

University of Florida Levin College of Law

From the Selected Works of Mark Fenster

2005

The Opacity of Transparency

Mark Fenster, *University of Florida*



Available at: https://works.bepress.com/mark_fenster/4/

The Opacity of Transparency

Mark Fenster*

ABSTRACT: The normative concept of transparency, along with the open government laws that purport to create a transparent public system of governance, promises the moon—a democratic and accountable state above all, and a peaceful, prosperous, and efficient one as well. But transparency, in its role as the theoretical justification for a set of legal commands, frustrates all parties affected by its ambiguities and abstractions. The public's engagement with transparency in practice yields denials of reasonable requests for essential government information, as well as government meetings that occur behind closed doors. Meanwhile, state officials bemoan the significantly impaired decision-making processes that result from complying with transparency's sweeping and powerful legal mandates and complain about transparency's enormous compliance costs.

This Article argues that the frustrations with creating an open government originate in the concept of "transparency" itself, which fails to consider the tensions it conceals. The easy embrace of transparency as a basis for normative and utilitarian ends evades more difficult questions. When is transparency most important as an administrative norm? To what extent should an agency be held to that norm? Open government laws fall short in answering these questions because, relying on the assumptions of "transparency," they typically operate at exceptionally high levels of abstraction. As a result, they establish both broad mandates for disclosure and broad authority for the exercise of a state privilege of non-disclosure, and they ultimately fail to produce an effective, mutually acceptable level of administrative openness. Transparency theory's flaws result from a simplistic model of linear communication that assumes that information, once set free from the state that creates it, will produce an informed, engaged public that will hold officials accountable. To the extent that this model fails to describe accurately the state, government information, and the public, as

* Associate Professor, Levin College of Law, University of Florida. Thanks to comments and suggestions along the way from colleagues and friends including Tom Cotter, Heidi Kitrosser, Lyrissa Lidsky, Lars Noah, Bill Page, and Larry Solum, and many thanks to Robert Norway and Grace Kim for excellent and patient research assistance. I am grateful for financial support from the Levin College of Law during the Article's extended germination.

well as the communications process of which they are component parts, it provides a flawed basis for open government laws.

This Article critiques the assumptions embedded in transparency theory and suggests an alternative approach to open government laws that would allow a more flexible, sensitive means to evaluate the costs and benefits of information disclosure. It also proposes institutional alternatives to the current default regime in open government laws, which relies on weak judicial enforcement of disclosure mandates, and offers substantive suggestions that would improve efforts to establish a more accountable state and an informed public.

INTRODUCTION	888
I. "TRANSPARENCY"	894
A. <i>TRANSPARENCY'S BENEFITS</i>	895
1. Democratic Benefits.....	895
2. Positive Consequences.....	899
B. <i>TRANSPARENCY'S LIMITS</i>	902
1. Transparency's Constitutional Threat.....	903
2. Transparency's Negative Consequences.....	906
II. <i>TRANSPARENCY'S BALANCE</i>	910
III. <i>OPACITY</i>	914
A. <i>THE SENDER: THE STATE AND INFORMATION</i>	915
1. The Incoherent State	915
2. The Unresponsive State	919
B. <i>THE MESSAGE: GOVERNMENT INFORMATION</i>	921
1. Government Information Does Not Exist	922
2. Government Information Has No Meaning	924
C. <i>THE RECEIVER: THE PUBLIC AND GOVERNMENT INFORMATION</i>	927
D. <i>THE FRUSTRATIONS CAUSED BY TRANSPARENCY THEORY'S FLAWED COMMUNICATIONS MODEL</i>	933

THE OPACITY OF TRANSPARENCY

887

IV. SOME REALISM ABOUT TRANSPARENCY	936
A. <i>EVALUATING THE COSTS AND BENEFITS OF TRANSPARENCY</i>	936
1. Benefits	936
2. Costs	937
3. Obstacles to Imposing Optimal Disclosure Requirements	937
B. <i>IMPROVING THE DECISIONS OF GOVERNANCE</i>	940
C. <i>DISCLOSING GOVERNMENT INFORMATION IN A COMPREHENSIBLE AND TIMELY MANNER</i>	941
D. <i>INSTITUTIONAL OVERSIGHT OF OPEN GOVERNMENT LAWS</i>	945
CONCLUSION	949

INTRODUCTION

By any commonsense estimation, governmental transparency, defined broadly as a governing institution's openness to the gaze of others,¹ is clearly among the pantheon of great political virtues.² A fundamental attribute of democracy,³ a norm of human rights,⁴ a tool to promote political and economic prosperity and to curb corruption,⁵ and a means to enable effective relations between nation states,⁶ transparency appears to provide

1. See OXFORD ENGLISH DICTIONARY 419 (2d ed. 1989) (defining "transparent," in its figurative uses, as both "[f]rank, open, candid, ingenuous," and "[e]asily seen through, recognized, understood, or detected").

2. For purposes of this Article, except where noted otherwise, I use "transparency" to refer to the openness of the federal and state executive branches to the public. Openness is also an issue in other contexts, such as between branches of the government (and particularly between Congress and the President), between the judiciary and the public, and between corporations and their shareholders (as well as the public). It also arises when the government attempts to punish whistleblowers or stop the circulation of leaked information. While my discussion of transparency may be applicable in some respects to those other contexts, each raises many distinct theoretical and legal issues and all are outside this Article's scope. On the interbranch informational dispute, see, for example, William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781. On efforts to impose transparency norms on corporations for the general public good, see MARY GRAHAM, *DEMOCRACY BY DISCLOSURE: THE RISE OF TECHNOPOPULISM* (2002); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 618–24 (1999); Archon Fung et al., *The Political Economy of Transparency: What Makes Disclosure Policies Sustainable?* (John F. Kennedy Sch. of Gov't Faculty Research Working Papers Series No. RWP03-039 (2004)), available at <http://ssrn.com/abstract=384922>. On the value of transparency for the corporation itself and its shareholders, see DON TAPSCOTT & DAVID TICOLL, *THE NAKED CORPORATION* 62–93 (2003). *But see Get Naked*, THE ECONOMIST, Oct. 18, 2003, at 66 (noting doubts as to whether absolute transparency would make a functional, better corporation). On the constitutional basis for public access to court proceedings, see Jonathan L. Hafetz, *The First Amendment and the Right of Access to Deportation Proceedings*, 40 CAL. W. L. REV. 265, 269–89 (2004). On federal statutory protections for whistleblowers, and especially the weakness of those protections, see Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531 (1999); and on the difficult burden of government efforts to restrain publication of leaked information, see *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (rejecting, in the Pentagon Papers case, prior restraint on publication despite the government's claim of significant threats to national security).

3. See *infra* Part I.A.1.

4. See TOBY MENDEL, *FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY*, at iii–vii (2003), available at <http://www.article19.org/docimages/1707.pdf>; Stephen Sedley, *Information as a Human Right*, in *FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION* 239 (Jack Beatson & Yvonne Cripps eds., 2000).

5. See Robert Martin & Estelle Feldman, *Access to Information in Developing Countries* ch. 5 (Apr. 1998) (Working Paper, Transparency International), available at http://www.transparency.org/working_papers/martin-feldman/5-why-develop.html.

6. See Frederick M. Abbott, *NAFTA and the Legalization of World Politics: A Case Study*, 54 INT'L ORG. 519, 529–31 (2000); Alasdair Roberts, *A Partial Revolution: The Diplomatic Ethos and Transparency in Intergovernmental Organizations*, 64 PUB. ADMIN. REV. 410 (2004).

such a remarkable array of benefits that no right-thinking politician, administrator, policy wonk, or academic could be against it.⁷ But transparency is not merely a political norm; candidates, partisans, and activists utilize it as a rhetorical weapon to promise full-scale political and social redemption.⁸ Contentious political campaigns and popular political consciousness seethe with allegations that government officials engage in secret, corrupt activities (if not full-scale conspiracies) and overflow with promises that sufficient organization, popular will, and correct leadership will finally provide citizens with the responsive, trustworthy, and above all, *knowable* government they deserve.

Nevertheless, transparency's status as a legal obligation for government entities in the United States and as an individual right for American citizens is remarkably vague.⁹ And notwithstanding occasional periods of openness,

7. On transparency's emergence in the past decade as a core concept of governance, see Thomas Blanton, *The World's Right to Know*, FOREIGN POL'Y, July 2002, at 50.

8. See Geoffrey H. Hartman, *A Note on Plain Speech and Transparency*, 14 LAW & LITERATURE 25, 28 (2002) (sarcastically characterizing transparency as promising an authenticity that will allow the truth to "rise to the surface like cream, and so to abolish the esoteric in human contact and communication").

9. There is no individual right of access to government information in the U.S. Constitution. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion of Burger, C.J.); *Pell v. Procunier*, 417 U.S. 817, 834 (1974); *Manogg v. Stickle*, 181 F.3d 102 (6th Cir. 1999); Martin E. Halstuk, *Policy of Secrecy—Pattern of Deception: What Federalist Leaders Thought About a Public Right to Know, 1794–98*, 7 COMM. L. & POL'Y 51, 74–76 (2002). But cf. Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right To Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95, 125–45 (2004) (arguing that access rights fall under liberal democratic conceptions of free speech rights as enabling self-government and checking government abuses, and thus should receive First Amendment protection). The Supreme Court has found a limited First Amendment right of access to criminal trials and pre-trial proceedings, however. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580–81 (1980). Congress is subject to some constitutional transparency requirements in the Journal Clause, which mandates that each house keep a "Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy," and, where one-fifth of those present at a vote agree, record the results of any vote. U.S. CONST. art. I, § 5, cl. 3. For a fuller treatment of congressional transparency, see Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 410–22 (2004).

Federal statutory open-government laws require disclosure of federal records and open meetings, with enumerated exceptions. See, e.g., Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (2000) (requiring, with exceptions, that each federal agency make information available to the public upon request); Government in the Sunshine Act, 5 U.S.C. § 552(b) (2000) (requiring, with exceptions, that every meeting of an agency be open to public observation). Some states have adopted constitutional provisions granting a right to access, while all have statutes that perform functions analogous to the federal FOIA and Government in the Sunshine Acts. See, e.g., CAL. CONST. art. I, § 3(b)(1) (granting "the right of access to information concerning the conduct of the people's business"); FLA. CONST. art. I, § 24 (granting "the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf"); Laura Schenck, Note, *Freedom of Information Statutes: The Unfulfilled Legacy*, 48 FED. COMM. L.J. 371, 372–73 n.7 (1996) (listing state freedom of information statutes).

government seems eternally resistant to disclosure.¹⁰ Current political developments—specifically, the Bush Administration’s efforts to control the flow of information from the executive branch¹¹ and post-September 11 concerns that government information disclosures might breach homeland security¹²—portend a new period of “retrenchment” (one begun during the

10. For accounts of the federal government’s resistance to disclosure, see Thomas Blanton, *National Security and Open Government in the United States: Beyond the Balancing Test*, in NATIONAL SECURITY AND OPEN GOVERNMENT: STRIKING THE RIGHT BALANCE 33, 34–54 (2003); Christina E. Wells, “National Security” Information and the Freedom of Information Act, 56 ADMIN. L. REV. 1195, 1201 (2004). The best evidence of generalized frustration at the state level is the existence of the National Freedom of Information Coalition, an organized network of member groups around the country that advocate for stronger open government laws and endeavor to force state and local agencies to comply with them. See Nat’l Freedom of Info. Coal., Our Mission, <http://www.nfoic.org/Mission.html> (last visited March 11, 2006).

11. One recent self-described “polemic” that summarizes the allegations and arguments relating to the Bush Administration’s efforts to control government information is JOHN W. DEAN, WORSE THAN WATERGATE: THE SECRET PRESIDENCY OF GEORGE W. BUSH xiv (2004); see also John D. Podesta, *Shadow Creep: Government Secrecy Since 9/11*, 2002 U. ILL. J.L. TECH. & POL’Y 361, 370–72 (criticizing the Bush Administration’s approach to government secrecy, both before and after the events of September 11, 2001); Bradley Pack, Note, *FOIA Frustration: Access to Government Records Under the Bush Administration*, 46 ARIZ. L. REV. 815, 823–27 (2004) (criticizing the Bush Administration’s actions during the post-9/11 period).

12. See Nancy Chang, *How Democracy Dies: The War on Our Civil Liberties*, in LOST LIBERTIES: ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOM 33, 36–39 (Cynthia Brown ed., 2003); Stephen Gidiere & Jason Forrester, *Balancing Homeland Security and Freedom of Information*, 16 NAT. RESOURCES & ENV’T 139 (2002); Wells, *supra* note 10, at 1197; Keith Anderson, Note, *Is There Still a “Sound Legal Basis”? The Freedom of Information Act in the Post-9/11 World*, 4 OHIO ST. L.J. 1605 (2003); Kristen Elizabeth Uhl, Comment, *The Freedom of Information Act Post-9/11: Balancing the Public’s Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261 (2003).

Following the September 11 attacks, the Bush Administration has withdrawn information from public access about certain immigration cases and publications that had previously been available from federal government websites and has sought to tighten access to information relating to weapons of mass destruction and “other information that could be misused to harm the security of our nation or threaten public safety.” Patrice McDermott, *Withhold and Control: Information in the Bush Administration*, 12 KAN. J.L. & PUB. POL’Y 671, 672–74 (2003); Andrew Card, Guidance on Homeland Security Information Issued (Mar. 19, 2002), <http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm>; FED. RESEARCH DIV., LIBRARY OF CON., LAWS AND REGULATIONS GOVERNING THE PROTECTION OF SENSITIVE BUT UNCLASSIFIED INFORMATION (2004), <http://www.fas.org/sgp/library/sbu.pdf>. During the first term of the George W. Bush Administration, the number of documents classified increased considerably more than it did during the Clinton Administration, while the number of documents declassified decreased in a corresponding fashion. See Gregg Sangillo, *Incarceration of Information?*, NAT’L J., Oct. 23, 2004, at 3227–28. Congress has also expanded executive agency powers to withhold information from the public. Critics allege that the Critical Information Infrastructure Act, passed as part of the Homeland Security Act, will inhibit disclosure of information about the risks and safety hazards posed by utilities, gas pipeline operations, and similar industrial infrastructure that had previously been available under state and federal law. See Homeland Security Act of 2002 § 214, 6 U.S.C. § 133; John Gibeaut, *The Paperwork War on Terrorism*, A.B.A. J., Oct. 2003, at 63, 67–68; Brett Stohs, *Protecting the Homeland by Exemption: Why the Critical Infrastructure Information Act of 2002 Will Degrade the Freedom of Information Act*, 2002

latter years of the Clinton Administration) in the oft-delayed march towards transparency's promise.¹³ The Bush Administration may occasionally express its commitment to openness,¹⁴ as do most courts when they review challenges to government agencies' refusals to disclose information.¹⁵ But when executive officers and agencies routinely deny access to the government's inner workings on the grounds that some exception or other privilege overrides a statutory disclosure requirement, open government seems more like a distant, deferred ideal than an actually existing practice.¹⁶

This regular departure from a principle that is so universally embraced seems bizarre. But it gets worse. *All* parties to the uncertain reach of transparency find the legal obligations and enforcement mechanisms of open government laws to be immensely frustrating.¹⁷ In the federal and state

DUKE L. & TECH. REV. 18, available at <http://www.law.duke.edu/journals/dltr/articles/PDF/2002DLTR0018.pdf>.

13. See Blanton, *supra* note 10, at 51–54 (describing secrecy during the current Bush Administration, and arguing that it began during Clinton's second term); Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Executive Privilege*, 60 MD. L. REV. 205 (2001) (condemning the Clinton Administration's reliance on sweeping executive privilege claims to keep information about White House activities secret).

14. See, e.g., Memorandum from John Ashcroft on the Freedom of Information Act to the Heads of All Federal Departments and Agencies (Oct. 12, 2001), available at <http://www.usdoj.gov/04foia/011012.htm> (declaring that “[i]t is only through a well-informed citizenry that the leaders of our nation remain accountable to the governed and the American people can be assured that neither fraud nor government waste is concealed” while also advising agencies that the Department of Justice will defend decisions to deny FOIA requests “unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records”).

15. See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (noting that “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed” before proceeding to affirm denial of a FOIA request on the ground that the witness statements in an unfair labor practices hearing before the National Labor Relations Board fell within a FOIA exception because their release would interfere with enforcement proceedings); *EPA v. Mink*, 410 U.S. 73, 80 (1973) (characterizing FOIA as “broadly conceived” and intended “to permit access to official information long shielded unnecessarily from public view and . . . to create a judicially enforceable public right to secure such information from possibly unwilling official hands” before proceeding to hold that an agency's classification of documents may not be reviewed by a court in camera).

16. With respect to matters of national security and foreign policy, for example, most challenges to agency denials to disclose documents end at the summary judgment stage, when courts typically defer to agency affidavits stating the applicability of FOIA exemption (b)(1). See 1 JAMES T. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* § 11:11, at 524–25 (3d ed. 2000) (discussing 5 U.S.C. § 552(b)(1) (2000)). And as a political matter, disappointment among disclosure advocates about the disjunction between the public statements of presidents in favor of openness and their actual efforts to keep information secret dates back to the earliest years of FOIA. See Elias Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741, 746 (1975) (describing the contradictory words and actions of Presidents Johnson and Nixon, the first executives following FOIA's enactment).

17. By “open government laws,” I mean to focus specifically on federal statutes that require public access to government documents and the meetings of federal agencies. The two

systems, those who request information under the various freedom of information and “sunshine” statutes regularly face delays and blanket denials.¹⁸ The result of one recent poll sponsored by open government advocates found widespread public concern that government secrecy is pervasive and that the public has too little access to public records and meetings.¹⁹ At the same time, agencies engaged in law enforcement, defense, and national security consider open government laws to be at best a burden and, at worst, a threat to their work.²⁰ Moreover, the financial and administrative costs of complying with these laws are significantly greater than zero, and these costs may adversely affect the ability of all federal, state, and local agencies to make effective decisions in a rational, deliberative, and efficient manner.²¹ One could dismiss these competing concerns as complaints about the unavoidable costs and inefficiencies of democracy and the inevitable limits required to maintain a secure nation and functional government. But, to return to the widespread recognition of its status as a preeminent political norm, if transparency is so essential, why do we settle for less than its perfection? Why must we worry about its costs?

The problem posed by these questions and the frustrations with the open government laws that the questions represent originates in the concept of “transparency” itself. As both an instrumentalist project to achieve open government and, more broadly, a descriptive concept claimed to be at the core of democracy, transparency fails to consider the tensions it conceals. It assumes too much of the state, of government information, and of the public, and as a result, fails to produce or to helpfully inform an effective, mutually acceptable level of administrative openness. The easy embrace of

most prominent such laws are the Freedom of Information Act, 5 U.S.C. § 552 (2000), and the Government in the Sunshine Act, 5 U.S.C. § 552(b) (2000). Although I focus mostly on federal statutes, I also refer to state constitutional and statutory provisions requiring analogous public access to the operations and documents of state government.

18. See Michele Bush Kimball, *Law Enforcement Records Custodians' Decision-Making Behaviors in Response to Florida's Public Records Law*, 8 COMM. L. & POL'Y 313, 314–16 (2003) (describing widespread noncompliance of state and local government agencies with state disclosure laws); REPORTERS COMM. FOR FREEDOM OF THE PRESS, HOMEFRONT CONFIDENTIAL: HOW THE WAR ON TERRORISM AFFECTS ACCESS TO INFORMATION AND THE PUBLIC'S RIGHT TO KNOW 71–80 (6th ed. 2005), available at <http://www.rcfp.org/homefrontconfidential/foreword.html> (describing the increasing resistance of federal agencies to responding to FOIA requests following September 11); Freedom of Info. Ctr., Mo. Sch. of Journalism, Audits and Surveys of State Freedom of Information Laws (Feb. 20, 2005), <http://foi.missouri.edu/openrecseries/index.html> (summarizing audits of state and local government responses to requests made under state freedom of information laws that show variable, but largely imperfect, compliance).

19. See Andy Alford, *It's the Law: Texans Can't Be Kept in the Dark*, AUSTIN AM.-STATESMAN, Mar. 13, 2005, at A1.

20. See, e.g., Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 922–23 (D.C. Cir. 2003), cert. denied, 540 U.S. 1104 (2004) (describing affidavits filed by the Department of Justice and FBI officials asserting that disclosure of information on identities of detainees held following September 11 would harm ongoing law enforcement efforts and national security).

21. See *infra* Part I.B.2.

transparency as a basis for normative and instrumental ends evades more difficult questions: When is transparency most important as an administrative norm? To what extent should an agency be held to that norm? These challenging but necessary questions typically lead transparency proponents and open government laws to concede a set of exceptions to disclosure that are just as broad and, ironically, just as opaque as the transparency norms themselves. Thus, where disclosure requirements threaten to reveal information regarding national security, national defense, and law enforcement investigations, the positive norms of transparency must give way to state claims for the need to hoard information for the public safety and good. These exceptions, in turn, unravel the ideal of transparency by vesting broad discretion about whether and how much to disclose in the very state actors that have claimed the exceptions in the first place.²²

The result is a ritualistic struggle over openness and privilege, with grave consequences. An overly broad conception of transparency with similarly broad exceptions too often leads to excessive openness requirements placed upon some levels of government and administrative decisions and too rarely leads to effective openness requirements when the state makes its most important, irreversible commitments to a particular policy. Furthermore, a legislative or constitutional commitment to transparency does not magically lead to the informed, deliberative, and/or participatory public that advocates claim will arise when the state finally disgorges its secrets. "Transparency," used in its strongest and most abstract form in the context of open government, acts as a term of opacity that promises more than it can deliver and ultimately fails to further its stated end of a better, more responsive, and truly democratic government. Rather than abstract normative claims and rhetoric, what is needed is some realism about transparency's costs and benefits for the public, for governance, and for the relationship between the public and government.

Abandoning transparency in its broadest conceptual form does not, however, require abandoning a commitment to open government and democracy. Rather, recognizing transparency's limits forces us to recognize the practical limits of imposing open government requirements on a bureaucratic state to which we delegate significant authority and of which we have high expectations. As a general matter, any effort to regulate disclosure must clearly and, as much as possible, precisely account for both the relative costs and benefits of openness. What kinds of governmental decisions and political participation are most likely to benefit from transparency? What kinds of costs and dangers will government officials and institutions face as a result of meeting transparency requirements? The implications of such an accounting for transparency rules have not been sufficiently considered; instead, transparency advocates and skeptics talk past each other within the

22. See SISSELA BOK, *SECRETS* 115 (1982).

stale, abstract discourse of transparency theory, in which each normative and consequential claim faces an equally valid counter-claim.

This Article seeks to begin asking the questions above by rethinking transparency as a concept. It begins with a survey of the literature on transparency's meaning as a component of political theory, law, and policy. Part I summarizes the arguments in favor of and against strong forms of transparency imposed on government entities and describes the conceptions of transparency's necessity and limits that are built into democratic theory. The Article characterizes the ground shared by these arguments as comprising a "transparency theory" that provides an underlying justification and framework for open government laws. Part II explains transparency theory and the balance it attempts to strike between the thrust of disclosure requirements and the parry of governmental privilege claims. Part III critiques that balance by identifying, explicating, and demystifying the simplistic model of linear communication that itself underlies contemporary transparency theory. It argues that transparency theory fails to comprehend the complexities of bureaucracy, communication, and the public, and that as a result, disclosure laws exclusively focus on the processes of information production and the types of information produced. Part IV suggests an alternative approach to open government laws that would allow more flexible, sensitive means to evaluate the costs and benefits of information disclosure. It suggests that decisions about disclosure should focus on more precise considerations of the costs and benefits from disclosure to governmental and public decision-making, rather than on broad normative concepts and categories of government information. Part IV also argues in favor of considering the timeliness and comprehensibility of information disclosures and proposes institutional alternatives to the current default regime in open government laws, which relies on weak judicial enforcement of disclosure mandates.

I. "TRANSPARENCY"

The arguments in favor of transparency seem fairly commonsensical and perhaps even obvious, at least in part because an informed citizenry and an open, accessible government are essential elements of liberal democratic theory and are more consistent with modern Western political values than the alternative of secret government and an ignorant public.²³ As a general matter, proponents make two claims on behalf of transparency: first, a government that is more transparent is therefore more democratic; and second, a government that is more transparent will operate in a more effective and efficient manner, and will thereby better serve its citizens while dealing more fairly and peaceably with other nations. In this Part, I first summarize these sets of claims and then present some of the most trenchant

23. See EDWARD A. SHILS, *THE TORMENT OF SECRECY* 23–24 (1956).

criticisms of them. Critics argue that strong forms of transparency requirements are neither essential nor beneficial to a democratic republic, which in its constitutional structure can correct any governmental abuses—either internally through checks and balances or externally through elections—without the dangers and inefficiencies that excessive openness creates.

A. TRANSPARENCY'S BENEFITS

1. Democratic Benefits

Contemporary transparency advocates typically draw connections between their efforts and the beginnings of modern liberal democratic theory in order to make the argument that open government is an essential element of a functional liberal democracy. James Madison's statement in an 1821 letter that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both,"²⁴ serves as the quote most often used by authors to demonstrate the foundational nature of transparency in modern democratic theory and in the American constitutional scheme.²⁵ But one can find similar, if not quite as pithy, sentiments in the classical liberalism of Locke,²⁶ Mill,²⁷ and Rousseau,²⁸ in both Benthamite utilitarian philosophy²⁹ and

24. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in *THE COMPLETE MADISON: HIS BASIC WRITINGS* 337 (Saul K. Padover ed., 1953) ("[A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives.")

25. A recent Westlaw search for the quotation in the "Journals and Law Reviews" database found 201 full quotations, almost entirely within articles asserting the need for open government. See, e.g., Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 *CORNELL L. REV.* 651, 652 (2003) (using a quote in the opening sentence to support the argument that presidential papers should be seen as inherently public property); Paul Wellstone, *Growing Media Consolidation Must Be Examined to Preserve Our Democracy*, 52 *FED. COMM. L.J.* 551, 551–52 (2000) (using a quote in the fourth paragraph of the brief article warning of anti-democratic possibilities of media consolidation). Such use extends backwards to criticisms of secrecy in the Reagan and Nixon eras. See MORTON H. HALPERIN & DANIEL N. HOFFMAN, *TOP SECRET: NATIONAL SECURITY AND THE RIGHT TO KNOW* 106 (1977); STEVEN L. KATZ, *GOVERNMENT SECRECY: DECISIONS WITHOUT DEMOCRACY* 2 (1987).

However, these uses of Madison's homily to support transparency may obscure the quotation's origins. According to one recent account, Madison intended the oft-cited sentences as part of an effort to support education—the "popular knowledge" of the quotation serving as an exhortation to a Kentucky professor seeking support for public school funding—rather than to support disclosure of government information, as has been supposed throughout the past fifty years. See Michael Doyle, *Misquoting Madison*, *LEGAL AFF.*, July/Aug. 2002, at 16, 16–18.

26. See AJUME H. WINGO, *VEIL POLITICS IN LIBERAL DEMOCRATIC STATES* 16–18 (2003) (discussing the importance of transparency in Locke's *First Treatise of Government*).

27. See JOHN STUART MILL, *Considerations of Representative Democracy*, in *UTILITARIANISM: ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 262 (H.B. Action ed., 1972) (1861).

Kantian moral philosophy,³⁰ as well as in the statements of other framers of the American Constitution³¹—even if the framers’ own deliberations over the Constitution were rather less than fully transparent.³² Bentham, for example, argued that publicity enables closer relations between the state and its public by securing the confidence of the governed in the legislature, by facilitating communication between the state and the public, and by creating a more informed electorate.³³ If fully knowledgeable of government workings, the public can play its proper roles as enlightened tribunal and collective decisionmaker whose “national intelligence,” trust, and attention lend “confidence and security” to “open and free policy.”³⁴

Following these principles, contemporary political theorists place the publicity of government laws and actions at the core of democracy because it enables both the rational choice of the individual citizen and the full flowering of informed public debate by the collective. Liberal philosophers who assume a contractual relationship between government and its citizens presume that openness enables individuals to grant their informed consent to be governed. The Rawlsian original position, for example, identifies publicity as a necessary condition for the creation of a just society because it allows individuals to choose, in a rational and knowledgeable manner, the principles for a society with which they would agree to associate.³⁵ The individual’s choice must be informed for the thought experiment of the original position to be meaningful. Similarly, Rawls’s political liberalism requires that free and equal citizens fully understand and scrutinize society’s institutions rather than misconceive the political order due to “accidental or

28. See JEAN JACQUES ROUSSEAU, *Dedication to the Republic of Geneva*, in DISCOURSE ON THE ORIGIN OF INEQUALITY 32–33 (G.D.H. Cole trans., 1988).

29. See JEREMY BENTHAM, POLITICAL TACTICS 29–44 (Michael James et al. eds., 1999).

30. See Immanuel Kant, *Eternal Peace*, in THE PHILOSOPHY OF KANT 470 (Carl J. Friedrich ed., 1949).

31. See Morris D. Forkosch, *Freedom of Information in the United States*, 20 DEPAUL L. REV. 1, 38–46 (1971); David Mitchell Ivester, Note, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109, 120–34 (1977). Nevertheless, the framers neither intended nor considered the First Amendment to prohibit government secrecy or to create a constitutional right to information access. See Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 933 (1992); Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 10 (1957).

32. See J.R. Pole, *Introduction* to THE AMERICAN CONSTITUTION: FOR AND AGAINST: FEDERALIST AND ANTIFEDERALIST PAPERS 18 (J.R. Pole ed., 1987); see also Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 410–12 (2000) (arguing that the closed constitutional convention in the American colonies provided distinct advantages for the constitutional framing).

33. BENTHAM, *supra* note 29, at 29–34.

34. *Id.*

35. See JOHN RAWLS, A THEORY OF JUSTICE 16, 454 (1971). For Rawls, publicity is also a constituent element of the well-ordered society, whose citizens must know and comprehend the society’s basic structure and political and social institutions. See JOHN RAWLS, POLITICAL LIBERALISM 35 (1993).

established delusions, or other mistaken beliefs resting on the deceptive appearances of institutions that mislead us as to how they work.”³⁶

Indeed, formal notions of the rule of law, whether they emphasize a Rawlsian just state or a Hayekian minimalist one,³⁷ require self-enacting, publicly accessible, and comprehensible legislation that limits and confines all exercise of public authority, and that facilitates the private ordering of individual behavior as a result.³⁸ Only to the extent that these laws gain the consent of the governed—which itself can only be freely given if the laws and their enforcement are public—will the political and administrative authorities that enact and enforce these laws be legitimate.³⁹ Proponents of deliberative democracy share the contractarians’ commitment to publicity, asserting that transparent reasoning and decisionmaking by a representative body enable public discussion and the broadening of citizens’ and officials’ moral and political perspectives.⁴⁰ A deliberative understanding of the publicity principle requires that government give public justifications for its policies⁴¹ and promote rational, critical public debate and unrestricted communication in order to enable development of a functional, democratic public sphere.⁴² In short, liberal democratic theory requires the state to give an account of itself to its public and to justify its actions to the individual and community.⁴³

Legislative and judicial efforts to curb government secrecy and protect informed individual choice, public debate, and state self-justification harness this liberal democratic concept of transparency’s benefits. Consider, for example, the normative presumptions upon which Congress relied in

36. RAWLS, POLITICAL LIBERALISM, *supra* note 35, at 68.

37. See FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 74–75 (1944); RAWLS, A THEORY OF JUSTICE, *supra* note 35, at 238. William Sage has connected transparency as a concept with libertarian politics, arguing that transparency rhetoric, in the context of health-care disclosure, operates as part of a “resurgent rhetoric of individualism and self-reliance in American politics, reflecting diminished expectations of government and heightened skepticism regarding public programs and public institutions,” despite widespread public distrust of the market and of concentrations of corporate power. See William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1707 (1999).

38. See generally Robert G. Vaughn, *Introduction* to FREEDOM OF INFORMATION, at xi, xv–xvi (Robert G. Vaughn ed., 2000) (discussing how approaches to administrative law that privilege the formal rule of law understand the need for open government).

39. In this sense, the argument for transparency resembles arguments in favor of administrative reform that invoke a strict conception of the rule of law. See generally Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385, 397–99 (summarizing the rule of law ideal of the administrative process).

40. See AMY GUTTMAN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 100–01 (1996); Joshua Cohen, *Democracy and Liberty*, in DELIBERATIVE DEMOCRACY 185, 193–94 (Jon Elster ed., 1998).

41. GUTTMAN & THOMPSON, *supra* note 40, at 101.

42. JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 208–09 (Thomas Burger trans., 1989) (1962).

43. See JAMES G. MARCH & JOHAN P. OLSEN, DEMOCRATIC GOVERNANCE 146–48 (1995).

passing the original Freedom of Information Act (“FOIA”) in 1966. The House of Representatives Report on the original legislation rested its conclusion about the necessity of a broader, more exacting public access law on the fact that “[a] democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies.”⁴⁴ Congress presumed that requiring government to make its information available to the public would in turn improve the quality of voter decisionmaking and, as a result, the quality of governance as representatives respond to a more “intelligent” electorate. Similar statements regarding the broad democratic basis for open government laws accompanied passage of the two most important expansions of FOIA, those passed in response to Watergate in 1974⁴⁵ and the “Electronic FOIA” amendments of 1996.⁴⁶ Under this approach, the doctrine of executive privilege that enables a President to keep certain types of information secret—to the extent that the doctrine exists at all—must give way to congressional and judicial efforts to provide essential information to the public.⁴⁷

Prevailing strains of liberal democratic political theory and open government legislation thus share the assumptions that the publicity of open government produces an informed and interested public, and by implication, that secrecy caused by opaque or closed government produces suspicious and/or ignorant masses. Openness is a necessary condition of popular democratic power, a predicate for effective representative government, and an indispensable part of the everyday life of the free individual and of the wider demos. On this view, where the oversight and accountability that should be the natural result of the American tri-partite system of separate governing powers fail—a result that is more likely to

44. H.R. REP. NO. 89-1497, at 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2429. The House and Senate Committee Reports differ in historically important ways because of different sets of political pressures placed on them during the time of the bill’s drafting and passage. *See* Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 809–11 (1967); Note, *The Freedom of Information Act: Access to Law*, 36 FORDHAM L. REV. 765, 767 (1968). I ignore these differences because my focus is instead on the larger conceptual presumptions that the reports share concerning the need for and likely effects of transparency.

45. Pub. L. No. 93-502, 88 Stat. 1561 (codified as amended at 5 U.S.C. § 552 (1994)).

46. Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (codified at 5 U.S.C. § 552 (Supp. II 1996)). For a description of how these amendments changed agency obligations to make information available electronically and to reduce delays in responding to FOIA requests, see generally Mark H. Grunewald, *E-FOIA and the “Mother of All Complaints”: Information Delivery and Delay Reduction*, 50 ADMIN. L. REV. 345 (1998).

47. *See, e.g.*, RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 7–13, 354–56 (1974) (arguing, based upon constitutional text, history, and governmental function, that congressional power is “senior” to executive power, and that as a result, the judicial must begin with a “presumption against” executive secrecy); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited* 37 (2005) (unpublished manuscript, on file with the Iowa Law Review) (arguing that openness pervades Constitution structure as an “operative norm”).

occur when the President and Congress are from the same political party⁴⁸—transparency must be imposed through legislative enactment. Ultimately, modern political theory and open government legislation assume transparency can operate as a force capable of establishing a public and a public sphere itself, creating legitimate government and then legitimating the actions of the government that it creates by enabling informed individual choice and collective, democratic decisionmaking.

2. Positive Consequences

Transparency proponents also cite instrumental reasons for imposing disclosure requirements on government.⁴⁹ These consequentialist arguments similarly trace back to the beginnings of modern liberal democratic theory.⁵⁰ The most significant consequences flow from the public's increased ability to monitor government activity and hold officials, particularly incompetent and corrupt ones, accountable for their actions.⁵¹ Additional information also enables individuals to make better decisions in their private lives and regarding their engagement in the market, resulting, for example, in changed consumer and industry behavior in fields as diverse as health and the environment.⁵² Secrecy is costly, and therefore transparency represents

48. See Greg Miller & Bob Drogin, *Senators Examining Quality of CIA Intelligence on Iran*, L.A. TIMES, Feb. 5, 2005, at A1 (quoting the Chairman of the Senate Intelligence Committee on the increased scrutiny with which his committee would view intelligence the Bush Administration relies upon in determining its strategy in dealing with Iran after its revelations that the Administration, with little congressional oversight, had relied upon faulty intelligence in going to war in Iraq).

49. In this respect, the argument for transparency resembles arguments in favor of reforming administrative agencies to enable them better to achieve instrumental goals. See Sargentich, *supra* note 39, at 410–15 (describing “public purposes,” or instrumentalist, ideal of administrative process).

50. See, e.g., JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 27 (Currin V. Shields ed., Bobbs-Merrill Co., Inc. 1958) (1861) (asserting that publicity is a constituent element of representative democracy by allowing citizens to check the bad behavior and decisions of their leaders and encourage the good).

51. See *Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 928 (D.C. Cir. 1982) (Skelley Wright, J.) (explaining that Congress's intent in enacting the Sunshine Act requiring open agency meetings was to “enhance citizen confidence in government, encourage higher quality work by government officials, stimulate well-informed public debate about government programs and policies, and promote cooperation between citizens and government. In short, it sought to make government more fully accountable to the people”); MARCH & OLSEN, *supra* note 43, at 162–65; SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT* 162–65 (1999); Joseph E. Stiglitz, *On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life*, Oxford Amnesty Lecture, 13–15 (Jan. 27, 1999).

52. See Mark Goldschmidt, *The Role of Transparency and Public Participation in International Environmental Agreements: The North American Agreement on Environmental Cooperation*, 29 B.C. ENVTL. AFF. L. REV. 343 (2002); Frances Irwin & Carl Bruch, *Information, Public Participation, and Justice*, 32 ENVTL. L. REP. 10784 (2002); Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. U. L. REV. 653, 662–65 (1993).

cost-saving: as the number of classified documents has steadily risen,⁵³ the process of classifying documents and then protecting those classified as secret now exacts over \$8 billion in public and private costs.⁵⁴

But transparency also has more subtle, though equally beneficial, consequences. It enables the free flow of information among public agencies and private individuals, allowing input, review, and criticism of government action, and thereby increases the quality of governance.⁵⁵ When individual agencies hoard information, they inhibit the ability of entities working in the same or related areas of operation to provide competing or collaborative work.⁵⁶ For this reason, the late Senator Daniel Patrick Moynihan argued, military and intelligence agencies failed to recognize growing evidence of the failing Soviet state, leading to massive but unnecessary Cold War military expenditures.⁵⁷ Similarly and more recently, the 9/11 Commission found that the failure of law enforcement and intelligence agencies to share information and communicate fully with the President led the security apparatus of the federal government to ignore evidence that may have foiled the terrorist attacks of September 11, 2001.⁵⁸ Critics of the Bush Administration's use of intelligence to support its claims about Iraq's weapons program and relationship with terrorist networks have especially condemned the "echo chamber" within the White House that allowed plausible but incorrect hypotheses and false or partial intelligence to face no public vetting or internal criticism during the lead-up to the war.⁵⁹ Military analysts have also argued that the highly structured classification apparatus, which depends upon formal definitions of classified information, formal

53. See Scott Shane, *Since 2001, Sharp Increase in the Number of Documents Classified by the Government*, N.Y. TIMES, July 3, 2005, at A14.

54. See INFO. SEC. OVERSIGHT OFFICE, 2004 REPORT ON COST ESTIMATES FOR SECURITY CLASSIFICATION ACTIVITIES, <http://www.archives.gov/isoo/reports/2004-cost-report.html> (identifying that the government's cost of classification for fiscal year 2004 was \$7.2 billion, which represents nearly a three-fold increase over the past nine years, and costs to industry regularly approach \$1 billion).

55. SECRECY: REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at xxi (Comm. Print 1997) [hereinafter MOYNIHAN COMM'N REPORT].

56. See DANIEL PATRICK MOYNIHAN, SECRECY 77-79, 142-43, 214 (1998).

57. See *id.* at 154-201, 221-22.

58. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 357-58 (W.W. Norton ed., 2004).

59. See David Barstow, *How White House Embraced Suspect Iraq Arms Intelligence*, N.Y. TIMES, Oct. 3, 2004, at A1; Dafna Linzer & Barton Gellman, *Doubts on Weapons Were Dismissed*, WASH. POST, Apr. 1, 2005, at A1. The so-called "Downing Street Memos," internal documents distributed among high-level British government officials prior to the war in Iraq, illustrate that, at least on its face, the intelligence that the Bush Administration touted as demonstrating an advanced Iraqi weapons-building program and ties between Saddam Hussein and al-Qaeda was unpersuasive to an informed audience operating outside of this echo chamber. See Glenn Frankel, *From Memos, Insights into Ally's Doubts on Iraq War: British Advisors Foresaw Variety of Risks, Problems*, WASH. POST, June 28, 2005, at A1.

procedures for giving clearance to individuals to view classified information, and technical and operational procedures for protecting classified information, conflicts with efforts to modernize military operations and intelligence analysis.⁶⁰

An open government offers numerous additional advantages to a democratic nation, especially in its relations to the wider global community.⁶¹ Transparency enables stronger, more peaceful international relations by allowing for more accurate verification of nations' compliance with international agreements and standards; national markets gain greater access to foreign investment through credible government oversight and more efficient regulation of market activity; and global environmental agreements are more effective and are more effectively enforced through accessible information.⁶² With respect to the increasingly international, cooperative scientific community, government efforts to prevent cross-border sharing of scientific information reduce scientists' autonomy from political and administrative forces and ultimately impede their independent advancement of scientific knowledge.⁶³

60. See Bruce Berkowitz, *Secrecy and Security*, HOOVER DIG., Winter 2001, <http://www.hooverdigest.org/011/berkowitz.html>; cf. Beth M. Kasper, *The End of Secrecy? Military Competitiveness in the Age of Transparency* 38–39 (Ctr. for Strategy & Tech., Air War College, Occasional Paper No. 23, 2001) (arguing that the U.S. military must speed its decision-making processes to account for both the increase in its own information gathering capabilities and the transparency of its operations to others).

61. Numerous multinational organizations and NGOs have focused on the larger global benefits to open government. These include the OECD and UNESCO. See *Information, Consultation and Public Participation in Policy-making: Building Open Government in OECD Member Countries*, in ORG. FOR ECON. CO-OPERATION AND DEV., *OPEN GOVERNMENT: FOSTERING DIALOGUE WITH CIVIL SOCIETY* 7, 11, 15 (2003); Transparency International and the Open Society Institute, <http://www.transparency.org>; THE RIGA DECLARATION: TRANSPARENCY IN LOCAL GOVERNMENT IN EASTERN EUROPE (2000), <http://lgi.osi.hu/publications/2000/23/rd.pdf>.

62. See Ann Florini, *The End of Secrecy*, FOREIGN POL'Y, Summer 1998, at 50.

63. See SHILS, *supra* note 23, at 160–92; Benjamin S. DuVal, Jr., *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579, 606 (1986); J.H. Reichman & Paul F. Uhlir, *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment*, 66 LAW & CONTEMP. PROBS. 315, 326–27 (2003); *Secrecy and Knowledge Production* (Cornell Univ. Peace Studies Program, Occasional Paper No. 23, 1999), http://www.einaudi.cornell.edu/PeaceProgram/publications/occasional_papers/occasional-paper23.pdf; cf. Leslie Gielow Jacobs, *A Troubling Equation in Contracts for Government Funded Scientific Research: "Sensitive But Unclassified" = Secret But Unconstitutional*, 1 J. NAT'L SECURITY L. & POL'Y 113, 117–28 (2005) (describing federal government attempts by law, regulatory practice, and funding contracts to control scientific information). Indeed, the Soviet Union's efforts to manage the disclosure and availability of scientific information put both scientific progress and human safety at a significant disadvantage. JACQUES S. GANSLER & WILLIAM LUCYSHYN, *THE UNINTENDED AUDIENCE: BALANCING OPENNESS AND SECRECY: CRAFTING AN INFORMATION POLICY FOR THE 21ST CENTURY* 5 (2004), http://www.cpppe.umd.edu/Bookstore/Documents/UnintendedAudience_3.05.pdf.

The empirical, consequentialist claim for transparency views secrecy's adverse effects on efficient and effective government as not only separate from, but for some, equal to, normative claims on behalf of liberal democratic values.⁶⁴ But these two propositions typically run together on the assumption that an open democratic regime that enables informed, individual choice not only provides means for citizens to monitor, and to some extent participate in government decisions, but also enables an open society that encourages productive public and private investment as well as good relationships with other nations.⁶⁵ Ultimately, for its proponents, transparency produces an informed public, a responsive government, and as a result, a functional society.

B. TRANSPARENCY'S LIMITS

But governmental transparency cannot be complete. Bentham noted this,⁶⁶ as do not only deliberative democrats (who have a particular interest in protecting the deliberation process from intrusive publicity),⁶⁷ but transparency advocates themselves.⁶⁸ Government cannot operate in a manner that provides complete access to all proceedings and documents. Complete transparency not only would create prohibitive logistical problems and expenditures (given the number of documents and meetings that would need to be made available), but more importantly, it would impede many of the government's most important operations and infringe upon the privacy interests of individuals who give personal information to the government.⁶⁹ Thus, skeptics of a strong form of transparency complain about the potential excesses of disclosure requirements while they question both the extent of the benefits that such requirements offer and the notion that absolute government openness is ideal.⁷⁰ And if citizens are not necessarily interested in or capable of being informed by full disclosure of government

64. Moynihan and Richard Gid Powers, who contributed an extended introduction to Moynihan's monograph, largely reject normative concerns about disclosure as a necessary and direct good for democracy, in part because they have less confidence than many transparency advocates in the inherent possibilities of a participatory, informed public, and in part because they fear the political paranoia of the margins. See MOYNIHAN, *supra* note 56, at 219–21; Richard Gid Powers, *Introduction to id.* at 1, 17, 42–48.

65. See, e.g., Stiglitz, *supra* note 51, at 26–27 (associating the instrumental and intrinsic benefits of transparent democracy).

66. See BENTHAM, *supra* note 29, at 39 (enumerating instances when publicity should be suspended).

67. See, e.g., GUTTMAN & THOMPSON, *supra* note 40, at 103–26 (evaluating various possible exceptions to the norm of publicity).

68. See, e.g., Stiglitz, *supra* note 51, at 18–25 (discussing legitimate, limited exceptions to transparency).

69. See BOK, *supra* note 22, at 175–76; Robert L. Saloschin, *The Department of Justice and the Explosion of Freedom of Information Act Litigation*, 52 ADMIN. L. REV. 1401, 1407 (2000).

70. See Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar./Apr. 1982, at 14, 15.

operations,⁷¹ and if the empirical claims about transparency's positive consequences remain unproven,⁷² then mandated disclosure may have minimal positive consequences and no democratic value at all. Strong arguments in favor of transparency, in other words, face significant challenge from within democratic theory.

1. Transparency's Constitutional Threat

Transparency advocates work from the assumptions that a disclosure deficit naturally results from a constitutional system that lacks explicit commitments to openness, that this deficit represents a constitutional failing and a threat to democracy, and that some statutory or constitutional legal intervention is necessary to curb that threat and correct that failing. To question these assumptions, as then-Professor Antonin Scalia did in an important 1982 article, is to challenge the notion that an apparent lack of explicit disclosure requirements represents a threat at all. For Scalia, the tripartite system of government created by the Constitution provides sufficient disclosure of government information.⁷³ The Constitution empowers Congress, within limits, to check executive discretion and inquire into the President's actions, while every election allows voters to inquire into and reject the political branches' decisions. Because the institutionalized checks and balances of a constitutional representative democracy lead to a sufficient degree of government transparency, Scalia argued, the harms caused by any additional disclosure requirements overshadow whatever benefits these additional requirements might claim to offer.⁷⁴

71. See DANIEL YANKOLOVITCH, *THE MAGIC OF DIALOGUE* 24 (1999); *infra* Part III.C.

72. See Neal D. Finkelstein, *Introduction: Transparency in Public Policy*, in *TRANSPARENCY IN PUBLIC POLICY* 1, 1 (Neal D. Finkelstein ed., 2000) (questioning whether consequentialist claims have ever been proven and asserting that they are likely to be unprovable, given the difficulty in testing whether any given policy is "transparent" and the extent to which such transparency has a causal effect on a subsequent government decision or public behavior).

73. Scalia, *supra* note 70, at 19.

74. *Id.* For Scalia, FOIA and similar efforts to force open government are an historic aberration, products of "the obsession that gave them birth—that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and its surrogate, the press." *Id.* This obsession, he argues, is not merely romantic but empirically incorrect; instead, disclosure of government corruption and overreaching (including the Watergate break-in and examples of illegal CIA and FBI actions against American citizens) occurred because of the internal dynamics of the American constitutional system. *Id.* This assertion is largely false; although none of the instances of disclosure he mentions were initially made public through the FOIA, they were the products of investigative journalism, political activism, and agency error in releasing classified or otherwise secret information rather than the result of any natural "checks and balances" of internal government structures. See KATHRYN S. OLMSTED, *CHALLENGING THE SECRET GOVERNMENT: THE POST-WATERGATE INVESTIGATIONS OF THE CIA AND FBI* 11–39 (1996). These disclosures resulted from intervention into and disruption of antidemocratic acts of governmental secrecy that sought to hide information about the progress of the war in Southeast Asia and about potentially illegal acts taken by those within the executive branch or with ties to the President.

The most significant of such harms, at least at the level of creating systemic political danger, arises from Congress imposing, and the judiciary enforcing, unconstitutional duties and demands on the executive branch through statutory disclosure requirements. Transparency skeptics' concerns about a vulnerable Constitution represent the dark side of the theory that a strong, equipoised constitutional system produces sufficient information; it bubbles under common law constitutional doctrines that concern efforts by the executive to avoid information disclosure. Fears that transparency will threaten the Constitution, for example, fuel the core logic behind the amorphous concept of executive privilege,⁷⁵ the right of the President (and, perhaps, presidential advisers)⁷⁶ to resist disclosure of information.⁷⁷ The Court in *United States v. Nixon*,⁷⁸ reviewing President Nixon's claims of executive privilege as a defense against the release of documents and tapes to the Special Prosecutor investigating the Watergate break-in and its cover-up, identified the constitutional nature of the confidentiality of presidential communications in the executive branch's "supremacy . . . within its own assigned area of constitutional duties."⁷⁹ To threaten disclosure of certain types of information imperils not only the President's autonomy, but it also upsets the careful balance created by the separate autonomies of American constitutional government. Justice Harlan, in his dissent in the Pentagon Papers case, provided the strongest judicial statement of this argument. Harlan argued against the Court's refusal to grant an injunction that would restrain the press from publishing materials whose disclosure, the President claimed, would harm military operations. The Court's action would establish new and troubling judicial authority to review presidential claims of the

75. See Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1188 (1999) ("[T]here are as many versions of executive privilege as there are proponents and . . . each version of executive privilege seems to approximate exactly what the particular [proponent] deems appropriate and no more.").

76. See *In re Sealed Case*, 121 F.3d 729, 749–50 (D.C. Cir. 1997) (holding that executive privilege may extend to the communications of presidential advisers even when the President takes no part in the communications).

77. See Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1069 (1999). Rozell, perhaps the most prominent and prolific commentator on executive privilege, recognizes the privilege as qualified by compromise between the President and Congress, with disputes resolved ultimately by courts. See MARK J. ROZELL, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY* 165–66 (2002). The assertion, inferred from the text of the Vesting Clause in Article II, that executive privilege is in fact absolute and unqualified, is far less prevalent, although not unheard of. See *Nixon v. Sirica*, 487 F.2d 700, 737–52 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part) (finding absolute privilege in the Vesting Clause and applying privilege to judicial and congressional efforts to obtain information from the executive); see also U.S. CONST. art. II, § 1, cl. 1 (Vesting Clause).

78. 418 U.S. 683 (1974).

79. *Id.* at 705.

threats disclosures would cause and would thereby increase the judiciary's power at the expense of the executive's.⁸⁰

Concerns regarding transparency's adverse effects on a vulnerable constitutional structure arise even outside the heady realms of national security and presidential invocations of executive privilege. Consider, for example, the heretofore unsuccessful constitutional challenges to the Federal Advisory Committee Act ("FACA").⁸¹ FACA was enacted in the same post-Watergate era as FOIA and the Government in the Sunshine Act.⁸² It requires, among other things, that an advisory committee, task force, or similar group established within the executive branch that includes at least one member who is not a federal employee or officer must hold open meetings and make its records available within a framework similar to that established by FOIA.⁸³ Congress intended FACA in part to enable public scrutiny of what it deemed an increasingly powerful advisory committee process within the executive branch that industry standards had captured.⁸⁴ But in passing FACA, Congress also mandated substantive requirements and procedures that regulate the President's and executive officers' ability to seek advice from individuals outside government.⁸⁵ While the Supreme Court and D.C. Circuit have avoided the separation of powers issues that FACA creates in *Public Citizen v. U.S. Department of Justice*,⁸⁶ *Association of American Physicians and Surgeons v. Clinton*,⁸⁷ and *In re Cheney*⁸⁸ (by holding that FACA applied to neither the ABA Standing Committee on the Federal Judiciary nor President Clinton's Task Force on National Health Care Reform nor the National Energy Policy Development Group, respectively), minority opinions in *Public Citizen* and *Association of American Physicians and Surgeons* argued that FACA is unconstitutional on the grounds that it infringes upon the President's freedom "to investigate, to be informed, to evaluate, and to consult" while performing his constitutional duties.⁸⁹

80. N.Y. Times Co. v. United States, 403 U.S. 713, 756–57 (1971) (Harlan, J., dissenting).

81. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. II §§ 1–15 (2000)).

82. See Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 464 (1997).

83. 5 U.S.C. app. II § 10 (2000).

84. See Croley & Funk, *supra* note 82, at 464–65.

85. See 5 U.S.C. app. II § 5(b)(2), (3) (2000) (requiring advisory committees to be "fairly balanced in terms of the points of view represented" and requiring precautions ensuring that their advice and recommendations "will not be inappropriately influenced by the appointing authority or by any special interest").

86. 491 U.S. 440 (1989).

87. 997 F.2d 898 (D.C. Cir. 1993).

88. 406 F.3d 723, 727–28 (D.C. Cir. 2005).

89. *Pub. Citizen*, 491 U.S. at 488 (Kennedy, J., concurring) (quoting *Washington Legal Found. v. U.S. Dep't of Justice*, 691 F. Supp. 483, 493 (D.C. 1988)); see also *Ass'n of Am. Physicians*, 997 F.2d at 924–25; Croley & Funk, *supra* note 82, at 468–71 (summarizing separation of powers challenges and executive privilege issues to FACA). See generally Carolyn Bingham

Indeed, as recently as 2004 the Supreme Court has stated that frustrating Congress's objectives in FACA is necessary, in some cases, to prevent the greater harm of unconstitutional, congressionally imposed disclosure mandates, notwithstanding the important public interest in open government.⁹⁰

2. Transparency's Negative Consequences

In addition to these more abstract constitutional concerns, critics also challenge what they consider to be the enormous unintended consequences of disclosure requirements.⁹¹ First and foremost, they argue, forced disclosure creates a nation that is more susceptible to security breaches and less able to enforce its own laws because evil-doers will have greater access to information that could be used to threaten the health and safety of the public.⁹² Congress has responded to such concerns by exempting military, national security, and law enforcement operations from FOIA disclosure.⁹³ The federal judiciary has largely adopted this preference when it evaluates challenges to the President's and executive branch agencies' unwillingness to disclose allegedly exempted documents.⁹⁴

The events of September 11 seem to have reinforced these dynamics of judicial review. Judge Sentelle wrote for a two-judge majority in the D.C. Circuit's 2003 decision holding that the names of persons detained following the September 11, 2001, attacks and the details of their detainment fell within FOIA's law enforcement exception.⁹⁵ Judge Sentelle referred to and followed what he described as a long tradition of judicial deference to the Justice Department in FOIA cases that raise national

Kello, Note, *Drawing the Curtain on Open Government? In Defense of the Federal Advisory Committee Act*, 69 BROOK. L. REV. 345 (2003) (arguing in favor of FACA's constitutionality).

90. *Cheney v. U.S. Dist. Court*, 124 S. Ct. 2576, 2589 (2004).

91. See James T. O'Reilly, *FOIA and Fighting Terror: The Elusive Nexus Between Public Access and Terrorist Attack*, 64 LA. L. REV. 809, 812-14 (2004) [hereinafter O'Reilly, *FOIA and Fighting Terror*]; Scalia, *supra* note 70, at 15 (calling FOIA "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored").

92. Two post-September 11 expressions of this position are Anderson, *supra* note 12, and Laura A. White, *The Need for Governmental Secrecy: Why the U.S. Government Must Be Able to Withhold Information in the Interest of National Security*, 43 VA. J. INT'L L. 1071 (2003).

93. See 5 U.S.C. § 552(b) (1), (7) (2000).

94. See, e.g., *United States v. Nixon*, 418 U.S. 683, 710-11 (1974) (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)) (noting that when "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged," a court should recognize that the protections provided by executive privilege require the judiciary to refrain from second-guessing the President); O'REILLY, *supra* note 16, § 11.26 ("[d]eference is great when the agency asserts that a serious harm would result from disclosure" of documents that allegedly contain national security information).

95. See *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 937 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004).

security issues. Because terrorism presents America with “an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore,” Judge Sentelle wrote, a court cannot second-guess executive judgments about the adverse effects that any disclosure would have on ongoing law enforcement proceedings related to the war on terrorism.⁹⁶ Such judicial second-guessing would leave the nation vulnerable to attack.

At a more quotidian level, disclosure requirements also undeniably raise the fiscal costs of government.⁹⁷ Agency efforts to comply with FOIA are expensive.⁹⁸ In addition to the direct costs of responding to FOIA requests, judicial oversight of agency request denials—made worse by brief deadlines imposed on agencies and expedited, de novo judicial review—drain limited judicial resources.⁹⁹ State courts and state and local agencies, subject to or empowered with enforcement of analogous state open government laws, face similar administrative and adjudicatory costs at the state level but without the resources and taxing authority enjoyed by the federal government. The breadth of public disclosure requirements increases these costs. Anyone can request information under FOIA’s expansive mandate that agencies make all records that are not otherwise excepted available to “any person,”¹⁰⁰ no matter the reason. Frequent FOIA requesters include businesses that seek the records of competitors for commercial motivations,

96. *Id.* at 928, 932.

97. Transparency requirements may hamper some non-governmental operations as well. Scientists and researchers employed or funded by the government, for example, could be forced to disclose data at an early stage of their government-sponsored studies, leading to premature use or criticism of their work. *Cf.* DuVal, *supra* note 63, at 621–25; Lars Noah, *Scientific “Republicanism”: Expert Peer Review and the Quest for Regulatory Deliberation*, 49 EMORY L.J. 1033, 1065–66 (2000) (arguing against disclosure of the working documents of regulatory peer review panels). The trade secrets and commercial or financial information of private firms contracting with the government could be vulnerable to competitors, thereby leading firms to withdraw from governmental operations and harm the public as well. *See* *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 874–75 (D.C. Cir. 1992). *See generally* WILLIAM L. CASEY, JR. ET AL., *ENTREPRENEURSHIP, PRODUCTIVITY, AND THE FREEDOM OF INFORMATION ACT* (1983). An exemption from FOIA requirements covers “matters that are trade secrets . . . obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b) (4) (2000).

98. “In Fiscal Year 2002, the total cost of all FOIA-related activities for all federal departments and agencies, as reported in their annual FOIA reports, was” over \$300 million. Office of Info. & Privacy, U.S. Dep’t of Justice, Summary of Annual FOIA Reports for Fiscal Year 2002, <http://www.usdoj.gov/oip/foiapost/2003foiapost31.htm>. *See generally* Charles J. Wichmann III, Note, *Ridding FOIA of Those “Unanticipated Consequences”: Repaving a Necessary Road to Freedom*, 47 DUKE L.J. 1213, 1219–21 (1998) (tracking the enormous increase in FOIA compliance costs following the 1974 amendments).

99. *See* *Savage v. CIA*, 826 F.2d 561, 563 (7th Cir. 1987) (complaining that judicial consideration of “petty” FOIA requests is a monumental waste of judicial resources); Abner J. Mikva, *Knowing You, Knowing Me*, LEGAL TIMES, Jan. 6, 1997, at 23 (describing the administrative burden of FOIA enforcement on federal district courts).

100. 5 U.S.C. § 552(a) (3) (A) (2000).

individuals seeking personal and family records from the Social Security Administration for genealogical research, or litigants attempting to circumvent discovery rules in suits against the government.¹⁰¹ One unintended consequence of transparency, then, is the transfer of wealth between corporations inside as well as outside of the United States when competitors and foreign governments obtain information about American industry that is submitted to or collected by the government.¹⁰²

Transparency also harms government decisionmaking by adversely affecting the ability of government officials to deliberate over policy matters outside of the public eye, and by curbing or skewing the production of informational goods. Disclosure of documents prepared by government officials may inhibit a president and agency decisionmakers from receiving candid, objective, and knowledgeable advice from subordinates.¹⁰³ Closed deliberations enable policymakers to make more thoughtful consideration of the available information and the relative advantages of alternatives, to engage in more fulsome and substantive debate over the most popular and unpopular alternatives regarding even the most passionate public issues, and to bargain openly in order to reach a widely acceptable and optimal result, without the inevitable pressure that accompanies public scrutiny.¹⁰⁴

101. See Amy E. Rees, *Recent Developments Regarding the Freedom of Information Act: A "Prologue to a Farce or a Tragedy; or, Perhaps Both,"* 44 DUKE L.J. 1183, 1184 (1995); Chuck McCutcheon, *Demand for Public Information Is Surging*, NEWHOUSE NEWS SERVICE, Mar. 7, 2005, <http://www.newhouse.com/archive/mccutcheon030805.html>. A Heritage Foundation investigation of the logs kept by four federal agencies of the requests they received for information under FOIA during the first six months of 2001 revealed that only a small percentage came from journalists and private individuals. Instead, the majority of requests came from individuals identifying themselves as attorneys and from corporations. See Mark Tapscott & Nicole Taylor, *Special Report: Few Journalists Use the Federal Freedom of Information Act*, <http://www.heritage.org/Press/MediaCenter/FOIA.cfm>.

102. See O'Reilly, *FOIA and Fighting Terror*, *supra* note 91, at 813.

103. See, e.g., *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997) ("If presidential advisers must assume they will be held to account publicly for all approaches that were advanced, considered but ultimately rejected, they will almost inevitably be inclined to avoid serious consideration of novel or controversial approaches to presidential problems.").

104. See BOK, *supra* note 22, at 175–76; David M. Welborn et al., *Background Report for Recommendation 84-3: Implementation and Effects of the Federal Government in the Sunshine Act*, in RECOMMENDATIONS AND REPORTS, at 199, 235–39 (1984); Michael A. Lawrence, *Finding Shade from the "Government in the Sunshine Act": A Proposal to Permit Private Informal Background Discussions at the United States International Trade Commission*, 45 CATH. U. L. REV. 1, 10–12 (1995); James T. O'Reilly & Gracia M. Berg, *Stealth Caused by Sunshine: How Sunshine Act Interpretation Results in Less Information for the Public About the Decision-Making Process of the International Trade Commission*, 36 HARV. INT'L L.J. 425, 458 (1995) (arguing that closing particular types of ITC deliberations would lead to better deliberation and would, as a result, better promote public understanding of Commission decisions); Vermeule, *supra* note 9, at 412–13. Courts often affirm this belief, perhaps based on their own practice of closed deliberations and conferences. See, e.g., *United States v. Nixon*, 418 U.S. 683, 705 (1974) ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.").

Anecdotal complaints about open meeting laws suggest that agencies subject to these laws hold fewer meetings; engage in a constrained, less-informed dialogue when they meet; are vulnerable to greater domination by those who possess greater communications skills and self-confidence, no matter the quality of their ideas; and lose the potential for informal, creative debate that chance or planned meetings outside of the public eye enable.¹⁰⁵

For agencies seeking to control the information they produce, laws protecting against the disclosure of government information offer a second-best alternative to a regime in which government could own and prohibit, via property right, the unauthorized circulation of information.¹⁰⁶ The protections provided to private parties by intellectual property law are intended in part to create incentives for the production of socially beneficial information.¹⁰⁷ Government efforts to maintain some information as secret are in some ways analogous, insofar as they assume that a privilege against disclosure allows the production of more and better information and better governance.¹⁰⁸ Just as creativity and innovation in the sciences and arts are adversely affected by a legal regime that under-protects intellectual property, so the amount of information produced by government and the quality of its

One example of the negative unintended consequences of the wide application of open government laws to all public agencies is its effect on public universities. Many public universities must comply with state open records and open meetings acts during their searches for high level administrators, thereby both raising the costs of conducting the search and suppressing the pool of applicants to those willing to be involved in a public search. *See generally* Wood v. Marston, 442 So. 2d 934, 939 (Fla. 1983) (demonstrating that state sunshine laws apply to search for law school dean and cover all aspects of search committee's collective inquiries and discussion of candidates); Nick Estes, *State University Presidential Searches: Law and Practice*, 26 J.C. & U.L. 485, 502–08 (2000) (surveying relevant state statutes and discussing the costs of open-ended transparency requirements on universities).

105. *See* Nicholas Johnson, *Open Meetings and Closed Minds: Another Road to the Mountaintop*, 53 *DRAKE L. REV.* 11, 22–24 (2004); Joseph W. Little & Thomas Tompkins, *Open Government Laws: An Insider's View*, 53 *N.C. L. REV.* 451, 452 (1975); Kathy Bradley, Note, *Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC and You*, 49 *FED. COMM. L.J.* 473, 481–85 (1997); Randolph J. May, *Taming the Sunshine Act; Too Much Exposure Inhibits Collegial Decision Making*, *LEGAL TIMES*, Feb. 5, 1996, at 24.

106. *Cf.* RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 242 (1981) (noting that two methods for protecting information are by creating property rights in information and by secrecy).

107. *See* U.S. CONST. art. 1, § 8, cl. 8 (granting power to Congress in the patent and copyright clause “[t]o promote the Progress of Science and useful Arts”); ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 10 (3d ed. 2003) (“Intellectual property in the United States is fundamentally about incentives to invent and create.”).

108. This is a key assumption when courts find constitutional protection for executive secrecy. *See, e.g., Nixon*, 418 U.S. at 705 (“Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of decisionmaking process.”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–21 (1936) (recognizing advantages of executive secrecy in foreign affairs).

decision-making are harmed when disclosure requirements become too rigorous. In addition, by enabling executive agencies to keep information from becoming an easily circulated and appropriable public good, secrecy allows better governmental decision-making and more effective national security protections and law enforcement.¹⁰⁹ Viewed this way, transparency's limits enable a functioning democracy.

II. TRANSPARENCY'S BALANCE

Considered together, the democratic and consequentialist arguments in favor of and against strong-form transparency share certain assumptions. They each assume an opposition between the public state and its private citizenry, and that for democracy to function, this opposition must be managed and, where possible, dissolved. They also agree that in its acts of governing, the state produces information, whether in the form of written texts (e.g., records) or practices (e.g., meetings), that exposes and explains its actions; that government would by default keep at least some significant portion of that information from the public; and that government can control access to its information. For proponents of strong-form transparency, these assumptions constitute a problem that disclosure law and policy must solve; for transparency skeptics (or weak-form transparency advocates), these assumptions constitute a system of government and a set of norms and practices that any disclosure law or policy must protect. Put another way, proponents and skeptics disagree about the normative and

109. On the relationship between secrecy and the "public domain" status of government-produced information, see Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 123-38 (2003).

This consequentialist assumption parallels that in intellectual property law regarding the benefits of property rights protection for the production of intellectual goods. Consider, for example, the conflicts over the availability of presidential papers. Former presidents typically want property rights over their presidential materials in order to control access to them and shape their historical record, but they can no longer do so after passage of the Presidential Records Act of 1978 ("PRA"). See Presidential Records Act of 1978, Pub. L. No. 95-591, § 2, 92 Stat. 2523, 2534 (codified as amended at 44 U.S.C. § 2202 (2000)) (providing that "[t]he United States shall reserve and retain complete ownership, possession, and control of Presidential records"). On the history of the PRA, see generally Carl Bretscher, *The President and Judicial Review Under the Records Act*, 60 GEO. WASH. L. REV. 1477 (1992); Carl McGowan, *Presidents and Their Papers*, 68 MINN. L. REV. 409, 416 (1983). In response and in order to provide greater control by the current and former Presidents over historical materials, President George W. Bush, by executive order, has granted the incumbent and former Presidents veto power over access to presidential records. See Exec. Order No. 13,233, 66 Fed. Reg. 56,025 (Nov. 1, 2001). See generally Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 CORNELL L. REV. 651 (2003); Marcy Lynn Karin, Note, *Out of Sight, but Not Out of Mind: How Executive Order 13,233 Expands Executive Privilege While Simultaneously Preventing Access to Presidential Records*, 55 STAN. L. REV. 529 (2002); Stephen H. Yuhon, Note, *The Imperial Presidency Strikes Back: Executive Order 13,233, the National Archives, and the Capture of Presidential History*, 79 N.Y.U. L. REV. 1570 (2004).

practical effects of disclosure requirements—effects that they feel certain would occur—but they agree both that transparency is better than its opposite in the abstract, and that they can derive and impose the measure of transparency that democracy requires. Together, these common principles constitute a general approach that I will call “transparency theory,” which itself includes both stronger and weaker forms that advocate for requiring variable degrees of disclosure upon government entities.

In the abstract terms of its debate, transparency theory allows legislative, regulatory, and judicial efforts to impose some level of transparency in constitutional doctrines, statutes, and regulations that at least appear to reconcile the concerns raised by transparency advocates and skeptics.¹¹⁰ The reconciliation operates as a balancing test. The constitutional doctrine of executive privilege, for example, offers a core of protection for the President and his advisers, but its application requires courts to balance competing concerns. These concerns include “the fair administration of criminal justice” and the need of defendants facing criminal prosecution for information that might be eligible for privilege,¹¹¹ along with the public benefits of preserving the former presidents’ archival materials for legitimate historical and government purposes.¹¹² Statutory disclosure requirements proceed in a similar, though somewhat more precise, fashion. In crafting FOIA, for example, Congress attempted to achieve a similar balance in recognizing that while it attempted to legislate a “general” or “broad” philosophy of openness, it must nevertheless respect “certain

110. Such competing, apparently oppositional approaches arise throughout theories of government, and administrative law must inevitably operate within and resolve these contradictory claims. See Sargentich, *supra* note 39, at 392–97 (identifying the “rule of law,” “public purposes,” and “democratic process” as core conflicting ideals of administrative process); cf. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1277 (1984) (critiquing the self-contradictory conceptual models that undergird public and private bureaucratic orders). As one prominent administrative law casebook cleverly demonstrates, the matched pairs of administrative law canons seem infinite and proceed in a Llewellynesque thrust-and-parry formation. See JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 30–32 (5th ed. 2003) (applying Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950) to the similarly paired critiques of administrative structure, authority, procedure, and actions).

111. *United States v. Nixon*, 418 U.S. 683, 711–12 (1974).

112. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 452–53 (1977). Most commentators on executive privilege, even those who are skeptical of its existence and wisdom, admit some degree of balance to its operation. See, e.g., BERGER, *supra* note 47, at 356 (noting significant role of judiciary in considering the subject matter and the effects on public interest of nondisclosure when dealing with executive efforts to keep information secret); Rozell, *supra* note 77, at 163–66 (explicating a qualified executive privilege doctrine whose precise balance between privilege and disclosure is struck by the judiciary); Kitrosser, *supra* note 47, at 65–69 (offering limited exceptions to argument against the doctrine of executive privilege where Congress seeks to overstep its constitutional powers and where the President or other executive branch officials refuses to disclose thoroughly private information that is unrelated to official duties).

equally important rights” and “opposing interests” which are difficult but “not . . . impossible” to balance.¹¹³ “Success lies,” the Senate Report to FOIA concluded, “in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.”¹¹⁴ Congress endorsed the empirical and normative presumptions of transparency advocates that openness is a prerequisite to a functional model of democracy even as it limited disclosure requirements in practice because of similarly broad presumptions of countervailing interests. It achieved these limits most explicitly in a series of enumerated exemptions to disclosure requirements,¹¹⁵ versions of which are part of state open records and meetings acts.¹¹⁶

This dual doctrinal movement—at once surging towards disclosure and then receding back towards privilege—hearkens directly back to the irresolvable conflict between transparency advocates and their critics, both of whom offer powerful justifications for rigorous disclosure requirements and vigorous executive branch protections. The balance struck between these dual movements offers both sufficient stability to provide a sense of continuity in public rights and government practices, and sufficient flexibility to allow somewhat diverse approaches over successive presidential administrations and historical periods.

Given the trans-historical, abstract nature of transparency theory, it should not surprise us that the balance embedded in disclosure laws responds to historical circumstances, and that one set of arguments or the other will have greater purchase at any particular moment.¹¹⁷ At such times, the political party or a politician whose position appears relatively out of favor in a current balance will complain that the balance has failed to hold, or that the current balance represents a poor means to meet preferable normative and consequential ends.¹¹⁸ Viewed in this light, complaints that

113. *Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 80 n.6 (1973) (quoting S. REP. NO. 813, at 3 (1965)).

114. *Id.*

115. 5 U.S.C. § 552 (b)(1)–(7) (2000).

116. *See, e.g.*, FLA. CONST. art. I, § 24(c) (authorizing legislature to construct narrow restrictions to open records requirement that are “no broader than necessary to accomplish the stated purpose of the law”); *Times Mirror Co. v. Superior Court*, 813 P.2d 240, 247 (Cal. 1991) (characterizing California’s Public Records Act as “modeled on” the federal FOIA, with general disclosure requirements and specific exceptions); *Fink v. Lefkowitz*, 393 N.E.2d 463, 466 n.* (N.Y. 1979) (characterizing New York’s Freedom of Information Law as “patterned after the Federal analogue”); *see also* Teresa Dale Pupillo, *The Changing Weather Forecast: Government in the Sunshine in the 1990s—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165, 1172–73 (1993) (summarizing range of statutory exceptions to state open meetings laws).

117. Edward Shils made an analogous argument five decades ago when he analyzed secrecy and openness as results of opposing historical trends that remain in play in contemporary politics, law, and government. *See* SHILS, *supra* note 23, at 24–25.

118. At present, disclosure advocates, many of whom oppose at least some of the Bush Administration’s politics, represent this position. *See, e.g.*, REPORTERS’ COMM. FOR FREEDOM OF

shift between partisans demonstrate both the necessity and the success of the balance struck in information disclosure laws. Consider the typical scenario in which a former minority party gains control of an apparatus of government and engenders from the new minority opposition precisely the same complaints that the new majority had previously voiced about government secrecy when it was out of power.¹¹⁹ When this shift occurs, we could conclude that the balance between disclosure and privilege has produced a sufficient quantity of government information to allow a functioning, competitive democratic system—albeit one that produces a significant quantity of fulminating rhetoric regarding excess secrecy, corruption, and conspiracy.

And yet, the balance appears not to be working. The main parties to information disclosure disputes—the executive branch, Congress, and interested members of the public—remain convinced that this balancing act is a failure. Inter-branch disputes over information the President is unwilling to release to Congress arise repeatedly; the public remains largely ignorant about the actions of its government; disclosure laws continue to exact financial, deliberative, and bureaucratic burdens on government, even when disclosure serves no useful purpose; and vast quantities of information, some of which may offer significant insight for the public's understanding of current politics and policy, remain secret. We have achieved rhetorical consensus regarding transparency's value and have generated costly and elaborate bureaucratic solutions in an effort to pursue it. But we have not actually achieved the goals of transparency in practice.

A central cause of these frustrations, the remainder of this Article asserts, lies in the conceptual framework underlying the disclosure/privilege balance struck by transparency theory—that is, in the terms and framing of the debate between transparency advocates and skeptics. The balances struck by the judiciary in the executive privilege doctrine and Congress in the FOIA presume that suitably narrow disclosure requirements based on the type of information requested and the context in which it is produced will advance democracy and lead to positive consequences while protecting

THE PRESS, *Foreword*, in HOMEFRONT CONFIDENTIAL: HOW THE WAR ON TERRORISM AFFECTS ACCESS TO INFORMATION AND THE PUBLIC'S RIGHT TO KNOW, *supra* note 18, at 1 (calling for the public and media "to push back" and restore the balance of disclosure and secrecy that the Bush Administration has upset); Blanton, *supra* note 10, at 33–34 (arguing that because disclosure inevitably loses to security concerns in the disclosure/exemption balance, the very idea of a "balance" should be replaced with an enforced regime of open government in which exemptions from disclosure are limited, if not abolished entirely).

119. This is precisely what happened following the 2000 election, when the kinds of allegations of rampant secrecy that plagued the Clinton Administration were visited upon the Bush Administration. On the Clinton era, see Greg Ferguson & David Bowermaster, *Whatever It Is, Bill Clinton Likely Did It*, U.S. NEWS & WORLD REP., Aug. 8, 1994, at 29; Philip Weiss, *The Clinton Haters*, N.Y. TIMES MAG., Feb. 23, 1997, at 36. On allegations of secrecy in the Bush Administration, see sources cited *supra* notes 11–12.

government and avoiding negative consequences. This presumption itself, based on abstractions posed by debates within transparency theory, relies on a series of component assumptions that, on closer examination, appear both empirically unsupportable and conceptually flawed. I turn to these flaws in Part III.

III. OPACITY

Transparency theory, composed of the assumptions shared among transparency advocates and skeptics about information and its capacity to be communicated to the public, ultimately leads to laws and policies that misconstrue the issues at stake in the relationship between disclosure, democracy, and the bureaucratic state. These errors arise from transparency theory's positing of a set of discernible and coherent actors and entities involved in the production and reception of information: first, a producer and sender of messages, the state, that can be forced to divulge information that it would otherwise seek to hoard; second, messages, whether in the form of documents or meetings, whose existence and meaning are self-evident; and third, receivers, in the form of an audience or public, who are able and motivated to understand disclosed messages and their significance. Put schematically, the assumptions look like this:

- government constitutes a potential "sender" of its information, *so long as we impose the proper disclosure requirements upon it*;
- government information constitutes a message necessary for a functional democracy, *so long as it is disclosed*; and
- the public awaits disclosure of government information, and will act in predictable, informed ways, *so long as it has access to government information*.

At its core, then, transparency theory takes the form of a classic, linear model of communication that posits a simple process of information transmission from a source to an intended audience via the medium of a message.¹²⁰ The most famous such model sought to enable the evaluation of a communications technology's ability to transmit information efficiently and effectively¹²¹ and was subsequently utilized within the emerging field of mass communications research as a means to conceptualize the processes and effects of the mass media.¹²² Transparency theory asserts that government information works in the same manner. It assumes the existence of a nascent (and beneficial) communications process that is blocked by the state. Communication can occur, and therefore stronger

120. See generally Wilbur Schramm, *Information Theory and Mass Communication*, 32 JOURNALISM Q. 131 (1955).

121. See Claude Shannon, *A Mathematical Theory of Communication*, 27 BELL SYS. TECH. J. 379, 379-81 (1948).

122. See HANNO HARDT, CRITICAL COMMUNICATION STUDIES: COMMUNICATION, HISTORY AND THEORY IN AMERICA 77-90 (1999).

democracy can emerge, once the state is pried open and its information is set free. Like the information and mass communications theory upon which it appears to build, this model fails because of its simplistic, inaccurate conception of how communication actually works.¹²³ As a result, the model obfuscates or ignores the complexity of its component parts: modern government's sprawling, often incoherent bureaucracy; the slippery nature of "information"; the elusive and frustrating capacities of the public; and, ultimately, the difficulties of the communications process itself.

In the first three sections that follow, I explain the weaknesses of transparency theory by focusing on its assumptions of a "sender," "message," and "receiver" of government information. I close by explaining how this model serves as a flawed model for open government laws.

A. THE SENDER: THE STATE AND INFORMATION

The traditional account of transparency presumes the existence of a coherent, responsible, and responsive state in the traditional form that exists as a model of democratic government in liberal political theory. This represents two errors that I describe in this section: the contemporary state is not particularly coherent; and the dynamics of modern bureaucracy are such that the state is not responsive.

1. The Incoherent State

Although the nation state retains its power as an existing apparatus of sovereign control over geographically identifiable jurisdictions, the "technologies" of power are themselves dispersed to multiple, overlapping entities, many of which have no direct relationship with government as traditionally understood.¹²⁴ The concept of a unified, coherent, sovereign state, whether in its general form as an ideal or in its particular form in, for example, the United States, is increasingly under threat from above, in the form of greater economic, military, political, and legal interdependence among nations.¹²⁵ Indeed, international regulation depends for its promulgation and enforcement upon a combination of public international organizations and "transgovernmental networks" that are opaque both in identity and practices.¹²⁶ And the United States's federalist system and tripartite federal system of powers also create multiple, overlapping layers of

123. See *infra* Part III.D.

124. See NIKOLAS ROSE, POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT 16–20 (1999).

125. See JOHN HOFFMAN, BEYOND THE STATE 209–13 (1995); David Held, *Democracy: From City-States to a Cosmopolitan Order?*, in PROSPECTS FOR DEMOCRACY 13, 25–27 (David Held ed., 1993); Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2037–39 (2003).

126. Eleanor D. Kinney, *The Emerging Field of International Administrative Law: Its Content and Potential*, 54 ADMIN. L. REV. 415, 425 (2002).

governmental jurisdiction and competencies that cooperate with each other at times and conflict at other times.

Thus, the nation state and its subsidiary units have neither the status nor the power and coherence that classical political theory presumes,¹²⁷ given the state's remarkable, often paralyzing complexity, the political limits placed on its activities, and the near-universal critique of "government"—whether in the form of calls for its "reinvention" or for its abandonment.¹²⁸ This is merely a descriptive claim; whether the movement it describes signals the possible emergence of a better, multi-level "cosmopolitan democracy,"¹²⁹ a complex "global system of regulatory regimes to which locales and regions relate in a federated system,"¹³⁰ or a more frightening transnational "Empire"¹³¹ is irrelevant for my purposes. More important are its multi-layered, overlapping structures that appear incoherent and often conflict with each other.

Sovereign states and identifiable state actors do continue to exist, of course, and American governmental entities are subject to openness requirements imposed by constitutions and laws of administrative procedure at the state and federal levels. At the same time, complicated governmental structures complicate the prospect of identifying the actor that contributed to or finalized a particular governmental decision, or that holds particular government information.¹³² Consider, for example, the sprawling Department of Homeland Security, which, as one commentator has noted, represents an "agglomeration of agencies, each with its own set of rules and procedures and unique culture, [which] raises a host of administrative, regulatory and governmental organization issues that likely will take years to resolve."¹³³ When one seeks information about operations relating to

127. Balakrishnan Rajagopal, *International Law and Social Movements: Challenges of Theorizing Resistance*, 41 COLUM. J. TRANSNAT'L L. 397, 411–12 (2003).

128. CLAU OFFE, MODERNITY AND THE STATE 64–65 (1996).

129. DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER 270–83 (1995).

130. Iris Marion Young, *Self-Determination and Global Democracy: A Critique of Liberal Nationalism*, in NOMOS XLII: DESIGNING DEMOCRATIC INSTITUTIONS 147, 174 (Ian Shapiro & Stephen Macedo eds., 2000).

131. MICHAEL HARDT & ANTONIO NEGRI, EMPIRE 3–21 (2000).

132. One litigation manual describes in detail the various issues that a person seeking information must resolve in choosing the correct agency and addressing an initial request: the agency or agencies with whom to file the request; the proper procedures to use for those agencies; which office or offices of those agencies to contact; whether the documents may have been moved to storage in the Federal Records Center or the National Archives; which agencies may have additional exemptions in their organic or program statutes that would allow them to avoid disclosure; and what contents to include in the initial request. See HENRY A. HAMMITT ET AL., LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 19–25 (2002).

133. William S. Morrow, Jr., *Administrative, Regulatory and Organizational Challenges Facing the New Homeland Security Department*, ADMIN. & REG. L. NEWS, Summer 2003, at 11. Indeed, the Department of Homeland Security's dispersal of billions of dollars to the states for their homeland security purchases has not been subject to disclosure or public accountability. See

“homeland security,” then, whom does one contact? Contemporary military actions, such as the “War on Terror” similarly require a vast number of agencies with confusingly overlapping responsibilities. Thus, when the ACLU sought documents relating to the alleged abuse of prisoners held overseas by the United States, it filed FOIA requests with, among other agencies, the Department of Defense, the Department of Homeland Security, the Department of Justice and many of its components, the CIA, and the Department of State.¹³⁴

The proliferation of public entities is not the only cause of complexity and confusion. The federal government frequently attempts to protect industry from disclosure requirements for security purposes. For example, the Clinton Administration initiated, and the current Bush Administration has intensified, the federal government’s reliance on private, industry-specific coalitions known as ISACs (Information Sharing and Analysis Centers) to share security information relating to a sector’s physical and cyber infrastructure without making such information vulnerable to legislative or regulatory information disclosure requirements.¹³⁵

At the same time, widespread efforts at the federal and state level to contract with private entities to provide services, either on behalf of or in place of government, further complicate traditional conceptions of the state.¹³⁶ Consider, for example, the effects from the increasing privatization of activities previously performed entirely or largely by federal and state agencies.¹³⁷ Whatever the merits of the military’s increased reliance on private contractors in its peacekeeping missions and in the war against and the occupation of Iraq, such reliance makes an area of government operations that was already significantly less than transparent even more

Eileen Sullivan, *Billions in States’ Homeland Purchases Kept in the Dark*, CONG. Q., June 22, 2005, available at http://www.cq.com/public/20050622A_homeland.html. The failure of the Federal Emergency Management Agency (“FEMA”) to respond quickly and effectively to Hurricane Katrina is seen in part by FEMA’s incorporation within the Department of Homeland Security. See Susan B. Glasser & Josh White, *Storm Exposed Disarray at the Top*, WASH. POST, Sept. 4, 2005, at A1.

134. *ACLU v. Dep’t of Def.*, 339 F. Supp. 2d 501, 502 (S.D.N.Y. 2004).

135. ISACs were initiated by Presidential Decision Directive 63/NSC-63 (1998), <http://www.fas.org/irp/offdocs/pdd/pdd-63.htm> [hereinafter PDD 63] (establishing the Clinton Administration’s Policy on Critical Infrastructure Protections). Their use was expanded following 9/11. See Exec. Order No. 13,231, 66 Fed. Reg. 53,063 (Oct. 18, 2001). On their operation, see O’Reilly, *FOIA and Fighting Terror*, *supra* note 91, at 822–24.

136. See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1306 (2003). Although discovery requests imposed on private contracts may be analogous to open records acts and may be served on non-parties to litigation, private causes of action have procedural hurdles that few open government laws require. Compare Jack M. Beermann, *Administrative-Law-Like Obligations on Private[ized] Entities*, 49 UCLA L. REV. 1717, 1724 (2002) (analogizing discovery to FOIA), with Freeman, *supra*, at 1322–23 (critiquing Beermann’s argument).

137. See generally Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COMM. L.J. 21 (1999).

opaque and less accountable to the public.¹³⁸ Some state governments retain only limited oversight over the privately owned and operated state prisons with which they have contracted to hold their prisoners, while they shield the prison operators from the disclosure requirements imposed on similar state-run facilities.¹³⁹

Congress and courts have formulated complicated, indeterminate rules to resolve this fundamental conflict between laws intended to cover government agencies and the increasing reliance by those agencies on private firms for research and for the operation of traditional government functions. Congressional efforts to resolve this conflict under FOIA have proven largely unsuccessful. Sorting whether an entity is an “agency” for purposes of FOIA is one confusing issue.¹⁴⁰ Another is the definition of an “agency record,” which the Supreme Court has defined as a document that is within the possession and control of the government.¹⁴¹ These issues are especially important in the regulatory process, where federal agencies rely heavily on contractors or grantees to perform much of the essential empirical, scientific research on which regulations are based. Efforts to clarify the legal status of records produced as a result of the agency-grantee

138. On the specific issues arising from the use of military contractors in the Iraq occupation, see P.W. Singer, *Nation Builders and Low Bidders in Iraq*, N.Y. TIMES, June 15, 2004, at A23. On military and national security outsourcing generally, see P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (2004); Ann R. Markusen, *The Case Against Privatizing National Security*, 16 GOVERNANCE 471, 489–90 (2003).

139. See Nicole Cásarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249, 268–91 (1995); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1392–94 (2003).

140. See generally, e.g., *Dong v. Smithsonian Inst.*, 125 F.3d 877 (D.C. Cir. 1997) (the Smithsonian Institution is not an agency); *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996) (the National Security Council is not an agency); *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) (the President is not an agency); *Pub. Citizen Research Group v. Dep’t of Health, Educ. & Welfare*, 668 F.2d 537 (D.C. Cir. 1981) (the Professional Standards Review Organization, a private company that contracted to review Medicare and Medicaid providers, was not an agency); *Irwin Mem’l Blood Bank v. Am. Nat’l Red Cross*, 640 F.2d 1051 (9th Cir. 1981) (the Red Cross is not an agency); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) (the Office of Science and Technology is an agency).

141. See *Kissinger v. Reporters’ Comm. for the Freedom of the Press*, 445 U.S. 135, 152 (1980). Following *Kissinger*, courts have struggled over FOIA’s applicability when a document was not created by, or is not currently possessed by an agency. See generally, e.g., *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136 (1989) (copies of federal court decisions in the agency’s possession were agency records); *GE v. U.S. Nuclear Regulatory Comm’n*, 750 F.2d 1394 (7th Cir. 1984) (company’s internal report on nuclear reactor, which had been subpoenaed by the Commission in connection with a licensing proceeding, was an agency record); *Am. Fed’n of Gov’t Employees Local 1923 v. Dep’t of Health & Human Servs.*, 712 F.2d 931 (4th Cir. 1983) (list of home addresses of employees of Social Security Administration headquarters were not agency records); *Paisley v. CIA*, 712 F.2d 686 (D.C. Cir. 1983) (documents created by agency in response to congressional investigation were agency records); *Wolfe v. Dep’t of Health & Human Servs.*, 711 F.2d 1077 (D.C. Cir. 1983) (report prepared by President-elect’s transition team, in possession of the Secretary’s Chief of Staff, was not an agency record).

and agency-contractor relationship have failed, in part, due to conflicts between Congress and the executive branch, and in part, because of the difficulty of imposing transparency on the scientific process.¹⁴² The practice of contracting with private firms even creates some sharp ironies, as federal agencies have begun to contract out their own responses to FOIA requests¹⁴³—leading inevitably to the issue of whether records produced by the private firms engaged in reviewing FOIA requests would themselves be subject to FOIA. State courts and legislatures face the same issues and have similarly failed to develop a consensus or clarity for their open government laws.¹⁴⁴ For transparency advocates, the simple solution to the problem of whether public disclosure requirements apply to private firms is to characterize such firms as the relevant state actor with which they have contracted, and to extend all open government obligations to all such private operations.¹⁴⁵ Of course, efforts to extend the burdens of public law procedural and disclosure requirements to private entities inevitably reduce the economic and administrative advantages that originally led government agencies to privatize or contract out previously public services.¹⁴⁶

2. The Unresponsive State

To further complicate the state's role as sender in a linear communication process, recall that the transparency requirement is imposed—legislatively in the first instance, then administratively through

142. See Donald T. Hornstein, *Accounting for Science: The Independence of Public Research in the New, Subterranean Administrative Law*, 66 LAW & CONTEMP. PROBS. 227, 237–46 (2003). In 1980, the Supreme Court held that private organizations receiving financial grants from the federal government do not fall within the FOIA definition of “agency” unless a federal agency provides extensive and detailed supervision of their work. *Forsham v. Harris*, 445 U.S. 169, 179 (1980). In November 1998, Congress overturned *Forsham* by adding one sentence to the 4,000 pages of an omnibus spending bill that directed the Office of Management and Budget (“OMB”) to subject certain recipients of federal grants and “all data produced under an award” of a federal contract to a non-profit organization to FOIA. See Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-495 (1998). The OMB Guidelines implementing Congress's command are narrower in scope than the amendment's author intended, once again complicating the responsibility of private entities working for the federal government to comply with disclosure mandates under FOIA. See O'REILLY, *supra* note 16, § 4.10; Richard Shelby, *Accountability and Transparency: Public Access to Federally Funded Research Data*, 37 HARV. J. ON LEGIS. 369 (2000).

143. See Christopher Lee, *On FOIA Front, More Agencies Contract Out*, WASH. POST, June 8, 2001, at A21.

144. See Martin D. Bunker & Charles N. Davis, *When Government “Contracts Out”: Privatization, Accountability and Constitutional Doctrine*, in ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE 85, 90–93 (Charles N. Davis & Sigman L. Splichal eds., 2000); Craig D. Feiser, *Protecting the Public's Right to Know: The Debate Over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. U. L. REV. 825, 835 (2000).

145. See Cäsarez, *supra* note 139, at 300–03; Feiser, *supra* note 137, at 54–61.

146. Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321, 345 (2004).

information requests or bureaucratic process, and finally, perhaps, through judicial command—upon the state apparatus, which may choose not to comply. As Max Weber explained, the logic of bureaucratic administration rests in part on the production and hoarding of information, and on a bureaucracy's "keeping secret its knowledge and intentions" from competing organizations and from the public.¹⁴⁷ Inevitably, state institutions know what information they have produced and where such information is stored and, through that monopoly of knowledge about their own information, retain significant discretion over the existence and ultimate release of documents. Their knowledge extends not only over the content of such documents, but also over whether such documents reasonably fall within any statutory exemptions from disclosure—a judgment that state institutions make in the first instance.¹⁴⁸ Congress sought to address this asymmetry by allowing courts to examine documents in camera in order to determine the applicability of statutory exemptions.¹⁴⁹ Federal courts have also attempted to mitigate the inequities further under FOIA by requiring an agency that seeks to avoid disclosure in some instances to produce an index that lists the documents the agency is refusing to release and the specific statutory exemptions that provide the authority for its refusal.¹⁵⁰ But in the national security context, agencies have succeeded in gaining from Congress, the President, and courts the authority to refuse to acknowledge the existence of information a requester seeks on the grounds that to do so would reveal intelligence methods and sources.¹⁵¹ When information is "born classified"—that is, when information is created with the knowledge and understanding by its creators and those who oversee them that it was created secretly and that it would remain secret indefinitely—its creators claim levels of both exceptional expertise and privilege that confound the abilities of judicial generalists using traditional judicial procedures in applying generally applicable legislative enactments.¹⁵²

147. 3 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 992 (Guenther Roth & Claus Wittich eds., 1968).

148. See Vaughn, *supra* note 38, at xv.

149. See 5 U.S.C. § 552(a)(4)(B) (2000).

150. It is called a "Vaughn Index," after the D.C. Circuit decision in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir.1973). See generally O'REILLY, *supra* note 16, § 8.11.

151. See, e.g., 5 U.S.C. § 552(c)(1)–(3) (2000) (authorizing agencies to treat records as not subject to FOIA at all if disclosure of the existence of the records "could reasonably be expected to interfere with [law] enforcement proceedings"); *Bassiouni v. CIA*, 392 F.3d 244, 245–47 (7th Cir. 2004) (upholding the CIA's refusal to acknowledge the existence of information that may impact intelligence operations and national security); Exec. Order No. 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003) (authorizing agencies to refuse to confirm or deny the existence of requested records "whenever the fact of their existence or nonexistence is itself classified").

152. See Aviam Soifer, *Born Classified, Born Free: An Essay for Henry Schwarzschild*, 19 CARDOZO L. REV. 1369, 1385 (1998).

In short, the sprawling, multi-headed state must, to an extent, police itself. As Weber argued, bureaucratization is an optimal process for carrying out specialized “administrative functions according to purely objective considerations.”¹⁵³ Given its role as the producer and, under disclosure requirements, the initial sender of information, the bureaucratic state inevitably retains significant authority over the production and storage of government information. In bureaucratic organizations, information enables its holder to perform his or her functions—often more effectively by virtue of keeping that information from others—and to amass power.¹⁵⁴ Bureaucracy’s relationship to democracy and popular rule in the modern state is thus contradictory: a democracy may simultaneously desire a functional bureaucracy despite the bureaucratic production of secrets while it also attempts to impede the bureaucracy’s growth, in part out of fear that these secrets disrupt popular rule.¹⁵⁵ In short, efforts to stop bureaucratic secrecy or to impose disclosure requirements to mitigate it run counter to the necessary and inevitable dynamics of the bureaucratic state, as well as its resistance to change.¹⁵⁶ In its multiple forms, the state may indeed produce messages, but characterizing the state as an actual, willing, or even acquiescent “sender” of its information under current government disclosure laws misunderstands the operations of the modern state apparatus. In the words of sociologist David Beetham, “[o]penness is the keystone of democratic politics, but proposals to achieve it are likely to prove insufficient when they take no account of the pressures causing secretiveness in the first place.”¹⁵⁷

B. THE MESSAGE: GOVERNMENT INFORMATION

The traditional account of transparency presumes that the message or text of government information is discernible and can be transmitted in the form in which it was produced by the sender. This represents two errors: it

153. 2 WEBER, *supra* note 147, at 975.

154. See *id.* at 992; see also Stanton K. Tefft, *Secrecy, Disclosure and Social Theory*, in *SECRECY: A CROSS-CULTURAL PERSPECTIVE* 35, 36–37 (Stanton K. Tefft ed., 1980) (positing existence of a “secrecy process” in which “insiders” use means to conceal information that outsiders try to obtain).

155. See WOLFGANG J. MOMMSEN, *THE POLITICAL AND SOCIAL THEORY OF MAX WEBER* 110 (1989); 3 WEBER, *supra* note 147, at 988, 990–92; Sheldon Wolin, *Max Weber: Legitimation, Method, and the Politics of Theory*, 9 *POL. THEORY* 401, 412 (1981).

156. This resistance is often to any external command to change, even if the command is to protect *more* secrets. A U.S. General Accounting Office survey of FOIA officers at twenty-five federal agencies found that less than a third of them had perceived significant change resulting from a command issued by Attorney General Ashcroft two years earlier to be more hesitant to disclose information on a discretionary basis. U.S. GEN. ACCOUNTING OFFICE, *FREEDOM OF INFORMATION ACT: AGENCY VIEWS ON CHANGES RESULTING FROM NEW ADMINISTRATION POLICY 2* (2003), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-03-981>.

157. DAVID BEETHAM, *BUREAUCRACY* 101 (2d ed. 1996).

assumes the existence of a message outside of the context of government disclosure laws themselves, and it assumes the possibility of that message's transmission without distortion or effect. Instead, any "message" that government information comprises is produced and only exists within a political and regulatory framework that shapes its creation and only circulates within a mediated environment that reshapes it in the process of making it available.

1. Government Information Does Not Exist

Just as the extent of intellectual property protection structures the kinds of research and creativity that individuals and institutions undertake,¹⁵⁸ so the rules of open government that exempt certain types of information from disclosure lead officials and agencies to behave in particular ways when they prefer to keep their conduct or the information they produce secret.¹⁵⁹ Scholars have long known that governmental bodies will shift decision-making processes in response to open government requirements.¹⁶⁰ Producers or custodians of information shift the medium, classification, or content of information they prefer to keep secret towards the safe harbors provided under the exceptions to disclosure laws. Thus, for example, members of a legislative or regulatory body subject to open meetings and public records laws may communicate with each other or meet by means (such as by person-to-person oral communications or in less than a quorum) such that the "information" they produce falls outside the ambit of applicable state transparency requirements.¹⁶¹

Similarly, the tendency of those with original and derivative classification authority to overclassify documents demonstrates the regular practice of disclosure avoidance.¹⁶² Agencies widely delegate to mid-level

158. See JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS* 13 (1996).

159. See, e.g., Marshall, *supra* note 2, at 814 (arguing that officials who fear disclosure requirements are less likely to air dissenting views, will not memorialize their views, will have their views discounted even if they are communicated orally because they are not memorialized, and their views will not become part of government's institutional memory); Turley, *supra* note 13, at 209 (predicting that, as a result of adverse executive privilege decisions during the Clinton Administration, the conduct of White House meetings was likely to change, as was the willingness of staff to take notes during meetings).

160. See ROBERT LUCE, *LEGISLATIVE PROCEDURE* 142 (1922).

161. State open meetings laws take a variety of approaches to the issue of what constitutes a "meeting" to which sunshine laws apply. Some state legislation sweeps broadly and prohibits any meeting between two or more members of a public body without public notice and access, while other states define a "meeting" narrowly to encompass only those gatherings where a quorum is present to discuss official business. See ANN TAYLOR SCHWING, *OPEN MEETINGS LAWS* § 6.6 (2d ed. 2000).

162. See MOYNIHAN COMMISSION REPORT, *supra* note 55, at 7–8; Wells, *supra* note 10, at 1201–02; Edward L. Xanders, *A Handyman's Guide to Fixing National Security Leaks: An Analytical Framework for Evaluating Proposals to Curb Unauthorized Publication of Classified Information*, 5 J.L. & POL. 759, 768–69 (1989). Classification decisions are governed by Executive Order. See Exec.

managers the authority to classify information within categories that restrict public access.¹⁶³ A 1997 congressional commission estimated that a total of three million government and industry employees have authority to limit public access to government documents.¹⁶⁴ At the same time, safely classifying a document requires little more than fitting some of the document's information within one of the broad and vague categories provided by the Executive Order establishing the classification system.¹⁶⁵ For documents at the margins of the definition of classification, numerous factors come into play in the decision to classify, including risk aversion,¹⁶⁶ political gain,¹⁶⁷ or a desire to cover up government incompetence.¹⁶⁸ According to recent testimony before a subcommittee of the House of Representatives by the Deputy Undersecretary of Defense for Counterintelligence and Security, misclassification is the result of government officials who misunderstand classification requirements, fail to declassify data that is no longer sensitive, and ignore the needs or interests of the public.¹⁶⁹ At bottom, overclassification represents a bureaucratic tendency—perhaps intentional, perhaps merely by default—to utilize legal

Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 28, 2003) (providing the current standards, authority, categories, and duration by which information may be classified); Wells, *supra* note 10, at 1198–99.

163. Nearly 4,000 federal officials have the delegated authority to “stamp a document ‘top secret,’ ‘secret’ or ‘confidential’ under multiple sets of complex rules.” See Michael J. Sniffen, *‘Secrets’ Perplex Panel; Classified Data Growing to Include ‘Comically Irrelevant,’* WASH. POST, Sept. 3, 2004, at A17. Agencies as diverse as the Departments of Transportation and Agriculture delegate such authority widely among administrators. See, e.g., 70 Fed. Reg. 2819 (Jan. 18, 2005) (to be codified at 49 C.F.R. pt. 1) (delegating the authority to designate information as “Sensitive Security Information” to all administrators and the general counsel of the Department of Transportation); U.S. DEP’T OF AGRIC., DEPARTMENTAL REGULATION NO. 3440-002 (Jan. 30, 2003), available at <http://www.ocio.usda.gov/directives/files/dr/DR3440-002.htm> (delegating similar authority to under and assistant secretaries, agency administrators, regional directors, office directors, and heads of field establishments).

164. See MOYNIHAN COMM’N REPORT, *supra* note 55, at 31. Those with so-called “derivative” classification authority perform the vast majority of classification actions. See *id.* (citing the figure of ninety-four percent of classification actions over a six-year period prior to the report).

165. See *id.* at 21–22.

166. See *id.* at 19 (calling for the shift from a “risk avoidance approach to security [classification], which seeks to anticipate all risks in the protection of assets, [to] a risk management approach, which seeks to concentrate limited resources on those assets the loss of which would have the most profound effect on the national security”); Saloschin, *supra* note 69, at 1406 (noting tendency of government attorneys and agency managers to prefer non-disclosure in order to protect institutions and clients).

167. See Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 HASTINGS COMM. & ENT. L.J. 247, 336 (1994).

168. See Erwin N. Griswold, *Secrets Not Worth Keeping*, WASH. POST, Feb. 15, 1989, at A25 (noting, as a former Solicitor General who had defended the government’s attempt to suppress the Pentagon Papers, that “there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another”).

169. See Sniffen, *supra* note 163, at A17.

tools to protect information from disclosure. Tellingly, the inadvertent release of classified documents is far rarer than the inadvertent classification of information that does not warrant protection.¹⁷⁰

When an agency or an individual government official prefers to protect information from disclosure, then the agency or official is more likely to produce it in a form, circulate it by a method, and/or maintain or destroy it so that the information will either fall outside disclosure requirements or avoid detection. Although no legal (or illegal) form or method of resisting disclosure is foolproof, the very attempt demonstrates the fact that communications technologies are substitutable, enabling a potential producer or sender of information to choose a method of communication that would enable greater control over the information's circulation. If the form of government information is fungible and officials and agencies are likely to resist disclosure, then no essential thing called "government information" exists that can be perfectly regulated to achieve transparency.

2. Government Information Has No Meaning

Transparency theory presumes that the intent of the government as author, as well as the political and bureaucratic significance of any piece of government information, is manifest in its text. This presumption ignores the complexity of "signification" or meaning-making, the processes by which any document or oral communication can be said to communicate to, and have significance for, an audience.¹⁷¹ Communicative messages are subject to formal and informal rules of language, as well as to the generic and conventional structures through which, for example, bureaucracies

170. To illustrate, according to a recently declassified Department of Energy study, fewer than 1,600 of the 1.36 million pages of data related to nuclear weapons that had been publicly released by military departments between 1995 and 1999 contained information classified as "restricted data" or "formerly restricted data." See OFFICE OF CLASSIFICATION AND INFO. CONTROL, U.S. DEP'T OF ENERGY, FIFTEENTH REPORT ON INADVERTENT RELEASES OF RESTRICTED DATA AND FORMERLY RESTRICTED DATA UNDER EXECUTIVE ORDER 12,951, DOE/SO-10-0015 (Oct. 2004), <http://www.fas.org/sgp/othergov/doe/inadvertent15.pdf> (Deleted Version). In fact, the vast majority of inadvertently released classified data should not have been classified in the first place. *Id.* at 1–2.

171. By "signification," I refer not only to the term's initial use within semiotics as a process of meaning creation. See generally Paul Perron, *Semiotics*, in THE JOHNS HOPKINS GUIDE TO LITERARY THEORY & CRITICISM 658 (Michael Groden & Martin Kreisworth eds., 1994). Signification is also the concept of meaning production that has since been taken up by virtually all structuralist and poststructuralist literary and cultural theories. See MODERN CRITICISM AND THEORY: A READER I (David Lodge ed., 1988) (introducing an excerpt from Ferdinand de Saussure's *Course in General Linguistics* and noting its pervasive influence in literary criticism and theory); Richard Johnson, *What Is Cultural Studies Anyway?*, in WHAT IS CULTURAL STUDIES? A READER 76, 96–98 (John Storey ed., 1996) (noting role of semiotics and theories of the text in the development of cultural studies). For a thorough introduction to semiotics, see Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 626–45 (2004).

operate.¹⁷² Hermeneutic, structuralist, and poststructuralist theories of textual interpretation have destabilized notions that the “text” exists somewhere apart from the interpretive moment; rather, the text, in its multiple meanings, emerges from the social, institutional, historical, intertextual, and discursive context within which the reader engages with it.¹⁷³

Administrative agencies communicate through a variety of highly structured events and types of documents—noticed and open meetings, notices of proposed rulemakings, official memoranda, informal electronic correspondence, and the like—that themselves operate within certain statutory rules and historical norms, and that in turn condition the form in which government information appears. The moments in which a government official or other individual encodes a written or spoken statement that becomes government information and the moments in which that information is disclosed and then decoded by members of the public are separate and distinct. There is no necessary correspondence between the official or officials who create and then write or speak “government information” and the public that may receive it; therefore, the communicative text, the document or meeting that contains “government information,” is not a static thing with a stable meaning.¹⁷⁴ Given the complex process of translating data and information between institutional contexts and the different historical and social contexts of the text’s production and its interpretation, “government information” has no pure, essential form.¹⁷⁵

Transparency theory not only fails to consider the problem of the text, it also ignores the effects of information’s transmission and distribution.¹⁷⁶ The technologies and institutions of mass communications—from print to electronic to broadcast to digital media, from major daily newspapers to cable and network television news shows to informational and explicitly partisan websites—through which people access disclosed government

172. See generally Stuart Hall, *Encoding/Decoding*, in *CULTURE, MEDIA, LANGUAGE* 129 (Stuart Hall et al. eds., 1980).

173. To avoid the pain of an exceedingly long footnote, I offer TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* chs. 2–4 (2d ed. 1996), as a general introduction to the last century of humanistic theories of interpretation. Legal scholarship has incorporated such theories, most typically for purposes of explaining the difficulty of judicial interpretation. See generally Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166 (1996); Nouri Gana, *Beyond the Pale: Toward an Exemplary Relationship Between the Judge and the Literary Critic*, 15 LAW & LITERATURE 313, 327 (2003); Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505 (1992).

174. See Hall, *supra* note 172, at 131, 136.

175. See Steven Mailloux, *Interpretation*, in *CRITICAL TERMS FOR LITERARY STUDY* 121 (Frank Lentricchia & Thomas McLaughlin eds., 1st ed. 1990).

176. The original model of linear communication, which focused on solving the engineering problems of distance and mass communications, considered the technological issues of transmission and reception. See Shannon, *supra* note 121, at 380.

information affect the message contained therein and its interpretation. One need not go to McLuhanesque lengths¹⁷⁷ to recognize that individual media technologies shape the form that messages take and establish distinct dynamics in the relationships between sender and receiver.¹⁷⁸ At the same time, media institutions play enormously important roles as gatekeepers of information that select and present news within organizational, professional, economic, and ideological constraints.¹⁷⁹ Consider the incentive and institutional structures within which the press and its employees operate. Media companies and their employees seek financial gain, compete with each other, attempt to further political objectives, and strive to meet professional goals of achievement. These objectives, and the discipline that attempting to meet them imposes, may in some instances lead news organizations to serve as a conduit of information that would help create an informed, deliberative public. But more often, they will incline the media towards creating and finding political scandal rather than focusing on and explaining political issues and development,¹⁸⁰ and towards producing depoliticized, risk-averse, and entertainment-focused content.¹⁸¹ Contemporary politicians and officials recognize these tendencies and exploit them by strategically disclosing “information” through coordinated public relations campaigns that produce pre-packaged, tightly controlled “news.”¹⁸²

177. I refer here to a strain of technological determinism associated with the Canadian media theorist Marshall McLuhan. See MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964) (“[T]he medium is the message.”).

178. I make this claim in a limited fashion, not to posit the dawning of a revolutionary new “information society” where digitization and the Internet offer a vastly new universe, but as a more humble, commonsensical claim that a text’s medium (print, sound, motion picture, and the like), its means of transmission (physical in the case of print or projected film, or using limited-spectrum or high-bandwidth capacity), and the potential for immediate interactivity affect the “message” that is sent. See generally HAROLD INNIS, THE BIAS OF COMMUNICATION 33 (1951) (describing the development and impact of new communications technologies on human society); EVERETT M. ROGERS, COMMUNICATION TECHNOLOGY 9 (1986) (identifying significant features of new communications technologies). On the complex, ideological formation of the notion of an “information society,” see Ann Balsamo, *Myths of Information: The Cultural Impact of New Information*, in THE INFORMATION REVOLUTION: CURRENT AND FUTURE CONSEQUENCES 225 (Alan L. Porter & William H. Read eds., 1998).

179. See DENIS MCQUAIL, MCQUAIL’S MASS COMMUNICATION THEORY 276–305 (5th ed. 2005); HERBERT I. SCHILLER, INFORMATION INEQUALITY 43–47 (1996). For a summary and review of the literature on the analog and digital media industries and their tendency towards consolidation, see Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1445–55 (2004).

180. See JOHN B. THOMPSON, POLITICAL SCANDAL: POWER AND VISIBILITY IN THE MEDIA AGE 75–84 (2000).

181. See CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 58–62 (1993); Robert W. McChesney, *The Political Economy of Global Communication*, in CAPITALISM AND THE INFORMATION AGE 1, 15–20 (Robert W. McChesney et al. eds., 1998).

182. See KEVIN R. KOSAR, CONG. RESEARCH SERV., PUBLIC RELATIONS AND PROPAGANDA: RESTRICTIONS ON EXECUTIVE AGENCY ACTIVITIES 1–4 (2005), available at

In this institutional and technological process, the texts of government information are edited, explained, de- and re-contextualized, and interpreted. Put in the context of its underlying model of information and communication, transparency theory's conception of information ignores "noise," random disturbances introduced by something other than the communicator that inhibit the perfect transmission of information,¹⁸³ and thereby fails to note that human communication processes, which are dependent upon symbolic and technological means, are inherently imperfect.¹⁸⁴ Thus, the subset of government texts that are ultimately disclosed does not appear to the public as raw information that is ready, in its capacity as the carrier of the stuff of government and politics, to enable democracy and produce the consequences anticipated by transparency advocates.¹⁸⁵

C. THE RECEIVER: THE PUBLIC AND GOVERNMENT INFORMATION

The traditional account of transparency presumes that the public receives and reacts in a rational and predictable way to government

<http://www.fas.org/sgp/crs/RL32750.pdf> (listing recent controversies surrounding administrative agencies' use of public relations campaigns); David Barstow & Robin Stein, *Under Bush, a New Age of Prepackaged News*, N.Y. TIMES, Mar. 13, 2005, at A1 (reporting that at least twenty federal agencies have produced news segments that were subsequently incorporated, without attribution, into local television broadcasts); Tom Brune, *Cadre Grows to Rein In*, NEWSDAY, Feb. 24, 2005, at A22 (reporting on the Bush Administration's efforts to control its public image and message through information control); Robert Pear, *Politics Can Get in the Way of Keeping Papers Secret*, N.Y. TIMES, Apr. 10, 2004, at A9 (describing Bush Administration's disclosure of classified information for political expediency). In two recent decisions, the Government Accountability Office found that Bush Administration efforts to utilize an editorial writer/radio talkshow host and to produce its own news segments without public notice or proper public attribution in order to promote its activities violated federal prohibitions against using appropriated funds for publicity or propaganda not authorized by Congress. See DEP'T OF EDUC., CONTRACT TO OBTAIN SERVICES OF ARMSTRONG WILLIAMS, GAO REPORT B-305368 (Sept. 30, 2005), available at <http://www.gao.gov/decisions/appro/305368.htm>; DEP'T OF EDUC., NO CHILD LEFT BEHIND ACT VIDEO NEWS RELEASE AND MEDIA ANALYSIS, GAO REPORT B-304228 (Sept. 30, 2005), available at <http://www.gao.gov/decisions/appro/304228.htm>. More recently, press reports have uncovered Pentagon efforts to produce and subsidize the printing of news by putatively independent news organizations in Iraq and Afghanistan. See Jeff Gerth, *Military's Information War Is Vast and Often Secretive*, N.Y. TIMES, Dec. 11, 2005, at A1. See generally Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005) (arguing that for reasons of accountability and transparency, government must make its role clear when it engages in public debate).

183. See CLAUDE SHANNON & WARREN WEAVER, *THE MATHEMATICAL THEORY OF COMMUNICATION* 108–09 (1949); Schramm, *supra* note 120, at 135–36.

184. See GRAEME PATTERSON, *HISTORY AND COMMUNICATIONS* 100–01 (1990).

185. Even websites that merely make raw documents available in the form in which they received them, such as the public interest website of the National Security Archive and the commercial website *The Smoking Gun*, select and edit these documents and, in posting them, implicitly (at times, explicitly) make editorial comments. See National Security Archive Homepage, <http://www.gwu.edu/~nsarchiv> (last visited Feb. 11, 2005); The Smoking Gun Homepage, <http://www.thesmokinggun.com> (last visited Feb. 11, 2005).

information disclosed by the state. But as with its assumptions about the sender and message, traditional conceptions of transparency fail to account for the complex processes within which the public “receives” government information and then incorporates (or fails to incorporate) that information within its resulting political attitudes and behavior. Just as the “text” assumed in transparency theory does not exist in any pure form, so the “public” as an interested, informed, and rational collective does not exist, either.

Transparency theory presumes, in the first instance, the existence of an interested public that needs and wants to be fully informed. This presumption badly needs proof.¹⁸⁶ A vast body of empirical studies demonstrates citizens’ lack of political knowledge.¹⁸⁷ Summarizing the extent of voter ignorance, one commentator has concluded that “voters are not just ignorant about specific policy issues, but about the basic structure of government,” lack ideological consistency in issue stances, and have been found to be consistently ignorant about politics by survey research into the matter since the late 1930s.¹⁸⁸ Public choice theory explains this finding by asserting that voters, to the extent that they have any interest in politics at all, are more interested in policy outcomes than policy inputs, have an infinitesimally small impact on political decisionmaking as individuals, and have few incentives to spend the resources required to acquire information.¹⁸⁹ Thus, the public’s ignorance is rational and will not be mitigated in the abstract much, if at all, by efforts to increase the disclosure of government information, especially given the already-existing “superabundance” of information available from existing sources.¹⁹⁰

Efforts to complicate the assumptions of rational actor models and voter ignorance through the insights of behavioral and cognitive psychology

186. See Peter Dennis Bathory & Wilson Carey McWilliams, *Political Theory and the People’s Right to Know*, in *GOVERNMENT SECRECY IN DEMOCRACIES* 3, 13–15 (Itzhak Galnoor ed., 1977) (questioning the existence of a public that wants to be, and is capable of being, informed).

187. For a thorough examination of the literature, see Samuel DeCanio, *Beyond Marxist State Theory: State Autonomy in Democratic Societies*, 14 *CRITICAL REV.* 215, 219–21 (2000).

188. Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 *CRITICAL REV.* 413, 417–19 (1998).

189. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 238–59 (1957); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 *SUFFOLK U. L. REV.* 1, 51 (1986).

190. Philip E. Converse, *Popular Representation and the Distribution of Information*, in *INFORMATION AND DEMOCRATIC PROCESSES* 369–71 (John A. Ferejohn & James H. Kuklinski eds., 1990). Indeed, the informational excess of contemporary politics and culture might itself constitute a barrier to better, more informed political decision-making and activity insofar as it leads to the public’s inability to believe that any information is definitive. See JODI DEAN, *PUBLICITY’S SECRET: HOW TECHNOCULTURE CAPITALIZES ON DEMOCRACY* 163 (2002). Thus, widespread voter ignorance could be explained as not irrational by noting the difficulty for every voter, no matter the extent of their knowledge, to gain sufficiently reliable information about the effects of any political decision by an elected official given the relative inability to interpret the meaning of the available information. See Jeffrey Friedman, *Introduction: Public Ignorance and Democratic Theory*, 12 *CRITICAL REV.* 397, 408–09 (1998).

do not change this conclusion drastically. These fields have identified the heuristic devices, or rules of thumb, that shape individuals' judgment processes and lead to reflexive, often inaccurate perceptions, and that further cast doubt on the existence of the deliberative, open-ended, and open-minded decisional processes that transparency advocates assume to be possible.¹⁹¹ Candidates and political parties may serve as helpful, though still imperfect, heuristic devices that enable voters to choose in relatively rational and informed ways,¹⁹² but such short-cuts do not help voters to understand and decide on positions regarding complicated matters of national and political importance for which clear heuristic cues are unavailable.¹⁹³

Consider, for example, public knowledge and opinion during the period prior to the invasion of Iraq in 2003. Long after sufficient information existed to disprove the contention, large segments of the American public believed (and, to an extent, continue to believe) in a proved link between Saddam Hussein, al Qaeda, and the September 11 terrorism attacks, in part because of the Bush Administration's speculative insistence on such a connection in the period immediately prior to and following the end of official hostilities in the war in Iraq.¹⁹⁴ In trusting the Administration's account, some members of the public who voted for President Bush in the 2004 election, by relying on heuristic devices or employing rational calculation, may have ignored or chosen to disbelieve contrary evidence. But, at a minimum, they voted to re-elect the President despite publicly available information regarding one of the central, pre-war justifications for invading Iraq.¹⁹⁵ Accordingly, merely requiring disclosure of

191. See REID HASTIE & ROBYN M. DAWES, *RATIONAL CHOICE IN AN UNCERTAIN WORLD* 7 (2001); Thomas Gilovich & Dale Griffin, *Introduction—Heuristics and Biases: Then and Now*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 1, 15–16 (Thomas Gilovich et al. eds., 2002); Cass R. Sunstein, *Introduction*, in *BEHAVIORAL LAW AND ECONOMICS* 1, 3 (Cass R. Sunstein ed., 2000).

192. See DOWNS, *supra* note 189, at 100, 210; Richard R. Lau & David P. Redlawsk, *Voting Correctly*, 91 *AM. POL. SCI. REV.* 585, 594 (1997).

193. See Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus"*, 50 *UCLA L. REV.* 1141, 1160–61 (2003).

194. See *Many Think Iraq, al-Qaeda Linked*, GAINESVILLE SUN, Apr. 23, 2004, at 9A; Dana Milbank & Claudia Deane, *Hussein Link to 9/11 Lingers in Many Minds*, WASH. POST, Sept. 6, 2003, at A1.

195. Divergent, often incorrect, views on the evidence about Saddam Hussein's regime continued into the 2004 presidential election, generally induced by the misstatements of the candidates and campaigns themselves. See Peter S. Canellos, *Misperceptions Linger, with Candidates' Help*, BOSTON GLOBE, Oct. 26, 2004, at A3; Glenn Kessler, *Bush Recasts Rationale for War After Report*, WASH. POST, Oct. 10, 2004, at A32; Glenn Kessler & Jim VandeHei, *Misleading Assertions Cover Iraq War and Voting Records*, WASH. POST, Oct. 6, 2004, at A15; Dana Milbank, *The Gap Between Closed Minds*, WASH. POST, Oct. 24, 2004, at A4.

more information might have little effect in the face of efforts to manipulate such information through false or misleading statements.¹⁹⁶

In addition to assuming the public is attentive, interested, and knowledgeable, transparency theory further presumes that the public understands and learns from government information in predictable ways. But the public's pre-existing knowledge and capacity to understand information is limited, and the public in turn understands information within existing cultural and social frames. At the moment a text ultimately has meaning for its audience, the receiver has decoded the text in a manner framed by individual social and cognitive structures of understanding that are in part determined by race, class, gender, educational background, and the like.¹⁹⁷ Critiquing largely quantitative studies and behaviorist theories of media reception as a passive process in which an audience merely absorbs the pre-constituted meanings of broadcast messages, the ethnographic study of media audiences has revealed that "people actively and creatively make their own meanings and create their own culture."¹⁹⁸ The cultural study of media reception asserts that the act of "reading" a text—whether a soap opera, a television news show, or a report on the contents of a disclosed government document (or even, indeed, the document itself as it is reproduced in a newspaper or on a website)—constitutes a process of negotiation between media representations and the social experiences and background that structure the reader's response.¹⁹⁹ In the formal and social processes of reception, the "message" operates not as a mechanical signal that produces knowledge and certain behaviors, but is instead subject to the interpretive frames of individuals who are themselves parts of existing interpretive communities.²⁰⁰

196. Indeed, manipulative information control, which includes not only withholding and selectively disclosing information, but also "spinning" information in the most positive manner, has been a part of every modern American presidential administration. See Sheryl Gay Stolberg, *When Spin Spins Out of Control*, N.Y. TIMES, Mar. 21, 2004, at D1.

197. See Hall, *supra* note 172, at 130.

198. Ien Ang, *Culture and Communication: Towards an Ethnographic Critique of Media Consumption in the Transnational Media System*, in WHAT IS CULTURAL STUDIES 237, 240 (John Storey ed., 1996); see also IEN ANG, DESPERATELY SEEKING THE AUDIENCE 170 (1991) (arguing that ethnographic studies of television audiences reveal the "multifaceted, fragmented and diversified repertoire of practices and experiences" of engaging with the mass media).

199. This conception of the audience is most closely associated with the pioneering work of the British ethnographer and cultural studies theorist David Morley, who studied television news audiences in *The 'Nationwide' Audience: Structure and Decoding* (1980) and researched how the contexts of television viewing affect media reception in *Family Television: Cultural Power and Domestic Leisure* (1986). On the influence of Morley's work on cultural studies, see Colin Sparks, *Stuart Hall, Cultural Studies, and Marxism*, in STUART HALL: CRITICAL DIALOGUES IN CULTURAL STUDIES 71, 93–94 (David Morley & Kuan-Hsing Chen eds., 1996).

200. Elsewhere, I have argued for efforts to incorporate these insights into political and legal theory. See Mark Fenster, *Murray Edelman and the Study of Political and Legal Symbols*, 17 CRITICAL REV. (forthcoming 2006). For efforts to do this kind of work, see generally ROSEMARY COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND*

At the same time that the public knows too little about information that is already available and responds actively to the information it is provided, a significant portion of the public also believes in, and imputes extraordinary significance to, the existence of false, and even fantastic, secret information. Recent work in anthropology,²⁰¹ political science,²⁰² history,²⁰³ and cultural studies²⁰⁴ on American populism and conspiracy theory demonstrates the extent to which Americans (as well as members of other political cultures with populist tendencies) often perceive politics and other aspects of public life to be controlled by secretive groups within or outside the government. Belief that power is concentrated disproportionately in secret public and private elites indicates a pervasive anxiety about secrecy that feeds off of, but does not necessarily react rationally towards the existence of undisclosed government information.²⁰⁵ When significant segments of the public believe that corruption or conspiracy permeate government, their desire for transparency becomes obsessive and their ability to rationally sort and interpret information suffers as a result.²⁰⁶ Consider, for example, a satirical book originally published in the late-1960s called *Report from Iron Mountain*.²⁰⁷ Intended to satirize Vietnam-era official government reports, the book claimed to reproduce a leaked, semi-official document concluding that war is essential in order to maintain a docile public and an expansive economy. Since the moment of its publication, and repeatedly over the past twenty-five years, many political activists and conspiracy theorists have considered the book to be documentary evidence of a soulless American government that has survived by promoting unnecessary military operations and the ideological domination of its citizens.²⁰⁸ Some readers' desire for secret government information, in other words, transformed a satire that

THE LAW (1998) (applying cultural media studies to trademark law); Toby Miller, *What It Is and What It Isn't: Cultural Studies Meets Graduate-Student Labor*, 13 YALE J.L. & HUMAN. 69 (2001) (applying cultural media studies to labor law).

201. See PARANOIA WITHIN REASON: A CASEBOOK ON CONSPIRACY AS EXPLANATION (George E. Marcus ed., 1999); TRANSPARENCY AND CONSPIRACY: ETHNOGRAPHIES OF SUSPICION IN THE NEW WORLD ORDER (Harry G. West & Todd Sanders eds., 2003).

202. See generally DEAN, *supra* note 190.

203. See generally MICHAEL KAZIN, THE POPULIST PERSUASION: AN AMERICAN HISTORY (1995).

204. See generally MARK FENSTER, CONSPIRACY THEORIES: SECRECY AND POWER IN AMERICAN CULTURE (1999); PETER KNIGHT, CONSPIRACY CULTURE: FROM THE KENNEDY ASSASSINATION TO THE X-FILES (2001).

205. See Susan Harding & Kathleen Stewart, *Anxieties of Influence: Conspiracy Theory and Therapeutic Culture in Millennial America*, in TRANSPARENCY AND CONSPIRACY, *supra* note 201, at 258, 264.

206. See Kermit L. Hall, *The Virulence of the National Appetite for Bogus Revelation*, 56 MD. L. REV. 1, 5-7 (1997).

207. See generally LEONARD C. LEWIN, REPORT FROM IRON MOUNTAIN: ON THE POSSIBILITY AND DESIRABILITY OF PEACE (Free Press 1996) (1967).

208. Victor Navasky, *Introduction*, in REPORT FROM IRON MOUNTAIN ON THE POSSIBILITY AND DESIRABILITY OF PEACE, *supra* note 207, at v, v-xvi.

resembled a leaked classified document into real, insidious evidence of government perfidy.

By assuming a public capable of correctly interpreting the meaning and significance of formerly secret government information, transparency theory ignores the powerful role that secrecy plays in the cultural imaginary. In his classic sociological treatment of the modern obsession with secrecy, Georg Simmel noted that “the secret produces an immense enlargement of life” and offers “the possibility of a second world alongside the manifest world.”²⁰⁹ The actual content of the secret—the information it contains—might in fact have negligible value, but to label information “secret” is to hint that it offers rarity and value and may render the object a kind of fetish.²¹⁰ According to Simmel, this can lead the public, which has limited access to the entity that withholds information, to assume that everything related to a secret is “important and essential” and requires more attention than the information that is known.²¹¹ Thus, secret, undisclosed government information takes on its own autonomous value, overwhelms the content it imbues with meaning and significance, and affects any effort to process and interpret information that ultimately is disclosed.²¹² Unless government operates in absolute transparency—a logistical impossibility—a populist public that is skeptical about the operations of government will always want more information and will always suspect that essential information remains undisclosed. Populist fears of secrecy, especially those that are deep-seated and lead to an all-encompassing distrust of the political order, cannot be satiated through open government laws.²¹³

209. GEORG SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* 330 (Kurt H. Wolff ed. & trans., 1950) [hereinafter SIMMEL, *SOCIOLOGY*].

210. See GEORG SIMMEL, *On the Concept and the Tragedy of Culture, in THE CONFLICT IN MODERN CULTURE AND OTHER ESSAYS* 27, 40–42 (K.P. Etkorn trans., 1968) (extending Marx’s theory of commodity fetishism to the “immanent logic of development” of cultural forms by which such forms “estrangle themselves from their origin as well as from their purpose”).

211. SIMMEL, *SOCIOLOGY*, *supra* note 209, at 333.

212. On Simmel’s examination of modernity’s increasing promise that the mundane surface of things merely hides a deeper intellectual stratum that the modern subject desires to dig up, see DAVID FRISBY, *SIMMEL AND SINCE: ESSAYS ON SIMMEL’S SOCIAL THEORY* 165–68 (1992).

213. See FENSTER, *supra* note 204, at 89–91. Alan Favish’s efforts to use FOIA requests to disprove the conclusion of five separate investigations that Assistant White House Counsel Vincent Foster’s death was a suicide rather than murder—efforts that resulted in litigation before the Supreme Court—epitomize this tendency. See *Nat’l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570, 1582 (2004) (requiring a FOIA requester to produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred in order to overcome the privacy protections in FOIA exemption 7(C), 5 U.S.C. § 552(b)(7)(C) (2000)).

D. THE FRUSTRATIONS CAUSED BY TRANSPARENCY THEORY'S FLAWED COMMUNICATIONS MODEL

By their nature, linear communications models simplify complex, historically situated processes.²¹⁴ Sharing the assumptions of such models, transparency theory's abstract normative commitments and consequentialist assumptions fail to consider and incorporate the complexity of bureaucratic practices, the communication process, and the interest and responsiveness of the public. Transparency theory's weaknesses and blindspots lead to open government laws that in some contexts improve the quality of government operations and public participation in democracy through increased information disclosure, but that fail to do so in others.²¹⁵ More specifically, open government laws create two core frustrations: they fail to successfully tailor disclosure requirements and as a result, require too much of government in some instances and too little in others; and they fail to adequately tailor the time and manner of disclosure and as a result, ignore the specific needs of the public.

With respect to disclosure requirements, open government laws are both under- and over-inclusive in their coverage. In some instances, open government laws defer excessively to claims of constitutional structure or national security, offering privileges to the state when none is due or when information is essential to produce an informed and, more importantly, knowledgeable and engaged public. As a result, open government laws too frequently fail to provide the public with essential information in a timely, comprehensible, and legitimate manner. In other instances, open government laws impose excessive costs and constraints on the state, and in the process, impede its bureaucratic operations. Those government entities and officials that can more easily utilize the inevitable gaps in disclosure requirements, and thereby take advantage of open government laws' under-inclusivity, will do so; while those whose work cannot exploit such gaps or who do not have the resources to resist disclosure requirements will be more

214. See JAMES W. CAREY, *COMMUNICATION AS CULTURE* 31–32 (1989); HARDT, *supra* note 122, at 121–22; Jennings Bryant, *Will Traditional Media Research Paradigms Be Obsolete in the Era of Intelligent Communication Networks?*, in *BEYOND AGENDAS: NEW DIRECTIONS IN COMMUNICATIONS RESEARCH* 149, 157–58 (Philip Gaunt ed., 1993). Shannon and Weaver, who developed the most famous of these models, conceded as much:

This theory is so general that one does not need to say what kinds of symbols are being considered—whether written letters or words, or musical notes, or spoken words, or symphonic music, or pictures. The theory is deep enough so that the relationships it reveals indiscriminately apply to other forms of communication. This means, of course, that the theory is sufficiently imaginatively motivated so that it is dealing with the real inner core of the communications problem, no matter what special form the actual case may take.

SHANNON & WEAVER, *supra* note 183, at 114–15.

215. See Sage, *supra* note 37, at 1826–28.

open, even when such openness inhibits their decision-making abilities. Thus, federal agencies and officials with broad FOIA exceptions, large discretionary budgets, and litigation support from the Department of Justice can resist FOIA requests to the greatest extent possible.²¹⁶ By contrast, officials at the state and especially the local level, faced with state constitutional and statutory open government mandates while constrained by limited taxing authority and tighter budgetary constraints, are less able to avoid disclosure and will therefore be, for better or worse, more transparent. Ironically, the state entity furthest in distance away from most Americans, the federal government, is the one best able to avoid openness requirements, while the level of government that is closest and perhaps most directly accountable is the least able to afford the costs of transparency and is the one most burdened with it.

Because of their over- and under-inclusivity, open government laws cannot always deliver the core promise of transparency theory: that open governments govern optimally. Government changes its operations in response to open government laws, sometimes for the better and sometimes simply to avoid disclosure. Faced with unavoidable openness requirements, state and local governments may operate in the way transparency theory anticipates by being more accountable in their actions, or they may decide to govern less, whether by choice or to avoid the financial and political costs of openness.²¹⁷ A document, controversial law, or meeting foregone is one that need not be disclosed.²¹⁸ By contrast, federal agencies that face avoidable openness requirements may operate in the ways transparency theory anticipates, by disclosing what they must while keeping secret that which is best left undisclosed, or they may simply attempt to maximize their control over government information and fight all efforts to force disclosure. In their broad legal mandates and privileges, the open government laws that transparency theory has helped spawn enable both sets of these variable results.²¹⁹

Similarly, open government laws fail to produce the presumed product of transparency, an informed, participatory democracy, because they explicitly ignore the public, the presumed user and beneficiary of open

216. See generally Saloschin, *supra* note 69.

217. On the relationship between transparency requirements in the federal regulatory state and deregulation, see Alexander Nathan Hecht, *Administrative Process in an Information Age: The Transformation of Agency Action Under the Data Quality Act*, 31 J. LEGIS. 233, 235 (2005).

218. This is a version of the prescription Ilya Somin makes after reviewing evidence of voter ignorance—that if the public knows too little about government, then government should be more limited in scope. See Somin, *supra* note 188, at 446. Transparency, too, can be seen as a means not to improve, but to shrink, government. See Sage, *supra* note 37, at 1707.

219. In this sense, transparency is analogous to intellectual property, which James Boyle has critiqued for being “massively indeterminate” in its efforts to balance incentives to create intellectual products against fears that overprotection would stifle creation and use, and in its tendency to make empirical claims without empirical proof. BOYLE, *supra* note 158, at 175.

government, and as a result, fail to tailor the time and manner of disclosure. Open government laws focus solely on maximizing the release of “government information,” a technical concept that, even if the laws prove successful in forcing disclosure, still leaves unmet the normative and utilitarian goals of better, more democratic government. They do not focus on improving the “knowledge” of an understanding, participatory, competent public.²²⁰ Nor do they consider the variable needs or interests a public might have for knowledge at particular moments—for example, immediately prior to an election or to a particularly important political policy decision facing legislators or governmental decisionmakers. Furthermore, because of the kinds and breadth of the exceptions available under FOIA and constitutional doctrines of privilege, open government laws fail to enforce disclosure requirements in the areas of federal governmental performance where they are most needed: to evaluate decisions regarding such key political issues as national security and foreign relations. In such instances, the public must rely on Congress to provide a watchdog function²²¹—a task that Congress either may find difficult to perform in the face of presidential resistance²²² or may perform poorly.²²³ Precisely when

220. On the distinction between “information” and “knowledge,” see FRANK WEBSTER, *THE INFORMATION SOCIETY* 21 (1994); Balsamo, *supra* note 178, at 229–30; David Sholle, *What Is Information? The Flow of Bits and the Control of Chaos*, in *DEMOCRACY AND THE NEW MEDIA* 343, 347 (Henry Jenkins & David Thorburn eds., 2003).

221. See *Watkins v. United States*, 354 U.S. 178, 200 n.33 (1957) (citing WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* 303 (1901)); Sam Nunn, *The Impact of the Senate Permanent Subcommittee on Investigations on Federal Policy*, 21 *GA. L. REV.* 17, 18 (1986).

222. The most significant example of presidential resistance to congressional oversight was the Iran-Contra Affair, in which members of the Reagan Administration funded a secret program to provide aid to the Nicaraguan Contras through arms sales to Iran. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 101–16 (1990).

223. Congress may perform its public watchdog function poorly in a variety of ways and for a variety of reasons. It might, for example, abuse its position and press for too much information for largely political or personal reasons (when, for example, government is divided and the President and Congress represent two opposing parties), or it might underperform its oversight duties and gather insufficient amounts of information while releasing even less to the public (when, for example, the President and Congress are from the same party, or when a committee and the agency it oversees establish an excessively friendly, stable relationship). See, e.g., Federalist Society Symposium, *Reforming Government Through Oversight: A Good or Bad Idea?*, 13 *J.L. & POL.* 557, 565 (1997) (quoting a statement made by Christopher Schroeder, then an official of the Clinton Justice Department, characterizing congressional investigations into the Clinton Administration as based on a “vendetta” and intended primarily to “bring[] someone down,” including perhaps the President himself); Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 *ADMIN. L. REV.* 197, 216–17 (1992) (explaining how a long-term relationship between intelligence oversight committees and the intelligence services they oversee fosters “leniency in oversight”); Dana Priest, *Congressional Oversight of Intelligence Criticized*, *WASH. POST*, Apr. 27, 2004, at A1 (reporting widespread conclusions by “current and former intelligence committee members and a broad

the public most needs transparency, it may be unavailable despite, or even because of, open government laws. By relying on transparency theory's simplistic model of communication, open government laws offer only frustratingly blunt instruments that operate only on parts of a complicated communications process.

IV. SOME REALISM ABOUT TRANSPARENCY

To calibrate an optimal practice of open government, transparency theory must abandon equating the best government with the one that is most open—or, more precisely, with the one that *appears* most open on the face of its formal commitment to transparency requirements. As a general phenomenon and in particular cases, secrecy is both contextual, arising from a particular set of historical circumstances, and intentional, requiring some human agency working to withhold information from others.²²⁴ Accordingly, transparency's goals require a context-specific definition of transparency, viewed in terms of specific policy objectives, system constraints, and the costs and benefits of open government requirements, rather than an approach that regulates secrecy based on the presumed motivations of officials in the abstract.²²⁵ Context-specific determinations may, at times, lead to less openness than present law requires, and may at other times, lead to more transparency than current law and practice allow. But they will more precisely meet the goals transparency theory identifies as the democratic and utilitarian bases for open government law. This final Part considers a few of the characteristics that a more pragmatic, realistic open government regime would have, conceptually, substantively, and institutionally.

A. EVALUATING THE COSTS AND BENEFITS OF TRANSPARENCY

As part of an initial inquiry, a legal regime intended to maximize transparency while enabling effective governance must realistically evaluate the benefits and costs of disclosure with as much precision as possible.²²⁶ Benefits and costs look roughly like this:

1. Benefits

For the public and government agencies and officials alike, the benefits of any particular disclosure include the normative and consequential gains

swath of intelligence experts" that congressional oversight of intelligence, both pre-September 11 and in the lead-up to the war in Iraq, has been poor).

224. See KIM LANE SCHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* 15–16 (1988).

225. See Finkelstein, *supra* note 72, at 6.

226. I have been influenced in what follows by Fung et al., *supra* note 2, at 12–18, which considered the benefits and costs of regulatory regimes that rely upon informational disclosure imposed by the state on private actors.

to government described above,²²⁷ as well as the savings enjoyed by government and private industry from avoiding the billions of dollars it costs to keep and protect secrets.²²⁸ Although such benefits are shared and spread across the entirety of the population and government as public goods, specific groups, whether by affinity or self-interest, experience transparency benefits in a more concentrated way. Some transparency advocates, for example, represent both themselves and the general public: the press, which has both a professional and a commercial interest in information disclosure; NGOs focused on “freedom of information” issues; political opponents of the government who hope to expose information detrimental to the party and individuals in power; and current elected and appointed officials who want to publicize those policies that benefit their constituencies in particular and the public generally.

2. Costs

Disclosure requirements create costs to government operations and the public in a number of ways: by forcing disclosures that actually harm national security, military actions, and law enforcement; by inhibiting deliberative decision-making; and by imposing administrative costs incurred through opening meetings and disclosing documents. As with benefits, these costs are largely spread throughout the population, but some individuals face more concentrated costs. Elected and appointed officials, for example, experience personalized and specific reputational costs (and perhaps legal liability) from the disclosure of failed or unpopular policies and decisions. Additionally, private entities whose legal or illegal input into the public decision-making process would more likely be exposed and who would suffer reputational harms and increased risk of legal liability also face concentrated costs from disclosure. These latter two disclosure “costs,” of course, are likely also to benefit governance and the public. An open government regime must therefore be able to sort government claims about the excessive costs of any particular disclosure so that protections intended to minimize the spread of costs to government are not used to minimize the concentrated reputational or political costs to individual officials.

3. Obstacles to Imposing Optimal Disclosure Requirements

Optimal disclosure requirements would attempt to maximize the benefits to the public and to the state’s operations while minimizing the operational, decision-making, and administrative costs they impose. An effort that seeks only to minimize costs without considering the benefits to

227. See *supra* Part I.A–B.

228. See MOYNIHAN COMM’N REPORT, *supra* note 55, at 9–10.

offset those costs would lead to under-disclosure;²²⁹ while an effort that seeks only to maximize benefits without considering costs would lead to over-disclosure. But two key obstacles impede imposition of optimal disclosure requirements: we have no clear method to evaluate and compare costs and benefits, and we have no institution that appears competent and willing to analyze and adjudicate disclosure disputes. In other words, any transparency regime that seeks to impose disclosure requirements must confront both substantive issues of what to make transparent and the institutional issue of whom to vest with authority to resolve substantive disputes.

The current federal regime of open government laws attempts to avoid these obstacles by eschewing thorough case-by-case analysis. At present, courts reviewing FOIA challenges to government refusals to disclose documents generally do not make particularized considerations that weigh the respective values of disclosure and non-disclosure.²³⁰ This is in part because federal open government laws largely require disclosure of everything except information that falls within enumerated categories, which can be withheld.

It is also because of the institutional framework on which these laws rely. Federal and state open government regimes authorize agencies and courts to adjudicate disclosure disputes. Most public records laws rely in the first instance on the compliance of the government officials or agency that produced the records—that is, the individuals who bear the concentrated costs that might be incurred by the records' release. Public records laws typically rely in the second instance on courts, which tend to defer to officials' declarations regarding the necessity of secrecy in some areas of governmental operations, such as law enforcement, military operations, and especially national security.²³¹ As Judge Patricia Wald, former Chief Judge of

229. An otherwise insightful recent effort to establish a means to evaluate how best to decide whether to make unclassified information available fails to further a disclosure cost-benefit analysis because it ignores the extent to which disclosure might in fact provide public benefits because it considers only the convenience and cost to potential terrorists of using the information. *See* GANSLER & LUCYSHYN, *supra* note 63, at 42–44.

230. The most important exceptions to open government laws' avoidance of individualized determinations that consider the extent of the public's anticipated benefit from disclosure are in FOIA's privacy exemptions, where courts "must balance the public interest in disclosure against the [privacy] interest Congress intended the Exemption to protect." *U.S. Dep't of Justice v. Reporters' Comm. for Freedom of the Press*, 489 U.S. 749, 776 (1989) (interpreting 5 U.S.C. § 552(b)(7)(C)); *see also* *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976) (finding congressional intent to establish analogous balancing test for exemption 5 U.S.C. § 552(b)(6)). Agencies are required to consider declassification of documents when "the need to protect such information may be outweighed by the public interest in disclosure of the information," but that determination is to be made by the agency itself and is not subject to judicial review or any other external review. Exec. Order No. 13,292, § 3.1(b), 68 Fed. Reg. 15,315 (Mar. 28, 2003).

231. *See* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 714–15 (2002).

the D.C. Circuit and author two decades earlier of a significant article extolling FOIA's virtues,²³² recently noted approvingly, the D.C. Circuit, which considers a significant proportion of the appeals over refusals to release the most politically sensitive presidential information, has been "reluctant to allow private citizens access to presidential information via the use of statutes passed by Congress to regulate the executive branch generally"—despite strong textual arguments that signal congressional intent otherwise.²³³ The Rehnquist Court in particular was unkind to an expansive vision of FOIA.²³⁴

The judiciary may simply not be the optimal institution, or even the appropriate institution, for adjudicating informational disputes, especially at the federal level. Whether because of courts' lack of expertise in government claims that disclosure will harm national security or law enforcement issues, desire to avoid significant interbranch disputes, or even a tendency to defer to the executive simply out of ritualized deference, the judiciary has proven itself to be a weak enforcer of statutory open government requirements, especially in difficult, controversial cases.²³⁵ As a result, federal open government laws, as well as analogous laws in many states, fail to establish an institutional structure that can effectively evaluate the costs and benefits of disclosure, particularly when the government information in dispute is controversial and risks harming the officials who play a central role in the disclosure process.²³⁶

Based in part on current but underutilized programs or proposals, I offer some initial suggestions in the three sections that follow about how the problems of substantive assessment and institutional structure could begin

232. Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649 (1984).

233. Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 766–67 (2002).

234. See Verkuil, *supra* note 231, at 715–16.

235. See Adam M. Samaha, *Executive Exposure: Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. (forthcoming 2006) (manuscript at 44, on file with the Iowa Law Review); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 61–62.

236. Adam Samaha argues that despite its proven limitations as an enforcer of statutory rights and its unwillingness to recognize a constitutional right of information access, the judiciary can nevertheless prove able to develop a constitutional basis for access through reference to foreign constitutional norms and analogous judicial "platforms" by which courts have constructed constitutional common law. See Samaha, *supra* note 235, (manuscript at 52–61). But even Samaha concedes that courts defer to the executive, almost without exception, in the most difficult cases. See *id.* (manuscript at 44) (acknowledging the judiciary's poor record in FOIA national security cases). The fact that the Supreme Court has rebuffed the executive on isolated occasions in the war on terrorism, see *id.* (citing *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004)), may only demonstrate that the judiciary perceives the individual's right to a due process liberty interest or right to seek a writ of habeas corpus to be significantly greater than a general public interest in access to government information. If the judiciary cannot enforce existing statutory rights, it seems even less likely that it would recognize new constitutional ones.

to be resolved, and how an additional focus on informational outputs—that is, on how the timing of disclosure and the comprehensibility of that which is disclosed can improve the decisions of governance—can better address the dangers to democracy caused by public ignorance.

B. IMPROVING THE DECISIONS OF GOVERNANCE

Open government laws should focus most closely on maximizing the benefits and minimizing the costs of two sets of decisions and actions: those decisions made by government, and those made by the public. The government must be able to protect its decisional process from the interference that excessive scrutiny brings, while the public must be able to evaluate the government's decision as soon as possible—and, where possible and appropriate, in order to allow public input and oversight before a final decision is made. To do so, the public must have access to not merely, and perhaps not even, a comprehensive quantity of information explaining the government's decision, but, equally important, the most comprehensible presentation of information, in as timely a manner as possible.²³⁷ What matters, then, is considering how government and the public make use of information and how best to optimize that use.

As transparency skeptics maintain, secrecy during the decision-making process can be defensible; once the process is over, however, the need to protect governmental deliberations diminishes considerably while the need for the public to have access to the information on which the governmental deliberations were based is much greater.²³⁸ In some instances, disclosure of government information will unquestionably benefit the public while creating only the administrative costs to government of making the information available. Open government laws, and especially those that require government agencies to make information available electronically on the Internet, handle these instances easily.²³⁹ Instances in which the costs and benefits are mixed, or in which disclosures would be beneficial to the public but potentially costly to the operations of government agencies, prove more difficult.

In such situations, both government agencies and the party that resolves disputes and/or enforces the open government law could effectively further the aims of transparency theory by balancing the degree to which members of the public could make a more informed political choice in the short-term

237. Cf. Fung et al., *supra* note 2, at 39 (arguing that effective information-based regulation promoting transparency in the private sector requires information to be available in comprehensible form).

238. See Posner, *supra* note 189, at 50.

239. See, e.g., 5 U.S.C. § 552(a)(1), (2) (2000) (requiring agencies to make certain types of information available to the public); 5 U.S.C. § 552(a)(2)(E) (2000) (requiring agencies to make certain types of information available by “computer telecommunications” or “other electronic means”).

if given the information against the likely short- and long-term costs to government operations from disclosure.²⁴⁰ Open government laws establish a generalized, binary set of default rules and exceptions in order to resolve the conflict at the heart of transparency theory between transparency's benefits and dangers. I am instead proposing a context-specific focus on decisional outputs that considers the value of disclosure to the public, in terms of both the timing and content of the disclosure, and the cost of disclosure to government, focusing again on timing. This approach focuses less on the quantity of information available than the effects of disclosure on accountability and decision-making. It assumes that better government information, utilized well both by the state and the public, will in turn produce better decision-making.

Viewed this way, open government becomes a means to improve governance rather than an end in itself. This view in turn enables a more sensitive and precise means to evaluate costs and benefits and avoids some of the simpler assumptions about inevitable triumphs and dangers that are certain to flow from disclosure. The two sections that follow consider both the substantive and institutional implications of this approach and develop further its focus on the type and timing of information, and the institutional problems that a context-specific approach raises.

C. *DISCLOSING GOVERNMENT INFORMATION IN A COMPREHENSIBLE
AND TIMELY MANNER*

Open government laws need to consider more precisely how and when information is released to the public. Even if critics of a simple conception of the public are correct and the public is generally ignorant or unable to sort information especially well,²⁴¹ its ignorance may arise from a lack of information or from misinformation rather than from willfully invalid beliefs.²⁴² No amount of information, and no mode of presenting information, can inform the willfully, culpably ignorant; the uninformed and misinformed, by contrast, at least have the potential of becoming informed and of participating knowledgeably in democratic dialogue and decision-making. The issue is developing means of imparting information that can better achieve the worthy goals of transparency advocates. Two factors that transparency theory and laws attempting to implement it fail to emphasize sufficiently are comprehensibility and the variable value that information has over time.

240. Individual determinations of this balance may create additional administrative costs unless a better substantive and institutional approach leads federal agencies to curb their expensive practice of overclassification.

241. See *supra* Part III.C.

242. See Robert B. Talisse, *Does Public Ignorance Defeat Deliberative Democracy?*, 16 CRITICAL REV. 455, 457-58 (2004).

Most government information laws require simply that information be made available, not that it should be useful or understandable to the public.²⁴³ Imposing some form of a comprehensibility requirement on government is fraught with difficulties, from the problem of definition (what precisely constitutes “comprehensible”?) to enforcement issues (are courts to evaluate what constitutes “comprehensible”?). But when the state hopes for, needs, or expects an informed public—as in, for example, when members of the public are voting on referenda and initiatives,²⁴⁴ and when they are making important decisions on issues with significant public health implications²⁴⁵—the government does make additional efforts to provide information in a way that will aid voters. Notwithstanding the difficulty of defining and enforcing a comprehensibility requirement, in other words, government can, when necessary, impose such requirements on itself and others. Government disclosures more readily produce better public understanding and decision-making not merely when they are made available as raw information, but when they are made available in a way that the public can understand.

Information also is more likely to produce an informed, engaged public when it is presented in a timely manner. By “timely” I mean that immediate or rapid disclosure may be necessary when the information would allow the public to hold the state accountable at crucial junctures, such as prior to elections or during periods when the executive or legislature is considering a significant commitment of resources or a lasting commitment to a policy. Although the cost of information disclosure may outweigh its benefits at one moment—especially before the government’s decisional process or a particular government action is complete—the benefits of disclosure may outweigh the costs at a later moment. Stringent open meeting laws that require all discussions by a governmental entity to be open to the public may

243. See, e.g., 5 U.S.C.A. § 552(a)(1) (West 2002) (requiring publication in the *Federal Register* of certain information regarding federal agency operations, procedures, and rules of general applicability); 5 U.S.C.A. § 552(a)(2) (West 2002) (requiring federal agencies to “make available for public inspection and copying,” including by “computer telecommunications,” certain types of records not otherwise published in the *Federal Register*).

244. The statewide initiative process in California, for example, requires that before circulating petitions to collect voter signatures, proponents must submit their proposed initiatives to the state Attorney General to prepare an official title and summary. See CAL. ELEC. CODE § 9004 (West 2003). The proposed initiative may also be referred to the Department of Finance and the Joint Legislative Budget Committee for preparation of a fiscal analysis if the Attorney General determines that the initiative measure finds that such an analysis is necessary. See *id.* § 9005. Each page of a petition on which proponents gather signatures must contain the Attorney General’s title and summary and the full text of the initiative measure in a specified font size and typeface. See *id.* §§ 9008, 9014.

245. See CHRISTOPHER L. PETERSON, TAMING THE SHARKS: TOWARDS A CURE FOR THE HIGH-COST CREDIT MARKET 266–74 (2004) (recounting the development of the Surgeon General’s warning on cigarette labels as a highly successful means to inform the public of health risks relating to smoking through a comprehensible, objective, and empirically verifiable message).

impose excessive constraints on deliberation that could be avoided by at least temporarily excluding the public. Conversely, classification regulations may enable government agencies to keep information secret long after any threat of its disclosure is past—and so far into the future that its benefits to the public's ability to hold the state accountable for its actions have significantly diminished.

Government information laws already consider time as a factor for disclosure. For example, “sunshine laws” implicitly focus on the significance of timely disclosure when they require the simultaneous production and release of information through open meetings. Similarly, the Executive Order establishing classification policy in the executive branch identifies various time periods after which declassification should either be automatic or considered.²⁴⁶ But these are blunt measurements, requiring either immediacy or long periods of time established *ex ante*. In other contexts, statutory and common law approaches to information ownership and disclosure provide a variety of means to protect rights flexibly based on information's changing value over time.²⁴⁷ The time value of information must play a significant role in open government laws, and whatever

246. See Exec. Order No. 13,292, 68 Fed. Reg. 15315, §§ 1.5, 3.1 (Mar. 25, 2003) (setting forth duration of classification and procedures for declassification and downgrading). The slowness with which many agencies are declassifying documents makes the “automatic” declassification requirements that were originally based on a number of years significantly more flexible than they were presumably intended to be. See INFO. SEC. OVERSIGHT OFFICE, REPORT TO THE PRESIDENT: AN ASSESSMENT OF DECLASSIFICATION IN THE EXECUTIVE BRANCH (Nov. 30, 2004), <http://www.archives.gov/isoo/reports/2004-declassification-report.html>.

247. For example, courts have narrowly protected the advantage that being first in the market with information bestows. See, e.g., *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 245 (1918) (protecting the right of “hot news” provider from copying); *NBA v. Motorola, Inc.*, 105 F.3d 841, 852 (2d Cir. 1997) (citing *Int'l News Serv.*, 248 U.S. at 231) (including evaluation of the time sensitivity of information's value in test under appropriation in “hot news” context); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. c (1995) (“The originator of valuable information or other intangible assets normally has an opportunity to exploit the advantage of a lead time in the market. This can provide the originator with an opportunity to recover the costs of development and in many cases is sufficient to encourage continued investment.”). Similarly, owners of trade secrets that have been misappropriated may be awarded an injunction against the information's use for a limited period of time, either until the trade secret has ceased to exist or until any commercial advantage the competitor gained by its misappropriation has ceased to exist. See UNIF. TRADE SECRETS ACT § 2(a) (amended 1985), 14 U.L.A. 619 (2005). Courts may issue temporary injunctions that are temporally limited *per se* or permanent injunctions that are limited only until such time as the information becomes available otherwise. See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 473–74 (1974) (upholding permanent injunction to enforce confidentiality agreements until trade secrets were released to or became available to the public); *Sigma Chem. Co. v. Harris*, 794 F.2d 371, 375 (8th Cir. 1986) (rejecting temporally unlimited injunction). Although the federal patent and copyright statutes also explicitly consider the time value of information in providing temporary limited monopoly rights over certain types of information, they do so through blanket time periods. See 17 U.S.C. § 304 (2000) (establishing various terms of protections for copyrighted or copyrightable materials); 35 U.S.C. § 154(a)(2) (2000) (establishing a twenty-year term for patents).

institution adjudicates and oversees the resolution of disclosure disputes should be authorized to facilitate disclosure or non-disclosure based on a realistic assessment of the information's potential value to the public and potential harm to the government if it is disclosed.²⁴⁸

Consider, for example, the issues at play when secret information would be exceptionally valuable to the public as it prepares to vote or to express support or opposition to an important governmental decision—such as the decision to declare war. In that context, legal requirements or political pressure that would lead the government to release pertinent information may create high costs, but may in fact be necessary for a functional democracy. Keeping such information from the public because it falls within a particular exemption or because it qualifies for secrecy classification may or may not be detrimental to the public, depending upon the particular context and time in which the issue arises. At the same time, presenting only partial information that fails to provide an accurate account of available intelligence, although technically an effort to inform the public, also fails to produce an informed public.

The most prominent recent example of both the advantages and the dangers of extensively disclosing secret information in advance of an important decision was the Bush Administration's high-profile efforts to explain the threat that Iraq represented to the United States during the months just prior to the invasion of Iraq in 2003.²⁴⁹ Secretary of State Colin Powell's speech before the Security Council of the United Nations in March 2003 was especially significant. An unprecedented disclosure of classified information in an effort to inform the international community and American public about the justification for war, the speech could serve as a model for a timely and significant disclosure intended to inform the public.²⁵⁰ As such, it was a dramatic success, persuading the American public as to the necessity and inevitability of the war in Iraq.²⁵¹ But the intelligence on which Powell had relied ultimately proved faulty and the presentation of that intelligence as authoritative proof of Iraq's advanced weapons program and Saddam Hussein's relationship with the groups responsible for the 9/11

248. See Mark H. Grunewald, *Freedom of Information Act Dispute Resolution*, 40 ADMIN. L. REV. 1, 37 (1988).

249. The two most prominent public disclosures of information during the period were President Bush's State of the Union Address in January 2003 and Secretary of State Colin Powell's speech before the Security Council of the U.N. in March. Secretary Powell's speech was especially significant. For the background on these disclosures, see BOB WOODWARD, *PLAN OF ATTACK* 295, 297–301, 307–12 (2004).

250. See Dana Priest, *Telling Secrets: Not Just What, but How*, WASH. POST, Feb. 6, 2003, at A23.

251. See Jill Darling Richardson, *Poll Analysis: Americans Convinced by Powell U.N. Address Even If Member Nations Are Not*, L.A. TIMES, Feb. 9, 2003.

attacks at best represented a negligent, one-sided, and, ultimately, manipulative use of disclosure to persuade, rather than to inform.²⁵²

But this dramatic misuse of timely disclosures does not make the model any less important; it only demonstrates that those who would disclose must take the ethical responsibility, and bear the political risks, that come with exceptional disclosures. That is, the flaws in Secretary Powell's disclosures arise not from the time in which they were made—a time when the public and other nations required more information to make their decisions regarding their support for the Bush Administration—but from the incorrect, partial, and above all misleading content of the disclosures. Perhaps most significantly of all, the incident demonstrates the opportunity that timely disclosure offers for the constitution of an informed public on the brink of war—even if, in this instance, the public was misinformed as to the direct threat Iraq posed to the United States.

D. INSTITUTIONAL OVERSIGHT OF OPEN GOVERNMENT LAWS

Finally, more effective transparency, as a matter of conception and practice, requires better institutional design. Federal open government laws rely on the judiciary to resolve challenges to agency determinations about the applicability of disclosure requirements and exemptions.²⁵³ This has not worked well, not least because the judiciary has proven exceptionally deferential to executive efforts to resist disclosure.²⁵⁴ Non-judicial resolution of government information disputes, by contrast, has served the often contentious arguments between Congress and the President over presidential and executive branch information reasonably well, at least in those instances in which the branches are controlled by different political parties or when Congress acts independently of the executive branch's wishes.²⁵⁵ This resolution process has performed satisfactorily even for

252. On the errors in Powell's speech, and various theories on the cause of those errors, see Bruce Berkowitz, *We Collected A Little, and Assumed a Lot*, WASH. POST, Feb. 1, 2004, at B1; Barton Gelman & Walter Pincus, *Depiction of Threat Outgrew Supporting Evidence*, WASH. POST, Aug. 10, 2003, at A1; Walter Pincus & Dana Milbank, *Bush, Rice Blame CIA for Iraq Error*, WASH. POST, July 12, 2003, at A1.

253. See 5 U.S.C. § 552(a)(4)(B) (2000) (establishing jurisdiction in federal district court to consider a complaint against a federal agency for improperly withholding information as part of FOIA); 5 U.S.C. § 552b(h) (establishing jurisdiction in federal district court for enforcement of the government in the Sunshine Act).

254. See *supra* notes 231–34 and accompanying text.

255. See Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 116–25 (1996); Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197 (1992). Admittedly, the interbranch relationship differs significantly from the relationship between the government and the public in quite significant ways—differences that make this analogy less than perfect. Unlike with individual members of the public who seek information from the executive branch, the President often must negotiate with Congress in order to create and preserve a trusting, reciprocal, long-term relationship to achieve other goals. The President and

disputes over intelligence activities, which pose very difficult political and national security issues.²⁵⁶ But interbranch disputes between relatively equal parties operate in the shadow of constitutional crisis; Congress and the President seek judicial resolution at great risk, and the judiciary faces similar danger in trying to settle such disputes.

Disputes between the public and executive do not share the political and legal gravity of interbranch disputes and do not lead as naturally to a non-judicial institutional solution. An executive agency or the President can merely ignore individual members of the public or small groups of citizens, while the executive branch ignores Congress at its peril. Nevertheless, disputes between the executive branch and members of the public can raise similar constitutional issues if an agency resists requirements imposed upon it by Congress, with judicial review and judicially enforced remedies. But transparency theory either relies heavily on judicial review as a means to achieve its goals or ignores the complex institutional dimension of government information production and protection altogether. It is therefore unsurprising that open government laws fail to design democratic institutions that can organize and regulate information in order to achieve the goals on which the underlying theory is based.²⁵⁷ Instead, they simply attempt to graft additional administrative obligations onto a preexisting bureaucracy and vest judicial authority with oversight.

More effective open government laws would create and vest authority in non-judicial institutions that can develop expertise in overseeing informational disputes between members of the public and government agencies, and that can perform more individualized inquiries into the costs

Congress may also share general policy goals in some areas (such as, for example, national security) and may be equally averse to the political risks involved in high-stakes informational disputes. See Shane, *supra*, at 221–22. Nevertheless, the ongoing frustrations of the interbranch relationship, especially given the persistent political competition between the branches, and the uncertain results of a legal resolution to such disputes may pull the parties in opposite directions, leading either to congressional efforts to force the President to divulge information Congress does not need, or to presidential efforts to keep information secret against statutory mandates and for purely political reasons. See *id.* at 222–26. Because judicial resolution of interbranch informational disputes strain the limits of politics and justiciability and often prove frustrating for all three branches, most proposals for reform (or in favor of the status quo) stress the value of negotiated solutions, whether through formal, generalized agreements over the procedural and substantive frameworks for dispute resolution, or through a more amorphous commitment to compromise. See Jonathan L. Entin, *Executive Privilege and Interbranch Comity After Clinton*, 8 WM. & MARY BILL RTS. J. 657, 660–68 (2000) (summarizing arguments against judicial resolution of interbranch informational disputes and in favor of negotiated settlements). *But see* Wald & Siegel, *supra* note 233, at 750–60 (arguing that judicial resolution of interbranch disputes is often essential and touting the D.C. Circuit's record in providing just and effective resolutions).

256. See Shane, *supra* note 255, at 215.

257. Cf. John Ferejohn, *Instituting Deliberative Democracy*, in NOMOS XLII: DESIGNING DEMOCRATIC INSTITUTIONS, *supra* note 130, at 75, 86–87 (arguing that theories proposing an ideal deliberative democracy too seldom consider issues of institutional design).

and benefits of disclosure.²⁵⁸ Such institutions must be independent from the agencies that they oversee.²⁵⁹ They could take a number of forms, some of which have been proposed at the federal level or adopted at the state level. An external institution that reviews disclosure practices—such as, for example, the Public Interest Declassification Board²⁶⁰—could provide preemptive review of agency overclassification, whether as a general practice with respect to certain events or issues, or in response to public requests. Despite passage of legislation creating the Public Interest Declassification Board in 2000, the Board was unfunded and unmanned for more than five years and did not meet for the first time until February 2006.²⁶¹

258. Cf. Fung et al., *supra* note 2, at 38–39 (arguing that effective information-based regulation promoting transparency in the private sector requires strong political intermediaries to represent those who use the disclosed information).

259. This requirement would exclude, for example, the Interagency Security Classification Appeals Panel (“ISCAP”), which is composed of senior-level representatives from the Departments of State, Defense, and Justice, the Central Intelligence Agency, the National Archives, and the Assistant to the President for National Security Affairs. See Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995). ISCAP serves a valuable function by hearing, in the first instance, appeals of an agency’s decision to keep information classified. From May 1996 through December 2002, ISCAP declassified a significant proportion of the documents whose denial of declassification was appealed; however, its rate of reversal and declassification of documents dropped significantly in the 2004 fiscal year, at least in part because the majority of the documents that it refused to order declassified were considered to be of more recent vintage (i.e., less than twenty-five years old) and as such, enjoy a significantly lower classification threshold. See INFO. SEC. OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 2002, at 9–10 (2003), available at <http://www.archives.gov/isoo/reports/2002-annual-report.pdf>; INFO. SEC. OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 2004, at 7 (2005) (citing Exec. Order No. 12,958 §§ 1.4, 3.3(b), 60 Fed. Reg. 19,825 (Apr. 17, 1995)), available at <http://www.archives.gov/isoo/reports/2004-annual-report.pdf>. But given ISCAP’s lack of independence from the agencies that make the initial decision to classify documents, its decisions will likely consider only the costs of disclosure while ignoring—and perhaps discounting—the benefits of disclosure to the public.

260. See Public Interest Declassification Act of 2000, Pub. L. No. 106-567, tit. VII, 114 Stat. 2856 (codified at 50 U.S.C. § 435 (2000)) (establishing the Public Interest Declassification Board in order, among other things, “[t]o promote the fullest possible public access to a thorough, accurate, and reliable documentary record”). As of late September 2005, the House of Representatives had voted to appropriate funding for the Board as part of the 2006 Defense Appropriations Act. See *House Votes to Fund Public Interest Declass Board*, SECRECY NEWS, June 22, 2005, <http://fas.org/sgp/news/secretcy/2005/06/062205.html>.

261. See Press Release, National Archives, President Bush Requests \$338 Million in FY 2007 for the National Archives and Records Administration (Feb. 6, 2006), <http://www.archives.gov/press/press-releases/2006/mr06-60.html>; Public Interest Declassification Board to Meet, Secrecy News, http://www.fas.org/blog/secretcy/2006/02/public_interest_declassificati.html. *Hearing on Information Overclassification: Hearing Before the H. Subcomm. on National Security, Emerging Threats, and International Relations*, 109th Cong. (testimony of Rep. Christopher Shays, Chairman, Subcommittee on National Security, Emerging Threats, and International Relations); Christopher Lee, *Declassification Board: Named but Unfunded; Panel on Government Secrecy Unable to Operate*, WASH. POST, May 2, 2005, at A15. Another example is the Assassination Records Review Board, established in the President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 (2000), which

Additional models exist. On occasion, Congress has legislatively established independent commissions vested with the authority (including, occasionally, subpoena power) to gather information and issue a report and recommendations.²⁶² Vesting adjudicative authority in a separate administrative agency or a department within an existing agency, as at least one state has done to strengthen its public records act,²⁶³ may also provide greater institutional support for public requesters.²⁶⁴ Efforts to establish institutions that can resolve disputes and enable collaboration between private individuals and public agencies further promise a more effective means to establish a better informed public. Congress or individual agencies could establish an ombudsman with authority and expertise in mediating FOIA disputes,²⁶⁵ as one state has successfully accomplished for disputes arising from its own public records act.²⁶⁶ At the local level, collective deliberation by community groups comprised of government officials and private citizens has enabled both the release of more information—as public officials begin to trust the public more and to recognize what information would be especially useful—and better comprehension of the information released.²⁶⁷

during the period of its existence evaluated federal agency decisions not to release records relating to the assassination.

262. See Jonathan Simon, *Parthasiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419, 1437–55 (2005). The most prominent recent example of such commissions is the National Commission on Terrorist Attacks on the United States, created by statute in November 2002. See Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306 §§ 601–11, 116 Stat. 2383, 2408–13 (codified at 6 U.S.C.A. § 101 (West 2002)).

263. See CONN. GEN. STAT. § 1-205 (establishing a “Freedom of Information Commission,” with the authority, among other things, to investigate alleged violations of the state’s Freedom of Information Act); see also Robert G. Vaughn, *Administrative Alternatives and the Federal Freedom of Information Act*, 45 OHIO ST. L.J. 185, 193–200 (1984) (describing and analyzing Connecticut’s law).

264. See Grunewald, *supra* note 248, at 37–46 (1988) (proposing an “Information Access Authority,” either within existing agencies or as a new, separate agency, to adjudicate and mediate FOIA disputes); Vaughn, *supra* note 263, at 209–12 (considering potential usefulness of Connecticut’s Freedom of Information Commission as a model for the reform of FOIA).

265. See Grunewald, *supra* note 248, at 56–64. Legislation currently before both houses of Congress would create an Office of Government Information Services within the Administrative Conference of the United States to “offer mediation services between persons making requests under section 552 and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, issue advisory opinions if mediation has not resolved the dispute.” See OPEN Government Act of 2005, H.R. 867, 109th Cong. § 11 (2005); OPEN Government Act of 2005, S. 394, 109th Cong. § 11 (2005) (creating an Office of Government Information Services that will mediate disputes between FOIA requesters and agencies).

266. See FLA. STAT. § 16.60 (2003) (establishing public records mediation program within the office of the state Attorney General); Kimball, *supra* note 18, at 354–57 (describing Florida’s mediation program and that of other states).

267. ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY 60, 71 (2004).

No clear institutional fix is likely to emerge without testing at the state and individual agency levels. But empowering an external entity with the authority to work between a government agency and an individual seeking information from that agency is more likely to avoid the judiciary's institutional limitations in enforcing disclosure requirements and adjudicating disclosure disputes.²⁶⁸

CONCLUSION

Transparency is at once impossible and necessary. It is impossible because when propounded in its strongest form, the concept of "transparency" relies upon an inappropriate model of information and communication to produce an inaccurate understanding of government information. Transparency advocates' failure to recognize the impossibility of achieving perfect democratic governance and a thoroughly informed and engaged public results in a frustrating and often ineffective legal regime.

But transparency is also necessary because a state that fails to design a system capable of disclosing information essential for a government to be held accountable by an informed public is undemocratic. Proponents will not achieve either normative democratic goals or good, functional governance through further clarification of abstract concepts or the reiteration of broad, emphatic statements about the "Farce or . . . Tragedy" of undisclosed information.²⁶⁹ Rather, the task for those on all sides of the debate surrounding open government is to consider institutional and substantive approaches that would better achieve the essential ends that transparency theory seeks. These include emphases on substantive improvements in open government laws and governmental compliance with them, especially in terms of the timeliness and comprehensibility of disclosures, as well as on developing new institutions that can provide more informed and rigorous resolutions of informational disclosure disputes.

268. See *supra* text accompanying notes 231–36.

269. See *supra* notes 24–25 and accompanying text.