12] One of the most problematic rationales for the separation of the races in *Plessy v. Ferguson* was the Court's conclusion that Louisiana could use its police power to implement this system of discrimination against

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6 *See* Robin D. Barnes, *How Civil Rights and Pro-Peace Demonstrations Transformed the Press Clause Through Surrogacy*, 34 WM. MITCHELL L. REV. 1021, 1043 (2008) (citing SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY (2007)).

7 *Federal Power to Prosecute Violence Against Minority Groups*, 57 YALE L.J. 855, 855-56 (1948).

8 *See id.* at 856.

9 Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

10 *Legal Sanctions to Enforce Desegregation in the Public Schools: The Contempt Power and the Civil Rights Acts*, 65 YALE L.J. 630, 636 (1956).

11 *Id.* at 637.

12 *Id.* at 636-37.

blacks to control the violent behavior of white Southerners.[13] The *Brown* decision rejected a conservative point of view that contended that the utilization of the police power to prevent violence by whites against blacks was an adequate justification to maintain racial segregation.[14]

Southern whites' violence against school integration might have had the unintended effect of forcing the executive branch to enforce decrees of the judicial branch.[15] The slight suggestion that courts would not act to implement their integration decrees in order to escape violent resistance to their judicial authority was an obvious incitement to force the judiciary to abandon the goal of ending compulsory school segregation.[16] The rule that illegal acts should not deny a person of his constitutional rights should especially be followed when white Southerners promised racial violence in disobedience of the Court's decree.[17]

III. The Civil Rights Movement's Challenge to Democracy's Tolerance for Racial Discrimination Inspired the Supreme Court to Upgrade the Freedom of Association Doctrine

Robin D. Barnes contended the Supreme Court developed the doctrine of freedom of association during the high point of the civil rights movement.[18] Martin Luther King, Jr., an acknowledged leader of the civil rights movement, often considered constitutional issues in developing a strategy to advance the goal of racial equality.[19] Likewise, any lawyer who engages in constitutional interpretation has a duty to at

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13 *The Supreme Court, 1956 Term*, 71 Harv. L. Rev. 94, 152 (1957); Plessy v. Ferguson, 163 U.S. 537, 547-48 (1896).

14 *The Supreme Court, 1956 Term*, *supra* note 13, at 152.

15 *See* Note, *Supreme Court Equity Discretion: The Decrees in the Segregation Cases*, 64 Yale L.J. 124, 134 n.38 (1954).

16 *See id.* at 134.

17 *Id.*

18 Barnes, *supra* note 6, at 1046.

19 *See* Randall Kennedy, *Martin Luther King's Constitution: A Legal History Of The Montgomery Bus Boycott*, 98 Yale L.J. 999, 1000 (1989).

least provide examples of how the Constitution might apply to hypothetical situations or litigation.[20]

Professor Herbert Wechsler articulated his belief that the Justices on the Supreme Court are obligated to make principle-neutral determinations when applying constitutional law.[21] Professor Wechsler criticized the Supreme Court for departing from a principle-neutral determination in deciding free speech issues under the First Amendment and school segregation cases under the Fourteenth Amendment.[22] According to Professor Wechsler, by deciding in *Brown* that racial segregation in public schools violated the principle of equal protection of the law, the Supreme Court made an improper value choice by not basing the decision on the neutrality principle.[23] Professor Benjamin F. Wright appropriately contended that Professor Wechsler's application of neutral principles to the issue of state enforced segregation was misleading, unnecessary, and confusing.[24]

According to Professor Wright, Professor Wechsler's application of neutral constitutional principles to the ending of the separate but equal doctrine clearly conveyed "the impression of finding some validity in . . . *Plessy v. Ferguson*."[25] The separate but equal theory was a race-based sociological value judgment approved by the Supreme Court that was not socially neutral.[26] As a society, it was easy to reject any demand that reversing the separate but equal doctrine required constitutional neutrality.[27] Any call by Professor Wechsler to apply neutral principles to the end of judicially approved race-based segregation was indeed misplaced irony.[28] Litigation to implement the decree under

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[20] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 20 (1959) ("One who has ventured to advance such generalities about the courts and constitutional interpretation is surely challenged to apply them to some concrete problems—if only to make clear that he believes in what he says.").

[21] *Id.* at 19.

[22] *Id.* at 20-23.

[23] *Id.* at 33-34.

[24] Benjamin F. Wright, *The Supreme Court Cannot Be Neutral*, 40 TEX. L. REV. 599, 599 (1962).

[25] *Id.* at 606.

[26] *See id.*

[27] *See id.*

[28] *See id.*

Brown to desegregate public schools in the South was often met with delay, hostility, and violence by the white community.[29] From a historical perspective, one commentator appropriately warned federal courts that if they were to allow violence to serve as a basis to delay the implementation of the *Brown* decree to end mandated segregation in public schools, they would be issuing an unnecessary "invitation to lawlessness."[30]

This Article's major focus is on a contextual discussion of the freedom of association and the pursuit of racial justice from 1954 to 1968. The freedom of NAACP members to come together and challenge the policies and politics of racial segregation and discrimination faced significant legal challenges in the South during the 1950s.[31] A Southern strategy of enacting state and local laws expressed their resistance to racial equality during the 1950s and revealed a Southern effort to implement a problematic legal strategy under the Constitution to prevent the protests of the 1960s from ever taking place.[32] The controversy over racial segregation in the public schools of Little Rock included deploying the military in 1957.[33] However, one of the least observed characteristics of the Little Rock situation was the attempt by state and local officials to suppress all challenges to segregation.[34] One such attempt included preventing those who rejected racial segregation from associating with each other as members of the NAACP to advance their common goal.[35]

The freedom of association is necessary for a person or a group of people to be successful in a democracy.[36] Without the Supreme Court's recognition of the freedom of association as a constitutionally protected right, members of the NAACP and other supporters of the

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[29] Notes, *Implementation of Desegregation by the Lower Courts*, 71 HARV. L. REV. 486, 490-91 (1958).

[30] *Id.* at 490.

[31] Joseph B. Robison, *Protection of Associations from Compulsory Disclosure of Membership*, 58 COLUM. L. REV. 614, 615 (1958).

[32] *See id.* at 616-17.

[33] *Id.* at 614.

[34] *Id.*

[35] *Id.* at 614-15.

[36] Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 1 (1964).

civil rights movement would not have had the opportunity to utilize the democratic process effectively.[37] One commentator appropriately contended that the proper doctrinal home for protecting the freedom of association was the freedom of expression individuals enjoy under the First Amendment.[38] As a policy matter, it was very dangerous not to protect associational expression because the denial of the freedom of association would allow the state to suppress the racial minorities' entire civil rights movement.[39] The First Amendment freedom of association prohibits the government from restricting one's ability to join the NAACP as a means of expressing support for a progressive civil rights agenda.[40] The freedom of association was the conceptual child of the First Amendment freedom to promote our thoughts and dreams to members of the civil rights community.[41] In cases linking the NAACP to claims of violation of the freedom of association, the Supreme Court failed to clearly state whether the freedom of association rights belonged to individual members or to the NAACP in its corporate capacity.[42]

The freedom of association was not without limits; however, the constitutional significance of equality in the voting process in a democracy was very strong.[43] For instance, the freedom of association did not exist when the immediate goal of the state-sponsored associational interest was to deny black voters the chance to have their votes counted on an equal basis with their white peers.[44]

The First Amendment of the United States Constitution does not refer to freedom of association.[45] Nevertheless, the First Amendment not only prohibits Congress from making any law diminishing either the

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37 *See id.*

38 *Id.* at 22.

39 *See id.* at 23.

40 *Id.*

41 *See* Lawrence J. Rothenberg, *The Registration of Communist-Front Organizations: The Statutory Framework and the Constitutional Issue*, 113 U. PA. L. REV. 1270, 1285 (1965).

42 *Id.*

43 *See* William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 22 (1961).

44 *Id.* at 25.

45 Robison, *supra* note 31, at 619.

freedom of speech or the press, but it also gives the people the right to assemble in tranquility and formally request the government to remedy their grievances.[46] By 1958, courts were recognizing the freedom of association as having a distinct constitutional protection under the First Amendment.[47]

In 1957, the United States Supreme Court stated that our government was founded on the theory that every citizen had the right to come together for both political expression and association.[48] The NAACP defeated the organized effort of several southern states to conquer it by convincing the Supreme Court that those laws which mandated public disclosure of its membership list were unconstitutional violations of the fundamental liberty to associate for a common cause.[49]

IV. Freedom of Association Cases Protecting the Right Not to Provide Disclosure of Membership Lists Proved to Be a Lifeline for the NAACP and its Local Branches During the Civil Rights Movement

Next, this Article analyzes three Supreme Court cases acknowledging the right of association, which was the lifeline that prevented

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46 U.S. Const. amend. I.

47 *See* Robison, *supra* note 31, at 620 (citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 141 (1951)); Bridges v. Wixon, 326 U.S. 135, 163 (1945); Whitney v. California, 274 U.S. 357, 372 (1927); *see also* Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring); AFL v. Reilly, 155 P.2d 145, 148-50 (Colo. 1944)). *See generally* 1 Thomas I. Emerson & David Haber, Political and Civil Rights in the United States 248 (2d ed. 1958) (summarizing the concerns behind state and federal limits on exercise of franchises); Arthur M. Schlesinger, Paths to the Present 248 (Houghton Mifflin Co. 1964) (describing the possible threats to unions because of the different views of Negro slavery between the North and the South); Glenn Abernathy, *The Right of Association*, 6 S.C.L.Q. 32 (1953) (illustrating the abundance of associations in America).

48 Robison, *supra* note 31, at 620 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

49 *Id.* at 614-16; *see also* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958) (holding that "the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment").

Southern states from using public disclosure, registration, or tax laws to destroy either the NAACP or the civil rights movement.

The Court's acknowledgment of a right of anonymity under the First and Fourteenth Amendments demonstrated an understanding that compulsory disclosure would have a chilling effect on the expression of thoughts, dreams of racial equality, and involvement in the NAACP, which could help make such dreams a reality.[50] The Court's position of protecting a person's right against illegitimate disclosure requests by the government during the civil rights movement inspired angry and severe criticism.[51]

A. NAACP v. Alabama ex rel. *Patterson*

While reviewing a constitutional challenge to a judgment of civil contempt entered against the NAACP by the courts of Alabama, the United States Supreme Court stated unmistakably that the Constitution protected the freedom of association of NAACP members.[52] In considering whether the Alabama court's production order violated fundamental freedoms safeguarded by the Due Process Clause of the Fourteenth Amendment, the Supreme Court was less than clear about whether the freedom of association was grounded in a First Amendment liberty of an expressive nature or a separate due process liberty to engage in lawful concerted activity.[53] The Supreme Court properly concluded that Alabama did not have a legitimate interest in forcing the NAACP to disclose the names of its members.[54] It was obvious that the Supreme Court did not believe that Alabama should be able to use the resources of the state's legal system to retaliate against its citizens for choosing to join the NAACP and for supporting its efforts to end racial segregation.[55]

When the Supreme Court linked its rationale for approving the freedom of association to the freedom of speech without stating un-

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[50] *See* Notes & Comments, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084, 1105-07 (1961).

[51] *Id.* at 1104-05.

[52] *Patterson*, 357 U.S. at 466.

[53] *See id.* at 460.

[54] *Id.* at 465.

[55] *See id.* at 462.

equivocally that the freedom of association was an independent right under the First Amendment, it unnecessarily created a reasonable inference that its freedom of association theory was dependent on the Free Speech Clause.[56] The liberty language in *Patterson* strongly suggested that a valid freedom of association claim was required for the Free Speech Clause to apply.[57] "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[58] In my opinion, the Supreme Court's language in *Patterson* indicates the freedom of speech "liberty" interest protected by the Due Process Clause of the Fourteenth Amendment also shields a person's expressive freedom to make a symbolic statement regarding her associational status with a cause, organization, or person.

One commentator, Keola R. Whittaker, equated the failure of the State of Alabama in *Patterson* to show a controlling justification for requiring a disclosure of a membership list as the functional equivalent of a failure to demonstrate a compelling state interest under the strict scrutiny test.[59] According to Whittaker, the strict scrutiny standard employed in *Patterson* has been useful in several subsequent actions to put a stop to a state compelling the NAACP to disclose its membership list.[60] Professor Katherine J. Strandburg indicated the Supreme Court's current First Amendment jurisprudence offers solid protection to formal associations and acknowledges the essential role of freedom of association in a democratic society.[61] A distinct line of cases conveyed the significance of being able to associate free from government investiga-

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[56] *See id.* at 460-61.

[57] *See id.* at 460.

[58] *Id.* (citing Staub v. City of Baxley, 355 U.S. 313, 321 (1958); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Palko v. Connecticut, 302 U.S. 319, 324 (1937); Gitlow v. New York, 268 U.S. 652, 666 (1925)).

[59] Keola R. Whittaker, *Gay-Straight Alliances and Free Speech: Are Parental Consent Laws Constitutional?*, 24 BERKELEY J. GENDER L. & JUST. 48, 58 (2009).

[60] *Id.* (citations omitted). *But cf.* Buckley v. Valeo, 424 U.S. 1 (1976) (approving of *NAACP v. Alabama* ex rel. *Patterson* but distinguishing this case by holding the state's interest in assuring fair elections outweighed the rights of political parties to keep their donor list private).

[61] *See* Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 783 (2008)

tion based on membership.[62] Particularly, the First Amendment safeguarded membership lists of expressive associations from the possession of the government unless the strict scrutiny test was met.[63] Subsequent cases, which restricted the government's power to make inquiries into association membership, were clearly the progeny of both *Patterson* as well as *Bates v. City of Little Rock*.[64] Professor Strandburg contended that the rationale implemented to restrict governmental access to the membership lists of civil rights organizations during the civil rights movement should be modified to address today's new technological methods that an entity may utilize for acquiring information regarding group affiliation.[65]

B. Bates v. City of Little Rock

Petitioner Williams, president of a local chapter, gave the City Clerk of North Little Rock an affidavit indicating his local organization constituted a branch of the NAACP, a New York Corporation.[66] Williams's statement in the affidavit was remarkably candid about the state of race relations in Arkansas in 1957, and how the request by the city for the names of its members was a poorly disguised pretext to use the information to practice racial terrorism or harassment against its members.[67]

In 1957, when Williams submitted his affidavit, which alleged a longstanding constitutional right to join an organization on an anonymous basis,[68] the Supreme Court had not consistently recognized the freedom to associate for a common cause as an established and independent constitutional right enforceable against state and local officials.[69]

(citing Boy Scouts of Am. v. Dale, 530 U.S. 640, 647-48 (2000); Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984)).

62 *Id.*

63 *Id.* (citing *Buckley*, 424 U.S. at 64; NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-63 (1958)).

64 *Id.*

65 *Id.*

66 Bates v. City of Little Rock, 361 U.S. 516, 519-20 (1960).

67 *Id.* at 520.

68 *Id.*

69 *See, e.g.*, Am. Commc'ns Ass'n v. Douds, 339 U.S. 382 (1950) (holding a provision requiring officers of a labor organization to file an affidavit stating they are

Williams asserted in his affidavit that the traditional freedom of individuals to anonymously associate to pursue racial justice was a right implicit at the start of the United States Constitution.[70] In 1958, one year after Williams made his assertion, the Supreme Court protected the NAACP members' right to associate anonymously when pursuing one's civil or human rights.[71]

As a result of writing this Article, my respect for the many nonviolent freedom fighters like Bates and Williams—who were prime targets of Southern white terrorists—has grown tremendously. People like Bates and Williams are true American heroes because they risked their lives and fortunes by stepping up to the legal plate as local public figures and leaders in the battle for racial justice. I have the greatest respect for Thurgood Marshall as a brilliant lawyer and insightful Associate Justice of the United States Supreme Court. However, Justice Marshall would not have had an opportunity to litigate his challenge to America's denial of civil rights to African Americans without civil plaintiffs and criminal defendants like Bates and Williams, who were willing to fight the Southern system of racial apartheid, at great personal risk, in the American judicial system. Justice Marshall's belief in human equality represents his life and legacy.[72] His skills as a litigator and his commitment to social justice allowed him to impact constitutional jurisprudence and serve the nation well as a member of the Court.[73] As a beneficiary of Justice Marshall's litigation skills, I feel a sense of profound gratitude to the many individuals like Bates and Williams who were the civil rights plaintiffs and defendants who gave Justice Marshall and other civil rights lawyers an opportunity to

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not a member of the Communist party was constitutional); De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (explaining that when determining whether the right to assemble is preserved the Court looks "not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects"). *But see* Gitlow v. New York, 268 U.S. 652, 665-66 (1925) (holding that assembling to advocate for the use of violence for a purpose is in itself criminal and therefore not protected).

70 *Bates*, 361 U.S. at 520-21.

71 NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958).

72 G. Todd Butler & Jason Marsh, *Foreword: Celebrating The Life And Legacy Of Thurgood Marshall*, 27 Miss. C. L. Rev. 289, 289 (2008).

73 *See id.*

demonstrate their impressive legal skills in the never-ending fight for racial justice in America. I do not believe I would have had an opportunity to enroll in the University of Mississippi in 1969 as a freshman but for Thurgood Marshall's winning argument before the Supreme Court in 1954 in *Brown*, which supported the right of an integrated public education.[74]

Professor Richard H. Fallon, Jr. of Harvard Law School highlighted the important role the *Bates* decision played in applying the strict scrutiny test to First Amendment cases alleging a violation of the freedom of association.[75] The decision in *Bates*, where the United States Supreme Court found a law in Arkansas requiring disclosure of membership lists without a compelling justification to be unconstitutional, proved to be an effective roadblock to Southern efforts to use the legal process to destroy the NAACP through state-sponsored public disclosure of its local membership lists.[76] The Southern strategy to suppress the First Amendment rights of those who challenged Jim Crow segregation in the South was on a collision course with those who believed that the First Amendment protected their right to come together and protest the human indignity they faced everyday because of the color of their skin. The South's determination to reject the goal of racial equality established in *Brown* prompted many states in the South to suppress the collective efforts by communities of color and their supporters.[77] In *Bates*, after people of color and their supporters organized to challenge the separate but equal Jim Crow practices in Arkansas, the United States Supreme Court boldly declared, "it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States."[78]

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[74] *See generally* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[75] Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1280 (2007).

[76] *See generally* Bates v. City of Little Rock, 361 U.S. 516 (1960) (holding ordinances which compelled disclosure of community organizations' membership lists unconstitutional).

[77] *See Brown*, 347 U.S. at 495 (invalidating the separate but equal doctrine); *Bates*, 361 U.S. at 527 (invalidating an attempt by Southern states to suppress assemblies of people of color and their supporters by compelling disclosure of their membership).

[78] *Bates*, 361 U.S. at 523 (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958); De Jonge v. Oregon, 299 U.S. 353, 364 (1937)).

Although a state must have a compelling justification to meet the strict scrutiny standard to require the NAACP to disclose its membership list, officials in *Bates* failed to demonstrate even a reasonable relationship between requiring the NAACP to reveal the names of its members and the intended purpose of the occupational license tax.[79] The Court further stated, "The taxes are not, and as a matter of [Arkansas] law cannot be, based on earnings or income, but upon the nature of the occupation or enterprise conducted."[80]

When the NAACP was asked questions concerning the nature of its operation inside two Arkansas cities under the occupation tax regulation, it provided the following answer:[81]

> We are an affiliate of a national organization seeking to secure for American Negroes their rights as guaranteed by the Constitution of the United States. Our purposes may best be described by quoting from the Articles of Incorporation of our National Organization where these purposes are set forth as: voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interest of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law. To ascertain and publish all facts bearing upon these subjects and to take any lawful action thereon; together with any kind and all things which may lawfully be done by a membership corporation organized under the laws of the State of New York for the further advancement of these objects.
> The Articles of Incorporation hereinabove referred to are on file in the office of the Secretary of State of the State of Arkansas. In accord with these purposes and aims, (this) Branch, NAACP was chartered and organized, and

[79] *Id.* at 525.
[80] *Id.*
[81] *Id.*

> we are seeking to effectuate these principles within (this municipality).[82]

The Supreme Court then decided that both Little Rock and North Little Rock were unsuccessful in displaying either a significant or reasonable justification for an occupation tax that would have the reasonable, foreseeable consequence of placing a chilling effect on the associational rights of NAACP members of the local branches.[83] The Supreme Court concluded that the cities' inability to link any activity of the local branches of the NAACP where a license tax may apply, demonstrated a failure by city officials to show any legitimate justification for unduly burdening associational rights of the NAACP members with an occupational tax that would result in a membership list disclosure.[84] The cities could not punish branches of the NAACP under the guise of local law for refusing to reveal membership information when the two cities could not demonstrate a rational interest in obtaining such information.[85] From 1954 to the 1960s, a comparatively progressive Supreme Court protected the First Amendment rights of protesting civil rights groups from prohibited governmental oppression in the South.[86] Consequently, this period earned its designation as the civil rights revolution because of its impact on minorities' rights.[87]

C. Shelton v. Tucker

In the 1960 case of *Shelton v. Tucker*, the United States Supreme Court confronted the issue of whether an Arkansas law, which required all teachers in the state to file an annual affidavit listing all organizations with which they had membership for the preceding five years, was unconstitutional under the First Amendment's freedom of association.[88] Shelton, a teacher in a Little Rock school for twenty-five

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82 *Id.* at 525-26 (internal quotation marks omitted).

83 *Id.* at 527.

84 *Id.* at 526-27.

85 *Id.* at 527.

86 *See* David Kairys, *A Brief History of Race and the Supreme Court*, 79 TEMP. L. REV. 751, 762 (2006).

87 *Id.*

88 Shelton v. Tucker, 364 U.S. 479, 480 (1960).

> The question to be decided here is not whether the State of Arkansas can ask certain of its teachers about all their organizational

years, refused to file the affidavit which resulted in the school refusing to renew his teaching contract.[89] The Supreme Court held that the Arkansas law was unconstitutional because it interfered with the freedom of association.[90] Despite the freedom of association issue, the Supreme Court stated that the State of Arkansas had the right to examine the competence and fitness of those who taught in schools because, in the classroom, they could have a significant influence on the attitude of young minds regarding the society in which they live.[91]

Significantly, though, the Supreme Court in *Shelton* in framing the issue did not ground the freedom of association in the First Amendment.[92] One could argue from a Due Process Clause perspective the Supreme Court implicitly concluded the burden on the freedom of teachers to associate with the NAACP was fundamentally unfair, because the arbitrary nature of the mandatory membership disclosure questions did not have any rational relationship to a teacher's job-related experience or qualification.[93]

However, one may also contend the Supreme Court analyzed the associational issue presented in *Shelton* under a functional substantive

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> relationships. It is not whether the State can ask all of its teachers about certain of their associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizational activity. The question is whether the State can ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period.

Id. at 487-88.

89 *Id.* at 482-83.

90 *Id.* at 490.

> The scope of the inquiry required by Act 10 is completely unlimited. The statute requires a teacher to reveal the church to which he belongs, or to which he has given financial support. It requires him to disclose his political party, and every political organization to which he may have contributed over a five-year period. It requires him to list, without number, every conceivable kind of associational tie-social, professional, political, avocational [sic], or religious. Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness.

Id. at 488.

91 *Id.* at 485.

92 *See id.* at 487.

93 *See id.* at 488.

due process liberty interest interpretation of the Fourteenth Amendment to the Constitution.[94] According to the Supreme Court, even when the governmental purpose is legitimate and substantial, that purpose cannot be practiced by means that generally suppress fundamental personal liberties protected by substantive due process, if that purpose can be accomplished by using narrower means.[95] Courts must consider the extent of the legislative abridgment on the freedom of association in light of less drastic measures available for realizing the same basic purpose.[96] Therefore, the unlimited and indiscriminate sweep of the Arkansas law was an unconstitutional violation of a fundamental personal liberty interest—the right of association protected by an inherent substantive Due Process Clause component of the Fourteenth Amendment.[97] Arkansas's teacher disclosure law was a comprehensive interference with a substantive due process liberty in the freedom of association because it was not a narrowly tailored means to implement a state's legitimate inquiry into its teachers' qualifications and skills.[98]

According to Professor Stewart Jay, during the 1960s, claims of substantive associational rights were often presented to the Supreme Court as the type of fundamental personal liberty that required more than a rational basis justification.[99] Under *Shelton*, a state may not place undue impediments on the freedom of association under the First Amendment without a compelling justification.[100] According to Justice John Harlan's dissent in *Shelton*, the majority opinion found the Arkansas teacher disclosure law was unconstitutional because the law "is too broad, because it asks more than may be necessary to effectuate the State's legitimate interest. Such a statute, it is said, cannot justify the inhibition on freedom of association which so blanket an inquiry may entail."[101] I believe the universal significance of *Shelton* was that its

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94 *See id.* at 480, 484-85.

95 *Id.* at 488.

96 *Id.*

97 *Id.*

98 *Id.* at 490.

99 Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 955 (2008).

100 *See Shelton*, 364 U.S. at 497-98 (Harlan, J., dissenting) (citing Uphaus v. Wyman, 364 U.S. 388 (1960)).

101 *Id.* at 498.

reasoning was not limited to the freedom of association or speech, because whenever a state carries out a legitimate state goal that burdens any fundamental liberty protected by the Fourteenth Amendment, it must use the least restrictive means under the compelling state interest requirement.[102]

The Supreme Court in *Shelton* recognized freedom of speech and freedom of association as fundamental rights deserving of protection unless the government has used the least restrictive means available under the strict scrutiny test.[103] According to Professor Jay, because other options would allow the state to achieve its legitimate goals without imposing similarly unreasonable burdens on the right to associate, the Supreme Court concluded that Arkansas's real intention was to restrain associational communication in violation of the Constitution.[104] It is my contention that the Supreme Court, after considering all the options available to the State of Arkansas to acquire relevant information about the qualifications of its teachers, appropriately understood that if they left the Arkansas mandatory membership disclosure law unchecked, it would have a chilling effect on the ability of the NAACP and its members to associate for the purpose of challenging a corrupt system of racial segregation under the separate but unequal justice routine that the Court unfortunately approved in *Plessy*,[105] but wisely rejected in *Brown*.[106]

V. Conclusion

When the civil rights movement needed help from 1954 to 1968, the Supreme Court granted the movement a helping hand by articulating that the freedom of association included the right of the NAACP not to disclose the names of its members in order to protect them from the risk of losing their lives or suffering severe economic hardship.[107] Many

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102 *See generally id.* at 497-98.

103 *Id.*

104 Jay, *supra* note 99, at 956.

105 *See generally* Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896) (supporting the separate but equal doctrine).

106 *See generally* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (rejecting the separate but equal doctrine).

107 *See, e.g.*, Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

individuals risked their lives by becoming party plaintiffs in litigation challenging either racial segregation or racial injustice in the wild American South. "The first half of the twentieth century saw mostly a continuation of the Supreme Court's rejection of minority claims and rights[.]"[108] However, during the civil rights movement, the Supreme Court uncharacteristically protected minority rights and claims by endorsing a freedom of association theory that allowed the NAACP to refuse to disclose the names of its members who chose to be anonymous.[109] Professor David Kairys contended that the history of the Supreme Court on race issues revealed, even after the passage of the Civil War Amendments, a persistent lack of serious concern for racial equality.[110] I am glad the Supreme Court was able to correct the freedom of association doctrine during the civil rights movement. The Court's understanding of the freedom of association doctrine prevented Southern states from using mandatory membership disclosure laws to achieve their goal of destroying the NAACP. But for the NAACP, its supporters, and the Supreme Court's treatment of the freedom of association, the civil rights movement of the 1950s and 1960s might have been delayed until the twenty-first century.

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108 Kairys, *supra* note 86, at 761.

109 *See, e.g.*, *Bates*, 361 U.S. 516; *Patterson*, 357 U.S. 449.

110 Kairys, *supra* note 86, at 769.