Disclosure and Its Discontents

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INTRODUCTION

Government-mandated disclosure of information is a longstanding source of First Amendment discontent. The Supreme Court’s feeble responses to the anti-Communist investigations of the 1940s and 50s, which centered on compelled disclosures of political affiliations, largely inspired the debate about categorization and balancing that occupied First Amendment scholarship in the mid-twentieth century. For proponents of categorization, the Communism cases showed that First Amendment analysis must proceed at the level of types or categories of expression and that ad hoc balancing of the costs and benefits of regulation was dangerously underprotective of expressive interests.

Today, the legal paradigms have shifted, but disclosure remains a methodological sticking point. The dominant strain in current free speech doctrine, and a significant one in related scholarship, is what some have called “purposivism,” which holds that the First Amendment is primarily, if not exclusively, concerned with the government’s purpose in regulating speech. Compelled disclosure, however, has long been assessed not by its...
purposes, but by its detrimental effects on expressive association. Thus, under the successive paradigms of categorization versus balancing and purpose versus effects, disclosure law has fallen on the wrong side of the prevailing theory. It inquires into the effects of disclosure on expression, and then it balances those effects against the interests served by disclosure.

This, at least, is what a restatement of disclosure doctrine would tell us. My aim here is to complicate this picture in two ways. First, I argue that a small but important set of disclosure cases is actually about categorization and purpose, rather than balancing and effects. Specifically, where the government forces disclosure in order to penalize or deter protected speech, it is acting with a purpose that should be recognized as categorically suspect under the First Amendment. Moreover, the Communism cases, which embraced balancing and fueled the categorization-versus-balancing debate, and the early civil-rights-era case of *NAACP v. Alabama ex rel. Patterson*, which provided the effects-and-balancing standard still in use today, exemplify this type of illicit purpose. In other words, the very cases that put disclosure doctrine on the “wrong” side of the dominant First Amendment paradigms should actually have been on the “right” side, because they involved categorically suspect government purposes.

Second, although disclosure law is more about purpose and categorization than generally recognized, it does not follow that the doctrine is mistaken in focusing on effects and balancing. As a normative matter, the issue of disclosure presents a particularly strong challenge to the predominant, dim view of effects- and balancing-tests. Real and hypothetical instances of compelled disclosure are some of the most...
persuasive examples of regulation in which total indifference to effects seems incorrect under various conceptions of the First Amendment. And inevitably, to the extent that regulatory effects matter, it becomes difficult to avoid case-by-case balancing.

Properly conceived, then, disclosure law is about both categorization and balancing, both purpose and effects. In what follows, I develop this claim by arguing, in Part I, that First Amendment disclosure principles properly include protection against a suspect form of discriminatory governmental purpose. I then argue, in Part II, that several objections to taking effects into account should not lead us to ignore them entirely, and that disclosure is one area where considering effects may be especially appropriate.

I.

To show that disclosure implicates questions of governmental purpose, I describe the early disclosure cases and argue that they contain a principle regarding a certain category of suspect government purpose. I suggest that this principle is in line with the First Amendment prohibition on content-based discrimination that governs direct restrictions on expression. I then suggest why recognizing a rule against a particular type of government purpose may accomplish less in the area of disclosure than the prohibition on content discrimination accomplishes in the area of direct restrictions on speech.

A.

The Supreme Court’s first extended engagements with compelled disclosure came in the 1950s, courtesy of McCarthyism and Southern massive resistance to desegregation. The cases of this era cast a long shadow. *NAACP v. Alabama ex rel. Patterson,* a civil rights case, provides a doctrinal standard still in use, while the specter of McCarthyism provides a benchmark of illegitimacy against which instances of compelled disclosure are still compared.

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6 One previous case was *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 66 (1928), upholding a New York law requiring oath-based groups—notably the Ku Klux Klan—to disclose their membership.


The backdrop of the McCarthy-era cases is familiar. Throughout the late 1940s and 1950s, both houses of Congress, as well as many states, undertook large anti-Communism efforts that included calculated exposure of those engaged in "un-American" activities. The House and the Senate held extensive hearings in which individuals from various walks of life were questioned about their own political associations and those of their friends and colleagues. Those who refused to testify or admitted "un-American" associations faced retaliation by the government and by private actors using, for example, industry blacklists.

Judicial review of anti-Communism efforts was largely sympathetic to the government. Lower courts tended to find the inquiries justified by national security interests. The Supreme Court at first avoided the issue or struck a balance in favor of the government. Although it ultimately became more hostile to a variety of anti-Communism schemes, even then its objections tended to be oblique, dealing mostly with concerns about lack of fair notice or proper procedures.

Meanwhile, in the mid-1950s, the Southern states began their campaign of massive resistance against school desegregation. Among the many tactics employed was disclosure of the membership of civil rights organizations such as the NAACP. Several states sought such disclosure through new laws or through the application of existing law.
In Alabama’s case, the state attempted to subpoena membership rolls in the course of a suit against the NAACP for failing to register under the state’s foreign-corporations law. When the NAACP refused to comply with the subpoena, the Alabama court held the organization in contempt. After the Alabama courts rejected the NAACP’s constitutional claim, the Supreme Court reversed, holding that compliance with the subpoena would violate NAACP members’ freedom of association. Associational rights are unconstitutionally burdened, the Court held, where the effect of disclosure would be to expose individuals to reprisals by disapproving third parties. Under such conditions, individuals would face an improper deterrent—a chilling effect—against forming associations to engage in protected expression.

In this particular case, the NAACP demonstrated a burden on associational rights because it “made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.” Balancing the state’s interests in obtaining the information against the members’ interests in withholding it, the Court concluded that the state had failed to justify the deterrent effect that disclosure would have on associational rights.

The approach in NAACP crystallized an aspect of the Communism cases. There, too, to the extent that the Court recognized a constitutional cost to the government’s efforts, it often couched it in terms of the deterrent effects on protected association. And it tended to resolve that concern, one way or the other, through balancing.

The effects-and-balancing approach articulated in NAACP v. Alabama has become the primary standard for violations of associational rights, including most compelled disclosures. A court first asks the extent to

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18 NAACP v. Alabama, 357 U.S. at 451-52.
19 Id. at 466.
20 Id. at 462-63.
21 Id. at 462.
22 Id. at 464-66.
which the challenged state action burdens expressive association. In disclosure cases, this burden generally takes the form of a deterrent effect on association. Establishing a constitutionally significant deterrent effect requires a showing of credible threats of reprisal, usually predicated on evidence of past reprisals. If a deterrent effect is constitutionally significant, then it must be balanced against the interests furthered by the challenged regulation.

Thus, the Communism cases and NAACP v. Alabama expressly involve effects and balancing, and they were instrumental in making effects and balancing the key questions for this entire area of First Amendment law.

B.

In the Communism and civil rights cases, however, the wrongs involved were not best described in terms of effects and balancing. As many commentators recognized at the time, the exposure tactics of both McCarthyism and massive resistance intentionally targeted disfavored viewpoints for adverse treatment. The purpose behind these tactics was categorically suspect in First Amendment terms.

This conclusion rests on a proposition and a corollary. The proposition is that for the government to punish these viewpoints directly—whether by criminal, civil or administrative penalties—would clearly have violated the First Amendment. It is quite clear today, as a matter of First Amendment doctrine, that viewpoint discrimination triggers strict scrutiny and is virtually always disallowed.

27 This virtual prohibition on viewpoint discrimination enjoys the support of a wide spectrum of First Amendment conceptions, a convergence that may explain why this principle has become a generally accepted doctrine even while underlying theories of the First Amendment remain heavily contested.28

25 See, e.g., John Doe No. 1 v. Reed, 130 S. Ct. 2811, 2821 (2010); Citizens United, 130 S. Ct., at 915; Buckley, 424 U.S. at 74.

26 See, e.g., REDISH, supra note 9, at 132-71; Kreimer, supra note 8, at 127-28; Robert B. McKay, With All Deliberate Speed, 43 VA. L. REV. 1205, 1235-42 (1957); Robison, supra note 9, at 624, 647.

27 See, e.g., Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 95 (1972). Appropriate exceptions might include the bestowal of certain government benefits, such as highly sensitive security jobs. But see United States v. Robel, 389 U.S. 258, 266-67 (1967) (invalidating political affiliation test for nuclear munitions worker).

Of course, in the 1940s and 50s, it was not entirely clear that discrimination was prohibited against active Communist organizations, which were likened to criminal conspiracies. \(^{29}\) Even at that time, however, it was perfectly clear that outright criminalization would have been unconstitutional with respect to the NAACP and most of the "un-American" associations targeted by McCarthy-era congressional investigations, and many strongly suspected that the same was true for Communist organizations as well. In fact, the strategy behind compelled disclosure was to deter indirectly what the government doubted it could criminalize directly. The Department of Justice expressly justified the program in these terms, arguing before the Supreme Court that it was "clear that Congress has power under the Constitution to adopt a program of publicity and disclosure as a public safeguard against subversive propaganda which Congress does not wish to, and perhaps cannot, prohibit." \(^{30}\) The House Un-American Activities Committee made similar statements. \(^{31}\)

If the government could not criminalize the offending viewpoints directly, the corollary is that it also could not penalize them through exposure. Here, the government action at issue is not criminal, civil, or administrative penalty. Instead, it is disclosure or threatened disclosure undertaken with the dual aims of exposing speakers to shame and reprisals and employing that unwelcome prospect to deter their protected expression. These aims indicate that the government's purpose is to single out particular speakers for unfavorable treatment. This unfavorable treatment is doled out according to viewpoint. Such viewpoint discrimination is as wrongful when it occurs by means of exposure as it is when achieved by formal penalty.

\(^{29}\) See, e.g., Communist Party v. Subversive Activities Control Bd., 351 U.S. 115 (1956) (declining to reach constitutionality of Subversive Activities Control Act of 1950); Dennis v. United States, 341 U.S. 494, 501 (1951) (plurality) (construing and upholding the Smith Act); Robison, supra note 9, at 627-28 (declining to opine on whether "Communist action organizations" could constitutionally be subject to statutory penalties).

\(^{30}\) Brief for the United States at 111, Emspak v. United States, 349 U.S. 190 (1955), quoted in Robison, supra note 9, at 626 n.55.

\(^{31}\) See Robison, supra note 9, at 625-26 (quoting HouseHUAC report asserting HUAC to be "empowered to explore and expose activities by un-American individuals and organizations which, while sometimes being legal, are nonetheless imical to our American concepts and our American future") (emphasis added). See also id. at 625 (quoting first chairman of the HUAC, "I am not in a position to say whether we can legislate effectively in reference to this matter, but I do know that exposure in a democracy of subversive activities is the most effective weapon that we have in our possession.").
This corollary is not without controversy. In the McCarthy era, government officials distinguished criminal or administrative penalties from compelled disclosure. In 1947, for example, the President's Committee on Civil Rights recognized Communists' and Fascists' right to speak and assemble but argued for a legislatively implemented "principle of disclosure," whereby Communists who wished to speak would not be permitted to do so anonymously.\(^{32}\)

The Supreme Court had taken much the same view about twenty years earlier in *Bryant v. Zimmerman*.\(^{33}\) The case involved a New York law compelling all organizations that required oaths of their members (except unions and "benevolent orders" such as the Freemasons) to file certain information with the Secretary of State, including membership rolls.\(^{34}\) Contemporaneous commentators understood the law to be directed at eliminating the Ku Klux Klan, and this understanding was essentially accepted, and approved, by the Court in *Bryant*.\(^{35}\) Disposing of Bryant's claim that the law infringed upon his right of free association, the Court acknowledged one justification offered by the government:

\[\text{[R]equiring this information to be supplied for the public files will operate as an effective or substantial deterrent from the violations of public and private right to which the association might be tempted if such a disclosure were not required. The requirement is not arbitrary or oppressive, but reasonable and likely to be of real effect.}\(^{36}\)

In the Court's view, it posed no First Amendment problem to deter the risk of illegal conduct by means of deterring protected association.

On one view, then, there is a distinction between the government's power to outlaw an organization and its ability to require disclosures. In defense of this distinction, it could be argued that, while constrained in the realm of law not to legislate against protected expression, the government is free in the realm of norms to express preferences for some speech or viewpoints over others. If the government may express preferences for certain ideas (say, by running public service announcements in favor of tolerance and diversity), it may also express disapproval for particular

\(^{32}\) See Robison, *supra* note 9, at 625.


\(^{34}\) *Id.*

\(^{35}\) See *id.* at 75-76; Robison, *supra* note 9, at 642-43 & n.151.

\(^{36}\) 278 U.S. at 72.
ideas (say, discrimination). If it may express disapproval for particular ideas, it may express disapproval for speech articulating those ideas (say, through official statements criticizing pornography or hate speech for expressing discriminatory views). And if it may express disapproval for speech articulating those ideas, it may identify particular individuals or groups that engage in such speech.

Such a line of argument encroaches upon controversial questions about the permissible scope and substance of “government speech,” that is, the power of the government to express substantive views and attempt to persuade citizens of those views. Some would contest the starting premise of the above line of argument and claim that the government is never allowed to take positions on the value of controversial moral and political views.37 It would follow that the government may not express disapproval of the protected activities of particular individuals or groups.

But one need not object wholesale to the government’s holding and expressing substantive views to think that this power does not include exposing particular individuals or associations for expressing other views. Even if the government may express disapproval of, say, pornographic speech, it does not follow that it can single out individuals or associations suspected of engaging in such expression in order to deter their activities. The latter exceeds the government’s power to express views for itself and turns its substantial powers of intimidation against particular citizens or groups. It is an instance of the government’s singling out speakers for unfavorable treatment on the basis of their engagement in protected expressive activity, and it cannot reasonably be distinguished from other forms of such unfavorable treatment. In short, the government may not use personal exposure to deter indirectly speech that it cannot prohibit directly.

Thus, the Communism cases and NAACP v. Alabama represent a categorical presumption against a certain form of government purpose: where the government orders disclosure in order to penalize or deter particular viewpoints, its action is presumptively prohibited.

Although the cases at hand clearly involved viewpoint discrimination, we might expand this anti-discrimination principle to include other types of discrimination that are typically viewed as wrongful within First Amendment law. For example, it seems similarly wrongful for the government to order disclosure in order to penalize or deter a speaker’s

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37 See, e.g., ALEXANDER, supra note 2, at 11, 186 (arguing that liberal speech theory must take such a position, though ultimately rejecting the position as incoherent). But see Abner S. Greene, Government of the Good, 53 VAND. L. REV. 1, 8-26 (2000).
decision to engage in expression involving protected subjects. The same
might be said of disclosing speakers on the basis of their use of particular
words or other choices about the content of their message. Such an
expansion would recognize that, in practice, it is sometimes quite difficult
to distinguish between viewpoint discrimination on the one hand and
subject-matter or message-related discrimination on the other. For
example, would a disclosure requirement for those engaging in sexually
themed expression be subject-matter related, or would it be discrimination
against a particular viewpoint on sexuality? Moreover, as a matter of
principle, it is difficult to say why viewpoint discrimination should be
treated with more hostility than these other forms.

Perhaps for these reasons, a central tenet of First Amendment doctrine
is a prohibition on “content-based” discrimination within the realm of
direct regulations on speech. This principle renders suspect restrictions
based upon viewpoint, subject matter, and particular choice of words and
in principle could expand to other forms of message-related discrimination
as well. First Amendment doctrine has not recognized a similar principle
in the realm of disclosure; instead it relies primarily on the effects test of
NAACP v. Alabama. My contention here—that NAACP and the McCarthy
cases involve a categorically suspect form of government purpose—is
essentially an argument that those cases actually embody an anti-
discrimination principle akin to the prohibition on content-based
discrimination.

If we were to accept a disclosure anti-discrimination principle, we could
identify certain forms of government purpose as suspect without resorting
to an effects test. On this view, the government may not, for example,
release lists of those who produce or consume non-obscene pornography
with a view toward exposing them to reprisals or deterring their
expression. And if campaign-finance disclosure requirements existed for
the purpose of deterring political speech, then, under current doctrinal
views of campaign finance, those requirements, too, would be impermissible. In any event, I think it quite clear that this is not the case,
but recognition of a disclosure anti-discrimination principle helps to clarify
what questions we should be asking.

38 See Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 VAND. L.
REV. 265, 283-86 (1981) (noting the practical and conceptual difficulties of distinguishing viewpoint
discrimination from discrimination on the basis of subject matter and manner of presentation); Kendrick, supra note 28, at 242-47 (discussing various conceptions of “content” discrimination, most
of which encompass more than viewpoint discrimination).
40 See Kendrick, supra note 28, at 296-98.
Of course, these examples bring to light important issues that surround any inquiry into governmental purpose, including what sources should be relevant to the inquiry, and what role an illicit purpose must play in order to render governmental decisionmaking unconstitutional. Answers to these questions lie beyond the scope of this project, within more general debates about the significance of governmental purpose and the proper conception of legislative intent. My point here is that, however one conceives of the purpose inquiry, government actors should be constrained from divulging the identity of particular speakers with the purpose of penalizing or deterring protected expression.

Thus disclosure, like other First Amendment areas, contains a strong categorical rule against discriminatory purpose: the government may not use disclosure to target particular speakers for unfavorable treatment for engaging in protected expression. The principle may not exhaust the constitutional inquiry for disclosure requirements, but it is an essential part of it.

C.

There is one important difference between the categorical, purpose-based principle just identified and the prohibition on content discrimination typically applied to direct restrictions on speech. With direct restrictions on speech, it is much easier to infer a suspect purpose from the existence of a restriction targeted at a particular viewpoint or message. Rarely will the government offer a plausible justification for such restrictions that is unrelated to the substance of the restricted speech. The case law provides a handful of colorable examples, but for the most part when the government classifies speech for restriction on the basis of its message, it is fairly clear that the government is seeking to penalize speech on account of what it is saying. Thus the Supreme Court has generally treated such restrictions as presumptively invalid.

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41 For a discussion of the Supreme Court's conception of governmental purpose in the content-discrimination context, see Kendrick, supra note 28, at 285-86. My disclaimer is also intended to apply to debates about whether purpose matters in determining the moral permissibility of actions. See, e.g., T.M. Scanlon, Moral Dimensions, 69-86 (2008). To address that issue here would take me far afield from the topic of disclosure.


With respect to content-related disclosures, as opposed to restrictions, such a presumption would be inappropriate. There are enough legitimate reasons for the government to legislate disclosure that it would be improper to draw an inference of discrimination from the fact of a disclosure requirement. First, information is necessary to governance, particularly so in a regulatory state. The government may legitimately seek disclosures to ensure the functioning not just of its campaign finance system but also of its securities laws, its prescription drug approval process, and any number of other regulatory undertakings. A large amount of disclosure may be required incidentally to other forms of regulation, in the absence of any discriminatory purpose.

Second, in contrast with most restrictions on speech, compelled disclosure may itself serve First Amendment values. Under any First Amendment theory concerned with the availability of information to listeners, it must be recognized that disclosure (1) has the danger of reducing the amount of information available to listeners by chilling would-be speakers while (2) having the benefit of supplying audiences with important information about their information—namely, its source. Under any First Amendment theory concerned about the interests of speakers (exclusively or in addition to those of listeners), disclosure has (1) the danger of chilling would-be speakers and (2) the benefit of allowing speakers to identify and associate with like-minded others. Thus, under many theories, First Amendment values are present on both sides of the disclosure equation. It is thus all the more difficult to infer that the government’s aim in requiring disclosure is discrimination against the information it seeks to disclose.44

None of this is to undermine the prohibition on content discrimination. It is simply to say that a virtual prohibition on a certain type of purpose gets us less far with disclosure than it does with direct restrictions of expression. As a matter of principle, the prohibition may be just as strong in the disclosure context as it is in the context of restrictions on expression.

44 This argument is in tension with Robert Post’s claim that compelled disclosures and compelled restrictions should be equally impermissible, at least outside of the commercial speech context. See Robert Post, Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association, 2005 SUP. CT. REV. 195, 220-22 (2005). Post and I may ultimately agree that certain types of government purpose are illegitimate as applied to both disclosures and restrictions; to that extent, I agree with his symmetry principle. But I believe, first, that this anti-discrimination principle may justify a broader rule on the restriction side than on the compulsion side, and, second, that some compulsions may actually serve First Amendment values, while the vast majority of restrictions will not. I thus reject a broad-based symmetry principle.
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But it is a weaker basis for a broad presumption of suspect purpose in a large number of cases.

II.

I have argued that an essential part of the constitutional analysis of disclosure requirements is a categorical prohibition on a certain kind of governmental purpose. The next question is whether this prohibition should make up the entirety of the analysis, or whether effects should matter as well.

A.

Proponents of certain First Amendment theories need no convincing that the effects of disclosure laws should matter. Among them are autonomy theorists who care about the impact of the law upon individuals' ability to form ideas and make decisions. On such views, even well-intentioned disclosure laws must be evaluated according to reasonable individuals' desire for information. Given that disclosure may at once provide listeners (and would-be speakers) with useful information and deter other would-be speakers (and thus deprive listeners of other viewpoints), determining the effect of a law upon autonomy may require a type of balancing.

Meanwhile, under any view that takes the goal of the First Amendment to be promoting expression, concern with effects is also self-evident. The question compelled disclosure presents is whether provision of one type of information, such as the name of a source, deters individuals from engaging in expression in the first place, and what this means for the total

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45 See, e.g., Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1168-71 (2003) (arguing that laws may violate constitutional rights in either their aim or their effects). Of course, autonomy theorists concerned with effects may also recognize certain categorical principles. The prohibition on discriminatory purpose articulated in the last section may be one such principle. In this symposium, Helen Norton has suggested that speakers who seek to deceive or keep secrets from listeners are not entitled to confidentiality; this principle is distinct from but need not foreclose a concern with the effects of disclosure on speakers or listeners.

46 *Cf.* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 369 (1991) (posing that an ideal judge "would try to adopt the point of view of an individual whose only interest is in reaching a correct decision, and ask: does the information currently available...deviate substantially from what that hypothetical individual would desire?"). Strauss himself, however, seems to restrict the function of the First Amendment to cases involving a purpose of attempting to persuade through the denial of information. *See id.* at 334, 336. The exclusivity of his persuasion principle stands in some tension with his view that the ideal judge should ask what hypothetical rational individuals would like to know; if they would like to know information denied them through incidental restrictions, this too would seem to restrict their autonomy.
amount of information. These types of questions may be very difficult to answer, but on speech-maximizing views of the First Amendment, they are the right questions to ask.

B. So-called purposivists, however, would reject any conception of the First Amendment that is concerned with effects in their own right.\(^47\) Note that this position may still allow for consideration of effects as a proxy for a law’s illicit purpose. A law that has a severely disparate impact on a particular viewpoint, or one that is highly overbroad in comparison with its purported justification, might conceal an invidious purpose. Purposivists may consider effects for this reason, but they would reject any interest in effects unrelated to determining a law’s purpose.

The question is whether this severely limited approach to effects is justifiable. For at least some purposivist accounts, questions of disclosure and anonymity present a difficult challenge. For example, Jed Rubenfeld, contending that both moral philosophy and democratic theory are not “appropriate” bases for First Amendment theory, grounds his purposivism in an examination of the First Amendment’s “paradigm cases.”\(^48\) These cases include such “core violations” as “suppressing revolutionary dissent, criminalizing blasphemy, and censoring art.”\(^49\)

It is not clear, however, what counts as a paradigm case and what does not. If the approach to identifying such cases is based on intuition,\(^50\) then some disclosure cases may trigger strong intuitions that they violate foundational First Amendment values. And yet at least some of these cases

\(^47\) See, e.g., ALEXANDER, supra note 2, at 11; Rubenfeld, supra note 2, at 782.

\(^48\) Rubenfeld, supra note 2, at 821.

\(^49\) Id. Rubenfeld does not address disclosure at length, but in passing he suggests that it is outside the scope of the “anti-orthodoxy principle” that underlies his purposivist approach. He distinguishes between facts and opinions and argues that the First Amendment is concerned only with the latter. Id. On the side of “facts” not covered by the First Amendment, he places “lies, misrepresentations, failures to disclose material information, [and] breaches of confidentiality.” Id. (emphasis added). This suggests that the law may require disclosures where necessary (and enforce bargains for confidentiality). His dichotomy would appear to leave no room for concerns with the chilling effect of otherwise allowable regulation on the sphere of “the world of meaning, of ideas, of feeling, of the ineffable, of spirit” which is his concern. Id. If no concern with effects is permitted then presumably the prophylactic rule of New York Times v. Sullivan, 376 U.S. 254, 279-81 (1964), is not only unnecessary but illegitimate. Similarly, concerns with the deterrent effects of disclosure on expression and association must be disregarded. The question is why it is not a First Amendment concern that state action will have foreseeable effects on these rights, when Rubenfeld is simultaneously deeply concerned that “each person is free to express himself without fear that his beliefs or feelings or imaginings will be deemed unspeakable by law.” Rubenfeld, supra note 2, at 821.

\(^50\) See id. at 818 (describing his theory as arising from “the basic intuition that individuals have the ‘right to their opinion’”).
are the product not of purposeful governmental discrimination against protected expression, but rather of general laws, applied to expression. For example, forced disclosure of journalists’ sources might strike many as inherently wrong (and the prevalence of state shield laws may be some indication that it does). Yet the application of grand jury rules to reporters does not appear to run afoul of the prohibition on invidious governmental purpose.

Following a similar approach, one might hypothesize other disclosures that, even if required with no invidious purpose, might provoke a strong intuition that First Amendment rights were implicated. Among these might be mandated disclosures applied to whistleblowers, police informants, union members, peer reviewers, poll respondents, and indeed to voters. In some of these cases, disclosure may ultimately be justified, at least some of the time. But under an intuitionist approach, it is difficult to argue that there would never be an intuition that the First Amendment should play some role in that decision. And because the approach is founded entirely upon intuition, there is no principled reason categorically to foreclose all interest in effects.

Larry Alexander has offered a comprehensive explication of another purposivist account. On this account, the First Amendment “expresses as its primary value that government not preempt individuals’ evaluations of information.” This view prohibits the government from restricting speech on the basis of its own evaluation of the speech’s message. Alexander’s principle incorporates the anti-discrimination rule articulated in Part I: the government may not seek to penalize or deter a message, including through disclosure. Alexander’s prohibition goes beyond many others, however, because it forbids the state from compelling speech in order to inform potential listeners, even where the state attempts to protect people against non-knowing forms of deception. Such efforts, in Alexander’s view, are illegitimate attempts to preempt individuals’ evaluation of information. He


52 See ALEXANDER, supra note 2, at 9 ("Freedom of expression is implicated whenever an activity is suppressed or penalized for the purpose of preventing a message from being received."). Alexander argues that a human right to freedom of expression must take this form, but he ultimately rejects the right as untenable. See id. at 147-73.

53 Alexander, supra note 2, at 969; see also ALEXANDER, supra note 2, at 11.

54 ALEXANDER, supra note 2, at 70, 81.
thus views it as impermissible for the government to compel disclosure of a speaker or group’s identity in order to prevent audiences from being deceived—assuming, one supposes, that the speaker does not knowingly undertake deception.\footnote{Id. at 118-119.}

Alexander’s principle reaches even farther, however, to prohibit any form of legislation or judicial review based on the effect of the proposed law on expression.\footnote{Id. at 33.} For example, it would be impermissible for a city council to vote to fund longer library hours out of a belief that libraries are important informational resources. To do so would be to favor the informational effects of libraries over the informational effects of alternative uses of the funding.\footnote{Id.} Because the government may not preempt individuals’ evaluation of information, it may not favor one distribution of information over another.

This prohibition has clear ramifications for disclosure regulation. On Alexander’s account, the government may not make decisions based upon projected effects on speech.\footnote{Id. at 118-19.} It follows that no state entity could adopt a general disclosure principle on the theory that more information is always better, nor could it preserve anonymity out of concern about deterrent effects on expression.\footnote{Id.} Either decision would favor one distribution of information over another. On Alexander’s view, then, not only does the First Amendment not require the government to consider the informational effects of disclosure; it prohibits it from doing so.

Alexander’s view deserves a much more thorough consideration than I can give it here, but I will explore briefly a few reasons to be skeptical about it. Some of these are practical. One ramification, as Alexander observes, is to lock into place the speech effects of the current set of background entitlements, because the government has no authority to change them.\footnote{See Alexander, supra note 2, at 943.} The question also arises whether existing law must be rolled back (if existing disclosure law grew up out of concerns about effects-related. See id. at 118-19 (arguing that the analysis "turns on the harms the government is seeking to prevent and whether interdicting messages because of their content is a step on preventing that harm"). The point is that, even if he considered them effects-related, he would still find them impermissible, because the government is not allowed to consider the speech effects of laws. As soon as the government legislates on the basis of informational effects, its inquiry collapses into what Alexander calls "Track One," that is, impermissibly purpose-related lawmaking. Id. at 13 (citing Tribe, supra note 43, §12-2, at 792).}{\footnote{See Alexander, supra note 2, at 943.}}
informational effects, presumably it is illegitimate) or whether it is accepted as part of the baseline, along with non-legal practices. The larger practical implication is that Alexander’s position hamstrings governmental action on all information-related policies and governmental evaluation of the informational effect of all policies. The idea that the First Amendment imposes such a level of interference with policymaking should raise concerns that something has gone awry in the underlying argument.

Alexander’s view also runs counter to common intuitions about the value of expression and information. While information is often regarded as a public good, Alexander’s view expressly prohibits the government from treating it as one. Public education becomes a dubious enterprise, and public funding for the arts and scientific research is almost certainly impermissible. Indeed, not only is information not a public good; it is never a legitimate policy interest. On most views, the First Amendment serves to provide expression with special protection not enjoyed by most governmental interests. The irony of Alexander’s view is that the effect of the First Amendment is to leave expression with less solicitude than the run of ordinary interests, because the generation of information or expression is not a permissible policy goal. For many, this implication of Alexander’s view is likely sufficient to make it unacceptable as a formulation of a free speech principle.

More importantly, Alexander’s neutrality principle seems unnecessarily constrictive. An obligation not to restrict private speech does not require the state to remain neutral with respect to all ideas. The state may have a duty to tolerate speech generated by citizens while retaining the power to express values through its speech and policies. Government speech may distort speech distributions, and it will generally be undertaken with the goal of persuading listeners. But distortive effects and persuasive aims are

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61 Alexander seems to suggest that retaining existing law may be acceptable. See id.
62 See ALEXANDER, supra note 2, at 33; Alexander, supra note 2, at 933. Alexander at times argues that perhaps the government can fund libraries—or, presumably, mandate disclosures—if it does so not on its own estimation of informational value but as the result of an aggregation of the private preferences of voters. See ALEXANDER, supra note 2, at 21. If a majority of voters want libraries rather than tennis courts, the legislature may respond to this preference if it does so as a kind of direct-democracy conduit, rather than as a deliberative, representative body. But this is a difficult position to occupy. A representative government could always be understood as representing the preferences of voters. But presumably it is not acceptable for the government to implement the private preferences of the electorate against, say, offensive speech or certain political affiliations. The fact that these preferences are coming from voters rather than from their representatives does not make them any more legitimate. It is difficult to see why other evaluations of information should be any different.
63 See supra note 37 and accompanying text.
not the only features that characterize governmental restrictions on speech. These are also characterized by the purpose of punishing citizens for their ideas, or of preventing them from obtaining access to certain ideas. Government speech does not share these features. To the extent that we believe these are important features of impermissible speech restrictions, we may distinguish them from government speech.

The same holds true for a purported state obligation not to take informational effects into consideration when legislating. Such considerations need not have the purpose of punishing citizens for or blocking their access to certain ideas (nor, for that matter, of persuading them of anything). To this extent, consideration of informational effects is dissimilar from typical restrictions on individual expression. In the case of disclosure, where speech values are on both sides of the equation, the government may reasonably conclude that audiences would like to have the information that disclosure would provide, even if an incidental effect of this disclosure will be the chilling of some other expression. So long as the government is not attempting to deter that expression, it is promoting information as a good rather than penalizing speakers for their messages.

Nor is it obvious that Alexander’s neutrality principle is required by liberal moral values. Alexander sees the principle as a particular manifestation of a larger liberal commitment to government neutrality, wherein the state cannot select or impose a particular comprehensive conception of the good. Accordingly, the government may not express a particular comprehensive view or adopt policies that presuppose one. Alexander’s claim frames information-conscious regulation in the same terms: because the government may not adopt a particular conception of the good, it may not place value on certain messages over others nor, indeed, on expression as opposed to other pursuits.

A possible response is that neutrality toward comprehensive views need not disable the state entirely from considering informational effects in legislating, because not all such regulation is dependent on comprehensive

\[\text{\smallfootnote{64 ALEXANDER, supra note 2, at 147.}}\]

\[\text{\smallfootnote{65 Alexander ultimately concludes that liberal neutrality is hopelessly paradoxical, because it rests inevitably on a comprehensive view and cannot be justified on non-neutral terms. See id. at 147-73. Alexander’s broader argument raises two large questions: (1) whether a principle of speech-neutrality necessarily relies on a background principle of liberal neutrality, and (2), if it does, whether the principle of liberal neutrality is coherent (or desirable). Although addressing these questions is well beyond the scope of this paper, I gesture at some possible responses in the text above.}}\]
conceptions of the good. The state may justify such considerations on the basis of public reasons which reasonable people may be expected to accept. The decision to fund libraries, for example, may have the purpose of helping citizens to perform their political duties as citizens, or of enabling them better to pursue their own conceptions of the good. A decision to require or prevent disclosure may have the purpose of providing citizens with information toward the same ends. These purposes may be justified in terms of public reason, without reference to any particular comprehensive view.

In its strongest form, purposivism forbids that freedom of expression take account of the incidental effects of regulation. Both Rubenfeld's paradigm-based account and Alexander's neutrality-based account take this form, but neither offers compelling reasons why concern with effects must be foreclosed altogether.

C.

If we move away from this strand of argument, the most significant remaining objections to effects are administrative and institutional. As many have noted, a First Amendment regime that analyzes laws for their incidental effects on information is a regime that must undertake to analyze all laws. If anyone could challenge any law on the basis of its effects on expression, courts would find themselves having to apply some non-negligible level of First Amendment scrutiny to every law.

In addition, even assuming the administrative capacity to handle this load, the challenges of assessing and balancing informational effects are great. Courts would be required to forecast the effects of both a given law and an alternative state of affairs. The epistemic challenges of making

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66 Another response might be to adopt a form of moderate liberal perfectionism, which holds that the government may adopt and promote specific liberal conceptions of the good. See, e.g., Greene, supra note 37, at 22-26 (contrasting "thick" and "thin" perfectionist views of government speech).

67 See generally JOHN RAWLS, POLITICAL LIBERALISM (2d ed. 2005). For recent defenses of liberal public reason, see, for example, JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION (2011); RONALD C. DEN OTTER, JUDICIAL REVIEW IN AN AGE OF MORAL PLURALISM (2009). Because Alexander rejects liberal neutrality, he would likely treat as beside the point my argument that a commitment to neutrality need not foreclose all governmental interest in the speech effects of regulation. Alexander's broader critique of liberalism is deeply controversial, and addressing it directly would require much more space than I have here. My present point is simply that government neutrality, should one accept it, need not foreclose consideration of all speech effects in the way Alexander claims.

68 See, e.g., ALEXANDER, supra note 2, at 9-10; Ely supra note 1, at 1487-88.

69 This alternative condition may just be the world without the law, but a constitutional test requiring a least restrictive means would also require comparison against all other possible regulations. See Alexander, supra note 2, at 935-36.
such predictions would be staggering for any institution, and perhaps particularly so for courts, whose mission is not typically taken to include the kind of free-ranging policy inquiries expected of legislatures. Next, courts must balance these two alternatives against each other, taking into account their effects on information and on other legitimate governmental interests. Such a process inevitably casts the court as policymaker, a role that on some accounts it should seek to minimize, not expand.

Although administrative capacity is a serious concern, it does not justify a blanket rejection of inquiries into effects. As I have argued, on many different accounts of the First Amendment, consideration of effects is permissible, if not required. At the least, the case for considering effects should be weighed against administrative concerns about capacity. Even were administrative considerations ultimately to prevail, First Amendment law would explain this most accurately by making transparent the balance between significant expressive interests and limited judicial capacity. To conclude that administrative concerns must prevail does not mean that countervailing expressive interests do not exist.

Something similar may be said regarding the objection to courts as policymakers. Institutionally speaking, part of what courts do is to make policy based upon judgments about the way the world is. It is defensible for courts to seek to minimize that function, but some amount of such policymaking is inescapable. One place where it may be inappropriate to reject the policymaking role is where, under multiple conceptions of a constitutional right, full protection of that right requires it. At the least, if institutional considerations prevail, it should again be with acknowledgement that this balance entails imperfect vindication of expressive interests.

Finally, while policymaking may be institutionally acceptable, the fact remains that it brings great epistemic challenges. There are, however, many possible responses to this problem. Again, one option is to conclude that the costs of the endeavor outweigh its benefits. Another is for courts to continue to make such inquiries with little or no

70 But see Frederick Schauer, The Dilemma of Ignorance: PGA Tour, Inc. v. Casey Martin, 2001 SUP. CT. REV. 267, 286 (2001) ("[T]he phenomenon of lawmaking on the basis of dimly informed policy speculation can arguably be said to be an accurate, even if possibly mean-spirited, characterization of the entire common law process.").

71 Cf. TRIBE, supra note 43, §16-20, at 1510-12 (urging that Supreme Court's reluctance to impose intrusive remedies should not be articulated as a conceptual limitation which excludes concern with effects from the notion of equality).

72 Schauer, supra note 69, at 295-97 (discussing various responses to the problem of lack of factual information).
acknowledgment of their difficulty. Two other strategies, however, would allow for some recognition of the epistemic problem without abandoning concern with effects. One possibility is to allow some role for consideration of effects in the service of vindicating expressive interests but to minimize it by prioritizing other, (potentially) less fraught decisional principles. On this view, courts should, for example, first search disclosure laws for the type of suspect purpose described in Part I before turning to a consideration of effects. This would, of course, modify the existing, exclusively effects-based doctrinal inquiry. Finally, courts could invest in becoming better at projecting effects.

There is no reason why both of these options may not be pursued simultaneously.

Again, it is possible that institutional limitations will ultimately limit courts’ considerations of effects. I have argued here, however, that there are few, if any, substantive reasons to reject an effects inquiry altogether, and many theories of the First Amendment would affirmatively endorse such an inquiry. To my mind, this lack of a substantive bar makes a categorical rejection of effects-based inquiries quite dubious. Instead of imposing a blanket rule, we might leave open the possibility that, in some areas, the institutional concerns will be so slight, or the expressive interests so weighty, as to make an inquiry into effects feasible and important.

Regulation of disclosure is a good candidate for such consideration. One feature of disclosure regulations is that they are likely to have a disparate impact on unpopular views. This potential for systematic bias is more identifiable and predictable than the speech effects of most regulations. The institutional case for ignoring this effect is accordingly weaker. At the same time, on many theories of the First Amendment, the case for considering this effect is quite strong, because it is concentrated upon particularly vulnerable speech that may otherwise go unexpressed. This intuition about effects need not determine the substance of the law. It may only signal an occasion on which it would make sense for legislatures and courts to invest in confirming the intuition with empirical information to the extent possible. In demanding a showing of actual retaliation to demonstrate a substantial burden on association, the *NAACP v. Alabama* standard attempts, in however simple a way, to do just that. Although its

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73 See id. at 289-92; see also Yale Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather Than on “Empirical Proposition”? 16 CREIGHTON L. REV. 565 (1983) (searching for a non-empirical basis for the exclusionary rule); Leslie Kendrick, Against the Chilling Effect: The Case of Speaker’s Intent, 54 WM. & MARY L. REV. (forthcoming 2013) (arguing that one legitimate response to empirical quandaries is to seek other decisional principles).

74 See Schauer, supra note 70, at 290-95.

75 See, e.g., Patterson, 357 U.S. at 449; Brown v. Socialist Workers Party, 459 U.S. 87 (1982).
method of measuring effects is crude, and although it leads to exacting scrutiny of many laws that should ultimately pass muster, the NAACP standard is asking the appropriate question. Some disclosure laws, at least, may give rise to cases in which widely held free speech principles argue strongly in favor of balancing effects, and institutional considerations should not necessarily foreclose that possibility.

CONCLUSION

I have made two primary claims. First, I have argued that disclosure law should reflect a categorical prohibition on compelled disclosure with the purpose of penalizing or deterring protected expression. This prohibition is latent in the early case law and should be accepted under a wide variety of First Amendment theories. Second, I have argued that other compelled disclosures should be analyzed for their effects on expression, which will inevitably involve balancing interests. This claim is less controversial than it may seem at first. I have attempted to respond to various substantive arguments that the First Amendment should only be concerned with purpose. I have also argued that the institutional objections to effects analysis, while important, should not always trump the substantive reasons to engage in it. I have finally posited that disclosure law is an area where effects inquiries may be warranted. In short, I have tried to show that the question of disclosure reaches across First Amendment paradigms to encompass both categorization and balancing, both purposes and effects.