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## Transparency's Ideological Drift

**ABSTRACT.** In the formative periods of American “open government” law, the idea of transparency was linked with progressive politics. Advocates of transparency understood themselves to be promoting values such as bureaucratic rationality, social justice, and trust in public institutions. Transparency was meant to make government stronger and more egalitarian. In the twenty-first century, transparency is doing different work. Although a wide range of actors appeal to transparency in a wide range of contexts, the dominant strain in the policy discourse emphasizes its capacity to check administrative abuse, enhance private choice, and reduce other forms of regulation. Transparency is meant to make government smaller and less egregious.

This Article traces transparency's drift in the United States from a progressive to a more libertarian, or neoliberal, orientation and offers some reflections on the causes and consequences — and on the possibility of a reversal. Many factors have played a part, including corporate capture of freedom of information laws, the exponential growth in national security secrecy, the emergence of the digital age and associated technologies of disclosure, the desire to facilitate international trade and investment, and the ascendance of market-based theories of regulation. Perhaps the most fundamental driver of this ideological drift, however, is the most easily overlooked: the diminishing marginal returns to government transparency. As public institutions became subject to more and more policies of openness and accountability, demands for transparency became more and more threatening to the functioning and legitimacy of those institutions and, consequently, to progressive political agendas. Coming to terms with transparency law's ambivalent legacy is the first step toward redeeming its promise in the present day.

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## INTRODUCTION

American law concerning disclosures of information to the public, or what we now call transparency, was substantially forged during two historical periods: the Progressive Era around the turn of the twentieth century and the decade between the mid-1960s and the mid-1970s. In each of these periods, legal reformers imagined that increasing transparency would decrease certain sorts of exploitation and abuse. And in so doing, they believed, transparency would help to promote bureaucratic rationality, secure confidence in government, and distribute power more equitably. Whether it was the “people’s lawyer” Louis Brandeis and President Wilson extolling the virtues of publicity in the 1910s or Congressman John Moss and representatives of the news media fighting for the Freedom of Information Act a half century later, the motivating assumption was that exposing powerful institutions to the light of ongoing scrutiny would not only “disinfect”<sup>1</sup> those institutions but also bring about a more effective, responsive, and democratic regulatory state.

Since those formative periods, however, the meaning of transparency has changed. Transparency is still celebrated as a tool to root out undesirable conduct, and transparency laws are still used for this purpose. But across many policy domains, the pursuit of transparency has become increasingly unmoored from broader “progressive” values such as egalitarianism, expertise, or social improvement through state action and increasingly tied to agendas that seek to reduce other forms of regulation and to enhance private choice. If legal guarantees of transparency were once thought to make government more participatory and public-spirited, they are now enlisted to make government leaner and less intrusive.

Transparency has thus experienced what Professor Jack Balkin calls *ideological drift*.<sup>2</sup> In the United States, as well as in other Western democracies, transparency’s political valence has become less progressive and more libertarian over the past several decades. Many factors have contributed to this development, ranging from corporate capture of open records regimes to the emergence of the digital age and new technologies of disclosure to the ascendance of neoliberal political economy and its preferred modes of public regulation. Progressives

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1. See Louis D. Brandeis, *What Publicity Can Do*, HARPER’S WKLY., Dec. 20, 1913, at 10, 10 (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants.”). As Professor Noah Feldman has noted, Justice Brandeis’s metaphor is “based on a medical theory now long refuted (alcohol is a much better disinfectant).” Noah Feldman, *In Defense of Secrecy*, N.Y. TIMES MAG. (Feb. 10, 2009), [https://www.nytimes.com/2009/02/15/magazine/15wwln\\_lede-t.html](https://www.nytimes.com/2009/02/15/magazine/15wwln_lede-t.html) [<https://perma.cc/9AGW-WZSR>].
  2. See *infra* Part I (explaining Balkin’s theory of ideological drift).

themselves have unwittingly enabled this drift by embracing a vision of transparency as a universal tenet of “good governance,”<sup>3</sup> even a primary virtue worth attaining for its own sake.<sup>4</sup> Reversing the drift would require engaging with transparency in more skeptical, instrumental, and institutionally sensitive terms: not as an end in itself, but rather as a means to achieve particular social goods; and not as a transcendent normative ideal, but rather as an administrative technique like any other – with contestable moral, political, and distributional implications.

Transparency's ideological drift, this Article further suggests, is both symptom and cause of a multigenerational movement in American regulatory reform, from positive statism to skeptical statism and antistatistism. Recent historical scholarship has shown how Progressive Era elites and New Deal administrators embraced civil liberties law “to strengthen rather than to circumscribe the administrative state,” only to see that body of law take an “antistatist and judge-centric turn” in subsequent decades in response to totalitarianism abroad and a growing federal bureaucracy at home.<sup>5</sup> Transparency law took a comparable turn in this period and then a more decisive turn in the late twentieth century. In explicating transparency's transformation, accordingly, I hope to fill in one piece

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3. See MICHAEL SCHUDSON, *THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945-1975*, at 4, 18 (2015) (observing that transparency “today seems to be a motherhood-and-apple-pie value” and “has become a consensual norm in public life both in the United States . . . and in many other parts of the world”); Lars Thøger Christensen & Joep Cornelissen, *Organizational Transparency as Myth and Metaphor*, 18 EUR. J. SOC. THEORY 132, 133 (2015) (stating that transparency “has become a taken-for-granted ideal . . . of how society and its organizations must function”); Gregory Michener, *Policy Evaluation via Composite Indexes: Qualitative Lessons from International Transparency Policy Indexes*, 74 WORLD DEV. 184, 184 (2015) (“[T]ransparency has become the *sine qua non* of good governance in virtually all public and private administrative arenas.”).
  4. For the distinction between primary virtues, “which are directly related to the goals which [people] pursue as the ends of their life,” and secondary virtues, which “concern the way in which we should go about our projects,” whatever they may be, see ALASDAIR MACINTYRE, *SECULARIZATION AND MORAL CHANGE* 24 (1967). See also SCHUDSON, *supra* note 3, at 22-23 (noting that transparency's strongest advocates treat it as a primary virtue and proposing that it is better viewed as “a secondary virtue or perhaps something suspended between primary objectives and secondary virtues”); Darin Barney, *Politics and Emerging Media: The Revenge of Publicity*, 1 GLOBAL MEDIA J. 89, 91 (2008) (suggesting that in recent years “publicity has been reified, converted from a social relationship or process into an object or thing; from a means into an end-in-itself”).
  5. Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1085, 1092 (2014); see also *id.* at 1085 n.4 (collecting and summarizing additional works, by Karen Tani, Laura Weinrib, and others, on the “positive relationship between civil libertarianism and state building in early twentieth-century America”).

of a much larger story about changes in American attitudes toward constraining and empowering government.

Before proceeding, two significant caveats are in order. First, my focus is on transparency as a legal and administrative norm, or the idea that institutions should be required by law to make information about their activities available to the general public or other outside monitors.<sup>6</sup> I am not concerned here with disclosures made by individuals, whether in their intimate relationships or in their dealings with state and society. Put differently, this is not an article about personal exposure or privacy.<sup>7</sup>

Second, even when defined as a regulatory technique, transparency is a protean concept that may be invoked in a wide range of settings for a wide range of ends.<sup>8</sup> In seeking to analyze its development over time, I am necessarily glossing many historical complexities in order to limn a general, but discernible, arc within mainstream law and policy circles. I do not mean to suggest that transparency used to be a wholly or uncomplicatedly progressive idea that has been betrayed—or that it has any “true” or essential meaning.<sup>9</sup> Rather, transparency was depicted throughout the twentieth century as a fix for perceived failures of governance.<sup>10</sup> As theories and practices of governance evolved in certain directions, and as new groups seized on disclosure laws for new purposes, applications and understandings of transparency evolved along with them. That is how ideological drift often works.

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6. Cf. Christopher Hood, *Transparency in Historical Perspective*, in *TRANSPARENCY: THE KEY TO BETTER GOVERNANCE?* 3, 4-5 (Christopher Hood & David Heald eds., 2006) (reviewing similar definitions of transparency “in its now ubiquitous governance-related sense”).
  7. For the suggestion that the concept of privacy drifted rightward in constitutional debate following the Warren Court era, see Sanford Levinson, *The Warren Court Has Left the Building: Some Comments on Contemporary Discussions of Equality*, 2002 U. CHI. LEGAL F. 119, 124-32.
  8. See, e.g., TERO ERKKILÄ, *GOVERNMENT TRANSPARENCY: IMPACTS AND UNINTENDED CONSEQUENCES* 24-25 (2012) (discussing “various modalities” and “divergent rationales” in the transnational discourse of transparency).
  9. My analysis of transparency’s changing meaning, accordingly, does not focus on its conceptual or semantic content but instead on the interactions over time between various legal instantiations of transparency and various political actors seeking to access or control information.
  10. See Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 U. PITT. L. REV. 443, 448-49 (2012) (describing transparency advocates as joined in the search for a “fix” to “a fundamental and pervasive problem” of informational asymmetry “endemic to government,” yet sharply at odds on the nature of the problem and of government itself). As Professor Fenster details, a variety of reform movements have attached a variety of aspirations to transparency in recent decades. See *id.* at 451-501.

## I. DEFINING IDEOLOGICAL DRIFT

The policies, principles, and ideas that we use to evaluate and explain the legal and social order, Balkin has observed, “do not have a fixed normative or political valence.”<sup>11</sup> On the contrary, their “valence varies over time as they are applied and understood repeatedly in new contexts and situations.”<sup>12</sup> This is the phenomenon of ideological drift. An argument or a trope that “appears on its face to have determinate political consequences” in a certain period may come to have very different meanings and effects when repeated in a future period.<sup>13</sup> An argument or a trope that is initially seen as “populist” or “left-wing” may in later years be identified with causes seen as “elitist” or “right-wing,” and vice versa—although Balkin suggests that “the most common examples” of ideological drift “are comparatively liberal principles that later serve to buttress comparatively conservative interests.”<sup>14</sup>

The examples of “colorblindness” and “free speech” are instructive. When the first Justice Harlan stated in his 1896 *Plessy v. Ferguson* dissent that the “Constitution is color-blind,”<sup>15</sup> it seemed “a radical assertion of racial equality.”<sup>16</sup> Against the backdrop of Jim Crow, the Black Codes, and widespread practices of racial apartheid, for the courts to insist on constitutional colorblindness would have been an enormous advance for the legal position of African Americans and other racial minorities. By the 1990s, however, Justice Harlan’s language had “become the rallying cry of conservatives who opposed affirmative action programs that were designed to disestablish racial stratification.”<sup>17</sup> The colorblindness conceit drifted from left to right. Arguments for unfettered free speech have moved in a similar direction. In the early part of the twentieth century, in Balkin’s telling, left-liberals in the United States “tended to take relatively libertarian views on free speech,” while conservatives were “more likely to balance the interest in free speech against the interest in social order” and “the preservation of

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11. J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 870 (1993).

12. *Id.*

13. J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131, 1148 (1994).

14. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383. Ideological drift operates on higher-level, classificatory concepts as well. “The notions of ‘left’ and ‘right’ or ‘liberal’ and ‘conservative’ are themselves subject to drift, because over time the positions taken by those who identify themselves (or are identified) as conservatives and liberals tend to change.” Balkin, *supra* note 11, at 874.

15. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

16. Jack M. Balkin, *Deconstruction’s Legal Career*, 27 CARDOZO L. REV. 719, 731 (2005).

17. *Id.*

important social values.”<sup>18</sup> Yet by the end of the century, many left-liberals had come to endorse a balancing approach to the First Amendment in areas such as sexual harassment and campaign finance,<sup>19</sup> while many conservatives were “using the very same absolutist forms of argument offered by the left in previous generations” to oppose economic and social welfare regulation.<sup>20</sup>

A slightly more formal definition of ideological drift may be helpful. We can say that ideological drift occurs in law and public policy when:

1. At Time One, an idea tends to be associated with policy outcomes or reform agendas that have political orientation *X*; and
2. At Time Two, the idea becomes substantially (though not necessarily exclusively) associated with policy outcomes or reform agendas that have political orientation not-*X*.

This is intended to be a broad definition. It does not require the operation of ideology in any comprehensive sense. And it allows for different *types* and *degrees* of drift, depending on what exactly is changing over time – for instance, the normative leanings of an idea’s proponents or the practical effects of its implementation – and by how much. Complete reversal of an idea’s political valence is not required; meaningful movement toward the other end of the political spectrum is all that is necessary and sufficient. Balkin portrays ideological drift as a recurring phenomenon, indeed a “ubiquitous” one,<sup>21</sup> and this formulation seems to capture what he and other users of the term have in mind.

Ideological drift occurs for two basic reasons. First, even if the content of a policy or principle appears to remain stable over time, developments in the wider world – shifts in culture, technology, demography, political organization, and so on – will invariably alter its social and semiotic significance.<sup>22</sup> Requiring government officials to be “colorblind,” in the sense of taking no account of race, means

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18. Balkin, *supra* note 11, at 871.

19. *See id.*

20. Balkin, *supra* note 14, at 384; *see also* Mark Tushnet, *Can You Watch Unenumerated Rights Drift?*, 9 U. PA. J. CONST. L. 209, 210 (2006) (“The case of free speech provides seemingly the easiest example of ideological drift.”).

21. J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 87 (1998) (stating that ideological drift is “a ubiquitous phenomenon in social and political life”). If one credits this claim, then it should not be surprising to learn that a concept like transparency has experienced *some* sort of ideological drift. The interest lies in figuring out such a drift’s contours, dynamics, and implications.

22. *See* Balkin, *supra* note 11, at 871.

something very different in a society that already forbids de jure racial segregation than it does in a society that pervasively employs such segregation. Second, the idea itself may change as its content becomes contested and reinterpreted, often in response to the effectiveness of early proponents.<sup>23</sup> Liberals and conservatives now debate not only the applicability of Justice Harlan's colorblindness argument to present circumstances, but also whether the argument embodies a higher-order commitment to racial anticlassification, racial antisubordination, or something else besides. When complaints start to surface that "a good idea has been taken too far" or that a principle's "true meaning" has been perverted, it is frequently a sign that ideological drift is underway.<sup>24</sup>

Certain sorts of ideas may be especially susceptible to ideological drift (and especially amenable to being analyzed in its terms). Although initially promoted for specific reformist purposes, the concept of colorblindness lacks an intrinsic political valence. It describes either a state of affairs or a procedural goal; it can be operationalized any number of ways; and it gains coherent practical meaning only when embedded in a broader normative program and institutional context. As we will see, transparency is similar in all of these respects.

## II. WHEN TRANSPARENCY WAS (MORE) PROGRESSIVE

What did transparency mean to legal reformers in the Progressive Era, from roughly 1890 through the early part of the twentieth century, and in the decade between the mid-1960s and the mid-1970s? What did the concept connote, and what was its legalization intended to accomplish? A brief review of the claims made by leading advocates of "publicity," "freedom of information," and other cognate terms suggests some common political and epistemological assumptions.<sup>25</sup> Those who designed transparency policies in these periods generally envisioned the policies as facilitating not just a government less prone to abuse, but

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23. *See id.* at 871-72. Some of the ways in which an idea could be reimagined or recharacterized for different political purposes may be apparent at the idea's formation. But given the contingencies of history and the limits of foresight, "the conservative implications of a progressive idea," or the progressive implications of a conservative idea, "may not be recognized at the time by the persons who espouse that idea." J.M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831, 1834 (1991).

24. Balkin, *supra* note 11, at 872-73.

25. This review crams a large volume of history into a small number of pages. The best defense of such compression, I believe, is that "there is a certain poetry in brevity and something to be gained from the effort to distill simple essences from complex ideas," Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1397 (2017) — in particular, the opportunity to see patterns and continuities across reform programs or bodies of thought.



also a more vigorous and egalitarian regulatory state capable of taming private economic interests.

*A. The Progressive Era*

To right any wrong in the United States is, after all, a simple process. You have only to exhibit it where all the people can see it plainly . . . .

– Charles Edward Russell, 1920<sup>26</sup>

For American progressives at the turn of the twentieth century, the call for new laws mandating “publicity” was tied to a reform agenda that aimed to limit the influence of big business and to produce more efficient, scientific, and democratically accountable regulation. Progressivism encompassed a broad set of movements, and many of its disparate – and at times internally inconsistent – elements did not emphasize transparency per se.<sup>27</sup> Nonetheless, it is possible to identify central themes in legal advocacy on the subject and thereby to recover a sense of transparency’s ideological profile at the time.

The iconic figure in this regard is Brandeis, whose dictum that “[s]unlight is . . . the best of disinfectants”<sup>28</sup> continues to be quoted to this day. Brandeis focused on corporate, more than governmental, exposure.<sup>29</sup> By forcing investment bankers to disclose the commissions they charged to issuers of securities,<sup>30</sup> in

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26. CHARLES EDWARD RUSSELL, *THE STORY OF THE NONPARTISAN LEAGUE: A CHAPTER IN AMERICAN EVOLUTION* 64 (1920). At the time he wrote these words, Russell was well known as a “crusading progressive reformer” and “muckraking provocateur exposing the excesses of industrialism.” ROBERT MIRALDI, *THE PEN IS MIGHTIER: THE MUCKRAKING LIFE OF CHARLES EDWARD RUSSELL*, at x (2003).

27. For a survey of mounting efforts by historians in the 1970s to challenge the coherence of progressivism, and the efforts of other historians to counter those critiques and identify some “ideational glue” that held progressive movements together, see Daniel T. Rodgers, *In Search of Progressivism*, 10 *REVIEWS AM. HIST.* 113, 121 (1982). See also *id.* at 123–27 (arguing that progressives tended to orient themselves around three distinct rhetorics or “clusters of ideas”: “antimonopolism,” the “language of social bonds,” and “the language of social efficiency”). Without denying that progressivism contained numerous internal fissures as well as glaring failings on issues such as race, I want to suggest here that leading progressives’ arguments for “publicity” reflected a coherent set of normative goals and values.

28. Brandeis, *supra* note 1, at 10.

29. Cf. K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 *CARDOZO L. REV.* 1621, 1629 (2018) (noting that “Brandeis exemplifies [the] Progressive Era critique of private power” as a potential source of domination).

30. Brandeis, *supra* note 1, at 12.

addition to severing the “nexus between all the large potentially competing corporations” through prohibitions on interlocking directorates,<sup>31</sup> Brandeis believed that economic concentration and predation could be curtailed without sacrificing economic growth. While publicizing bankers’ fees might help investors make informed decisions, the fundamental goal was to rein in the profits and power of the big banks. “The disease was bigness, not fraud.”<sup>32</sup>

Brandeis’s message found a large audience. Filtered through emerging theories of transparency as a tool for investor protection and market efficiency, his suggestion of mandatory disclosure was ultimately adopted in a much broader form in the Securities Act of 1933 and the Securities Exchange Act of 1934.<sup>33</sup> Well into the middle part of the century, the “faith in publicity that animated Progressive remedies for corporate ills remained the predominant characteristic of corporation law reform.”<sup>34</sup>

Brandeis also helped to develop the “Brandeis brief” as a litigation tool in the years before he joined the Supreme Court. As famously deployed in *Muller v. Oregon*, which upheld a maximum-hours law for women workers, the Brandeis

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31. Louis D. Brandeis, *Serve One Master Only!*, HARPER’S WKLY., Dec. 13, 1913, at 10, 10 (emphasis omitted).
  32. Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 406 n.90 (1990); see also JEFFREY ROSEN, LOUIS D. BRANDEIS: AMERICAN PROPHET 73 (2016) (“Brandeis proposed a series of remedies for the evils he associated with financial oligarchy and the curse of bigness. He believed that disclosure of the excessive underwriting fees, commissions, and profits of the investment banks would lead to public protests against them.”); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1213 (1999) (“[D]isclosure was not an end in itself for Brandeis, but a means to an end—breaking up the untoward concentration of economic power in the hands of the ‘money monopoly.’”). For a broader account of Brandeis’s fixation on “bigness” as a social evil, see THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN 80-142 (1984).
  33. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78qq (2018)); Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa (2018)); see Edward J. Janger, *Brandeis, Progressivism, and Corporate Law: Rethinking Benedict v. Ratner*, 37 BRANDEIS L.J. 63, 77 (1998) (“The Securities Act of 1933 embodies Brandeis’s vision of public disclosure of financial information.”); Williams, *supra* note 32, at 1211-23 (reviewing Brandeis’s views on disclosure and their influence on the development of securities law). The Clayton Antitrust Act, Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27; 29 U.S.C. §§ 52-53 (2018)), responded more immediately to Brandeis’s call for limiting concentrations of financial power.
  34. MORTON KELLER, REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900-1933, at 91 (1990) (internal quotation marks omitted). Emblematic of this faith in publicity is Herbert Croly’s remark in his 1909 manifesto, *The Promise of American Life*, that “[i]n an atmosphere of discussion and publicity really prudent employers and labor organizations would fight very rarely, if at all.” HERBERT CROLY, THE PROMISE OF AMERICAN LIFE 393 (1909).

brief prioritized the “very copious collection” of sociological data over traditional legal argument in defense of protective legislation.<sup>35</sup> Some historians have questioned the novelty and efficacy of the *Muller* filing.<sup>36</sup> For our purposes, the important point is that the Brandeis brief, as both a legal technique and political symbol, embodied the progressives’ fusion of moralism and optimistic empiricism – their conviction that “facts were necessary to good governance,” especially with respect to vulnerable populations, and that “publicity and sunlight produced those necessary facts.”<sup>37</sup> Responsive state action, it was assumed, would follow.

Well beyond Brandeis’s interventions, publicity became “a rallying cry for progressive politicians” seeking to cultivate more engaged citizens and bring discipline to markets in the early 1900s.<sup>38</sup> As Governor of New York and then as President, Theodore Roosevelt repeatedly asserted that “publicity would help expose and curb corporate abuses,”<sup>39</sup> which in turn would reduce governmental abuses by limiting opportunities for corporate capture. Federal laws such as the Pure Food and Drug Act<sup>40</sup> and the Meat Inspection Act<sup>41</sup> of 1906 imposed extensive monitoring and labeling requirements on commercial producers and retailers. The Progressive Party platform of 1912 demanded additional legislation

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35. 208 U.S. 412, 419 (1908) (discussing Brandeis’s brief); see also PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 114–31 (1984) (describing the *Muller* brief and contending that it “changed the course of American legal history”).
36. See generally David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 2D 9 (2011); Noga Morag-Levine, *Facts, Formalism, and the Brandeis Brief: The Origins of a Myth*, 2013 U. ILL. L. REV. 59.
37. Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1316 (2010); see also MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 222 (2009) (stating that the *Muller* brief reflected “the progressive era’s faith in scientific investigation”). On Brandeis’s own optimistic empiricism, see Henry J. Friendly, *Mr. Justice Brandeis: The Quest for Reason*, 108 U. PA. L. REV. 985, 998–99 (1960) (“‘[T]he truth shall make you free.’ Surely this was the essence of Brandeis’ teaching. He was the authentic child of the *Aufklärung*; he had none of today’s doubts as to whether the truth could be ascertained.”). On the progressives’ optimistic empiricism generally, see ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 163 (1995) (“No word carried more progressive freight than *publicity*: expose the backroom deals in government, scrutinize the balance sheets of corporations, attend the public hearings on city services, study the effects of low wages on family life . . . . Once the public knew, it would act: knowledge produced solutions.”).
38. Kevin Stoker & Brad L. Rawlins, *The “Light” of Publicity in the Progressive Era: From Searchlight to Flashlight*, 30 JOURNALISM HIST. 177, 178 (2005).
39. *Id.*; see also LEWIS L. GOULD, *AMERICA IN THE PROGRESSIVE ERA, 1890–1914*, at 27 (2001) (“[President Roosevelt] advanced the idea that publicity about the operations of large corporations was the best way to insure their socially beneficial behavior.”).
40. Pub. L. No. 59–384, 34 Stat. 768 (1906) (repealed 1938).
41. Pub. L. No. 59–382, 34 Stat. 669 (1906) (codified as amended in scattered sections of 22 U.S.C.).

to ensure greater “[p]ublicity as to wages, hours and conditions of labor,” and “industrial accidents and diseases,” along with “complete publicity of those corporation transactions which are of public interest.”<sup>42</sup> “To an increasing extent,” Walter Weyl observed in 1912, “we are putting our trust in business publicity. It is a splendid means of unchaining public resentment or of inciting public approval.”<sup>43</sup> “Publicity,” former Secretary of the Interior James Garfield assured a Cleveland audience that same year, “is the foundation of honest dealing and of the right relation between industry and the public welfare.”<sup>44</sup> Throughout the 1910s, publicity and business regulation were frequently linked in U.S. newspapers.<sup>45</sup>

At the same time, progressives pressed for greater transparency and reduced patronage in government institutions and the political process. The Pendleton Act of 1883 sought to reorient public sector hiring and promotion around “open, competitive examinations.”<sup>46</sup> Systems for selecting elected representatives were moved out of party backrooms in the 1900s and 1910s through the adoption of presidential primaries in a majority of states and the adoption of direct primaries for most state and federal elective offices.<sup>47</sup> Congress included a broad whistleblower protection measure in the Lloyd-La Follette Act of 1912, providing that the right of federal civil servants “to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with.”<sup>48</sup> Following repeated entreaties by President Roosevelt and civic groups such as the National Publicity

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42. *Progressive Party Platform of 1912*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=29617> [<https://perma.cc/B395-V7UX>].

43. WALTER E. WEYL, *THE NEW DEMOCRACY* 294 (1912).

44. James R. Garfield, *Publicity in Affairs of Industrial Combinations*, 42 *ANNALS AM. ACAD. POL. & SOC. SCI.* 140, 145 (1912). “If you and I are permitted to hide behind a corporation, great or small, and be free from public inspection or supervision,” Garfield continued, “we then have every opportunity to do that which will be unfair toward our competitors, unfair toward the public.” *Id.*; see also Henry Clews, *Publicity and Reform in Business*, 28 *ANNALS AM. ACAD. POL. & SOC. SCI.* 143, 154 (1906) (“We are now on the high road to the correction of a multitude of abuses and the country is to be congratulated upon this salutary movement for improvement and reform in our business methods. Our great remedy is PUBLICITY, and the enforcement of the law.”).

45. Stoker & Rawlins, *supra* note 38, at 182.

46. Pendleton Act, ch. 27, § 2, 22 Stat. 403, 403 (1883) (codified as amended in scattered sections of 5 U.S.C.).

47. See WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* 75 (1970).

48. Pub. L. No. 62-336, § 6, 37 Stat. 539, 555 (1912) (codified as amended at 5 U.S.C. § 7211 (2018)).

Law Organization, Congress also enacted in 1910 the first federal campaign finance disclosure law, the Publicity of Political Contributions Act (commonly known as the Publicity Act).<sup>49</sup> A “central focus of early twentieth-century progressivism,” as election law experts have noted, was “[e]radicating the corrupting influence of undisclosed political contributions and expenditures.”<sup>50</sup>

Borrowing ideas from the Progressive Party, President Wilson pushed the transparency theme further following his election in 1912. On the campaign trail and in his 1913 book *The New Freedom*, Wilson insisted that “to put our government again on its right basis . . . it is necessary to open up all the processes of our politics.”<sup>51</sup> At home, Wilson called for more “sunshine” in congressional deliberations, the selection of political party leaders, and public administration.<sup>52</sup> Abroad, Wilson dramatically called for, and then failed to fully implement, an end to secret negotiations and agreements.<sup>53</sup> After the collapse of Wilson’s 1919 peace plan, anti-imperialist “peace progressives” intensified the critique of international diplomacy as an arena in which political and corporate elites strike clandestine deals that bind their compatriots to war.<sup>54</sup>

Muckraking journalists, meanwhile, inspired and participated in transparency reform campaigns through their exposés of unsanitary working conditions, unscrupulous business practices, and myriad forms of corruption, often at the intersection of industry and government. “It is hardly an exaggeration to say that the Progressive mind was characteristically a journalistic mind,” Richard Hof-

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49. Publicity Act, ch. 392, 36 Stat. 822 (1910). The Publicity Act, which was expanded in 1911, followed a 1907 law that banned corporate contributions to federal candidates. For a discussion of the Publicity Act and its genesis, see Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections and How 2012 Became the “Dark Money” Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL’Y 383, 385-86, 401-11 (2013).

50. Potter & Morgan, *supra* note 49, at 385-86.

51. WOODROW WILSON, *THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE* 111 (1913).

52. See JAMES J. MARQUARDT, *TRANSPARENCY AND AMERICAN PRIMACY IN WORLD POLITICS* 71-77 (2011).

53. See *id.* at 82-89.

54. See, e.g., ROBERT DAVID JOHNSON, *THE PEACE PROGRESSIVES AND AMERICAN FOREIGN RELATIONS* 79-86 (1995) (discussing Senator Robert La Follette’s categorical opposition to secret treaties and his eventual break with President Wilson over the issue).

stadter has written, “and that its characteristic contribution was that of the socially responsible reporter-reformer.”<sup>55</sup> These reporter-reformers not only collected unsettling facts but also in many cases “went beyond observation and description to advocacy for Progressive reform.”<sup>56</sup>

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Transparency (or publicity), in short, was an explicit centerpiece of the Progressive program to invigorate and professionalize government while enhancing economic competition and fairness. United by their discontent with Gilded Age plutocracy and their insistence on state solutions, progressive lawyers, activists, journalists, and politicians embraced transparency as a means of limiting the excesses of both private corporations and the public servants responsible for overseeing them. Crucially, for progressives of all stripes the “mere negation of power” was never enough.<sup>57</sup> Exposing the inner workings of institutions was not an end in itself, but rather a precondition for new modes of responsive reg-

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55. RICHARD HOFSTADTER, *THE AGE OF REFORM 185* (1955). See generally LOUIS FILLER, *MUCKRAKING AND PROGRESSIVISM IN THE AMERICAN TRADITION* (2d ed. 1996). In 1912, the direction of exposure was reversed when “Congress attached a rider to the post office bill that required ‘the very publications which live by turning the search-light of publicity upon everybody and everything’ to publish facts concerning their ownership and circulation and to mark all paid matter as ‘advertisements.’” Stoker & Rawlins, *supra* note 38, at 182 (quoting *Newspapers Opposing Publicity*, 45 LITERARY DIG. 603, 607 (1912)).
56. ROBERT MIRALDI, *MUCKRAKING AND OBJECTIVITY: JOURNALISM’S COLLIDING TRADITIONS* 49 (1990).
57. DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* 54 (1998) (“[P]rogressives everywhere . . . claimed that mere negation of power was not enough.”); see also Glen Gendzel, *What the Progressives Had in Common*, 10 J. GILDED AGE & PROGRESSIVE ERA 331, 333 (2011) (arguing that “[m]ost fundamentally, what the progressives had in common was an ideology of positive statism defined in opposition to the dominant late nineteenth-century conservative ideology of negative statism”); Elizabeth Sanders, *Rediscovering the Progressive Era*, 72 OHIO ST. L.J. 1281, 1289 (2011) (arguing that “the central tenets of progressive reform in its own time” were the “value of collective action” and the “belief that government is the solution to the problems of an industrial democracy” (emphasis omitted)); cf. Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2026 (2018) (“The Progressives followed the German philosopher G.W.F. Hegel in understanding the state as an institution that guarantees individual and collective freedom through expert regulation and social-welfare provision. But, unlike Hegel, they argued that administration must be informed by public opinion.” (footnote omitted)).

ulation and democratic action. As attested by the introduction of the secret ballot<sup>58</sup> and by Brandeis's own efforts to establish a right to privacy,<sup>59</sup> progressives were willing to trade certain forms of openness for opacity where the risks to principled decision making or other values seemed too severe.

By the end of the Progressive Era, however, the political valence of transparency was already starting to drift. President Wilson and his allies gradually grasped that transparency reform would not be sufficient to contain the power of industry.<sup>60</sup> The term "publicity" became increasingly identified with corporate strategies to control public opinion, instead of with governmental strategies to harness public opinion to control corporations.<sup>61</sup> In the 1940s, probusiness conservatives uneasy with the New Deal and the expanding administrative state led the push to impose stricter transparency requirements on the regulatory process, as in the "public information" and notice-and-comment provisions of the 1946 Administrative Procedure Act (APA).<sup>62</sup> The following decade saw Senator Joseph McCarthy using the "spotlight of pitiless publicity" to expose alleged communist sympathizers in the federal executive branch,<sup>63</sup> while numerous state and

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58. See *Burson v. Freeman*, 504 U.S. 191, 202-06 (1992) (describing the widespread adoption of secret ballot laws around the turn of the twentieth century).

59. On Brandeis's lifelong struggle to reconcile his commitments to privacy and transparency, see generally Richards, *supra* note 37.

60. See MARQUARDT, *supra* note 52, at 79 ("Those around [President Wilson], Brandeis included, had come to the conclusion that the New Freedom reform program, with its emphasis on 'sunlight' as a method to re-energize the political and economic liberty of the people, was idealistic and naïve. Wilson sensed that the publicity of big business had its limitations . . .").

61. See Stoker & Rawlins, *supra* note 38, at 177-78, 183-86.

62. Pub. L. No. 79-404, §§ 3-4, 60 Stat. 237, 238-39 (1946) (codified as amended in scattered sections of 5 U.S.C.); see Tom McClean, *Who Pays the Piper? The Political Economy of Freedom of Information*, 27 GOV'T INFO. Q. 392, 396 (2010) ("Although the justification for [the APA's 'public information' section] was formally couched in terms of the democratic rights of private individuals, it is fairly clear that the specifically economic concerns of private enterprise were fundamentally what was at stake . . ."); William J. Stuntz, *Secret Service: Against Privacy and Transparency*, NEW REPUBLIC, Apr. 17, 2006, at 12, 12-13 ("[The APA's] goal was to rein in the executive agencies through which New Dealers regulated the economy, chiefly by making those agencies more open . . . The winners were those who didn't want government agencies to do much governing."). As the preceding discussion suggests, Professor Stuntz's further claim that conservatives embraced transparency because it is an "inherently conservative idea[]," Stuntz, *supra*, at 13, is belied by pre-New Deal history. Indeed, this Article highlights a period in which transparency was seen as a key tool for ensuring a stronger state – and cautions against imputing an intrinsic political valence to a concept like transparency.

63. See Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 13-22 (1991). It is not clear that all of McCarthy's methods of exposure qualify as transparency in the institutional, administrative sense that I am using the term. See *supra* notes 6-7 and accompanying text.

local governments in the South sought to undermine civil rights organizations by requiring publication of their membership lists.<sup>64</sup>

By midcentury, then, transparency's political valence had become ambiguous. If the Progressive Era campaigns for transparency had frequently faced outward, toward private corporations and their influence on public bodies, transparency law began in this period to turn inward, toward the machinery of government itself. Transparency's salience as a democratic ideal faded; Brandeis's sunlight metaphor moved from the center to the periphery of the left-liberal legal imagination. But not for long.

*B. The 1960s and 1970s*

[The Government in the Sunshine Act] will, I am certain, restore the faith of the public in their governmental agencies and will enable such agencies to function in a more equitable fashion. The fear and mistrust which have characterized the public's view of government . . . ha[ve] seriously weakened its effectiveness. It is our obligation as representatives and legislators to eradicate that fear.

—Rep. Benjamin Gilman, 1976<sup>65</sup>

The cultural and political “awakenings” of the 1960s “created an unprecedented openness of institutions to critical public view.”<sup>66</sup> This renewed interest in openness took many forms, across both public and private domains, and yielded proliferating claims of a “right to know.”<sup>67</sup> At the national level, reformers in this decade and the next codified a commitment to transparency in a series of landmark statutes, including the Freedom of Information Act (FOIA),<sup>68</sup> the

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64. See Kreimer, *supra* note 63, at 42-43 & n.117.

65. 122 CONG. REC. H28,474 (daily ed. Aug. 31, 1976).

66. Hugh Hecl, *The Sixties' False Dawn: Awakenings, Movements, and Postmodern Policy-Making*, in *INTEGRATING THE SIXTIES* 34, 57 (Brian Balogh ed., 1996); cf. Sheila Jasanoff, *A Century of Reason: Experts and Citizens in the Administrative State*, in *THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE* 382, 388 (Stephen Skowronek et al. eds., 2016) (describing the period from 1969 through the 1970s as “the decade of transparency”).

67. For a broad overview of these developments and the rise of a postwar “culture of transparency,” see generally SCHUDSON, *supra* note 3.

68. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2018)). FOIA was significantly strengthened in 1974 amendments. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (codified as amended at 5 U.S.C. § 552 (2018)).



Fair Packaging and Labeling Act,<sup>69</sup> the Truth in Lending Act,<sup>70</sup> the National Environmental Policy Act of 1969 (NEPA),<sup>71</sup> the Legislative Reorganization Act of 1970 (LRA),<sup>72</sup> the Federal Election Campaign Act of 1971 (FECA),<sup>73</sup> the Federal Advisory Committee Act (FACA),<sup>74</sup> the Magnuson-Moss Warranty Act,<sup>75</sup> the

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69. Pub. L. No. 89-755, 80 Stat. 1296 (1966) (codified as amended at 15 U.S.C. §§ 1451-1461 (2018) and 21 U.S.C. §§ 379f, 379s, 1033, 1049 (2018)).
70. Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1667f (2018)).
71. Pub. L. No. 91-190, 83 Stat. 852 (1969) (codified as amended in scattered sections of 42 U.S.C.). NEPA requires that federal agencies produce environmental impact statements before certain “major” actions may go forward. *Id.* § 102(2)(C), 83 Stat. at 853 (codified as amended at 42 U.S.C. § 4332(2)(C) (2018)).
72. Pub. L. No. 91-510, 84 Stat. 1140 (1970) (codified as amended in scattered sections of 2 U.S.C.). Among other reforms, the 1970 LRA authorized television and radio broadcasting of congressional committee hearings, limited the use of closed hearings, and enabled public disclosure of individual House members’ votes in the Committee of the Whole. For a summary of the Act’s transparency provisions and their expansion over the course of the 1970s through House and Senate rules changes, see DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* 21 (1991); Walter Kravitz, *The Advent of the Modern Congress: The Legislative Reorganization Act of 1970*, 15 LEGIS. STUD. Q. 375, 378, 390-92 (1990); and Brent Ranalli et al., *The Sunshine Reforms and the Transformation of Congressional Lobbying* 8-18 (July 10, 2017) (unpublished manuscript) (on file with author). See also Paul Rundquist, *Secrecy in Congress*, in 4 THE ENCYCLOPEDIA OF THE UNITED STATES CONGRESS 1774, 1775 (Donald C. Bacon et al. eds., 1995) (“By the end of the 1970s, virtually all committee meetings and hearings, except for those dealing with national security issues, ongoing criminal investigations, or matters that might defame an individual, were open to the public.”); *The Transparency Problem(s)*, CONG. RES. INST. (2017), <https://www.congressionalresearch.org/TransparencyProblem.html> [<https://perma.cc/P4UU-GJ6E>] (“[T]he 1970 LRA . . . quietly eliminated [congressional] secrecy overnight. Immediately, everyone on earth had access to nearly every amendment and vote ‘from hopper to floor.’”).
73. Pub. L. No. 92-225, 86 Stat. 3. FECA’s disclosure title, *id.* §§ 301-311, 86 Stat. at 11-19, was augmented by Congress three years later. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §§ 201-209, 88 Stat. 1263, 1272-88 (codified as amended in scattered sections of 52 U.S.C.).
74. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. app. §§ 1-16 (2018)).
75. Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended at 15 U.S.C. §§ 2301-2312 (2018)). This Act requires written warranties to “fully and conspicuously disclose in simple and readily understood language the[ir] terms and conditions.” *Id.* § 102(a), 88 Stat. at 2185 (codified at 15 U.S.C. § 2302(a) (2018)). Professor Robert Rabin has argued that “in many ways the consumerist impulses triggered by [Ralph] Nader’s auto safety campaign built directly upon the foundations of Progressive era legislation” and cited the Magnuson-Moss Warranty Act as an example of this lineage. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1283-84 (1986).

Government in the Sunshine Act (GITSA),<sup>76</sup> and more. The federal courts, for their part, began in the 1970s to demand greater “openness, explanation, and participatory democracy” in reviewing agency rulemaking under the APA.<sup>77</sup> Several of the statutes from this period would go on to serve as templates for reformers worldwide,<sup>78</sup> and they continue to supply the legal scaffolding within which government transparency is produced and contested in the United States today.

Relative to the transparency campaigns of the Progressive Era, the 1960s-70s campaigns were not as closely identified with a specific political label or set of politicians. Nor did they target big business or political bossism to a similar degree. In some respects, the ideological profile of transparency had already evolved since the 1910s, becoming more identified with skepticism of federal agencies (which in the Progressive Era needed to be created and now needed reform) as well as with consumerism and complacency about economic structure. If the Progressive vision of transparency assumed the legitimacy of secrecy in certain realms and the capacity of the state to secure the common good, the vision of transparency that came to predominate in the postwar era was more axiomatic, proceduralist, and lawyer-driven—such that one might question whether the latter was “really” progressive or rather a stalking horse for the libertarian developments to come.<sup>79</sup> Still, the 1960s and 1970s transparency campaigns and their Progressive predecessors shared important ideological features, above all the aspiration to level the playing field between ordinary citizens and corporate interests and thereby make the governmental process more equitable, effective, and credible.

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76. Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended in scattered sections of 5 and 39 U.S.C.).
77. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978); *see also, e.g., United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 248-52 (2d Cir. 1977).
78. *See, e.g., David E. Pozen, Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1098-99, 1105-06 (2017) (discussing FOIA's global influence); Council on Env'tl. Quality, *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-Five Years*, EXECUTIVE OFF. PRESIDENT 3 (1997), <https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf> [<https://perma.cc/8MQT-PT2J>] (“NEPA has been emulated by more than 25 states and over 80 countries around the world, and serves as a model for environmental impact assessments for such global institutions as the World Bank.”).
79. A further complication is that the meaning of progressivism itself began to evolve in the postwar period, ultimately placing less “faith in expertise as [a] means of transcending social conflict” and rejecting “the racism and sexism that [had] marred progressivism's earlier manifestation[s].” Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. (forthcoming 2018) (manuscript at 1 n.2), <https://ssrn.com/abstract=3133367>. The discussion that follows does not dwell on developments within progressivism, except to the extent they have intersected with transparency law.

The canonical piece of transparency legislation dating from this period – and arguably the canonical piece of transparency legislation in the modern world<sup>80</sup> – is FOIA. Hailed as a “quintessential” example of “participatory policy-making,”<sup>81</sup> FOIA contains some strikingly bold features. Unlike the original APA, it allows “any person” to request any federal agency record for any reason, or no reason at all.<sup>82</sup> Agencies are required to turn over every responsive, nonexempt record within weeks.<sup>83</sup> Users of the law pay only a small fraction of the costs the government incurs in fulfilling their requests.<sup>84</sup> Noncommercial requesters pay the least.<sup>85</sup>

Led by Representative John Moss, a House subcommittee spent over a decade laying the groundwork for FOIA’s enactment. Moss garnered support from a number of groups, each with distinct but related complaints regarding government secrecy. These groups included journalists increasingly frustrated by the executive branch’s information-control activities (and increasingly evangelical about their role as guardians of democracy), scientists frustrated by administrative secrecy practices that inhibited their research, consumer advocates frustrated by the inaccessibility of data bearing on public health and safety, and members of Congress frustrated by agencies’ withholding of information and the concomitant erosion of legislative oversight. In addition to these institutional pressures, the push for FOIA and its 1974 amendments drew on broader social and political forces: the Cold War imperative to differentiate the American political system from that of the Soviet Union, the growing cultural sentiment that citizens were

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80. See David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 314 n.204 (2010) (“FOIA introduced a norm of open access to government documents that has commanded deep public loyalty, taken on a quasi-constitutional valence, and spawned a vast network of imitator laws at all levels of United States government and in democracies around the world.”).

81. Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1445 (2000).

82. 5 U.S.C. § 552(a)(3)(A) (2018); see Pozen, *supra* note 78, at 1102 & n.24.

83. 5 U.S.C. § 552(a)(6) (2018).

84. See Pozen, *supra* note 78, at 1116, 1123-24.

85. 5 U.S.C. § 552(a)(4)(A)(ii)(II) (2018). FOIA’s progressive fee structure was developed in the 1980s. See Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, §§ 1801-1804, 100 Stat. 3207-3207-48 to -50 (current version at 5 U.S.C. § 552 (2018)); Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10012 (Mar. 27, 1987).

entitled to know what their government was up to, and the “credibility gap” generated by the experiences of Watergate and the Vietnam War.<sup>86</sup> FOIA’s proponents tended to emphasize goals such as enhancing democratic accountability<sup>87</sup> and public trust in government<sup>88</sup> and, by the 1970s, reducing national security “overclassification.”<sup>89</sup> With the important exception of the news media, business interests played little role in the early development of the law.<sup>90</sup>

Something of the political complexion of the original FOIA can be gleaned from the figure of Moss himself, as well as his famous civil society collaborator Ralph Nader. If Moss came across as “laissez-faire” in his “vision of press freedom,”<sup>91</sup> he was a down-the-line Great Society liberal otherwise.<sup>92</sup> Often with the help of Nader, he crusaded for “consumer protection, securities reform, environ-

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86. For largely complementary discussions of these forces and the creation of FOIA, see HERBERT N. FOERSTEL, *FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT* 21-44 (1999); SAM LBOVIC, *FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA* 164-89 (2016); MICHAEL R. LEMOV, *PEOPLE’S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMER RIGHTS* 47-68 (2011); SCHUDSON, *supra* note 3, at 28-60; Sam Archibald, *The Early Years of the Freedom of Information Act—1955 to 1974*, 26 *POL. SCI. & POL.* 726 (1993); Fenster, *supra* note 10, at 451-66; and George Kennedy, *Advocates of Openness: The Freedom of Information Movement 16-135* (Aug. 1978) (unpublished Ph.D. dissertation, University of Missouri–Columbia) (on file with author).
87. See, e.g., S. REP. NO. 88-1219, at 8 (1964) (“Although the theory of an informed electorate is so vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for a policy of disclosure.”).
88. See, e.g., Victor H. Kramer & David B. Weinberg, *The Freedom of Information Act*, 63 *GEO. L.J.* 49, 49 (1974) (“[FOIA] ranks with the Bill of Rights as a basis for the preservation of citizen’s [sic] confidence in government . . .”).
89. See Pozen, *supra* note 78, at 1118 (describing the effort to fix overclassification through FOIA).
90. Cf. Margaret B. Kwoka, *Inside FOIA, Inc.*, 126 *YALE L.J.F.* 265, 265 (2016) (“[T]he legislative history of FOIA reveals almost no contemplation of commercial uses for the law.”).
91. LBOVIC, *supra* note 86, at 183-84. Professor Lebovic’s book places the development of FOIA in the context of the rise of the official classification system and the Cold War secrecy state. “Seen in isolation,” Lebovic argues, “the passage of the nation’s first FOI law seems like an unprecedented breakthrough for transparency. In reality, it was a weak ameliorative to unprecedented levels of secrecy. What is truly significant about FOIA is the fact that American citizens felt they needed such a law for the first time.” *Id.* at 189.
92. Certain other early congressional proponents of FOIA, most notably Donald Rumsfeld, did not share Moss’s broader political goals so much as a desire to challenge the Johnson Administration (1963-69). As President Ford’s chief of staff, Rumsfeld would later urge Ford to veto the 1974 amendments that gave the Act real teeth. See Thomas Blanton, *Freedom of Information at 40*, NAT’L SECURITY ARCHIVE (July 4, 2006), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB194> [<https://perma.cc/CVD5-79L2>].

mental protections,” and workers’ rights at the same time as he crusaded for freedom of information.<sup>93</sup> In the minds of Moss, Nader, and their supporters, the freedom of information cause was intimately bound up with a broader vision of good government that had a strong proregulatory strain. Those who opposed laws like FOIA, in their view, revealed themselves to be national security hawks, Article II absolutists, or—most likely—“well-heeled insiders” who wished to maintain the privileged access to policymakers they enjoyed in “smoke-filled rooms.”<sup>94</sup>

A similar story could be told about virtually all of the other government transparency measures enacted between 1966 and 1976. By opening up legislative and administrative bodies to “critical public view,”<sup>95</sup> these laws aimed to prevent well-heeled insiders, especially industry groups, from exercising undue influence over those bodies—and consequently to enhance the fairness, the deliberativeness, and (in the argot of the time<sup>96</sup>) the public interestedness of their work. FECA’s disclosure requirements for campaign contributions would not only “serve[] an informing function,” the thinking went, but also help “deter corrupt givers,” “discourage receivers from being corrupted,” and ensure “the integrity of a basic governmental process.”<sup>97</sup> NEPA’s environmental impact statements would not only “provide data and description,” but also force recalcitrant agencies to give greater weight to widely held environmental concerns as against

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93. Ralph Nader, *Foreword to LEMOV*, *supra* note 86, at ix; cf. Todd Holmes, *The Swing of the Political Pendulum: Congressman John Moss, the Democratic Party, and the United Farm Workers’ Grape Strike and Boycott, 1965-1970*, 88 S. CAL. Q. 295, 319 (2006) (noting that “Moss marketed himself as a representative of the working man and . . . the proud recipient of the ‘Union Label,’” at least outside the agricultural sector). Reflecting on Moss’s career, Nader wrote in 2011 that “Moss had his heyday of success largely between 1966 and 1976 when the Vietnam War, the military draft, the civil rights struggles, and the rise of the women’s liberation movement all helped create both an enabling climate and more progressive legislators for what was accomplished in the consumer, environmental, and worker fields of action.” Nader, *supra*, at ix.
94. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1323 (2010) (referring to Nader’s “battle against smoke-filled rooms populated only by well-heeled insiders”).
95. Hecló, *supra* note 66, at 57.
96. See generally Peter H. Schuck, *Public Interest Groups and the Policy Process*, 37 PUB. ADMIN. REV. 132, 132-36 (1977) (discussing the rise of liberal “public interest groups” and “public interest” rhetoric in the late 1960s and early-to-mid 1970s).
97. Brief for the Attorney General and the Federal Election Commission at 29-30, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436, 75-437) (internal quotation marks omitted); see also, e.g., Statement on Signing the Federal Election Campaign Act of 1971, PUB. PAPERS 165 (Feb. 7, 1972) (“By giving the American public full access to the facts of political financing, this legislation will guard against campaign abuses and will work to build public confidence in the integrity of the electoral process.”).

the self-serving demands of regulated firms.<sup>98</sup> The LRA's opening up of committee hearings and House members' votes would not only enrich public debates about legislation, but also reduce political alienation<sup>99</sup> and the outsized power of conservative committee chairs.<sup>100</sup> FACA would not only bring order and oversight to the sprawling world of federal advisory committees, but also ensure that these committees "adequately and fairly represent the public interest"<sup>101</sup> rather than the "highly paid lobbyist" who learns the Washington "game and how to play it."<sup>102</sup>

The mid-1970s campaign to enact GITSA is particularly instructive. Throughout the congressional deliberations on GITSA, supporters insisted

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98. Daniel A. Dreyfus & Helen M. Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RESOURCES J. 243, 254 (1976); see also Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53, 83 (1996) ("Environmentalists [at the time of NEPA's enactment] perceived a cozy relationship in which agency bureaucrats, along with the regulated parties, made decisions without regard to the preferences of the vast majority of Americans."); Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689, 696 (2000) ("NEPA, like the open government laws, made it easier for environmentalists and other public interest groups to monitor agencies, like the Department of Agriculture, that were perceived by them to be excessively friendly to corporate and business interests.").
99. See, e.g., *Legislative Reorganization Act of 1970: Hearing Before the Spec. Subcomm. on Legis. Reorganization of the H. Comm. on Rules*, 91st Cong. 297-98 (1969) (statement of Rep. Philip E. Ruppe) ("[T]he provisions set forth in the committee bill governing the open conduct of committee hearings are an extremely significant step toward more active citizen interest in the legislative process. In this period of increasing alienation among the people of this Nation, we cannot afford unnecessary secrecy . . ."); 116 CONG. REC. 23,916 (July 13, 1970) (statement of Rep. Fred Schwengel) (discussing "the need for more record voting as a means of giving the constituent a better understanding and to make the Congressman more responsive to his constituents, and for attempting to restore public confidence in the Congress").
100. See Ranalli et al., *supra* note 72, at 10 ("The liberals believed that by opening up committee business to the public, and by recording votes in the Committee of the Whole that had previously gone unrecorded, they could weaken the iron grip of the committee chairmen on House legislation.").
101. S. REP. NO. 92-1098, at 5 (1972) (quoting statement of Sen. Charles H. Percy).
102. *Advisory Committees: Hearings Before the Subcomm. on Intergovernmental Relations of the S. Comm. on Gov't Operations*, 92d Cong. 808 (1971) (statement of Sen. Charles H. Percy); see also *id.* at 832 (statement of Sen. Lee Metcalf) ("Many people think that these advisory committees which meet in secret . . . have special interests, for instance, [members who are] employed by a chemical company making pesticides. Many people think they may have the ear of Government. It would seem to me that the only way to allay that suspicion is to have open meetings, open hearings, and a verbatim transcript."); *id.* at 983-84 (statement of Ralph Nader) ("Legislative action is imperative to establish and enforce the principle that no special interest groups whatsoever shall be entitled to invisible and privileged access to high-level civil servants and agency executives.").

again and again that the Act's open-meetings requirement for federal agencies would help secure both public trust in government and public-interested regulation. "It is no secret that public confidence in government is at an all time low," the heads of the Consumer Federation of America wrote to Congress in 1976. "A major source of citizen cynicism is the growing conviction that government decisions are often made behind closed doors with access and input being too frequently the exclusive privilege of well-financed special interest groups."<sup>103</sup> In this climate of citizen cynicism and agency capture, the enactment of GITSA would "go a long way toward restoring public confidence and trust in the legislative and executive branches," according to the bill's Senate sponsor.<sup>104</sup> More than that, a Senate committee report announced, GITSA would "significantly increase cooperation between the public and government agencies," compliance with agency decisions, and the quality of the decision-making process.<sup>105</sup>

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In sum, the transparency reformers of the 1960s and 1970s generally did not see a tension – and on the contrary assumed a symbiosis – between making government more visible in its procedural norms and making government more responsive and redistributive in its substantive outputs. Letting in the sunlight would be good not just for "cleaning up" politics, on their account. It would also be good for the environmentalist, the consumer, the journalist, the peacenik, "the little guy,"<sup>106</sup> and the efficacy and authority of the state itself. Although the

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103. Letter from Carol Tucker Foreman, Exec. Dir., & Kathleen F. O'Reilly, Legislative Dir., Consumer Fed'n of Am., to Reps. Bella S. Abzug & Dante B. Fascell (July 28, 1976), reprinted in GOVERNMENT IN THE SUNSHINE ACT, SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 608 (Joint Comm. Print 1976); see also 122 CONG. REC. 28,473 (1976) (statement of Rep. Bella S. Abzug) ("Part of the disenchantment with the Federal Government has been the feeling of citizens that it does its work behind closed doors and in concert with special interests."); Susan T. Stephenson, Comment, *Government in the Sunshine Act: Opening Federal Agency Meetings*, 26 AM. U. L. REV. 154, 207 (1976) ("[T]he Sunshine Act has been deemed essential in today's pervasive aura of cynicism and mistrust toward the federal government."); Thomas H. Tucker, "Sunshine" – *The Dubious New God*, 32 ADMIN. L. REV. 537, 537 (1980) ("[GITSA] stemmed from a belief that government had become too secretive and remote from the people, and that it was serving special interests and those of the government itself as opposed to those of the public at large.").

104. Lawton M. Chiles, Jr., *Government in the Sunshine*, 34 FED. B.J. 352, 355 (1975); see also Tucker, *supra* note 103, at 543 ("Perhaps the most emotionally persuasive argument for open meetings on the federal level was the need to restore the people's faith in the government and its leaders.").

105. S. REP. NO. 94-354, at 5-6 (1975).

106. Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar.-Apr. 1982, at 14, 16 (stating that the original FOIA and its 1974 amendments "were promoted as a boon to the press, the public interest group, the little guy").

new suite of laws focused on public bodies rather than big business, transparency exited the 1970s as it had entered the century, with a distinctly progressive cast.

### III. TRANSPARENCY'S RIGHTWARD DRIFT

Over the past several decades, a series of developments have collectively changed the ideological valence of transparency. As a norm of public administration, transparency's stature has only grown. Groups on all sides of the political spectrum swear fealty to it.<sup>107</sup> In its actual application, however, transparency has become increasingly associated with institutional incapacity and with agendas that seek to maximize market freedom and shrink the state – a trend epitomized by the Federalist Society's launch in 2016 of a Regulatory Transparency Project dedicated “to foster[ing] a national conversation around the issue of regulatory excess and the harms it causes.”<sup>108</sup> The link between open government and active government has become ever more attenuated.

This Part seeks to illustrate and begin to make sense of this transformation. Again, the claim is not that opening up institutions to public scrutiny has become exclusively or even predominantly a libertarian concern.<sup>109</sup> The claim is that this area of law and advocacy has become on balance substantially *more* libertarian,

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107. See, e.g., Hood, *supra* note 6, at 3 (“We might almost say that ‘more-transparent-than-thou’ has become the secular equivalent of ‘holier than thou’ in modern debates over matters of organization and governance.”).

108. *About the Project*, REG. TRANSPARENCY PROJECT, <https://regproject.org/about> [<https://perma.cc/43PJ-Y3J6>]. The Federalist Society “is a group of conservatives and libertarians dedicated to reforming the current legal order.” *Our Background*, FEDERALIST SOCIETY, <https://fedsoc.org/our-background> [<https://perma.cc/DT3Y-UJZK>]. Recently, the Koch brothers – often depicted in the liberal media as “out to destroy progressivism,” Jane Mayer, *Covert Operations*, NEW YORKER (Aug. 30, 2010), <http://www.newyorker.com/magazine/2010/08/30/covert-operations> [<https://perma.cc/M8SA-UQ2E>] (quoting a Democratic political strategist) – have begun to sponsor open government programming through their philanthropic organizations. See, e.g., *2017 FOI Summit*, NAT’L FREEDOM OF INFO. COALITION, <http://www.nfoic.org/foi-center/foi-summits/2017-foi-summit> [<https://perma.cc/BXQ5-EQ67>] (listing the Charles Koch Institute as a “Gold Sponsor” for an event bringing together federal and “state FOI coalitions and open government advocates”).

109. Nor do I mean to suggest that all struggles over transparency, in the past or present, can be neatly assimilated to the left/right divide. For a contemporary Supreme Court case illustrating the irreducible normative complexity of transparency in certain domains, such as where it is in potential conflict with privacy interests, see the fractured opinions in *Doe v. Reed*, 561 U.S. 186 (2010), which upheld a state law requiring disclosure of referendum petitions containing signatory information.



in both cultural and functional terms, than it used to be. The ideological profile of transparency has not made a u-turn; it has drifted, to the right.<sup>110</sup>

Where do we see evidence of this drift? I cannot hope to offer anything like a comprehensive survey of the contemporary legal landscape, but some examples will help to clarify the descriptive claim and the practical stakes. Mitigating the risk of selection bias, these examples largely track the leading transparency reforms of the 1960s and 1970s – reforms that, as described above, were heralded as progressive breakthroughs that would simultaneously revitalize regulation and restore citizens’ faith in government. While my focus remains on American public law, I will suggest that a number of the dynamics contributing to the collapse of this reform vision have arisen in other Western democracies as well, making transparency’s ideological drift at least partly a transnational phenomenon.<sup>111</sup>

### A. Open Records Law

A natural place to start is with “the crown jewel of transparency,”<sup>112</sup> FOIA. In devising a request-and-respond system for federal agency records, FOIA’s original creators and amenders envisioned its core users as being left-leaning investigative reporters and, by 1974, public interest groups such as Common Cause or Public Citizen.<sup>113</sup> Profit-motivated enterprises, however, soon came to domi-

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110. I have found one prior work that characterizes transparency as experiencing ideological drift. Invoking Balkin’s theory, Professor Daniel Solove warned in the early 2000s that while “[l]aws fostering transparency are justified as shedding light into the dark labyrinths of government bureaucracy,” such laws “are increasingly becoming a tool for powerful corporations to collect information about individuals to further their own commercial interests.” DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 151 (2004). Solove’s story of drift has affinities with my own, although he focuses on transparency’s relationship to privacy whereas I wish to consider its relationship to politics and governance.

111. *But cf.* STEFANOS GEROULANOS, *TRANSPARENCY IN POSTWAR FRANCE: A CRITICAL HISTORY OF THE PRESENT* 15-17 (2017) (contending that in postwar France the uses and problems of transparency were fundamentally different, and the concept of transparency far less celebrated, than in other Western societies).

112. TED GUP, *NATION OF SECRETS: THE THREAT TO DEMOCRACY AND THE AMERICAN WAY OF LIFE* 119 (2007); *see also* John Moon, *The Freedom of Information Act: A Fundamental Contradiction*, 34 AM. U. L. REV. 1157, 1158 (1985) (observing that FOIA “is viewed by many as one of the crown jewels of liberalism”). For detailed development of the points made in this Section, see generally Pozen, *supra* note 78.

113. *See* Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1415 (2016) (describing “the press and watchdog groups whose mission is to enhance external oversight of governmental activity and promote democratic governance” as the “constituencies at the heart of FOIA’s intended use”);

nate the requester pool. Today, commercial requesters—including a cottage industry of data brokers and information resellers—submit over two-thirds of the FOIA requests to agencies ranging from the Environmental Protection Agency (EPA) to the Food and Drug Administration to the Securities and Exchange Commission (SEC).<sup>114</sup> Regulated firms routinely use the records they obtain from FOIA, as well as the threat of FOIA litigation, to slow down the work of, and gain leverage over, their agency overseers.<sup>115</sup> So do a growing list of right-wing watchdog organizations that have turned to FOIA as a means to “[a]nnoy the Statists” at agencies such as the EPA through “witch hunts” and “fishing expeditions.”<sup>116</sup> Beyond commercial actors, the other main category of requesters, and for some agencies the largest category, is individuals seeking records about themselves.<sup>117</sup> Although they do not raise concerns of corporate capture or political witch hunts, these requests, too, are dictated by private rather than public interests and may collectively degrade FOIA’s capacity to fulfill its democratic aims.<sup>118</sup>

The hope that FOIA would rein in the Cold War secrecy state, meanwhile, quickly proved quixotic. Judges declined to push back against national security agencies’ claims of exemption, Congress declined to develop alternative disclosure strategies, and the volume of classified information swelled to previously unthinkable proportions.<sup>119</sup> FOIA not only failed “to pierce the tank armor” of

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*see also* Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 954 n.150 (2018) (noting that surveys from the 1970s consistently indicated that “journalists on the whole leaned left, and were more likely to be Democrats than Republicans by approximately a two-to-one margin”).

114. See Kwoka, *supra* note 113, at 1376-401; Pozen, *supra* note 78, at 1103, 1112-13.

115. See Pozen, *supra* note 78, at 1115-16, 1125-27. Although the public narratives about FOIA rarely touched on this theme, new archival research by Lebovic shows that in executive branch deliberations during the early 1960s, numerous agencies worried that FOIA would undermine their ability to regulate economic activity. See Sam Lebovic, *How Administrative Opposition Shaped the Freedom of Information Act*, in *TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION* 13, 15-18 (David E. Pozen & Michael Schudson eds., 2018).

116. CHRISTOPHER C. HORNER, *THE LIBERAL WAR ON TRANSPARENCY: CONFESSIONS OF A FREEDOM OF INFORMATION “CRIMINAL”* 195, 229 (2012); cf. Mark Tapscott, *Taming the Nanny State Means Saving the FOIA*, HERITAGE FOUND. (Aug. 9, 2004), <https://www.heritage.org/homeland-security/commentary/taming-the-nanny-state-means-saving-the-foia> [<https://perma.cc/Q2ZP-GGWU>] (reminding readers on “the Right” that “FOIA can be the Nanny State’s worst enemy”).

117. See Margaret B. Kwoka, *First-Person FOIA*, 127 YALE L.J. 2204 (2018).

118. See *id.* at 2207-10, 2243-49, 2261-62 (arguing that large volumes of “first-person” requests undermine FOIA’s effectiveness as a tool of public accountability).

119. See Pozen, *supra* note 78, at 1118-23.

national security secrecy,<sup>120</sup> but also arguably helped to shore up a classification system that, prior to the Act's passage, had stood on uncertain legislative footing.<sup>121</sup>

FOIA still facilitates some nontrivial number of disclosures that serve progressive causes, and many on the left still laud its accountability benefits — especially following President Trump's election.<sup>122</sup> But the Act's cultural profile has slowly moved rightward along with its political economy, as journalists and ordinary citizens complain of being crowded out by commercial requesters and as organizations such as Judicial Watch have come to prominence by weaponizing the Act against climate scientists, labor law enforcers, and other officials who are targeted precisely because they are seen as progressives.<sup>123</sup> Similar dynamics have been observed with state open records laws,<sup>124</sup> which have also become tools for the political harassment of public university professors.<sup>125</sup> Over a half

120. Baher Azmy, *An Insufficiently Accountable Presidency: Some Reflections on Jack Goldsmith's Power and Constraint*, 45 CASE W. RES. J. INT'L L. 23, 36 (2012).

121. See Pozen, *supra* note 78, at 1122.

122. See, e.g., Ethan Barton, *Liberal Activists Are Bombarding Trump with New FOIA Lawsuits*, DAILY CALLER (May 31, 2017), <http://dailycaller.com/2017/05/31/liberal-activists-are-bombarding-trump-with-new-foia-lawsuits> [https://perma.cc/FW74-GHG3]; see also Jake Lucas, *How Times Reporters Use the Freedom of Information Act*, N.Y. TIMES (July 21, 2018), <https://www.nytimes.com/2018/07/21/insider/information-freedom-reporters-pruitt.html> [https://perma.cc/Q4DG-DSK3] (describing FOIA requests as “essential tools” for *New York Times* journalists, although quoting Washington correspondent Charlie Savage as stating, “FOIA is basically useless if you don't file a lawsuit to force the government to act”).

123. See Pozen, *supra* note 78, at 1112-17, 1127-36; see also *id.* at 1128 n.183 (noting that civil libertarian organizations and liberal-leaning transparency groups that utilize FOIA have not similarly weaponized it against disfavored officials).

124. A recent letter in the *New Yorker* about a group called Reclaim with ties to Stephen Bannon provides a vivid illustration:

Reclaim's strategy is to demand extensive data from municipalities and school districts, requests that are used to burden and shame public employees, furthering Reclaim's libertarian and so-called alt-right political agenda throughout the state. The organization has weaponized the state's Freedom of Information Law to “request,” and sue for, financial documents from two hundred and fifty villages, towns, and cities in Orange, Westchester, Putnam, and other counties in New York. Reclaim also holds local “workshops” to build a “citizen army” that floods communities with public-information requests. Its ultimate goal is to overwhelm governments and achieve the deconstruction of the administrative state.

Joyce St George, Letter to the Editor, *The Billionaires' President*, NEW YORKER (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/10/letters-from-the-april-10-2017-issue> [https://perma.cc/6MDG-QLUD].

125. For a broad overview and valuable critical discussion of this phenomenon, see Claudia Polsky, *Open Records, Shuttered Labs: Ending Political Harassment of Public University Researchers*, 66

century into its existence, good evidence that FOIA has improved the quality of governance (however measured) is slim to nonexistent.<sup>126</sup> Evidence that it has contributed to a discourse of antigovernmentalism, on the other hand, continues to mount.<sup>127</sup> Originally conceived as a model of participatory policy making, FOIA has evolved into a corporate subsidy that largely insulates the state's most opaque components from public scrutiny while hamstringing comparatively accountable agencies entrusted with regulating health, safety, the economy, the environment, and civil rights.

### B. Open Meetings Law

Laws such as FACA and GITSA, which require agencies to open certain meetings to the public, have evolved in analogous ways. As explained in Section II.B, the purpose of these laws was to enhance the quality and legitimacy of the decision-making process while keeping special interests at bay. The standard view is that they have done more or less the inverse. "Because of the open meetings and public disclosure requirements" of FACA, administrative law scholars lament, "agencies have decreased significantly their use of advisory committees," turning instead to ad hoc alternatives and self-interested sources of outside guidance.<sup>128</sup> Where advisory committees are used, "FACA has hindered collaborative

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UCLA L. REV. (forthcoming 2019), <https://ssrn.com/abstract=3140154>. Professor Polsky explains that the phenomenon is likely to grow more acute, *id.* (manuscript at 58-61), and argues that it leads to "distortion of scholars' work," "impair[s] . . . candid communication" in the academy, and "deter[s] research into critically important but controversial areas," *id.* (manuscript at 81-82).

126. See Pozen, *supra* note 78, at 1129-30; cf. Richard Calland & Kristina Bentley, *The Impact and Effectiveness of Transparency and Accountability Initiatives: Freedom of Information*, 31 DEV. POL'Y REV. 869, 872 (2013) ("There is very little evidence of the effectiveness of FOI generally or transnationally . . ."); Stephen Kosack & Archon Fung, *Does Transparency Improve Governance?*, 17 ANN. REV. POL. SCI. 65, 66, 83 (2014) (explaining that there is a lack of clear evidence, more broadly, that transparency policies produce desirable governance outcomes in either developed or developing countries). *But cf.* Gregory Michener, *Mistaken Measures? Tracing the Impact of Transparency Policies* 5 (2018) (unpublished manuscript) (on file with author) (arguing that "most transparency policies have diffuse, indirect, long-term upstream and downstream impacts" that cannot be measured "using standard methodological toolkits").

127. See Pozen, *supra* note 78, at 1130-36.

128. 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 5.19, at 393-94 (5th ed. 2010); see also Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 953 (2009) ("The requirements FACA imposes on agencies . . . have significantly curtailed or even inhibited agencies' use of advisory committees.").

forms of stakeholder involvement<sup>129</sup> as well as the ability to produce timely and useful advice.<sup>130</sup> It has also been suggested that FACA's requirement of "fairly balanced" committees<sup>131</sup> tends to undermine rather than bolster the committees' credibility, as partisans invoke the "naively apolitical" language of balance to challenge their composition and to accuse the executive branch of "politicizing" science.<sup>132</sup>

The historical development of GITSA is, if anything, even more dispiriting. Surveying the literature, a leading administrative law casebook observed in 2014 that it is "increasingly clear" GITSA has caused "some injury to the process of decisionmaking."<sup>133</sup> "Because of [GITSA], meetings among members of multi-member agencies are infrequent; such agencies often make important decisions through notational voting with no prior deliberation; and communications at

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129. Thomas C. Beierle & Rebecca J. Long, *Chilling Collaboration: The Federal Advisory Committee Act and Stakeholder Involvement in Environmental Decisionmaking*, 29 ENVTL. L. REP. 10,399, 10,400 (1999); see also Dover A. Norris-York, Comment, *The Federal Advisory Committee Act: Barrier or Boon to Effective Natural Resource Management?*, 26 ENVTL. L. 419, 421 (1996) ("FACA now serves as a barrier to the incorporation of advice from a variety of sources. Agencies dislike its numerous administrative requirements, and citizens resent how agency interpretations of the Act prevent them from working with agency officials and advisory committees." (footnote omitted)).
130. See James T. O'Reilly, *Applying Federal Open Government Laws to Congress: An Exploratory Analysis and Proposal*, 31 HARV. J. ON LEGIS. 415, 463-64 (1994); see also Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 846 (2014) ("Today, we have the unfortunate Federal Advisory Committee Act, which extends these open-meeting requirements even to bodies that only provide advice to the federal government and ties these advisory groups in knots for little meaningful public benefit." (footnote omitted)).
131. 5 U.S.C. app. § 5(b)(2) (2018).
132. Mark B. Brown, *Fairly Balanced: The Politics of Representation on Government Advisory Committees*, 61 POL. RES. Q. 547, 547, 558 (2008). Last spring, House Republicans passed on a party-line vote the EPA Science Advisory Board Reform Act of 2017, H.R. 1431, 115th Cong. (2017), which would reduce the proportion of scientists on the EPA's Science Advisory Board while making it easier for industry representatives with a potential interest in the Board's activities to serve, so long as they disclose their conflicts of interest. See Ed Yong, *The Transparency Bills that Would Gut the EPA*, ATLANTIC (Mar. 15, 2017), <https://www.theatlantic.com/science/archive/2017/03/how-to-gut-the-epa-in-the-name-of-honesty/519462> [<https://perma.cc/CRF5-BBZF>].
133. RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 9.4.3, at 425 (6th ed. 2014).

open meetings are grossly distorted,” marked by “stilted and contrived discussions.”<sup>134</sup> “[W]hen open meetings are held,” qualitative empirical research suggests, “they may have little or no bearing on decisions.”<sup>135</sup> State open meetings laws – many of which are broader in scope than GITSA and carry stricter penalties for noncompliance<sup>136</sup> – have likewise been found to chill candor, hamper compromise, shift deliberation into backroom channels, and shift power to staff and lobbyists.<sup>137</sup> The mid-1970s notion that laws like GITSA would “restore the faith of the public in their governmental agencies and . . . enable such agencies to function in a more equitable fashion”<sup>138</sup> now seems hopelessly naïve, if not exactly backwards.

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134. 1 PIERCE, *supra* note 128, § 5.18, at 392; *see also id.* (stating that GITSA “certainly” has had the effect of “crippling multimember agencies”); Randolph May, *Reforming the Sunshine Act*, 49 ADMIN. L. REV. 415, 416 (1997) (“Suffice it to say that there appears to be a fairly widespread consensus that the Sunshine Act is not achieving its principal – and obviously salutary – goal of enhancing public knowledge and understanding of agency decisionmaking. Instead, there is a considerable body of evidence . . . that the Act’s ‘open meeting’ requirement curtails meaningful collective deliberation and substantive exchange of ideas among agency members.”).
135. David M. Welborn et al., *The Federal Government in the Sunshine Act and Agency Decision Making*, 20 ADMIN. & SOC’Y 465, 471 (1989); *see also id.* at 482 (finding, based on interviews and surveys, that GITSA caused agencies to move “from collegial toward individualized, segmented, and fractionalized processes” of decision making).
136. *See* PETER L. STRAUSS ET AL., GELLHORN AND BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS 523 (11th ed. 2011).
137. *See* Steven J. Mulroy, *Sunlight’s Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy*, 78 TENN. L. REV. 309, 360-67 (2010). Similar observations have been made about the effects of open meetings laws abroad. *See, e.g.*, David Stasavage, *Does Transparency Make a Difference? The Example of the European Council of Ministers*, in TRANSPARENCY: THE KEY TO BETTER GOVERNANCE?, *supra* note 6, at 165, 177 (discussing “evidence that within the [European] Council [of Ministers] and its subsidiary bodies, there is a much greater propensity for deliberation to take place in those settings that are the most secretive”).
138. 122 CONG. REC. H28,474 (daily ed. Aug. 31, 1976) (statement of Rep. Benjamin Gilman). Closer to the mark was the contrarian view of the Federal Trade Commission’s former Assistant General Counsel, expressed in a 1980 law review article, that the move to open meetings would prove a false “god,” potentially debilitating agency initiative and disserving the general public. Tucker, *supra* note 103, at 545-49. For another early skeptical account by an agency insider, see Stuart M. Statler, *Let the Sunshine in?*, 67 A.B.A. J. 573, 575 (1981), which observes: “Those attending our meetings [at the Consumer Product Safety Commission] and burying us with [FOIA] requests are the very ones against whom the commission is considering action. They are paid to do just that . . . [T]he very interests meant to be watched over have become the watchdogs.”

### C. Legislative Process

The 1970s reforms that opened up congressional committees and the House floor have yielded disappointment and dysfunction on a larger scale. Initiated in earnest with the enactment of the 1970 LRA, these reforms are now believed by many to have contributed to an increase in special-interest influence and a decline in institutional comity and capacity. The glare of publicity made it more difficult for members of Congress to negotiate with each other in candid, creative, and productive ways; rising levels of partisanship since the 1970s aggravated this difficulty.<sup>139</sup> Lobbyists, moreover, no longer had to wait in the lobby during markup sessions and other committee meetings. While these meetings were in theory thrown open to all, in practice only deep-pocketed outfits were able to send representatives – and to punish or reward legislators based on what the legislators said or how they voted – in any systematic fashion.<sup>140</sup> The machinations of the lobbyists themselves, on the other hand, remained relatively obscure.<sup>141</sup> By the 1980s, members and observers of Congress routinely complained that laws like the LRA, “which had opened up committee legislative drafting sessions to the public in order to dilute the power of business lobbyists,

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139. A 2016 cover story in the *Atlantic* on the “disintegration” of American politics evokes this concern in dramatic terms: “Smoke-filled rooms, whatever their disadvantages, were good for brokering complex compromises in which nothing was settled until everything was settled; once gone, they turned out to be difficult to replace. In public, interest groups and grandstanding politicians can tear apart a compromise before it is halfway settled.” Jonathan Rauch, *How American Politics Went Insane*, ATLANTIC (July/Aug. 2016), <https://www.theatlantic.com/magazine/archive/2016/07/how-american-politics-went-insane/485570> [https://perma.cc/49QE-NF5W]. A 2014 essay in the *Atlantic* advanced a strikingly similar argument. David Frum, *The Transparency Trap*, ATLANTIC (Sept. 2014), <https://www.theatlantic.com/magazine/archive/2014/09/the-transparency-trap/375074> [https://perma.cc/87RF-PPPT] (“Reformers keep trying to eliminate backroom wheeling and dealing from American governance. What they end up doing instead is eliminating governance itself . . .”).

140. See Ranalli et al., *supra* note 72, at 22-28 (detailing ways in which the congressional transparency reforms of the 1970s enhanced business lobbyists’ leverage over legislators).

141. See, e.g., Moshe Cohen-Eliya & Yoav Hammer, *Nontransparent Lobbying as a Democratic Failure*, 2 WM. & MARY POL’Y REV. 265, 266 (2011) (“Empirical research shows that the lion’s share of lobbying occurs in niches characterized by no involvement of the public and almost no rivalry.”); Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1136-38 (2016) (contrasting the contemporary U.S. lobbying regime, which “provides preferential access . . . to the politically powerful” and generates “little to no public record outside of the compelled self-disclosure reports mandated by the Lobbying Disclosure Act [of 1995],” with the “public, transparent process” for petitioning Congress that prevailed in the early republic).

had precisely the opposite effect. They enabled business lobbyists to monitor the votes of each elected official more closely.”<sup>142</sup>

Scores of social scientists have offered complementary critiques in the years since.<sup>143</sup> An American Political Science Association task force set out in 2012 to study the “breakdown of political negotiation within Congress.”<sup>144</sup> Its final report fingered transparency as a significant culprit. Reflecting on the 1970s reforms, one chapter commented that “gridlock in the American Congress has been exacerbated by the ‘sunshine laws’ that opened up committee deliberation to the public but also to lobbyists and other special interests.”<sup>145</sup> Another chapter

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142. DAVID VOGEL, *FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA* 234 (1989); *see also, e.g.*, JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM* 260 (1987) (quoting Senator Bob Packwood as saying: “Common Cause simply has everything upside down when they advocate ‘sunshine’ laws . . . . When we’re in the sunshine, as soon as we vote, every trade association in the country gets out their mailgrams and their phone calls in twelve hours, and complains about the members’ votes”); Catherine E. Rudder, *Committee Reform and the Revenue Process*, in *CONGRESS RECONSIDERED* 117, 126 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 1st ed. 1977) (“Opening meetings to the public has meant opening meetings to everyone, including lobbyists, who, it has been claimed, take an even greater part in writing Ways and Means legislation than they did in the past.”); Alan Ehrenhalt, *Special Report: The Individualist Senate*, 40 *CONG. Q. WKLY.* 2175, 2177-78 (1982) (“Most senators seem to agree that [recent procedural reforms] have made negotiation and political self-sacrifice infinitely more difficult. Open meetings are singled out most often.”); Martha M. Hamilton, *Opening Up Congress: Ending Smoke-Filled Rooms Hasn’t Hurt Special Interests*, *WASH. POST*, May 6, 1984, at F5 (“[T]he congressional sunshine initiative became a tool for the very special interests whose power the reforms were supposed to dilute. Corporations and lobbying groups have seized on the open hearings to help them hold legislators accountable as never before.”). Today’s Congress is by no means entirely transparent, *see* WALTER J. OLESZEK, *CONG. RESEARCH SERV.*, R42108, *CONGRESSIONAL LAWMAKING: A PERSPECTIVE ON SECRECY AND TRANSPARENCY* 12 (2011) (listing remaining pockets of congressional secrecy and confidentiality), but it “conducts much of its business in public, perhaps more so than ever in its over 200-year history,” *id.*

143. In a more general and philosophical register, political theorists have also called attention to publicity’s potentially deleterious effects on deliberation. *See, e.g.*, Simone Chambers, *Behind Closed Doors: Publicity, Secrecy, and the Quality of Deliberation*, 12 *J. POL. PHIL.* 389, 392-94 (2004).

144. AM. POLITICAL SCI. ASS’N, *Executive Summary*, in *NEGOTIATING AGREEMENT IN POLITICS: REPORT OF THE TASK FORCE ON NEGOTIATING AGREEMENT IN POLITICS*, at vi, vi (Jane Mansbridge & Cathie Jo Martin eds., 2013).

145. Cathie Jo Martin et al., *Conditions for Successful Negotiation: Lessons from Europe*, in AM. POLITICAL SCI. ASS’N, *supra* note 144, at 121, 127 (internal punctuation omitted); *see also* Cathie Jo Martin, *Negotiating Political Agreements*, in AM. POLITICAL SCI. ASS’N, *supra* note 144, at 1, 14 (“[S]unshine laws’ . . . have diminished legislators’ capacities to engage in free-flowing dialogue in private spaces about a range of possible solutions.”).



observed that “the more transparent the legislative process is, the more the public dislikes Congress”; “[t]ransparency does not necessarily lead to greater institutional legitimacy” and on the contrary “may undermine it”; and “[m]ore worrisome, transparency often imposes direct costs on successful deal making” by preventing legislators from deviating from party messages and by interfering with the good-faith search for multidimensional solutions.<sup>146</sup> “By now,” yet another chapter explained, “the empirical evidence on the deliberative benefits of closed-door interactions seems incontrovertible.”<sup>147</sup> Social scientists have also developed formal models suggesting that when policy is made in the open, lawmakers with better information than their constituents are less likely to select policies that advance the constituents’ interests.<sup>148</sup> More recently, drawing on an extensive bibliography they assembled on the harms of opening up Congress,<sup>149</sup> researchers affiliated with the Congressional Research Institute have argued that the 1970 LRA, in particular, hurt the middle class and the poor while constituting a “major coup” for lobbyists and wealthy special interests.<sup>150</sup>

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146. Sarah A. Binder & Frances E. Lee, *Making Deals in Congress*, in AM. POLITICAL SCI. ASS’N, *supra* note 144, at 54, 63–64; cf. FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* 504 (2014) (arguing that transparency reforms such as “round-the-clock media coverage of Congress” have failed to enhance accountability and have contributed to government “decay”).

147. Mark E. Warren et al., *Deliberative Negotiation*, in AM. POLITICAL SCI. ASS’N, *supra* note 144, at 86, 108.

148. See, e.g., Justin Fox, *Government Transparency and Policymaking*, 131 PUB. CHOICE 23 (2007) (imposing the additional condition that constituents are uncertain about whether the lawmaker is biased); see also Andrea Prat, *The Wrong Kind of Transparency*, 95 AM. ECON. REV. 862 (2005).

149. *Transparency Citations*, CONG. RES. INST. (Sept. 19, 2016), <http://www.congressionalresearch.org/citations.html> [<https://perma.cc/RD58-F8FK>]. For an especially thorough discussion of the “dark side” of contemporary congressional transparency, see JASON GRUMET, *CITY OF RIVALRY: RESTORING THE GLORIOUS MESS OF AMERICAN DEMOCRACY* 85–110 (2014). To date, the most substantial (though still limited) effort to rebut the claims that congressional transparency has empowered lobbyists and impaired bipartisan dealmaking appears to be Gary D. Bass et al., *Why Critics of Transparency Are Wrong*, BROOKINGS INST. 2–6, 12–14 (2014), <https://www.brookings.edu/research/why-critics-of-transparency-are-wrong> [<https://perma.cc/R3W5-FHQ4>]. For a rejoinder, see Francis Fukuyama, *The Limits of Transparency*, AM. INTEREST (Jan. 4, 2015), <https://www.the-american-interest.com/2015/01/04/the-limits-of-transparency> [<https://perma.cc/EJ8A-XWER>].

150. *The Transparency Problem(s)*, *supra* note 72.

The notion that legislative transparency was “taken too far”<sup>151</sup> in the 1970s has thus become increasingly familiar.<sup>152</sup> As with FACA and GITSA, experience has subverted expectations. Opening up Congress appears to have complicated and constrained governance without enhancing its credibility or public-spiritedness.

#### D. Campaign Finance Regulation

Transparency holds a privileged place in the contemporary American jurisprudence on the role of money in elections. Ever since its 1976 decision in *Buckley v. Valeo*, which upheld FECA’s disclosure rules and limits on contributions and invalidated FECA’s limits on independent expenditures,<sup>153</sup> the Supreme Court has indicated that transparency is less likely than other forms of campaign finance regulation to run afoul of the First Amendment. “[M]indful of Mr. Justice Brandeis’ advice” that sunlight is “the best of disinfectants,”<sup>154</sup> the *Buckley* Court reasoned that “disclosure requirements . . . appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption.”<sup>155</sup> Although the Court left open the possibility that certain disclosure rules might be unconstitutional as applied,<sup>156</sup> the overall tenor of its analysis was celebratory and optimistic. Key passages read as if they could have been written by Brandeis himself. “[D]isclosure requirements,” the Court pronounced, “deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election.”<sup>157</sup>

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151. Cf. *supra* text accompanying note 24 (noting that ideological drift is frequently associated with complaints that “a good idea has been taken too far” or that its “true meaning” has been perverted).

152. Although the United States may be an acute case, this notion has become increasingly familiar in other countries as well. See Alasdair Roberts, *Making Transparency Policies Work: The Critical Role of Trusted Intermediaries* 5 (Suffolk Univ. Law Sch., Legal Studies Research Paper No. 14-39, 2014), <https://ssrn.com/abstract=2505674> (“Openness is now regarded as one of the factors that has contributed to the seizing-up of democratic systems.”).

153. 424 U.S. 1, 12-54 (1976).

154. *Id.* at 67 (quoting LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY: AND HOW THE BANKERS USE IT* 62 (Nat’l Home Library Found. ed. 1933)).

155. *Id.* at 68.

156. *Id.* at 68-74.

157. *Id.* at 67 (citation omitted); see also *id.* at 67-68 (asserting that disclosure requirements facilitate informed voting and the enforcement of contribution limits).

In hindsight, this transparency triumphalism was an ominous sign for the larger campaign finance reform movement. If disclosure requirements are so good at informing voters and deterring corruption, proponents of unlimited spending asked, then why would a legislature need to go further?<sup>158</sup> The federal judiciary became increasingly receptive to this logic as time went by, notwithstanding the absence of evidence that such disclosure actually reduces corruption.<sup>159</sup> In the 2000s, courts began to strike down or narrow a growing list of expenditure limits,<sup>160</sup> aggregate contribution limits,<sup>161</sup> and public-financing schemes<sup>162</sup> under the Free Speech Clause of the First Amendment—all while praising the purifying effects of transparency. The *Citizens United* majority, for example, insisted that unlike prohibitions on corporate electioneering communications, “disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.”<sup>163</sup> At this point, disclosure is one of the few regulatory tools left standing.<sup>164</sup>

The structure of ideological drift in this example is somewhat different from that of the previous ones. These 1970s-era transparency reforms do not appear to have been co-opted by economic interests or to have otherwise disempowered

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158. See, e.g., Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 688-89 (1997).

159. See, e.g., Michael D. Gilbert & Benjamin F. Aiken, *Disclosure and Corruption*, 14 ELECTION L.J. 148, 149 (2015) (“The theory that disclosure combats corruption has become conventional wisdom. But that wisdom is flawed. Disclosure does not necessarily reduce corruption—it can exacerbate it.”).

160. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

161. See, e.g., *McCutcheon v. FEC*, 572 U.S. 185 (2014); *Randall v. Sorrell*, 548 U.S. 230 (2006).

162. See *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011); cf. *Davis v. FEC*, 554 U.S. 724 (2008) (striking down a provision of federal law that relaxed campaign-contribution limits for the opponents of wealthy self-financed candidates).

163. 558 U.S. at 371. “This transparency,” the Court continued, “enables the electorate to make informed decisions and give proper weight to different speakers and messages.” *Id.*; see also Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1459 (2014) (“[N]ot only did the [*Citizens United*] Court conclude that BCRA’s disclosure requirements passed constitutional muster, but the existence and content of those requirements was arguably a critical component of the Court’s conclusion that the substantive limitation [on electioneering expenditures] violated the First Amendment.”).

164. See Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 49 (2012) (“Disclosure is the lone area of campaign finance regulation that even the Roberts Court appears to support.”).

the state.<sup>165</sup> Rather, courts have been primarily responsible for upending the campaign finance field. And throughout this process, conservative judges have seized on the availability and purported sufficiency of disclosure requirements to justify their decisions. Campaign finance disclosure laws, in other words, have not themselves turned out to be the bane of regulators. But they have been a boon to deregulators.

As this example suggests, ideological drift in one realm (free speech) may enable ideological drift in an adjacent realm (transparency). The longstanding progressive belief in the virtues of campaign finance disclosure converged, after the 1960s, with an emerging libertarian jurisprudence of the First Amendment. The result was the dismantling of state and federal regulatory schemes in which disclosure requirements were meant to interlock with spending limits to curtail political corruption.

#### *E. Consumer Protection and Targeted Transparency*

As discussed in Part II, legal reformers in the Progressive Era and the 1960s-70s began to demand the disclosure of product information in standardized formats as a means to safeguard the public from exploitative practices by increasingly complex firms. These transparency mandates were sometimes justified as “a kind of least-objectionable regulating,”<sup>166</sup> and they generally operated within

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165. In the wake of *Citizens United*, moreover, left-leaning activists have been clamoring for stronger campaign finance disclosure, while several groups on the right-libertarian side have been pursuing as-applied challenges to the existing rules. See Robert Yablon, *Campaign Finance Reform Without Law*, 103 IOWA L. REV. 185, 204-05 (2017); see also Conor Friedersdorf, *The Turn Against Transparency in Campaign Finance*, ATLANTIC (Apr. 22, 2014), <http://www.theatlantic.com/politics/archive/2014/04/charles-krauthammers-shortsighted-turn-against-transparency/361013> [<https://perma.cc/AL9A-Y4KG>] (explaining that “[t]he most influential conservative newspaper columnist in America, Charles Krauthammer,” had come by 2014 “to favor a future of secret campaign contributions” after long advocating “no limits on giving – but with full disclosure”). Now that campaign finance transparency is one of the only regulatory tools that is legally available, its political valence may be tacking back toward the left.

166. SCHUDSON, *supra* note 3, at 93-94 (“Proponents of disclosure [in the 1960s and 1970s] urged that it was a kind of least-objectionable regulating. It did not tell private companies how to do business; it only demanded that they inform consumers accurately about what that business is.”); see also HOFSTADTER, *supra* note 55, at 245 (“It was [President Theodore Roosevelt’s] belief that while business combinations should be accepted and recognized, their affairs, their acts and earnings should be exposed to publicity . . .”).

a market-friendly frame.<sup>167</sup> Crucially, however, their creators stood ready to supplement transparency with more exacting forms of regulation – from forbidding large banks to share directors<sup>168</sup> to outlawing tie-in sales<sup>169</sup> to requiring automobile makers to install airbags in every car<sup>170</sup> – in situations where disclosure alone seemed unlikely to secure the common good or to protect unsophisticated parties.

Over the past several decades, the targeted transparency strategy has become “ubiquitous.”<sup>171</sup> Laws mandating specific sorts of disclosures to consumers, investors, borrowers, and patients have proliferated at the state and federal level. Conceived as a means to minimize government interference with the market, such “disclosure schemes blossomed in the 1980s under the Reagan administration as part of a trend to inform and educate rather than regulate.”<sup>172</sup> Emerging

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167. The leader of the consumer protection movement in the 1970s, Ralph Nader, was “frequently criticized by the left for accepting the economic status quo,” even as he was criticized by the right for “interfering too much in the competitive workings of the market through overlegislation and overregulation of business.” LIZABETH COHEN, *A CONSUMERS’ REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 359 (2004).

168. See Brandeis, *supra* note 31, at 10 (urging such a prohibition).

169. See, e.g., Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 102(c), 88 Stat. 2183, 2186 (1975) (codified at 15 U.S.C. § 2302(c) (2018)) (“No warrantor of a consumer product may condition his written or implied warranty of such product on the consumer’s using, in connection with such product, any [other] article or service . . .”).

170. See *U.S. Set to Require Air Bags or Other Restraints for Cars*, N.Y. TIMES, July 11, 1984, at A10 (discussing Nader’s long-running fight for mandatory airbags).

171. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 650 (2011); see also ARCHON FUNG ET AL., *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* 19–34 (2007) (reviewing the rapid development of targeted transparency policies in the United States since the mid-1980s); *id.* at 6–7 (describing Brandeis as an early proponent of targeted transparency and the 1906 Pure Food and Drug Act as an early example); Ben-Shahar & Schneider, *supra*, at 652–65 (cataloging examples of mandated disclosure and arguing that they amount to a “Disclosure Empire”).

172. Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1092 (2007); see also *id.* at 1090 (“For the past several decades, . . . lawmakers have turned to information as a regulatory tool because it is politically acceptable and it interferes less with individual choice and with the operation of markets. Mandatory disclosure has become a sort of ‘regulation-lite’ extolled even by those who would ordinarily oppose regulation.”); Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 354 (2011) (“Mandating disclosure of information . . . is said to improve the efficiency and rationality of market decisions, avoid fraud, and advance public policy goals, all without intruding significantly upon the autonomy of market actors. It sometimes appears as a kind of magical minimalism that delivers significant rewards at little cost.” (footnote omitted)).

philosophies of “soft paternalism” (including “asymmetric paternalism”<sup>173</sup> and “libertarian paternalism”<sup>174</sup>) pushed this trend further in the 2000s. Drawing on research in the behavioral social sciences that calls into question the neoclassical model of human agency, proponents of these philosophies seek to transcend ordinary political divides by avoiding openly coercive forms of government action, such as mandates and penalties, and replacing them when feasible with “light-touch,” “choice-preserving” alternatives.<sup>175</sup> Targeted transparency is “one of the main options in [their] arsenal.”<sup>176</sup> Instead of forcing individuals or firms to behave in a certain way, the thinking goes, regulators should look to respond to “behavioral market failures” by forcing disclosure of pertinent information and nudging people toward desired outcomes.<sup>177</sup> A recent proposal by the Chair of the Federal Communications Commission (FCC) to jettison “heavy-handed” net neutrality protections in favor of transparency requirements for internet service providers is a perfect case in point.<sup>178</sup>

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173. See, e.g., Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211 (2003).

174. See, e.g., Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron,* 70 U. CHI. L. REV. 1159 (2003).

175. See Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why,* 127 HARV. L. REV. 1593, 1603-05, 1609-10 (2014) (describing the “soft paternalism” approach propounded by scholars such as Cass Sunstein and Richard Thaler). Thus, rather than adopt quotas or targets of any sort to ensure diverse representation on corporate boards, as countries like Norway have done, the SEC in 2009 adopted a disclosure rule that asks publicly traded firms to report on whether and how they consider diversity in director nominations. Proxy Disclosure Enhancements, 74 Fed. Reg. 68334, 68364 (Dec. 23, 2009) (codified at 17 C.F.R. § 229.407(c)(2)(vi)). Professor Aaron Dhir has found that this disclosure rule is likely failing to “produce diversity-enhancing results along sociodemographic lines.” AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 20 (2015).

176. Bubb & Pildes, *supra* note 175, at 1598; see also Amanda Shanor, *The New Lochner,* 2016 WIS. L. REV. 133, 163-77 (mapping “the rise of the information state and its distinctive use of what are often termed lighter-touch regulatory tools – such as mandated disclosures – in place of or in addition to command-and-control regulation”).

177. George Loewenstein et al., *Disclosure: Psychology Changes Everything,* 6 ANN. REV. ECON. 391, 394 (2014); see also *id.* at 392 (“An important advantage of disclosure requirements, as opposed to harder forms of regulation, is their flexibility and respect for the operation of free markets. Regulatory mandates are blunt swords . . . Information provision, by contrast, respects freedom of choice.”).

178. “Under my proposal,” FCC Chair Ajit Pai explained, “the federal government will stop micromanaging the Internet. Instead, the FCC would simply require Internet service providers to be transparent about their practices so that consumers can buy the service plan that’s best for them . . .” *Chairman Pai Circulates Draft Order to Restore Internet Freedom and Eliminate Heavy-Handed Internet Regulations,* FCC (Nov. 21, 2017), [http://apps.fcc.gov/edocs\\_public/attachmatch/DOC-347868A1.pdf](http://apps.fcc.gov/edocs_public/attachmatch/DOC-347868A1.pdf) [<https://perma.cc/4S2F-RJE3>].

As Professors Ryan Bubb and Richard Pildes have pointed out, however, the very social science on which these prescriptions are based suggests that disclosure often will not be “a realistic way to adequately rectify individual incapacity to make accurate, informed judgments based on appropriate time horizons.”<sup>179</sup> Recipients of disclosed information face daunting behavioral and practical barriers to processing, and then acting on, much of this information. Unsophisticated parties are especially likely to lose out.<sup>180</sup>

More generally, as Professors Omri Ben-Shahar and Carl Schneider have detailed, the growing reliance on targeted transparency in fields like consumer law and health law often appears to be “hurting the people it purports to help,”<sup>181</sup> not least by crowding out other forms of regulation and legal protection.<sup>182</sup> A 2000 report by a joint task force of the U.S. Department of Housing and Urban Development and the U.S. Department of the Treasury, for instance, found that written disclosure requirements for home loans did not in themselves assist low-income borrowers – most of whom were unable to understand their terms or to shop for a different loan – so much as insulate predatory lenders “where fraud or

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179. Bubb & Pildes, *supra* note 175, at 1598. “[T]hese widespread individual failings,” Bubb and Pildes explain, “might well suggest regulatory tools beyond disclosure: policies that limit choices or mandate specific substantive outcomes . . .” *Id.*

180. Under the First Amendment’s compelled-speech doctrine, meanwhile, the federal courts in recent years have struck down some of the strongest disclosure requirements aimed at employers (as to their employees’ labor law rights), cigarette makers, and anti-abortion pregnancy centers, while upholding requirements that force doctors to relay scripted messages about the risks of abortion or to show ultrasound images to women seeking to terminate their pregnancies. See Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1279–80, 1309–51 (2014); see also Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2378 (2018) (invalidating a California law requiring pregnancy centers to provide certain factual information to patients); Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 339–51 (2016) (explaining that claims of compelled speech have become a key tool for proponents of an antilabor, “deregulatory First Amendment”); Christine Jolls, *Debiasing Through Law and the First Amendment*, 67 STAN. L. REV. 1411, 1413 (2005) (describing and critiquing “a recent uptick in First Amendment invalidation” of legally required communications to consumers). This is another area, like campaign finance, where transparency’s rightward drift has been shaped by a broader drift in First Amendment jurisprudence. For an overview of the latter drift and progressive responses, see generally Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. (forthcoming 2018), <https://ssrn.com/abstract=3249794>.

181. Ben-Shahar & Schneider, *supra* note 171, at 650–51.

182. See *id.* at 738–40 (explaining how mandated disclosure may lull consumers and regulators into complacency and disable statutory antifraud protections and common law doctrines such as unconscionability).

deception may have occurred.”<sup>183</sup> A 2006 SEC rule requiring expanded compensation disclosure did not “mitigate rent extraction” and “prevent managers from receiving unearned compensation,” but rather reduced flexibility for compensation committees and led to even higher levels of executive pay.<sup>184</sup> Both in the United States and elsewhere, a recent wave of disclosure laws intended to avert corporate human rights abuses in global supply chains is now being critiqued as ineffective at best, given the paucity of meaningful remedies and the inability of consumers to interpret the disclosed information,<sup>185</sup> and perverse at worst, given “the public relations advantages of compliance with a human rights law at a negligible cost.”<sup>186</sup>

To be sure, some uses of targeted transparency have been more effective than others.<sup>187</sup> The EPA's Toxics Release Inventory, to take just one example, has been credited with “driving improvements in pollution performance,”<sup>188</sup> while any

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183. HUD-TREASURY TASK FORCE ON PREDATORY LENDING, CURBING PREDATORY HOME MORTGAGE LENDING 66-67 (2000), <http://www.huduser.gov/portal/Publications/pdf/treasrpt.pdf> [<https://perma.cc/2JWC-HN46>]. “[I]n combination” with nontransparency reforms, the report concluded, “earlier, simpler, and more reliable disclosures . . . could increase consumer awareness and enable borrowers to protect themselves” in the mortgage market. *Id.* at 67.
184. Brandon Gipper, *The Economic Effects of Mandating Expanded Compensation Disclosures 1-4* (Feb. 2017) (unpublished manuscript), <https://ssrn.com/abstract=2514578> (analyzing Executive Compensation and Related Person Disclosure, 71 Fed. Reg. 53157 (Sept. 8, 2006) (codified in scattered sections of 17 C.F.R.)).
185. See Jena Martin, *Hiding in the Light: The Misuse of Disclosure to Advance the Business and Human Rights Agenda*, 56 COLUM. J. TRANSNAT'L L. 530, 566-76 (2018) (reviewing “mounting evidence” on the “ineffectiveness” of these laws and identifying remedial deficits and consumer misunderstandings as important contributing factors); see also Adam S. Chilton & Galit A. Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 STAN. J. INT'L L. 1, 5 (2017) (arguing that “the problems that have limited the effectiveness of disclosure regimes,” in general, “are likely to be exacerbated in the context of supply chain disclosures” and presenting experimental evidence suggesting that consumers cannot differentiate between compliant and non-compliant disclosures).
186. Martin, *supra* note 185, at 576.
187. See generally FUNG ET AL., *supra* note 171, at 50-126 (considering conditions under which targeted transparency policies are more likely to be effective); Loewenstein et al., *supra* note 177, at 405-11 (same). For a balanced discussion of the advantages and disadvantages of “regulatory” uses of disclosure, see PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS* 101-05 (12th ed. 2018).
188. Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 288 (2001). This inventory “requires facilities that meet minimum size and emission thresholds to report, on standardized forms, their annual releases of listed toxic pollutants.” *Id.* at 259. In conceding that “there are situations in which mere transparency can help,” prominent communitarian theorist and transpar-



number of studies suggest that well-designed disclosure interventions can generate price savings.<sup>189</sup> Moreover, although probusiness conservatives and libertarians initially championed disclosure-based approaches, certain disclosure requirements have drawn sharp challenges in recent years from industry groups that characterize them as unduly burdensome or misleading.<sup>190</sup> As Professor Amanda Shanor has shown, “[t]he turn towards lighter-touch regulation was . . . encouraged by many of the same business advocates now litigating against the constitutionality of lighter-touch regulatory regimes.”<sup>191</sup>

Like its track record in protecting consumers, the political profile of targeted transparency is mixed. Across numerous areas of law, though, it presents another case of a transparency technique developed for progressive purposes in the early 1900s and the 1960s-70s that has turned out to advance deregulatory agendas and to reproduce rather than rectify preexisting power disparities. Whether or not Ben-Shahar and Schneider are correct that such disclosure “chronically fails

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ency skeptic Amitai Etzioni notes that “some evidence suggests that pollution-disclosure requirements result in reduced emissions.” Amitai Etzioni, *Transparency Is Overrated*, ATLANTIC (Jan. 13, 2014), <http://www.theatlantic.com/politics/archive/2014/01/transparency-is-overrated/282990> [https://perma.cc/95KU-WQ2T]. “But most times,” Etzioni quickly adds, “we need the real thing: positive government action in the form of regulation.” *Id.*

189. See, e.g., Jeffrey R. Kling et al., *Comparison Friction: Experimental Evidence from Medicare Drug Plans*, 127 Q.J. ECON. 199, 199 (2012) (finding, in a randomized field experiment, that sending Medicare patients a letter with personalized drug-cost information led to greater switching among drug plans and “an average decline in predicted consumer cost of about \$100 a year among letter recipients”); Federico Rossi & Pradeep K. Chintagunta, *Price Transparency and Retail Prices: Evidence from Fuel Price Signs in the Italian Highway System*, 53 J. MARKETING RES. 407, 408-09 (2016) (finding that the introduction of an Italian law requiring “large electronic signs along the road near gas stations . . . to post the fuel prices of several gas station located nearby” led gasoline prices to decrease “on average by 1 euro cent per liter”). *But see*, e.g., Joanna Shepherd, *Is More Information Always Better? Mandatory Disclosure Regulations in the Prescription Drug Market*, 99 CORNELL L. REV. ONLINE 1, 4, 17-22 (2013) (arguing that recently promulgated regulations requiring U.S. pharmacy benefit managers to disclose sensitive financial information are likely to increase the cost of prescription drugs).
190. See, e.g., *CTIA-Wireless Ass’n v. City of Berkeley*, 854 F.3d 1105 (9th Cir. 2017) (upholding against a First Amendment and preemption challenge a local ordinance requiring cell phone retailers to inform prospective purchasers that carrying a cell phone may cause them to exceed federal guidelines for exposure to radio-frequency radiation); *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014) (partially invalidating under the First Amendment a 2012 SEC rule requiring firms using “conflict minerals” to disclose the origin of those minerals). Some progressives, meanwhile, continue to press for expanded disclosure requirements in fields they have not yet colonized. See, e.g., Estlund, *supra* note 172, at 379-91 (advocating greater use of mandatory disclosure in employment law).
191. Shanor, *supra* note 176, at 169. The deregulatory goalposts thus keep shifting. A quintessential “light-touch” regulatory technique, mandated disclosure, is increasingly being attacked on the ground that it is too heavy-handed.

to accomplish its purpose,”<sup>192</sup> it has evolved into a stock substitute for more robust and direct regulation.

#### F. Open Data

The ascendant “open data” movement evinces a similarly single-minded commitment to transparency, along with a tin ear for progressive anxieties over proposed reforms. Over the past decade, transparency advocates in the United States and abroad have increasingly promoted the concept of open data as a linchpin of open government. Open data refers to “information that can be universally and readily accessed, used, and redistributed free of charge in digital and machine-readable form.”<sup>193</sup> Touting the transformative potential of big data and data analytics, its proponents cite success stories such as New York City’s use of open data to assist entrepreneurs through its online Business Atlas, Chicago’s use of open data to forecast food-safety violations, and the financial information company BrightScope’s use of “previously ‘locked up’ Department of Labor . . . retirement plan data to offer better decision-making tools to investors.”<sup>194</sup> Open data enthusiasts urge public bodies to post as many “high-value” datasets<sup>195</sup> as possible on websites like Data.gov, not only to make their budgets and operations more easily accessible but also “to support efficient, evidence-

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192. Ben-Shahar & Schneider, *supra* note 171, at 651; *see also* Omri Ben-Shahar & Carl E. Schneider, *Coping with the Failure of Mandated Disclosure*, 11 JERUSALEM REV. LEGAL STUD. 83, 83 (2015) (“Our critics . . . seem not to dispute – indeed, they generally accept – our core arguments that mandated disclosure’s record is dismal and that its challenges are daunting.”).

193. Beth Simone Noveck, *Open Data: The Future of Transparency in the Age of Big Data*, in TROUBLING TRANSPARENCY, *supra* note 115, at 206, 206; *see also id.* at 211-13 (reviewing the development of the U.S. open government data movement). The author of this insightful essay was the director of the White House Open Government Initiative from 2009 to 2011.

194. *Id.* at 210. For additional success stories, *see* Beth Simone Noveck, *How Open Data Can Revolutionize a Society in Crisis*, BRINK (Mar. 28, 2017), <http://www.brinknews.com/how-open-data-can-revolutionize-a-society-in-crisis> [<https://perma.cc/6YR3-J6HP>].

195. *Cf.* Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to the Heads of Exec. Dep’ts & Agencies (Dec. 8, 2009), <http://obamawhitehouse.archives.gov/open/documents/open-government-directive> [<https://perma.cc/WK8V-PW98>] (directing federal agencies to publish “high-value information” online in open formats).

based” policy making,<sup>196</sup> enable new forms of public-private collaboration, and “fuel new data-driven businesses.”<sup>197</sup>

A nearly theological faith in technology and private ordering animates some of this movement’s claims. “At their most exuberant,” Professor Mark Fenster notes, open data advocates “assert that online collaboration and data flows between public and private parties can shrink the state, if not make it wither away altogether.”<sup>198</sup> Critics on the left have responded with alarm, accusing the open data movement of commodifying government information,<sup>199</sup> supplying a “Trojan Horse” for the privatization of public services and the marketization of fields such as education,<sup>200</sup> inviting algorithmic discrimination by regulators and

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196. Noveck, *supra* note 193, at 212 (citing *Moneyball for Government Principles*, MONEYBALL FOR GOV’T, <http://moneyballforgov.com/moneyball-principles> [https://perma.cc/K9WL-PMK6]).

197. *Open Data: What’s in a Name?*, GOVLAB BLOG (Jan. 16, 2014), <http://thegovlab.org/open-data-whats-in-a-name> [https://perma.cc/7K5C-HNPZ]; see also Eric Kansa, *It’s the Neoliberalism, Stupid: Why Instrumentalist Arguments for Open Access, Open Data, and Open Science Are Not Enough*, LSE IMPACT BLOG (Jan. 27, 2014), <http://blogs.lse.ac.uk/impactofsocialsciences/2014/01/27/its-the-neoliberalism-stupid-kansa> [https://perma.cc/53SN-ZDS4] (noting that open data advocates “talk about the wonderful commercial opportunities that will come from freeing” government data).

198. Fenster, *supra* note 10, at 485; see also Laura Franceschetti, *The Open Government Data Policy as a Strategic Use of Information to Entrench Neoliberalism? The Case of Italy*, 9 PARTECIPAZIONE E CONFLITTO 517, 524 (2016) (“[Open government] policy clearly embodies the neoliberal idea of a space of public action where the State is no more the prevalent actor.”); Stanley Fish, *‘Transparency’ Is the Mother of Fake News*, N.Y. TIMES (May 7, 2018), <http://www.nytimes.com/2018/05/07/opinion/transparency-fake-news.html> [https://perma.cc/W8QT-4ELM] (stating that internet transparency enthusiasts’ “deepest claim – so deep that they are largely unaware of it – is that politics can be eliminated”); cf. Jodi Dean, *Communicative Capitalism: Circulation and the Foreclosure of Politics*, 1 CULTURAL POL. 51, 54 (2005) (arguing more generally that under “communicative capitalism,” “the fantasy of activity or participation” by informed, engaged citizens “is materialized through technology fetishism”).

199. See, e.g., Clare Birchall, *“Data.gov-in-a-box”: Delimiting Transparency*, 18 EUR. J. SOC. THEORY 185, 189-91 (2015).

200. Amanda Clarke & Helen Margetts, *Governments and Citizens Getting to Know Each Other? Open, Closed, and Big Data in Public Management Reform*, 6 POL’Y & INTERNET 393, 411 (2014) (discussing Canada); see also, e.g., Lawrence Angus, *School Choice: Neoliberal Education Policy and Imagined Futures*, 36 BRIT. J. SOC. EDUC. 395 (2015) (analyzing the “neoliberal” logic behind an Australian government website that compares schools on the basis of standardized test results); Jo Bates, *The Strategic Importance of Information Policy for the Contemporary Neoliberal State: The Case of Open Government Data in the United Kingdom*, 31 GOV’T INFO. Q. 388, 394 (2014) (arguing that “the Open Government Data agenda is . . . being used strategically, and often insidiously, by the UK government to fuel a range of broader and more controversial policies, which are aimed at the continuation of the neoliberal form of state through the current crisis”).

downstream data users against disadvantaged groups,<sup>201</sup> and “co-opting the language of progressive change in pursuit of what turns out to be a small-government-focused subsidy for industry.”<sup>202</sup> In line with these accusations, the histories of the Data Access Act<sup>203</sup> and the Data Quality Act,<sup>204</sup> enacted in 1998 and 2000 respectively, suggest how (proto-)open data policies justified in the language of transparency, data integrity, and evidence-based policy making may turn out to be an industry “weapon” for “delaying or derailing agency action.”<sup>205</sup> At this writing, conservative members of Congress are pushing an open data bill called the HONEST Act that, if enacted, is widely expected to stifle the use of scientific research by the EPA.<sup>206</sup> Before he resigned this past summer, EPA Administrator Scott Pruitt promoted another open data measure widely seen as an attempt “to undermine much of the science that underpins modern environmental regulations governing clean water and clean air.”<sup>207</sup>

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201. See *Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights*, EXECUTIVE OFF. PRESIDENT 5 (May 2016), [http://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016\\_0504\\_data\\_discrimination.pdf](http://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf) [<https://perma.cc/H7JQ-N2T3>] (acknowledging this concern).
202. Tom Slee, *Why the “Open Data Movement” Is a Joke*, WHIMSLEY (May 1, 2012), <http://whimsley.typepad.com/whimsley/2012/05/why-the-open-data-movement-is-a-joke.html> [<https://perma.cc/VS4X-4AR9>].
203. Pub. L. No. 105-277, tit. III, 112 Stat. 2681, 2681-495 (1998).
204. Pub. L. No. 106-554 app. C, § 515, 114 Stat. 2763, 2763A-153 to -154 (2000) (codified at 44 U.S.C. § 3516 note (2018)). The Data Access Act is also known as the Shelby Amendment, and the Data Quality Act is also known as the Information Quality Act; none of these are official titles. Both measures were enacted as riders to lengthy appropriations bills.
205. Alexander Nathan Hecht, *Administrative Process in an Information Age: The Transformation of Agency Action Under the Data Quality Act*, 31 J. LEGIS. 233, 234 (2005) (discussing the Data Quality Act). For representative critiques of these laws as tools of deregulation and information capture, see Donald T. Hornstein, *Accounting for Science: The Independence of Public Research in the New, Subterranean Administrative Law*, 66 LAW & CONTEMP. PROBS. 227, 230-39 (2003); Karen EC Levy & David Merritt Johns, *When Open Data Is a Trojan Horse: The Weaponization of Transparency in Science and Governance*, BIG DATA & SOC’Y, Jan.-June 2016, at 1, 2-4; and Wagner, *supra* note 94, at 1400-02.
206. H.R. 1430, 115th Cong. (2017); see Brian Resnick, *The House Just Passed Two Bills that Would Stifle Science at the EPA*, VOX (Mar. 30, 2017), <http://www.vox.com/science-and-health/2017/3/30/15112704/transparency-epa-bills-not> [<https://perma.cc/JY8U-EQ6S>]; Yong, *supra* note 132.
207. Lisa Friedman, *The E.P.A. Says It Wants Research Transparency. Scientists See an Attack on Science.*, N.Y. TIMES (Mar. 26, 2018), <http://www.nytimes.com/2018/03/26/climate/epa-scientific-transparency-honest-act.html> [<https://perma.cc/LBP7-52FG>]. Pruitt’s proposed rule would prevent the EPA from “consider[ing] scientific research unless the underlying raw data can be made public,” which would likely disqualify most studies that rely on confidential personal health information. *Id.*

In its emphasis on technical collaboration and public engagement, the open data movement sounds some progressive notes, at least of a thinned-out, consumer-oriented sort. And certain open data undertakings, such as the Obama Administration's Police Data Initiative<sup>208</sup> or the Consumer Financial Protection Bureau's database of consumer complaints,<sup>209</sup> align with substantive progressive policy goals, while researchers and reporters have harnessed various other datasets to enhance their work or to expose patterns of inequity.<sup>210</sup> As with targeted transparency, open data's political coalition is broad and its applications are diverse. Yet without denying the potential value or versatility of the instrument, it is fair to observe that the open data movement has overall demonstrated limited concern for the left-liberal priorities that animated the transparency regimes of the early 1900s and the 1960s-70s, such as curbing corporate power, ensuring a fair and representative political process, securing public support for state action, and protecting society's most vulnerable.

"Significant by its absence" in many open data advocates' techno-libertarian theories of governance, as Fenster points out, "is government's more traditional . . . police-power authority to enforce laws and promulgate and enforce regulations, as well as its role in redistributing wealth."<sup>211</sup> The degree to which the open data movement deemphasizes these regulatory functions suggests a latent skepticism of the state at the core of the movement's identity. Like so many consumer-disclosure mandates before them, open data reforms billed as empowering the public through access to information may end up shifting the burden of governance outside government.

### G. *International Economic Policy*

Before the open data movement burst onto the scene, commentators on the left had begun to develop a parallel critique of transparency's role in international

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208. See POLICE DATA INITIATIVE (2017), <http://www.policedatainitiative.org> [<https://perma.cc/M6DS-WC84>].

209. See *Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/data-research/consumer-complaints> [<https://perma.cc/JFP9-TENL>]; cf. Rory Van Loo, *Regulatory Police*, 119 COLUM. L. REV. (forthcoming 2019) (manuscript at 40-41), <http://ssrn.com/abstract=3168798> (describing "public shaming" as "a potentially powerful mechanism" for agencies to police regulatory infractions by businesses).

210. See, e.g., CHRISTINA ROGAWSKI ET AL., GOVLAB, OPEN DATA'S IMPACT: OHIO, USA: KENNEDY V. CITY OF ZANESVILLE (2016) (describing the role of open data about public works in revealing a multidecade pattern of discriminatory water service provision to African-American residents of Zanesville, Ohio).

211. Fenster, *supra* note 10, at 486. Even some of open data's strongest advocates acknowledge the "apps-over-substances nature of open data policy" to date. Noveck, *supra* note 193, at 215.

economic reform. A growing body of scholarship, most of it produced outside the United States and the legal academy, critiques the “complicity” of transparency in the efforts of Western governments and nonprofit organizations to export controversial economic policies and austerity measures to the developing world since the 1970s.<sup>212</sup> On these accounts, the rhetoric and logic of transparency—in the form of accounting and auditing standards, budgetary and monetary policy statements, and the like—have given “good-governance” cover to an ineluctably political project of deregulation, financialization, and the privileging of market stability and shareholder capitalism over democratic values. “[T]ransparency’s fundamental purpose” since the emergence of the Washington Consensus, Professor Garry Rodan contends, has been “rendering greater discipline and accountability of policy makers and actors to the market,” while simultaneously narrowing and “depoliticiz[ing]” the field of struggle.<sup>213</sup> Whereas prior generations of reformers endorsed government transparency as a means to assist ordinary citizens and consumers, institutions such as the International Monetary Fund and the World Bank began in the 1980s to endorse transparency “as a mechanism to better serve and protect the financial investor.”<sup>214</sup>

This facet of transparency’s rightward drift takes us away from this Article’s focus on U.S. law and into a space I cannot address in any detail. It is nevertheless worth noting, because the United States is an important player in the story and the story itself is bound up with domestic developments. Just as left-leaning critics of the Washington Consensus view its transparency prescriptions as “exemplary neoliberal tools of governance,”<sup>215</sup> left-leaning critics of open data and mandated disclosure view these techniques as “closely linked to a neoliberal ethos . . . that promotes individualism, entrepreneurship, voluntary forms of regulation[,] and formalized types of accountability” at the expense of collective

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212. Clare Birchall, *Transparency, Interrupted: Secrets of the Left*, THEORY, CULTURE & SOC’Y, Dec. 2011, at 60, 65. Representative works in this vein include Christina Garsten & Monica Lindh de Montoya, *Introduction: Examining the Politics of Transparency*, in TRANSPARENCY IN A NEW GLOBAL ORDER: UNVEILING ORGANIZATIONAL VISIONS 1 (Christina Garsten & Monica Lindh de Montoya eds., 2008); Garry Rodan, *Neo-Liberalism and Transparency: Political Versus Economic Liberalism*, in THE NEO-LIBERAL REVOLUTION: FORGING THE MARKET STATE 197 (Richard Robison ed., 2006); and Afshin Mehrpouya & Marie-Laure Djelic, *Transparency: From Enlightenment to Neoliberalism or When a Norm of Liberation Becomes a Tool of Governing* (HEC Paris, Research Paper No. ACC-2014-1059, 2014), <http://ssrn.com/abstract=2499402>.

213. Rodan, *supra* note 212, at 198.

214. Mehrpouya & Djelic, *supra* note 212, at 39.

215. Andrea Ballestero S., *Transparency in Triads*, 35 POLAR 160, 160 (2012).

politics.<sup>216</sup> If progressives' relationship to the sunshine laws of the 1960s-70s has increasingly been characterized by disappointment and disillusionment, their relationship to the most powerful transnational transparency program of the past several decades is now marked by outright cynicism and suspicion.

#### IV. DRIVERS OF DRIFT

So much for description. *Why* has transparency law drifted away from its progressive roots? The previous Part highlighted several mechanisms of drift that have been recognized in the literature, although not as such, including the unintended consequences of opening up deliberative bodies to public scrutiny and the strategic (and very much intended) turn to disclosure rules to head off stronger forms of regulation. Yet while in-depth studies of these mechanisms and the underlying policies are indispensable,<sup>217</sup> there may be illumination to be gained from reflecting briefly on the larger explanatory picture.

At one level, as noted above,<sup>218</sup> drift appears almost foreordained. Transparency is an abstract ideal and a procedural tool. Like constitutional colorblindness, it can be deployed to very different effects depending on the prevailing social arrangements and on the normative commitments and worldviews of those in a position to invoke it. As such, transparency was bound to be put to new uses by new groups in new settings, some of which would not necessarily conform to and might even contradict the progressive aspirations of its initial proponents. This explanation seems sound as far as it goes, but it is itself so abstract and underspecified – it could be reformulated as a Critical Legal Studies axiom about the indeterminacy of law – as to be of limited use in investigating the trajectory of transparency. The better view, this Part suggests, is that transparency's transformation is a story not merely of random or inevitable drift, but of the iterated interaction between formal transparency structures and broader developments in the cultural, economic, technological, and legal environment. Specific aspects

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216. Garsten & Lindh de Montoya, *supra* note 212, at 3; *see also* Mike Ananny & Kate Crawford, *Seeing Without Knowing: Limitations of the Transparency Ideal and Its Application to Algorithmic Accountability*, 20 *NEW MEDIA & SOC'Y* 973, 979 (2018) (arguing that the ideal of transparency “can invoke neoliberal models of agency” and “places a tremendous burden on individuals to seek out information about a system, to interpret that information, and determine its significance”); Regina Queiroz, *From the Exclusion of the People in Neoliberalism to Publicity Without a Public*, *PALGRAVE COMMS.*, Nov. 21, 2017, at 1, 7 (arguing that neoliberal transparency is largely “addressed to private, self-interested individuals who, instead of seeking public well-being and following public rules, are right to follow their own unrestricted, private well-being” – yielding “publicity without a public”).

217. I try to provide such a study in a recent article on FOIA. *See generally* Pozen, *supra* note 78.

218. *See supra* notes 21-24 and accompanying text.

of transparency law and politics, in other words, have made them especially prone to drift in specific ways. Anyone wishing to theorize, or reverse, transparency's ideological drift must therefore grapple both with sweeping social trends and with the details of disclosure regulation.<sup>219</sup>

### A. *Beyond Transparency Law*

Let us begin by considering some factors that are relatively external to transparency itself. As explained in Part I, when the background to a policy or a principle changes, the political valence of the policy or principle is liable to change even if (and sometimes especially if) it maintains its surface meaning. Something like this seems plainly to have happened in the case of transparency, although the developments sketched below have overlapped with transparency law and advocacy in ways that confound simple causal claims.

#### 1. *The Neoliberal Turn*

Perhaps the broadest and most obvious “background” factor of interest is the rise of neoliberalism—a style of thinking and policy making characterized by market-fundamentalist premises and a constricted view of democratic possibilities for reshaping economic relations—during the time period under consideration.<sup>220</sup> Once again, transparency policies are embedded within systems of governance as well as political-economic contexts. As those systems and contexts evolve, the meaning of transparency can be expected to evolve as well. To some extent, then, transparency's ideological drift likely follows from a larger ideological drift in theories and practices of regulation since the mid-1970s. This connection is especially apparent in the areas of mandated disclosure, open data, and international development, where, as discussed above, transparency reforms have been explicitly justified as a means of enhancing freedom of choice, transcending factional politics, and minimizing government interference with the market.

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219. Although the subject is so large that the discussion here can be no more than suggestive, this Part aims to spark and to structure a multidisciplinary inquiry toward that end.

220. See generally David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* 1 (2014) (defining neoliberalism similarly and describing its rise over the past several decades). The term “neoliberalism” has acquired multiple meanings. Most relevant here are the strands of neoliberalism as an “intellectual project,” a “bundle of business-friendly policy measures,” and a “cultural regime” oriented around themes of market efficiency and market rationality. Daniel Rodgers, *The Uses and Abuses of “Neoliberalism,”* *DISSENT* (Winter 2018), <http://www.dissentmagazine.org/article/uses-and-abuses-neoliberalism-debate> [https://perma.cc/M3BY-GR65].



The historical evolution of the language of open government advocacy is intriguing in this regard. The progressives in the early 1900s spoke of “publicity,” rhetorically tethering their efforts to the notion of a public and its needs and demands. The 1960s-70s reformers spoke of “freedom of information” and the “right to know,” injecting a more individualistic and legalistic element into the discourse along with a bold emancipatory ambition. The current generation of advocates speaks of “transparency,” which both recasts the project in more technocratic terms and conjures a comparatively narrow and stringent ideal – not of a government that promotes citizen knowledge or the general good but of one that is see-through, and perhaps hollowed out.

Transparency’s rightward drift in law and politics, however, is not satisfactorily characterized as a mere epiphenomenon of the ascendance of neoliberalism (or “new public management,” “new governance,” “nudging,” and other such approaches to public administration). At a conscious level, many transparency advocates do not draw on these approaches or these labels in formulating their prescriptions. Several of the ways in which transparency’s meaning has shifted – for instance, through the co-optation of open records and open meetings regimes by unanticipated users – arose in a decentralized manner and do not appear to reflect any coherent neoliberal plan. And as I will soon suggest, the design and operation of contemporary transparency laws may have *themselves* partly shaped the progress of neoliberalism.<sup>221</sup> To whatever extent neoliberal ideology lies behind transparency’s drift, additional forces are thus at work. We need to push the explanatory analysis further.

Put somewhat differently, the advent of neoliberalism seems critical to understanding the growing demand for transparency and its growing detachment, since the 1970s, from the progressive ideal of an active government that facilitates shared control over political life. The neoliberal resistance to “state” intervention in the “market” and the neoliberal conception of the “consumer-citizen,”<sup>222</sup> who stands in relation to the government as a buyer does to a seller, share important practical and conceptual affinities with the libertarian-inflected notions of transparency that predominate today. Yet at the level of domestic policy or administration, precise linkages and causal influences between these two sets of developments are often difficult to make out. Much more work remains to be done in investigating the connections among transparency, neoliberalism, and law. This Article’s analysis of ideological drift, I hope, can help to frame such investigations and to ground them historically and institutionally.

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221. See *infra* Sections IV.A.3, IV.B.

222. Grewal & Purdy, *supra* note 220, at 13.

## 2. *Changes in the Media and Ideas Industry*

As the legislative history of FOIA makes plain,<sup>223</sup> transparency advocates in the 1960s and 1970s generally imagined that left-leaning public interest organizations and professional journalists – “socially responsible reporter-reformer[s]”<sup>224</sup> in the progressive mold – would be the primary acquirers of government information in the first instance. Yet while both groups are important constituencies for official transparency measures, researchers have consistently found that they play a less central role than was anticipated. Studies of requester logs, for example, suggest that members of the news media submit well under ten percent of the total requests under FOIA and its state-level analogues, and that nonprofit organizations submit even less.<sup>225</sup> Open congressional committee meetings are not frequented by reporters or citizen activists so much as by business lobbyists.<sup>226</sup>

Developments in the media and related sectors, meanwhile, have transformed the nature of public interest investigation and the *interpretations* given to government disclosures. These developments are especially important for understanding how transparency’s cultural profile has changed. The end of the last great wave of transparency reform in the mid-1970s coincided with the start of a major institution-building effort on the political right, which over the course of the late 1970s, 1980s, and 1990s yielded a network of watchdog groups (such as Judicial Watch and the Media Research Center), think tanks (such as the Heritage Foundation and the Cato Institute), and media outlets (such as the Fox News Channel and *The Rush Limbaugh Show*) designed to challenge the perceived liberal hegemony of the established order.<sup>227</sup> As compared to their older

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223. See *supra* note 113 and accompanying text.

224. HOFSTADTER, *supra* note 55, at 185.

225. See, e.g., Katherine Fink, *State FOI Laws: More Journalist-Friendly, or Less?*, in TROUBLING TRANSPARENCY, *supra* note 115, at 91, 103 tbl.5.1 (finding that members of the news media filed between zero and six percent of all FOI requests to state environmental agencies in 2014); *Frequent Filers: Businesses Make FOIA Their Business*, SOC’Y OF PROF. JOURNALISTS READING ROOM (July 3, 2006), <http://www.spj.org/rrr.asp?ref=31&t=FOIA> [<https://perma.cc/PBY7-JKUK>] (finding that members of the news media filed six percent and “nonprofit groups” filed three percent of all FOIA requests to Cabinet departments and large agencies in September 2005). Following the newspaper industry’s contraction in the mid-2000s, use of these laws by journalists dropped off sharply. See JAMES T. HAMILTON, *DEMOCRACY’S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE JOURNALISM 168-70* (2016).

226. See Ranalli et al., *supra* note 72, at 20-31.

227. For an overview of this institution-building effort and its implications for the way government is portrayed in the public sphere, see Fishkin & Pozen, *supra* note 113, at 951-59. See also DANIEL W. DREZNER, *THE IDEAS INDUSTRY: HOW PESSIMISTS, PARTISANS, AND PLUTOCRATS*

counterparts on the left, many of these organizations operate according to a more explicitly partisan ethic; well before President Trump rose to power, allegations of government overreach and liberal bias in the “mainstream media” were a defining theme.<sup>228</sup>

The details of these developments are complex, but the point here is simple. From the perspective of postwar open government reformers such as John Moss and Ralph Nader, the rise of a right-wing “ideas industry” and media “echo chamber” has changed the way in which disclosures are disseminated to large swaths of the population — and not for the better. Every revelation about a public official or entity, including revelations about alleged attempts to avoid revelation, now brings with it a new set of opportunities to reframe facts, obscure the overall shape of government activity, and sow alienation.<sup>229</sup> Just as progressives in the early twentieth century came to fear that “publicity” could be a tool for manipulating the masses rather than educating and empowering them,<sup>230</sup> progressives in the early twenty-first century are coming to see that transparency has the same

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ARE TRANSFORMING THE MARKETPLACE OF IDEAS 123-45 (2017) (discussing the rise of conservative and libertarian think tanks).

228. See Fishkin & Pozen, *supra* note 113, at 954-59. Helping such narratives to flourish, media deregulation through reforms like the FCC’s withdrawal of the fairness doctrine in 1987, Syracuse Peace Council, 2 FCC Rcd. 5043 (1987), and the enactment of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.), encouraged new forms of consumer-driven programming and “an appetite for more sensational items in the newsrooms.” PAUL MANNING, NEWS AND NEWS SOURCES: A CRITICAL INTRODUCTION 66 (2001). At this writing, the poster child for undercover reporting — a tactic traditionally used by mainstream media outlets with circumspection, see Greg Marx, *The Ethics of Undercover Journalism*, COLUM. JOURNALISM REV. (Feb. 4, 2010), [http://archives.cjr.org/campaign\\_desk/the\\_ethics\\_of\\_undercover\\_journalism.php](http://archives.cjr.org/campaign_desk/the_ethics_of_undercover_journalism.php) [<https://perma.cc/DBN3-YCBP>] — is the “rightwing attack organization” Project Veritas. Ed Pilkington, *Project Veritas: How Fake News Prize Went to Rightwing Group Beloved by Trump*, GUARDIAN (Nov. 29, 2017), <http://www.theguardian.com/us-news/2017/nov/29/project-veritas-how-fake-news-prize-went-to-rightwing-group-beloved-by-trump> [<https://perma.cc/U4UW-C6TS>].
229. In 2005, the writer David Foster Wallace observed in a trenchant essay that “the ever increasing number of ideological news outlets creates . . . a kind of epistemic free-for-all in which ‘the truth’ is wholly a matter of perspective and agenda” and that the “Mainstream Media’s Liberal Bias idea,” promoted by talk radio hosts like Rush Limbaugh, functions simultaneously “as an articulation of the need for right-wing (i.e., unbiased) media . . . and as a mechanism by which any criticism or refutation of conservative ideas [can] be dismissed.” David Foster Wallace, *Host: Deep into the Mercenary World of Take-No-Prisoners Political Talk Radio*, ATLANTIC (Apr. 2005), <http://www.theatlantic.com/magazine/archive/2005/04/host/303812> [<https://perma.cc/5R7P-PUYT>]. Plugged into this media ecosystem, nearly any piece of information about liberal policies or policymakers generated by an open record, open hearing, or other disclosure device becomes subject to corrosive critique and conspiratorial spin.
230. See *supra* note 61 and accompanying text.

ambiguous relationship to public opinion formation.<sup>231</sup> In a democracy, the political implications of any given disclosure scheme will always depend, to some extent, on the political leanings and methods of the civil society institutions that explain what its disclosures mean. And in the United States, those institutions have moved rightward since the mid-1970s.

### 3. *Declining Trust in Government*

Over this same period, the level of trust in government has declined significantly in the United States and other advanced democracies.<sup>232</sup> This trend, too, has infused the uses and meanings of open government law with a mounting adversarialism. Popular distrust fuels demand for “evidence” of agency activities, as transparency itself “becomes a symbol of organizational [honesty] and health.”<sup>233</sup> And yet, distrust also creates an environment in which skeptical interpretations of such evidence can flourish, which in turn fuels demand for additional disclosures. No happy equilibrium is ever reached. Without an affirmative political program to guide information policy, as in the Progressive Era, transparency mandates never seem to generate a widely shared sense of security or empowerment regarding the institutions that are “opened up.” They end up generating, instead, calls for ever more transparency.

With the benefit of hindsight, it now seems that the postwar transparency reformers who believed sunshine laws could restore faith in government may have been not simply overoptimistic but fundamentally mistaken about the dynamics they were setting in motion. Following Onora O’Neill, an impressive group of (mainly non-American) scholars suggests that institutional transparency requirements must themselves bear some blame for the collapse of popular trust, as these requirements end up holding complex governmental processes to unrealistic standards, fostering an antagonistic relationship between the watchers and the watched, and institutionalizing a “culture of suspicion.”<sup>234</sup> Causality

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231. As this Article has sought to show, vital to this growing awareness is the fact that transparency has proven itself not just susceptible to strategic behavior but a relatively empty concept, normatively, in the absence of a stable political referent.

232. See generally Stephen M. Griffin, *California Constitutionalism: Trust in Government and Direct Democracy*, 11 U. PA. J. CONST. L. 551, 571-80 (2009) (providing a detailed overview of the social science evidence on the decline of trust in government in the United States since the 1960s).

233. Garsten & Lindh de Montoya, *supra* note 212, at 7.

234. See ONORA O’NEILL, *A QUESTION OF TRUST* 63-79 (2002); see also ERKKILÄ, *supra* note 8, at 25 (arguing that access-to-information policies can have paradoxical effects on political accountability and trust in government because they “build[] on the idea of conflict in state-citizen relations”); PIERRE ROSANVALLON, *COUNTER-DEMOCRACY: POLITICS IN AN AGE OF DISTRUST*

is exceedingly difficult to establish here. Yet insofar as this suggestion has merit, it becomes even more implausible to characterize transparency's ideological drift as a mere byproduct of a larger drift toward neoliberalism or antigovernmentalism in public law and political culture. Rather, these drifts developed on overlapping tracks, continuously reshaping and reinforcing one another.

#### 4. *Advances in Information Technology*

Supporting some of the foregoing social and economic trends, the advent of the digital age has likely contributed to and complicated transparency's ideological drift on a variety of levels. By allowing information to be stored, shared, and mined with incomparably greater scale and sophistication, digital technology has created the conditions of possibility for the open data movement and its state-shrinking ambitions.<sup>235</sup> By lowering the cost of filing records requests, it has increased government agencies' compliance burden and enabled the efforts of regulated firms and opposition groups to bombard agencies with disclosure demands.<sup>236</sup> By facilitating a shift in social norms toward greater exposure and exhibition,<sup>237</sup> it has made many practices of secret-keeping (however well motivated) all the more suspicious. By helping to reorient economic activity away

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259 (Arthur Goldhammer trans., 2008) (arguing that the use of transparency to constrain power “engenders the very disillusionment it was intended to overcome” by leaving power unable to “respond to the demands placed on it”); A.J. Brown et al., *The Relationship Between Transparency, Whistleblowing, and Public Trust*, in RESEARCH HANDBOOK ON TRANSPARENCY 30, 32 (Padideh Ala'i & Robert G. Vaughn eds., 2014) (arguing that “greater transparency itself has likely fuelled distrust” through both direct and indirect causal mechanisms); Garsten & Lindh de Montoya, *supra* note 212, at 7 (“[O]ne may wonder whether [formal transparency] measures do not in fact serve to amplify a sense of insecurity and mistrust, rather than to ease uncertainty and restore trust.”); Hans Krause Hansen & Mikkel Flyverbom, *The Politics of Transparency and the Calibration of Knowledge in the Digital Age*, 22 *ORG.* 872, 875 (2015) (reviewing a range of “critical studies [that] have argued that transparency, usually promoted as a trust-enhancing measure, can spur mistrust”); Daniel Wyatt, *The Many Dimensions of Transparency: A Literature Review* 8-12 (Univ. of Helsinki Faculty of Law, Legal Studies Research Paper No. 53, 2018), <http://ssrn.com/abstract=3213821> (reviewing recent empirical and theoretical studies by European scholars that suggest an uncertain and potentially negative relationship between transparency and trust); cf. Lawrence Lessig, *Against Transparency*, *NEW REPUBLIC* (Oct. 9, 2009), <http://newrepublic.com/article/70097/against-transparency> [<https://perma.cc/VK4F-GHS4>] (predicting that the digital transparency movement, if pursued too aggressively, “will simply push any faith in our political system over the cliff”).

235. See *supra* Section III.F.

236. See Pozen, *supra* note 78, at 1123-28.

237. See generally BERNARD E. HARCOURT, *EXPOSED: DESIRE AND DISOBEDIENCE IN THE DIGITAL AGE* (2015) (exploring the role of digital technologies in fostering an “expository society”); cf. David Pozen, *Irresistible Surveillance?*, *CONCURRING OPINIONS* (Mar. 14, 2016), <http://>

from industrial production “toward the production, accumulation, and processing of information,”<sup>238</sup> it has accelerated the spread of “informational capitalism” and augmented the incentives of many commercial actors to minimize exposure of their own proprietary data while maximizing access to data concerning private citizens and public regulators. And by proliferating sources of online information and opportunities for virtual participation, it has arguably exalted “publicity in the place of . . . more demanding democratic goods.”<sup>239</sup> Even as the overabundance of data has made the role of “trusted intermediaries” all the more critical for public comprehension,<sup>240</sup> the rise of the “filter bubble,” “fake news,” trolling, flooding, and other pathologies associated with the internet seems to have exacerbated skepticism of expertise and of truth itself.<sup>241</sup> There may well be additional pathways through which the digital revolution has nudged transparency in less (or more) progressive directions, and I am necessarily painting with extremely broad, speculative strokes here. But these strike me as some of the most plausible and salient changes affecting transparency’s current political valence.

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concurringopinions.com/archives/2016/03/irresistible-surveillance.html [https://perma.cc/BMP6-BGR4] (“Millions upon millions of ‘digital subjects’ . . . have come to embrace forms of exposure that commoditize their own privacy.”).

238. Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 371 (2016); cf. Kessler & Pozen, *supra* note 180 (manuscript at 17) (discussing “transformations in the capitalist system [that] have imbued more and more economic activity with communicative content”).
239. Barney, *supra* note 4, at 92; see also Jodi Dean, *Why the Net Is Not a Public Sphere*, 10 CONSTELLATIONS 95, 101 (2003) (arguing that transparency “is the ideology of technoculture” and that its “materialization” in the internet tends to degrade rather than enhance democratic practices of conflict and contestation).
240. Roberts, *supra* note 152, at 10; see also Nadia Hilliard, *Monitoring the U.S. Executive Branch Inside and Out: The Freedom of Information Act, Inspectors General, and the Paradoxes of Transparency*, in TROUBLING TRANSPARENCY, *supra* note 115, at 166, 182 (discussing the growing “need for public intermediaries . . . to make [transparency] tools truly democratic”).
241. See Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. 7-16 (2017), <http://knightcolumbia.org/sites/default/files/content/Emerging%20Threats%20Tim%20Wu%20Is%20the%20First%20Amendment%20Obsolete.pdf> [https://perma.cc/YWN6-FSY]. For the suggestion that digital technology has helped produce a greater amount of “epistemic closure” on the political right, see Jonathan Chait, *The Great Epistemic Closure Debate*, NEW REPUBLIC (Apr. 9, 2010), <http://newrepublic.com/article/74356/the-great-epistemic-closure-debate> [https://perma.cc/LN8G-VW2C], which observes: “If technology is playing a role here, it’s probably allowing for a more totalistic alternative information coocon. Conservatives always had access to conservative opinion, but the rise of cable and the internet allowed them to create news sources that totally replaced, rather than merely supplemented, the mainstream media.”

In recent years, commentators on the left have celebrated several technology-assisted transparency developments of less certain legality: for instance, the apparent proliferation of national security whistleblower “leaks”<sup>242</sup> and the growing campaign to keep tabs on the police and the intelligence agencies through processes of “copwatching”<sup>243</sup> and “sousveillance.”<sup>244</sup> Notably, however, these bottom-up developments have arisen partly *in response to* the perceived failures of the transparency laws that are the focus of this Article. They illuminate just how accommodating these laws have been of nontransparency from a select group of government officials – namely, those who wield national security or law enforcement powers.

### B. Within Transparency Law

The last point deserves additional emphasis and explication, as well as some generalization beyond the national security and law enforcement areas. At the same time that far-reaching sociopolitical and technological developments were altering the meaning of transparency since the mid-1970s, the structure of transparency law and advocacy was generating its own normative momentum from within. A few “internal” features stand out.

#### 1. The Rise and Rise of National Security Secrecy

Ever since the executive branch’s creation of a Cold War information-control apparatus, U.S. open government legislation has contained a gaping, growing hole. For all their ambition, postwar transparency reformers largely failed to check the emergence of this apparatus and the consolidation of the official classification system for “national security” information<sup>245</sup> – a system that is still

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242. See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 529, 630 (2013) (noting the apparent proliferation of such leaks).

243. See Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 393 (2016) (exploring the rise of “organized copwatching,” whereby “groups of local residents . . . carry visible recording devices, patrol neighborhoods, and film police-citizen interactions in an effort to hold police departments accountable to the populations they police”).

244. See JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 206 (2012) (discussing ways in which digital technology has enhanced citizens’ “synoptical power” to engage in “sousveillance” and watch the government from below).

245. For critical overviews of the classification system, see COMM’N ON PROTECTING AND REDUCING GOV’T SECRECY, REPORT, S. DOC. NO. 105-2, at 19-46 (1997); and Elizabeth Goitein & David M. Shapiro, *Reducing Overclassification Through Accountability*, BRENNAN CTR. FOR JUSTICE 12-

governed by executive order, not by statute, and that is estimated to contain billions upon billions of pages of nonpublic documents.<sup>246</sup> A welter of exemptions, exclusions, and deference doctrines ensure that open records laws, open meetings laws, whistleblower protection laws, notice-and-comment rules, and the like do not penetrate too deeply into the work of the federal security agencies.<sup>247</sup>

Once one appreciates just how large and labyrinthine the national security state now is,<sup>248</sup> it becomes apparent that the canonical open government achievements of the 1960s and 1970s in fact opened up government at the margins. Many critics on the left (and some on the right) condemn “overclassification” as an impediment to democratic accountability.<sup>249</sup> From a historical perspective, the problem is even more acute and ironic. Although perceived national security abuses helped drive parts of the progressive transparency movement

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20 (2011), [http://www.brennancenter.org/sites/default/files/legacy/Justice/LNS/Brennan\\_Overclassification\\_Final.pdf](http://www.brennancenter.org/sites/default/files/legacy/Justice/LNS/Brennan_Overclassification_Final.pdf) [<https://perma.cc/PGK2-RN4J>].

246. See Peter Galison, *Removing Knowledge*, 31 CRITICAL INQUIRY 229, 230 (2004) (estimating as of 2004 that around “8 billion pages” had been classified in the United States since 1978 and noting that “[s]ome suspect as many as a trillion pages are classified”). The controlling executive order is currently Exec. Order No. 13,526, 3 C.F.R. § 298 (2010).

247. See generally SUDHA SETTY, NATIONAL SECURITY SECRECY: COMPARATIVE EFFECTS ON DEMOCRACY AND THE RULE OF LAW 1-72 (2017) (providing an overview of national security secrecy practices across the three branches of government). On the limits of national security whistleblower protections, see Pozen, *supra* note 242, at 527, which explains that, although they have proliferated across government in recent decades, whistleblower protection laws “play a marginal role” in the national security context; and Kaeten Mistry, *The Rise and Fall of National Security Whistleblowing in the Long 1970s*, at 2 (2018) (unpublished manuscript) (on file with author), which argues that after the 1970s national security “whistleblowing became more perilous just as government employees were increasingly the only source for the public to understand what the state was doing.” On national security secrecy in Congress, see Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT’L SECURITY J. 241, 259-81 (2015), which details the post-1970s rise of “secret law” in the form of classified addenda to defense and intelligence appropriations acts.

248. See Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST (July 19, 2010), <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control> [<https://perma.cc/8X9F-ZF5Z>] (estimating that some “1,271 government organizations and 1,931 private companies work on programs related to counterterrorism, homeland security[,] and intelligence in about 10,000 locations across the United States” and that over 850,000 individuals hold top-secret security clearances).

249. For notable recent examples, see Goitein & Shapiro, *supra* note 245, at 1, which argues that “[o]verclassification is rampant” and “corrodes democratic government”; and *Out of the Shadows: Recommendations to Advance Transparency in the Use of Lethal Force*, COLUM. L. SCH. HUM. RTS. CLINIC & SANA’A CTR. FOR STRATEGIC STUD. 106-12 (2017), <http://www.outoftheshadowsreport.com> [<https://perma.cc/7V8U-3WDJ>], which argues that overclassification of information regarding the U.S. government’s “targeted killing” policies has undermined democratic accountability, human rights, and the rule of law.



during and after the Vietnam War,<sup>250</sup> the upshot has been an ever-expanding asymmetry between national security secrecy and other forms of secrecy. That is to say, even as the transparency laws of the 1960s and 1970s placed increasingly onerous demands on the domestic policy process, they grew increasingly detached from the state's most violent and least visible components. While the National Labor Relations Board continually runs into the strictures of FOIA, FACA, GITSA, and the APA, the National Security Agency runs riot.

The rightward drift in transparency law's normative valence is thus a function not only of the ways this body of law has been used but also of the ways it has not been used—and the overall distribution of scrutiny and secrecy it has thereby engendered. The shape of this distribution, as it now stands, seems harder to square with the progressive commitment to energetic, egalitarian government than with a libertarian vision of a minimalist state authorized primarily to protect citizens against violent threats.<sup>251</sup>

## 2. *Corporate Capture and Anti-Public-Sector Bias*

If concerned citizens cannot learn all that much about defense or intelligence operations through our canonical transparency laws, and if journalists play a more marginal role than was anticipated, then who *is* taking advantage of these laws where they have bite? The composition of this group will inevitably have practical and political implications.

American transparency law largely leaves the answer to the market. Our open records, open meetings, and open data laws are designed to be equally accessible to “any person,” including legal persons.<sup>252</sup> Populist in principle, this refusal to ration the transparency entitlement—coupled in the case of FOIA with a requester-driven, litigation-intensive procedure—has led in practice to a user base heavily skewed toward business enterprises.<sup>253</sup> Many firms have a strong, steady motivation to learn what their regulators and competitors are up to, or to resell

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250. See, e.g., Pozen, *supra* note 78, at 1118-23 (discussing the failed efforts of FOIA's 1974 amendments to rein in national security secrecy by tightening the Act's national security exemption).

251. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 26 (1974) (discussing “[t]he night-watchman state of classical liberal theory, limited to the functions of protecting all its citizens against violence, theft, and fraud, and to the enforcement of contracts”).

252. See, e.g., *supra* note 82 and accompanying text (explaining this feature of FOIA); *supra* notes 72, 140-142 and accompanying text (explaining how the 1970 LRA opened up congressional committee meetings to the general public).

253. See *supra* note 114 and accompanying text; see also Pozen, *supra* note 78, at 1112-17 (discussing ways in which business interests have been economically subsidized and politically empowered by FOIA).

taxpayer-subsidized information to third parties. As a class, they are also far more likely than citizen-investigators or resource-strapped nonprofits to have the time, money, and expertise to navigate the FOIA bureaucracy, monitor congressional hearings, or parse high-value datasets – and then to exploit the information they acquire for private gain.<sup>254</sup> Opening up government documents or deliberations does nothing, in itself, to reduce the political privilege of well-financed and well-organized groups, and because of these dynamics it may even exacerbate distributional disparities. Progressive-minded reformers of the 1960s and 1970s, we might say, focused too much on the power of their transparency tools and not enough on the power structures that would condition their use.

Other design choices now taken for granted have had important allocative effects. Laws such as FOIA and the Data Quality Act have done more than provide informational subsidies to a subset of private organizations. These laws have also redirected transparency's gaze away from all such organizations by limiting their disclosure requirements to government bodies.<sup>255</sup> This “anti-public sector bias,” as Professor Irma Sandoval-Ballesteros calls it,<sup>256</sup> rivets critical scrutiny on government bureaucrats, raises the relative cost of investigating corruption and abuse in the private sector, and leads both “the ideal of ‘freedom of information’ and the evils of excessive secrecy [to be] associated, legally and symbolically, with the public sector alone.”<sup>257</sup>

Some commentators have puzzled over the apparent “trend in muckraking journalism over the past few decades, away from fighting private corporate power, in favor of fighting government power.”<sup>258</sup> One likely contributor to this trend is the incentive structure created by late twentieth-century open government law. Our most powerful transparency tools remain trained on the state –

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254. Cf. R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 275 (1990) (“We now know that open meetings filled with lobbyists, and recorded votes on scores of particularistic amendments, serve to increase the powers of special interests, not to diminish them.”).

255. See Pozen, *supra* note 78, at 1114-16, 1132-33 (discussing this aspect of FOIA); Wendy Wagner & David Michaels, *Equal Treatment for Regulatory Science: Extending the Controls Governing the Quality of Public Research to Private Research*, 30 *AM. J.L. & MED.* 119, 138-40 (2004) (discussing this aspect of the Data Access Act and the Data Quality Act and linking it to a larger asymmetry in the oversight of public versus private scientific research).

256. See Irma Eréndira Sandoval-Ballesteros, *Structural Corruption and the Democratic-Expansive Model of Transparency in Mexico*, in *TROUBLING TRANSPARENCY*, *supra* note 115, at 291, 302-05 (identifying an “anti-public sector bias” in access-to-information and anticorruption laws that exempt “private” actors).

257. Pozen, *supra* note 78, at 1114-15.

258. Mark Ames, *Seymour Hersh and the Dangers of Corporate Muckraking*, *PANDO* (May 28, 2015), <http://pando.com/2015/05/28/seymour-hersh-and-the-dangers-of-corporate-muckraking> [<https://perma.cc/4WH8-D86P>].

and continue to reinforce the narrative that its activities are especially in need of discipline and exposure – even as many forms of power have shifted away from the state since the mid-1970s on account of globalization and free-market economic policies.<sup>259</sup>

### 3. *Diminishing Marginal Returns*

Finally, perhaps the most basic driver of transparency’s ideological drift is also the most easily overlooked. On virtually any account of what transparency is valuable for, its benefits are likely to be subject to diminishing marginal returns.<sup>260</sup> Exposing an extremely secretive or otherwise unregulated process to a few rays of sunlight may be a major improvement over the status quo ante. In the Progressive Era, good-government reformers frequently confronted situations of little to no meaningful transparency across both the private and public sectors. Even in the 1960s and 1970s, significant pockets of darkness persisted, although good-government reformers legislated against a backdrop of substantially greater visibility and accountability.

As public institutions have become the targets of more and more policies of openness and accountability in the years since, demands for greater transparency from those same institutions have generally become less and less capable of producing significant democratic or procedural benefits<sup>261</sup> – and potentially more

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259. Many of our most powerful transparency tools remained trained, above all, on the *administrative* state. FOIA, for example, applies only to federal executive branch agencies and does not cover Congress, the courts, or private entities. See 1 JAMES T. O’REILLY, FEDERAL INFORMATION DISCLOSURE § 4:5 (3d ed. 2000). When state and federal agencies were relatively limited in scope in the early 1900s, the amount of economically, socially, and politically consequential information they generated and acquired was correspondingly modest. By the 1960s, however, and even more so today, the administrative state had become a vastly larger target for those seeking to elicit such information. See generally KENNETH F. WARREN, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM 35–63 (5th ed. 2011) (reviewing different dimensions of “the growth of administrative power”). The administrative state might, in this sense, be seen as a victim of its own success. Cf. *supra* note 5 and accompanying text (noting that the expansion of the federal bureaucracy helped provoke an analogous antistatist turn in mid-twentieth-century U.S. civil liberties law).

260. Cf. Pozen, *supra* note 80, at 275–323 (explaining that government secrecy becomes more problematic on consequentialist, democratic, and constitutional grounds as the “depth” of secret-keeping increases).

261. Demands for more “open data” could be an important exception to this claim, insofar as they live up to their promise of enabling qualitatively new forms of collaboration and problem-solving.

and more threatening to the capacity and legitimacy of the institutions.<sup>262</sup> To take Brandeis's metaphor further, sunlight may be an excellent "disinfectant"<sup>263</sup> in certain settings. But a lot of sunlight does not necessarily disinfect appreciably better than a moderate amount of sunlight. And too much of the stuff starts to kill off good organisms as well as bad ones. Expose any ecosystem to unremitting glare, and the result will not be an earthly paradise but Death Valley.<sup>264</sup>

It is a fallacy, then, to assume that the institutional benefits of transparency increase in any sort of lockstep – or indeed that they increase at all – as levels of openness increase, at least past some functional threshold. Given the existence of collective-action barriers, time and resource limitations, bounded rationality, and myriad other forces that constrain citizens' ability to put information to effective use on their own behalf, it is equally fallacious to assume that transparency's social benefits operate in such a manner. Brandeis's metaphor turns out to have a much more ambiguous meaning than he intended. Concerned primarily about big business rather than public administration, he never took into account the possibilities, then remote but now quite real, of "over-accountability,"<sup>265</sup> anti-public-sector bias,<sup>266</sup> or antiregulatory effects. He failed to foresee how his rhetoric might come one day to subvert the progressive ideals that underwrote it.<sup>267</sup>

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262. On the potential tensions between institutional transparency and social legitimacy, see sources cited *supra* note 234. See also Binder & Lee, *supra* note 146, at 63 ("[T]he more transparent the legislative process is, the more the public dislikes Congress." (citing JOHN HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS (1995))); Jenny de Fine Licht, *Transparency Actually: How Transparency Affects Public Perceptions of Political Decision-Making*, 6 EUR. POL. SCI. REV. 309, 309 (2013) (finding in an experimental setting that "[p]erceptions of transparency are . . . largely shaped by transparency cues (e.g. statements provided by external sources) rather than by the degree of actual transparency, and no direct effect of actual transparency can be found on decision acceptance"); Jenny de Fine Licht et al., *When Does Transparency Generate Legitimacy? Experimenting on a Context-Bound Relationship*, 27 GOVERNANCE 111, 111 (2014) (finding in an experimental setting that "[o]nly when behavior close to a deliberative democratic ideal was displayed did openness of the process generate more legitimacy than closed-door decision making with postdecisional justifications").

263. See *supra* notes 1, 28 and accompanying text.

264. Recall again in this regard that complaints about "too much of a good thing" are a classic sign that ideological drift is occurring. See *supra* note 24 and accompanying text.

265. See generally Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185 (2014) (discussing situations where effective accountability mechanisms, including information-forcing mechanisms, end up decreasing rather than increasing an agent's likelihood of acting in her principal's best interests).

266. See *supra* Section IV.B.2.

267. I do not mean to chide Brandeis. Transparency law has evolved in ways no one could have anticipated. The problems that he and other progressives confronted were their own, and they

**CONCLUSION: REDIRECTING TRANSPARENCY?**

Ideological drifts, as Balkin explains, can reverse themselves. “[P]olitical and legal ideas can change their political valence over time from progressive to conservative and back again.”<sup>268</sup> Might transparency move in a progressive direction in the years ahead? What could reformers do to facilitate such a shift, or conversely to fend it off?

The Trump Administration represents both an opportunity for and a threat to the project of redirecting transparency onto a more progressive path. It is an opportunity because Trump’s political ascent underscores the limits of postwar legal liberalism and unsettles its regulatory assumptions, and because Trumpism is itself so inimical to progressive values that almost anything that helps to check it—in particular FOIA requests—may be doing some progressive good for the time being. Yet Trumpism is also a threat for that very reason, insofar as it obscures the *counter*-progressive work that transparency laws have been doing in recent decades. Alarm over this Administration may fuel a partisan escalation in the transparency arms race that will produce an overestimation of the gains of such “resistance” in the short term, while coming back to constrain those who wish to build a more active and egalitarian administrative state in the longer term. The history recounted in this Article offers a cautionary tale for those activists and policymakers of today who—like their predecessors from the Progressive Era and the 1960s and 1970s—look to transparency to curb plutocratic excesses, invigorate participatory democracy, or make government more effective and trusted.

At the same time, an appreciation of transparency’s ideological drift suggests some more constructive lessons. A premise of this Article is that the past century’s open government measures cannot be well understood in isolation, but rather must be considered in a larger intellectual and political context and in relation to one another. By taking a panoramic view of how our canonical transparency laws emerged and evolved, we may be able to identify common mistakes and blind spots in the contemporary legal discourse.

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fashioned their tools according to their historical moment. Our generation would do well to follow suit.

268. Balkin, *supra* note 23, at 1833.

Given the view this Article has afforded, the following high-level principles strike me as especially useful starting points for redeeming the promise of transparency law in a new gilded age.<sup>269</sup> It may be the case that some of these principles are more likely to attract support on the political left. Yet most should hold appeal for a larger group of outcome-oriented governance reformers, both at home and abroad. And all of them should clarify the normative stakes for participants in these debates.

1. *Desacralizing transparency.* Certain forms of transparency concerning the basic contours of government action may well be prerequisites to individual and collective self-determination and can be justified without consequentialist assumptions. Beyond that floor, however, this Article has highlighted just how practically and politically complicated – and perverse – transparency mandates can be. It follows that we should stop assigning “quasi-religious significance”<sup>270</sup> to transparency in most realms and start treating it more like an ordinary administrative norm. It further follows that we should be open to the possibility of shrinking or even doing away with transparency measures, perhaps including FACA and GITSA, that cause genuine policy harm. Even if more information is *prima facie* better than less, transparency’s susceptibility to drift counsels against abstract assumptions about its virtues, categorical critiques of its absence, or static approaches to policy design.

2. *Recognizing the politics of transparency.* Liberal lawyers, scholars, and judges are clear-eyed about the conservative, anticlassificationist agenda that the idea of a “colorblind Constitution” advances in contemporary policy debates.<sup>271</sup> Transparency’s ideological drift from left to right has been much less complete and more complex (and much more similar in this respect to free speech’s late

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269. To be clear, such redemption is unlikely to be achievable through transparency reform alone. Just as developments in the wider world have changed transparency’s meaning and confounded reformers’ objectives in the past, *see supra* Section IV.A, they may do so in the future in ways that cannot necessarily be predicted, much less controlled, *ex ante*. And yet, if I am right that the normative structure of transparency law and advocacy has both enabled ideological drift and shaped some of those broader social developments, then there is reason to believe that transparency reform can matter a great deal.

270. Hood, *supra* note 6, at 3; *see also* Emmanuel Alloa, *Transparency: A Magic Concept of Modernity*, in *TRANSPARENCY, SOCIETY, AND SUBJECTIVITY: CRITICAL PERSPECTIVES* 21, 45 (Emmanuel Alloa & Dieter Thomä eds., 2018) (suggesting that transparency is the only Enlightenment ideal that “never under[went] any thorough questioning during the twentieth century”).

271. *See supra* notes 16–17 and accompanying text; *see also, e.g.*, Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 *HARV. C.R.-C.L. L. REV.* 63, 112 (1993) (“The adoption of colorblind constitutionalism, while perhaps motivated by different concerns, clearly furthers the political agenda of the neo-conservative right by defending and preserving white privilege.” (footnote omitted)).

twentieth-century drift).<sup>272</sup> Even still, the comparison is revealing. It throws into relief just how ahistorical and politically ingenuous many analyses of transparency have become. Without reducing it to a partisan subject, politicizing transparency – in the sense of calling attention to, and encouraging public debate about, its ideological and distributional implications – could substantially deepen the legal and policy discourse.

3. *Transparency as a complement to, not a substitute for, substantive regulation.* As explained above, an important sense in which transparency has drifted rightward is the increasing reliance on it to stave off other forms of regulation that are seen as more coercive or market-disruptive.<sup>273</sup> In area after area, however, transparency has proven inadequate by itself to achieve public objectives or protect vulnerable parties. To take just one more example, a number of state and local governments have recently adopted “open-file” policies that require prosecutors to turn over their investigatory files to criminal defendants before trial.<sup>274</sup> Yet while legal scholars and advocates have touted this reform as a means to level the playing field, the best evidence indicates that open-file policies are of little utility unless combined with strengthened enforcement mechanisms and increased funding for indigent defense.<sup>275</sup> If the early twentieth-century progressives were overoptimistic about transparency’s capacity to stimulate new modes of collective problem-solving, recent reformers have been overoptimistic about

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272. See *supra* notes 18–20 and accompanying text.

273. See *supra* Sections III.D, III.E, IV.A.1.

274. See Editorial, *Justice and Open Files*, N.Y. TIMES (Feb. 26, 2012), <http://www.nytimes.com/2012/02/27/opinion/justice-and-open-files.html> [<https://perma.cc/6RY3-2QCP>].

275. The important study that establishes these points is Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771 (2017). For another recent null finding on the effects of a transparency reform initially heralded by the left, see David Yokum et al., *Evaluating the Effects of Police Body-Worn Cameras: A Randomized Controlled Trial*, LAB @ DC (2017), <https://isps.yale.edu/research/publications/isps17-028> [<https://perma.cc/QBY8-QGYQ>]. For sympathetic analyses of specific transparency policies, see Craig Holman, *Disclosure Is Fine, but Genuine Lobbying Reform Must Focus on Behavior*, ADMIN. & REG. L. NEWS, Summer 2006, at 5, 5, which explains that federal lobbying law has “emphasized disclosure as a means of keeping the potentially corrupting influence of lobbyists in check. But recent experience strongly suggests that disclosure is no longer enough . . . [G]enuine lobbying reform today must venture into the regulation of the *conduct* of lobbyists and the ethical *behavior* of members of Congress and their staff”; and Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L.J. 1267, 1267 (2017), which concludes that “[t]he unpleasant truth is that creating effective digital regulators,” which pursue consumer protection goals through mandated disclosures on websites, apps, and the like, “would require investing heavily in a new oversight regime or sophisticated state regimes.” For a more general argument about the need to pair information-forcing policies with policies that directly enhance the “civic capacity” of marginalized groups, see K. Sabeel Rahman, *From Civic Tech to Civic Capacity: The Case of Citizen Audits*, 50 PS: POL. SCI. & POL. 751 (2017).

its capacity to solve problems on its own. Transparency, we have learned, is neither an inevitable spur to nor an adequate substitute for good substantive regulation, although it may be an indispensable complement. As in the case of open-file reform, information-forcing measures must be integrated into broader regulatory strategies. Policy makers should abandon any default preference for stand-alone transparency fixes in favor of what we might call “transparency plus.”

4. *Connecting asymmetries of information to asymmetries of power.* One of the early progressives' basic insights about transparency ought to resonate across the political spectrum. In general, they believed, the case for exposure is strongest where secrecy enables the accumulation of arbitrary political or economic power. Applying this insight to the present time can help us to identify forms of transparency that deserve greater support – and to see the contingency of the public/private divide that has come to organize the American statutory landscape (but not cutting-edge statutory schemes abroad, such as South Africa's Promotion of Access to Information Act).<sup>276</sup> The risk of undisclosed and unchecked domination in the United States is today sourced less plausibly to legislatures or political machines, and more plausibly to institutions such as multinational corporations or the defense, intelligence, and law enforcement agencies – and to the computer algorithms used by all of these.<sup>277</sup> Wherever the potential for such

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276. See Promotion of Access to Information Act 2 of 2000 § 50(1) (S. Afr.) (providing that a “requester must be given access to any record of a private body if . . . that record is required for the exercise or protection of any rights”); see also Richard Calland, *Exploring the Liberal Genealogy and the Changing Praxis of the Right of Access to Information: Towards an Egalitarian Realization*, THEORIA, Sept. 2014, at 70, 79 (discussing the “groundbreaking” and “deliberately progressive” application of this law to private actors); *Private Bodies and Public Corporations*, RIGHT2INFO.ORG (Sept. 13, 2013), <http://www.right2info.org/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations> [https://perma.cc/HFY5-RC8N] (explaining that most countries' FOI laws now “provide for access to information held by public corporations and/or private entities that perform public functions or receive public funds”). Within the United States, state open records laws generally follow FOIA in exempting private entities from their coverage as a default matter, but many use some version of a “functional equivalent” test to determine if the records of [a] private or quasi-private entity should be disclosable.” *Entities Subject to the Law*, REPORTERS COMM. FOR FREEDOM PRESS, <http://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/entities-subject-law-o> [https://perma.cc/7DSG-ESEY].

277. See generally FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2015) (describing and critiquing the “black box” secrecy of financial institutions and large corporations that rely on proprietary algorithms); *Algorithmic Transparency: End Secret Profiling*, ELECTRONIC PRIVACY INFO. CTR., <http://www.epic.org/algorithmic-transparency> [https://perma.cc/7CA3-EAJM] (“As more decisions become automated and processed by algorithms, these processes become more opaque and less accountable.”). *But cf.* Ananny & Crawford, *supra* note 216, at 984 (emphasizing that “transparency alone cannot create accountable [algorithmic] systems”). For a forceful argument that greater



domination resides, transparency reforms that seek to reduce it ought to be a higher priority than reforms that seek marginally more openness from organizations that are already highly visible.

5. *From institutional disinfectant to democratic catalyst.* This Article has shown that as the project of transparency-law reform has evolved over the past several decades, it has become increasingly fixated on shaming and restraining public actors, and increasingly divorced from its original goals of enhancing regulatory responsiveness and shared access to public goods.<sup>278</sup> While transparency is more celebrated than ever as a tool of political resistance and consumer choice, it no longer serves what Professor Jane Mansbridge calls “a political theory of *democratic action*.”<sup>279</sup> Reversing transparency’s ideological drift will be all but impossible without a return to this broader vision of what such laws are supposed to accomplish: not so much disinfecting a diseased patient as making both state and society more equitable and effective. A rhetorical recalibration may be necessary as well. We seem to be stuck with the unfortunate term “transparency” for the foreseeable future. But those who seek to move transparency back toward a progressive path could at least resist the other, disciplinary metaphors that have come to dominate the field—disinfecting, policing, exposing, shining a spotlight—in favor of a language that (re)emphasizes a more affirmative set of democratic aspirations.

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Taken together, these principles outline a broad agenda for transparency theory and activism: one that asks which sorts of information-forcing mechanisms, tied to which other sorts of regulation, will be constitutive of a healthy democracy capable of surfacing and solving collective-action problems under current conditions. Figuring out how exactly to translate such high-level principles into granular policy prescriptions will no doubt prove an enormous challenge. The critical first step, however, is to stop ignoring the political evolution and the political economy of transparency, and to start coming to grips with the ambivalent legacy of prior reform movements. While I cannot have any certainty about where such conversations will lead, I do have a strong sense that scholarship and advocacy that questions and updates the commitments behind liberal pieties such as transparency, rather than simply amplifying them afresh, is going to be

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transparency is still needed in a variety of formally and functionally privatized “alternative dispute resolution” systems, see Judith Resnik, *The Functions of Publicity and of Privatization in Courts and Their Replacements* (from Jeremy Bentham to #MeToo and *Google Spain*) (Mar. 2018) (unpublished manuscript) (on file with author).

278. Cf. ROSANVALLON, *supra* note 234, at 258 (suggesting that an “ideology of transparency” has come to displace, rather than serve, the “old” democratic ideal of “creat[ing] through politics a society in which people could live together in a shared world”).

279. Jane Mansbridge, *On the Importance of Getting Things Done*, 45 PS: POL. SCI. & POL. 1, 1 (2012).

## TRANSPARENCY'S IDEOLOGICAL DRIFT

especially important in the age of Trump and beyond. If the next generation of Brandeisian or Naderite reformers is to strike a better, more durable balance between open government and active government, disclosure and deliberation, sunlight and shade, it will have to reckon with all the ways in which transparency law has already drifted beyond its grasp.