

# ADMINISTRATIVE LAW REVIEW

## Seeing the State: Transparency as Metaphor

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Reprinted from  
*Administrative Law Review*  
Volume 62, Number 3, Summer 2010

Cite as  
62 ADMIN. L. REV. 617 (2010).

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# SEEING THE STATE: TRANSPARENCY AS METAPHOR

MARK FENSTER\*

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## INTRODUCTION

Early in his memoir *Secrets*, Daniel Ellsberg recalls the moment he first surreptitiously accessed top-secret government information, an experience that would lead him, ultimately, to become the most famous liberator of classified documents in American history. Ellsberg was then a young, rising

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Pentagon bureaucrat who had been hired away from his previous position as a research analyst at Rand, a private think tank that served as a consultant to the Pentagon's efforts fighting the Vietnam War, to work for John T. McNaughton, Assistant Secretary of Defense for International Security Affairs.<sup>1</sup> In the course of his duties, McNaughton received classified documents that Ellsberg lacked sufficient security clearance to read. The binder in which those documents were filed sat on a rolling bookstand in McNaughton's office. Every evening, the bookstand was rolled into a secure, locked closet. Ellsberg could see the binder but was not allowed to look inside, despite its promise of invaluable information that could divulge the secrets of the unfolding drama in Vietnam. Ellsberg narrates the event of one fateful evening:

It was too much for me. There came a night—I can't remember how many weeks it was after [McNaughton] had directed my attention to this forbidden binder—when I did pull it out of the row of files and open it. . . . The office was dark; the light was coming from inside the closet. I was in the process of putting the rolling stand away for the night. I looked inside the thick binder and riffled through the contents. It was like opening the door on Ali Baba's treasure. . . . At a glance I could see that what I held in my hand was precious. Reading just a few paragraphs here and there was, for me, like breathing pure oxygen. My heart was pounding.<sup>2</sup>

Witness the tension and expectation as Ellsberg—who would later illegally release to United States newspapers what would be famously referred to as the “Pentagon Papers”—describes the ecstasy of access and anticipates what would soon become his troubled, infamous relationship to secret documents. The records that he was forbidden to view almost commanded that he view them. They offered him new, important information, and therefore revelation—the purest form of “oxygen” an analyst like Ellsberg requires to survive and prosper. But their access had been strictly limited. Not only were they removed from the public, which was ignorant of their existence, they were even kept separate from someone like Ellsberg, a Harvard-trained wunderkind specifically hired to assist the government agency that forbid him access. Ellsberg was forced to violate the law that prohibited him from viewing the documents, to cross both the legal line and physical boundary that placed this binder beyond his view. His heroism, to those who see it as such, began when he traversed that well-guarded (but not well-guarded enough!) threshold into the sacred space where the most privileged information is secured. Only then could he

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1. DANIEL ELLSBERG, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* 35–36 (2002).

2. *Id.* at 81.

imagine freeing that information from its physical constraints; only then could he imagine educating the public of the policies and actions that were being undertaken in its name.

For Ellsberg and those committed to the expansion and strict enforcement of open government laws, the antidote to the wrong of excessive governmental secrecy is greater transparency. Without access to the government, the public can neither evaluate the government's performance in the past, nor hold the government accountable in the present, nor deliberate over the government's future representatives or policies.<sup>3</sup> As Ellsberg's description vividly reveals, transparency suggests both visibility—these documents exist, and powerful government officials can see them—and a distance that makes that visibility difficult to achieve—you can't see them, and you don't even know they exist. The young bureaucrat would only become the (in)famous Daniel Ellsberg by allowing the public to view the information that was kept secret and secure.

When applied as a foundational concept for federal and state administrative laws mandating some form of open government, transparency assumes the existence of a gap that arises naturally between the state and its public. Its underlying logic works as follows. Government institutions operate at a distance from those they serve. To be held accountable and to perform well, the institutions must be visible to the public. But in the normal course of their bureaucratic operation, public organizations—sometimes inadvertently, sometimes willfully; sometimes with good intent, sometimes with unethical or illegal intent—create institutional impediments that obstruct external observation. These obstructions must be removed in order for the institutions to be visible and, ultimately, transparent. The dictionary definition of the word *transparency*

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3. See *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (declaring that Congress's clear intent in enacting the Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (2006)), was "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny" (quoting *Rose v. Dep't of the Air Force*, 495 F.2d 261, 263 (2d Cir. 1974))); *Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 928 (D.C. Cir. 1982) (noting that Congress's purpose in enacting the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552b (2006)), was "to make government more fully accountable to the people"); Peter M. Shane, *Legislative Delegation, the Unitary Executive, and the Legitimacy of the Administrative State*, 33 HARV. J.L. & PUB. POL'Y 103, 108 (2010) ("The essence of accountability lies in the transparency of government actions, the public's capacity to insist on justifications for the exercise of power, and arrangements that subject officials to discipline when justifications for their actions fall short."); Senator Richard Shelby, *Accountability and Transparency: Public Access to Federally Funded Research Data*, 37 HARV. J. ON LEGIS. 369, 370 (2000) ("Transparency and accountability in government are two principles crucial to securing the public trust.").

makes this dynamic plain: something that is transparent has “the property of transmitting light, so as to render bodies lying beyond completely visible; that can be seen through . . .”<sup>4</sup> A transparent window, for example, enables one to see inside from outside or vice versa, rendering visible to each other those that are on either side, despite their separation.<sup>5</sup>

Employed in this way, the term *transparency* simultaneously describes both an aspirational goal—full openness to the public—and the core problem that must be overcome in order for that goal to be met—the separation between the state and public. Judges, policy advocates, academics, and legislatures frequently deploy the concept’s metaphorical authority when adjudicating, advocating, and legislating transparency. “Democracies die behind closed doors,” a federal appellate court declared when finding that the First Amendment prohibits the government from closing immigration hearings to the public and press without an individualized showing of justification.<sup>6</sup> “Sunlight” or “sunshine,” when it is allowed to shine through previously darkened, secretive places, provides the best of “disinfectants,” Louis Brandeis famously contended when he decried the corrupt trusts of the early twentieth century.<sup>7</sup> Information must be set free from its bureaucratic constraints, as Congress declared in the name of its act requiring executive branch agencies to disclose information.<sup>8</sup> Deep secrets—those state secrets that the public does not know that it does not know because they are hidden below the public’s view—pose the greatest danger in liberal constitutional democracy, two important recent law

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4. THE OXFORD ENGLISH DICTIONARY 419 (2d ed. 1989).

5. The same dynamic exists even when a commentator complicates the concept by substituting “translucent” for “transparency” in recognizing the inevitable limitations on public access to government information. See, e.g., Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 923, 969–76 (2006).

6. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002). The quotation almost immediately inspired the titles of two law review articles. See Lauren Gilbert, *When Democracy Dies Behind Closed Doors: The First Amendment and “Special Interest” Hearings*, 55 RUTGERS L. REV. 741 (2003); Rena Steinzor, *“Democracies Die Behind Closed Doors”*: *The Homeland Security Act and Corporate Accountability*, 12 KAN. J.L. & PUB. POL’Y 641 (2003); see also *Clark-Cowlitz Joint Operating Agency v. FERC*, 798 F.2d 499, 501 (D.C. Cir. 1986) (“The Government in the Sunshine Act embodies the general policy that federal agencies should ‘conduct their meetings in the open, rather than behind closed doors.’” (quoting S. REP. NO. 94-354, at 1 (1975))).

7. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (Augustus M. Kelley 1986) (1914) (“Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”); see also *infra* note 28 (identifying the influence this metaphor has on legal academic writings).

8. Freedom of Information Act (FOIA), Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (2006)).

review articles have persuasively argued.<sup>9</sup> Transparency thus serves as more than a mere technical concept that provides the basis for constitutional, legislative, and regulatory rules. It also acts as a powerful metaphor that drives and shapes the desire for a more perfect democratic order.

Ideally, of course, there would be no distance between observer and observed, between the governed and those institutions that govern. The metaphor, in other words, would accurately diagnose the problem and set an agenda for the cure. Under a strong form of transparency, government doors should never be closed; government should not operate in the darkness; all government information should be available to the public; and in the rare instance when they must be kept from the public, government secrets should not be so deep that their existence is unknown.<sup>10</sup> How else can citizens make up their minds independently of government officials and media gatekeepers, and advise elected officials as to the wisest course of action? A weaker conception of transparency concedes the need to balance transparency's beneficial effects and normative value against the state's need to withhold a limited amount of information whose disclosure would cause identifiable harm.<sup>11</sup> As a metaphor, transparency suggests two solutions: allow the public to view the state directly, or require the state to make its work available for the public to review. Open government laws rely on both of these solutions by requiring certain government entities to hold open meetings, trials, and deliberations,<sup>12</sup> and by mandating that government records be made public routinely or in response to a public request.<sup>13</sup> Both the strong and weak conceptions of transparency assert that

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9. David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 289–93, 305–25 (2010); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 514–15, 542–43 (2007).

10. The most vocal proponents of transparency in its strongest form are journalists and open government advocates. See, e.g., National Freedom of Information Coalition, About NFOIC, Bylaws, <http://www.nfoic.org/about> (last visited Aug. 5, 2010) (describing the group as “a nonpartisan alliance of citizen-driven nonprofit freedom of information organizations, academic and First Amendment centers, journalistic societies and attorneys”); Reporters Comm. for Freedom of the Press, Freedom of Information Resources, <http://www.rcfp.org/foia/> (last visited Aug. 5, 2010) (describing the organization as “the nation’s leading advocate for open government issues on behalf of journalists”).

11. See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 910–14 (2006) (describing the balance between benefits and limitations in conceptions of transparency).

12. See, e.g., Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552b (2006)) (establishing open meeting requirements for federal administrative agencies); Bagley–Keene Open Meeting Act, CAL. GOV’T CODE §§ 11120–11132 (West 2005) (establishing open meeting requirements for California public agencies).

13. See, e.g., FOIA, 5 U.S.C. § 552 (establishing disclosure requirements for federal

the legal order imposed by such laws—and other efforts by the state, urged on by the public, to impose openness—can unveil the state, eradicating or at least mitigating its distance from its citizens through mandates and obligations placed on government institutions and officials.

And yet, the regular, ritualistic outpouring of public complaints about the weakness of such laws and the power and dangers of a secretive government suggests that transparency's metaphorical ideal in fact does not prevail.<sup>14</sup> The state remains distant and unseen, perhaps even concealed. In an earlier article, I explored the conceptual reasons why this disappointment seems endemic to transparency.<sup>15</sup> In this article, I explain how transparency's metaphoric dimensions—the problem it identifies and the goal it sets—impede our ability to understand and address the complexities of the modern administrative state.

The public prefers a proximate, comprehensible, responsive bureaucracy, one that fulfills the “democratic wish” of a directly accountable government.<sup>16</sup> Populist and progressive reforms and political campaigns endeavor to take the nation back from the present crisis caused by an autocratic, secretive “other” ensconced in Washington and state capitols.<sup>17</sup> They promise that by revealing the state's operations, transparency's metaphoric understanding can enable the public to control the state. The transparency movement, which came of age as part of what Richard Stewart called the “reformation” of American administrative law in the 1970s and after, suggests that the state must and can be made visible.<sup>18</sup>

Administrative reform cannot, however, deliver on transparency's metaphoric promise. The state's large, organizationally and physically dispersed public bureaucracies perform a variety of functions and make a staggering number of decisions of varying importance, not all of which can be viewed before the fact or even easily reviewed later. The state is too big, too remote, and too enclosed to be completely visible. The very nature of the state, in other words, creates the conditions of its obscurity. It can

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administrative agencies); California Public Records Act, CAL. GOV'T CODE §§ 6250–6276.48 (West 2008) (establishing disclosure requirements for California public agencies).

14. See Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1014–15 & nn.9–12 (2008) (summarizing and collecting recent commentaries decrying the current state of open government laws).

15. See generally Fenster, *supra* note 11.

16. JAMES A. MORONE, *THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT* (rev. ed., Yale University Press 1998).

17. See *infra* text accompanying notes 36–47.

18. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1669–71 (1975).

never be fully transparent, at least not in the sense that the term and its populist suspicions of the state require. Overinvestment in transparency as a metaphor leads open government advocates to lament insufficiently effective administrative laws, while the debate over how best to make the government open too often focuses on how to make the state permanently and entirely visible rather than on devising means to improve public oversight and education.<sup>19</sup> Transparency's fear of a secret, remote government—like its promise of a visible, accessible one—heightens the concept's salience even as it obscures the limits of its enforceability as an administrative norm.

Transparency is a means to achieve the end of a more responsive state that more effectively achieves democratically agreed-upon ends. Transparency's symbolic pull, its ability to grab the public's imagination, leads us to fetishize means at the cost of ends.<sup>20</sup> My underlying assumption is that bureaucracy is necessary to carry out the tasks required in a complex society and economy. As the public administration scholar Donald Kettl has argued, "society has yet to discover anything that works better in coordinating complex action" than public bureaucracies.<sup>21</sup> The public must certainly know about the government's operations, but obtaining that knowledge is not a costless transaction. Simplistic understandings of the state's operations and the potential of imposing equally simplistic understandings of transparency can lead to imperfect, costly measures to disclose information and less effective governance.

This Article proceeds as follows: Part I explores transparency's

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19. Cf. Cary Coglianese, *The Transparency President? The Obama Administration and Open Government*, 22 GOVERNANCE 529, 537 (2009) (distinguishing between "fishbowl" transparency, which focuses on the maximal release of government data, and "reasoned" transparency, which more effectively requires government officials to provide "sound reasons for their decisions"); Mark Schmitt, *Transparency for What?*, AM. PROSPECT, Mar. 2010, at A10 (criticizing efforts to require the release of government data and praising legislative enactments that instead focus on increasing public understanding).

20. See Fenster, *supra* note 11, at 941; see also Lawrence Lessig, *Against Transparency: The Perils of Openness in Government*, NEW REPUBLIC, Oct. 21, 2009, at 37 (questioning the likely consequences of what he describes as the "naked transparency movement"); William J. Stuntz, *Secret Service: The Liberal Case Against Individual Privacy and Government Transparency*, NEW REPUBLIC, Apr. 17, 2006, at 12, 14 ("Transparency makes politics a running argument about decision-making, not about decisions.").

21. Donald F. Kettl, *Public Bureaucracies*, in THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 366, 373 (R.A.W. Rhodes et al. eds., 2006); see also Kenneth J. Meier & Gregory C. Hill, *Bureaucracy in the Twenty-First Century*, in THE OXFORD HANDBOOK OF PUBLIC MANAGEMENT 51, 51 (Ewan Ferlie et al. eds., 2005) ("[L]arge-scale tasks that government must perform . . . will remain key functions of governments in the twenty-first century and . . . bureaucracies, likely public but possibly private, will continue to be the most effective way to do these tasks.").

metaphoric work within American law, politics, and culture, and identifies its dual role as both a powerful, populist metaphor and a set of imperfect technocratic tools. It introduces the argument that Parts II and III then develop: transparency's obsessive concern with visibility and the effort that this concern inspires to contain the state ultimately fail and disappoint because of the state's inevitable organizational and geographic distance from the public. The technocratic tools of open government cannot in fact meet the demands that transparency's force as a political and administrative symbol animates. Part II focuses on the state's organizational complexity, both as a matter of form and function, and describes the various constitutional and statutory mechanisms that simultaneously establish an intricate institutional network and impose a limited, variable set of transparency commands. Part III describes the physical impediments to transparency caused by the vast territory of the American state, the complexity of its jurisdictional units, and the physical structures that house government offices. Both Parts II and III explain the impediments to the state's visibility and the imperfect means that have been developed to overcome them.

A final, concluding part posits that the ultimate technocratic tool that could successfully contain the state and make it visible would reverse Jeremy Bentham's Panopticon, rendering the state a prisoner of the public's gaze. The impossibility of this solution demonstrates the limits of transparency as a symbol and suggests that the way forward is to understand transparency's limited usefulness as a term for achieving both an effective and accessible state. Nevertheless, this Article concludes, transparency's prevalence as a political concept requires reform efforts to balance delicately technocratic efficacy with populist demands.

## I. TRANSPARENCY AS POPULIST METAPHOR

### A. *Transparency as Metaphor*

Among other things, Barack Obama's 2008 presidential campaign pledged to reverse the Bush administration's penchant for secrecy and its general opposition to transparency norms, proclaiming on its campaign website that if elected Obama would "Shine the Light on Washington Lobbying" as well as on federal contracts, tax breaks, and earmarks, and "Bring Americans Back into their Government."<sup>22</sup> Although it is difficult to

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22. BarackObama.com, Ethics, [http://www.barackobama.com/issues/ethics/index\\_campaign.php](http://www.barackobama.com/issues/ethics/index_campaign.php) (last visited Aug. 5, 2010). See Coglianese, *supra* note 19, at 533 (describing how, "[a]s a candidate, Obama had clearly signaled his support of open government reforms").

ascertain what role Obama's transparency pledge played in his victory, it was one among many issues that constituted his campaign's narrative of Obama as an agent of change.<sup>23</sup> Obama's message was not an idiosyncratic one. The Democratic Party's 1976 campaign platform, when Jimmy Carter defeated Gerald Ford in the first post-Watergate presidential election, offered quite similar calls for "responsive" and "competent" government that would end the "remote government" whose "secretive and unresponsive" approach the Nixon-Ford presidency had established.<sup>24</sup>

Both campaigns featured self-proclaimed outsiders who touted their promises to reform a corrupt and secretive Washington and to make government accessible and visible to the public. Elect me and you will have your government back, their campaigns vowed. Underlying this partisan political discourse are the notions that the government you fear operates behind a veil of secrecy while the government you want operates in the open, and that no amount of secrecy is warranted while no amount of transparency is too great. These campaigns described a fallen world in which the state is remote and apart from its citizenry, operating corruptly and out of the public's view. At the same time, they promised a government that would be close, visible, trustworthy, and transparent.

Such rhetoric is in fact quite common when an organization or writer advocates on behalf of transparency. "America is a nation of secrets," one recent popular book warns, "an increasingly furtive land where closed doors outnumber open ones . . . ."<sup>25</sup> A large, international network of nongovernmental organizations that seek to expand public rights to information attempt to aid journalists and members of the public by

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23. Indeed, soon after taking office, President Obama declared in an official memorandum published in the *Federal Register* that his "Administration is committed to creating an unprecedented level of openness in Government." Memorandum from President Barack Obama on Transparency and Open Government to the Heads of Executive Departments and Agencies (Jan. 21, 2009), 74 Fed. Reg. 4685 (Jan. 26, 2009), available at <http://www.whitehouse.gov/the-press-office/transparency-and-open-government>.

24. DEMOCRATIC PARTY PLATFORM OF 1976, <http://www.presidency.ucsb.edu/ws/index.php?pid=29606> (last visited Aug. 5, 2010). John McCain's 2008 campaign and the Republican Party's 2008 platform also promised transparency, but the former focused more on campaign finance and the latter focused on the budget process and earmarks. See Klaus Marre, *McCain Vows Unprecedented Transparency*, THE HILL, May 15, 2008, <http://thehill.com/homenews/campaign/1356-mccain-vows-unprecedented-transparency-2008-05-15.html>; Posting of Laura Meckler to Washington Wire, *McCain Promises Transparency, Accountability*, <http://blogs.wsj.com/washwire/2008/05/15/mccain-promises-transparency-accountability/> (May 15, 2008, 06:00 EST); 2008 REPUBLICAN PARTY PLATFORM, <http://www.presidency.ucsb.edu/ws/index.php?pid=78545> (last visited Aug. 5, 2010).

25. TED GUP, NATION OF SECRETS 9 (2007).

pressuring governments to “free” information, operate in the open and in the sunshine, and make government data constantly and immediately available on an on-demand, real-time basis.<sup>26</sup> The image pervades the academic literature on transparency as well, with definitions and introductory sections that imaginatively and provocatively present the government as a closed, isolated entity with shuttered windows and locked doors. One academic definition of transparency states that the term “refers to the degree to which information is available to outsiders that enables them to have informed voice in decisions and/or to assess the decisions made by insiders.”<sup>27</sup> Following Brandeis’s dictum, hundreds of law review articles assert that “sunlight” offers a solution that can “disinfect” bad government and corruption.<sup>28</sup> Some authors cast information as a substance that in a proper democracy must flow freely out of the government’s clutches and into the waiting arms of the public.<sup>29</sup>

Compare this rhetoric to the far more fanciful depictions of a corrupt, secretive state in popular culture, which vividly and imaginatively harness

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26. See Judicial Watch, Our Programs, <http://www.judicialwatch.org/programs> (last visited Aug. 5, 2010); OpenTheGovernment.org, Statement of Values, <http://www.openthegovernment.org/article/subarchive/63> (last visited Aug. 5, 2010); Reporters Comm. for Freedom of the Press, *supra* note 10; Soc’y of Professional Journalists, Project Sunshine, <http://www.spj.org/sunshine.asp> (last visited Aug. 5, 2010); Sunlight Foundation, About the Sunlight Foundation, <http://sunlightfoundation.com/about/> (last visited Aug. 5, 2010).

27. Ann Florini, *Introduction: The Battle Over Transparency*, in *THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD* 1, 5 (Ann Florini ed., 2007).

28. See, e.g., Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 *YALE L. & POL’Y REV.* 399, 399 (2009) (“[S]unlight in the form of robust public access to government information is essential to the vitality of democratic governance.”); Rebecca M. Bratspies, *Regulatory Trust*, 51 *ARIZ. L. REV.* 575, 622–23 (2009) (quoting Brandeis to begin a section arguing in favor of a strong conception of transparency as a means to create greater trust in regulators); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 *HARV. L. REV.* 1197, 1212–13 (1999) (using the Brandeis quote, noting his importance in the development of securities laws, and arguing the SEC should require expanded disclosures); Note, *Disclosure as a Legislative Device*, 76 *HARV. L. REV.* 1273, 1273 (1963) (deploying the Brandeis quote as epigraph). A Westlaw search on April 19, 2010, in the Journals and Law Reviews database for articles that include the terms “sunlight” and “disinfectant” in the same sentence found 552 documents.

29. See, e.g., Aftergood, *supra* note 28, at 399 (“[T]he free flow of information to interested members of the public is a prerequisite to their participation in the deliberative process and to their ability to hold elected officials accountable.”); Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 *CARDOZO PUB. L. POL’Y & ETHICS J.* 577 (2009) (arguing for the relevance of understanding information as needing to be free as part of open government obligations); 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, 167 (2004) (decrying government’s tendency to “seal off information at its source”).

the same imagery for dramatic effect. The *dénouement* of the first season of *The X-Files* reveals the locked Pentagon repository where the government sequesters the most prized, awful secrets from an ignorant public—the files that contain evidence of alien life and government conspiracy and that sit locked in a secured vault, accessible only to the few perfidious bureaucrats that know of the vault’s existence.<sup>30</sup> The film adaptation of *All the President’s Men* memorably depicts the only place where the intrepid Woodward and Bernstein can obtain crucial government information about the illegal activities of the Nixon White House: the dark, obscure garage where they meet their anonymous source, Deep Throat. In one famous scene, the reporters sift through a huge stack of paper slips in order to find evidence of the administration’s malfeasance. The camera tracks steadily upward towards the library’s very high ceiling in a shot that captures the plight of two private citizens who attempt, against all odds, to pierce the informational haze that a complex but coordinated state can create. They are small and insignificant, forced to piece together a crucial story from obscure bits of evidence made only partially available, if at all, within the state’s cavernous, intimidating architecture.<sup>31</sup>

The series of paired terms upon which transparency proponents and filmmakers rely—open and closed, transparent and secret, sunshine and darkness, inside and outside, and the like—works powerfully and metaphorically to give some normative, symbolic bite to an administrative norm. Films and television shows, political campaigns, and popular political discourse generally present secrecy and conspiracy as political commonplace, and suggest that the lone individual—as in Daniel Ellsberg’s leak of the Pentagon Papers and Woodward and Bernstein’s reporting on what became known as the Watergate scandal<sup>32</sup>—must save us from official corruption and perfidy.<sup>33</sup> Indeed, the political reforms that followed the Vietnam War and Watergate depended in part on popular disgust with government secrets,<sup>34</sup> as well as on Ellsberg’s and Woodward and Bernstein’s deification as heroic actors exposing government deceitfulness and treachery.<sup>35</sup>

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30. *The X-Files: The Erlenmeyer Flask* (Fox Television broadcast May 13, 1994).

31. *ALL THE PRESIDENT’S MEN* (Warner Bros. 1976).

32. CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT’S MEN* (1974).

33. ELLSBERG, *supra* note 1; DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE* 33–47 (1996).

34. See HERBERT N. FOERSTEL, *FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT* 46–48 (1999).

35. See Senator Edward M. Kennedy, *Foreword: Is the Pendulum Swinging Away from Freedom of Information?*, 16 HARV. C.R.-C.L. L. REV. 311, 311–12 (1981); Note, *Keeping Secrets: Congress,*

Transparency thus operates simultaneously in two ways. It constitutes a technical concept that, when properly implemented in law and regulation, produces goods deemed essential for a democratic society: an effective administrative state; a knowledgeable citizenry that can hold the government accountable; and an active, deliberative polis.<sup>36</sup> In implementing this understanding of the concept, constitutions and legislatures impose transparency through legal and administrative commands and institutional design, all of which require the intricate drafting of provisions and the delicate balancing of interests. At the same time, transparency also offers a highly charged metaphor of a corrupt, secretive state that must be made visible. The metaphoric understanding of transparency animates deeply held beliefs about the state's legitimacy, escalating to the level of a preeminent democratic imperative the technocratic legal issue of how best to make the official administrative bureaucracy accessible.

### B. *Transparency and the Democratic Wish*

Transparency's two understandings, the technical or technocratic and the metaphorical, can work to mutual advantage. The Obama administration, for example, is attempting to meet the vivid rhetorical promises made in the Obama campaign with bureaucratic and technological reforms—small bore, technocratic efforts to change the bureaucratic culture of the federal government and to make government data more easily accessible.<sup>37</sup> But they can also conflict. Each time the Obama administration has failed to take the most pro-transparency positions—on state secrets, photos of prisoners taken at the Abu Ghraib prison, and congressional negotiations over health care reform legislation, for example—critics from various points on the political spectrum have asserted that the President has failed to meet his campaign promises.<sup>38</sup> In

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*the Courts, and National Security Information*, 103 HARV. L. REV. 906, 908–09 (1990).

36. See Fenster, *supra* note 11, at 895–902.

37. See Memorandum from Peter Orszag, Director, Office of Mgmt. and Budget, on Open Government Directive to the Heads of Executive Departments and Agencies, (Dec. 8, 2009) [http://www.whitehouse.gov/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf) (announcing the directive to federal agencies to increase government information available online, improve the quality of government information, and “create and institutionalize a culture of open government”); see also Coglianese, *supra* note 19, at 533–35 (describing the Obama administration's early efforts to expand transparency).

38. See, e.g., Glenn Greenwald, *Obama and Transparency: Judge for Yourself*, SALON.COM, June 17, 2009, [http://www.salon.com/news/opinion/glenn\\_greenwald/2009/06/17/transparency/](http://www.salon.com/news/opinion/glenn_greenwald/2009/06/17/transparency/) (collecting and endorsing criticisms from the left); Michael Isikoff, *Obama Closes Doors on Openness*, NEWSWEEK, June 29, 2009, available at

such instances, the metaphorical understanding of transparency overwhelms its technocratic understanding by creating a set of expectations that legal and regulatory reforms cannot fulfill. By invoking transparency's symbolic meanings, a candidate or political movement may fire a drive for comprehensive solutions that rejects or minimizes the importance of technical, incremental efforts and that will accept nothing less than a perfectly accessible and visible state. Even as it reforms executive branch compliance with open government laws and norms, the Obama administration will continually frustrate transparency advocates, leftist reformers skeptical of the administration's centrism, and conservative political opponents who characterize every refusal to disclose information or open government as another victory by a closed, secretive bureaucracy over the people's will.

The paired terms upon which transparency relies thus establish openness as a metonym for democracy—an element of a representative government that appears to stand for its entirety. An engaged, informed populace can control a transparent state, but a distant, secretive bureaucracy rules the nontransparent state. In this sense, transparency offers a deeply populist account of politics and the administrative state in which an unresponsive state can and ultimately will obstruct and oppose inquisitive private individuals.<sup>39</sup> By “populist,” I mean both the historical populist movements in the United States and, more particularly, the populist rhetoric and logic that suffuse American politics.<sup>40</sup> Populism simplifies complex political alignments and issues within a stark, symbolic dichotomy between “the people” at one pole and “the other”—the power bloc in charge—at the

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<http://www.newsweek.com/id/202875> (criticisms from a mainstream periodical); Editorial, *Health-Care Secrets*, WALL ST. J., Aug. 29–30, 2009, at A12 (editorial criticism from the right).

39. I leave aside for purposes of this Article the precise nature of the historical relationship between populism and transparency's metaphoric understanding and whether, for example, it represents an aspect of what historian Richard Hofstadter described as the “paranoid style” in American politics, or whether it is a more recent and more rational response to the expansion of the executive branch since the Great Depression and especially following World War II. See RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS* (2d prtg., Alfred A. Knopf 1966). My purpose here is merely to note the relationship and to assert that the rhetoric of strong-form transparency advocacy and that implied by the term's underlying metaphor clearly align with the rhetoric of American populism.

40. On populism as a flexible, rhetorical mode of persuasion in politics as well as an historical survey of populist movements, see generally MICHAEL KAZIN, *THE POPULIST PERSUASION* (1995). On the populist logic in American political culture, see MARK FENSTER, *CONSPIRACY THEORIES: SECRECY AND POWER IN AMERICAN CULTURE* 84–89 (rev. and updated ed. 2008).

absolute opposite.<sup>41</sup> Populist appeals identify threats to the national identity and claim to speak on behalf of an identifiable collective “we,” a people who are rising up to challenge and resist the concentrated interests that hold power and the seemingly dangerous ideas and values those interests represent.<sup>42</sup> Populism drifts left and right, with no necessary connection either to an institutional party or ideology. It can appear conservative (in the anticommunism of the 1950s and early 1960s), liberal (in the New Deal of the 1930s), or thoroughly independent (in the Populist campaigns of the late nineteenth century)—in each instance it identifies some concentration and combination of state and private power that threatens the people.<sup>43</sup>

Populism plays a recurring role in the inevitable fight over the institutional processes of democratic political and social order.<sup>44</sup> Because democratic representational politics relies on a gap between the public and its elected representatives that is mediated by established political institutions, populist rhetoric claims to offer some more direct or authentic means of representation in the name of the people when those institutions appear illegitimate, whether as a result of substantive or procedural irregularities.<sup>45</sup> As Jack Balkin has explained, populist approaches to law and government commit to two basic preferences: popular participation and regular rotations of authority and power.<sup>46</sup> Each preference envisions a state that is proximate and thoroughly visible to the citizens that control it. Thus, self-proclaimed populist or popular constitutional theorists in the legal academy embrace a vision of the constitutional order that they claim would prove more responsive to the popular will and less capable of elite manipulation.<sup>47</sup>

Critics or skeptics of populism, especially those tied to what Balkin has called the progressive category or strain of public law, decry the retrograde

41. See ERNESTO LACLAU, ON POPULIST REASON 18 (2005).

42. Margaret Canovan, *Trust the People! Populism and the Two Faces of Democracy*, 47 POL. STUD. 2, 4–5 (1999).

43. KAZIN, *supra* note 40, at 192–93.

44. Cf. BONNIE HONIG, POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS 3, 15 (1993) (describing the “perpetual contest” and unending resistance that mark politics).

45. Francisco Panizza, *Introduction*, in POPULISM AND THE MIRROR OF DEMOCRACY 1, 14 (Francisco Panizza ed., 2005).

46. See J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1945 (1995) (reviewing CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993)).

47. See, e.g., LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999). For a summary and critique of popular constitutionalism, see Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897 (2005).

and conservative implications of understanding the complex contemporary state in such simplistic terms.<sup>48</sup> For progressives committed to the regulatory intervention into market activity provided by the administrative state, the government cannot rely on direct democratic rule, but must instead utilize expert, public agencies that deliberate rationally and are protected from direct political control and popular sentiment.<sup>49</sup> Populist ideals can thus constitute a barrier to good, progressive governance. In Edward Rubin's terms, they rely on an inherited set of symbols and metaphors that "produce a sense of dissonance or incongruity, a grinding of intellectual gears, when applied to a modern administrative state."<sup>50</sup> The progressivism of the regulatory state supports open government, but as a tool for improved governance rather than as a democratic end in itself.<sup>51</sup>

Transparency thus operates somewhat uneasily and ironically at the conjunction of legal and political populism and progressivism. Its populism pursues what James Morone has called the "democratic wish" for direct democracy, consensus, and localism that generates and assembles a popular will to create a more perfectly accessible and instrumental state.<sup>52</sup> Its mobilization around the ideal of the visible state proceeds restlessly and endlessly, driven by the unsatisfactory nature of the corrupt present. At the same time, its progressive cast—its commitment to legal rules and institutions that can constrain the state and make it visible—attempts to address and manage popular discontent through a bureaucratic apparatus,

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48. Balkin, *supra* note 46, at 1946–47.

49. See Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 96–98 (2003). This debate is merely another instance of the longstanding struggle over the administrative state's legitimacy, one that began in the United States in earnest during the New Deal era, when progressive academics engaged in battle with conservatives fearful of an unaccountable and unconstitutional executive branch. See Mark Fenster, *The Birth of a "Logical System": Thurman Arnold and the Making of Modern Administrative Law*, 84 OR. L. REV. 69, 80–91 (2005).

50. EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 13 (2005).

51. See *id.* at 140 (noting criticisms of various federal open government laws, but ultimately approving of them as means by which administrative agencies interact with the public); see also *infra* notes 142–45 (discussing ambivalence of "new public governance" scholars towards transparency). Political leftists and progressives may espouse a strong commitment to transparency. See, e.g., Ellen Miller, *Obama at One*, NATION, Feb. 1, 2010, at 21 (contribution by the Sunlight Foundation Executive Director to a progressive magazine's forum both praising and criticizing Obama's record on transparency in his first year in office); Greenwald, *supra* note 38 (leftist writer condemning Obama's poor commitment to transparency). In doing so, they espouse a left populism analogous to that of the popular constitutional theorists identified above, many of whom would also identify themselves as progressives or leftists. See *supra* note 48 and accompanying text.

52. MORONE, *supra* note 16, at 5–9.

one that has grown steadily at the federal, state, and local levels since the nation's founding. The state's bureaucratic apparatus executes legal rules and regulations and is itself controlled by an evolving and expanding set of laws.

This produces a cyclical, ironic dynamic: the populist demand for popular control of the state in turn leads to a more expansive state that in turn creates a larger bureaucratic organization that in turn leads to calls for more popular control. The Jacksonian era illustrates this dynamic quite well. Swept into power on a wave of populist sentiment that sought to wrest power away from what they characterized as a ruling Federalist elite and replace it with egalitarian, popular control of the state,<sup>53</sup> Andrew Jackson and Jacksonian Democrats remade and expanded the federal bureaucracy, recasting the emerging American bureaucracy as one based on offices and rules rather than individuals and privilege.<sup>54</sup> In this instance and others throughout American political and administrative history, the effort to make the state more accessible and accountable to the people also has led to an expanded administrative state.<sup>55</sup> The narrower contemporary populist call to create a more visible state creates a similar dynamic. Forced to impose its will on a complex, decentralized set of governmental institutions created to meet its citizens' substantive demands for public goods, benefits, and regulatory programs, efforts to create a more open government must rely on complex combinations of procedural laws, regulations, and institutions. The democratic wish for transparency may (or may not) lead to a more visible state, but it will certainly produce more of the state to make visible.

### C. *The Impossibility of Transparency*

As a result of the populist dynamic that at once fears and expands the state, transparency has proven and will continue to prove impossible to achieve as an administrative norm in its strongest, metaphorical form. From its beginnings, the new United States faced a dire organizational problem: how and whether to create a federal government out of a disparate set of colonies spread over a large territory while still addressing

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53. See MORTON KELLER, *AMERICA'S THREE REGIMES: A NEW POLITICAL HISTORY* 67–200 (2007); SEAN WILENTZ, *ANDREW JACKSON* 6 (2005).

54. See MORONE, *supra* note 16, at 92–94; Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 *YALE L.J.* 1568, 1583–84 (2008).

55. See MORONE, *supra* note 16, at 11–13; Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 *YALE L.J.* 1636, 1734–35 (2007).

the popular demand for a direct, accessible government. The effort to do so spawned anxious commentary from proponents of the new constitution and angry condemnations by their critics. In *The Federalist Number 37*, James Madison worried about the “arduous” task facing the constitutional convention in “marking the proper line of partition between the authority of the general and that of the State governments,” and suggested that the issue was so complex, and its solution so difficult to derive, that the resulting lines drawn in the constitutional convention were the necessary result of human estimation and political compromise.<sup>56</sup> The Anti-Federalists, meanwhile, characterized the task as impossible rather than merely arduous, and dismissed the resulting constitution as fatally flawed. Writing as Cato in *The New-York Journal* in 1787 (in a letter later collected as part of *The Antifederalist Papers*), New York Governor George Clinton warned against the “consolidation or union” of states that comprise an “immense extent of territory” “into one great whole”:

[W]hat can you promise yourselves, on the score of consolidation of the United States into one government? Impracticability in the just exercise of it, your freedom insecure, even this form of government limited in its continuance, the employments of your country disposed of to the opulent, to whose contumely you will continually be an object. You must risk much, by indispensably placing trusts of the greatest magnitude, into the hands of individuals whose ambition for power, and aggrandizement, will oppress and grind you. Where, from the vast extent of your territory, and the complication of interests, the science of government will become intricate and perplexed, and too mysterious for you to understand and observe; and by which you are to be conducted into a monarchy, either limited or despotic; the latter, Mr. Locke remarks, *is a government derived from neither nature nor compact*.<sup>57</sup>

In response to such arguments, Alexander Hamilton conceded that those who lived closer to the seat of power would enjoy greater access to the state than those who lived far away, but he argued that the proper institutional design of government, combined with the development of an active civil society and independent press, would produce a functional, accountable state.<sup>58</sup> The Hamiltonian belief that organization can correct the structural

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56. THE FEDERALIST NO. 37, at 227–31 (James Madison) (Clinton Rossiter ed., 1961).

57. THE ANTIFEDERALIST PAPERS No. 14, at 36–38 (George Clinton) (Morton Borden ed., 1965).

58. THE FEDERALIST NO. 84, *supra* note 56, at 516–17 (Alexander Hamilton); *cf.* THE FEDERALIST NO. 10, *supra* note 56, at 83 (James Madison) (arguing that a republic encompassing a larger territory, and therefore a larger population, would include more distinct parties and interests that would result in more factions that would check each other’s tendency to dominate).

problems caused by a large territory and complex federal system has remained prevalent throughout the twentieth century, most notably in repeated efforts to reorganize and tame what are seen as fragmented, haphazardly structured executive branches of both the federal and state governments.<sup>59</sup> Bureaucratic organization has its “ups and downs” in modern democracies, in organizational theorist Johan Olsen’s terms, but its hold remains “tenacious” and its history marked by theoretical and political arguments over how best to design institutions and rules that might improve or perfect governmental operations.<sup>60</sup>

These anxieties and arguments about the state originate in two distinct obstructions to the public’s ability to view it. The first barrier is organizational. If, in Madison’s terms, it has proven difficult to draw lines among the various levels and agents of government that wield state authority, then, in the Anti-Federalists’ terms, the state will appear “intricate and perplexed, and too mysterious” to monitor.<sup>61</sup> Visibility requires simplicity because complexity creates opacity. The second barrier is spatial. Hamilton argued that the state could manage its offices and officers across vast distances through the formal and informal relationships among federal, state, and local governments, and by the diligent work of an alert press and public. He assumed that a complex organization of governmental institutions and civil society would develop, built in large part on the public’s agents in the press and federal and state capitals that would promote the national and public interest. The Anti-Federalists, by contrast, predicted that the vast post-colonial territory—itsself having a small footprint compared to the current United States—would frustrate the development of a functional national government and cohesive civil society.

If transparency abhors the distance between the state and public and

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59. See PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE COMMITTEE 40–41 (1937); see also Thomas H. Stanton, *Executive Organization and Management After September 11, 2001*, in MAKING GOVERNMENT MANAGEABLE, at xvii, xviii–xix (Thomas H. Stanton & Benjamin Ginsberg eds., 2004) (more recent complaint about the executive branch’s disorganization). On the cyclical, seemingly endless efforts to reorganize the federal government, see PAUL C. LIGHT, *THE TIDES OF REFORM: MAKING GOVERNMENT WORK, 1945–1995* (1997); JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 52–55 (1981); and Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 406–08 (1996). On the long history of state government reform, see JAMES L. GARNETT, *REORGANIZING STATE GOVERNMENT: THE EXECUTIVE BRANCH* (1980); and Jeffrey L. Brudney et al., *Reinventing Government in the American States: Measuring and Explaining Administrative Reform*, 59 PUB. ADMIN. REV. 19 (1999).

60. Johan P. Olsen, *The Ups and Downs of Bureaucratic Organization*, 11 ANN. REV. POL. SCI. 13, 27 (2008).

61. THE ANTIFEDERALIST PAPERS No. 14, *supra* note 57, at 37 (George Clinton).

requires immediacy, then efforts to make the government's operations fully visible must overcome the organizational and spatial distances that arise naturally from the size and complexity of the American state. Writing in the early twentieth century, Max Weber predicted the development of this conflict between an expanding territory and state on the one hand and the populist American desire for an accessible government on the other. "It is obvious," Weber declared, "that technically the large modern state is absolutely dependent upon a bureaucratic basis. The larger the state, and the more it is a great power, the more unconditionally is this the case."<sup>62</sup> He foresaw that the United States, which was then "not fully bureaucratized," would likely become so as the nation faced "greater . . . zones of friction with the outside and . . . more urgent . . . needs for administrative unity at home."<sup>63</sup> The relatively young nation's expanding size—both in population and space—would propel the American state from a relatively small, directly accountable democracy toward becoming the administrative state required to perform the functions citizens demand.<sup>64</sup>

Thus would the government bureaucracy, a key element of what Weber famously characterized as the antidemocratic, authoritarian, and instrumental rationality of modernity's "iron cage," enmesh the United States.<sup>65</sup> Its vastly expanded administrative apparatus, which collects and preserves vast quantities of data in its everyday operation, would take advantage of the informational asymmetry that bureaucracies typically enjoy over the public.<sup>66</sup> "Bureaucratic administration," Weber wrote, "means fundamentally domination through knowledge"—domination made possible by the bureaucracy's ability to hoard knowledge and keep its intentions secret.<sup>67</sup> To the extent that a state's large territory dictates a larger and more powerful administrative apparatus, then, a state the size of the United States, with its necessary bureaucratic rule, would inevitably attempt to protect itself from the public's view. It would, in sum, make transparency an impossible goal to attain.

Parts II and III explore these organizational and territorial issues in

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62. 3 MAX WEBER, *ECONOMY AND SOCIETY* 971 (Guenther Roth & Claus Wittich eds., 1968).

63. *Id.*

64. *Id.* at 949–52 (discussing the limits of direct democracy).

65. See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 178–81 (Talcott Parsons trans., 1958); Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031, 1056–58 (2004); Rubin, *supra* note 49, at 149–50.

66. See 1 WEBER, *supra* note 62, at 218–23.

67. *Id.* at 225; 3 WEBER, *supra* note 62, at 992.

greater detail and identify the variable, imperfect measures developed in an effort to make the state visible. They assert that the vast territory of the United States, along with its citizenry's expectations of both an expansive but also accessible and accountable government, have increased the demand for transparency even as they have made it more difficult to meet.

## II. EXPOSING THE ORGANIZATIONAL STATE

As a result of its framers' quite conscious intent, the United States Constitution inaugurated a prototypically modern, complex organization. It sets forth in its articles a range of roles (legislator, executive, administrator, judge) and institutions that would shape the behaviors of those who would assume official positions, simply by virtue of the organizational scheme.<sup>68</sup> Contemporary government agencies, many of them subject to additional organizational mandates by their state constitutions,<sup>69</sup> carry on this tradition. Their official organizational charts graphically represent how they delegate their institutional authority and tasks,<sup>70</sup> again under the assumption that the correct organization and hierarchy will produce the correct official behavior, which will in turn result in the optimal kind and extent of governance.<sup>71</sup> If linked together, all such governmental charts—those of the co-equal branches of the federal government and their agencies, committees, and respective hierarchies, as well as of state governments and their multitudinous municipal governments and administrative agencies—constitute a formal atlas of American government, a great chain of the state's being.

Such maps seem to inscribe a spatial logic that plots the division of labor and allocates authority within units and positions. As the maps expand and proliferate—down within branches of a particular level of government, and across federal, state, and local levels—they seem to form a never-ending, bewildering series of Leviathans rather than a comprehensible single state. Under a strong conception of transparency that would require a continually visible state, such complexity constitutes a significant problem. If the state is to be visible and perceptible, it ought to be visible in its entirety as a

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68. See SHELDON S. WOLIN, *POLITICS AND VISION* 348–52 (expanded ed., 2004). On the significance of roles for modern bureaucracies, see 3 WEBER, *supra* note 62, at 956.

69. See Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551 (2001).

70. See, e.g., FCC Organizational Chart, <http://www.fcc.gov/fccorgchart.html> (last visited Aug. 5, 2010); Texas Department of State Health Services Organizational Chart, <http://www.dshs.state.tx.us/orgchart/default.shtm> (last visited Aug. 5, 2010); City of Houston, 2010 Organization Chart, <http://www.houstontx.gov/budget/10budadopt/orgchrt.pdf> (last visited Aug. 5, 2010).

71. See WOLIN, *supra* note 68, at 351–52.

whole *and* as constituent parts—from the federal top of the President, the Congress, and the Supreme Court, down to the lowest-level service provider of the local government. To implement transparency’s inherent promise, public access laws must thus attempt to bridge or collapse the vast organizational distance the state creates so that the public, as citizens, subjects, and clients, can know the government that ultimately, and at least theoretically, serves it. Perhaps a Nozickian “night-watchman state” could be so flat and simple that it proves thoroughly and perfectly visible.<sup>72</sup> But even the relatively simple modern government envisioned by the United States Constitution allocates tasks and authorities in a complex system that strains the public’s capability to view and comprehend the state<sup>73</sup>—especially once the regulatory state, nascent from the colonial period through the early twentieth century, began to grow.

Below I consider three distinct legal authorities that either create or reflect this complexity: a constitutional order that imposes only minimal and quite variable openness requirements on the various branches and levels of government; an executive branch whose evolving size and complexity limit Congress’s efforts to impose statutory openness obligations on it; and the blurred lines between the government and the private entities with whom it collaborates and to whom it outsources operations that challenge the reach of open government laws.

#### A. Constitutional Transparencies

The Constitution’s initial distribution of authority between the federal and state governments and among the federal government’s branches blocks the creation of a uniform, comprehensive approach to public access. Consider the first four Articles in turn. Although the framers engaged in spirited debates about the need for the proposed legislative branch to be open to the public,<sup>74</sup> the Constitution imposes no structural, uniform openness requirement upon Congress. Instead, it requires certain and limited disclosure practices,<sup>75</sup> and allows only Congress to impose

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72. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 26–27 (1974). A proponent of a minimal state would view transparency as merely a practical problem of institutional design and would rely more heavily on markets than on the regulation of governmental behavior. See Malcolm Thorburn, *Rethinking the Night-Watchman State?*, 60 U. TORONTO L.J. (forthcoming June 2010).

73. See *infra* Part II.A.

74. See Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 410–22 (2004).

75. U.S. CONST. art. I, § 5, cl. 3 (requiring Congress to keep and publish “from time to time” a journal of its proceedings and its members’ votes, while also allowing Congress to except “such Parts as may in [its members’] Judgment require Secrecy”); *id.* § 9, cl. 7

procedural rules upon itself.<sup>76</sup> Notably, when Congress saw fit to place disclosure and other procedural requirements on executive branch agencies through the Freedom of Information Act (FOIA), it imposed no such requirements on itself.<sup>77</sup>

The Constitution makes even fewer openness demands of the executive, requiring only that the President “from time to time give to the Congress Information of the State of the Union,”<sup>78</sup> a minimal command that has resulted in an annual speech that ritualistically offers self-selected information deemed politically important to the President’s agenda and popularity.<sup>79</sup> The only additional transparency requirements made of the

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(requiring Congress to publish “a regular Statement and Account of the Receipts and Expenditures of all public Money”); *id.* § 7, cl. 2 (“[T]he Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively.”).

76. See U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . .”). Congress does so through rules established either by each house or by statute. See Elizabeth Garrett, *Conditions for Framework Legislation*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 294 (Richard W. Bauman & Tsvi Kahana eds., 2006); Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of the Proceedings Clause*, 19 J.L. & POL. 345, 346 (2003). Each house of Congress enjoys the exclusive authority to establish its own procedural and administrative rules, while courts may review challenges only to a rule’s construction or application, not to its rationality, and even then only very deferentially. *Yellin v. United States*, 374 U.S. 109, 143–44 (1963) (White, J., dissenting) (applying and quoting *United States v. Ballin*, 144 U.S. 1, 5 (1892)). See generally John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 530–33 (2001) (summarizing Rulemaking Clause decisions in the Supreme Court and D.C. Circuit). A recent example of a congressional self-disclosure rule came about as part of Congress’s response to scandals in which lobbyists seemed to wield undue influence on the legislative process. See Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 515–17 (2007); Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 529–33 (2009).

77. Indeed, the Administrative Procedure Act’s (APA’s) definition of “agency” explicitly excludes Congress. APA, 5 U.S.C. § 551(1)(A) (2006). The APA’s definition is in turn incorporated in many open government statutes, such as the Privacy Act, 5 U.S.C. § 552a(a)(1) (2006), the FOIA, 5 U.S.C. § 552(f) (2006), the Government in the Sunshine Act, 5 U.S.C. § 552b(a)(1) (2006), and the Federal Advisory Committee Act (FACA), 5 U.S.C. app. § 3(3) (2006). See generally James T. O’Reilly, *Applying Federal Open Government Laws to Congress: An Explorative Analysis and Proposal*, 31 HARV. J. ON LEGIS. 415 (1994) (explaining Congress’s limited self-imposed disclosure requirements and proposing means to impose more).

78. U.S. CONST. art. II, § 3, cl. 1.

79. For opposing accounts of the what the State of the Union Clause requires of the President, compare Vasana Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 7–34 (2002) (arguing that the clause places a duty on the President to provide extensive information to Congress and assist in deliberative efforts to formulate legislation and coordinate enforcement), with Steven G. Calabresi & Kevin H. Rhodes, *The*

presidency and executive branch are those that Congress mandates or that are self-imposed. The most prominent general statutory mandates placed upon executive branch agencies are largely uncontroversial in the abstract.<sup>80</sup> The Freedom of Information Act requires the disclosure by executive branch agencies of certain documents,<sup>81</sup> the Government in the Sunshine Act requires executive branch agencies to hold open meetings,<sup>82</sup> the Federal Advisory Committee Act places open government requirements on certain types of committees created by the executive branch,<sup>83</sup> and the Presidential Records Act requires the President to retain records and make them available to the public after he or she leaves office.<sup>84</sup> Each statute imposes a particular openness requirement on a limited universe of entities, most typically those defined by the respective statutes as agencies and advisory committees.

But as the history of these statutes demonstrates—especially the history of the FOIA—both the extent of their applicability and the specific requirements they impose have proven hotly contested.<sup>85</sup> As they have

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*Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1207 n.262 (1992) (stating that the clause requires no more than occasional presidential reports to Congress on general matters). Current expectations of the State of the Union speech and presidential behavior demonstrate that the latter argument has clearly won out. See Richard Primus, *Limits of Interpretivism*, 32 HARV. J.L. & PUB. POL'Y 159, 173–74 (2009) (describing current understanding and interpretive tradition of the State of the Union Clause).

80. This was not always the case. President Johnson did not support the original statute, and President Ford vetoed the 1974 amendments to the FOIA that strengthened its disclosure obligations. See FOERSTEL, *supra* note 34, at 39–48. Prior to his confirmation as a judge on the D.C. Circuit, Antonin Scalia wrote a blistering critique of the statute in the American Enterprise Institute's journal in 1982. See Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar./Apr. 1982, at 14. Today, however, no elected official would propose repealing any of the existing open government laws, and efforts to strengthen them frequently have bipartisan support. See, e.g., Daniel J. Metcalfe, *The Cycle Continues: Congress Amends the FOIA in 2007*, ADMIN. & REG. L. NEWS, Spring 2008, at 11 (noting the bipartisan effort to enact amendments to the FOIA in 2007). In addition, nongovernmental organizations (NGOs) supporting the FOIA are either nonpartisan or range across the political system. Of the NGOs cited *supra* note 26, Judicial Watch is avowedly conservative, while others are nonpartisan. See Judicial Watch, About Us, <http://www.judicialwatch.org/about-us> (last visited Aug. 5, 2010).

81. 5 U.S.C. § 552 (2006).

82. Government in the Sunshine Act, 5 U.S.C. § 552b (2006).

83. FACA, 5 U.S.C. app. §§ 1–16 (2006).

84. Presidential Records Act of 1978, 44 U.S.C. §§ 2201–2207 (2006).

85. See FOERSTEL, *supra* note 34 (history of the FOIA); SUZANNE J. PIOTROWSKI, GOVERNMENTAL TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM 21–24 (2007) (history of the FOIA, focusing on discontent with its shortcomings); PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, GELLHORN & BYSE'S ADMINISTRATIVE LAW 762–66 (rev. 10th ed. 2003) (history of the Government in the Sunshine Act and discussion of

grown more vigorous and coercive, congressional mandates on the executive branch's openness have approached constitutional common law limits on inter-branch interference, most notably through the tangled doctrine of executive privilege and the more generalized concept that the President should be free from constraint in seeking advice and counsel from close advisors.<sup>86</sup> At the same time, presidential administrations have varied in their commitment to transparency in general and in their willingness to interpret these statutes broadly or narrowly,<sup>87</sup> while agency compliance with the FOIA mandates varies considerably.<sup>88</sup> Significantly, the Constitution's lack of any general openness requirement permits such

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criticisms of its effects on agency deliberations); Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH. & LEE L. REV. 1239, 1253–58 (2008) (history of the FACA, focusing on discontent with its shortcomings and controversies over its constitutionality); 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, 666–77 (2003) (history and controversies surrounding the Presidential Records Act of 1978).

86. On the current general state of the doctrines of executive privilege, state secrets, and presidential prerogatives over information bearing on national security and foreign affairs, see Pozen, *supra* note 9, at 321–22. On the constitutional issues surrounding FACA's limitations on the President's ability to seek advice, see Fenster, *supra* note 85, at 1254–56.

87. The Attorney General typically issues a memorandum to the federal branch agencies declaring its interpretation of the FOIA and how the Department of Justice plans to litigate contested cases. They tend to vary with each change of party control of the White House—with a Democratic president, the memo tends to favor disclosure, and with a Republican president, it tends to favor nondisclosure. Compare Memorandum from Eric Holder, Attorney General, on the Freedom of Information Act to the Heads of Executive Departments and Agencies (Mar. 19, 2009), <http://www.justice.gov/ag/foia-memo-march2009.pdf> (withdrawing memorandum from Attorney General Ashcroft and announcing “a clear presumption: In the face of doubt, openness prevails.”) (quoting Memorandum from President Barack Obama on the Freedom of Information Act to the Heads of Executive Departments and Agencies (Jan. 21, 2009), <http://www.whitehouse.gov/the-press-office/freedom-information-act>), and Memorandum from Janet Reno, Attorney General, on the Freedom of Information Act to the Heads of Departments and Agencies (Oct. 4, 1993), [http://www.usdoj.gov/oip/foia\\_updates/Vol\\_XIV\\_3/page3.htm](http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm) (“The Department [of Justice] will no longer defend an agency's withholding of information merely because there is a ‘substantial legal basis’ for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure.”), with Memorandum from John Ashcroft, Attorney General, on the Freedom of Information Act to the Heads of all Federal Departments and Agencies (Oct. 12, 2001), <http://www.doi.gov/foia/foia.pdf> (“When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis . . .”).

88. See COALITION OF JOURNALISTS FOR OPEN GOV'T, *THE WAITING GAME: FOIA PERFORMANCE HITS NEW LOWS* (2007), [http://www.cjog.net/documents/CX\\_FOIA\\_report\\_Part\\_1.pdf](http://www.cjog.net/documents/CX_FOIA_report_Part_1.pdf) (comparing agency request backlog across 1998, 2002, 2005, and 2006 and finding variability over time and among agencies).

variance among administrations.

Some constitutional doctrines force a degree of openness on the federal and state judiciary. The Sixth Amendment rights to “a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed” require that at least a proportion of the work performed by courts must be public and include a degree of public participation,<sup>89</sup> while the First Amendment also requires public access to criminal trials.<sup>90</sup> But there is no constitutional requirement for open judicial deliberation and conferences, and the tradition of published judicial opinions is just that—a tradition, rather than a constitutional requirement.<sup>91</sup> Some federal district courts and circuit courts of appeal allow cameras in the courtroom, as do some state courts, but no federal constitutional requirement or right binds courts, and no systematic approach prevails.<sup>92</sup> At the same time, modern criminal and civil procedural rules place significant emphases on pretrial procedures and alternative dispute resolutions that undercut the relatively simple and abstract constitutional provisions regarding an open judicial process.<sup>93</sup> The

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89. U.S. CONST. amend. VI.

90. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–76, 581 (1980) (plurality opinion); see also Kitrosser, *supra* note 29, at 106–11 (summarizing *Richmond Newspapers* and discussing its progeny).

91. Marci A. Hamilton & Clemens G. Kohnen, *The Jurisprudence of Information Flow: How the Constitution Constructs the Pathways of Information*, 25 CARDOZO L. REV. 267, 289–93 (2003). Moreover, despite their status as government documents free from the restraints of copyright protection, many judicial documents in the federal system are difficult for the public to view without paying expensive electronic access fees. See Stephen Schultze, *Electronic Public Access Fees and the United States Federal Courts’ Budget: An Overview* (Harvard Univ. Berkman Ctr. for Internet & Soc’y, Working Paper) [http://cyber.law.harvard.edu/~sjschultze/Schultze\\_PACER\\_Budget\\_Working\\_Paper.pdf](http://cyber.law.harvard.edu/~sjschultze/Schultze_PACER_Budget_Working_Paper.pdf) (last visited Aug. 5, 2010).

92. See *Courtroom Television Network, LLC v. State*, 769 N.Y.S.2d 70, 96–97 (Sup. Ct. 2003) (giving an overview of federal and state approaches to cameras in the courtroom).

93. See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006) (decrying lack of public access to discretionary governmental decisions in the criminal process, especially in the plea bargain process); Kenneth Feinberg, *Transparency and Civil Justice: The Internal and External Value of Sunlight*, 58 DEPAUL L. REV. 473 (2009) (former Special Master of the September 11th Victim Compensation Fund of 2001 discussing the incomplete progress of and prospects for greater transparency in civil litigation); Hamilton & Kohnen, *supra* note 91, at 293–97 (noting the existence of general rules of judicial and court access, as well as the various exceptions and limiting principles to those rules); Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 982–85 (2008) (discussing public access to the criminal justice system in general); Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 542–60 (2006) (describing the delegation of formal civil adjudication to relatively inaccessible administrative courts, arbitrators, and settlement agreements).

Constitution's lack of a general, expansive right or requirement for judicial transparency allows federal and state courts significant leeway in opening or closing their operations to public view.

Because the United States Constitution fails both to command states to be transparent and to provide individual rights that would allow individuals to impose administrative openness, individual state constitutions and governments have been free to devise their own open government mandates. Shaped by idiosyncratic institutional designs, states take relatively diverse approaches that mix statutory and constitutional requirements and impose different degrees of openness.<sup>94</sup> Transparency advocates frequently express frustration at the variability and relative rigor of state laws. A 1993 survey, for example, found wide variation in the form and substance of state open meeting laws.<sup>95</sup> A 2007 report issued by two nongovernmental organizations used a variety of criteria to evaluate state constitutional and statutory provisions and declared that thirty-eight states had failing laws.<sup>96</sup> Compounding the problem, state officials and judges exhibit varying degrees of commitment to and compliance with their respective open government laws; nongovernmental organizations and media groups in many states that have performed audits of state and municipal government agencies' response to open record requests variably decry and hesitantly applaud agencies' performances.<sup>97</sup> A decentralized federalist system in an area unregulated by federal constitutional rights and commands thus results in a wide-ranging degree of transparency across states and municipalities.

Rather than imposing transparency's ideal of a constantly and

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94. See Rossi, *supra* note 69, at 554–55. Numerous websites offer links to or texts of the fifty states' laws. See, e.g., Nat'l Freedom of Information Coal., State FOI Laws, <http://www.nfoic.org/state-foi-laws> (last visited Aug. 5, 2010); Reporters Comm. For Freedom of the Press, Open Government Guide, <http://www.rcfp.org/ogg/index.php> (last visited Aug. 5, 2010).

95. Teresa Dale Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990s—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165 (1993).

96. Nat'l Freedom of Information Coal. & Better Gov't Ass'n, States Failing FOI Responsiveness, <http://www.nfoic.org/bga> (last visited Aug. 5, 2010). A 2002 version of the study gave failing grades to eight states, but a D+ or lower to twenty-four states, and the remaining states received no higher than a B. Better Gov't Ass'n & Investigative Reporters and Editors, Freedom of Information in the USA: Part 1 (2002), <http://www.ire.org/foi/bga/>; see also BETTER GOV'T ASS'N & INVESTIGATIVE REPORTS AND EDITORS, FREEDOM OF INFORMATION IN THE USA SURVEY RESULTS (2002), <http://www.ire.org/foi/bga/ranking.pdf> (grading and ranking states in 2002 study).

97. See Nat'l Freedom of Information Coal., Audits and Open Records Surveys, <http://www.nfoic.org/audits-and-open-records-surveys> (last visited Aug. 5, 2010) (collecting and linking to audits performed in different states).

thoroughly visible state, the constitutional scheme sets forth some limited, variable transparency requirements to individual federal branches, while it restrains the ability of any branch to impose further requirements on another.<sup>98</sup> The Constitution created a decentralized complex of government institutions without a uniform standard or set of commands that would make the state as a whole and in its parts fully visible to its public. It also leaves to individual states the authority to establish their own governmental structure and administrative norms (within constitutional constraints) and limits the federal government from interfering with state governance. The idiosyncratic nature of each branch and level—its different tasks, its distinct history, and the conditions under which each of its bureaucracies works—renders an organizational map that resists transparency as an abstract and absolute norm, especially as each branch and level expands to engage more complex and demanding tasks. The Constitution's organizational plan, then, not only fails to create a transparent state—it affirmatively stands in the way of creating one.

### B. Statutory Transparencies

Like the Constitution, congressional efforts to impose openness obligations on the executive branch have also failed to establish a general, uniform legal norm, again in part because of the complex organization of government institutions. Congress's intent in enacting the FOIA, the most prominent of Congress's open government enactments, as well as language within the statute itself suggested that it would sweep broadly across the federal government.<sup>99</sup> Those entities subject to its mandates are required to make certain information available as a matter of course,<sup>100</sup> and must also respond to public requests for documents not subject to those requirements.<sup>101</sup>

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98. Cf. Samaha, *supra* note 5, at 948–49 (describing the constitutional regime for public access to information as “Unsatisfying”).

99. See, e.g., 5 U.S.C. § 552(a) (2006) (“Each agency shall make available to the public information as follows . . . .”); 112 CONG. REC. 13641 (1966) (statement of Rep. Moss in floor debate prior to the House of Representatives’ vote to pass S. 1160, which would become the Freedom of Information Act) (The FOIA will “remove every barrier to information about—and understanding of—Government activities . . . .”); EDWARD KENNEDY, AMENDING THE FREEDOM OF INFORMATION ACT, S. REP. NO. 93-854, at 3 (1974) (declaring that the FOIA amendments would draw back the “curtains of secrecy . . . around the business of government”).

100. 5 U.S.C. § 552(a)(1)–(2) (2006).

101. *Id.* § 552(a)(3). Some documents are exempted based either on their content, their status as inter- or intra-office memoranda, or specific exemptions created by other statutes. *Id.* § 552(b)(1)–(9).

The FOIA does not, however, apply uniformly across the federal government, as it explicitly does not apply to the judiciary or to Congress itself.<sup>102</sup> Indeed, it does not even apply to all entities within the executive branch. It only affirmatively applies to “[e]ach agency,”<sup>103</sup> a term that the FOIA defines in an enumerated list.<sup>104</sup> Congress has granted certain agencies, most notably the CIA, broad exemptions from disclosure.<sup>105</sup> The Supreme Court has held that the FOIA’s legislative history makes clear that Congress intended to exclude the Office of the President, the President’s immediate personal staff, and units in the Executive Office of the President whose sole function is to advise and assist the President.<sup>106</sup> It remains unclear how broadly that exception sweeps. The Court has yet to provide an authoritative interpretation of it,<sup>107</sup> while lower federal courts have developed an indeterminate multifactor test to ascertain whether the FOIA applies to nontraditional and advisory entities that the President or executive branch agencies created within the Executive Office of the President.<sup>108</sup> The factors include whether the entity exercises “substantial

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102. *Id.* § 551(1)(A), (B) (exempting the Congress and federal courts from the definition of “agency”).

103. *Id.* § 552(a).

104. *Id.* § 552(f)(1) (defining “agency” as “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency”).

105. *See, e.g.*, 50 U.S.C. § 403-1(i)(1) (2006) (directing the CIA to “protect intelligence sources and methods from unauthorized disclosure”); *id.* § 403g (exempting the CIA from any law requiring “disclosure of the organization, functions, names official titles, salaries, or numbers of personnel employed by the Agency”). *See generally* CIA v. Sims, 471 U.S. 159, 167–68 (1985) (applying statutory exemption to CIA). The third exemption of the FOIA, 5 U.S.C. § 552(b)(3) (2006), provides that the FOIA does not apply to matters that are “specifically exempted from disclosure by statute,” so long as the statute meets certain requirements.

106. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. REP. NO. 93-1380, at 15 (1974) (Conf. Rep.)). More recent congressional enactments that incorporate the FOIA’s definition of *agency* similarly make plain the distinction between “Executive Office” and “Office of the President.” *See* *Wilson v. Libby*, 535 F.3d 697, 708 (D.C. Cir. 2008) (explaining that the Privacy Act, 5 U.S.C. § 552a, which followed and incorporated the FOIA’s definition of *agency*, similarly excludes the President, Vice President, and their close advisors from liability).

107. The Court considered this issue briefly in *Kissinger*, but did no more than resolve the issue that Kissinger was acting in his capacity as National Security Adviser when the documents in controversy were created, and therefore, the documents were not considered the records of an agency under the FOIA. *See* 445 U.S. at 156. The Court made no effort to develop a test for lower courts to apply in more difficult cases.

108. *See* *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 566 F.3d 219, 222–23 (D.C. Cir. 2009) (reiterating the series of tests). On the complexity of the Executive

independent authority”<sup>109</sup> and has been granted sufficiently broad delegated power such that it has “less continuing interaction with the President”;<sup>110</sup> whether the entity’s “sole function [is] to advise and assist the President,”<sup>111</sup> and it is “close operationally” to the President;<sup>112</sup> and “whether it has a self-contained structure.”<sup>113</sup> The more independent the entity seems, the more likely a court will deem it an agency and subject it to the FOIA’s disclosure regime; while the closer the entity is to the President, the less likely the FOIA will apply.<sup>114</sup>

This standard leads to seemingly random results. Among the entities found to be agencies under the FOIA that were sufficiently removed from the President and that possessed sufficient independent authority are the Office of Science and Technology (1971),<sup>115</sup> the Office of Management and Budget (1978),<sup>116</sup> and the Council on Environmental Quality (1980).<sup>117</sup> Among those found not to be agencies because they are too close to the President, have insufficient independent authority, or both, are the Council of Economic Advisers (1985),<sup>118</sup> White House Counsel (1990),<sup>119</sup> the President’s Task Force on Regulatory Relief (1993),<sup>120</sup> the Executive Residence of the White House (1995),<sup>121</sup> the National Security Council

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Office of the President (EOP) and the fact that presidential decisionmaking exempt from the FOIA is in fact decisions made by executive branch bureaucrats, not by the President himself, see Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 753 (2007).

109. *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971).

110. If so, then it is an “agency” subject to the FOIA. *Meyer v. Bush*, 981 F.2d 1288, 1293–94 (D.C. Cir. 1993).

111. *Soucie*, 448 F.2d at 1075.

112. *Meyer*, 981 F.2d at 1293.

113. *Id.* at 1293.

114. In this way, the FOIA’s definition of *agency* implicitly recognizes constitutional limits on Congress’s authority to regulate the presidential deliberative process, which also turns in part on the relative position of the advisor. As the D.C. Circuit has held, communications made between presidential advisers, but not directly to the President, can be protected under the privilege for presidential communications only if the advisers are not too “remote and removed from the President,” and at minimum must be within the staff of a White House adviser rather than an executive branch agency. See *In re Sealed Case*, 121 F.3d 729, 751–52 (D.C. Cir. 1997).

115. *Soucie*, 448 F.2d at 1078–79.

116. *Sierra Club v. Andrus*, 581 F.2d 895, 902 (D.C. Cir. 1978), *overruled on other grounds*, 442 U.S. 347 (1979).

117. *Pac. Legal Found. v. Council on Env’tl. Quality*, 636 F.2d 1259, 1263, 1265–66 (D.C. Cir. 1980).

118. *Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038, 1043 (D.C. Cir. 1985).

119. *Nat’l Sec. Archive v. Archivist of the U.S.*, 909 F.2d 541, 545 (D.C. Cir. 1990).

120. *Meyer v. Bush*, 981 F.2d 1288, 1298 (D.C. Cir. 1993).

121. *Sweetland v. Walters*, 60 F.3d 852, 855 (D.C. Cir. 1995).

(1996),<sup>122</sup> the Smithsonian Institution (1997),<sup>123</sup> and the Office of Administration within the Executive Office of the President (2009).<sup>124</sup>

*Meyer v. Bush*, a 2–1 decision in one of the D.C. Circuit’s most influential efforts to parse the definition of *agency*, illustrates this confusing indeterminacy.<sup>125</sup> The issue before the court was whether the FOIA applied to the President’s Task Force on Regulatory Relief, a cabinet-level entity created by President Ronald Reagan to lead his administration’s efforts to reduce federal regulation. For Judge Lawrence Silberman, joined by fellow Reagan appointee Judge David Sentelle in the majority, the Task Force served as an advisory body that offered nothing more than guidance to the Office of Management and Budget (OMB) regarding regulatory rules and programs. It “was positioned between the OMB” and the President, and thus “only a hair’s breadth from the President,” and its members, many of whom (including the Vice President) were also agency heads or cabinet members in their own right, were also “the functional equivalents of assistants to the President.”<sup>126</sup> Therefore, it was not an agency under the FOIA. For Judge Patricia Wald, a Carter appointee writing in dissent, the Task Force was a “separate functional establishment within the Executive Office of the President to which the President delegated some of his executive powers,” and therefore a powerful cohesive unit with direct supervisory control over agencies below it in the hierarchical chain of executive branch authority.<sup>127</sup>

Both arguments seem plausible under the D.C. Circuit’s test, and no essential, consistent logic emerges from the test’s application in *Meyer v. Bush* or in the related case law. The executive branch has proven too amorphous and confusing for a thorough and uniform legislative transparency regime. When the President or Congress creates a new entity within the executive branch that does not clearly constitute an agency, we will not know its obligations under the FOIA without an extensive, fact-specific survey on the messy organizational map of the federal government, unless Congress clearly exempts it from or clearly subjects it to the FOIA in its organic statute.<sup>128</sup> Indeed, presidential administrations create such

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122. *Armstrong v. Executive Office of the President*, 90 F.3d 553, 565 (D.C. Cir. 1996).

123. *Dong v. Smithsonian Inst.*, 125 F.3d 877, 883 (D.C. Cir. 1997).

124. *Citizens for Responsibility and Ethics in Wash. v. Office of Admin.*, 566 F.3d 219, 224 (D.C. Cir. 2009).

125. *Meyer*, 981 F.2d 1288.

126. *Id.* at 1294.

127. *Id.* at 1298, 1307, 1313 (Wald, J., dissenting).

128. Congress occasionally exempts new, innovative agency-like entities from FOIA obligations. *See, e.g.*, 15 U.S.C. § 7215(b)(5)(A) (2006) (exempting the Public Company Accounting Oversight Board, created as part of the Sarbanes–Oxley Act, from the FOIA).

entities regularly, especially to oversee or advise politically significant and controversial programs. Examples include the taskforce created to oversee deregulatory efforts during the Reagan administration, as seen in *Meyer v. Bush*;<sup>129</sup> the Task Force on National Health Care Reform on health care reform during the Clinton administration, headed by first lady Hillary Clinton, to which the Federal Advisory Committee Act was held not to apply;<sup>130</sup> and the National Energy Policy Development Group in the George W. Bush administration, headed by Vice President Cheney, to which the Federal Advisory Committee Act was also held not to apply.<sup>131</sup> These entities played key roles in devising and implementing policy for the presidents who created them, and their creators designed and placed them within the executive branch in a way that limits public access to their proceedings and records.

### C. Private Transparencies

The American state has long used private entities to perform seemingly public functions,<sup>132</sup> and it has long delegated to or worked closely with private actors when it has engaged in law- and regulation-making.<sup>133</sup> Indeed, these relationships are so longstanding and embedded in public governance that no clear boundary separates the state from the private entities with which it works to regulate and deliver services.<sup>134</sup> Should seemingly public information produced or possessed by private entities be made public? Similarly, should information produced by or concerning private entities with which the state collaborates or transacts be made public? Under the populist understanding of transparency, the private information that the government possesses or could or should possess, or that private actors produce or disclose while participating in or negotiating

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129. See *supra* text accompanying notes 125–27.

130. See *Ass’n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 916 (D.C. Cir. 1993).

131. *In re Cheney*, 406 F.3d 723, 731 (D.C. Cir. 2005) (en banc). See also *Judicial Watch, Inc. v. Dep’t of Energy*, 412 F.3d 125, 131–32 (D.C. Cir. 2005) (holding that employees of the Department of Energy, whose work for that agency would be subject to the FOIA, produced work that was not “agency records” subject to the FOIA when they were detailed to the National Energy Policy Development Group, which was not subject to the FOIA).

132. See DONALD F. KETTL, *SHARING POWER: PUBLIC GOVERNANCE AND PRIVATE MARKETS* 6–8 (1993); Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321, 322–23 (2004).

133. See Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

134. PAUL C. LIGHT, *THE TRUE SIZE OF GOVERNMENT* 5 (1999). The best conceptual treatment of this issue in the legal academic literature is Chris Sagers, *The Myth of “Privatization,”* 59 ADMIN. L. REV. 37 (2007).

with government, becomes public information and therefore should be made available to the public. If the state is to be visible, then all of its parts, including private individuals and entities that actively interact with or serve as adjuncts to the state, should be visible.

This proposition has not, however, prevailed. Consider first the dynamics at play over the disclosure of information the government gathers about private individuals and entities through its lawmaking, rulemaking, and law enforcement activities. Federal law requires the federal government to protect the privacy of private individuals from and about whom it collects information in some contexts,<sup>135</sup> while the FOIA excepts from disclosure the privileged or confidential commercial data the government collects in order to encourage those it regulates to continue to share information.<sup>136</sup> Federal law also protects some information submitted by owners and operators of “critical infrastructure” from disclosure on the grounds that the release of such information might threaten national security.<sup>137</sup> The state’s intimate and ongoing relationship with individuals and those it regulates limits the extent to which current law allows it to disclose private information that it controls. Whether as a matter of personal privacy, corporate function and commercial property, or national security, private entities are not treated simply as part of the state, even if the state collects information about them or uses them to perform

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135. The Privacy Act prohibits disclosure of routine personal information except to the person to whom the record pertains, or with that person’s permission. 5 U.S.C. § 552a(b), (d) (2006). In addition, the FOIA’s exemptions include privacy protection. *See id.* § 552(b)(6) (exempting files on individuals for which disclosure “would constitute a clearly unwarranted invasion of personal privacy”); *id.* § 552(b)(7)(C) (exempting records or information compiled for law enforcement only to the extent that their disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy”).

136. *Id.* § 552(b)(4). Indeed, corporations engage in extensive “reverse-FOIA” litigation in order to preempt efforts by their competitors to use FOIA requests to obtain their trade secrets and other valuable information. *See, e.g.,* Chrysler Corp. v. Brown, 441 U.S. 281, 293–94, 317–18 (1979) (approving of reverse-FOIA litigation by finding a private right of action under the APA to seek injunctive relief prohibiting the disclosure of information submitted to the government that plaintiffs claim to be commercially sensitive). For agencies, the reverse-FOIA process has proven costly, as regulated corporate entities use litigation to secure their information from competitors. *See* David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1817 n.197 (2008). Nevertheless, for industry representatives, the reverse-FOIA process proves relatively indeterminate and not a guarantee to protect against disclosure. *See* James W. Conrad, *Protecting Private Security-Related Information from Disclosure by Government Agencies*, 57 ADMIN. L. REV. 715, 729–32 (2005).

137. *See* Critical Infrastructure Information Act of 2002, Pub. L. No. 107-296, §§ 211–215, 116 Stat. 2135, 2150–55 (codified at 6 U.S.C. §§ 131–134 (Supp. II 2000)); Steinzor, *supra* note 6.

important state or state-like functions.

At times the government does more than merely collect information about private entities and individuals; it also collaborates or negotiates with them in regulatory programs sometimes referred to as “new” or “new public” governance.<sup>138</sup> Departing from a traditional top-down command-and-control approach, in which an identifiable state agency requires an identifiable private entity to comply with mandatory practices or regulatory targets or face punishment, a state entity adopting a new governance approach to achieve a particular outcome works closely with private actors to develop and implement a program or programs that can best achieve its goal. The federal Negotiated Rulemaking Act<sup>139</sup> has created the most formalized and congressionally authorized model for new governance processes, allowing an administrative agency to negotiate openly with regulated entities and interested parties through a chartered committee that observes the openness requirements of the Federal Advisory Committee Act.<sup>140</sup> Additional “tools” developed by new governance advocates offer a much wider spectrum of public-private coordination than the formal negotiation process, including some that are significantly less formalized.<sup>141</sup>

The blurring of government authority in new governance efforts raises significant concerns about a resulting program’s accountability and visibility to the public.<sup>142</sup> Government delegation of some degree of regulatory authority to private or hybrid public-private entities may increase the state’s organizational complexity and may thereby decrease the state’s visibility to the public. Some degree of privacy may be essential to the process, however. If private entities that collaborate with the government would thereby become subject to open government laws, they may be less willing to engage directly with the government. Their reluctance would in turn undermine the collaborative approach that new

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138. For a recent summary of the field, see Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819, 823–37 (2008) (reviewing LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006) and LISA HEINZERLING & MARK V. TUSHNET, *THE REGULATORY AND ADMINISTRATIVE STATE* (2006)).

139. 5 U.S.C. §§ 561–570a (2006).

140. See *id.* § 564(a) (requiring notice of regulatory negotiations in the Federal Register); *id.* § 565(a) (requiring formal chartering of committees); *id.* § 566(d), (g) (requiring that committees keep meeting minutes and records consistent with the FACA).

141. See Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, in *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* 1, 9–22 (Lester M. Salamon ed., 2002) [hereinafter *TOOLS OF GOVERNMENT*] (defining the new governance paradigm and listing various tools that fall within it).

142. See Paul L. Posner, *Accountability Challenges of Third-Party Government*, in *TOOLS OF GOVERNMENT*, *supra* note 141, at 523, 524–28.

governance seeks to promote. At the same time, to the extent that current law limits the FOIA's applicability to new governance efforts, then the new governance approach appears significantly less than perfectly transparent.

Proponents argue, however, that collaborative governance offers a more “dynamic accountability” than conventional top-down regulatory programs; new governance, they argue, imposes measures like peer review and reporting requirements that provide as much if not more government oversight than traditional public governance.<sup>143</sup> In addition, some new governance programs themselves enhance information disclosure, targeting particular kinds of data whose release to the public can inform individuals and positively shape their behavior.<sup>144</sup> Thus, proponents argue, new governance results in better, more effective regulation, although perhaps it allows less openness according to traditional conceptions of public disclosure and transparency.<sup>145</sup> Again, a vigorous populist approach to transparency would protest against those aspects of new governance programs that offer less than full disclosure—protests that, if made into law, might conflict with and undermine whatever gains this less traditional form of governance offers.

The state frequently does more than collaborate with private entities—it often and explicitly contracts out or privatizes government services.<sup>146</sup> This

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143. Charles F. Sabel & William H. Simon, *Epilogue: Accountability Without Sovereignty*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 395, 400–01 (Gráinne de Búrca & Joanne Scott eds., 2006); see also Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 438–39 (2006) (arguing that proper design of new governance programs can provide sufficient public accountability).

144. See ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 1–7 (2007); Janet A. Weiss, *Public Information*, in TOOLS OF GOVERNMENT, *supra* note 141, at 227–33.

145. See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 455–57 (2004) (arguing that transparency and increased access to information do not themselves improve regulation, and that the state may need to be less than perfectly transparent in order to develop more effective regulatory programs). In a volume of essays intended to serve as a guide to new governance, the only essay that mentions and seems to embrace open-ended public transparency appears as the twentieth of twenty-three chapters and includes the topic as one among many “policy tools” that further democratic ends. Steven Rathgeb Smith & Helen Ingram, *Policy Tools and Democracy*, in TOOLS OF GOVERNMENT, *supra* note 141, at 565, 579. Furthermore, the same volume’s introduction concedes that for new governance to succeed in producing a more effective regulatory state, “classical notions of democratic accountability may need to be loosened and more pluralistic conceptions developed,” while the introduction fails to include transparency as one of its criteria for evaluating particular new governance tools. Salamon, *supra* note 141, at 23–24, 38.

146. See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369–71 (2003). The academic literature on the privatization of public services is vast; a useful

longstanding tradition of American governance offers, so its proponents say, a more efficient and effective means to deliver services that the government has performed in the past or can perform.<sup>147</sup> In an especially poignant example, the federal government has begun outsourcing to private firms not only the digital storage of its information,<sup>148</sup> but also its handling of FOIA requests, for the stated reason that private information management companies can provide better, more reliable, and less expensive service in these activities than the federal civil service.<sup>149</sup> Proponents argue that outsourcing not only improves government services, but it makes the resulting smaller government leaner, more efficient and flexible, and more responsive—a type of reform that enjoys bipartisan support.<sup>150</sup> For transparency proponents and critics of privatization alike, the public's need to view the state's operations does not disappear merely by virtue of a contractual agreement with a private entity.<sup>151</sup> When the law extends open government obligations to private entities, however, it threatens to undercut the instrumental and political advantages of privatization and new forms of governance.<sup>152</sup> Unsurprisingly, given this conflict, federal and state laws have taken halting, uncertain steps to impose transparency norms on private entities with whom the state is contracting or governing.<sup>153</sup> The issue pervades all national governments with freedom

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citation to it is in Sagers, *supra* note 134, at 43–48 & nn.14–38.

147. See David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 651–57 (1986).

148. See Office of Information & Privacy, U.S. Dep't of Justice, *Treatment of Agency Records Maintained for an Agency by a Government Contractor for Purposes of Records Management*, FOIA POST, July 2008, <http://www.justice.gov/oip/foiapost/agencyrecords.htm> (stating that the FOIA, as amended by § 9 of the OPEN Government Act of 2007, Pub. L. No. 110-175, § 9, 121 Stat. 2524, 2528–29 (to be codified as amended at 5 U.S.C. § 552(f)(2)), applies to agency records maintained by private contractors).

149. Christopher Lee, *On FOIA Front, More Agencies Contract Out*, WASH. POST, June 8, 2004, at A21; J. Nicholas Hoover, *Microsoft Taps into Open Government Market*, INFORMATIONWEEK, Dec. 15, 2009, <http://www.informationweek.com/news/government/info-management/showArticle.jhtml?articleID=222002100>.

150. See DAVID G. FREDERICKSON & H. GEORGE FREDERICKSON, *MEASURING THE PERFORMANCE OF THE HOLLOW STATE* 21 (2006); LIGHT, *supra* note 134, at 6. This claim is widely contested, particularly in terms of the actual size of government and the limits placed on government control and management of contractors' work. See FREDERICKSON & FREDERICKSON, *supra*, at 20–21; LIGHT, *supra* note 134, at 176–79.

151. PAUL VERKUIL, *OUTSOURCING SOVEREIGNTY* 90, 105–06 (2007). But see Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003) (arguing that privatization can extend public norms into the private sector by encouraging and sometimes forcing private entities to incorporate public goals in their activities).

152. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 586–87 (2000).

153. See Matthew D. Bunker & Charles N. Davis, *When Government "Contracts Out"*:

of information laws, and as Alasdair Roberts has explained, it has caused a “conceptual muddle” regarding how “to determine where the boundaries of government lie” and how best to draft rules that can force disclosure upon private entities that “appear governmental.”<sup>154</sup>

These conflicts between the gains of public-private collaboration, and the limits such collaboration place on the state’s visibility, illustrate the inevitable and pervasive barriers to making the government thoroughly transparent. In order to meet the public’s expectations for the range and quality of services it must perform, the state must work with private entities; but that work may as a result either make the state less transparent, or may provoke an effort to treat private entities as state actors that will in turn undercut the range and quality of services the state can offer. If the state must be visible, its efforts to provide effective regulation and services are likely to suffer, at least to some extent.

#### D. *The Impossibility of Organizational Exposure*

In all of its various complexities, the contemporary state organization of the United States poses great challenges to any effort to impose visibility. The complexities are both endogenous—reflecting historical, path-dependent decisions about institutional design made at the nation’s founding and throughout its history—and exogenous—the result of governmental adaptations to social and economic development in civil society. Transparency cannot simply be imposed on such a massive network of institutions and individuals; legal, regulatory, and normative projects to make the state more visible must grapple with design, implementation, and enforcement issues across a broad, diverse range of levels, branches, and webs.

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*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, *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). In one illustrative case, the Supreme Court held that private organizations receiving financial grant money 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, 186 (1980). Nearly two decades later, Congress overturned that decision by narrowly extending the FOIA’s application to information produced by federal grantees relied upon by an agency in promulgating regulations. See Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998). On the history and aftermath of the so-called “Shelby Amendment,” see Donald T. Hornstein, *Accounting for Science: The Independence of Public Research in the New, Subterranean Administrative Law*, 66 LAW & CONTEMP. PROBS. 227, 230–33 (2003).

154. ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* 160–61 (2006).

### III. EXPOSING THE PHYSICAL STATE

Two of the state's most basic physical characteristics impede its visibility to the public. The first is the state's territorial size and political-geographic complexity. For the state to be thoroughly transparent and reduce or collapse its distance from the public, its operations and personnel must be identifiable and made available for public inspection, no matter their location. The immense size and intricate overlap of government entities in the United States frustrate any effort to achieve such perfect or even near-perfect visibility. The second impediment is architectural. The thoroughly transparent state must be capable of allowing the public to view where and how government employees work: the physical spaces of the built bureaucratic environment. Government buildings have standard architectural elements—walls, ceilings, doors, and windows—that serve naturally to exclude the public and obscure the state. Even if it were physically possible either to enable the public to see through the structures that house the state or to invite the public into these structures at all times, the effort can prove so intrusive and costly as to make the work of public officials difficult if not impossible. The first two sections of this Part offer a more detailed account of these geographic and architectural issues, while the third section describes two instances in which access to information laws confront, and ultimately fail to respond coherently to, the state's spatial and physical complexity.

#### A. *Distance*

The federal government is sovereign over a significant amount of well-populated territory. Its three branches may all have their headquarters in Washington, but their decisions and administration also occur in agency and congressional offices and federal courthouses scattered throughout Washington as well as the fifty states. The federal government shares sovereignty over the same territory with state governments, and both the federal and state governments overlap municipal governments. Many state and local governments preside over extraordinary amounts of territory from their capitols and city halls—heavily populated Los Angeles County, for example, occupies more than 4,000 square miles of land, while sparsely populated Alaska sits on over 570,000 square miles.<sup>155</sup> Enabling the public to view such diffuse Leviathans proves a difficult challenge, as does

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155. U.S. Census Bureau, State & County QuickFacts: Los Angeles County, California, <http://quickfacts.census.gov/qfd/states/06/06037.html> (last visited Aug. 5, 2010); U.S. Census Bureau, State & County QuickFacts: Alaska, <http://quickfacts.census.gov/qfd/states/02000.html> (last visited Aug. 5, 2010).

enforcing any general edict for openness upon officials in geographically scattered organizations.

Both the Hamiltonian faith in administrative and structural means to manage government and enable democracy across vast distances,<sup>156</sup> and the Weberian warning that such solutions would lead to an imperfect modern state ruled by an information-hoarding bureaucracy,<sup>157</sup> foreshadowed ongoing arguments and anxieties about the state's operations in an expansive American territory. Weber correctly predicted the expansion of the American administrative state, while Hamilton anticipated systematic efforts to control it, efforts that began almost immediately in the federalist period of the early Republic.<sup>158</sup> A larger and more diverse nation than even Hamilton's Anti-Federalist opponents feared, coupled with an administrative apparatus that Weber foresaw but that Hamilton could not have anticipated, has made Hamilton's confident forecast of private collective actions to control the administrative state appear naïve at best.<sup>159</sup> His general prescription for public and private institutional checks and balances, however, survives in the federal and state laws that attempt to provide uniform controls over vast and far-flung bureaucracies. In the present day, federal and state administrative laws impose standard procedural rules, including requirements for public access to information, equally on the operations of agencies' headquarters and its offices. At the same time, federal courthouses, enforcing federal law and using uniform federal rules of civil and criminal procedure and providing equal levels of openness, were dispersed across the nation in the twentieth century in an effort to extend both federal authority and federal rights.<sup>160</sup> At least as a formal matter, then, the American state appears to have proven Hamilton correct by successfully addressing the territorial concerns of the Anti-Federalists.

As a matter of practice, however, these formal commands are not self-enforcing. Central authorities have limited control over their dispersed

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156. See *supra* text accompanying notes 58–61.

157. See *supra* text accompanying notes 62–67.

158. See LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY*, 199–209 (1948); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 *YALE L.J.* 1256, 1305–07 (2006).

159. Nevertheless, the role of the press in checking government misdeeds—one of the roles that Hamilton hoped it would play—has remained the strongest justification for First Amendment protections against prior restraint. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 719–20 (1931) (asserting that press liberties are necessary as a means to protect against corrupt officials who take advantage of the increasingly complex administration of government).

160. See Judith Resnik, *Whither and Whether Adjudication?*, 86 *B.U. L. REV.* 1101, 1106–08 (2006).

organizations, and not all branches and agencies of the individual units are equally visible to their citizens. Even assuming that those at the center of authority want their inferior officers to be visible to the public—a desire that appears to vary among agencies and executive administrations, given the variability of their levels of compliance<sup>161</sup>—the periphery can resist central commands, as Michael Lipsky observed in his study of “street-level bureaucrats” and the “relative autonomy from organizational authority” enjoyed by front-line government officials.<sup>162</sup> Police officers on the street and teachers in the classroom, as well as public information officials and FOIA officers removed from an agency’s central command, inevitably have significant discretion to make substantive and administrative decisions both as a means of responding to the particular context in which they find themselves and because they cannot in fact be controlled.<sup>163</sup> Physical distance, whether counted in miles, in feet, or by the floors of an office building, limits the extent to which superiors can monitor and exercise authority. If administrative discretion increases across space, and Weber’s assertion that bureaucracies prefer to hoard information is correct, then efforts to impose transparency on large, far-flung agencies will be doomed to failure—or at least to incomplete success. The geographical dispersal of authority thus limits both the state’s ability to supply bureaucracies that the public can see and the law’s ability to command them to be seen.

The government’s size and dispersal across the territory it governs is one obstacle to achieving a populist ideal of transparency; the state’s jurisdictional complexity is an additional one that can hinder the public’s view of the state. “By its very nature,” the political geographer John Short has written, “the nation-state is a spatial phenomenon,” one that manifests itself most clearly in the frontiers and borders between nations and in a nation’s internal division into such administrative subdivisions as regional, state, and local governments and their sub-agencies.<sup>164</sup> This might suggest that a geographical map, which visualizes a series of logical—if somewhat haphazardly arranged—nested centers and peripheries, would provide a blueprint for political order and behavior.<sup>165</sup> Like an organizational chart

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161. See *supra* text accompanying note 97.

162. MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 16–18 (1980).

163. JAMES Q. WILSON, BUREAUCRACY 327–29 (1989). For a recent reconsideration of Lipsky’s concept of the street-level bureaucrat, see Simon Halliday, Nicola Burns, Neil Hutton, Fergus McNeill & Cyrus Tata, *Street-Level Bureaucracy, Interprofessional Relations, and Coping Mechanisms: A Study of Criminal Justice Social Workers in the Sentencing Process*, 31 LAW & POL’Y 405 (2009).

164. JOHN R. SHORT, AN INTRODUCTION TO POLITICAL GEOGRAPHY 123 (1982).

165. On maps’ representational ideal, see Michael R. Curry, *Shelf Length Zero: The*

that claims to offer a hierarchical rendering of coordinated government entities, a map of the United States implies that political power is dispersed across a territory: the nation, with its federal capitol; the states, with their state capitols; and metropolitan regions, with their city halls, urban cores, and suburban and exurban peripheries.<sup>166</sup> Where authority is dispersed logically, the public can view, comprehend, and hold accountable those officials it can find in the cores of the respective (federal, state, and local) jurisdictional bodies.

As Richard Thompson Ford has noted regarding local governments, however, we cannot assume that territory and the maps that record it accurately reflect an essential, authoritative sovereign power, nor can we assume that a hierarchical relationship among political divisions subordinates the smallest and lowest subunit.<sup>167</sup> A governmental unit's authority, jurisdictional reach, and public accessibility are never as fixed or stable as a map suggests.<sup>168</sup> Federal, state, and local authorities whose territorial jurisdictions overlap any particular location frequently confuse the public.<sup>169</sup> How can the public see a state when they cannot discern which government entities are sovereign over a particular piece of land? Two examples: At the local level, especially in major metropolitan service areas, city and county governments frequently overlap or have shifting boundaries, requiring regional or crossjurisdictional coordination and governance and making regulatory responsibility difficult to pinpoint.<sup>170</sup>

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*Disappearance of the Geographical Text*, in SPACE AND SOCIAL THEORY 88, 90 (Georges Benko & Ulf Strohmayer eds., 1997). As representations, maps are not natural but are instead the result of efforts to produce a visual representation of the social world. See HENRI LEFEBVRE, THE PRODUCTION OF SPACE 84–85 (Donald Nicholson-Smith trans., 1991).

166. John Agnew, *Maps and Models in Political Studies: A Reply to Comments*, 15 POL. GEOGRAPHY 165 (1996).

167. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1860–61 (1994); cf. NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER 90–91 (1994) (critiquing the abstract conception of space that maps induce); W. Wesley Pue, *Wrestling with Law: (Geographical) Specificity vs. (Legal) Abstraction*, 11 URB. GEOGRAPHY 566, 567–68 (1990) (critiquing law's blindness to spatial complexity).

168. I am relying here on Henri Lefebvre's conception of the state's abstract political space and of the state's complex and unfolding relationship with its territory. See HENRI LEFEBVRE, STATE, SPACE, WORLD 224–25 (Neil Brenner & Stuart Elden eds., Gerald Moore et al. trans., 2009); LEFEBVRE, *supra* note 165, at 278–85. See generally Neil Brenner & Stuart Elden, *Henri Lefebvre on State, Space, Territory*, 3 INT'L POL. SOC. 353, 358–61 (2009).

169. Cf. Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1935–36 (2008) (describing the difficulty of dividing regulatory authority among different levels of government).

170. JON C. TEAFORD, THE METROPOLITAN REVOLUTION 5 (2006) (describing growth of major metropolitan service areas); cf. PETER CALTHORPE & WILLIAM FULTON, THE

Secondly, lakes and rivers often traverse state boundaries and are overseen (or, sometimes, are not overseen and are therefore the site of significant conflict) by complex regional agreements or government authorities.<sup>171</sup> These liminal spaces—parts not of one but of numerous jurisdictions, with no clear or obvious boundaries—render efforts both to govern and to view governance difficult if not impossible. Moreover, the modern state's sovereignty has long extended beyond its mere territory and been shaped and challenged internally not only by its citizens but by other states, nongovernmental organizations, transnational corporations, supranational institutions, and the global flows of economic trade and capital.<sup>172</sup> To the extent that different levels of government might cooperate with, ignore, or contest each other's jurisdiction and policies, the public will struggle to identify the particular government entity or entities from which they need to seek information.<sup>173</sup>

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REGIONAL CITY 61–63 (2001) (describing the patchwork of local governments in an increasingly “Regional City”).

171. See, e.g., Mark T. Imperial & Derek Kauneckis, *Moving from Conflict to Collaboration: Watershed Governance in Lake Tahoe*, 43 NAT. RESOURCES J. 1009, 1018–32 (2003) (discussing the history of the Tahoe Regional Planning Agency, formed by an interstate compact between California and Nevada, to oversee the planning of Lake Tahoe and its environs); Steven T. Miano & Michael E. Crane, *Eastern Water Law: Historical Perspectives and Emerging Trends*, NAT. RESOURCES & ENV'T, Fall 2003, at 14, 17–18 (discussing the complexity and varied success of interstate water compacts in the eastern United States).

172. See JOHN A. AGNEW, GLOBALIZATION AND SOVEREIGNTY 6–7 (2009); Saskia Sassen, *Bordering Capabilities Versus Borders: Implications for National Borders*, 30 MICH. J. INT'L L. 567 (2009). See generally KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? 5–9 (2009) (discussing the long history of, and controversy over, the relationship between American territory and the reach of American law). The notion of a state's absolute sovereignty within its borders is untenable in an international legal environment. See, e.g., Stephen D. Krasner, *Problematic Sovereignty*, in PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES 1, 2 (Stephen D. Krasner ed., 2001) (identifying competing conceptions of less-than-absolute sovereignty); Stuart Elden, *Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders*, 26 SAIS REV. OF INT'L AFF. 11, 14–18 (2006) (describing emergence of “contingent sovereignty” in international law).

173. This issue concerns the overlapping itself, not whether multiagency and multigovernment cooperation, their opposites, or some point along a continuum of cooperation and conflict will provide an optimal level of transparency. On the concept of “cooperative federalism,” see Susan Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 YALE L.J. 1344 (1983); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001). For an account that seeks to complicate the “cooperative” concept, see Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009). On the role of thoroughgoing conflict between federal and state governments, see Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1295–1301 (2004).

### B. Enclosure

Government buildings and offices enable public employees to perform their tasks by housing the spaces where officials, managers, and civil servants work, converse, officially meet, and store and protect official records. By containing state activity within built structures, buildings and offices also enclose that activity within walls and ceilings, and control access and visibility to it via doors and windows. As a result of making it possible for officials to work and to sort and protect the records that they collect and produce, government buildings inevitably separate officials from the public that they serve. Accordingly, allowing the public to view and enter government buildings is at once an issue of design and practice: can the public see and navigate its way into the building, and is the public in fact invited or allowed to enter?<sup>174</sup> The competing concerns of design and public policy help determine the extent of public access to officials and to government information.

Public architecture aspires to more than the simple, utilitarian goal of housing offices and allowing or limiting public access, however. It also attempts to shape the affective relationship between the state and its public.<sup>175</sup> It works iconically and symbolically to establish an identity for the national, state, or municipal governmental unit or units that a building hosts.<sup>176</sup> A public building's size, architectural design, and location announce the state's existence<sup>177</sup> and indicate its occupant or occupants'

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174. HAROLD D. LASSWELL WITH MERRITT B. FOX, *THE SIGNATURE OF POWER: BUILDINGS, COMMUNICATION, AND POLICY* 18 (1979); Mary R. Domahidy & James F. Gilsinan, *The Back Stage Is Not the Back Room: How Spatial Arrangements Affect the Administration of Public Affairs*, 52 PUB. ADMIN. REV. 588 (1992). On the highly structured nature of the courtroom as a controlled public space, see Gordon Bermant, *Courting the Virtual: Federal Courts in an Age of Complete Inter-Connectedness*, 25 OHIO N.U. L. REV. 527, 529–33 (1999); and Jonathan D. Rosenbloom, *Social Ideology as Seen Through Courtroom and Courthouse Architecture*, 22 COLUM.-VLAJ.L. & ARTS 463 (1998).

175. Two additional, secondary purposes that government buildings attempt to further, which this Article does not discuss, are the broader sense of community and social capital they can create in dense urban locations, see JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 179–86 (1961), and their ability to help deter criminal activity, see Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002). Neither purpose directly furthers public access, while efforts to achieve them may in fact limit the state's visibility.

176. See CHARLES T. GOODSELL, *THE AMERICAN STATEHOUSE: INTERPRETING DEMOCRACY'S TEMPLES* 3–4, 15–34 (2001) (discussing statehouse architecture's expressiveness and the historical evolution of architectural styles); AMOS RAPOPORT, *THE MEANING OF THE BUILT ENVIRONMENT* 55–56 (1982) (discussing nonverbal communication in architecture).

177. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 572 (2000) (noting that an agency's headquarters announces its existence to the world as a

relative prominence.<sup>178</sup> In doing so it may invite the polis to enter or intimidate them and discourage their entry.<sup>179</sup> The interior design and features of public buildings can also communicate openness or its opposite as they either foster or inhibit interaction among government actors and between the state and the public.<sup>180</sup> Public architectural design may consider the public visibility of and access to government officials' work as a significant end, but it may not.

Transparency laws must therefore attempt to address and mitigate the physical obstructions that walls and ceilings place before the public's ability to view and access state operations. They can succeed, at least to an extent. The Americans with Disabilities Act (ADA), which requires that public buildings, and public accommodations generally, be "readily accessible to and usable by individuals with disabilities,"<sup>181</sup> is one notable example. The ADA has significantly improved access to government offices and officials for a population that previously faced barriers to enter public buildings.

Open government laws attempt to mitigate the enclosure problem for the entire public in two primary ways: under the aegis of so-called "open meeting" or "sunshine" laws, government officials are required to make certain meetings accessible for public viewing, while open records laws (including the FOIA and its state analogues) require that agencies open

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coherent, material entity).

178. See, e.g., Ed Gibson, *Tales of Two Cities: The Administrative Facade of Social Security*, 35 ADMIN. & SOC'Y 408 (2003) (chronicling the location and architecture of the buildings housing the Social Security Administration).

179. See LASSWELL, *supra* note 174, at 16–17 (contrasting how public architecture in popular democratic and autocratic regimes communicates these regimes' relationships with their respective publics). Compare Arthur Goldberg, *An Inside Perspective on the 1962 Guiding Principles for Federal Architecture*, DESIGN Q., No. 94/95, 1975, at 16, 16–17 (describing "Guiding Principles for Federal Architecture," an influential federal report which advocated that architects and officials emphasize the aesthetic qualities of public buildings and draw the public into the "public parts" of government buildings through artwork and architecture), with Richard Briffault, *Facing the Urban Future After September 11, 2001*, 34 URB. LAW. 563, 568–69 (2002) (describing how efforts to enhance the security of government buildings after the 9/11 and Oklahoma City terrorist attacks have limited public access to them), and Edward H. Ziegler, *American Cities and Sustainable Development in the Age of Global Terrorism: Some Thoughts on Fortress America and the Potential for Defensive Dispersal II*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 95, 139 (2005). See also Charles T. Goodsell, *Bureaucracy's House in the Polis: Seeking an Appropriate Presence*, 7 J. PUB. ADMIN. RES. & THEORY 393, 396–407 (1997) (complaining that government building design in the 1970s led to massive structures that fail to take seriously their role in housing democratically accountable entities).

180. Dvora Yanow, *Built Space as Story: The Policy Stories That Buildings Tell*, 23 POL'Y STUD. J. 407, 417–19 (1995) (explaining how buildings tell "policy stories" to multiple audiences through their design).

181. 42 U.S.C. § 12183(a)(1) (2006).

their files to members of the public. In addition, video recordings and broadcast of government meetings via C-SPAN and state and local cable television and webcasting channels make otherwise public meetings more widely available. None of these efforts provide unlimited physical or visual access to all public buildings and offices at all times, however. As the next section explains, such transparency that they do provide is limited, either as a legal or practical matter, to certain preplanned public events or to files over which the government has initial control. The physical enclosure that walls and ceilings provide almost inevitably offer cover for the state from the public's gaze, and transparency obligations cannot fully overcome or compensate for enclosure's distance.

### *C. The Impossibility of Containment*

The state's geography and built environment thus pose significant barriers to government visibility and accessibility. Unsurprisingly, legislatures and courts struggle with these issues, and it proves difficult to shine light on the government and to free its information, especially when officials and documents refuse to stand still across the state's vast territory and public employees work within their offices or other interior spaces where their actions cannot so easily be viewed. As ever, the law can handle easy cases—most government documents are in fact housed in government offices and can be requested and found, while official meetings regularly occur in official meeting halls with public access. But more difficult cases—private documents that are held in government offices or government documents that are held in private spaces, or public officials' interactions in private locations outside formal meeting halls and government offices—test the limits of open government laws and challenge efforts to force compliance with the symbolic dimensions of transparency.

#### *1. Containing Meetings*

Although the constitutional framers met behind closed doors, in chambers (presumably) limited in sunlight though surely not infected, federal and state legislatures have long allowed the public to view their formal meetings, whether by constitution or custom.<sup>182</sup> Modern, comprehensive open meeting laws emerged in the states largely during the post-World War II period, and especially in response to revelations of the Nixon Administration's abuses of power (when Congress enacted the

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182. HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS* 180–84 (1953); JAMES RUSSELL WIGGINS, *FREEDOM OR SECRECY* 9–16 (1956).

Government in the Sunshine Act).<sup>183</sup> These laws extended the openness obligation to administrative bodies and local governments. Current statutory and state constitutional laws, frequently named “sunshine” laws (like the federal Act), require such meetings to be open and accessible to the public,<sup>184</sup> thus echoing transparency’s broader emphasis on visibility and presence, as do the court decisions interpreting them.<sup>185</sup>

The public is not invited to view everything the government does, however. By definition, the only event that these laws make thoroughly visible is the official occasion of a “meeting,”<sup>186</sup> a term whose meaning is not self-evident.<sup>187</sup> How far along in a decisionmaking body’s consideration of a matter does a gathering of its members constitute an official meeting?<sup>188</sup> Does an open meeting mandate apply only to the formal

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183. ANN TAYLOR SCHWING WITH CONSTANCE TAYLOR, OPEN MEETING LAWS 2D § 1.1 (2000); Note, *Open Meeting Statutes: The Press Fights for the “Right to Know,”* 75 HARV. L. REV. 1199, 1199–1200 (1962).

184. The federal open meeting statute is called the “Government in the Sunshine Act.” Pub. L. 94-409, 90 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552b (2006)). Analogous state laws are frequently referred to similarly. See Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida’s Position as a Leader in Open Government*, 35 FLA. ST. U. L. REV. 245, 245 & n.1 (2008) (explaining that all of Florida’s open government laws are popularly referred to as “Sunshine Laws”); My Florida Sunshine—The “Sunshine” Law, <http://www.myflsunshine.com/sun.nsf/pages/Law> (summarizing Florida’s open government laws) (last visited Aug. 5, 2010); see also MICH. COMP. LAWS SERV. § 15.263(1) (LexisNexis 2009) (state Open Meetings Act, declaring that “[a]ll meetings of a public body . . . shall be held in a place available to the general public.”).

185. See, e.g., *Regents of Univ. of Cal. v. Superior Court*, 976 P.2d 808, 826 (Cal. 1999) (Brown, J., concurring) (“There is rarely any purpose to a nonpublic premeeting conference except to conduct some part of the decisional process behind closed doors.”); *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974) (declaring that Florida’s “government in the sunshine law” barred instances when a city engages in its “decisional process behind closed doors”); *Atlanta Journal v. Hill*, 359 S.E.2d 913, 914 (Ga. 1987) (describing Georgia’s Open Meetings Act as intended “to protect the public—both individuals and the public generally—from ‘closed door’ politics”); *Okla. Ass’n of Mun. Att’ys v. State*, 577 P.2d 1310, 1313–14 (Okla. 1978) (“If an informed citizenry is to meaningfully participate in government or at least understand why government acts affecting their daily lives are taken, the process of decision making as well as the end results must be conducted in full view of the governed.”).

186. See, e.g., 5 U.S.C. § 552b(a)(2) (defining *meeting* as “the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business”).

187. SCHWING, *supra* note 183, § 6.6 (discussing various definitions of *meeting* in open meeting law, and describing it as “[t]he most telling single element to determine whether an open meeting act is strong and encompassing or weak and limited in scope”).

188. See David A. Barrett, Note, *Facilitating Government Decision Making: Distinguishing*

conferences that officials hold in an agency's official meeting space, or does the definition of *meeting* extend outside the official enclosure, to other rooms in government buildings, or even to gatherings and encounters held in restaurants and homes? And if the latter, more capacious definition applies, can officials be required to provide notice and public access to informal meetings that occur by chance or appointment—in which case, such meetings cannot as a practical matter take place within the ambit of the law? Do the government's operations and transparency's reach extend infinitely across the territories that its officials travel?

Consider the following case. Two elected members of a collegial body (e.g., a local legislature or hospital board) spontaneously decide to dine together with the general manager of a public agency overseen by the body. The two elected members alone do not constitute a quorum of the body, and they had no intent to circumvent the statutory open meeting requirement in the relevant state.<sup>189</sup> Nevertheless, at dinner they could discuss matters that are currently before the body or that could conceivably come before the body at a later date, while the public would be unable to monitor the conversation or even know the conversation took place. Is this a *meeting* that would require the members to give advance notice of their meal and to invite the public to join them?

Most open meeting statutes reach only formal meetings, defined as those that would adopt final actions, or at which a majority or quorum is in attendance.<sup>190</sup> This approach assumes that a meeting occurs in the normal course of a government entity's operations, at a scheduled time, most typically though not necessarily in the entity's office or in an official public meeting room.<sup>191</sup> Therefore, the majority of jurisdictions would allow the

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*Between Meetings and Nonmeetings Under the Federal Sunshine Act*, 66 TEX. L. REV. 1195, 1205–06 (1988) (distinguishing among stages in which a body is engaged in “collective inquiry” into the existence of and facts surrounding an issue, deliberation over a narrow range of proposals, or when the officials are deciding about a particular proposal).

189. This hypothetical case is based on two actual cases that did not result in reported decisions. See Joseph W. Little & Thomas Tompkins, *Open Government Laws: An Insider's View*, 53 N.C. L. REV. 451, 452 n.5 (1975); Peter H. Seed, *Florida's Sunshine Law: The Undecided Legal Issue*, 13 U. FLA. J.L. & PUB. POL'Y 209, 212–13 (2002).

190. Elizabeth Johnson Wallmeyer, *Open Meeting Laws: A Comparison of the Fifty States and the District of Columbia* 60–62 (2000) (unpublished M.A. thesis, University of Florida) (on file with author) (noting that thirty of forty-two states whose open meeting laws define *meeting* require either a quorum or majority of members).

191. See, e.g., GA. CODE ANN. § 50-14-1(a)(2) (2009) (defining *meeting* as a “gathering of a quorum of the members . . . at a designated time and place” to discuss or take action on official business); N.C. GEN. STAT. § 143-318.10(d) (2009) (defining *meeting* as “a meeting, assembly, or gathering together at any time or place . . . of a majority of the members of a public body for the purpose of conducting hearings, participating in deliberations, or voting

dinner meeting to take place without public notice or access because of its small size and the informal nature of the gathering, even if it results in a discussion by the members of an issue before the body. A small number of jurisdictions would bar the meeting, however. Interpreting their state statute, Florida courts and attorney general opinions would view the case as a violation of Florida's sunshine law unless the public is provided notice and access; to do otherwise, an intermediate appellate court has held, would allow members to "gather with impunity behind closed doors and discuss matters on which foreseeable action may be taken by that board or commission in clear violation of the purpose, intent, and spirit of the Government in the Sunshine Law."<sup>192</sup>

The issue maps the spatial and architectural problems the state creates onto the private lives and dual identities of public officials who are at once government officers and private individuals. Any space an official occupies, even a private restaurant, can be transformed into a government office and meeting room by virtue of the official's discussion of public business with colleagues.<sup>193</sup> A populist understanding of transparency would not allow officials to avoid their duty to be visible to the public by escaping into their private lives and identities because, as a California appellate court asserted, "[a]n informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance."<sup>194</sup> If an official can conduct public business out of the public's sight, and public business includes nearly any action that could lead to an official government act, then any enclosure and any space that the official occupies must be made

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upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body").

192. *Hough v. Stembridge*, 278 So. 2d 288, 289 (Fla. Dist. Ct. App. 1973); *see also* Fla. Op. Att'y Gen. 2000-08 (2000), <http://myfloridalegal.com/ago.nsf/Opinions/EDBA5F9E248932DA8525688000523870> (opining that the Sunshine Law "is generally applicable to any gathering where two or more members of a public board or commission discuss some matter on which foreseeable action will be taken by that board or commission," including a forum for all county fire commissioners where on some occasions more than one commissioner from a specific district may attend the same meeting). For an extended critique of this approach to Florida's law arguing that it is inconsistent with the statute's text and legislative history, *see* Seed, *supra* note 189. Other states take a similar approach. *See, e.g.,* VA. CODE ANN. § 2.2-3701 (2008) (defining *meeting* to include the "informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership"); *Mayor of El Dorado v. El Dorado Broad. Co.*, 544 S.W.2d 206, 207-08 (Ark. 1976) (holding that state Freedom of the Information Act applies to informal meetings of less than a quorum of members).

193. *See* SCHWING, *supra* note 183, § 5.74 (discussing how state open meeting laws consider the public or private character of the government's meeting place).

194. *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 263 Cal. App. 2d 41, 50 (Ct. App. 1968).

open to the public when necessary. Understood this way, the state can be everywhere, and the public must be able to view its officials everywhere across the state's territory and in any building where the public's business takes place. Taken to its logical end, however, this view would allow no space that an official occupies to be securely private—including his or her home (from where the official can make calls and send e-mails via private phone lines, computers, and e-mail accounts).<sup>195</sup> The fact that federal law and the vast majority of states refuse to extend their open meeting laws to this degree suggests that legislatures and courts have been hesitant to make the state thoroughly and constantly visible. Their unwillingness to adopt the populist approach suggests either a failure of will or a recognition that the state's visibility can and should be sacrificed to other interests, including the practical limits of transparency's enforcement and the private interests of public officials.

## 2. *Containing Documents*

Government agencies regularly possess in their facilities documents they did not create; conversely, records produced by the government frequently end up in the hands of individuals and institutions and are housed in buildings that are not themselves part of the government. Open government laws struggle to resolve the issue of whether an agency must disclose a record that it does not possess, and whether it should be required to release a record that it possesses but that originated with another part of the government. Do freedom of information statutes cover records that are not in government offices or on government property? Can they tame the tendency of documents to move across the government and into the file cabinets (and hard drives) of private individuals? Under the FOIA, the issue turns on whether a document is an "agency record," which the statute fails to define, and whether an agency has the duty to obtain and retain records, which the statute fails to specify.

The answer, according to the Supreme Court, is that to be subject to disclosure under the FOIA, a record must either be born governmental—it

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195. See *Goodson Todman Enter., Ltd. v. City of Kingston Common Council*, 550 N.Y.S.2d 157, 159 (App. Div. 1990) (holding that a meeting in a council member's home can be subject to open meeting law if it is planned and relates to government business); Stephen Schaeffer, Comment, *Sunshine in Cyberspace? Electronic Deliberation and the Reach of Open Meeting Laws*, 48 ST. LOUIS U. L.J. 755, 761–64 (2004) (discussing the application of open meetings laws to telephone and video conferences); Mark Thompson, Comment, *Opening Virtual Doors: Addressing Ohio's Open Meeting Law and the Use of Electronic Communication*, 34 U. DAYTON L. REV. 407, 418–21 (2009) (discussing courts' applications of open meeting laws in five states).

must have, as its provenance, a governmental pedigree—or be adopted by the government—that is, the government must willingly take possession of it.<sup>196</sup> This definition has a spatial dimension to it: the record must be produced within the government's domain, or later incorporated within it. Consider, for example, the case of Henry Kissinger's telephone notes.<sup>197</sup> Kissinger served as both National Security Advisor (from 1969 until 1975) and Secretary of State (between 1973 and 1977) under Presidents Nixon and Ford. Throughout his service, he regularly recorded his telephone conversations, and the resulting tapes were then transcribed and stored in documentary form in his personal files within the Department of State.<sup>198</sup> In October 1976, after obtaining a legal opinion from the Legal Adviser of the Department of State concluding that the transcribed notes constituted personal papers rather than agency records and were therefore his to keep after he left office, Secretary Kissinger arranged to remove the files to the private estate of Vice President Nelson Rockefeller.<sup>199</sup> By a later agreement, Kissinger deeded the notes to the Library of Congress with restrictions on public access to the materials prior to the death of the parties to the phone conversations.<sup>200</sup> When journalists and public interest groups subsequently filed requests to view the documents, the Department of State claimed that it no longer had possession of the files.<sup>201</sup>

The issue before the Court in *Kissinger v. Reporters Committee for Freedom of the Press*, as Justice Brennan highlighted in his dissent, was the extent to which the FOIA restrains an agency's authority to move documents—especially if a requester claims that the agency intended the documents' removal to make them inaccessible—and the effect that physical location has on their public access.<sup>202</sup> If the FOIA extends only to physical control by and within the state's facilities, and the law does not require an agency to disclose all of the records it considered in its decisionmaking process (no matter if the agency ever gained possession of them),<sup>203</sup> then a document's location outside of the state not only matters but is outcome

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196. See *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144–46 (1989). Note that this only speaks to the question of whether a record was improperly withheld, not to the question of whether it is an “agency record” subject to the FOIA. The latter issue is complicated by the organizational question of which entities are in fact subject to the FOIA, an issue discussed *supra* Part II.B.

197. See *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980).

198. *Id.* at 140.

199. *Id.* at 140–41.

200. *Id.* at 141–42.

201. *Id.* at 142–43. Some of the requests were filed before the files' removal. *Id.*

202. *Id.* at 159 (Brennan, J., concurring in part and dissenting in part).

203. See *Forsham v. Harris*, 445 U.S. 169, 188 (1980) (Brennan, J., dissenting).

determinative—a document not within the state’s control cannot be made available under the FOIA. A majority of the Supreme Court took this more limited approach to the issue in *Kissinger*, holding that a document that an agency does not possess has not been “withheld” under the FOIA.<sup>204</sup> If an agency does not possess a document, even if it has allowed the document to leave its possession, then its failure to retrieve it does not violate the law.<sup>205</sup> Because Secretary Kissinger’s telephone records were no longer housed within Department of State offices and under the agency’s control, the Department of State did not violate the FOIA by failing to release them.<sup>206</sup> To be an agency record, a document must be physically located within the state.<sup>207</sup>

The reverse situation creates what appears to be an odd result that further confounds the populist understanding of transparency. Just as documents created but not retained by an agency are no longer subject to the FOIA when they leave the agency’s control, so documents controlled by an agency that is subject to the FOIA but created by a public or private entity that is not subject to the FOIA are also not subject to the FOIA. Thus, in *Kissinger*, files that Kissinger created while he was a close advisor to the President (a role that does not fall within the FOIA’s ambit)<sup>208</sup> and before he became Secretary of State (when documents he created would fall within the FOIA) did not become Department of State records when they were moved to his new office.<sup>209</sup> Similarly, the record of a secret congressional committee hearing did not become an agency record because it was possessed by the CIA; rather, it remained within congressional control and was thus not subject to the FOIA, even if it was housed within the CIA’s facilities.<sup>210</sup> The D.C. Circuit’s current test for these types of

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204. *Kissinger*, 445 U.S. at 150–51.

205. Part of this limitation emanates from the FOIA’s limited reach. It does not require an agency to create or retain records; instead, the Federal Records Act, 44 U.S.C. §§ 2901–2910 (2006), and the Records Disposal Act, *id.* §§ 3301–3324, govern how records are managed and disposed of, and neither statute provides for a private right of action. The FOIA thus does not itself obligate an agency to retrieve a document that it allowed to leave its possession. *Kissinger*, 445 U.S. at 148–50.

206. *Kissinger*, 445 U.S. at 155.

207. A companion case to *Kissinger*, decided by the Court on the same day, came to a similar conclusion, holding that medical records produced by a private research organization under the aegis and with the funding of a federal agency are not subject to the FOIA because they were neither made nor received by a federal agency. *Forsham*, 445 U.S. at 186.

208. *See Kissinger*, 445 U.S. at 156.

209. *Id.* at 157.

210. *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978), *vacated in part on other grounds*, 607 F.2d 367 (D.C. Cir. 1979) (*per curiam*).

cases, a two-part standard to determine whether documents created either by or for Congress but in an agency's possession constitute agency records, inquires into whether Congress has in fact ceded control of the documents and whether the agency has gained over them full property rights, rather than simple possessory interests.<sup>211</sup>

*Kissinger's* result is the exact opposite of what an open government law that embraces the full implications of transparency would expect and demand.<sup>212</sup> A document located outside the state, *Kissinger* held, is not subject to the FOIA. But a document located within the state is *also* not necessarily subject to the FOIA. If the state created it or controls it, a populist understanding of transparency would argue the document ought to be made available to the public. The state's organizational and physical complexity should not keep it from being visible. The present state of the law appears to allow the government and its officials to move documents around its offices and territory in order to avoid disclosure.

#### D. *The Impossibility of Physical Exposure*

Geography and the built environment help define the state's reach and presence. The American state encompasses a huge territory, and in its branches and levels occupies a vast number of buildings. Insofar as the state and its administrative apparatus have solidified their position at the

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211. *Id.* at 347. *See, e.g.,* United We Stand Am., Inc. v. IRS, 359 F.3d 595 (D.C. Cir. 2004) (holding records created by IRS for the congressional Joint Committee on Taxation were agency records because, other than in its initial request, Congress failed to show sufficient intent to retain control over them); Paisley v. CIA, 712 F.2d 686, 695–96 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984) (*per curiam*) (holding records created by the CIA to aid a congressional investigation were agency records subject to the FOIA because Congress did not manifest sufficient intent to retain control over them); Holy Spirit Ass'n for the Unification of World Christianity v. CIA, 636 F.2d 838, 842–43 (D.C. Cir. 1980), *vacated in part on other grounds*, 455 U.S. 997 (1982) (*per curiam*) (holding that documents created by the CIA for Congress, which were sent to Congress and then returned to the CIA, constituted agency records subject to the FOIA because Congress failed to retain control over them).

212. *See, e.g.,* Feiser, *supra* note 153, at 58 (criticizing *Kissinger's* approach as “cramped” and arguing that “this approach would keep its records out of the public eye unless the FOIA agency actually possesses and uses the documents”); Samaha, *supra* note 5, at 971–72 (criticizing *Kissinger* as exemplifying one of the FOIA's main weaknesses: the ability of the government to avoid accountability to the public by moving or destroying documents); *The Supreme Court, 1979 Term—Freedom of Information Act: Threshold Definitional Barriers to Disclosure*, 94 HARV. L. REV. 232, 240 (1980) (characterizing *Kissinger's* limited reading of the FOIA as “unsatisfactory”); Marie Veronica O'Connell, Note, *A Control Test for Determining “Agency Record” Status Under the Freedom of Information Act*, 85 COLUM. L. REV. 611, 628–29 (1985) (attempting to read *Kissinger* broadly as part of a “control” theory that would make possession a non-determinative test for the FOIA's applicability).

core of an expansive and complex nation, their material scope and existence will continue to prove difficult to contain in a manner that will render them fully visible.

### CONCLUSION: THE PANOPTICIZED STATE

The metaphoric understanding of transparency, which defines the accessible, accountable government as one that can be seen, faces innumerable obstacles in the complex and dispersed American state. Technology can ameliorate but not remove such obstacles, notwithstanding constructive efforts to improve the release and usefulness of government data—and then to claim those improvements as technological fixes to a secretive, likely corrupt state.<sup>213</sup> Like the ongoing quest for legal and regulatory solutions to the problem of government opacity and unsatisfactory performance, the ongoing quest for technological fixes that make the state more accountable is itself symptomatic of the populist embrace of the visible state ideal. Information technology can make the state more visible, which will in turn force government officers to behave in ways that better comport with citizens' expectations. If we cannot see the physical state, and if we cannot thoroughly force the state to be seen through law, perhaps we can see a digital one—or at least its informational traces—on the Internet or through a spreadsheet.

These efforts call to mind another technological fix for a significant social problem that requires the surveillance of a set of dangerously wayward actors. In all of its guises, the transparency metaphor urges the construction of an inverted panoptic penal facility, one that puts the public—or some subset thereof—in the position of the guard and that casts government officials as the incarcerated. Jeremy Bentham's original design for his Panopticon arranged and illuminated cells so that the inmates would be constantly visible to prison guards located securely in a central tower. Prisoners could see the tower but could not see into it, and could constantly be seen, despite being confined to a cell from which they could not escape.<sup>214</sup> The prison's enclosure would illuminate them, removing the

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213. See, e.g., David Robinson et al., *Government Data and the Invisible Hand*, 11 YALE J.L. & TECH. 160, 160 (2009) (claiming that the government should release reusable, rather than processed, data, which would “embrace the potential of Internet-enabled government transparency”); Sunlight Foundation, *supra* note 26 (characterizing itself as using “cutting-edge technology and ideas to make government transparent and accountable . . . [by] focus[ing] on the digitization of government data and the creation of tools and Web sites to make that data easily accessible for all citizens”).

214. JEREMY BENTHAM, *Panopticon: Or, The Inspection-House, &c.*, in IV THE WORKS OF JEREMY BENTHAM 40, 44 (John Bowring ed., 1843). The best recent legal academic summaries and treatments of Bentham's Panopticon are Bernard E. Harcourt, *Reflecting on*

darkness that offered them protection while it captured them for the supervisor's eye. The Panopticon thus makes its subjects transparent to authority.

For the Panopticon's effect to reach its "[i]deal perfection," Bentham asserted, the subject should be unable to recognize when he is being watched, but should at all times "*conceive* himself to be so" scrutinized.<sup>215</sup> Constant and unending, the belief that one is being watched would prove self-regulating as it was internalized by the prisoner; it would thereby be less difficult and costly to impose, and would require fewer guards to administer.<sup>216</sup> The architecture of the Panopticon that creates the conditions of feeling under constant surveillance thereby shapes the prisoner and causes him to learn to shape himself, rendering through its physical design and organization a subject who considers himself to be the object of permanent surveillance. Such surveillance does not merely disincentivize resistance or thwart escape—it disciplines and organizes the behavior, thought, and desire of the surveilled. As Michel Foucault noted, Bentham brilliantly recognized that "[v]isibility is a trap."<sup>217</sup> Rather than an old-fashioned institution of power that banished certain undesirable activities and people—the criminal, the sick, the insane—the Panopticon could "carry the effects of power right to them" through "the calculation of openings, of filled and empty spaces, passages and transparencies."<sup>218</sup> It offers an architecture of "continuous observation made possible by technical arrangements."<sup>219</sup>

For Bentham, the panoptic model had clear implications for representative democracy. Throughout his political writings, Bentham emphasized the importance of allowing the public to view its political rulers. Publicity, he argued, would "constrain" the ruling assembly to perform its duty, allow it to secure the confidence of its public, and develop a more informed electorate.<sup>220</sup> Bentham imagined mechanisms to achieve a state that was constantly under scrutiny, particularly through the concept of the "Public Opinion Tribunal," a kind of societal committee or judiciary of the whole that would play a key role in a constitutional democracy.

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*the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 357–61 (1998); and Katyal, *supra* note 175, at 1130–32.

215. BENTHAM, *supra* note 214, at 40.

216. *Id.*

217. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 200 (Alan Sheridan trans., 1979).

218. *Id.* at 172.

219. SHOSHANA ZUBOFF, IN THE AGE OF THE SMART MACHINE 322 (1988).

220. JEREMY BENTHAM, POLITICAL TACTICS 29–34 (Michael James et al. eds., 1999).

Specifically, it would gather facts and evidence regarding the performance of public institutions; express approval or disapproval of the state, as well as reward or punish representatives and officials; and propose reforms and new institutional arrangements.<sup>221</sup> In this regard, his Tribunal, and his general understanding of publicity, imagined the public's check on government behavior as analogous to the Panopticon, in which the informed, collectively organized public "attempts to serve as the all-seeing eye, casting its critical reforming gaze over the full spectrum of governmental (indeed public) activity."<sup>222</sup> For Bentham, democracy's foundation was built on the panoptic principle of an ever-vigilant public managing a captive state and rulers.<sup>223</sup>

As with Bentham's Panopticon, the populist metaphorical conception of transparency views its objects—government institutions and officers, rather than incarcerated prisoners—as requiring discipline. Both long to provide an institutional solution to the problem they identify, one that can develop in their objects the self-discipline that will transform them into proper subjects: rehabilitated citizens for Bentham, a more responsive and responsible state for transparency advocates. Strong-form transparency thus would reverse the Panopticon, placing the people in the lookout and recasting the state as the object of surveillance. The sentiment is populist, but the institutional apparatus that would enact the sentiment is decidedly progressive: a solution to a significant social problem that works through a state institution intended to shape human behavior.

The fly in transparency's ointment is the same one that Bentham faced. As a practical matter, building a Panopticon proves difficult. Bentham could not persuade the various relevant authorities of his time—late eighteenth and early nineteenth century prison administrators, political leadership, and landowners—to allow him to build his model prison.<sup>224</sup> Instead, the Panopticon has come to stand as what Foucault calls a "program" rather than a material, historical fact: one of the "diverse realities articulated onto each other" that produces a series of wide-ranging effects throughout society; most importantly, these technologies "crystallize into institutions, they inform individual behavior, they act as grids for the

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221. See FREDERICK ROSEN, JEREMY BENTHAM AND REPRESENTATIVE DEMOCRACY 27–28 (1983).

222. *Id.* at 111; see also JANET SEMPLE, BENTHAM'S PRISON 321 (1993) ("Bentham's democracy is a structure full of light, as was the panopticon, but the light falls on those in authority.").

223. Alan McKinlay & Ken Starkey, *Managing Foucault: Foucault, Management and Organization Theory*, in FOUCAULT, MANAGEMENT AND ORGANIZATION THEORY 1, 3–4 (Alan McKinlay & Ken Starkey eds., 1998).

224. SEMPLE, *supra* note 222, at 192–281.

perception and evaluation of things.”<sup>225</sup> The Panopticon serves as a metaphor for the modern institution, one that seeks to discipline its subjects by forcing them to internalize external authority, to develop the discipline of the self. It also represents the madness and excess of modernity, the pernicious but essential means by which the state could develop as the apex of the modern, rational civilization. It is impossible and horrifying to imagine a world in which one is perpetually under threat of observation.<sup>226</sup> But it is also necessary as a metaphor to understand how the modern liberal state develops its subjects, and unsurprising therefore that one of the great liberal and utilitarian political philosophers—one whose writings on the role of publicity in a representative constitutional democracy remain filled with viable, relevant ideals—should have proposed it.

Viewing the boundless and endless desire to achieve a visible state in relation to the panopticonized state model leads to two related conclusions. First, because the state cannot be made wholly visible, short of dismantling it or imposing a maddening (and likely impossible to construct) panoptic apparatus, such a desire will lead only to cycles of frustration. The popular will to see the state will ride an asymptotic line that approaches—but never reaches—the perfect and perfectly accountable and responsive government. Second, the will to see the state is so much a part of American democratic, populist political culture that is skeptical of the state that it cannot itself be wished away.<sup>227</sup> Technocratic reform to provide incremental improvements to government performance—including but not limited to making government more open to the public—can neither ignore nor

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225. 3 MICHEL FOUCAULT, *ESSENTIAL WORKS: POWER* 232 (James D. Faubion ed., 2000).

226. It is unsurprising, therefore, that writers decrying public and private surveillance use the Panopticon as a metaphor for contemporary society. See, e.g., REG WHITAKER, *THE END OF PRIVACY* 32–46 (1999) (describing the Panopticon as a model for contemporary society). See generally Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 184–86 (2008) (noting the prevalence of the Panopticon in academic discussions of surveillance and privacy).

227. I am for this reason skeptical of Edward Rubin’s efforts to purge political concepts of their popular and (what he sees as therefore) unhelpful resonances with historical references to a long-vanished state and ideological misrecognitions of the current one by employing uninteresting, uninformative, and naïve heuristics. See RUBIN, *supra* note 50, at 16–17. As the legal realist Thurman Arnold argued regarding the conservative opposition to New Deal reform, which frequently expressed itself in legal formalist terms that attempted to thwart the administrative state, “[s]o long as our belief in rational moral government depends upon the law, it must continue to balance logically the contradictory ideals which that government must express.” THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 69 (5th prtg. 1948). In other words, incremental reform that appears to be a substitute for a new age of transparency must nevertheless present itself as the next important step toward the dawn of a full transparency that can never be achieved.

counteract populist demands for a fully visible state. Successful legislative, regulatory, and institutional interventions must recognize and respect the desire for a visible state while they also concede and grapple with the state's inevitable push towards opacity. In the struggle over transparency, the populist will and the technocratic will cannot be separated.