

The Opacity of Transparency

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ABSTRACT

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

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

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

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INTRODUCTION

By any commonsense estimation, governmental transparency, defined simply and broadly as a governing institution's openness to the gaze of others,¹ is clearly among the pantheon of great political virtues.² A fundamental attribute of democracy,³ a norm of human rights,⁴ a tool to promote political and economic prosperity and to curb corruption,⁵ and a means to enable effective relations between nation states,⁶ transparency appears to provide such a remarkable array of benefits that no right-thinking politician, administrator, policy wonk, or academic could be against it.⁷ But transparency is not merely a political norm; candidates, partisans, and activists utilize it as a rhetorical rallying cry and weapon to promise full-scale political and social redemption.⁸ Contentious political campaigns and popular political consciousness seethe with allegations that government officials engage in secret, corrupt

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

² For purposes of this Article, except where noted otherwise I use “transparency” to refer to the openness of the federal and state Executive Branch to the public. Openness is also an issue in other contexts, such as between branches of the government (and particularly between Congress and the President), between the judiciary and the public, and between corporations and their shareholders (as well as the public). While my discussion of transparency may be applicable in some respects to those other contexts, each raises many distinct theoretical and legal issues and all are outside this Article's scope. On the interbranch informational dispute, see, for example, William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781 (2004). On efforts to impose transparency norms on corporations for the general public good, see MARY GRAHAM, *DEMOCRACY BY DISCLOSURE: THE RISE OF TECHNOPOPULISM* (2000); Archon Fung et al., *The Political Economy of Transparency: What Makes Disclosure Policies Sustainable?*, John F. Kennedy School of Government Faculty Research Working Papers Series #RWP03-039, available at <http://ssrn.com/abstract=384922>; Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 618-24 (1999). On the value of transparency for the corporation itself and its shareholders, see DON TAPSCOTT & DAVID TICOLL, *THE NAKED CORPORATION* 62-93 (2003); *but see Get Naked*, *THE ECONOMIST* Oct. 18, 2003, at 66 (noting doubts as to whether absolute transparency would make a functional, better corporation). On the constitutional basis for public access to court proceedings, see Jonathan L. Hafetz, *The First Amendment and the Right of Access to Deportation Proceedings*, 40 CAL. W. L. REV. 265, 269-89 (2004).

³ See *infra* Part I.A.1.

⁴ See TOBY MENDEL, *FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY*, at iii-vii (2003), at <http://www.article19.org/docimages/1707.pdf> (last visited, May 15, 2004); Stephen Sedley, *Information as a Human Right*, in *FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION* 239 (Jack Beatson & Yvonne Cripps eds., 2000).

⁵ See Robert Martin and Estelle Feldman, *Access to Information in Developing Countries*, ch. 5 (Working Paper, Transparency International, 1998), at http://www.transparency.org/working_papers/martin-feldman/index.html (last visited, May 15, 2004);

⁶ See Alasdair Roberts, *A Partial Revolution: The Diplomatic Ethos and Transparency in Intergovernmental Organizations*, 64 PUB. ADMIN. REV. 408 (2004); Frederick M. Abbott, *NAFTA and the Legalization of World Politics: A Case Study*, 54 INT'L ORG 519, 529-31 (2000).

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

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

activities (if not full-scale conspiracies), and overflow with promises that sufficient organization, popular will, and correct leadership will finally provide citizens with the responsive, trustworthy, and, above all, *knowable* government they deserve.

Nevertheless, transparency's status as a legal obligation for government entities in the U.S. and as an individual right for American citizens is remarkably vague.⁹ And notwithstanding occasional periods of openness, government seems eternally resistant to disclosure.¹⁰ Current political developments—specifically, the Bush administration's efforts to control the flow of information from the Executive Branch¹¹ and post-September 11 concerns that government

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

Rather than a federal constitutional mandate, the vast body of federal open government laws are statutory and provide, with enumerated exceptions, disclosure of federal records and open meetings. See, e.g., 5 U.S.C. § 552 (Freedom of Information Act, requiring, with exceptions, that each federal agency shall make information available to the public upon request); 5 U.S.C. § 552b (Government in the Sunshine Act, requiring, with exceptions, that every meeting of an agency shall be open to public observation). Some states have adopted constitutional provisions granting a right to access, while all have statutes that perform analogous functions as the federal FOIA and Government in the Sunshine Acts. See, e.g., Cal. Const. Art. I, 3(b)(1) (granting "the right of access to information concerning the conduct of the people's business"); Fla. Const. Art. I, 24 (granting "the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf"); Note, Laura Schenck, *Freedom of Information Statutes: The Unfulfilled Legacy*, 8 FED. COMM. L.J. 371, 772-73 n.7 (1996) (listing state freedom of information statutes).

¹⁰ For accounts of the federal government's resistance to disclosure, see Thomas Blanton, *Beyond the Balancing Test: National Security and Open Government in the United States*, in NATIONAL SECURITY AND OPEN GOVERNMENT: STRIKING THE RIGHT BALANCE 33, 34-54 (Campbell Public Affairs Institute, Maxwell School of Citizenship and Public Affairs, Syracuse University, 2003); Christina E. Wells, "National Security" Information and the Freedom of Information Act, 56 ADMIN. L. REV. 1195, 1201 (2004). The best evidence of generalized frustration at the state level is the existence of the National Freedom of Information Coalition, an organized network of member groups around the countries that advocate for stronger open government laws and to force state and local agency compliance with them. See National Freedom of Information Coalition, *Our Mission*, available at <http://www.nfoic.org/Mission.html>.

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

information disclosure might breach homeland security¹²—portend a new period of “retrenchment” (one begun during the latter years of the Clinton Administration) in the oft-delayed march towards transparency’s promise.¹³ The Bush Administration may occasionally express its commitment to openness,¹⁴ as do most courts when they review challenges to government agencies’ refusals to disclose information.¹⁵ But when executive officers and

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

Following the September 11 attacks, the Bush administration has withdrawn from public access information about certain immigration cases and publications that had previously been available from federal government websites, and has sought to tighten access to information relating to weapons of mass destruction and “other information that could be misused to harm the security of our nation or threaten public safety.” Memorandum from Andrew Card, Assistant to the President and Chief of Staff, to Heads of Executive Departments and Agencies (Mar. 19, 2002), available at <http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm>; FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, *LAWS AND REGULATIONS GOVERNING THE PROTECTION OF SENSITIVE BUT UNCLASSIFIED INFORMATION* (2004), available at <http://www.fas.org/sgp/library/sbu.pdf>; Patrice McDermott, *Withhold and Control: Information in the Bush Administration*, 12 *KAN. J. L. & PUB. POL’Y* 671, 672-74 (2003). During the first George W. Bush Administration, the number of documents classified has increased considerably than during the Clinton Administration, while the number of documents that have been declassified has decreased in a corresponding fashion. See Gregg Sangillo, *Incarceration of Information?* *NAT’L J.* Oct. 3, 2004. Congress has also expanded executive agency powers to withhold information from the public. Critics allege that the Critical Information Infrastructure Act, passed as part of the Homeland Security Act, will inhibit disclosure of information about the risks and safety hazards posed by utilities, gas pipeline operations, and similar industrial infrastructure that had previously been available under state and federal law. See Homeland Security Act of 2002 § 214, 6 U.S.C. § 133; John Gibeau, *The Paperwork War on Terrorism*, *ABA J.*, Oct. 2003, 63, 67-68; Brett Stohs, *Protecting the Homeland by Exemption: Why the Critical Information Infrastructure Information Act of 2002 Will Degrade the Freedom of Information Act*, 2002 *DUKE L. & TECH. REV.* 0018, available at <http://www.law.duke.edu/journals/dltr/articles/2002dltr0018.html>.

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

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

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

agencies routinely deny access to the government's inner workings on the grounds that some exception or other privilege overrides a statutory disclosure requirement, open government seems more like a distant, deferred ideal than an actually existing practice.¹⁶

This regular departure from a principle that is so universally embraced and so apparently magical in its presumed effects seems anomalous and exasperating. In fact, *all* parties to the uncertain reach of transparency find the legal obligations and enforcement mechanisms of open government laws to be immensely frustrating. In the federal and state systems, those who request information under the various freedom of information and "sunshine" statutes regularly face delays and blanket denials.¹⁷ The result of one recent public poll sponsored by open government advocates found widespread concern that government secrecy is pervasive and that the public has too little access to public records and meetings.¹⁸ At the same time, agencies engaged in law enforcement, defense, and national security consider open government laws at best a burden and at worst a threat to their work.¹⁹ Moreover, the economic and administrative costs of complying with these laws is significantly greater than zero, and these costs may adversely affect the ability of all federal, state, and local agencies to make effective decisions in a rational, deliberative, and efficient manner.²⁰ One could dismiss these competing concerns as complaints about the unavoidable costs and inefficiencies of democracy and the inevitable limits required to maintain a secure nation and functional government. But, to return to the widespread recognition of its status as a preeminent political norm, if transparency is so magical and beneficial, why do we settle for less than its perfection? Why must we worry about its costs?

¹⁶ With respect to matters of national security and foreign policy, for example, most challenges to agency denials to disclose documents end at the summary judgment stage, when courts typically defer to agency affidavits stating the applicability of FOIA exemption (b)(1). See 1 JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 11:11, at 524 (3d ed. 2000) (discussing 5 U.S.C. § 552(b)(1)). And as a political matter, disappointment among disclosure advocates about the disjunction between the public statements of presidents in favor of openness and their actual efforts to keep information secret dates back to the earliest years of FOIA. See Elias Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 41 YALE L.J. 741, 746 (1975) (describing the contradictory words and actions of Presidents Johnson and Nixon, the first Executives following FOIA's enactment).

¹⁷ See REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS, HOMEFRONT CONFIDENTIAL: HOW THE WAR ON TERRORISM AFFECTS ACCESS TO INFORMATION AND THE PUBLIC'S RIGHT TO KNOW 60-77 (5th ed., 2004) (describing the increasing resistance of federal agencies to respond to FOIA requests following September 11, 2001); Michele Bush Kimball, *Law Enforcement Records Custodians' Decision-Making Behaviors in Response to Florida's Public Records Law*, 8 COMM. L. & POL'Y 313, 314-16 (2003) (describing widespread noncompliance by state and local government agencies to state disclosure laws); The Freedom of Information Center at the Missouri School of Journalism, *Audits and Surveys of State Freedom of Information Laws*, available at <http://foi.missouri.edu/openrecseries/index.html> (Feb. 20, 2005) (summarizing audits of state and local government responses to requests made under state freedom of information laws that show variable, but largely imperfect, compliance).

¹⁸ See Andy Alford, *It's the Law: Texans Can't Be Kept in the Dark*, AUSTIN AM.-STATESMAN, March 13, 2005, at A1.

¹⁹ See, e.g., *Center for Nat'l Sec. Stud. v. DOJ*, 331 F.3d 918, 922-23 (D.C. Cir. 2003), *cert. denied* 540 U.S. 1104 (2004) (describing affidavits filed by the Justice Department and FBI officials noting asserting that disclosure of information on identities of detainees held following September 11 would harm ongoing law enforcement efforts and national security).

²⁰ See *infra* Part I.B.2.

The problem posed by these questions, and the frustrations with open government laws that the questions represent, originate in the concept of “transparency” itself. As the core of a normative and instrumentalist project to achieve open government, the concept fails to consider the tensions it conceals. It assumes too much of the state, of government information, and of the public, and as a result fails to produce or helpfully inform an effective, mutually acceptable level of administrative openness. The easy embrace of transparency as a basis for normative and instrumental ends evades more difficult questions: When is transparency most important as an administrative norm? To what extent should an agency be held to that norm? These challenging but necessary questions typically lead transparency proponents and open government laws to concede a set of exceptions to disclosure that are just as broad and, ironically, just as opaque as the transparency norms themselves. Thus, where disclosure requirements threaten to reveal information regarding national security, national defense, and law enforcement investigations, the positive norms of transparency must give way to state claims for the need to hoard information for the public safety and good. These exceptions in turn unravel the ideal of transparency by vesting broad discretion about whether and how much to disclose in the very state actors that have claimed the exceptions in the first place.²¹

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

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

²¹ See SISSELA BOK, SECRETS 115 (1983).

This Article seeks to begin asking the questions above by rethinking transparency as a concept. It begins with a survey of the literature on transparency’s meaning as a component of political theory, law, and policy. Part I summarizes the arguments in favor of and against strong forms of transparency imposed on government entities, and describes the conceptions of transparency’s necessity and limits that are built into democratic theory. I characterize the ground shared by these arguments as comprising a “transparency theory” that provides an underlying justification and framework for open government laws. Part II explains transparency theory and the balance it attempts to strike between the thrust of disclosure requirements and the parry of governmental privilege claims. Part III critiques that balance by identifying, explicating, and demystifying the simplistic model of linear communication that itself underlies contemporary transparency theory. It argues that transparency theory fails to comprehend the complexities of bureaucracy, communication, and the public, and that, as a result, disclosure laws exclusively focus on the processes of information production and the types of information produced. Part IV suggests an alternative approach to open government laws that would allow a more flexible, sensitive means to evaluate the costs and benefits of information disclosure. It also proposes institutional alternatives to the current default regime in open government laws, which relies on weak judicial enforcement of disclosure mandates. Finally, I offer substantive suggestions that would improve efforts to establish a more accountable state and informed public.

I. “TRANSPARENCY”

The arguments in favor of transparency seem fairly obvious and commonsensical, at least in part because an informed citizenry and an open, accessible government are essential elements of liberal democratic theory and more consistent with modern Western political values than the alternative of secret government and an ignorant public.²² As a general matter, proponents make two claims on behalf of transparency: first, a government that is more transparent is therefore more democratic; and, second, a government that is more transparent will operate in a more effective and efficient manner, and will thereby better serve its citizens while dealing more fairly and peaceably with other nations. In this Part, I first summarize these sets of claims, and then present some of the most trenchant criticisms of them. Critics argue that strong forms of transparency requirements are neither essential nor beneficial to a democratic republic, which in its constitutional structure can correct any governmental abuses—either internally through checks and balances or externally through elections—without the dangers and inefficiencies that excessive openness creates.

A. Transparency’s Benefits

1. *Democratic Benefits*

Contemporary transparency advocates typically draw connections between their efforts and the beginnings of modern liberal democratic theory in order to make the argument that open government is an essential element of a functional liberal democracy. James Madison’s statement in an 1821 letter that “[a] popular Government without popular information, or the

²² See EDWARD SHILS, *THE TORMENT OF SECRECY* 23-24 (1956).

means of acquiring it, is but a prologue to a Farce or a Tragedy; or perhaps both,”²³ serves as the quote most often used by authors to demonstrate the foundational nature of transparency in modern democratic theory and in the American constitutional scheme.²⁴ But one can find similar, if not quite as pithy and compelling, sentiments in the classical liberalism of Locke,²⁵ Mill,²⁶ and Rousseau,²⁷ in both Benthamite utilitarian philosophy²⁸ and Kantian moral philosophy,²⁹ as well as in the statements of other framers of the American constitution³⁰—even if the framers’ own deliberations over the constitution were rather less than fully transparent.³¹ Bentham, for example, argued that publicity enables closer relations between the state and its public by securing the confidence of the governed in the legislature, by facilitating communication between the state and the public, and by creating a more informed electorate.³² If fully knowledgeable of the workings of government, the public can play its proper roles as

²³ Letter from James Madison to W.T. Barry, Aug. 4, 1822, THE COMPLETE MADISON 337, 337 (Saul Padover, ed., 1953) (“A people who mean to be their own governors must arm themselves with the power that knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both.”).

²⁴ A recent Westlaw search for the quotation in the “Journals and Law Reviews” database found 201 full quotations, almost entirely within articles asserting the need for open government. See, e.g., Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 CORNELL L. REV. 651 (2003) (using quote in opening sentence to support argument that presidential papers should be seen as inherently public property); Senator Paul Wellstone, *Growing Media Consolidation Must Be Examined to Preserve Our Democracy*, 52 FED. COMM. L.J. 551, 551-52 (2000) (using quote in second paragraph of brief article warning of anti-democratic possibilities of media consolidation). Such use extends backwards to criticisms of secrecy in the Reagan and Nixon eras. See STEVEN L. KATZ, *GOVERNMENT SECRECY: DECISIONS WITHOUT DEMOCRACY* 2 (1987); MORTON H. HALPERIN & DANIEL N. HOFFMAN, *TOP SECRET: NATIONAL SECURITY AND THE RIGHT TO KNOW* 106 (1977).

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

²⁵ See AJUME H. WINGO, *VEIL POLITICS IN LIBERAL DEMOCRATIC STATES* 16-18 (2003) (discussing the importance of transparency in Locke’s *First Treatise of Government*).

²⁶ See JOHN STUART MILL, *Considerations of Representative Democracy*, in UTILITARIANISM, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 262 (H.B. Action ed., 1972) (1861).

²⁷ See JEAN JACQUES ROUSSEAU, *Dedication to the Republic of Geneva*, in DISCOURSE ON THE ORIGIN OF INEQUALITY 32-33 (G.D.H. Cole trans., 1988).

²⁸ See JEREMY BENTHAM, *POLITICAL TACTICS* 29-44 (Michael James et al. eds., 1999).

²⁹ See Immanuel Kant, *Eternal Peace*, in THE PHILOSOPHY OF KANT 470 (Carl J. Friedrich ed., 1949).

³⁰ See Morris D. Forkosch, *Freedom of Information in the United States*, 20 DEPAUL L. REV. 1, 38-46 (1972); David Mitchell Ivester, Note, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109, 120-34 (1977). Nevertheless, the framers neither intended nor considered the First Amendment to prohibit government secrecy or to create a constitutional right to information access. See Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 933 (1992); Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 10 (1957).

³¹ See J.R. Poole, *Introduction*, in THE FEDERALIST AND ANTIFEDERALIST PAPERS 18 (J.R. Poole ed., 1987); see also Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 410-12 (2000) (arguing that the closed constitutional convention in the American colonies provided distinct advantages for the constitutional framing).

³² See BENTHAM, *supra* note 28, at 29-34.

enlightened tribunal and collective decisionmakers whose “national intelligence,” trust, and attention lend “confidence and security” to “open and free policy.”³³

Following these principles, contemporary political theorists place the publicity of government laws and actions at the core of democracy because it enables both the rational choice of the individual citizen and the full flowering of informed public debate by the collective. Liberal philosophers who assume a contractual relationship between government and its citizens presume that openness enables individuals to grant their informed consent to be governed. The Rawlsian original position, for example, identifies publicity as a necessary condition for the creation of a just society because it allows individuals to choose, in a rational and knowledgeable manner, the principles for a society with which they would agree to associate.³⁴ Indeed, formal notions of the rule of law, whether they emphasize a Rawlsian just state or a Hayekian minimalist one,³⁵ require self-enacting, publicly accessible, comprehensible legislation that limits and confines all exercise of public authority, and that facilitates the private ordering of individual behavior as a result.³⁶ Only to the extent that these laws gain the consent of the governed—which itself can only be freely given if the laws and their enforcement are public—will the political and administrative authorities that enact and enforce these laws be legitimate.³⁷ Proponents of deliberative democracy share the contractarians’ commitment to publicity, asserting that transparent reasoning and decisionmaking by a representative body enable public discussion and the broadening of citizens’ and officials’ moral and political perspectives.³⁸ A deliberative understanding of the publicity principle requires that government give public justifications for its policies,³⁹ and promote rational, critical public debate and unrestricted communication in order to promote a functional, democratic public sphere.⁴⁰ In short, liberal democratic theory requires the state to give an account of itself to its public and to justify its actions to the individual and community.⁴¹

³³ See BENTHAM, *supra* note 28, at 29-34.

³⁴ See JOHN RAWLS, A THEORY OF JUSTICE 16, 454 (1971).

³⁵ See FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 74-75 (1944); RAWLS, *supra* note 34, at 238. William Sage has connected transparency as a concept with libertarian politics, arguing that transparency rhetoric operates as part of a “resurgent rhetoric of individualism and self-reliance in American politics, reflecting diminished expectations of government and heightened skepticism regarding public programs and public institutions,” despite widespread public distrust of the market and of concentrations of corporate power. See William M. Sage, *Regulating Through Information: Disclosure and American Health Care*, 99 COLUM. L. REV. 1701, 1707 (1999).

³⁶ See generally Robert G. Vaughn, *Introduction*, in FREEDOM OF INFORMATION at xv, xv-xvi (ed. Robert G. Vaughn, 2000) (discussing how approaches to administrative law that privilege the formal rule of law understand the need for open government).

³⁷ In this sense, the argument for transparency resembles arguments in favor of administrative reform that invoke a strict conception of the rule of law. See generally Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WISC. L. REV. 385, 397-99 (summarizing rule of law ideal of the administrative process).

³⁸ See AMY GUTTMAN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 100-01; Joshua Cohen, *Democracy and Liberty*, in DELIBERATIVE DEMOCRACY 185, 193-94 (Jon Elster ed., 1998).

³⁹ GUTTMAN & THOMPSON, *supra* note 38, at 101.

⁴⁰ JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE 208-09 (trans. Thomas Burger, 1989).

⁴¹ See JAMES G. MARCH & JOHAN P. OLSEN, DEMOCRATIC GOVERNANCE 146-48 (1995).

Legislative and judicial efforts to curb government secrecy and protect informed individual choice, public debate, and state self-justification harness this liberal democratic conception of transparency's benefits. Consider, for example, the normative presumptions upon which Congress relied in passing the original Freedom of Information Act ("FOIA") in 1966. The House of Representatives' Report to the original legislation rested its conclusion about the necessity of a broader, more exacting public access law on the fact that "[a] democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies."⁴² Congress presumed that requiring government to make its information available to the public would in turn improve the quality of voter decisionmaking and, as a result, the quality of governance as representatives respond to a more "intelligent" electorate. Similar statements regarding the broad democratic basis for open government laws accompanied passage of the two most important expansions of FOIA, those passed in response to Watergate in 1974⁴³ and the "Electronic FOIA" amendments of 1996.⁴⁴

Prevailing strains of liberal democratic political theory and open government legislation thus share the assumptions that the publicity of open government produces an informed and interested public, and, by implication, that secrecy caused by opaque or closed government produces suspicious and/or ignorant masses. Openness is a necessary condition of popular democratic power, a predicate for effective representative government, and an indispensable part of the everyday life of the free individual and of the wider demos. Ultimately, transparency emerges within modern political theory and legislation as constitutive of the public and of the public sphere itself, creating legitimate government and then legitimating the actions of the government that it creates by enabling informed individual choice and collective, democratic decisionmaking.

2. Positive Consequences

Transparency proponents also cite instrumental reasons for imposing disclosure requirements on government.⁴⁵ These consequentialist arguments similarly trace back to the

⁴² H.R. Rep. No. 1497, 89th Cong., 2nd Sess. 1966, *reprinted in* 1966 U.S.C.C.A.N. 2418, 2428. The House and Senate Committee Reports differ in historically important ways because of different sets of political pressures placed on them during the time of the bill's drafting and passage. See Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHICAGO L. REV. 761, 809-11 (1967); Note, *The Freedom of Information Act: Access to Law*, 36 FORDHAM L. REV. 765, 767 (1968). I ignore these differences because my focus is instead on the larger conceptual presumptions that the reports share concerning the need and likely effects of transparency.

⁴³ Pub. L. No. 93-502, 88 Stat. 1561 (codified as amended at 5 U.S.C. § 552 (1994)).

⁴⁴ Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (codified at 5 U.S.C. § 552 (Supp. II 1996)). For a description of how these amendments changed agency obligations to make information available electronic and reduce delays in responding to FOIA requests, see Mark H. Grunewald, *E-FOIA and the "Mother of All Complaints": Information Delivery and Delay Reduction*, 50 ADMIN. L. REV. 345 (1998).

⁴⁵ In this respect, the argument for transparency resembles arguments in favor of reforming administrative agencies to enable them better to achieve instrumental goals. See generally Sargentich, *supra* note 37, at 410-15 (describing "public purposes," or instrumentalist, ideal of administrative process).

beginnings of modern liberal democratic theory.⁴⁶ The most significant consequences flow from the public's increased ability to monitor government activity and hold officials, particularly incompetent and corrupt ones, accountable for their actions.⁴⁷ Additional information also enables individuals to make better decisions in their private lives and in their engagement in the market, resulting, for example, in changed consumer and industry behavior in fields as diverse as health and the environment.⁴⁸ But transparency also has more subtle, though equally beneficial, consequences. It enables the free flow of information among public agencies and private individuals, allowing input, review, and criticism of government action, and thereby increases the quality of governance.⁴⁹ When individual agencies hoard information, they inhibit the ability of entities working in the same or related areas of operation to provide competing or collaborative work.⁵⁰ For this reason, the late Senator Daniel Patrick Moynihan argued, military and intelligence agencies failed to recognize growing evidence of the failing Soviet state, leading to massive but unnecessary Cold War military expenditures.⁵¹ Similarly and more recently, the 9/11 Commission found that the failure of law enforcement and intelligence agencies to share information and communicate fully with the President led the security apparatus of the federal government to ignore evidence that may have foiled the terrorist attacks of September 11.⁵² Military analysts have also argued that the highly structured classification apparatus, which depends upon formal definitions of classified information, formal procedures for giving clearance to individuals to view classified information, and technical and operational procedures for protecting classified information, conflicts with efforts to modernize military operations and intelligence analysis.⁵³

⁴⁶ See, e.g., JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 34 (Gateway Editions, 1962) (asserting that publicity is a constituent element of representative democracy by allowing citizens to check the bad behavior and decisions of their leaders and to encourage the good).

⁴⁷ See *Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 928 (D.C. Cir. 1982) (Skelley Wright, J.) (explaining that Congress's intent in enacting the Sunshine Act requiring open agency meetings was to "enhance citizen confidence in government, encourage higher quality work by government officials, stimulate well-informed public debate about government programs and policies, and promote cooperation between citizens and government. In short, it sought to make government more fully accountable to the people."); MARCH & OLSON, *supra* note 41, at 162-65; SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT 162-65 (1999); Joseph E. Stiglitz, *On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life*, Oxford Amnesty Lecture, Oxford, U.K. Jan. 27, 1999, at 13-15.

⁴⁸ See Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. U. L. REV. 653, 662-65 (1993).

⁴⁹ SECRETY: REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRETY, 103rd Cong., Report Pursuant to Public Law, S. DOC. NO. 105-2, at xxi (Comm. Print 1997) [*hereinafter* MOYNIHAN COMMISSION REPORT].

⁵⁰ See DANIEL PATRICK MOYNIHAN, SECRETY 73, 77-79, 142-43, 214 (1998).

⁵¹ See *id.* at 154-201, 221-22.

⁵² See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 357-58 (W.W. Norton ed., 2004).

⁵³ See Bruce Berkowitz, *Secrecy and Security*, HOOVER DIGEST 11, available at <http://www.hooverdigest.org/011/berkowitz.html> (May 10, 2004); cf. Beth M. Kasper, *The End of Secrecy? Military Competitiveness in the Age of Transparency*, Occasional Paper no. 23, Center for Strategy and Technology, Air War College 38-39 (2001) (arguing that the U.S. military must speed its decision-making processes to account for both the increase in its own information gathering capabilities and the transparency of its operations to others).

An open government offers numerous additional advantages to a democratic nation, especially in its relations to the wider global community.⁵⁴ Transparency enables stronger, more peaceful international relations by allowing for more accurate verification of nations' compliance with international agreements and standards; national markets gain greater access to foreign investment through credible government oversight and more efficient regulation of market activity; and global environmental agreements are more effective and more effectively enforced through accessible information.⁵⁵ With respect to the increasingly international, cooperative scientific community, government efforts to prevent cross-border sharing of scientific information reduces scientists' autonomy from political and administrative forces and ultimately impedes their independent advancement of scientific knowledge.⁵⁶

The empirical, consequentialist claim for transparency views secrecy's adverse effects on efficient and effective government as not only separate from but, for some, equal to normative claims on behalf of liberal democratic values.⁵⁷ But these two propositions typically run together, on the assumption that an open democratic regime that enables informed individual choice not only provides means for citizens to monitor and to some extent participate in government decisions, but also enables an open society that encourages productive public and private investment, as well as good relationships with other nations.⁵⁸ Ultimately, for its proponents, transparency produces an informed public and a responsive government, and, as a result, a functional society.

B. Transparency's Limits

But governmental transparency cannot be complete. Bentham noted this,⁵⁹ as do not only deliberative democrats (who have a particular interest in protecting the deliberation process from

⁵⁴ Numerous multinational organizations and NGOs have focused on the larger global benefits to open government. These include the OECD and UNESCO, *see Information, Consultation and Public Participation in Policy-making: Building Open Government in OECD Member Countries*, in ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OPEN GOVERNMENT: FOSTERING DIALOGUE WITH CIVIL SOCIETY 7, 11, 15 (2003), and Transparency International and the Open Society Institute, *see Transparency International*, available at <http://www.transparency.org>; RIGA DECLARATION: TRANSPARENCY IN LOCAL GOVERNMENT IN EASTERN EUROPE (Local Government & Public Service Reform Initiative, 2000), available at <http://lgi.osi.hu/publications/2000/23/RD.PDF>

⁵⁵ See Ann Florini, *The End of Secrecy*, FOREIGN POLICY, Summer 1998.

⁵⁶ See SHILS, *supra* note 22, at 160-92; *Secrecy and Knowledge Production*, Cornell University Peace Studies Program Occasional Paper #23 (Judith Reppy ed., 1999), available at http://www.einaudi.cornell.edu/PeaceProgram/publications/occasional_papers/occasional-paper23.pdf; Benjamin S. DuVal, Jr., *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579, 606 (1986).

⁵⁷ Moynihan and Richard Gid Powers, who contributed an extended introduction to Moynihan's monograph, largely reject normative concerns about disclosure as a necessary and direct good for democracy, in part because they have less confidence than many transparency advocates in the inherent possibilities of a participatory, informed public, and in part because they fear the political paranoia of the margins. See MOYNIHAN, *supra* note 50, at 219-21; Richard Gid Powers, *Introduction*, in *id.* at 1, 17, 42-48.

⁵⁸ See, e.g., Stiglitz, *supra* note 47, at 26-27 (associating the instrumental and intrinsic benefits of transparent democracy).

⁵⁹ See BENTHAM, *supra* note 28, at 39 (enumerating instances when publicity should be suspended).

intrusive publicity),⁶⁰ but transparency advocates themselves.⁶¹ Government cannot operate in a manner that provides complete access to all proceedings and documents. Complete transparency not only would create prohibitive logistical problems and expenditures (given the number of documents and meetings that would need to be made available), but, more important, it would impede many of government's most important operations and infringe on the privacy interests of individuals who give personal information to the government.⁶² Thus, skeptics of a strong form of transparency complain about the potential excesses of disclosure requirements while they question both the extent of the benefits that such requirements offer and the notion that absolute government openness is ideal.⁶³ And if citizens are not necessarily interested in or capable of being informed by full disclosure of government operations,⁶⁴ and if the empirical claims about transparency's positive consequences remain unproven,⁶⁵ then mandated disclosure may have minimal positive consequences and no democratic value at all. Strong arguments in favor of transparency, in other words, face significant challenge from within democratic theory.

1. Transparency's Constitutional Threat

Transparency advocates work from the assumptions that a disclosure deficit naturally results from a constitutional system that lacks explicit commitments to openness, that this deficit represents a constitutional failing and a threat to democracy, and that some statutory or constitutional legal intervention is necessary to curb that threat and correct that failing. To question these assumptions, as then-Professor Antonin Scalia did in an important 1982 article, is to challenge the notion that an apparent lack of explicit disclosure requirements represents a threat at all. For Scalia, the tri-partite system of government created by the Constitution provides sufficient disclosure of government information. The Constitution empowers Congress, within limits, to check Executive discretion and inquire into the President's actions, while every election allows voters to inquire into and reject the political branches' decisions. Because institutionalized checks and balances of a constitutional representative democracy lead to a sufficient degree of government transparency, Scalia argued, the harms caused by any additional disclosure requirements overshadow whatever benefits these additional requirements might claim to offer.⁶⁶

⁶⁰ See, e.g., GUTTMAN & THOMPSON, *supra* note 38, at 103-26 (evaluating various possible exceptions to the norm of publicity).

⁶¹ See, e.g., Stiglitz, *supra* note 47, at 18-25 (discussing legitimate, limited exceptions to transparency).

⁶² See BOK, *supra* note 21, at 175-76; Robert L. Saloschin, *The Department of Justice and the Explosion of Freedom of Information Act Litigation*, 52 ADMIN. L. REV. 1401 (2000).

⁶³ See Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, March/April 1982, at 14, 15.

⁶⁴ See DANIEL YANKOLOVITCH, THE MAGIC OF DIALOGUE 24 (1999); *infra* Part III.C.

⁶⁵ See Neal D. Finkelstein, *Introduction: Transparency in Public Policy*, in TRANSPARENCY IN PUBLIC POLICY 1, 1 (Neal D. Finkelstein ed., 2000) (questioning whether consequentialist claims have ever been proven, and asserting that they are likely unprovable, given the difficulty in testing whether any given policy is "transparent" and the extent to which such transparency has a causal effect on a subsequent government decision or public behavior).

⁶⁶ Scalia, *supra* note 63, at 15. For Scalia, FOIA and similar efforts to force open government are an historic aberration, products of "the obsession that gave them birth—that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and its surrogate, the press." *Id.* at 19. This obsession, he argues, is not merely romantic but empirically incorrect; instead, disclosure of government corruption and overreaching (including the Watergate break-in and examples of illegal CIA and FBI actions against American citizens) occurred

The most significant of such harms, at least at the level of creating systemic political danger, arises from Congress imposing, and the Judiciary enforcing, unconstitutional duties and demands on the Executive Branch through statutory disclosure requirements. Transparency skeptics' concerns about a vulnerable constitution represents the dark side of the theory that a strong, equipoised constitutional system produces sufficient information; it bubbles under common law constitutional doctrines that concern efforts by the Executive to avoid information disclosure. Fears that transparency will threaten the constitution, for example, fuels the core logic behind the amorphous concept of executive privilege,⁶⁷ the right of the President (and, perhaps, presidential advisers⁶⁸) to resist disclosure of information.⁶⁹ The Court in *United States v. Nixon*,⁷⁰ reviewing President Nixon's claims of executive privilege as a defense against the release of documents and tapes to the Special Prosecutor investigating the Watergate break-in and its cover-up, identified the constitutional nature of the confidentiality of presidential communications in the executive branch's "supremacy . . . within its own assigned area of constitutional duties."⁷¹ To threaten disclosure of certain types of information, then, imperils not only the President's autonomy, it also upsets the careful balance created by the separate autonomies of American constitutional government. Justice Harlan, in his dissent in the Pentagon Papers case, provided the strongest judicial statement of this argument. The Court's refusal to grant an injunction that would restrain the press from publishing materials whose disclosure the President claimed would harm military operations, Harlan argued, established new and troubling judicial authority to review presidential claims of the threats disclosures would cause, and thereby increased the Judiciary's power at the expense of the Executive.⁷²

Concerns regarding transparency's adverse effects to a vulnerable constitutional structure arise even outside the heady realms of national security and presidential invocations of executive privilege. Consider, for example, the heretofore unsuccessful constitutional challenges to the Federal Advisory Committee Act ("FACA").⁷³ Enacted in the same post-Watergate era as FOIA

because of the internal dynamics of the American constitutional system. This assertion is largely false; although none of the instances of disclosure he mentions were initially made public through the FOIA, they were the products of investigative journalism, political activism, and agency error in releasing classified or otherwise secret information rather than the result of any natural "checks and balances" of internal government structures. See KATHRYN S. OLMSTED, CHALLENGING THE SECRET GOVERNMENT: THE POST-WATERGATE INVESTIGATIONS OF THE CIA AND FBI 11-39 (1996). These disclosures resulted from intervention into and disruption of antidemocratic acts of governmental secrecy that sought to hide information about the progress of the war in Southeast Asia and about potentially illegal acts taken by those within the Executive Branch or with ties to the President.

⁶⁷ See Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1188 (1999) ("[T]here are as many versions of executive privilege as there are proponents and . . . each version of executive privilege seems to approximate exactly what the particular [proponent] deems appropriate and no more.").

⁶⁸ See *In re Sealed Case*, 121 F.3d 729, 549-50 (D.C. Cir. 1997) (holding that executive privilege may extend to the communications of presidential advisers even when the President takes no part in the communications).

⁶⁹ See Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1069 (1999).

⁷⁰ 418 U.S. 683 (1974).

⁷¹ *Id.* at 705-06.

⁷² *New York Times v. United States*, 403 U.S. 713, 756-57 (1971) (Harlan, J., dissenting).

⁷³ Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. App. II SS 1-15).

and the Government in the Sunshine Act,⁷⁴ FACA requires, among other things, that an advisory committee, task force, or similar group established within the Executive Branch and including at least one member who is not a federal employee or officer hold open meetings and make its records available within a framework similar to that established by FOIA.⁷⁵ Congress intended FACA in part to enable public scrutiny of what it deemed an increasingly powerful advisory committee process within the Executive Branch that had been captured by industry interests.⁷⁶ But in passing FOIA, Congress also mandated substantive requirements and procedures that regulate the President's and executive officers' ability to seek advice from the public. While majorities of the Supreme Court and D.C. Circuit have avoided the separation of powers issues FACA creates in *Public Citizen v. U.S. Department of Justice*⁷⁷ and *Association of American Physicians and Surgeons v. Clinton*⁷⁸ (by holding that FACA applied to neither the ABA Standing Committee on the Federal Judiciary nor President Clinton's Task Force on National Health Care Reform respectively), minority opinions in both cases argued that FACA is unconstitutional on the grounds that it infringed upon the President's freedom "to investigate, to be informed, to evaluate, and to consult" while performing his constitutional duties.⁷⁹

2. *Transparency's Negative Consequences*

In addition to these more abstract constitutional concerns, critics also challenge what they consider to be the enormous unintended consequences of disclosure requirements.⁸⁰ First and foremost, they argue, forced disclosure creates a nation that is more susceptible to security breaches and less able to enforce its own laws because evil-doers will have greater access to information that could be used to threaten the health and safety of the public.⁸¹ Congress has responded to such concerns by exempting military, national security, and law enforcement

⁷⁴ See Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 458-65 (1997).

⁷⁵ 5 U.S.C. app. §§ 3, 9, 10.

⁷⁶ See Croley & Funk, *supra* note 74, at 464-65.

⁷⁷ 491 U.S. 440 (1989).

⁷⁸ 997 F.2d 898 (D.C. Cir. 1993).

⁷⁹ *Public Citizen*, 491 U.S. at 482-88 (Kennedy, J., concurring); see also *Association of American Physicians*, 998 F.2d at 924-25. More recent decisions surrounding Vice President Cheney's National Energy Policy Development Group have not reached the constitutional issues surround FACA—at least yet. See *Walker v. Cheney*, 230 F.Supp. 2d 51, 75 (2002) (dismissing GAO suit under FACA for lack of standing without reaching FACA's constitutionality); *Judicial Watch v. National Energy Policy Development Group*, 219 F. Supp. 2d 20, 50-55 (D.D.C. 2002) (finding cause of action in mandamus to enforce FACA, and refusing to reach constitutional issue until after discovery); *appeal dismissed sub nom. In re Cheney*, 334 F.3d 1096 (D.C. Cir. 2003); *rev'd sub nom. Cheney v. U.S. Dist. Ct.*, 124 S.Ct. 2576 (2004) (reversing circuit court's denial of mandamus petition without reaching constitutionality of FACA). On the issue of FACA's constitutionality, see generally Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51 (1994) (arguing against FACA's constitutionality); Croley & Funk, *supra* note 74, at 468-71 (summarizing separation of powers challenges and executive privilege issues to FACA); Carolyn Bingham Kello, Note, *Drawing the Curtain on Open Government? In Defense of the Federal Advisory Committee Act*, 69 BROOKLYN L.REV. 345 (2003) (arguing in favor of FACA's constitutionality).

⁸⁰ See Scalia, *supra* note 63, at 15 (calling FOIA "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored").

⁸¹ Two post-September 11 expressions of this position are Anderson, *supra* note 12, and Laura A. White, *The Need for Governmental Secrecy: Why the U.S. Government Must Be Able to Withhold Information in the Interest of National Security*, 43 VA. J. INT'L L. 1071 (2003).

operations from disclosure in its exemptions to FOIA,⁸² and the federal judiciary has largely adopted this preference when it evaluates challenges to the President's and executive branch agencies' unwillingness to disclose allegedly exempted documents.⁸³

The events of September 11 seem to have reinforced the dynamics of judicial review. Writing for a two judge majority in the D.C. Circuit's 2003 decision holding that the names of persons detained following the September 11, 2001 attacks and the details of their detainment fell within FOIA's law enforcement exception,⁸⁴ Judge Sentelle referred to and followed what he described as a long tradition of judicial deference to the Justice Department in FOIA cases that raise national security issues. Because terrorism presents America with an enemy "just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore," Judge Sentelle wrote, a court cannot second-guess executive judgments about the adverse effects that any disclosure would have to ongoing law enforcement proceedings related to the war on terrorism.⁸⁵ To do so would leave the nation vulnerable to attack.

Such are the potentially grave risks of transparency; disclosure requirements also undeniably raise the fiscal costs of open government.⁸⁶ Agency efforts to comply with FOIA are expensive.⁸⁷ In addition to the direct costs of responding to FOIA requests, judicial oversight of agency request denials—made worse by brief deadlines imposed on agencies and expedited, de

⁸² See 5 U.S.C. § 552(b)(1), (7).

⁸³ See, e.g., *United States v. Nixon*, 418 U.S. 683, 710-11 (1974) (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (when "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged," a court should recognize that the protections provided by executive privilege require the Judiciary to refrain from second-guessing the President); O'REILLY, *supra* note 16, at § 11.26 ("[d]eference is great when the agency asserts that a serious harm would result from disclosure" of documents that allegedly contain national security information).

⁸⁴ See *Center for Nat'l Sec. Stud. v. DOJ*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied* 540 U.S. 1104 (2004).

⁸⁵ *Id.* at 928, 932.

⁸⁶ And not just for government. Transparency requirements may hamper some non-governmental operations as well. Scientists and researchers employed or funded by the government, for example, could be forced to disclose data at an early stage of their government-sponsored studies, leading to premature use or criticism of their work. See DuVal, *supra* note 56 at 621-25; cf. Lars Noah, *Scientific "Republicanism": Expert Peer Review and the Quest for Regulatory Deliberation*, 49 EMORY L.J. 1033, 1065-66 (2000) (arguing against disclosure of the working documents of regulatory peer review panels). The trade secrets and commercial or financial information of private firms contracting with the government could be vulnerable to competitors, thereby leading firms to withdraw from governmental operations and harm the public as well. See *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 874 (D.C. Cir. 1992); WILLIAM L. CASEY ET AL., *ENTREPRENEURSHIP, PRODUCTIVITY AND THE FREEDOM OF INFORMATION ACT* (1983). An exemption from FOIA requirements covers "matters that are trade secrets . . . obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

⁸⁷ In Fiscal Year 2002, the total cost of all FOIA-related activities for all federal departments and agencies, as reported in their annual FOIA reports, was over \$300 million. See Office of Information and Privacy, *Summary of Annual FOIA Reports for Fiscal Year 2002*, at <http://www.usdoj.gov/oip/foiapost/2003foiapost31.htm>. See generally Charles J. Wichmann III, Note, *Ridding FOIA of Those "Unanticipated Consequences": Repaving a Necessary Road to Freedom* 47 DUKE L.J. 1213, 1219-21 (1998) (tracking the enormous increase in FOIA compliance costs following 1974 amendments).

novo judicial review—drain limited judicial resources.⁸⁸ State courts and state and local agencies, subject to or empowered with enforcement of analogous state open government laws, face similar administrative and adjudicatory costs at the state level but without the resources and taxing authority enjoyed by the federal government. The breadth of public disclosure requirements increases these costs. Anyone can request information under FOIA's expansive mandate that agencies make all records that are not otherwise excepted available to "any person,"⁸⁹ for example, no matter the reason. Frequent FOIA requesters include businesses that seek the records of competitors for commercial motivations, individuals seeking personal and family records from the Social Security Administration for genealogical research, or litigants attempting to circumvent discovery rules in suits against the government.⁹⁰

Thus transparency appears costly and overbroad; it also harms government decisionmaking by adversely affecting the ability of government officials to deliberate over policy matters outside of the public eye, and by curbing or skewing the production of informational goods. Disclosure of documents prepared by government officials may inhibit a president and agency decisionmakers from receiving candid, objective, and knowledgeable advice from subordinates.⁹¹ Closed deliberations enable policymakers to make more thoughtful consideration of the available information and the relative advantages of alternatives, to engage in more fulsome and substantive debate over the most popular and unpopular alternatives regarding even the most passionate public issues, and to bargain openly in order to reach a widely acceptable and optimal result, without the inevitable pressure that accompanies public scrutiny.⁹² Anecdotal complaints about open meeting laws suggest that agencies subject to them hold fewer meetings, engage in a constrained, less informed dialogue when they meet, are vulnerable to greater domination by those who possess greater communications skills and self-

⁸⁸ See *Savage v. CIA*, 826 F.2d 561 (7th Cir. 1987) (complaining that judicial consideration of "petty" FOIA requests is a monumental waste of judicial resources); Abner Mikva, *Knowing You, Knowing Me*, LEGAL TIMES, Jan. 6, 1997, at 23 (describing administrative burden of FOIA enforcement on federal district courts).

⁸⁹ 5 U.S.C. § 552(a)(3)(A).

⁹⁰ See Amy E. Rees, *Recent Developments Regarding the Freedom of Information Act: A "Prologue to a Farce or a Tragedy; or, Perhaps Both,"* 44 DUKE L.J. 1183, 1184 (1995); Chuck McCutcheon, *Demand for Public Information is Surging*, Newhouse News Service, March 7, 2005, available at <http://www.newhouse.com/archive/mccutcheon030805.html>.

⁹¹ See, e.g., *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997) ("If presidential advisers must assume they will be held to account publicly for all approaches that were advanced, considered but ultimately rejected, they will almost inevitably be inclined to avoid serious consideration of novel or controversial approaches to presidential problems.").

⁹² See BOK, *supra* note 21, at 175-76; DAVID M. WELBORN ET AL., IMPLEMENTATION AND EFFECTS OF THE FEDERAL GOVERNMENT IN THE SUNSHINE ACT IN 1984 RECOMMENDATIONS AND REPORTS 235-39 (Administrative Conference of the United States: Background Report for Recommendation 84-3); Michael A. Lawrence, *Finding Shade from the "Government in the Sunshine Act": A Proposal to Permit Private Informal Background Discussions at the United States International Commission*, 45 CATH. U. L. REV. 1, 10-12 (1995); Vermeule, *supra* note 9, at 412-13. Courts often affirm this belief, perhaps based on their own practice of closed deliberations and conferences. See, e.g., *United States v. Nixon*, 418 U.S. 683, 705 (1974) ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.").

confidence no matter the quality of their ideas, and lose the potential for informal, creative debate that chance or planned meetings outside of the public eye enable.⁹³

In this sense, laws protecting against the disclosure of government information offer a second-best alternative to protecting against the unauthorized circulation of information in the absence of property rights protection for public intellectual products.⁹⁴ Ostensibly, when transparency is limited, concealment helps to produce higher quality decisions based upon more valuable information.⁹⁵ As disclosure requirements become more rigorous, then, the quantity and quality of information available to and considered by decision-makers shrinks. Thus, public officers and agencies need some privilege to keep information secret, at least temporarily, in order to perform their jobs properly. And, more broadly, transparency must be limited in order to allow a functioning democracy.

II. TRANSPARENCY'S BALANCE

Considered together, the democratic and consequentialist arguments in favor of and against strong-form transparency share certain assumptions. They each assume an opposition between the public state and its private citizenry, and that for democracy to function, this opposition must be managed and, where possible, dissolved. They also agree that in its acts of

⁹³ See Nicholas Johnson, *Open Meetings and Closed Minds: Another Road to the Mountaintop*, 53 DRAKE L. REV. 11, 22-24 (2004); Joseph W. Little & Thomas Tompkins, *Open Government Laws: An Insider's View*, 53 N.C. L. REV. 451, 452 (1975); Randolph J. May, *Taking the Sunshine Act: Too Much Exposure Inhibits Collegial Decision Making*, LEGAL TIMES, Feb. 5, 1996, at 24; Kathy Bradley, Note, *Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC and You*, 49 FED. COMM. L.J. 473, 481-85 (1997).

⁹⁴ Government claims that some information must remain secret, in other words, are efforts to use a secondary method to protect against information becoming an easily circulated and appropriable public good through disclosure. On the relationship between secrecy and the "public domain" status of government-produced information, see Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy and Intellectual Property*, 55 HASTINGS L.J. 91, 123-38 (2003). Cf. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 242 (1981) (noting that two methods for protecting information are by creating property rights in information and by secrecy).

⁹⁵ This consequentialist assumption parallels that in intellectual property law regarding the benefits of property rights protection for the production of intellectual goods. Consider, for example, the conflicts over the availability of presidential papers. Former presidents typically want property rights over their presidential materials in order to control access to them and shape their historical record, but, following the Presidential Records Act of 1978, can no longer do so. See Presidential Records Act of 1978, Pub. L. No. 95-591, § 2, 92 Stat. 2523, 2534 (codified as amended at 44 U.S.C. § 2202 (2000)) (providing that "[t]he United States shall reserve and retain complete ownership, possession, and control of Presidential records"). On the history of the PRA, see Carl Bretscher, *The President and Judicial Review Under the Records Act*, 60 GEO. WASH. L. REV. 1477 (1992); Carl McGowan, *Presidents and Their Papers*, 68 MINN. L. REV. 409, 416 (1983). In response and in order to provide greater control by the current and former presidents over historical materials, President George W. Bush, by executive order, has granted the incumbent and former President veto power over access to presidential records. See Exec. Order No. 13,233, 66 Fed. Reg. 56,025 (Nov. 1, 2001), at § 3(d)(1)(ii); Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 CORNELL L. REV. 651 (2003); Marcy Lynn Karin, Note, *Out of Sight, but Not of Mind: How Executive Order 13,233 Expands Executive Privilege While Simultaneously Preventing Access to Presidential Records*, 55 STAN. L. REV. 529 (2002); Stephen H. Yuhan, Note, *The Imperial Presidency Strikes Back: Executive Order 13,233, The National Archives, and the Capture of Presidential History*, 79 N.Y.U. L. REV. 1570 (2004).

governing, the state produces information, whether in the form of written texts (e.g., records) or practices (e.g., meetings), that exposes and explains its actions; that government would by default keep at least some significant portion of that information from the public; and that government can control access to its information. For proponents of strong-form transparency, these assumptions constitute a problem that disclosure law and policy must solve; for transparency skeptics (or weak-form transparency advocates), these assumptions constitute a system of government and a set of norms and practices that any disclosure law or policy must protect. Put another way, proponents and skeptics disagree about the normative and practical effects of disclosure requirements—effects that they feel certain would occur—but they agree both that transparency is better than its opposite in the abstract, and that they can derive and impose the measure of transparency that democracy requires. Together, they constitute a general approach that I will call “transparency theory,” which itself includes both stronger and weaker forms that advocate for requiring variable degrees of disclosure upon government entities.

In the abstract terms of its debate, transparency theory allows legislative, regulatory, and judicial efforts to impose some level of transparency in constitutional doctrines, statutes, and regulation that at least appear to reconcile the concerns raised by transparency advocates and skeptics.⁹⁶ The reconciliation operates as a balancing test. The constitutional doctrine of executive privilege, for example, offers a core of protection for the President and his advisers, but its application requires courts to balance competing concerns, such as “the fair administration of criminal justice” and the need of defendants facing criminal prosecution for information that might be eligible for privilege,⁹⁷ and the public benefits of preserving the former presidents’ archival materials for legitimate historical and government purposes.⁹⁸ Statutory disclosure requirements proceed in similar, though somewhat more precise, fashion. In crafting FOIA, for example, Congress attempted to achieve a similar balance in recognizing that while it attempted to legislate a “general” or “broad” philosophy of openness, it must nevertheless respect “certain equally important rights” and “opposing interests” which are difficult but “not . . . impossible” to balance.⁹⁹ “Success lies,” the Senate Report to FOIA concluded, “in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.”¹⁰⁰ Congress endorsed the empirical and normative presumptions of transparency advocates that openness is a prerequisite to a functional model of democracy

⁹⁶ Such competing, apparently oppositional approaches arise throughout theories of government, and administrative law must inevitably operate within and resolve these contradictory claims. See Sargentich, *supra*, note 37, at 392-97 (identifying the “rule of law,” “public purposes,” and “democratic process” as core conflicting ideals of administrative process); cf. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) (critiquing the self-contradictory conceptual models that undergird public and private bureaucratic orders). As one prominent administrative law casebook cleverly demonstrates, the matched pairs of administrative law canons seem infinite and proceed in a Llewellynesque thrust and parry formation. See JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 30-32 (5th ed. 2003) (applying Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L.REV. 395 (1950), to the similarly paired critiques of administrative structure, authority, procedure, and actions).

⁹⁷ *United States v. Nixon*, 418 U.S. 683, 711-12 (1974).

⁹⁸ *Nixon v. Administrator of General Services*, 433 U.S. 425, 452-53 (1977).

⁹⁹ *EPA v. Mink*, 410 U.S. 73, 80 n.6 (1973) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 5 (1965)).

¹⁰⁰ *Id.*

even as it limited disclosure requirements in practice because of similarly broad presumptions of countervailing interests. It achieved these limits most explicitly in a series of enumerated exemptions to disclosure requirements,¹⁰¹ versions of which are part of state open records and meetings acts.¹⁰²

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

Given the trans-historical, abstract nature of transparency theory, in other words, it should not surprise us that the balance embedded in disclosure laws responds to historical circumstances, and that one set of arguments or the other will have greater purchase at any particular moment.¹⁰³ At such times, the political party or politician whose position appears relatively out of favor in a current balance will complain that the balance has failed to hold or represents a poor means to meet the normative and consequential ends it favors.¹⁰⁴ Viewed in this light, complaints that shift between partisans demonstrate both the necessity and success of the balance struck in information disclosure laws. Consider the typical scenario in which a former minority party gains control of an apparatus of government and engenders from the new minority opposition precisely the same complaints that the new majority had previously voiced about government secrecy when it was out of power.¹⁰⁵ When this shift occurs, we could

¹⁰¹ 5 U.S.C. (b)(1)-(7).

¹⁰² See, e.g., Fla. Const. Art. I, sec. 24(c) (authorizing legislature to construct narrow restrictions to open records requirement that are “no broader than necessary to accomplish the stated purpose of the law”); Fink v. Lefkowitz, 393 N.E.2d 463, 466 n.* (N.Y. 1979) (characterizing New York’s Freedom of Information Law as “patterned after the federal analogue”); Times Mirror Co. v. Superior Court, 813 P.2d 240, 247 (Cal. 1991) (characterizing California’s Public Records Act as “modeled on” the federal FOIA, with general disclosure requirements and specific exceptions); see also Teresa Dale Pupillo, *The Changing Weather Forecast: Government in the Sunshine in the 1990’s—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165, 1172-73 (1993) (summarizing range of statutory exceptions to state open meetings laws).

¹⁰³ Edward Shils made an analogous argument five decades ago when he analyzed secrecy and openness as results of opposing historical trends that remain in play in contemporary politics, law, and government. See SHILS, *supra* note 22, at 24-25.

¹⁰⁴ At present, disclosure advocates, many of whom oppose at least some of the Bush Administration’s politics, represent this position. See, e.g., REPORTERS’ COMM. FOR FREEDOM OF THE PRESS, *Foreword*, in HOMEFRONT CONFIDENTIAL: HOW THE WAR ON TERRORISM AFFECTS ACCESS TO INFORMATION AND THE PUBLIC’S RIGHT TO KNOW (5th ed., September 2004), available at <http://www.rcfp.org/homefrontconfidential/foreword.html> (Mar. 6, 2005) (calling for the public and media “to push back” and restore the balance of disclosure and secrecy that the Bush Administration has upset); Blanton, *supra* note 10, at 33 (arguing that because disclosure inevitably loses to security concerns in the disclosure/exemption balance, the very idea of a “balance” should be replaced with an enforced regime of open government in which exemptions from disclosure are limited, if not abolished entirely).

¹⁰⁵ This is precisely what happened following the 2000 election, when the kinds of allegations of rampant secrecy that plagued the Clinton administration were visited upon the Bush administration. On the Clinton era, see Gary Ferguson & David Bowermaster, *Whatever It Is, Bill Clinton Likely Did It*, U.S. NEWS & WORLD REPORT,

conclude that the balance between disclosure and privilege has produced a sufficient quantity of government information to allow a functioning, competitive democratic system—albeit one that produces a significant quantity of fulminating rhetoric regarding excess secrecy, corruption, and conspiracy.

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

A central cause of these frustrations, the remainder of this Article asserts, lies in the conceptual framework underlying the disclosure/ privilege balance struck by transparency theory—that is, in the terms and framing of the debate between transparency advocates and skeptics. The balances struck by the Judiciary in the executive privilege doctrine and the Congress in FOIA presume that suitably narrow disclosure requirements based on the type of information requested and the context in which it is produced will advance democracy and lead to positive consequences while protecting government and avoiding negative consequences. This presumption itself, based on abstractions posed by debates within transparency theory, relies on a series of component assumptions that, on closer examination, appear both empirically problematic and conceptually flawed. I turn to these flaws in Part III.

III. OPACITY

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

1. government constitutes a potential “sender” of its information, *so long as we impose the proper disclosure requirements upon it*;

Aug. 8, 1994, at 29; Philip Weiss, *Clinton Crazy*, N.Y. TIMES MAGAZINE, Feb. 23, 1997, at 36. On allegations of secrecy in the Bush administration, see sources cited *supra* notes 11 & 12.

2. government information constitutes a message necessary for a functional democracy, *so long as it is disclosed*;
3. and the public awaits disclosure of government information, and will act in predictable, informed ways, *so long as it has access to government information*.

At its core, then, transparency theory takes the form of a classic, linear model of communication that posits a simple process of information transmission from a source to an intended audience via the medium of a message.¹⁰⁶ The most famous such model sought to enable the evaluation of a communications technology's ability to transmit information efficiently and effectively,¹⁰⁷ and was subsequently utilized within the emerging field of mass communications research as a means to conceptualize the processes and effects of the mass media.¹⁰⁸ Transparency theory asserts that government information works in the same manner, by assuming the existence of a nascent (and beneficial) communications process that is blocked by the state. Communication can occur, and therefore stronger democracy can emerge, once the state is pried open and its information set free. Like the information and mass communications theory upon which it appears to build, this model fails because of its simplistic, inaccurate conception of how communication actually works.¹⁰⁹ As a result, the model obfuscates or ignores the complexity of its component parts: modern government's sprawling, often incoherent bureaucracy, the slippery nature of "information," the elusive and frustrating capacities of the public, and, ultimately, the difficulties of the communications process itself.

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

A. The Sender: The State and Information

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

1. The Incoherent State

Although the nation state retains its power both as an existing apparatus of sovereign control over geographically identifiable jurisdictions, the "technologies" of power are themselves dispersed to multiple, overlapping entities, many of which have no direct relationship with government as traditionally understood.¹¹⁰ The concept of a unified, coherent, sovereign state,

¹⁰⁶ See Wilbur Schramm, *Information Theory and Mass Communication*, 32 JOURNALISM Q. 131 (1955).

¹⁰⁷ See Claude Shannon, *A Mathematical Theory of Communication*, 27 BELL SYS. TECH. J. 379 (1948).

¹⁰⁸ See HANNO HARDT, CRITICAL COMMUNICATION STUDIES: COMMUNICATION, HISTORY & THEORY IN AMERICA 77-90 (1992).

¹⁰⁹ See Part III-D, *infra*.

¹¹⁰ See NIKOLAS ROSE, POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT 16-20 (1999).

whether in its general form as an ideal or in its particular form in the United States, is increasingly under threat from above, in the form of greater economic, military, political, and legal interdependence among nations.¹¹¹ America's federalist system and tri-partite federal system of powers also create multiple, overlapping layers of governmental jurisdiction and competencies that at times cooperate with each other and at other times conflict. Thus the nation state and its subsidiary units have neither the status nor the power and coherence that classical political theory presumes,¹¹² given the state's remarkable, often paralyzing complexity, the political limits placed on its activities, and the near-universal critique of "government"—whether in the form of calls for its "reinvention" or for its abandonment.¹¹³ This is merely a descriptive claim; whether the movement it describes signals the possible emergence of a better, multi-level "cosmopolitan democracy,"¹¹⁴ a complex "global system of regulated regimes composed of locales and regions in a federated system,"¹¹⁵ or a more frightening transnational "Empire"¹¹⁶ is irrelevant for my purposes. More important is its multi-layered, overlapping structures that appear incoherent and often conflict with each other.

Sovereign states and identifiable state actors do continue to exist, of course, and American governmental entities are subject to openness requirements imposed by constitutions and laws of administrative procedure at the state and federal levels. But at the same time, complicated governmental structures make the prospect of identifying the actor that contributed to or finalized a particular governmental decision, or that holds particular government information, an increasingly complicated endeavor.¹¹⁷ Consider, for example, the sprawling Department of Homeland Security, which, as one commentator has noted, represents an "agglomeration of agencies, each with its own set of rules and procedures and unique culture, [and] raises a host of administrative, regulatory and governmental organization issues that likely will take years to resolve."¹¹⁸ When one seeks information about operations relating to "homeland security," then, whom does one contact? Contemporary military actions such as the "War on Terror" similarly require a vast number of agencies with confusingly overlapping responsibilities. Thus, when the ACLU sought documents relating to alleged abuse of prisoners

¹¹¹ See JOHN HOFFMAN, BEYOND THE STATE 209-13 (1995); Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2037-39 (2003); David Held, *Democracy: From City-States to a Cosmopolitan Order?*, in PROSPECTS FOR DEMOCRACY 10 (David Held ed., 1993).

¹¹² Balakrishnan Rajagopal, *International Law and Social Movements: Challenges of Theorizing Resistance*, 41 COLUM. J. TRANSNAT'L L. 397, 411-12 (2003).

¹¹³ See CLAUS OFFE, MODERNITY AND THE STATE 64-65 (1996).

¹¹⁴ DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER 270-83 (1995).

¹¹⁵ Iris Marion Young, *Self-Determination and Global Democracy*, in NOMOS XLII: DESIGNING DEMOCRATIC INSTITUTIONS 147, 174 (Ian Shapiro & Stephen Macedo eds., N.Y.U. Press 2000).

¹¹⁶ MICHAEL HARDT & ANTONIO NEGRI, EMPIRE 3-21 (2000).

¹¹⁷ One litigation manual describes in detail the various issues that a person seeking information must resolve in choosing the correct agency and address an initial request: which agency or agencies with whom to file the request; the proper procedures to use for those agencies; which office or offices of those agencies to contact; whether the documents may have been moved to storage in the Federal Records Center or the National Archives; which agencies may have additional exemptions in their organic or program statutes that would allow them to avoid disclosure; and what contents to include in the initial request. See HENRY A. HAMMITT ET AL., LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 19-25 (2002).

¹¹⁸ William S. Morrow, Jr., *Administrative, Regulatory and Organizational Challenges Facing the New Homeland Security Department*, ADMIN. & REG. L. NEWS, Summer 2003, at 11.

held overseas by the United States, it filed FOIA requests with, among other agencies, the Department of Defense, the Department of Homeland Security, the Justice Department and many of its components, the CIA, and the Department of State.¹¹⁹

The proliferation of public entities is not the only cause of complexity and confusion. Widespread efforts at the federal and state level to contract with private entities to provide services, either on behalf or in place of government, further complicate traditional conceptions of the state.¹²⁰ Consider, for example, the effects from the increasing privatization of activities previously performed entirely or largely by federal and state agencies.¹²¹ Whatever the merits of the military's increased reliance on private contractors in its peacekeeping missions and in the war and occupation of Iraq, such reliance makes an area of government operations that was already significantly less than transparent even more opaque and less accountable to the public.¹²² Some state governments retain only limited oversight over the privately owned and operated state prisons with which they have contracted to hold their prisoners, while they shield the prison operators from the disclosure requirements imposed on similar state-run facilities.¹²³

Congress and courts have formulated complicated, indeterminate rules to resolve this fundamental conflict between laws intended to cover government agencies and the increasing reliance by those agencies on private firms for research and for the operation of traditional government functions. Congressional efforts to resolve this conflict under FOIA have proven largely unsuccessful. Sorting whether an entity is an "agency" for purposes of FOIA is one confusing issue.¹²⁴ Another is the definition of an "agency record," which the Supreme Court

¹¹⁹ See *American Civil Liberties Union v. Department of Defense*, 339 F.Supp.2d 501, 502 (S.D.N.Y. 2004).

¹²⁰ See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1306 (2003). Although discovery requests imposed on private contracts may be analogous to open records acts and may be served on non-parties to litigation, private causes of action have procedural hurdles that few open government laws require. Compare Jack M. Beermann, *Administrative-Law-Like Obligations on Private[ized] Entities*, 49 UCLA L. Rev. 1717, 1724 (2002) (analogizing discovery to FOIA), with Freeman, *supra*, at 1322-23 (critiquing Beermann's argument).

¹²¹ See 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).

¹²² On the specific issues arising from the use of military contractors in the Iraq occupation, see P.W. Singer, *Nation Builders and Low Bidders in Iraq*, NEW YORK TIMES, June 15, 2004, at A23. On military and national security outsourcing generally, see P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2004); Ann R. Markusen, *The Case Against Privatizing National Security*, 16 GOVERNANCE 471, 489-90 (2003)

¹²³ See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1392-94 (2003); Nicole Càsarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249, 268-291 (1995).

¹²⁴ See, e.g., *Dong v. Smithsonian Inst.*, 125 F.3d 877 (D.C. Cir. 1997) (Smithsonian Institution is not an agency); *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996) (National Security Council is not an agency); *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) (the President is not an agency); *Pub. Citizen Research Group v. Dep't of Health, Educ. & Welfare*, 668 F.2d 537 (D.C. Cir. 1981) (Professional Standards Review Organization, a private company that contracted to review Medicare and Medicaid providers, was not an agency); *Irwin Mem'l Blood Bank v. Am. Nat'l Red Cross*, 640 F.2d 1051 (9th Cir. 1981) (Red Cross is not an agency); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) (Office of Science and Technology is an agency).

has defined as a document that is within the possession and control of the government.¹²⁵ These issues are especially important in the regulatory process, where federal agencies rely heavily on contractors or grantees to perform much of the essential empirical, scientific research on which regulations are based. Efforts to clarify the legal status of records produced as a result of the agency-grantee and –contractor relationship have failed in part due to conflicts between Congress and the Executive Branch, and in part because of the difficulty of imposing transparency on the scientific process.¹²⁶ The practice of contracting with private firms even creates some sharp ironies, as federal agencies have begun to contract out their own responses to FOIA requests¹²⁷—leading inevitably to the issue of whether records produced by the private firms engaged in reviewing FOIA requests would themselves be subject to FOIA. State courts and legislatures face the same issues, and have similarly failed to develop a consensus or clarity for their open government laws.¹²⁸ For transparency advocates, the simple solution to the problem of whether public disclosure requirements apply to private firms is to characterize such firms as the relevant state actor with whom they have contracted, and to extend all open government obligations to all such private operations.¹²⁹ And, of course, efforts to extend the burden of open government law compliance to private entities inevitably reduce the economic

¹²⁵ See *Kissinger v. Reporters Committee for the Freedom of the Press*, 445 U.S. 135, 157 (1980). Following *Kissinger*, courts have struggled over FOIA’s applicability when a document was not created by or is not currently possessed by an agency. See, e.g., *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136 (1989) (copies of federal court decisions in possession of agency were agency records); *GE v. United States Nuclear Regulatory Comm’n*, 750 F.2d 1394 (7th Cir. 1984) (company’s internal report on nuclear reactor, which had been subpoenaed by the Commission in connection with a licensing proceeding, was an agency record); *Am. Fed’n of Gov’t Employees Local 1923 v. Dep’t of Health & Human Servs.*, 712 F.2d 931 (4th Cir. 1983) (list of home addresses of employees of Social Security Administration headquarters were not agency records); *Paisley v. CIA*, 712 F.2d 686 (D.C. Cir. 1983) (documents created by agency in response to congressional investigation were agency records); *Wolfe v. Dep’t of Health & Human Servs.*, 711 F.2d 1077 (D.C. Cir. 1983) (report prepared by president-elect’s transition team, in possession of the Secretary’s chief of staff, was not an agency record).

¹²⁶ See Donald T. Hornstein, *Accounting for Science: The Independence of Public Research in the New, Subterranean Administrative Law*, 66 LAW & CONTEMP. PROBS. 227, 237-46 (2003). In 1980, the Supreme Court held that private organizations receiving financial grants from the federal government do not fall within the FOIA definition of “agency” unless a federal agency provides extensive and detailed supervision of their work. *Forsham v. Harris*, 445 U.S. 169, 179 (1980). In November 1998, Congress overturned *Forsham* by adding one sentence to the 4,000 pages of an omnibus spending bill that directed the Office of Management and Budget (“OMB”) to subject certain recipients of federal grants and “all data produced under an award” of a federal contract to a non-profit organization to FOIA. See Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, at 2681-459 (1998). The OMB Guidelines implementing Congress’s command is narrower in scope than the Amendment’s author intended, once again complicating the responsibility of private entities working for the federal government to comply with disclosure mandates under FOIA. See O’REILLY, *supra* note 16, at § 4.10; Senator Richard Shelby, *Accountability and Transparency: Public Access to Federally Funded Research Data*, 37 HARV. J. ON LEGIS. 369 (2000).

¹²⁷ See Christopher Lee, *On FOIA Front, More Agencies Contract Out*, WASH. POST June 8, 2001, at A21.

¹²⁸ See Martin D. Bunker & Charles N. Davis, *When Government “Contracts out”: Privatization, Accountability, and Constitutional Doctrine*, in ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE 85, 90-93 (Charles N. Davis & Sigman L. Spichal eds., 2000); Craig D. Feiser, *Protecting the Public’s Right to Know: The Debate Over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. U. L. REV. 825, 835 (2000).

¹²⁹ See Cásarez, *supra* note 123, at 300-03; Feiser, *supra* note 121, at 54-61.

and administrative advantages that originally led government agencies to privatize or contract out previously public services.¹³⁰

2. *The Unresponsive State*

To further complicate the state's role as sender in a linear communication process, recall that the transparency requirement is imposed—in the first instance legislatively, and then administratively through information requests or bureaucratic process, and finally, perhaps, through judicial command—upon the state apparatus, which may choose not to comply. As Max Weber explained, the logic of bureaucratic administration rests in part on the production and hoarding of information, and on a bureaucracy's "keeping secret its knowledge and intentions" from competing organizations and from the public.¹³¹ Inevitably, state institutions know what information they have produced and where such information is stored, and, through that monopoly of knowledge about their own information, retain significant discretion over the existence and ultimate release of documents. Their knowledge extends not only over the content of such documents, but also over whether such documents reasonably fall within any statutory exemptions from disclosure—a judgment that state institutions make in the first instance.¹³² Congress sought to address this asymmetry by allowing courts to examine documents *in camera* in order to determine the applicability of statutory exemptions.¹³³ Federal courts have also attempted to mitigate the inequities further under FOIA by requiring an agency that seeks to avoid disclosure in some instances to produce an index that lists the documents the agency is refusing to release and the specific statutory exemptions that provide the authority for its refusal.¹³⁴ But in the national security context, agencies have succeeded in gaining from Congress, the President, and courts the authority to refuse even to acknowledge the existence of information a requester seeks on the grounds that to do so would reveal intelligence methods and sources.¹³⁵

In short, the sprawling, multi-headed state must, to an extent, police itself. As Weber argued, bureaucratization is an optimal process for carrying out specialized "administrative functions according to purely objective considerations."¹³⁶ Given its role as the producer and, under disclosure requirements, the initial sender of information, the bureaucratic state inevitably retains significant authority over the production and storage of government information. In

¹³⁰ Dan Guttman, *Governance by Contract: Constitutional Visions; Time For Reflection and Choice*, 33 PUB. CONT. L.J. 321, 345 (2004).

¹³¹ See 2 MAX WEBER, *ECONOMY AND SOCIETY* 992 (Guenther Roth & Claus Wittich eds., 1968).

¹³² See Vaughn, *supra* note 36, at xv.

¹³³ See 5 U.S.C. § 552(a)(4)(B).

¹³⁴ It is called a "Vaughn Index," after the D.C. Circuit decision in *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir.1973). See generally O'REILLY, *supra* note 16, at § 8.16 (explaining that the Vaughn Index has become "the foundation for adversarial argument" in litigation over complex FOIA disputes).

¹³⁵ See, e.g., 5 USC § 552(c)(1)-(3). (authorizing agencies to treat records as not subject to FOIA at all if disclosure of the existence of the records "could reasonably be expected to interfere with [law] enforcement proceedings"); Executive Order 13292, 68 Fed. Reg. 15315, at § 3.6(a) (Mar. 28, 2003) (authorizing agencies to refuse to confirm or deny the existence of requested records "whenever the fact of their existence or nonexistence is itself classified"); *Bassiouni v. C.I.A.*, 392 F.3d 244, 245-47 (7th Cir. 2004) (upholding CIA's refusal to acknowledge existence of information that may impact intelligence operations and national security).

¹³⁶ See 2 WEBER, *supra* note 131, at 975.

bureaucratic organizations, information enables its holder to perform his or her functions—often more effectively by virtue of keeping that information from others—and to amass power.¹³⁷ Bureaucracy’s relationship to democracy and popular rule in the modern state is thus contradictory: a democracy may simultaneously desire a functional bureaucracy despite the bureaucratic production of secrets, while it also attempts to impede the bureaucracy’s growth in part out of fear that these secrets disrupt popular rule.¹³⁸ Efforts to stop bureaucratic secrecy or impose disclosure requirements to mitigate it, in short, run counter to the necessary and inevitable dynamics of the bureaucratic state. In its multiple forms, the state may indeed produce messages, but characterizing the state as an actual, willing, or even acquiescent “sender” of its information under current government disclosure laws misunderstands the operations of the modern state apparatus. In the words of sociologist David Beetham, “[o]penness is the keystone of democratic politics, but proposals to achieve it are likely to prove insufficient when they take no account of the pressures causing secretiveness in the first place.”¹³⁹

B. The Message: Government Information

The traditional account of transparency presumes that the message or text of government information is discernible and can be transmitted in the form it was produced by the sender. This represents two errors: it assumes the existence of a message outside of the context of government disclosure laws themselves, and it assumes the possibility of that message’s transmission without distortion or effect. Instead, any “message” that government information comprises is produced and only exists within a political and regulatory framework that shapes its creation, and only circulates within a mediated environment that reshapes it in the process of making it available.

1. Government Information Does Not Exist

Just as the extent of intellectual property protection structures the kinds of research and creativity that individuals and institutions undertake,¹⁴⁰ so the rules of open government that exempt certain types of information from disclosure lead officials and agencies to behave in particular ways when they prefer to keep their conduct or the information they produce secret.¹⁴¹ Scholars have long known that governmental bodies will shift decision-making processes in response to open government requirements.¹⁴² Producers or custodians of information shift the medium, classification, or content of information they prefer to keep secret towards the safe harbors provided under the exceptions to disclosure laws. Thus, for example, members of a

¹³⁷ See *id.* at 992.

¹³⁸ See *id.* at 988, 990-92; WOLFGANG J. MOMMSEN, *THE POLITICAL AND SOCIAL THEORY OF MAX WEBER* 110 (1989); Sheldon Wolin, *Max Weber: Legitimation, Method, and the Politics of Theory*, 9 *POL. THEORY* 401, 412 (1981).

¹³⁹ See DAVID BEETHAM, *BUREAUCRACY* 101 (2nd ed. 1996).

¹⁴⁰ See JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS* 13 (1996).

¹⁴¹ See, e.g., Marshall, *supra* note 2, at 814 (arguing that officials who fear disclosure requirements are less likely to air dissenting views, will not memorialize their views, will have their views discounted even if they are communicated orally because they are not memorialized, and their views will not become part of government’s institutional memory); Turley, *supra* note 13, at 209 (predicting that as a result of adverse executive privilege decisions during the Clinton Administration, the conduct of White House meetings was likely to change, as was the willingness of staff to take notes during meetings).

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

legislative or regulatory body subject to open meetings and public records laws may communicate with each other or meet by means (such as by person-to-person oral communications or in less than a quorum) so that the “information” they produce falls outside the ambit of applicable state transparency requirements.¹⁴³

Similarly, the tendency of those with original and derivative classification authority to overclassify documents demonstrates the regular practice of disclosure avoidance.¹⁴⁴ Agencies widely delegate to mid-level managers the authority to classify information within categories that restrict public access,¹⁴⁵ while a 1997 congressional commission estimated that a total of three million government and industry employees have authority to limit public access to government documents.¹⁴⁶ At the same time, safely classifying a document requires little more than fitting some of the document’s information within one of the broad and vague categories provided by the Executive Order establishing the classification system.¹⁴⁷ For documents at the margins of the definition of classification, numerous factors come into play in the decision to classify, including risk aversion,¹⁴⁸ political gain,¹⁴⁹ or a desire to cover up government incompetence.¹⁵⁰

¹⁴³ State open meetings laws take a variety of approaches to the issue of what constitutes a “meeting” to which sunshine laws apply. Some state legislation sweeps broadly and prohibits any meeting between two or more members of a public body without public notice and access; while other states define a “meeting” narrowly to encompass only those gatherings where a quorum is present to discuss official business. See ANN TAYLOR SCHWING, *OPEN MEETINGS LAWS*, at § 6.6 (2d ed. 2000).

¹⁴⁴ See MOYNIHAN COMMISSION REPORT, *supra* note 49, at 7-8; Wells *supra* note 10, at 1201-02; Edward L. Xanders, *A Handyman's Guide to Fixing National Security Leaks: An Analytical Framework for Evaluating Proposals to Curb Unauthorized Publication of Classified Information*, 5 J.L. POL. 759, 768-69 (1989). Classification decisions are governed by Executive Order. See Exec. Order No. 13,292, 3 C.F.R. 196 (2003) (providing the current standards, authority, categories, and duration by which information may be classified); see generally Wells, *supra* note 10, at 1198-99.

¹⁴⁵ Nearly 4,000 federal officials have the delegated authority to stamp a document “top secret,” “secret” or “confidential” under multiple sets of complex rules. See Michael J. Sniffen, *'Secrets' Perplex Panel; Classified Data Growing to Include 'Comically Irrelevant'*, WASH. POST, Sept. 3, 2004, at A17. Agencies as diverse as the Departments of Transportation and Agriculture delegate such authority widely among administrators. See, e.g., 70 Fed. Reg. 2819 (2005) (to be codified at 49 C.F.R. pt. 1) (delegating authority to designate information as “sensitive security information” to all administrators and the general counsel of the Department of Transportation); U.S. Dept. of Agriculture, Departmental Regulation No. 3440-002 (delegating similar authority to Under and Assistant Secretaries, Agency Administrators, Regional Directors, Office Directors, and Heads of Field Establishments), available at <http://www.ocio.usda.gov/directives/files/dr/DR3440-002.htm>.

¹⁴⁶ See MOYNIHAN COMMISSION REPORT, *supra* note 49, at 31. Those with so-called “derivative” classification authority perform the vast majority of classification actions. See *ibid.* (citing figure of 94 percent of classification actions over six-year period prior to the report).

¹⁴⁷ See MOYNIHAN COMMISSION REPORT, *supra* note 49, at 21-22.

¹⁴⁸ See MOYNIHAN COMMISSION REPORT, *supra* note 49, at 19 (calling for the shift from a “risk avoidance approach to security [classification], which seeks to anticipate all risks in the protection of assets, with a risk management approach, which seeks to concentrate limited resources on those assets the loss of which would have the most profound effect on the national security”); Saloschin, *supra* note 62, at 1406 (noting tendency of government attorneys and agency managers to prefer non-disclosure in order to protect institutions and clients).

¹⁴⁹ See Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 HASTINGS COMM. & ENT. L.J. 247, 336 (1994).

¹⁵⁰ See Erwin N. Griswold, *Secrets Not Worth Keeping*, WASH. POST, Feb. 15, 1989, at A25 (former Solicitor General who had defended the government's attempt to suppress the Pentagon Papers, noting that “there is massive

According to recent testimony before a subcommittee of the House of Representatives by the deputy undersecretary of defense for counterintelligence and security, misclassification is the result of government officials who misunderstand classification requirements, fail to declassify data that is no longer sensitive, and ignore the needs or interests of the public.¹⁵¹ At bottom, overclassification represents a bureaucratic tendency—perhaps intentional, perhaps merely by default—to utilize a legal technology to protect information from disclosure. Tellingly, the inadvertent release of classified documents is far rarer than the inadvertent classification of information that does not warrant protection.¹⁵²

When an agency or an individual government official prefers to protect information from disclosure, then, the agency or official is more likely to produce it in a form, circulate it by a method, and/ or maintain or destroy it so that the information will either fall outside disclosure requirements or avoid detection. Although no legal (or illegal) form or method of resisting disclosure is foolproof, the very attempt demonstrates the fact that communications technologies and the media of memorialization are fungible. If the form of government information is fungible and officials and agencies are likely to resist disclosure, then no essential thing called “government information” exists that can be perfectly regulated to achieve transparency.

2. *Government Information Has No Meaning.*

Transparency theory presumes that the intent of the government as author, as well as the political and bureaucratic significance of any piece of government information, are manifest in its text. This presumption ignores the complexity of “signification” or meaning-making, the processes by which any document or oral communication can be said to communicate to, and have significance for, an audience.¹⁵³ Communicative messages are subject to formal and informal rules of language, as well as to the generic and conventional structures through which, for example, bureaucracies operate.¹⁵⁴ Hermeneutic, structuralist, and poststructuralist theories

overclassification and that the principal concern of the classifiers is not with national security, but rather with government embarrassment of one sort or another”).

¹⁵¹ See Sniffen, *supra* note 145, at A17.

¹⁵² To illustrate, according to a recently declassified Department of Energy study, fewer than 1600 of the 1.36 million pages of data related to nuclear weapons that had been publicly released by military departments between 1995 and 1999 contained information classified as “restricted data” or “formerly restricted data.” In fact, the vast majority of inadvertently released classified data should not have been classified in the first place. See U.S. Department of Energy Office of Classification and Information Control, Fifteenth Report on Inadvertent Releases of Restricted Data and Formerly Restricted Data under Executive Order 12958, DOE/SO-10-0015 (Deleted Version), available at <http://www.fas.org/sgp/othergov/doe/inadvertent15.pdf>.

¹⁵³ By “signification,” I refer not only to the term’s initial use within semiotics as a process of meaning creation, see Paul Perron, *Semiotics*, in THE JOHNS HOPKINS GUIDE TO LITERARY THEORY & CRITICISM 658 (Michael Groden & Martin Kreisworth eds., 1994), but as the concept of meaning production has since been taken up by virtually all structuralist and poststructuralist literary and cultural theories. See MODERN CRITICISM AND THEORY: A READER 1 (David Lodge ed. 1988) (introducing excerpt from Ferdinand de Saussure’s *Course in General Linguistics* and noting its pervasive influence in literary criticism and theory); Richard Johnson, *What Is Cultural Studies Anyway?*, in WHAT IS CULTURAL STUDIES? A READER 76, 96-98 (ed. John Storey, 1996) (noting role of semiotics and theories of the text in the development of cultural studies). For a thorough introduction to semiotics, see Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. Rev. 621, 626-45 (2004).

¹⁵⁴ See Stuart Hall, *Encoding/Decoding*, in CULTURE, MEDIA AND LANGUAGE 129 (Stuart Hall et al. eds., 1980).

of textual interpretation have destabilized notions that the “text” exists somewhere apart from the interpretive moment; rather, the text, in its multiple meanings, emerges from the social, institutional, historical, intertextual, and discursive context within which the reader engages with it.¹⁵⁵

Administrative agencies communicate through a variety of highly structured events and types of documents— noticed and open meetings, notices of proposed rulemakings, official memoranda and informal electronic correspondence, and the like—that themselves operate within certain statutory rules and historical norms, and which in turn condition the form in which government information appears. The moments in which a government official or other individual encodes a written or spoken statement that becomes government information, and the moments in which that information is disclosed and then decoded by members of the public, are separate and distinct. There is no necessary correspondence between the official or officials who create and then write or speak “government information” and the public that may receive it; therefore, the intermediary in the transaction, the document or meeting that contains “government information,” is not a static thing with stable meaning.¹⁵⁶ Given the complex process of translating data and information between institutional contexts, and the different historical and social contexts of the text’s production and its interpretation, “government information” has no pure, essential form.¹⁵⁷

Transparency theory not only fails to consider the problem of the text, it also ignores the effects of information’s transmission and distribution.¹⁵⁸ The technologies and institutions of mass communications—from print to electronic to broadcast to digital media, from major daily newspapers to cable and network television news shows to informational and explicitly partisan websites—through which people access disclosed government information affect the message contained therein and its interpretation. One need not go to McLuhanesque lengths¹⁵⁹ to recognize that individual media technologies shape the form that messages take and establish distinct dynamics in the relationships between sender and receiver.¹⁶⁰ At the same time, media

¹⁵⁵ To avoid the pain of an exceedingly long footnote, I offer TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* chs. 2-4 (2d ed. 1996). Legal scholarship has incorporated such theories, most typically for purposes of explaining the difficult of judicial interpretation. See Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166 (1996); Nouri Gana, *Beyond the Pale: Toward an Exemplary Relationship Between the Judge and the Literary Critic*, 15 LAW & LIT. 313, 327 (2003); Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505 (1992).

¹⁵⁶ See Hall, *supra* note 154, at 131, 136.

¹⁵⁷ See Steven Mailloux, *Interpretation*, in *CRITICAL TERMS FOR LITERARY STUDY* 121 (ed. Frank Lentricchia & Thomas McLaughlin, 2d ed. 1995).

¹⁵⁸ The original model of linear communication, which focused on solving the engineering problems of distance and mass communications, considered the technological issues of transmission and reception. See Shannon, *supra* note 107, at 380.

¹⁵⁹ I refer here to a strain of technological determinism associated with the Canadian media theorist Marshall McLuhan. See MARSHALL MCLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 7 (1964) (“The medium is the message.”).

¹⁶⁰ I make this claim in a limited fashion, not to posit the dawning of a revolutionary new “information society” where digitization and the internet offers a vastly new universe, but as a more humble, commonsensical claim that a text’s medium (print, sound, motion picture, and the like), its means of transmission (physical in the case of print or projected film, or using limited spectrum or high bandwidth capacity), and the potential for

institutions play enormously important roles as gatekeepers of information that select and present news within organizational, professional, economic, and ideological constraints.¹⁶¹ Consider the incentive and institutional structures within which the press and its employees operate. Media companies and their employees seek financial gain, compete with each other, attempt to further political objectives, and strive to meet professional goals of achievement. These objectives, and the discipline that attempting to meet them imposes, may in some instances lead news organizations to serve as a conduit of information that would help create an informed, deliberative public. But more often, they will incline the media towards creating and finding political scandal rather than focusing on and explaining political issues and development,¹⁶² and towards producing depoliticized, risk-averse, and entertainment-focused content.¹⁶³ Contemporary politicians and officials recognize these tendencies and exploit them by strategically disclose “information” through coordinated public relations campaigns that produce pre-packaged, tightly controlled “news.”¹⁶⁴

In this institutional and technological process, the texts of government information are edited, explained, de- and recontextualized, and interpreted. Put in the context of its underlying model of information and communication, transparency theory’s conception of information ignores “noise,” random disturbances introduced by something other than the communicator that inhibit the perfect transmission of information,¹⁶⁵ and thereby fails to note that human communication processes which are dependent upon symbolic and technological means are inherently imperfect.¹⁶⁶ Thus, the subset of government texts that are ultimately disclosed do not appear to the public as raw information that is ready, in its capacity as the carrier of the stuff of

immediate interactivity affects the “message” that is sent. *See generally* HAROLD INNIS, *THE BIAS OF COMMUNICATION* (1951) (describing development and impacts on human society of new communications technologies); EVERETT M. ROGERS, *COMMUNICATION TECHNOLOGY* 9 (1986) (identifying significant features of new communications technologies). On the complex, ideological formation of the notion of an “information society,” see Ann Balsamo, *Myths of Information: The Cultural Impact of New Information*, in *THE INFORMATION REVOLUTION: CURRENT AND FUTURE CONSEQUENCES* 225 (A.L. Porter & W.H. Read eds., 1998).

¹⁶¹ *See* DENIS MCQUAIL, *MCQUAIL’S MASS COMMUNICATION THEORY* 244-98 (4th ed. 2000); HERBERT I. SCHILLER, *INFORMATION INEQUALITY* 43-47 (1996). For a summary and review of the literature on the analog and digital media industries and their tendency towards consolidation, see Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 *BERKELEY TECH. L.J.* 1389, 1445-55 (2004).

¹⁶² *See* JOHN B. THOMPSON, *POLITICAL SCANDAL: POWER AND VISIBILITY IN THE MEDIA AGE* 75-84 (2000).

¹⁶³ *See* CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 58-62 (1995); Robert W. McChesney, *The Political Economy of Global Communication*, in *CAPITALISM AND THE INFORMATION AGE* 1, 15-20 (Robert W. McChesney et al. eds., 1998).

¹⁶⁴ *See* KEVIN R. KOSAR, *PUBLIC RELATIONS AND PROPAGANDA: RESTRICTIONS ON EXECUTIVE AGENCY ACTIVITIES* 1-4 (Congressional Research Service, Order Code No. RL3275, 2005) (listing recent controversies surrounding administrative agencies’ use of public relations campaigns), available at <http://www.fas.org/sgp/crs/RL32750.pdf> (Feb. 28, 2005); David Barstow & Robin Stein, *Under Bush, a New Age of Prepackaged News*, *N.Y. TIMES*, March 13, 2005, at A1 (reporting that at least 20 federal agencies have produced news segments that were subsequently incorporated, without attribution, into local television broadcasts).

¹⁶⁵ CLAUDE SHANNON & WARREN WEAVER, *THE MATHEMATICAL THEORY OF COMMUNICATION* (1949); Schramm, *supra* note 106, at 135-36.

¹⁶⁶ *See* GRAEME PATTERSON, *HISTORY AND COMMUNICATIONS* 100-01 (1990).

government and politics, to enable democracy and produce the consequences anticipated by transparency advocates.¹⁶⁷

C. The Receiver: The Public and Government Information

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

Transparency theory presumes, in the first instance, the existence of an interested public that needs and wants to be fully informed. This presumption badly needs proof.¹⁶⁸ A vast body of empirical studies demonstrates citizens’ lack of political knowledge.¹⁶⁹ Summarizing the extent of voter ignorance, one commentator has concluded that voters are ignorant about specific policy issues and the basic structure of government, lack ideological consistency in issue stances, and have been found to be consistently ignorant about politics by survey research into the matter since the late 1930s.¹⁷⁰ Public choice theory explains this finding by asserting that voters, to the extent that they have any interest in politics at all, are more interested in policy outcomes than policy inputs, have an infinitesimally small impact on political decisionmaking as individuals, and have few incentives to spend the resources required to acquire information.¹⁷¹ Thus the public’s ignorance is rational and will not be mitigated in the abstract much, if at all, by efforts to increase the disclosure of government information, especially given the already existing “superabundance” of information available from existing sources.¹⁷²

¹⁶⁷ Even websites that merely make raw documents available in the form in which they received them, such as that of the public interest website of the National Security Archive and the commercial website *The Smoking Gun*, select and edit these documents, and in posting them implicitly (and at times explicitly) make editorial comments. See <http://www2.gwu.edu/~nsarchiv/> (Feb. 11, 2005); <http://www.thesmokinggun.com/> (Feb. 11, 2005)

¹⁶⁸ See Peter Dennis Bathory & Wilson Carey McWilliams, *Political Theory and the People's Right to Know*, in GOVERNMENT SECRECY IN DEMOCRACIES 3, 13-15 (Itzhak Galnoor ed., 1977) (questioning existence of a public that wants to be, and is capable of being, informed).

¹⁶⁹ For a thorough examination of the literature, see Samuel DaCanio, *Beyond Marxist State Theory: Autonomy in Democratic Societies*, 14 CRIT. REV. 215, 219-21 (2000).

¹⁷⁰ See Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRIT. REV. 413, 417-19 (1998).

¹⁷¹ See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 238-59 (1957); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK L. REV. 1, 51 (1986).

¹⁷² Philip E. Converse, *Popular Representation and the Distribution of Information*, in INFORMATION AND DEMOCRATIC PROCESSES 369-371 (John A. Ferejohn & James H. Kuklinski eds., 1990). Indeed, the informational excess of contemporary politics and culture might itself constitute a barrier to better, more informed political decisionmaking and activity, insofar as it leads to the public’s inability to believe that any information is definitive. See JODI DEAN, PUBLICITY’S SECRET: HOW TECHNOCULTURE CAPITALIZES ON DEMOCRACY 163 (2002). Thus, widespread voter ignorance could be explained as not irrational by noting the difficulty for every voter, no matter the extent of their knowledge, to gain sufficiently reliable information about the effects of any political decision by an elected official given the relative inability to interpret the meaning of the available information. See Jeffrey Friedman, *Introduction: Public Ignorance and Democratic Theory*, 12 CRIT. REV. 397, 408-09 (1998).

Efforts to complicate the assumptions of rational actor models and voter ignorance through the insights of behavioral and cognitive psychology do not change this conclusion drastically. These fields have identified the heuristic devices, or rules of thumb, that shape individuals' judgment processes and lead to reflexive, often inaccurate perceptions, and that further cast doubt on the existence of the deliberative, open-ended, and open-minded decisional processes that transparency advocates assume to be possible.¹⁷³ Candidates and political parties may serve as helpful, though still imperfect, heuristic devices that enable voters to choose in relatively rational and informed ways,¹⁷⁴ but such short-cuts do not help voters to understand and decide on positions regarding complicated matters of national and political importance for which clear heuristic cues are unavailable.¹⁷⁵ Consider, for example, public knowledge and opinion during the period prior to the invasion of Iraq in 2003. Long after sufficient information existed to disprove the contention, large segments of the American public believed (and to an extent continue to believe) in a proved link between Saddam Hussein, al Qaeda, and the September 11 terrorism attacks, in part because of the Bush administration's speculative insistence on such a connection in the period immediately prior to and following the end of official hostilities in the war in Iraq.¹⁷⁶ In trusting the administration's account, some members of the public who voted for President Bush in the 2004 election, by relying on heuristic devices or employing rational calculation, may have ignored or chosen to disbelieve contrary evidence. But, at minimum, they voted to re-elect the President despite publicly available information regarding one of the central, pre-war justifications for invading Iraq.¹⁷⁷ Accordingly, merely requiring disclosure of more information might have little effect in the face of efforts to manipulate such information through false or misleading statements.¹⁷⁸

In addition to assuming the public is attentive, interested, and knowledgeable, transparency theory further presumes that the public understands and learns from the government information that is or should be released in predictable ways. But the public's pre-existing knowledge and capacity to understand information are limited, and the public in turn understands

¹⁷³ See REID HASTIE & ROBYN M. DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD 7 (2001); Thomas Gilovich & Dale Griffin, *Introduction—Heuristics and Biases, Then and Now*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 1, 15-16 (Thomas Gilovich et al. eds., 2002); Cass R. Sunstein, *Introduction*, in BEHAVIORAL LAW AND ECONOMICS 1, 3 (Cass R. Sunstein ed., 2000).

¹⁷⁴ See DOWNS, *supra* note 171, at 100, 210; Richard R. Lau & David P. Redlawsk, *Voting Correctly*, 91 AM. POL. SCI. REV. 585, 594 (1997).

¹⁷⁵ See Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus"*, 50 UCLA L. REV. 1141, 1160-61 (2003).

¹⁷⁶ See *Many Think Iraq, al-Qaeda Linked*, GAINESVILLE SUN, April 23, 2004, at 9A; Dana Milbank & Claudia Deane, *Hussein Link to 9/11 Lingers in Many Minds*, WASH. POST, Sept. 6, 2003, A1.

¹⁷⁷ Divergent, often incorrect views on evidence about Saddam Hussein's regime continued into the 2004 presidential election, generally induced by the misstatements of the candidates and campaigns themselves. See Peter S. Canellos, *Misperceptions linger, with candidates' help*, BOSTON GLOBE, Oct. 26, 2004; Glenn Kessler, *Bush Recasts Rationale For War*, WASH. POST, Oct. 10, 2004; Glenn Kessler & Jim VandeHei, *Misleading Assertions Cover Iraq War and Voting Records*, WASH. POST, Oct. 6, 2004, at A15; Dana Milbank, *The Gap Between Closed Minds*, Oct. 24, 2004, at A4.

¹⁷⁸ Indeed, manipulative information control, which includes not only withholding and selectively disclosing information but also "spinning" information in the most positive manner, has been a part of every modern American presidential administration. See Sheryl Gay Stolberg, *When Spin Spins Out of Control*, NEW YORK TIMES, March 21, 2004, Sect. IV, p. 1.

information within existing cultural and social frames. At the moment a text ultimately has meaning for its audience, the receiver has decoded the text in a manner framed by individual social and cognitive structures of understanding that are in part determined by race, class, gender, educational background, and the like.¹⁷⁹ Critiquing largely quantitative studies and behaviorist theories of media reception as a passive process in which an audience merely absorbs the pre-constituted meanings of broadcast messages, the ethnographic study of media audiences has revealed that “people actively and creatively make their own meanings and create their own culture.”¹⁸⁰ The cultural study of media reception asserts that the act of “reading” a text—whether a soap opera, a television news show, or a report on the contents of a disclosed government document (or even, indeed, the document itself as it is reproduced in a newspaper or on a website)—constitutes a process of negotiation between media representations and the social experiences and background that structure the reader’s response.¹⁸¹ In the formal and social processes of reception, the “message” operates not as a mechanical signal that produces knowledge and certain behaviors, but is instead subject to the interpretive frames of individuals who are themselves parts of existing interpretive communities.

At the same time that the public knows too little about information that is already available and responds actively to the information it is provided, a significant portion of the public also believes in, and imputes extraordinary significance to, the existence of false and even fantastic secret information. Recent work in anthropology,¹⁸² political science,¹⁸³ history,¹⁸⁴ and cultural studies¹⁸⁵ on American populism and conspiracy theory demonstrates the extent to which Americans (as well as members of other political cultures with populist tendencies) often perceive politics and other aspects of public life as controlled by secretive groups within or outside government. Belief that power is concentrated disproportionately in secret public and private elites indicates a pervasive anxiety about secrecy that feeds off of, but does not

¹⁷⁹ See Hall, *supra* note 154, at 130.

¹⁸⁰ Ien Ang, *Culture and Communication: Towards an Ethnographic Critique of Media Consumption in the Transnational Media System*, in *WHAT IS CULTURAL STUDIES* 237, 240 (John Storey ed., 1996); see also IEN ANG, *DESPERATELY SEEKING THE AUDIENCE* 170 (1991) (arguing that ethnographic studies of television audiences reveal the “multifaceted, fragmented and diversified repertoire of practices and experiences” of engaging with the mass media).

¹⁸¹ This conception of the audience is most closely associated with the pioneering work of the British ethnographer and cultural studies theorist David Morley, who studied television news audiences in *THE “NATIONWIDE” AUDIENCE: STRUCTURE AND DECODING* (1980), and researched how the contexts of television viewing affect media reception in *FAMILY TELEVISION: CULTURAL POWER AND DOMESTIC LEISURE* (1986). On the influence of Morley’s work on cultural studies, see Colin Sparks, *Stuart Hall, Cultural Studies, and Marxism*, in *STUART HALL: CRITICAL DIALOGUES IN CULTURAL STUDIES* 71, 93-94 (David Morley & Kuan-Hsing Chen eds., 1996).

¹⁸² See *TRANSPARENCY AND CONSPIRACY: ETHNOGRAPHIES OF SUSPICION IN THE NEW WORLD ORDER* (Harry G. West & Todd Sanders eds., 2003); *PARANOIA WITHIN REASON: A CASEBOOK ON CONSPIRACY AS EXPLANATION* (George E. Marcus ed., 1999).

¹⁸³ See JODI DEAN, *PUBLICITY’S SECRET* (2002).

¹⁸⁴ See MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* (rev. ed. 1998).

¹⁸⁵ See MARK FENSTER, *CONSPIRACY THEORIES: SECRECY AND POWER IN AMERICAN CULTURE* (1999); PETER KNIGHT, *CONSPIRACY CULTURE: FROM KENNEDY TO THE X-FILES* (2001).

necessarily react rationally towards, the existence of undisclosed government information.¹⁸⁶ When significant segments of the public believe that corruption or conspiracy permeate government, their desire for transparency becomes obsessive and their ability to rationally sort and interpret information suffers as a result.¹⁸⁷ Consider, for example, a satirical book originally published in the late-1960s called *Report from Iron Mountain*.¹⁸⁸ Intended to satirize Vietnam-era official government reports, the book claimed to reproduce a leaked, semi-official document which concluded that war is essential in order to maintain a docile public and an expansive economy. Since the moment of its publication, and repeatedly over the past twenty-five years, many political activists and conspiracy theorists considered the book to be documentary evidence of a soulless American government that survived by promoting unnecessary military operations and the ideological domination of its citizens.¹⁸⁹ Some readers' desire for secret government information, in other words, transformed a satire that resembled a leaked classified document into real, insidious evidence of government perfidy.

Transparency theory, which assumes a public capable of correctly interpreting the meaning and significance of formerly secret government information, ignores the powerful role that secrecy plays in the cultural imaginary. In his classic sociological treatment of the modern obsession with secrecy, Georg Simmel noted that the secret “produces an immense enlargement of life” and offers “the possibility of a second world alongside the manifest world.”¹⁹⁰ The actual content of the secret—the information it contains—might in fact have negligible value, but to label information “secret” is to hint that it offers rarity and value, and may render the object a kind of fetish.¹⁹¹ According to Simmel, this can lead the public, which has limited access to the entity that withholds information, to assume that everything related to a secret is “important and essential” and requires more attention than the information that is known.¹⁹² Thus, secret, undisclosed government information takes on its own autonomous value, overwhelms the content it imbues with meaning and significance, and affects any effort to process and interpret information that ultimately is disclosed.¹⁹³ Unless government operates in absolute transparency—a logistical impossibility—a populist public that is skeptical about the operations of government will always want more information, and will always suspect that essential

¹⁸⁶ See Susan Harding & Kathleen Stewart, *Anxieties of Influence: Conspiracy Theory and Therapeutic Culture in Millennial America*, in TRANSPARENCY AND CONSPIRACY, *supra* note 182, at 258, 264.

¹⁸⁷ See Kermit L. Hall, *The Virulence of the National Appetite for Bogus Revelation*, 56 MD. L. REV. 1, 5-7 (1997).

¹⁸⁸ See LEONARD C. LEWIN, *REPORT FROM IRON MOUNTAIN: ON THE POSSIBILITY & DESIRABILITY OF PEACE* (Free Press, 1996) (1967).

¹⁸⁹ Victor Navasky, *Introduction*, in *id.* at v-xvi.

¹⁹⁰ See GEORG SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* 330 (Kurt H. Wolff trans. & ed., 1950) [*hereinafter* SIMMEL, *SOCIOLOGY*].

¹⁹¹ See GEORG SIMMEL, *On the Concept and Tragedy of Culture*, in *CONFLICT IN CULTURE AND OTHER ESSAYS* 27, 40-42 (trans. K.P. Elzorn, 1968) (extending Marx's theory of commodity fetishism to the “immanent logic of development” of cultural forms by which such forms “estrangle themselves from their origin as well as from their purpose”).

¹⁹² SIMMEL, *SOCIOLOGY*, *supra* note 190, at 333.

¹⁹³ On Simmel's examination of modernity's increasing promise that the mundane surface of things merely hid a deeper intellectual stratum that the modern subject desires to dig up, see DAVID FRISBY, *SIMMEL AND SINCE: ESSAYS ON SIMMEL'S SOCIAL THEORY* 165-68 (1992).

information remains undisclosed. Populist fears of secrecy, especially those that are deep-seated and lead to an all-encompassing distrust of the political order, cannot be sated through open government laws.¹⁹⁴

D. Conclusion: Transparency's Frustrations

By their nature, linear communications models simplify complex, historically situated processes.¹⁹⁵ Sharing the assumptions of such models, transparency theory's abstract normative commitments and consequentialist assumptions fail to consider and incorporate the complexity of bureaucratic practices, the communication process, and the interest and responsiveness of the public. And building upon transparency theory's normative, and consequentialist assumptions and its poor understanding of the state, communication, and the public, open government laws create two core frustrations: they fail to tailor disclosure requirements, and as a result require too much of government in some instances and too little in others; and they fail to tailor the time and manner of disclosure, and as a result ignore the specific needs of the public.

With respect to disclosure requirements, open government laws are both over- and under-inclusive in their coverage. In some instances, open government laws will defer excessively to claims of constitutional structure or national security, offering privileges to the state when none is due or when information is essential to produce an informed and, more importantly, knowledgeable and engaged public. In other instances, open government laws impose excessive costs and constraints on government, and in the process impede government operations. Those government entities and officials that can more easily utilize the inevitable gaps in disclosure requirements will do so; while those whose work cannot exploit such gaps or do not have the resources to resist disclosure requirements will be more open. Thus, federal agencies and officials with broad FOIA exceptions, large discretionary budgets, and litigation support from the Department of Justice can resist FOIA requests to the greatest extent possible.¹⁹⁶ By contrast, officials at the state and especially the local level, faced with state constitutional and statutory open government mandates while constrained with limited taxing authority and tighter budgetary constraints, are less able to avoid disclosure and will therefore be, for better or worse, more

¹⁹⁴ See FENSTER, *supra* note 185, at 89-91. Alan Favish's efforts to use FOIA requests to disprove the conclusion of five separate investigations that Assistant White House Counsel Vincent Foster's death was a suicide rather than murder—efforts that resulted in litigation before the Supreme Court—epitomizes this tendency. See *National Arch. & Rec. Admin. v. Favish*, 124 S.Ct. 1570, 1582 (2004) (requiring a FOIA requester to produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred in order to overcome the privacy protections in FOIA exemption 7(c), 5 U.S.C. § 552(b)(7)(C)).

¹⁹⁵ See JAMES W. CAREY, *COMMUNICATIONS AS CULTURE* 31-32 (1989); HARDT, *supra* note 108, at 121-22; Jennings Bryant, *Will Traditional Media Research Paradigms Be Obsolete in the Era of Intelligent Communication Networks?*, in *BEYOND AGENDAS: NEW DIRECTIONS IN COMMUNICATIONS RESEARCH* 149, 157-58 (Philip Gaunt ed., 1993). Shannon and Weaver, who developed the most famous of these models, conceded as much:

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

SHANNON & WEAVER, *supra* note 165, at 25.

¹⁹⁶ See Saloschin, *supra* note 62.

transparent. Ironically, the level of government furthest in distance away from most Americans is the one best able to avoid openness requirements, while the level of government least able to afford the costs of transparency is the one most burdened with it.

Because of their over- and under-inclusivity, open government laws cannot always deliver the core promise of transparency theory: that open governments govern optimally. Government changes its operations in response to open government laws, sometimes for the better and sometimes simply to avoid disclosure. Faced with unavoidable openness requirements, state and local governments may operate in the way transparency theory anticipates by being more accountable in their actions, or they may decide to govern less, whether by choice or to avoid the financial and political costs of openness. A document, controversial law, or meeting foregone is one that need not be disclosed.¹⁹⁷ By contrast, federal agencies that face avoidable openness requirements may operate in the ways transparency theory anticipates, by disclosing what they must while keeping secret that which is best left undisclosed, or they may simply govern in a way to maximize their control over government information and fight all efforts to force disclosure. In their theoretical abstractions and the breadth of its legal mandates and privileges, transparency theory and open government laws enable both sets of these variable results, and the frustrations that ensue for government and the public.¹⁹⁸

Similarly, open government laws fail to produce the presumed product of transparency, an informed, participatory democracy, because they explicitly ignore the public, the presumed user and beneficiary of open government, and as a result fail to tailor the time and manner of disclosure. Open government laws focus solely on maximizing release of “government information,” a technical concept that, even if the laws prove successful in forcing disclosure, still leaves unmet the normative and utilitarian goals of better, more democratic government. They do not focus on improving the “knowledge” of an understanding, participatory, competent public.¹⁹⁹ Nor do they consider the variable needs or interests a public might have for knowledge at particular moments—for example, immediately prior to an election or to a particularly important political policy decision facing legislators or governmental decisionmakers. Furthermore, because of the kinds and breadth of the exceptions available under FOIA and constitutional doctrines of privilege, open government laws fail to enforce disclosure requirements in the areas of federal governmental performance where they are most needed: to evaluate decisions regarding such key political issues as national security and foreign

¹⁹⁷ This is a version of the prescription Ilya Somin makes after reviewing evidence of voter ignorance—that if the public knows too little about government, then government should be more limited in scope. *See* Somin, *supra* note 170, at 446. Transparency, too, can be seen as a means not to improve but to shrink government. *See* Sage, *supra* note 35, at 1707.

¹⁹⁸ In this sense, transparency is analogous to intellectual property, which James Boyle has critiqued for being “massively indeterminate” in its efforts to balance incentives to create intellectual products against fears that overprotection would stifle creation and use, and in its tendency to make empirical claims without empirical proof. BOYLE, *supra* note 140, at 175.

¹⁹⁹ On the distinction between “information” and “knowledge,” see FRANK WEBSTER, *THE INFORMATION SOCIETY* 21 (1994); Balsamo, *supra* note 160, at 229-30; David Sholle, *What Is Information? The Flow of Bits and the Control of Chaos*, in *DEMOCRACY AND THE NEW MEDIA*, *DEMOCRACY AND THE NEW MEDIA* 343, 347 (Henry Jenkins & David Thorburn eds., 2003).

relations. In such instances, the public must rely on Congress to provide a watchdog function²⁰⁰—a task that Congress may find difficult to perform in the face of presidential resistance,²⁰¹ or may perform poorly.²⁰² Precisely when the public most needs transparency, it is unavailable. Relying on a simplistic model of communication, transparency theory spawned the relatively blunt, frustrating instruments of open government laws.

IV. SOME REALISM ABOUT TRANSPARENCY

Transparency theory and open government law operate at too high a level of abstraction and form, and take too little account of the anticipated effects of disclosed information on governance and the public in the present—which should be the preeminent concern of open government law, given the normative and utilitarian ends that transparency is intended to achieve. The quality of government operations and public participation in democracy may improve with increased information disclosure in some contexts, but not in others.²⁰³ As a general phenomenon and in particular cases, secrecy is both contextual, arising from a particular set of historical circumstances, and intentional, requiring some human agency working to withhold information from others.²⁰⁴ Accordingly, transparency’s goals require a context-specific definition of transparency, viewed in terms of specific policy objectives, system constraints, and the costs and benefits of open government requirements, rather than an approach that regulates secrecy based on the presumed motivations of officials in the abstract.²⁰⁵ Context-specific determinations may at times lead to less openness than present law requires, and may at other times lead to more transparency than current law and practice allow. But they will more

²⁰⁰ See *Watkins v. United States*, 354 U.S. 178, 200 n. 33 (1956); WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* 303 (1901); Senator Sam Nunn, *Congress's Role and Responsibility in the Federal Balance of Power: The Impact of the Senate Permanent Subcommittee on Investigations on Federal Policy*, 21 GA. L. REV. 17, 18 (1996).

²⁰¹ The most significant example of Presidential resistance to Congressional oversight was the Iran-Contra Affair, in which members of the Reagan Administration funded a secret program to provide aid to the Nicaraguan Contras through arms sales to Iran. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 101-16 (1990).

²⁰² Congress may perform its public watchdog poorly in a variety of ways and for a variety of reasons. It might, for example, abuse its position and press for too much information for largely political or personal reasons (when, for example, government is divided and the President and Congress represent two opposing parties), or it might underperform its oversight duties and gather insufficient amounts of information while releasing even less to the public (when, for example, the President and Congress are from the same party, or a committee and the agency it oversees establish an excessively friendly, stable relationship). See, e.g., Federalist Society Symposium, *Reforming Government Through Oversight: A Good or Bad Idea?*, 13 J. L. & POL. 557, 565 (statement of Christopher Schroeder, then an official of the Clinton Justice Department, characterizing Congressional investigations into the Clinton Administration as based on a “vendetta” and intended primarily to “bring[] someone down,” including perhaps the President himself); Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197, 216-17 (1992) (explaining how a long-term relationship between intelligence oversight committees and the intelligence services they oversee fosters “leniency in oversight”); Dana Priest, *Congressional Oversight of Intelligence Criticized*, WASH. POST, April 27, 2004, at A1 (reporting widespread conclusions by “current and former intelligence committee members and a broad swath of intelligence experts” that congressional oversight of intelligence, both pre-September 11 and in the lead-up to the war in Iraq War, has been poor).

²⁰³ Sage, *supra* note 35, at 1826-28.

²⁰⁴ See KIM LANE SCHEPPE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* 15-16 (1988).

²⁰⁵ See Finkelstein, *supra* note 65, at 6.

precisely meet the goals transparency theory identifies as the democratic and utilitarian bases for open government law. To calibrate an optimal practice of open government, then, transparency theory must abandon equating the best government with the one that is most open—or, more precisely, with the one that appears most open based on its commitment to formal transparency requirements. This final Part considers what such a determination would look like conceptually, substantively, and procedurally.

A. The Costs and Benefits of Transparency

As part of an initial inquiry, a legal regime intended to maximize transparency while it enables effective governance must realistically evaluate the benefits and costs of disclosure with as much precision as possible.²⁰⁶ At present, courts reviewing challenges under FOIA to government refusals to disclose documents generally do not make particularized considerations that weigh the respective value of disclosure and privilege.²⁰⁷ Benefits and costs look roughly like this:

1. Benefits

For the public and government agencies and officials alike, the benefits of any particular disclosure include the normative and consequential gains to government described above,²⁰⁸ as well as the savings enjoyed by government and private industry from the billions of dollars it costs to keep and protect secrets.²⁰⁹ Although such benefits are shared and spread across the entirety of the population and government as public goods, specific groups, whether by affinity or self-interest, experience transparency benefits in a more concentrated way. Some groups, for example, represent both themselves and the general public in advocating for open government: the press, which has both a professional and commercial interest in information disclosure; NGOs focused on “freedom of information” issues; political opponents of the government that hope to expose information detrimental to the party and individuals in power; and current elected and appointed officials who want to publicize those policies that benefit their constituencies in particular and the public generally.

2. Costs

Disclosure requirements create costs to government operations in a number of ways: by forcing disclosures that actually harm national security, military actions, and law enforcement;

²⁰⁶ I have been influenced in what follows from Fung et al., *supra* note 2, at 12-18, which considered the benefits and costs by the use of transparency as a regulatory regime imposed by the State on private actors.

²⁰⁷ The most important exceptions to open government laws’ avoidance of individualized determinations that consider the extent of the public’s anticipated benefit from disclosure is in FOIA’s privacy exemptions, where courts “must balance the public interest in disclosure against the [privacy] interest Congress intended the Exemption to protect.” *U.S. Dept. of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. 749, 776 (1989) (interpreting 5 U.S.C. § 552(b)(7)(C)); *see also* *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976) (finding congressional intent to establish analogous balancing test for exemption 5 U.S.C. § 552(b)(6)). Agencies are required to consider declassification of documents when “the need to protect such information may be outweighed by the public interest in disclosure of the information,” but that determination is to be made by the agency itself and is not subject to judicial review or any other external review. *See* Exec. Order No. 13,292, 68 Fed. Reg. 15315, § 3.1(b) (2003)

²⁰⁸ *See* Part I.A & B, *supra*.

²⁰⁹ *See* MOYNIHAN COMMISSION REPORT, *supra* note 49, at 9-10.

by inhibiting deliberative decisionmaking; and by imposing administrative costs incurred from opening meetings and disclosing documents. As with benefits, these costs are largely spread throughout the population, but some individuals face more concentrated costs. But elected and appointed officials, for example, experience personalized and specific reputational costs (and perhaps legal liability) from the disclosure of failed or unpopular policies and decisions. Additionally, private entities whose legal or illegal input into the public decisionmaking process would more likely be exposed and who would suffer reputational harms and increased risk of legal liability also face concentrated costs from disclosure. These latter two disclosure “costs,” of course, may also be benefits to governance and to the public. An open government regime must therefore be able to sort government claims about the excessive costs of any particular disclosure so that protections intended to minimize the spread costs to government are not used to minimize the concentrated reputational or political costs to individual officials.

3. *Obstacles to Imposing Optimal Disclosure Requirements*

Viewed this way, transparency advocates face at least two significant obstacles in their efforts to impose effective disclosure regimes. First, they must assess the costs and benefits of any individual disclosure, as well as of various types of disclosure, with some accuracy—a difficult task, given the abstract nature of transparency’s normative and utilitarian goals. If we cannot assume a linear, causal relationship between disclosure and public benefits, and if we demand some threshold of proof that disclosure will directly affect military operations, national security, or law enforcement investigations before we recognize a governmental privilege not to disclose, then divining a metric for cost-benefit analysis appears exceptionally difficult. Moreover, the public may be willing to accept some level of excessive secrecy in the protection of information (particularly relating to national security) whose disclosure would be more beneficial than costly, because the consequences of wrongful disclosure would be so grave.²¹⁰

Second, open government laws must vest institutional authority in an agent that can fairly and effectively enforce their mandates. Most public records laws rely in the first instance on the compliance of the government officials or agency that produced the records—that is, the individuals who bear the concentrated costs that might be incurred by the records’ release. Public records laws typically rely in the second instance on courts, which tend to defer to officials’ declarations regarding the necessity of secrecy in some areas of governmental operations, such as law enforcement, military operations, and especially national security.²¹¹ As Judge Patricia Wald, former chief judge of the D.C. Circuit and author two decades earlier of a significant article extolling FOIA’s virtues,²¹² recently noted approvingly, the D.C. Circuit, which considers a significant proportion of the appeals over refusals to release the most politically sensitive presidential information, has been “reluctant to allow private citizens access

²¹⁰ The willingness to bear this cost is analogous to the willingness of the victim of a contract breach to forego full compensation in order to keep secret a valuable interest. The increment of cost the public absorbs constitutes a kind of “secrecy interest.” See Omri Ben-Shahar & Lisa Bernstein, *The Secrecy Interest in Contract Law*, 109 *YALE L.J.* 1885, 1890-91 (2000).

²¹¹ See Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 *WM. & MARY L. REV.* 679, 714-15 (2002).

²¹² See Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 *EMORY L.J.* 649 (1984).

to presidential information via the use of statutes passed by Congress to regulate the executive branch generally”—despite strong textual arguments that signal congressional intent otherwise.²¹³ The Rehnquist Court in particular has been unkind to an expansive vision of FOIA.²¹⁴ As a result, federal open government laws, as well as analogous laws in many states, fail to establish an institutional structure that can effectively evaluate the costs and benefits of disclosure, particularly when the government information at issue is controversial and risks harming the officials who play a central role in the disclosure process.

In the two sections that follow, I offer some initial suggestions, based on current but underutilized programs or proposals, as to how the problems of substantive assessment and institutional structure could begin to be resolved.

B. The Decisions of Governance and the Time Value of Information.

Open government laws should focus most closely on maximizing benefits and minimizing costs to two sets of decisions and actions: those decisions made in the first instance by government, and those decisions made in the second instance by the public. The government must be able to protect its decisional process from the interference that excessive scrutiny brings, while the public must be able to evaluate the government’s decision as soon as possible—and, where possible and appropriate, before a final decision is made. To do so, the public must have access to not merely, and perhaps not even, a comprehensive quantity of information explaining the government’s decision, but, equally important, the most *comprehensible* presentation of information, as soon as possible.²¹⁵ What matters, then, is the use that government and the public make of information, how best to optimize that use, and when the disclosure of information will hurt or aid in that use.

Secrecy during the decision-making process can, in some cases, be defensible; once the process is over, however, the need to protect governmental deliberations diminishes considerably while the need for the public to have access to the information on which the governmental deliberations were based is much greater.²¹⁶ In some instances, disclosure of government information will unquestionably benefit the public while it creates only the administrative costs to government of making the information available. Open government laws, and especially those that require government agencies to make information available electronically on the Internet, handle these instances easily.²¹⁷ Instances in which the costs and benefits are mixed, or in which disclosures that would be beneficial to the public but potentially costly to the operations of government agencies, are more difficult. In such situations, both government agencies and the party that resolves disputes and/or enforces the open government law would more effectively

²¹³ See Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L. J. 737, 766-67 (2002).

²¹⁴ See Verkuil, *supra* note 211, at 715-16.

²¹⁵ Cf. Fung et al., *supra* note 2, at 39 (arguing that effective information-based regulation promoting transparency in the private sector requires information to be available in comprehensive form).

²¹⁶ See Posner, *supra* note 171, at 50.

²¹⁷ See, e.g., 5 U.S.C. § 552(a)(1), (2) (FOIA provision requiring agencies to make certain types of information available to the public); 5 U.S.C. § 552(a)(2)(E) (requiring agencies to make certain types of information available by “computer telecommunications” or “other electronic means”).

further the aims of transparency theory by balancing the degree to which the public, if given the information, could make an informed political choice in the short-term, against the likely short- and long-term costs on the particular entity or entities that would disclose the information and on broader government operations.²¹⁸ The proximity and gravity of the public's political decision, in other words, should be considered alongside the type and value of the information and the costs of its disclosure to government

Such determinations must also consider the time value of the information requested—both in terms of the benefits to the public of its rapid disclosure and the benefits to the government of its temporary non-disclosure. Although the cost of information disclosure may outweigh its benefits at one moment—especially before the government's decisional process or a particular government action is complete—the benefits of disclosure may outweigh the costs at a later moment. Stringent open meeting laws that require all discussions by a governmental entity to be open to the public may impose excessive constraints on deliberation that could be avoided by at least temporarily excluding the public. Conversely, classification regulations may enable government agencies to keep information secret long after any threat of their disclosure is past—and so far into the future that its benefits to the public have significantly diminished. For example, consider the issues at play when secret information would be exceptionally valuable to the public as it prepares to vote or to express public support or opposition to an important governmental decision—such as the decision to declare war. In that context, legal requirements or political pressure that will lead the government to release pertinent information may create high costs, but may in fact be necessary for a functional democracy. Keeping such information from the public because it falls within a particular exemption or because it qualifies for secrecy classification may or may not be detrimental to the public, depending upon the particular context and time in which the issue arises.

Such flexibility creates significant instability and indeterminacy. Government information laws already consider time as a factor for disclosure, though typically by using blunt measurements. For example, “sunshine laws” implicitly assert that time matters by requiring the simultaneous production and release of information through open meetings, while the Executive Order establishing classification policy in the Executive Branch establishes various durations after which declassification should either be automatic or considered.²¹⁹ But intellectual property law recognizes the time value of information in various contexts, and provides a variety of means to protect rights flexibly, based on information's diminishing value.²²⁰ Recognizing

²¹⁸ Individual determinations of this balance may create additional administrative costs unless a better substantive and institutional approach leads federal agencies to curb their expensive practice of overclassification.

²¹⁹ See Exec. Order No. 13,292, 68 Fed. Reg. 15315, §§ 1.5, 3.1 (2003) (setting forth duration of classification and procedures for declassification and downgrading). The slowness with which many agencies are declassifying documents makes the “automatic” declassification requirements that were originally based on a number of years significantly more flexible than they were presumably intended. See Information Security Oversight Office, Report to the President: An Assessment of Declassification in the Executive Branch (Nov. 30, 2004), available at http://www.archives.gov/isoo/reports/2004_declassification_report.html.

²²⁰ For example, courts have narrowly protected the advantage that being first in the market with information bestows. See, e.g., *International News Service v. Associated Press*, 248 U.S. 215 (1918) (protecting the right of “hot news” provider from copying); *NBA v. Motorola, Inc.*, 105 F.3d 841, 852 (2d Cir. 1997). (citing *INS*, 248 U.S. at

the significance of the time value of information, like recognizing the importance of the use the public will make of information in their political decisions, would make the institution that adjudicates and oversees mediation of disclosure disputes better able to consider and implement transparency's ends than merely considering abstract mandates and the applicability of broad exemptions.²²¹

C. Institutional Oversight of Open Government Laws

If more precise measures of costs and benefits are more likely to achieve transparency's ends than focusing on the type or medium of information, then determining a proper institutional locus of determining costs and benefits is essential. Federal open government law relies on judicial resolution of challenges to agency determinations about the applicability of disclosure requirements and exemptions. Non-judicial resolution of government information disputes has served the often contentious arguments between Congress and the President over presidential and executive branch information reasonably well.²²² This is true even for disputes over intelligence

231) (including evaluation of the time sensitivity of information's value in test under appropriation in "hot news" context); Restatement (Third) Unfair Competition, § 38 cmt. c. ("The originator of valuable information or other intangible assets normally has an opportunity to exploit the advantage of a lead time in the market. This can provide the originator with an opportunity to recover the costs of development and in many cases is sufficient to encourage continued investment."). Similarly, owners of trade secrets that have been misappropriated may be awarded an injunction against the information's use for a limited period of time, either until the trade secret has ceased to exist or until any commercial advantage the competitor gained by its misappropriation has ceased to exist. *See* UNIF. TRADE SECRETS ACT § 2(a). Courts may issue temporary injunctions that are temporally limited per se or permanent injunctions that are limited only until such time as the information becomes available otherwise. *See* *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 473 (1974) (upholding permanent injunction to enforce confidentiality agreements until trade secrets were released to or become available to the public); *Sigma Chemical Co. v. Harris*, 794 F.2d 371, 375 (8th Cir. 1986) (rejecting temporally unlimited injunction). Although the federal patent and copyright statutes also explicitly consider the time value of information in providing temporary limited monopoly rights over certain types of information, they do so through blanket time periods. *See* 35 U.S.C. § 532(a)(2) (twenty year term for patents); 17 U.S.C. § 304 (establishing various terms of protections for copyrighted or copyrightable materials).

²²¹ *See* Mark H. Grunewald, *Freedom of Information Act Dispute Resolution*, 40 ADMIN. L. REV. 1, 37 (1988).

²²² *See* Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 116-25 (1996); Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197 (1992). Admittedly, neither interbranch conflicts nor state government information pose identical sets of issues as federal open government laws. The interbranch relationship differs significantly from the state-public relationship in quite significant ways. On the one hand, some dynamics within the relations will lead to better negotiations: the President often must negotiate with Congress in order to create and preserve a trusting, reciprocal, long-term relationship to achieve other goals, while the President and Congress may share general policy goals in some areas (such as, for example, national security), and may be equally averse to the political risks involved in high-stakes informational disputes. *See* Shane, *supra*, at 221-22. Nevertheless, persistent political competition between the branches and background legal uncertainty may pull the parties in opposite directions, leading either to Congressional efforts to force the President to divulge information Congress doesn't need, or to Presidential efforts to keep information secret against statutory mandates and for purely political reasons. *See id.* at 222-26. But because judicial resolution of interbranch informational disputes strain the limits of politics and justiciability and often prove frustrating for all three branches, most proposals for reform (or in favor of the status quo) stress the value of negotiated solutions, whether through formal, generalized agreements over the procedural and substantive frameworks for dispute resolution, or through a more amorphous commitment to compromise. *See generally* Jonathan L. Entin, *Executive Privilege and Interbranch Comity After Clinton*, 8 WM. & MARY BILL RTS. J. 657, 660-68 (2000) (summarizing arguments against judicial resolution of interbranch

activities, which pose very difficult political and national security issues.²²³ But interbranch disputes between relatively equal parties operate in the shadow of constitutional crisis; the Congress and President seek judicial resolution at great risk, and the Judiciary faces similar danger in trying to settle such disputes. Lacking such underlying political and legal gravity, disputes between the public and Executive do not lead as naturally to a non-judicial institutional solution, despite the fact that such disputes can raise similar constitutional issues if an agency resists its duties under FOIA. Because transparency theory does not consider thoroughly the complex institutional dimension of government information production and protection, it is unsurprising that open government laws fail to design democratic institutions that can organize and regulate information in order to achieve the goals on which the underlying theory is based.²²⁴

For open government laws to be more effective, then, they must create and vest authority in non-judicial institutions that can develop expertise in overseeing informational disputes between members of the public and government agencies, and that can perform more individualized inquiries into the costs and benefits of disclosure.²²⁵ Such institutions could take a number of forms, some of which have been proposed at the federal level or adopted at the state level. Classification review boards can provide preemptive review of agency overclassification, whether as a general practice, with respect to certain events or issues, or in response to public requests.²²⁶ Vesting adjudicative authority in a separate administrative agency or a department within an existing agency, as at least one state has done to strengthen its public records act,²²⁷

informational disputes and in favor of negotiated settlements); *but see* Wald & Siegel, *supra* note 213, at 750-60 (arguing that judicial resolution of interbranch disputes is often essential, and touting the D.C. Circuit's record in providing just and effective resolutions).

²²³ See Shane, *supra* note 222, at 215.

²²⁴ Cf. John Ferejohn, *Instituting Deliberative Democracy*, in NOMOS XLII: DESIGNING DEMOCRATIC INSTITUTIONS 75, 86-87 (Ian Shapiro & Stephen Macedo eds., N.Y.U. Press 2000) (arguing that theories proposing an ideal deliberative democracy too seldom consider issues of institutional design).

²²⁵ Cf. Fung et al., *supra* note 2, at 38-39 (arguing that effective information-based regulation promoting transparency in the private sector requires strong political intermediaries to represent those who use the disclosed information). Such institutions must be independent from the agencies that they oversee, unlike, for example, the Interagency Security Classification Appeals Panel, which is composed of senior-level representatives from Departments of State, Defense, and Justice, the Central Intelligence Agency, the National Archives, and the Assistant to the President for National Security Affairs. See Exec. Order No. 12,958, 60 Fed. Reg. 19825 (1995).

²²⁶ See Public Interest Declassification Act of 2000, Pub. L. No. 106-567, tit. VII, 114 Stat. 2856 (codified at 50 U.S.C. § 435 (2003)) (establishing Public Interest Declassification Board in order, among other things, "to promote the fullest possible public access to a thorough, accurate, and reliable documentary record"). Despite the Act's passage, the Board has gone unfunded and President Bush has failed to appoint a full slate of members. See Testimony of Representative Christopher Shays, Chairman, Subcommittee On National Security, Emerging Threats, and International Relations, Committee on House Government Reform, Hearing on Information Overclassification, March 2, 2005, 2005 WLNR 3243312. Another example is the Assassination Records Review Board, established in the John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 (1994), which during the period of its existence evaluated the decisions by federal agencies not to release records relating to the assassination.

²²⁷ See CONN. GEN. STAT. § 1-205 (establishing a "Freedom of Information Commission," with the authority, among other things, to investigate alleged violations of state's Freedom of Information Act); see generally Robert G. Vaughn, *Administrative Alternatives and the Federal Freedom of Information Act*, 45 OHIO ST. L.J. 185, 193-200 (1984) (describing and analyzing Connecticut's law).

may also provide greater institutional support for public requesters.²²⁸ Finally, Congress or individual agencies could establish an ombudsman with authority and expertise in mediating FOIA disputes,²²⁹ as one state has successfully accomplished for disputes arising from its own public records act.²³⁰

CONCLUSION

Transparency and open government are at once impossible and necessary. Impossible, because in their strongest form they rely upon an inappropriate model of information and communication to produce an inaccurate understanding of government information, which results in an often ineffective legal regime. Necessary, because a state that lacks transparency and open government is undemocratic. The task for those on all sides of the debate surrounding open government is to consider institutional and substantive approaches that would better achieve the essential ends that transparency theory seeks.

²²⁸ See Grunewald, *supra* note 221, at 37-45 (1988) (proposing “Information Access Authority,” either within existing agencies or as a new, separate agency, to adjudicate and mediate FOIA disputes); Vaughn, *supra* note 227, at 209-12 (considering potential usefulness of Connecticut’s Freedom of Information Commission model for the reform of FOIA).

²²⁹ See Grunewald, *supra* note 221, at 56-64. Legislation currently before both houses of Congress would create an Office of Government Information Services within the Administrative Conference of the United States to “offer mediation services between persons making requests under section 552 and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, issue advisory opinions if mediation has not resolved the dispute.” See Openness Promotes Effectiveness in our National Government Act of 2005, H.R. 867, 109th Cong. (2005) § 11; OPEN Government Act of 2005, S. 394, 105th Cong. (2005), § 11 (creating Office of Government Information Services that will house a FOIA ombudsman to “mediate disputes between FOIA requestors and agencies”).

²³⁰ See Fla. Stat. §16.60 (2004) (establishing public records mediation program within the office of the state Attorney General); see generally Kimball, *supra* note 17, at 354-57 (describing Florida’s mediation program and that of other states).