

TARGETED TRANSPARENCY AS REGULATION

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ABSTRACT

Traditional government transparency tools are coming under increasing criticism. Laws like the Freedom of Information Act, once thought to revolutionize democracy by opening up government for all to see, have proven to be relatively rough tools (at best) in accomplishing accountability. While the democratic ideals are still celebrated, the increasing costs of broad open-the-government style laws—both monetary and nonmonetary—have not gone unnoticed.

Meanwhile, in the regulatory landscape for private companies, targeted disclosure requirements have become increasingly popular methods of encouraging all manner of socially beneficial behavior, be it curbing pollution, making safer consumer products, or ensuring anti-discrimination. Across a wide variety of sectors, companies and businesses now must disclose to the public specific data regarding business finances, environmental risks, safety hazards, and much more.

This Article is the first to apply the regulatory disclosure literature to gain insights on government transparency laws, revealing opportunities for designing transparency requirements to more closely hew to accountability goals. We categorize these laws “targeted transparency as regulation” because though they concern government transparency and not private disclosure, they operate to “regulate” government actions for specific and measurable accountability goals by incentivizing beneficial, ethical, reasoned conduct by agency officials.

Further, our experience with disclosure law provides insights on how to design targeted transparency as regulation requirements, including their promises and limits. While no panacea, targeted transparency as regulation has the potential to play a pivotal role in the next generation of government accountability laws and to provide a partial answer to the critics of broad-based open-the-government style oversight.

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INTRODUCTION

While seemingly semantic, transparency and disclosure generally mean two very different things. Transparency typically refers to across-the-board requirements for government openness.¹ This is the kind of transparency that is required for a functioning democracy, citizen engagement, and public accountability. Disclosure, on the other hand, typically refers to targeted requirements of private organizations to release otherwise closely held information.² Disclosure is meant to give consumers and investors the information they need to make rational choices, improve the functioning of the marketplace, and, as a result, incentivize private actors to behave in a socially beneficial way. And though the delineation between disclosure and transparency is seemingly stark at first blush, this is not to say that division is absolute. To that end, some scholars use the two words interchangeably, lumping in some government transparency policies

1. See, e.g., David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 102 (2018) [hereinafter Pozen, *Ideological Drift*] (focusing on government transparency); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 888 (2006) [hereinafter Fenster, *Opacity*] (same).

2. See, e.g., MARY GRAHAM, *DEMOCRACY BY DISCLOSURE: THE RISE OF TECHNOPOPOLISM* (2002) (examining disclosure as it is used to regulate private conduct); Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Discourse*, 159 U. PA. L. REV. 647, 649 (2011) (same).

with private disclosure and vice versa.³ However, the two areas are typically discussed as distinct mechanisms towing the public/private divide.

Indeed, there is an entire body of transparency literature, a field of transparency scholars, and a suite of laws known as transparency laws. These scholars tend to be in administrative law, public administration, and/or journalism disciplines, and they focus on holding government accountable. Transparency-minded advocates speak of the public's "right to know" and government records "belonging" to the public.⁴ Laws such as the Freedom of Information Act (FOIA) and open meetings requirements play center stage in this conversation.⁵ These laws are general: They apply to all records, all meetings, and all government activities. They do not target particularly useful information or particularly comprehensible forms of release. They don't require the government to create any particular information. They simply open the government for all to see.⁶

At least historically, this type of transparency was considered a nearly unmitigated good.⁷ The thinking was that the more transparent government was, the more the public would be informed of the government's activities and the better the public could act on that information, be it through voting, protesting, or participating in government decision-making.⁸ As a result, more transparency was thought to be nearly always better,⁹ while advocates admitted to very limited countervailing interests like national security. The celebration of government transparency as a public good almost expressly eschews

3. See *infra* notes 110-13 and accompanying text.

4. See, e.g., Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L. QUARTERLY 2 (1976) (discussing the foundations of the public's "right to know"); *Government Transparency*, ACLU OF COLO., <https://aclu-co.org/issues/government-transparency/> [<https://perma.cc/2S83-T6UZ>] (last visited March 31, 2021); Elias Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741, 742 (1975).

5. Freedom of Information Act, 5 U.S.C. § 552 (2018); Government in the Sunshine Act, 5 U.S.C. § 552b (2018).

6. See *supra* Section I.0

7. Amitai Etzioni, *The Limits of Transparency*, in TRANSPARENCY, SOCIETY AND SUBJECTIVITY 179, 180 (2018) ("Transparency has long been considered an unmitigated, incontestable 'good' by public intellectuals and scholars in liberal democracy societies.")

8. 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, 458 (2012) [hereinafter Fenster, *Transparency Fix*].

9. See, e.g., Memorandum on Transparency & Open Gov't from the President to the Heads of Exec. Dep'ts & Agencies, 74 Fed. Reg. 4,685, 4,685 (Jan. 21, 2009) (ordering agencies to apply a presumption in favor of disclosure of government records).

a consequentialist concern,¹⁰ privileging instead the much more amorphous and lofty values of citizenship and participation.¹¹

Disclosure, by contrast, is a body of law situated in the literature on corporate regulation, economic theory, market corrections, and cost-benefit analysis—areas ripe for assessment in terms of their concrete and measurable outcomes. The idea of disclosure in this context is that it can correct imperfect or one-sided information—such as the dangers of certain consumer products—and allow for consumers or investors to decide what level of risk they are willing to tolerate alongside other factors in their decision-making.¹² Originating with financial disclosure of publicly traded companies designed to empower investors in the wake of the stock market crash of 1929,¹³ disclosure has become a widespread mechanism in the law, touching on everything from consumer product safety warnings to food-and-drug labeling to bank lending documents.¹⁴ Importantly, these disclosure laws are also very targeted: They require the release of particular information in a particular format thought to meet a particular information need.¹⁵

Moreover, disclosure is often overtly regulatory.¹⁶ Disclosure has been seen at some times as part of any good comprehensive regulatory scheme and at other times as a replacement for substantive regulatory restrictions on behavior, so-called “command-and-control” regulation.¹⁷ Regardless, the idea is that disclosure requirements will form a sort of soft incentive for private actors to engage in more socially

10. Throughout this Article, we discuss the consequentialist goals of disclosure policies in terms of concrete and measurable outcomes, as opposed to more theoretical or ephemeral consequences. For example, one consequentialist aim of private disclosure mandates could be welfare maximization. In that context, disclosures are viewed as a tool to promote the welfare of consumers by providing pertinent information and allowing for more informed choices.

11. See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (“The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”) (citations omitted).

12. See Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. U. L. REV. 653, 655 (1993) [hereinafter Sunstein, *Informing America*] (“[W]e can generate a strong argument for informational remedies—on grounds of liberty, economic efficiency, and democracy.”).

13. See Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1093-94 (2007).

14. Ben-Shahar & Schneider, *supra* note 2, at 650, 675, 690.

15. *Id.* at 652-65 (providing a host of disclosure law examples, ranging from terms of credit laws to informed consent requirements). Reflecting this critical facet of these laws, some scholars refer to “targeted transparency” interchangeably with “disclosure.” See, e.g., ARCHON FUNG, MARY GRAHAM & DAVID WEIL, *FULL DISCLOSURE—THE PERILS AND PROMISE OF TRANSPARENCY* 5 (2007).

16. Ben-Shahar & Schneider, *supra* note 2, at 651, 679 (referring to disclosure as a “regulatory method”); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 613 (1999) [hereinafter Sunstein, *Informational Regulation*] (referring to disclosure in a regulatory context).

17. Sunstein, *Informational Regulation*, *supra* note 16, at 613, 619, 625.

beneficial conduct. One way it incentivizes better conduct is simply by shaming the company into better actions.¹⁸ Another way relies on a more complex system of feedback: consumer decision-making away from bad actors, investor valuation of stocks, and other market forces.¹⁹ Either way, however, disclosure has a specific regulatory end whose success can be ascertained.

Consistent with this account, the disclosure literature has focused on a consequentialist evaluation of disclosure laws' measurable success. These inquiries ask a question that is centrally relevant to much regulatory law: whether the cost of the regulatory intervention (in this case disclosure) is outweighed by the benefit. These studies have been much more mixed, if not outright negative, about disclosure's efficacy. Across various contexts, researchers have concluded that disclosure has little effect, or that the costs greatly exceed any marginal benefit. Unlike the advocates nearly uniformly celebrating transparency laws, even proponents often qualify their support of disclosure laws, and some researchers are outright opponents of disclosure as a regulatory tool.²⁰

But what about a requirement that looks more like a disclosure law—something that is targeted for a particular effect—turned back toward government? That is, what about disclosure laws that are meant to regulate government actors? A set of laws that meet this description exist. They range from environmental disclosures to campaign finance regulations to cost-benefit analyses.²¹ Yet, sometimes they are discussed as transparency laws.²² Sometimes they are lumped into the disclosure debate.²³ But more often, they are ignored. They don't fit neatly in either box. And scholars have not examined this category of intervention as a distinct matter.

This Article categorizes this set of laws as “targeted transparency as regulation.” And it argues that even though these laws are often lumped into the transparency category because they concern government actions, they act in a regulatory fashion like disclosure laws—except that they regulate government conduct rather than private conduct. It theorizes the mechanism by which targeted transparency as regulation requirements are designed to work and provides examples of current targeted transparency as regulation laws.

18. See Dalley, *supra* note 13, at 1093, 1101 (describing how disclosure as a “soft” form of intervention allows society to regulate through its reaction to information provided through disclosure as opposed to regulation directly from the government).

19. See *id.* at 1103 (explaining how disclosure can increase market competition and, in turn, deter socially unacceptable conduct).

20. See *infra* notes 102-10 and accompanying text.

21. See *infra* Section II.B (detailing examples of disclosure laws that are aimed toward regulating government actors).

22. See *infra* notes 110-13.

23. See *id.*

The concept of targeted transparency as regulation may be particularly salient today. Government transparency itself has recently come under some heavy critique.²⁴ Taking a less unquestioningly idealist approach, and applying a consequentialist test for government transparency, some scholars have argued that government transparency laws like FOIA are failing basic cost-benefit analyses—even hurting rather than improving governance.²⁵ This Article argues that targeted transparency as regulation—or disclosure requirements for government—may have an increasingly salient role to play in improving government transparency regimes.

To be sure, this Article does not purport to definitively answer which targeted transparency as regulation mechanisms are successful or unsuccessful, nor does it fail to recognize that the distinction between transparency and disclosure can sometimes be blurry. This Article only suggests that this distinct type of legal mechanism deserves separate examination. Understood properly, this Article offers an additional tool in the arsenal of regulatory mechanisms as applied to government conduct with the aim of government accountability.

This Article proceeds in four parts. Part I traces a shared origin of transparency and disclosure laws and then documents the division between them in the scholarly literature. Part II theorizes the underexamined intersection of transparency and disclosure as the targeted laws that apply to government information requirements. It first examines how the mechanisms of disclosure can and do apply to government and then provides examples of extant laws that operate under those theories. Part III explores the limits and possibilities of targeted transparency as regulation. Many of the limits of disclosure laws' success apply equally to government, and yet some of the failures of traditional transparency might be answered by targeted transparency as regulation. It concludes by suggesting that defining targeted transparency as regulation as a distinct category of information laws is helpful to understanding the transparency tools at our disposal.

I. TRANSPARENCY AS CITIZENSHIP/DISCLOSURE AS REGULATION

Government transparency and regulatory disclosure laws have had very distinct evolutions, despite common beginnings. This Part tells the story of a shared past but an often bifurcated present. Today,

24. See generally TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 1 (David Pozen & Michael Schudson, eds., 2018) [hereinafter TROUBLING TRANSPARENCY]; Emmanuel Alloa & Dieter Thomä, *Transparency: Thinking Through an Opaque Concept*, in TRANSPARENCY, SOCIETY AND SUBJECTIVITY (Emmanuel Alloa & Dieter Thomä eds., 2018); Pozen, *Ideological Drift*, *supra* note 1 at 100.

25. See David Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PENN. L. REV. 1097, 1099 (2017) [hereinafter Pozen, *Beyond*].

disclosure laws applying to private actors are justified and evaluated based on economic metrics. Whereas government transparency laws are mostly celebrated as unmitigated goods for citizenship and public participation.

A. *The Origins of Information Requirements*

In what must be one of the most misunderstood quotes, U.S. Supreme Court Justice Louis Brandeis famously said, “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”²⁶ It has been used to explain all manner of government transparency requirements, including FOIA.²⁷

Next to that misunderstood quote is another. James Madison once wrote that “[a] popular Government without popular information or the means of acquiring it is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors must arm themselves with the power knowledge gives.”²⁸ Beginning in the mid-twentieth century and carrying on through today, freedom of information advocates have invoked Madison’s words to advance a theory of transparency as integral to democratic citizenship. Indeed, members of Congress regularly quoted Madison during the FOIA debates as a means of highlighting the crucial role government transparency plays in a well-functioning democracy.²⁹

Neither Brandeis nor Madison was promoting our modern formulation of the public’s “right to know” about its government’s conduct. Instead, Madison was actually praising Kentucky for its public education system, not advocating for government openness.³⁰ Brandeis’s words invoked publicity as a tool to rein in the power of corporate investment bankers and promote fairness within the industry.³¹ Under Brandeis’s theory, forcing bankers to publicize their fees and commissions would curtail economic concentration. He argued that publicity itself would act as a “regulation of bankers’ charges which would apply automatically to railroad, public-service and industrial corporations alike.”³²

26. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (2d ed. 1932).

27. *See, e.g.*, Memorandum on Freedom of Info. Act from the President for the Heads of Exec. Dep’ts & Agencies, 74 Fed. Reg. 4,683, 4,683 (Jan. 21, 2009).

28. MICHAEL SCHUDSON, *THE RISE OF THE RIGHT TO KNOW, 1945–1975* at 28–29 (2015).

29. *Id.* In expressing the importance of transparency to a functioning democratic government, former Chairman of the Government Operations Committee William Dawson once explained that “[a]n informed public makes the difference between mob rule and democratic government.” *Id.* at 40.

30. *Id.* at 29.

31. Pozen, *Ideological Drift*, *supra* note 1, at 108–09.

32. Louis D. Brandeis, *What Publicity Can Do*, *HARPER’S WEEKLY* 10, 11 (Dec. 20, 1913), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/col-lection/papers/1910/1913_12_20_What_Publicity_Ca.pdf [<https://perma.cc/REQ2-6TFN>].

The misuse of these quotes, however, is understandable. In the early nineteenth century, calls for information requirements hardly distinguished between corporate and government conduct—they all served a regulatory end. Rhetoric embracing publicity as a means of regulation became somewhat of a rallying cry among progressive politicians in early twentieth century America.³³ Journalist Charles Edward Russell articulated the rationale behind the theory in 1920 when he said, “To right any wrong in the United States is, after all, a simple process. You only have to exhibit it where all the people can see it plainly.”³⁴ Likewise, President Theodore Roosevelt repeatedly insisted upon more publicity in the corporate world, which he argued would reduce government corruption by limiting occasions for corporate influence.³⁵ In fact, he specifically discussed the importance of corporate disclosure and publicity in his first official address to Congress.³⁶ Under the progressive platform, politicians of the time called for increased publicity in a host of areas, such as food-and-drug manufacturing and wage-and-hour conditions.³⁷ These demands for publicity, however, were not geared solely toward private industries; calls for publicity in government led to the enactment of federal legislation like the Publicity of Political Contributions Act of 1910, the first of several federal campaign disclosure laws.³⁸

With the New Deal and the rise of the administrative state came increased demands for more publicity as a means of regulation. Then-presidential-hopeful Franklin Delano Roosevelt adopted Brandeis’s general regulatory philosophy toward mandatory corporate disclosure during his first presidential campaign in 1932. On the campaign trail, he often invoked a Brandeis-like theme: “Let in the light.”³⁹ Shortly after assuming the presidency, Roosevelt successfully lobbied Congress to enact the Securities Act of 1933 and the Securities and Exchange Act of 1934. Congress’s adoption of Brandeis’s suggestions in these pieces of legislation is evident in their requirements, which compel corporations selling securities to disclose a variety of financial information to consumers. Congress believed that publicity, in turn,

33. Pozen, *Ideological Drift*, *supra* note 1, at 110.

34. CHARLES EDWARD RUSSELL, *THE STORY OF THE NONPARTISAN LEAGUE: A CHAPTER IN AMERICAN EVOLUTION* 64 (1920).

35. Pozen, *Ideological Drift*, *supra* note 1, at 110. *See also* Brigham Daniels, *Agency as Principle*, 48 GA. L. REV. 335, 399 (2014) (providing an account of President Theodore Roosevelt’s views of publicity with regard to transferring reserves from the Department of the Interior to the Department of Agriculture).

36. *See* F.M. Scherer, *Sunlight and Sunset at the Federal Trade Commission*, 42 ADMIN. L. REV. 461, 462-63 (1990) (explaining that Theodore Roosevelt invoked the importance of publicity to modern business in his first address to Congress as President).

37. Pozen, *Ideological Drift*, *supra* note 1, at 110-11.

38. *Id.* at 111-12.

39. GRAHAM, *supra* note 2, at 2. Specifically, President Franklin Delano Roosevelt insisted upon the “letting in of the light of day on issues of securities, foreign and domestic, which are offered for sale to the investing public.” *Id.* at 1-2.

would act as the primary safeguard to potential investors.⁴⁰ As author Mary Graham explained in recounting the importance of these legislative developments, “Disclosure had become a form of regulation.”⁴¹

B. Transparency as Citizenship

Despite this common origin in policy arenas in the United States, political philosophy around public transparency and private disclosure have evolved somewhat separately. As for public transparency, origins trace back at least to the Enlightenment era in Europe. With the rise of the public sphere in Europe in the late eighteenth and early nineteenth centuries came increased calls for public disclosure.⁴² For instance, in an order to his own ministers of state in 1804, King Frederick William III of Prussia said “that a decent publicity is for both government and subjects the surest guaranty against the negligence and spite of subaltern officials and deserves to be promoted and protected by all means.”⁴³ Similarly, in a speech to British Parliament in 1792, prominent statesman Charles J. Fox advocated for enhanced publicity. Fox declared, “It is certainly right and prudent to consult the public opinion. . . . [i]f the public op[i]nion did not happen to square with mine.”⁴⁴

So too did leading philosophers articulate the need for publicity to create legitimate democratic government and deter corrupt practices. According to German philosopher Immanuel Kant, publicity serves as a mediator between moral and political rights wherein the public can act as judge in determining the moral acceptability of the government’s actions.⁴⁵ Indeed, as Kant said in his 1795 work *Perpetual Peace: A Philosophical Sketch*, “All actions relating to the right of other men are unjust if their maxim is not consistent with publicity.”⁴⁶ And in one of his unpublished papers, he further explained “[t]hat which one cannot trust to announce publicly as one’s maxim, without thereby making it impossible to act on the maxim, is in conflict with the public law.”⁴⁷ Kant essentially theorizes that conduct—in particular action taken by government actors in our context—which

40. Trig R. Smith, *The S.E.C. and Regulation of Foreign Private Issuers: Another Missed Opportunity at Meaningful Regulatory Change*, 26 BROOK. J. INT’L L. 765, 767-68 (2000).

41. GRAHAM, *supra* note 2, at 2.

42. See generally JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* 57-88 (Thomas Burger & Frederick Lawrence trans., 1989).

43. *Id.* at 84.

44. *Id.* at 65.

45. IMMANUEL KANT, *Perpetual Peace*, in KANT’S PRINCIPLES OF POLITICS, 77, 147 (W. Hastie trans., T & T Clark 1891) (1795). See also Kevin R. Davis, *Kant’s Different “Publics” and the Justice of Publicity*, 83 KANT-STUDIEN 170, 170 (1992).

46. Davis, *supra* note 45, at 170 (quoting IMMANUEL KANT, ON HISTORY 129 (Lewis White Beck, Robert E. Anchor & Emil L. Fackenheim trans., 1963)).

47. *Id.*

cannot be made public out of fear of condemnation lacks legitimacy and is therefore immoral.

Similarly, Genevan philosopher Jean-Jacques Rousseau argued that publicity was necessary to enhance just governance. Rousseau focused on the success of small states, arguing that in such governments “all the citizens know and watch over one another; []the leaders can see for themselves the evil that is being done, the good they have to do; and [] their orders are carried out before their eyes.”⁴⁸

The European Enlightenment concept of “publicity” and public disclosure as a rhetorical device to advocate for government openness appears early in American history.⁴⁹ Pennsylvania delegate James Wilson spoke of the public’s right to know at the Constitutional Convention with regard to the collection of Senate and House of Representatives proceeding records: “The people have a right to know what their agents are doing or have done, and it should not be the option of the legislature to conceal their proceedings.”⁵⁰

The mechanism of government transparency to achieve public accountability is intimately tied to democratic theory. Under America’s representative form of democratic government, voters delegate policy decisions to their elected officials.⁵¹ The theory of transparency as civic engagement posits that through the free flow of information between the government and its citizenry, the public can review government decisions and provide meaningful feedback by way of engagement in the political process. Under this theory, specific knowledge of government actions allows the public to then “sanction” elected policymakers for unfavorable actions by exercising their rights at the voting booth, thereby indicating their disapproval of government decisions and helping to effectuate future changes in legislative policies.⁵²

Not only do proponents of transparency argue that providing the public with government information leads to a more informed electorate, but that it also allows the public to provide meaningful feedback to government agency actors to help shape new policies and regulations promulgated by the administrative state.⁵³ Under this

48. JEAN-JACQUES ROUSSEAU, *Considerations on the Government of Poland*, in POLITICAL WRITINGS 157, 182 (Frederick Watkins trans., 1953).

49. See, e.g., GRAHAM, *supra* note 2, at 1-3; KANT, *supra* note 45, at 147; Pozen, *Ideological Drift*, *supra* note 1, at 113-14 (noting that by the end of the American Progressive Era in the mid-twentieth century, “[t]he term ‘publicity’ became increasingly identified with corporate strategies to control public opinion, instead of with governmental strategies to harness public opinion to control corporations”). See generally KANT, *supra* note 45, at 147.

50. SCHUDSON, *supra* note 28, at 5.

51. Nigel Bowles, James T. Hamilton & David A. L. Levy, *Introduction*, in TRANSPARENCY IN POLITICS AND THE MEDIA xii (Nigel Bowles, James T. Hamilton & David A. L. Levy eds., 2014).

52. *Id.* at xii-xiv; see also Fenster, *Opacity*, *supra* note 1, at 896; see also Tal Z. Zarsky, *Transparent Predictions*, 2013 U. ILL. L. REV. 1503, 1538 (2013).

53. See Zarsky, *supra* note 52, at 1538-40.

formulation, transparency can facilitate a sort of citizen crowdsourcing dynamic, which leads to improvement in the outcome of government processes.⁵⁴ Thus, when people have access to a broad range of government information, they can then offer regulators unique insights from a diverse range of backgrounds and perspectives. These perspectives then allow regulators to build upon policies through outside expertise that the administrative agency may not have itself.⁵⁵ Thus, at base, the central justification for government transparency has always been the notion that it fosters civic engagement and facilitates the public's ability to provide democratic oversight.

It was not, however, until the mid-twentieth century, that calls for regulatory disclosure shifted from talk of "publicity" to the more modern conception of "freedom of information" and the public's "right to know." For instance, then-President Franklin Delano Roosevelt's first use of the phrase "freedom of information" occurred in a 1940 press conference in which he discussed the importance of uncensored news in democratic governments.⁵⁶ And just seven years later, President Harry S. Truman similarly invoked the phrase in an address to Congress in reference to America's involvement in the United Nations.⁵⁷ But the ideas of freedom of information and the public's right to know primarily rose to prominence as a major rallying cry for American journalists as they sought to advance free press protections.

The phrase "right to know" itself did not seem to appear in popular rhetoric until 1945 when the executive director of the Associated Press, Kent Cooper, utilized the phrase in a speech. In discussing the importance of the public's right to the news, Cooper said: "There cannot be political freedom in one country, or in the world, without respect for 'the right to know.'"⁵⁸ Members of the press and its supporters continued to employ these rhetorical devices into the 1950s as the Cold War intensified the public's concern regarding the growth of government secrecy increased.⁵⁹ In 1948, the American Society of

54. *Id.* at 1538.

55. To be sure, as Professor Tal Z. Zarsky notes, this particular form of transparency as civic engagement is contingent upon the public's overall willingness to participate in such a system. *Id.* at 1539.

56. Fenster, *Transparency Fix*, *supra* note 8, at 459.

57. *Id.* Although, somewhat ironically, President Truman effectively afforded the American public much less freedom of information when his administration created the first ever executive branch-wide classification system where both military and nonmilitary information could be deemed confidential in the interest of national security. This classification system effectively afforded the American public much less freedom of information. See Pozen, *Beyond*, *supra* note 25, at 1118.

58. See SCHUDSON, *supra* note 50, at 6-7. Cooper also authored a *Life Magazine* article in the same year entitled "Freedom of Information" in which he argued for the public's ability to "seek out the news." Kent Cooper, *Freedom of Information: Head of Associated Press Calls for Unhindered Flow of World News*, LIFE MAG., Nov. 13, 1944, at 55.

59. See Charles J. Wichmann III, *Ridding FOIA of those "Unanticipated Consequences": Repaving a Necessary Road to Freedom*, 47 DUKE L.J. 1213, 1217 (1998); see also SCHUDSON, *supra* note 50, at 45-50.

Newspaper Editors (ASNE), a prominent press group, founded the Committee on Freedom of Information.⁶⁰ One of the Committee's most important contributions occurred when it employed Harold Cross, a retired media lawyer, to assess the potential legal landscape of freedom of information laws within the United States.⁶¹ Through his work with the ASNE, Cross published one of the most prominent books on the contemporary American transparency movement, entitled *The People's Right to Know*, in which he succinctly argued, "Public business is the public's business. The people have the right to know."⁶² After detailing the current state of American transparency laws, the book concluded by calling on Congress "to legislate freedom of information for itself, the public, and the press."⁶³

Cross's book was the early planted seed that later became FOIA. In the mid-1950s, the emerging freedom of information movement in the journalism sphere caught the attention of Congressman John Moss, a newly elected Democratic representative from California who soon became the leading proponent of FOIA in the House of Representatives.⁶⁴ Shortly after he was elected, Moss was appointed chair of the recently formed Subcommittee on Government Information, colloquially known as the "Moss Committee."⁶⁵ The Moss Committee garnered support from various journalism organizations, and Moss himself encouraged media leaders to join him in the fight to "reverse the present Federal attitude of secrecy."⁶⁶

The freedom of information movement did not gain significant traction in the political sphere during the 1950s. But in 1961, President John F. Kennedy acknowledged the importance of the public's right to know when he said: "I shall withhold from neither the Congress nor the people any fact or report, past, present or future, which is necessary for an informed judgment of our conduct and hazards."⁶⁷ Although Moss was generally critical of the Kennedy administration's secrecy on many matters, such as its handling of the Cuban missile crisis, he ultimately viewed Kennedy's statement in 1961 as a symbolic turning point for the freedom of information movement.⁶⁸ After more than a decade, Moss watched his hard work pay off

60. SCHUDSON, *supra* note 50, at 42.

61. *Id.* at 42.

62. *Id.*

63. HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS* 246 (1953).

64. SCHUDSON, *supra* note 28, at 29, 37.

65. *Id.* at 40-41.

66. *Id.* at 41.

67. *Id.* at 49.

68. *Id.* at 49-50 (providing an account of a speech Moss gave to the California Associated Press where he "objected to Kennedy's centralization of information policy in the White House").

as Congress passed FOIA over the protests of various executive agencies.⁶⁹

At the time of its enactment, FOIA was a revolutionary piece of legislation. Many members of Congress believed FOIA was a disclosure-forcing mechanism of historic proportions and hoped that it would serve as a means of holding the burgeoning administrative state accountable.⁷⁰ It was indeed historic, as the United States became only the third country to provide the public with a right to access government records.⁷¹ Aside from allowing the public to access information in order to enrich the democratic process, Congress envisioned FOIA as a mechanism that would facilitate the public's ability to serve as watchdog over administrative agencies.⁷² Through the disclosure of public records, FOIA was meant to ensure that regulatory officials would act in the public interest instead of their own. Congress thus believed FOIA would directly advance a goal we classify as targeted transparency as regulation. Even President Lyndon Johnson noted the importance of FOIA as a regulatory mechanism upon signing the legislation, stating: "No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."⁷³

Thus, when Congress enacted FOIA in 1966, it did so with the same historical justification for government transparency or publicity. As evidenced by FOIA's legislative declaration, Congress announced: "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies."⁷⁴ Simply put, transparency allows the public to become better informed of its government's inner workings, which can in turn create a more knowledgeable electorate.⁷⁵

That FOIA's initial formulation proved inadequate to protect the public's right to know, in the end, only served to strengthen Congress's resolve. Only six years after its enactment, under the growing cloud of the Watergate scandal and the executive branch's extreme secrecy, Senator Edward Kennedy spearheaded the effort to amend FOIA to

69. *Id.* at 55-56 (noting that "[e]very single government executive agency that testified in the hearings on [FOIA] in 1966 was against it").

70. *See id.* at 57, 60.

71. The only two other countries to pass freedom of information legislation before the United States were Sweden in 1766 and Finland in 1951. *Id.* at 62.

72. Fred H. Cate, D. Annette Fields & James K. Bain, *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 42-43 (1994). The Court has acknowledged this legislative intent when it said that "FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny." *U.S. Dep't of Justice v. Reporters Comm'n for Freedom of the Press*, 489 U.S. 749, 774 (1989).

73. *See* Presidential Statement on Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, 1966, 2 WEEKLY COMP. PRES. DOC. 895 (July 11, 1966).

74. H.R. Rep. No. 89-1497, at 12 (1966).

75. *See* Fenster, *Opacity*, *supra* note 1, at 896.

provide it with some much needed teeth.⁷⁶ The resulting FOIA amendments lead to several new provisions designed to rein in agency discretion over disclosure decisions, such as the imposition of specific time limits to respond to requests and the addition of penalties for agencies' failure to comply with the law.⁷⁷ After the FOIA amendment passed in Congress, President Gerald Ford vetoed the bill, in part due to his concerns with the new enforcement mechanisms.⁷⁸ But Congress handily overrode President Ford's veto, approving the amendment by a vote of 371 to 31 in the House and 65 to 27 in the Senate.⁷⁹ Congress was committed to transparency's indispensable role in democracy.

Congress continued to call for greater democratic accountability with transparency laws. In the wake of Watergate and the Vietnam conflict, the nation's growing distrust of the executive branch was at an all-time high. As U.S. Supreme Court Chief Justice Earl Warren aptly wrote of the time, "If anything is to be learned from our present difficulties, compendiously known as Watergate, it is that we must open our public affairs to public scrutiny on every level of government."⁸⁰ Congress responded to Watergate by not only strengthening FOIA through its 1974 amendment to the law, but also enacting several other new laws that utilized the theory of transparency as citizenship.

For example, the Government in the Sunshine Act (the Sunshine Act) was enacted only two years after President Richard Nixon resigned from office.⁸¹ As one of the original sponsors of the bill noted in lauding the importance of the Sunshine Act during a subcommittee hearing, regulatory "officials . . . may feel they can be safely immune from criticism if the results [of their actions] are not favorable."⁸² The Sunshine Act thus requires administrative agencies to open meetings to public observation to rectify these concerns.⁸³

76. See, e.g., SCHUDSON, *supra* note 28, at 60; Erin C. Carroll, *Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press*, 2016 UTAH L. REV. 193, 208. In a subcommittee report on the proposed amendments, Senator Edward Kennedy argued, "the expectation of Congress that the doors of government would be opened to the public has not been fully realized." SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE COMM. ON THE JUDICIARY, U.S. SENATE, 93D CONG., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES: LETTER OF TRANSMITTAL III (Comm. Print 1974) <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/Sourcebk1974Final.pdf> [<https://perma.cc/3DAQ-3ST7>].

77. SCHUDSON, *supra* note 50, at 60.

78. *Id.*

79. *Veto Battle 30 Years Ago Set Freedom of Information Norms*, NAT'L SECURITY ARCHIVE (NOV. 23, 2004), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB142/index.htm> [<https://perma.cc/MW4F-RSP7>].

80. Earl Warren, *Government Secrecy: Corruption's Ally*, 60 A.B.A.J. 550, 550 (1975).

81. Government in the Sunshine Act, 5 U.S.C. § 552b (2018).

82. *Gov't in the Sunshine: Hearings on H.R. 11656 Before the Subcomm. On Admin. Law & Governmental Relations of the Comm. on the Judiciary*, 94th Cong. 2 (1976) (statement of Rep. Dante B. Fascell).

83. Government in the Sunshine Act, 5 U.S.C. § 552b(b) (2018).

Similarly, Congress embraced maximum government transparency as a cure to democratic ills when it enacted the Presidential Records Act of 1978 (the PRA).⁸⁴ During the Watergate investigations, Nixon sought to retain ownership over his White House records to prevent Congress from accessing damaging documents.⁸⁵ In response to Nixon's secrecy, Congress quickly passed temporary legislation to prevent him from retaining the records, and a series of blistering legal battles quickly ensued.⁸⁶ After the Court upheld Congress's right to demand Nixon's records and Nixon's resignation, Congress enacted the PRA to prevent similar battles with future presidents.⁸⁷ The PRA requires both the preservation and maintenance of presidential records and creates an affirmative duty to make presidential records publicly available "as rapidly and completely as possible."⁸⁸

C. Disclosure as Regulation

Unlike transparency, which is a word used mostly to refer to democratic participation in government, disclosure is typically used to refer to targeted information production requirements for private businesses. Indeed, this use of disclosure more closely hews to Brandeis's famous quote that "[s]unlight is said to be the best of disinfectants," because his 1913 series of articles in *Harper's Weekly* from which that quote is taken suggested that businesses should be required to disclose basic financial information to reduce risks to the public.⁸⁹

The majority of literature on disclosure focuses on disclosures required of mostly private actors. In her pathbreaking book, Mary Graham used three primary examples of disclosure requirements: toxic release inventories required of certain companies after the Bhopal chemical disaster in India, nutrition labels on food, and hospital ratings.⁹⁰ Graham followed up that work with another book, co-authored with Archon Fung and David Weil, where they also highlight mostly private entities' disclosure requirements. Indeed, of their eight primary examples, none are disclosures by public institutions.⁹¹

84. See Presidential Records Act, 44 U.S.C. § 2203(a)-(b) (2018).

85. Michael J. Mongan, *Fixing FACA: The Case for Exempting Presidential Advisory Committees from Judicial Review Under the Federal Advisory Committee Act*, 58 STAN. L. REV. 895, 923-24 (2005).

86. Carl Bretscher, *The President and Judicial Review Under the Records Act*, 60 GEO. WASH. L. REV. 1477, 1481-83 (1992) (detailing the events surrounding the PRA's enactment).

87. *Id.*

88. See 44 U.S.C. § 2203(g)(1) (2018).

89. GRAHAM, *supra* note 2, at 1.

90. See *generally id.* Admittedly, hospital ratings are a type of disclosure that incidentally covers some public institutions, alongside private counterparts.

91. See FUNG ET AL., *supra* note 15, at 52. The book does mention other disclosure requirements that are public, but they are not the focus of the inquiry. See, e.g., *id.* at 8.

To be sure, disclosure requirements are now ubiquitous. Fung, Graham, and Weil canvassed every final rule issued by a government agency between 1996 and 2005 and found no fewer than 133 rules mandating some form of disclosure. They reported that almost a quarter pertained to financial disclosure; fifteen percent concerned food and drugs; consumer products accounted for twenty-three percent; and the environment, workplace, and other matters prompted the remaining rules.⁹² Matthew Edwards explains that disclosure laws are “prevalent in the realm of consumer law, but there are examples in virtually every area of law.”⁹³

Without doubt, this is a comparatively new phenomenon. More than two decades ago, Cass Sunstein declared, “[I]nformational regulation, or regulation through disclosure, has become one of the most striking developments in the last generation of American law.”⁹⁴ The appeal is clear. At its simplest, disclosure “rests on a plausible assumption: that when it comes to decision-making, more information is better than less.”⁹⁵ It also has great practical appeal. It appears very inexpensive, effective, and desired by the public.⁹⁶ Moreover, sometimes it is not clear how best to regulate or what behavior to prohibit, and disclosure at the least allows the consumer to choose the level of risk they find acceptable.⁹⁷

Or, disclosure laws can be the result of political compromise.⁹⁸ Indeed, disclosure may be much more acceptable to lawmakers than substantive regulation because it is consistent with dominant American political commitments. As Paula Dalley explained, disclosure “comport[s] with the prevailing political philosophy in that disclosure preserves individual choice while avoiding direct governmental interference.”⁹⁹ That is, disclosure is in harmony with free market principles insofar as it does not limit substantive options but, rather, corrects information imbalances and serves to enhance a well-functioning marketplace.¹⁰⁰ It also resonates with American

(drinking water quality); *id.* at 12 (campaign finance); *id.* at 41 (school performance report cards); *id.* at 45 (terrorism threat level).

92. *Id.* at 20.

93. Matthew A. Edwards, *The Virtue of Mandatory Disclosure*, 28 NOTRE DAME J.L. ETHICS & PUB. POLY 47, 48 (2014).

94. Sunstein, *Informational Regulation*, *supra* note 16, at 613.

95. Ben-Shahar & Schneider, *supra* note 2, at 650.

96. *Id.* at 682.

97. Dalley, *supra* note 13, at 1092.

98. FUNG ET AL., *supra* note 15, at 14-15 (“[T]ransparency policies often represent pragmatic compromises” or “a politically viable means of responding to emerging risks or public service flaws in the context of widespread skepticism about the capacity of government alone to solve those problems.”); GRAHAM, *supra* note 2, at 12 (“In addition, disclosure systems responded to growing disenchantment with the rigidities of traditional regulation . . . Telling the public about risks provided a middle ground.”).

99. Dalley, *supra* note 13, at 1093.

100. Ben-Shahar & Schneider, *supra* note 2, at 681.

ideals of autonomy, allowing consumers to make their own decisions rather than dictating options by government intervention.¹⁰¹

But the literature has also established that as a consequence, disclosure is deeply deregulatory. As Amitai Etzioni explained, “The increasing popularity of transparency [or disclosure] coincided with a broader movement in favor of deregulation.”¹⁰² Indeed, now, disclosure is often seen not just a part of a regulatory scheme, but as a replacement for substantive regulatory requirements.¹⁰³ Even the Supreme Court declared as much in one of the landmark campaign finance cases: “[D]isclosure is a less restrictive alternative to more comprehensive regulations.”¹⁰⁴ As a result, disclosure laws are not only standard, but in fact often favored by lawmakers across legislatures, courts, and agencies.¹⁰⁵

While often substituting for substantive regulatory requirements, disclosure itself is nonetheless regulatory in nature. Amitai Etzioni argues that framing disclosure as an alternative to regulation “does not take into account that [disclosure] itself is a form of regulation,” which “may well be significantly less coercive than other kinds of regulation, but it is a difference of degree rather than in kind.”¹⁰⁶ The idea is that rather than requiring or prohibiting particular activities, disclosure allows the public to operate through the market or the political sphere in reaction to information and for that reaction, in turn, to encourage companies to engage in socially beneficial behavior.¹⁰⁷

Interestingly, unlike much of the transparency literature, literature on disclosure is almost universally consequentialist.¹⁰⁸ That is, the desirability of disclosure and its intended concrete, tangible

101. *Id.* See also Sunstein, *Informing America*, *supra* note 12, at 659 (“At least across a broad range of possibilities, people should be allowed to select their preferred mixes of risk, employment, salary, medical care, and so forth. If their choice is irrational, or if it has large consequences for others, the government is entitled to intervene. But the presumption should be in favor of private choice.”).

102. Etzioni, *supra* note 7, at 183. See also *id.* at 182 (“Transparency fits into their political philosophy because it is grounded in the sort of democratic populism whereby the people are empowered to rule themselves and to prevent private power and special interests from corrupting or dominating the state.”); Dalley, *supra* note 13, at 1106 (“[A] supplemental purpose of securities regulation is the regulation of lawful behavior. To the extent disclosure is aimed at this purpose, it is attempting to substitute for direct regulation.”).

103. George Loewenstein, Cass R. Sunstein & Russell Golman, *Disclosure: Psychology Changes Everything*, 6 ANN. REV. ECON. 391, 392 (2014); Etzioni, *supra* note 7, at 183 (“As deregulation expanded, transparency was increasingly promoted as an *alternative* to regulation.”).

104. *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 369 (2010).

105. Ben-Shahar & Schneider, *supra* note 2, at 652.

106. Etzioni, *supra* note 7, at 189, 191.

107. See Sunstein, *Informational Regulation*, *supra* note 16, at 614, 621-22; GRAHAM, *supra* note 2, at 2. For a full discussion of the theoretical link between disclosure and behavior change, see *infra* Part II(A).

108. See Matthew A. Edwards, *The Virtue of Mandatory Disclosure*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 47, 50 (2014) (critiquing the “dominant consequentialist perspective on mandatory disclosure” using a virtue ethics framework).

consequences have been examined from an empirical standpoint. Though we recognize consequentialism can aim toward a host of different outcomes, including those more amorphous and ephemeral in nature such as improving democracy, the literature on disclosure largely assesses the efficacy of policies in reaching a particularized and measurable outcome. The inquiry in this context typically boils down to whether disclosure tangibly changes behavior and, if so, whether the costs of disclosure policies are worth the measurable beneficial behavior changes.¹⁰⁹ This classic cost-benefit analysis, a hallmark of the regulatory state, has been applied to private disclosure requirements in a way that it has not historically been used to assess broad-based government transparency laws.

To be sure, the division between transparency and disclosure is not absolute. Some scholars, policymakers, and commentators interchange the two words.¹¹⁰ Moreover, some disclosure literature references examples of disclosure requirements that apply to public entities and acknowledge that disclosure can cross the private/public divide.¹¹¹ And some of what we would categorize as disclosure requirements for government have simply been lumped in with government transparency literature.¹¹² Yet, some helpful guidelines show that the two areas are nonetheless distinct.

Again, Mary Graham's book provides the best starting place:

New disclosure systems differed from these earlier right-to-know requirements in several respects. First, they collected information primarily to inform the public. Most right-to-know requirements had simply passed on information collected primarily to inform government actions. Second, disclosure systems served regulatory rather than normative purposes. Information was viewed as a way to change behavior, not simply as a public right. Format, timeliness, and completeness of data therefore became critical issues. Third, the new disclosure systems held creators of risks accountable. Instead of reports

109. See, e.g., Dalley, *supra* note 13, at 1089-90 (arguing, in large part, that disclosure has been relatively successful in the securities context because of several unique factors, but that it is less successful elsewhere, and discussing its limits); Ben-Shahar & Schneider, *supra* note 2, at 651 (indicting disclosure laws as failing to achieve their purpose and evaluating them on a cost-benefit metric); Loewenstein et al., *supra* note 103, at 392 (evaluating disclosure requirements' actual effect in light of various psychological heuristics in human decision-making).

110. For example, Amitai Etzioni uses the word "transparency" to refer to what is normally discussed as "disclosure." See Etzioni, *supra* note 7, at 189.

111. See, e.g., Sunstein, *Informational Regulation*, *supra* note 16, at 614, 621-22, 624 (acknowledging public oriented disclosure and using National Environmental Policy Act as an example).

112. For example, FOIA's affirmative disclosure provisions largely qualify as examples of targeted transparency as regulation (as we define it below), but are discussed (if at all) in the transparency literature. See, e.g., Delcianna Winders, *Fulfilling the Promise of EFOIA's Affirmative Disclosure Mandate*, 95 DENV. L. REV. 909, 918-20 (2018).

aggregated by industry or geographical area, the public received information about named facilities, companies, and products.¹¹³

That is, in disclosure regimes, documents must be created, not just opened up for inspection. The goal is to change behavior, not to foster a lofty ideal, and the disclosures are targeted, not generalized, in nature.

Despite passing discussions of isolated disclosure requirements that focus on government rather than private actors, government-focused disclosure requirements have never been examined separately. The next Part applies the disclosure literature to the government context. We are calling this category of laws targeted transparency as regulation, which encapsulates both the public/democratic nature of these mandates in combination with their targeted regulatory/behavior changing aims.

II. TARGETED TRANSPARENCY AS REGULATION

Targeted transparency as regulation is not a term that exists in the literature. It conveys the idea that there is a subset of laws that uses targeted disclosure requirements to regulate conduct, but rather than regulating private conduct, they regulate the conduct of government actors. To be clear, government actors can also be substantively “regulated,” of course, and the substantive limits of their authority are often the subject of administrative law litigation. That is, the mandates Congress delegates to agencies constrain their actions, authority, and substantive choices. But the use of disclosure, rather than mandates, to change *government* conduct has never been examined as a subset of transparency laws or as a subset of disclosure laws. Indeed, this type of information mandate is a hybrid of disclosure and transparency. This Part describes how targeted transparency as regulation operates, using the democratic theory literature and the disclosure literature to shed light on the unique properties of targeted transparency as regulation. It then provides a non-exhaustive set of examples of targeted transparency as regulation in the law today.

A. *How Transparency Regulates Behavior*

There is no universal definition of regulation. It is typically thought of in its most restrictive sense: A set of commands to take certain socially beneficial activities or restrictions that prevent certain socially undesirable activities.¹¹⁴ Traditional justifications for regulation are economic in nature. Market failures such as natural monopolies, information asymmetry, or moral hazards often spur regulators into

113. GRAHAM, *supra* note 2, at 15.

114. See ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE, UNDERSTANDING REGULATION 3 (2d ed. 2012).

action.¹¹⁵ But a somewhat newer set of justifications for regulation emerged out of various social justice movements. Regulations that stem from these concerns typically are designed to promote antidiscrimination goals or further distributional justice, aims that the market will not account for on its own.¹¹⁶

Disclosure requirements seemingly operate very differently. Instead of dictating what the behavior will be, these laws simply require disclosure of that behavior. Instead of telling companies they cannot pollute, it requires disclosure of the extent of pollution. Instead of mandating a certain percentage of female executives, it requires disclosure of gender identities on boards. Instead of prohibiting the gathering of personal data, it requires disclosing the types of data that will be gathered. Instead of banning gifts to public officials, it requires public officials to document the gifts they receive.

Yet, as described above, disclosure is now recognized as regulatory. Situating disclosure within regulation is consequential because regulations are adopted with particular substantive, tangible goals in mind and are measured in their success against those goals. So too are regulatory disclosure requirements. Thus, rather than simply assuming more disclosure is better, it is important to identify the mechanism through which disclosure is designed to operate so that its success or failure can be ascertained.¹¹⁷ Explaining that “targeted transparency policies represent a distinctive [] form of government intervention to further important public priorities,” leading scholars assert that they are “designed to change the behavior of information users and/or disclosers in specified ways.”¹¹⁸

In the disclosure literature, there are three primary mechanisms through which disclosure laws are thought to change the behavior of the disclosure requirement’s target in a socially desirable way. One is that disclosure of certain information could change the behavior of the public—be it as a consumer, investor, or citizen—and that the public’s reaction, in turn, would force disclosers to change their practices.¹¹⁹ A second is that disclosers will change their behavior even before the public reacts to the information in an effort to avoid the negative reaction, publicity, or shaming that would come with disclosure.¹²⁰ And a third is that disclosure requirements force the disclosers to pay attention to certain metrics, and thus encourage them to perform better on those metrics simply because they are measured and reported.¹²¹ Each of these mechanisms will be discussed in turn as they might apply to

115. *Id.* at 15-16, 18-20.

116. *Id.* at 22-23.

117. See generally Dalley, *supra* note 13, at 1106-08 (providing a useful example of an analysis of disclosure laws as a means to a substantive end).

118. FUNG ET AL., *supra* note 15, at 46, 40.

119. GRAHAM, *supra* note 2, at 10, 137.

120. Loewenstein et al., *supra* note 103, at 396.

121. Dalley, *supra* note 13, at 1111.

targeted transparency as regulation—or disclosure requirements that apply to government.

The most common understanding of disclosure requirements is that disclosure will provoke a public reaction that will, in turn, change the behavior of the discloser in a sort of “chain reaction of new incentives.”¹²² For example, if new disclosures concerned product safety, consumers would choose safer products, less safe products would stop being profitable, companies would start selling only safer products, and fewer injuries or deaths would result from the products at issue.¹²³ Frederick Schauer notes how “for one person or institution to have information about another is for the former to have power over the latter,” and that these types of disclosure laws alter the power dynamics between the public and powerful institutions.¹²⁴ In a sense, disclosure requirements give the public regulatory power; ordinary people can, through their choices, force powerful actors to protect health and safety.¹²⁵ In fact, it allows the public to, in a sense, directly choose an acceptable level of risk, rather than having government make that choice on their behalf.¹²⁶

This mechanism for disclosure’s regulatory effects is, although the most commonly identified, the least theoretically powerful in the context of disclosure by government, or targeted transparency as regulation. Paula Dalley compellingly describes how this type of chain reaction of disclosure has been relatively successful in the securities arena, and she notes that those disclosures “operate[] in an ideal environment.”¹²⁷ She identifies two factors that make the environment “ideal”: (1) there are plentiful informed readers of the information who act as decision-making intermediaries, such as investment advisors and institutional investors; and (2) the investing public is “likely to be as rational as anyone ever is” because it is a purely financial market.¹²⁸

However, those factors are largely absent from the relationship between the government and the public.¹²⁹ The central problem with presuming a chain reaction by which government discloses particular conduct and the public reacts in favor or against that conduct is that

122. See, e.g., FUNG ET AL., *supra* note 15, at 2.

123. *Id.*

124. See Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1347-49 (2011).

125. GRAHAM, *supra* note 2, at 137.

126. *Id.* at 10.

127. Dalley, *supra* note 13, at 1108.

128. *Id.*

129. To be sure, despite Dalley’s account of relative success in the securities industry, she acknowledges that disclosure has not met the same success in changing consumer/investor behavior in other arenas, a finding that is largely corroborated by other scholars. See Dalley, *supra* note 13, at 1108; see generally Ben-Shahar & Schneider, *supra* note 2, at 665-67 (describing the documented failure of mandated disclosure).

typically the public is not acting as a consumer with government. Rather, the public's primary recourse is voting.¹³⁰ But we do not live in a direct democracy, we have elected representatives. As Amitai Etzioni explains, "Given that people have one vote, they cannot vote for Affirmative Action but against the invasion of Iraq, and for increased foreign aid but against the use of drones, and on and on."¹³¹ That is, the information release can be limited to a narrow topic, but even then, a citizen's ability to act on that information is not so limited; rather, the recourse she has is general and based on amalgamated information.¹³² Moreover, as a non-financial transaction, the rationality of decision-making by the public is much farther from perfect. Plentiful literature describes the irrationality of voting decisions.¹³³

The second mechanism by which disclosure mandates can influence behavior is by incentivizing disclosers to improve their behavior before they have to disclose bad behavior. That is, if someone knows they will have to disclose their activities, it will change their behavior for the better without even waiting for a public reaction. If a board knows it will have to report on gender identities of board members, it will hire more women to ensure that reporting is not embarrassing. If a government official has to document all gifts received, it will encourage that official to reject expensive or otherwise improper looking generosity. If a company must disclose the pollution it is causing, it will choose to pollute less to save its reputation.

The most widely cited example of this mechanism arose from the Toxic Release Inventory, created by Congress in 1986, that required manufacturers to disclose toxic chemicals released into the environment on an annual basis.¹³⁴ As one group of scholars explains, "Even before the first company reports, executives of some large companies made commitments to reduce this pollution by as much as ninety percent. The mere *anticipation* of bad publicity had created strong incentives to improve environmental protection."¹³⁵

George Loewenstein, Cass Sunstein, and Russell Golman label this the "telltale heart effect," after Edgar Allen Poe's short story in which the narrator confesses to a murder because he believes—albeit

130. See Etzioni, *supra* note 7, at 194.

131. *Id.* at 195.

132. To be sure, there are other some other possible democratic responses to government information other than voting. These pathways will be discussed further in *infra* Part III.

133. See, e.g., BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES 2 (2007); Gary M. Lucas, Jr. & Slavisa Tasic, *Behavioral Public Choice and the Law*, 118 W. VA. L. REV. 199, 205-12 (2015).

134. Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11023 (2012); 40 C.F.R. § 372.1 (2012).

135. FUNG ET AL., *supra* note 15, at 29. See also Dalley, *supra* note 13, at 1126 (citing a combination of feared responses to the disclosures, consumer and regulatory, as the likely explanation for the change in behavior).

incorrectly—that he has been found out.¹³⁶ These scholars authored a meta-study amalgamating data on the effects of disclosure policy and concluded that those disclosure policies that have the most effect do so primarily by influencing the discloser’s behavior, not by changing the behavior of the disclosee.¹³⁷ As examples, they cite employers’ disclosures about workplace safety, restaurant sanitation ratings, calorie labels on menus, and appliance energy efficiency.¹³⁸ That is, in each of these examples, there was very little evidence of changes in consumer behavior, but producers nonetheless changed their products to improve on the metrics disclosed.

To be sure, one wonders why producers would change their behavior if consumers do not appear to care, but Loewenstein, Sunstein, and Golman contend that the disclosers have “an inflated sense of the public salience of disclosures, in a phenomenon related to the spotlight effect by which people exaggerate how much other people are looking at them.”¹³⁹ Notably, while this study is by far the most comprehensive as to this disclosure mechanism, it expressly omits the transparency requirements that apply to government.¹⁴⁰

Yet, the mechanism by which disclosers behavior is changed would seem to be particularly salient for government officials. After all, government officials are particularly prone to reputational shaming.¹⁴¹ Through the psychological response of shame, government actors are perhaps even more likely to act in certain ways—or decide to act or not act at all—based merely on the knowledge that public disclosure is required. This heightened response is likely precisely because of “the ethical obligation of individuals (in this case, government officials) to answer for their actions, possible failings, and wrongdoings.”¹⁴² Public disclosure of government information alone then could provide a watchdog function by ferreting out undesirable behavior without the need for particular remedial provisions.¹⁴³ In 1884, U.S. Supreme Court Justice Oliver Wendell Holmes highlighted these theoretical underpinnings of targeted transparency as regulation when he stated:

It is desirable that the trial of [civil] causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those

136. Loewenstein et al., *supra* note 103, at 396, 403.

137. *Id.* at 391, 396.

138. *Id.* at 396, 403-04.

139. *Id.* at 404 (citations omitted).

140. *Id.* at 412.

141. For an example of reputational shaming in the political context, see *infra* note 192 and accompanying text for a discussion of the Watergate scandale.

142. Zarsky, *supra* note 52, at 1533.

143. See Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1173 (2002).

who administer justice should always act under the sense of public responsibility”¹⁴⁴

Thus, in general, the concern about reputational integrity is likely to apply as much, if not more, to government officials than to private actors.

Indeed, Transparency International, an anticorruption organization operating around the world, focuses on all manner of information production, from transparency to disclosure, as a means to make it harder for government officials to act badly.¹⁴⁵ Frederick Schauer links this theory to an old Jeremy Bentham quote: “[T]he more strictly we are watched, the better we behave.”¹⁴⁶ Thus, this type of effect has been identified in the government context as well.

The third mechanism for potential behavior change through disclosure policy is tied to the information-forcing nature of disclosure policies. Unlike traditional “transparency” policies, which focus on the right to access already extant information, disclosure policies also force the gathering of particular information. The mere creation of information can cause a change in behavior.

One definition of “targeted transparency,” which is another way of describing disclosure laws, is any policy that requires that someone “collect, standardize, and release factual information to inform public choices. *Sometimes such information was new even to the agency or corporation that collected it.*”¹⁴⁷ That is, unless someone is forced to disclose certain data, it may not even be known within the organization because no one is required to track it. Merely knowing about an undesirable practice or effect of an organization’s practices may cause good faith leaders to change the organization’s ways.

Moreover, the literature on management theory explains that “managers ‘manage what [they] measure’; that is, managers will pay attention to things they are forced to keep track of.”¹⁴⁸ Under this mechanism, forcing organizations to produce certain data will in turn force them to know the results themselves and to inherently want to perform better on the metrics on which they are being held to account.

Government actors are, again, as likely or even more likely than private actors to be influenced by this mechanism. Government officials more than private managers go into public service out of a sense of duty and calling. They have a greater desire to serve the public and less of a private loyalty in their actions. As a result, the desire to

144. *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

145. Schauer, *supra* note 124, at 1352.

146. *Id.* (quoting JEREMY BENTHAM, *Farming Defended*, in 1 WRITINGS ON THE POOR LAWS 276, 277 (Michael Quinn ed., 2001) (1796)).

147. FUNG ET AL., *supra* note 15, at 28 (emphasis added).

148. Dalley, *supra* note 13, at 1111 (footnote call number omitted) (quoting Louis Loewenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1342 (1996)).

improve the organization so that known problems are resolved and disclosed, and metrics are improved, would seem even more salient in that context.

Thus, of the three identified mechanisms through which disclosure policies can change behavior, and therefore act as a regulatory mechanism, two of the three—indeed, the two that appear to be the most effective in the private context—would appear to apply equally, if not more forcefully, to government actors. Targeted transparency as regulation (or disclosure applied to government) thus may serve as a fruitful intervention to improve government conduct.

B. Examples of Targeted Transparency as Regulation Today

As the use of disclosure policies outside the government realm continues to grow, so too does the sphere of legislation aimed toward utilizing those same disclosure mechanisms to regulate *government* behavior. Examples of targeted transparency as regulation are not confined to one or two particular areas. Indeed, disclosure mechanisms in government now arise in a myriad of arenas in order to effectuate regulation without meaningful mandates. While these illustrations certainly abound, we highlight two particular regimes which illustrate the growing use of targeted transparency as regulation: (1) regulatory analysis and (2) ethical conflicts.

As to the first category, targeted transparency as regulation requirements in the regulatory analysis realm are those that aim to reveal certain aspects of the regulatory process or effects of proposed regulatory action. These policies generally require government actors, and particularly agencies, to provide the public with an explanation of a proposed regulatory action, without mandating that the agencies take any sort of action based on public responses. Instead, these policies are built upon the assumption that the agencies will be more reluctant to pursue a course of action that has particularly negative effects if it must first be publicly disclosed.

As to the second area, targeted transparency as regulation mandates related to ethical conflicts require disclosure of the interests held by government officials. These policies are created in hopes that government officials will be less likely to invest in or maintain special relationships with those they directly regulate. They also operate under the assumption that government officials who are subject to disclosure of ethical conflicts will be less likely to engage in favoritism if the public knows the officials have a personal stake in the issues they are regulating. This Section details how legislators have deployed targeted transparency as regulation primarily in these two arenas, using examples from each. It further explains other areas where targeted transparency as regulation has sporadically appeared.

1. Regulatory Analysis

In a way, targeted transparency as regulation in the regulatory context is at least as old as the Administrative Procedure Act (APA). The notice-and-comment rulemaking procedure contained within the APA acts as a prime example of this type of law. Under the notice-and-comment requirements, administrative agencies must first provide the public with general notice of proposed rules.¹⁴⁹ The agency must then give the public “an opportunity to participate in the rule making through submission of written data, views, or arguments”¹⁵⁰—otherwise known as the “comment” requirement of the procedure. After the required notice-and-comment period, the APA mandates that the agency consider any relevant matter the public presents in its comments before promulgating the final regulation.¹⁵¹

Congress first enacted the notice-and-comment rulemaking procedure in 1946 as a means of “infus[ing] the administrative process with the degree of openness, explanation, and participatory democracy required by the APA.”¹⁵² In the 1990s, the Clinton administration successfully lobbied for the passage of the E-Government Act, which requires agencies to use online platforms for notice-and-comment rulemaking procedures to further increase public participation in the regulatory rulemaking process and to improve the overall transparency of the process itself.¹⁵³ This reform was then expanded by the Bush administration through the launch of Regulations.gov.¹⁵⁴ The purpose of the launch was to create an Internet-based government portal that acts as a common source for all administrative agency records and allows the public to electronically submit comments to an

149. 5 U.S.C. § 553(b) (2018) (requiring such notice to include “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved”).

150. *Id.* § 553(c).

151. *Id.*

152. See Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POLY REV. 79, 86 (2012) (quoting *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027-28 (D.C. Cir. 1978)). Professor Shkabatur explains that this particular goal of the notice-and-comment rulemaking procedure has not been realized. She notes that the failure is twofold:

First, as broad citizen participation is hindered by barriers of expertise, resources, and motivation, agencies avoid the necessity to respond to public queries. Second, even if asked, agencies are reluctant to meaningfully explain their rulemaking priorities and normative preferences. Although the notice and comment process was envisioned as a landmark of public accountability, it has nonetheless evolved into a system that is widely considered inaccessible and nontransparent.

Id. at 87.

153. See *id.* at 94.

154. *Id.*

agency's proposed rule.¹⁵⁵ The site itself claims to have successfully “remove[d] the logistical barriers that made it difficult for a citizen to participate in the complex regulatory process.”¹⁵⁶ Today, the web portal contains thousands of proposed rules by countless administrative agencies, and interested parties can easily submit their comments with just the click of a button.

The APA notice-and-comment process was clearly “envisioned as a landmark of public accountability,”¹⁵⁷ providing a disclosure mandate that would force government into more reasoned and justified decision-making, as well as requiring actors to be more accountable to the public. But, targeted transparency as regulation in the sphere of regulatory analysis hardly ended there. Today, we have a host of disclosure requirements about the regulatory process that are not tied to any substantive regulatory agenda or even a required or prohibited action. Agencies proposing new rules must go through a myriad of analytical steps and disclose the outcomes of those processes as part of their notice of proposed rulemaking. The National Environmental Policy Act (NEPA) will serve as the primary example in this regard, though several other important examples are discussed toward the end of this Section.

When Congress first enacted NEPA in the early 1970s, it became one of the country's first major laws aimed toward creating a comprehensive national environmental policy.¹⁵⁸ Congress envisioned NEPA as a mechanism that would imbue the federal government with environmental awareness and promote environmental responsibility.¹⁵⁹ To be sure, the language of the statute itself articulates its hope of fostering “productive harmony” between “man and nature,” to “fulfill the social, economic, and other requirements of present and future generations of Americans.”¹⁶⁰ While Congress made

155. *Id.* at 94-95 (noting that although Regulations.gov “has been active for almost a decade, it has not enticed citizens to take a more active role in the rulemaking process. While some rules drew an unprecedented number of public comments, the Internet has hardly changed the traditional patterns and biases of citizen participation”).

156. *About Us*, REGULATIONS.GOV, <https://www.regulations.gov/about> [<https://perma.cc/K4A7-KBBL>] (last visited March 31, 2021).

157. Shkabatur, *supra* note 152, at 87.

158. Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1676-77 (1993) [hereinafter Herz, *Parallel Universes*]. See also COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS IX (1997), <https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf> [<https://perma.cc/2HD5-UVH2>]. And only twenty-five years after NEPA's enactment, the legislation had been emulated in over eighty countries around the world. *Id.* at 3.

159. Herz, *Parallel Universes*, *supra* note 158, at 1677.

160. National Environmental Policy Act, 42 U.S.C. § 4331(a) (2018). NEPA goes on to define these same lofty goals in more specificity, declaring that the mechanism will allow federal agencies to:

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

these aspirational and admittedly lofty goals clear, its practical aim in enacting NEPA “was to require the government to compile and disclose environmentally related information before going forward with any projects having a major effect on the environment.”¹⁶¹

The history reveals that NEPA’s framers intended for the legislation to be both procedural and substantive in nature. Indeed, NEPA’s Senate sponsor, Henry Jackson, wrote that “[a]doption of the Act constituted Congressional recognition of the need for a comprehensive policy and a new organizing concept by which governmental functions can be weighed and evaluated” through a systematic analysis of ways to minimize environmental harms.¹⁶² Thus, it was assumed that by assessing the environmental impacts of a given action, an agency would choose a course of action that would lessen adverse environmental impacts.

But in practice, NEPA has widely been utilized merely for its procedural mechanisms, leaving its substantive goals behind.¹⁶³ At its core, NEPA requires federal agencies to prepare “a detailed statement,” known as an Environmental Impact Statement (EIS), explaining the potential effects of a proposed action that will have a significant impact on environmental quality.¹⁶⁴ In an EIS, agencies must thoroughly consider all environmental impacts of their proposed action.¹⁶⁵ This includes describing the state of the current environment and the direct and indirect changes the proposal will cause, which includes consideration of “economic or social effects” that are interrelated to the potential environmental impacts.¹⁶⁶ In addition to discussing the impacts of a given proposal, an EIS must also explore alternatives to the proposed action, as well as evaluate their viability

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- (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
 - (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
 - (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
 - (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities; and
 - (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Id. § 4331(b).

161. Sunstein, *Informational Regulation*, *supra* note 16, at 621.

162. Henry M. Jackson, *Environmental Policy and the Congress*, 11 NAT. RESOURCES J. 403, 407 (1971); Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Act’s Substantive Law*, 20 J. LAND RESOURCES & ENVTL. L. 245, 247 (2000).

163. *See, e.g., id.* at 246.

164. 42 U.S.C. § 4332(2)(C) (2018). Additionally, for actions where it is unclear whether there will be a significant environmental impact, agencies must complete an Environmental Assessment (EA), which in turn allows an agency to determine whether an EIS is necessary. *See* 40 C.F.R. § 1501.4(b)-(c) (2019).

165. *See* 42 U.S.C. § 4332(2)(C).

166. *Id.* § 4332(2)(B)-(C). *See also* 40 C.F.R. § 1508.14 (2019).

and potential environmental harms.¹⁶⁷ Once an agency has prepared the final EIS, it must promulgate a “record of decision” which requires the agency to state its final decision on the proposal, discuss how it came to the decision, and explain why it rejected the alternatives within the EIS.¹⁶⁸ Both the record of decision and the EIS are submitted as public record.¹⁶⁹

After the agency has prepared its record of decision, the requirements of NEPA have been fully satisfied. In other words, short of information gathering, NEPA itself contains no enforceable regulatory mandate. So, if an EIS reveals that an agency’s proposed action will have a particularly deleterious effect on the environment, the agency need not change course. NEPA instead envisions the act of preparing an EIS to serve as a means of regulation in itself and, more specifically, serve as regulatory analysis.

Thus, NEPA relies heavily on the regulatory mechanisms found within the disclosure literature discussed in detail above.¹⁷⁰ In fact, NEPA has been described as essentially a “full disclosure law.”¹⁷¹ Because NEPA requires agencies to provide a public record of both its EIS and record of decision, it incentivizes the disclosing agency to improve its behavior before it has to publicize potentially harmful environmental effects of its proposed action. NEPA can therefore utilize disclosure in this context to motivate agencies, harkening back to reputational shaming or upholding reputational integrity. Equally important is the potential for NEPA to serve as an information-forcing tool. That is, NEPA, and the act of creating the EIS more specifically, forces agencies to gather environmental information that is particularly salient to a given action—information that may not have been gathered but for the NEPA obligation. Simply gathering this information could well cause an agency to change course, even before the public has knowledge of the EIS’s contents.

Whether NEPA’s disclosure mandates are successful as a behavior changing tool is widely debated. Twenty-five years after its enactment, the Council on Environmental Quality (CEQ), the federal office responsible for overseeing NEPA’s implementation,¹⁷² conducted a study to determine the overall effectiveness of the act.¹⁷³ Overall, the

167. This includes considering “the alternative of no action.” 40 C.F.R. § 1502.14(d) (2019). As Michael Herz notes, the discussion of alternative actions is generally considered “the heart of the environmental impact statement.” Herz, *Parallel Universes*, *supra* note 158, at 1679 (quoting 40 C.F.R. § 1502.14 (2019)).

168. 40 C.F.R. § 1505.2 (2019).

169. *Id.*; 42 U.S.C. § 4332(2)(C).

170. *See supra* notes 119-122 and accompanying text.

171. *Env’tl. Def. Fund, Inc. v. Corps of Eng’rs*, 325 F. Supp. 749, 759 (E.D. Ark. 1971).

172. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 158, at 3.

173. *See generally id.* at iii. To conduct this study, the CEQ solicited input from a host of interested parties, including (1) the original framers of NEPA; (2) members of Congress; (3) state and local agencies; (4) federal agencies; (5) academics; (6) nongovernmental organizations; (7) citizens; and (8) businesses. *Id.* at 5.

CEQ declared NEPA successful in that “agencies began to take a hard look at the environmental consequences of their actions before they made a final decision.”¹⁷⁴ The study further concluded that “NEPA’s most enduring legacy is as a framework for collaboration between federal agencies and those who will bear the environmental, social, and economic impacts of their decisions.”¹⁷⁵ But, the CEQ ultimately voiced concerns shared by many critics of NEPA: Its disclosure mandates are generally time consuming and very costly.¹⁷⁶ What is more, some pundits have gone so far as to claim that NEPA is merely “the product of 1960’s thinking, with no legislative or regulatory change to speak of” since its initial implementation.¹⁷⁷

This is not to say that the substantive goals that NEPA’s framers envisioned can never be realized. Many scholars have suggested a host of substantive mechanisms that could be added to the act to increase its efficacy.¹⁷⁸ Adding some form of action-forcing mandate could certainly provide some much-needed teeth to NEPA, ensuring that the requirements are not imposed in vain.

Targeted transparency as regulation in the regulatory context is not just found in environmental policy or the ubiquitous notice-and-comment rulemaking procedures. Indeed, disclosure mandates within regulatory analysis take many forms. For instance, the federal Paperwork Reduction Act (PRA)¹⁷⁹ was formulated specifically to regulate the growing paperwork burden federal agencies place on the public and other entities.¹⁸⁰ President Carter expounded on this justification when he signed a prior iteration of the PRA into law, noting that it was “the latest and one of the most important steps that we have taken to eliminate wasteful and unnecessary Federal paperwork and also to eliminate unnecessary Federal regulations.”¹⁸¹

174. *Id.* at iii, 7 (emphasis omitted).

175. *Id.* at 7 (emphasis omitted).

176. *Id.* The study noted further failures of NEPA, namely that “agencies make decisions before hearing from the public, documents are too long and technical for many people to use, and training for agency officials, particularly senior leadership, is inadequate.” *Id.*

177. *Problems and Issues with the National Environmental Policy Act of 1969: Hearing Before the H. Comm. on Res.*, 105th Cong. 1 (1998).

178. See, e.g., Lindstrom, *supra* note 162, at 264-66; Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA’s Progeny*, 16 HARV. ENVTL. L. REV. 207, 257-69 (1992).

179. Paperwork Reduction Act, 44 U.S.C. §§ 3501-3521 (2018).

180. U.S. OFFICE OF PERS. MGMT., PAPERWORK REDUCTION ACT (PRA) GUIDE: VERSION 2.0, (Apr. 2011), <https://www.opm.gov/about-us/open-government/digital-government-strategy/fitara/paperwork-reduction-act-guide.pdf> [<https://perma.cc/J75T-JMDG>]. Relevant to our discussion, the Office of Personnel Management further notes that the PRA seeks to (1) “[e]nsure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared, and disseminated” by the federal government; and (2) “[i]mprove the quality and use of Federal information to strengthen decision making, accountability, and openness in Government and society.” *Id.*

181. Remarks on Signing H.R. 6410 into Law, 3 PUB. PAPERS 2794-95 (Dec. 11, 1980). President Carter went on to state that the PRA “is another important step in our efforts to

Under the PRA, agencies must perform a “centralized review for federal agency information collections to ensure that they have practical utility, minimize burden, and are not duplicative of collections from other agencies.”¹⁸² Agencies must then submit this information to the Office of Information and Regulatory Affairs (OIRA), including an “estimate (to the extent practicable) [of] the burden in terms of time, effort, and financial resources required to complete the information collection.”¹⁸³ After this submission, an agency has fulfilled its obligations under the PRA.

Although the PRA was meant to reduce the paperwork burden placed on the public, that goal is far from realized. Indeed, the Government Accountability Office (GAO), the agency tasked with evaluating the effectiveness of the PRA, has consistently found the public has been subjected to an increased paperwork burden.¹⁸⁴ In the 1997 fiscal year, the GAO concluded that agencies placed an annual burden of 6.97 billion hours on the public.¹⁸⁵ Only sixteen years later, in 2013, that burden grew to 9.45 billion hours.¹⁸⁶ These numbers make clear that the efficacy of the PRA’s disclosure mandate has yet to be seen.

Similarly, the Small Business Regulatory Enforcement Fairness Act (SBREFA)¹⁸⁷ serves as a form of targeted transparency as regulation, particularly within the regulatory analysis context. Enacted as an amendment to the Regulatory Flexibility Act, the SBREFA created small business panels to review regulations that will have a significant economic impact on these small businesses.¹⁸⁸ The thought process behind the SBREFA is that agencies will respond to the small business panels’ unique feedback before taking action. Unfortunately, the overall success of the SBREFA as a regulatory tool has yet to be examined.¹⁸⁹

2. Ethical Conflicts

Targeted transparency as regulation can also be found within the realm of regulation aimed toward reducing the ethical conflicts many government actors encounter. These policies utilize increasingly common disclosure mechanisms in hopes that government officials will be less likely to invest in, or even maintain special relationships with,

trim waste from the Federal Government and to see to it that the Government operates more efficiently for all our citizens.” *Id.*

182. Arthur Fraas & Randall Lutter, *On the Economic Analysis of Regulations at Independent Regulatory Commissions*, 63 ADMIN. L. REV. 213, 219 (2011).

183. *Id.*

184. Stuart Shapiro & Deanna Moran, *The Checkered History of Regulatory Reform Since the APA*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 141, 163 (2016).

185. *Id.* at 163-64.

186. *Id.* at 164.

187. Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601 (2018).

188. Shapiro & Moran, *supra* note 184, at 172, 174.

189. *See id.* at 176.

those they directly regulate. Perhaps the most prolific example of targeted transparency as regulation in ethics is seen within the broad category of campaign finance. As Amatai Etzioni has noted, “According to the Congressional Research Service, using disclosure to reduce conflicts of interest and corruption has been among ‘the least controversial aspects’ in an ‘otherwise often-contentious debate’ on campaign finance policy.”¹⁹⁰

To be sure, disclosure has been deemed an “essential cornerstone of campaign finance reform and an automatic regulator, inducing self-discipline among political contenders and arming the electorate with important information.”¹⁹¹ Although the world of campaign finance regulation is admittedly vast, at its core are reporting, or “disclosure,” requirements found within the Federal Election Campaign Act (FECA). Enacted in 1971, Congress amended the FECA only three years later in part to respond to national outcry after the Watergate scandal.¹⁹² More specifically, the FECA amendments were seen as an “attempt to give practical vent to the shame and guilt aroused by the whole sorry spectacle.”¹⁹³

The FECA requires political committees to register with the Federal Election Commission (FEC), as well as to keep detailed accounts of all expenditures and contributions.¹⁹⁴ These requirements include disclosing the name and address of those contributing \$50 or more¹⁹⁵ and “the name and address of every person to whom any disbursement is made . . . and purpose of the disbursement, and the name of the candidate and the office sought by the candidate.”¹⁹⁶ The FECA also requires candidates and political committees to provide the FEC with quarterly reports of both expenditures and contributions, which the FEC then makes available “for public inspection, and copying.”¹⁹⁷

Even the Supreme Court has recognized the role that the FECA’s disclosure requirements can play in regulating ethical conflicts. Indeed, the Court has explained that “exposing large contributions and expenditures to the light of publicity” through the FECA could very well “discourage those who would use money for improper purposes either before or after the election.”¹⁹⁸ With the breadth of development of campaign finance disclosures, however, through both legislative amendments and judicial interpretation, it is quite difficult to quantify the effectiveness of the FECA and its progeny. That is not to say that

190. Etzioni, *supra* note 7, at 184.

191. *Id.* (internal quotation marks omitted).

192. Kirk J. Nagra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 *FORDHAM L. REV.* 53, 65 (1987).

193. *Id.* (quoting Joel L. Fleishman, *The 1974 Federal Election Campaign Act Amendments: The Shortcomings of Good Intentions*, 1975 *DUKE L.J.* 851, 852 (1975)).

194. 52 U.S.C. § 30102(c), (g) (2018).

195. *Id.* § 30102(b)(1), (b)(2)(B) (2018).

196. *Id.* § 30102(c)(5).

197. *Id.* § 30111(a)(4).

198. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

the rationale behind campaign finance disclosures fails to hold up. If political candidates and political committees know that they will be required to disclose both expenditures and contributions, they will be reticent to accept funds from those sources the public deems “corrupt.” In this way, campaign finance disclosure can serve to regulate problematic conflicts of interest without a firm regulatory mandate.

Another example of targeted transparency as regulation operating in the ethical conflicts realm is the financial disclosures required of federal government employees. These requirements, which Congress originally adopted in the Ethics in Government Act of 1978,¹⁹⁹ now apply to “high-level” officials in all three branches of government, including “the President, Vice President, Members of and candidates to Congress, and executive officials compensated on the Executive Schedule at level I (Cabinet officials) and level II (Under Secretaries of departments and heads of many executive branch and independent regulatory agencies).”²⁰⁰

Like the FECA, the Ethics in Government Act’s disclosure requirements were enacted in the wake of Watergate to “facilitate supervision, regulation, and deterrence of conflicts of interest between the *private* financial interests and the official *public* duties of federal officers.”²⁰¹ Under the requirements, high-level federal officials must annually disclose, either publicly or confidentially, a host of personal financial information. Information requiring disclosure under the act ranges from an official’s private income²⁰² to outside positions held by the official²⁰³ to the cash value of the official’s interests in blind trusts.²⁰⁴

The so-called STOCK Act, which Congress passed in 2012, only adds to these disclosure requirements.²⁰⁵ Under the STOCK Act, officials subject to the annual disclosure requirements of the Ethics in Government Act must also file periodic reports throughout the year.²⁰⁶ These reports must detail any and all financial transactions of \$1,000 or more either taken by, or for, the official.²⁰⁷ And while the STOCK Act and the Ethics in Government Act do not include regulatory

199. JACK MASKELL, CONG. RESEARCH. SERV., R43186, FINANCIAL DISCLOSURE BY FEDERAL OFFICIALS AND PUBLICATION OF DISCLOSURE REPORTS 1 (2013).

200. *Id.*

201. *Id.*

202. 5 U.S.C. app. 4 § 102(a)(1)(2018) (requiring disclosure of outside income totaling more than \$200).

203. *Id.* § 102(a)(6)(A).

204. *Id.* § 102(a)(8).

205. MASKELL, *supra* note 199, at 1, 4.

206. *Id.* at 4.

207. *Id.* (“These more frequent, periodic transaction reports must be filed within 30 days after the official is notified of a covered transaction in stocks, bonds, or other such securities (but no later than 45 days after the date of the transaction). The requirement for more frequent filing applies generally to transactions in stocks and bonds of individual companies, but does not apply to most mutual funds or to exchange traded funds (ETFs), nor to transactions in real property.”).

mandates themselves, the latter did establish the Office of Government Ethics to monitor these disclosures and watch for potential conflicts of interest.²⁰⁸

Until recently, these disclosure requirements have largely been lauded as successful.²⁰⁹ Commentators have noted that the requirements ensured that “[p]ublic officials disclosed their financial holdings and divested from those interests that might pose a conflict.”²¹⁰ But what has become increasingly apparent about these disclosure laws is their lack of regulatory mandate. To be sure, President Donald Trump refused to voluntarily adhere to traditional conflict of interest rules.²¹¹ While past presidents have generally (and voluntarily) divested themselves of interests that could raise corruption and conflicts questions, Trump repeatedly refused to adhere to this norm.²¹² This posture raised serious questions as to whether these fairly toothless financial disclosure requirements must be accompanied by some form of regulatory mandate in order to effectuate a change in behavior.

3. *Other Areas*

Targeted transparency as regulation, or disclosure policies aimed at regulating governmental conduct, is not exclusively relegated to ethical conflicts and regulatory analysis. Put another way, targeted transparency as regulation is not isolated to these two spheres. Although the examples below do not fall cleanly within our other two categories, they nevertheless function in a similar manner. Notably, these examples—the Civil Justice Reform Act of 1990 and open records laws requiring the release of law enforcement internal affairs investigations—are thought to serve as behavior regulating mechanisms.

As Matthew R. Kipp and Paul B. Lewis explain, “Sensing a critical need to address the mounting expense and delay of federal civil litigation, Congress, like the judiciary, sought to increase the degree

208. Stanley I. Kutler, *In the Shadow of Watergate: Legal, Political, and Cultural Implications*, 18 NOVA L. REV. 1743, 1749 (1994).

209. See, e.g., Delaney Marsco, *At 40 Years Old, the Ethics in Government Act Is in Need of a Tune-Up*, CAMPAIGN LEGAL CTR. (Oct. 26, 2018), <https://campaignlegal.org/update/40-years-old-ethics-government-act-need-tune> [<https://perma.cc/RKL9-9T4E>].

210. *Id.* See also Peter Overby, *Ethics Watchdog Has Big Impact on Federal Workers, but Not on Trump*, NPR (Feb. 26, 2017), <https://www.npr.org/2017/02/26/517009428/ethics-watchdog-has-big-impact-on-federal-workers-but-not-on-trump> [<https://perma.cc/KCS6-WBKD>] (noting that in 2017, Wilbur Ross, appointed to serve as U.S. Commerce Secretary, “reached an agreement with the Office of Government Ethics to sell off most of his holdings”).

211. See, e.g., DANIEL I. WEINER, BRENNAN CTR. FOR JUSTICE, *STRENGTHENING PRESIDENTIAL ETHICS LAW*, 1 (2017), <https://www.brennancenter.org/sites/default/files/publications/Strengthening%20Presidential%20Ethics%20Law.%20Daniel%20Weiner.pdf> [<https://perma.cc/XD3R-YWUC>]; Lisa Gilbert & Jennifer Ahearn, *A New Dawn of White House Ethics*, HILL (Oct. 12, 2018), <https://thehill.com/opinion/white-house/411196-a-new-dawn-of-white-house-ethics> [<https://perma.cc/AB6W-XH4G>].

212. See, e.g., Gilbert & Ahearn, *supra* note 211.

of early and active involvement of judges in the adjudicatory process.”²¹³ Thus from this backdrop, the Civil Justice Reform Act of 1990 (CJRA) was born. Under the CJRA, Congress required all ninety-four federal district courts to implement a “civil justice expense and delay reduction plan” that would “facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.”²¹⁴

Applicable to our discussion, the CJRA also requires the Director of Administrative Office of the U.S. Courts to “prepare a semiannual report showing, by U.S. district judge and magistrate judge, all motions pending more than six months, [and] all bench trials submitted more than six months.”²¹⁵ Once this information is compiled and the report is prepared, it is published online to provide a “snapshot” of pending matters.²¹⁶ The CJRA does provide the Director with authority to “develop and conduct comprehensive education and training programs.”²¹⁷ But it does not contain a regulatory mechanism beyond merely mandating disclosure of docket information. Accordingly, the CJRA essentially presumes that the act of disclosing this information will regulate U.S. district judges’ and magistrate judges’ case management strategies, thereby reducing delay in civil disputes brought in federal court.

Another area in which transparency is used as a regulatory tool is through the disclosure of internal affairs (IA) investigations into allegations of law enforcement misconduct. Requiring disclosure of final IA investigations is a relatively new phenomenon. To be sure, only a handful of states require public access to IA files,²¹⁸ and the rationale behind permitting disclosure of IA files is similar to all of the policies discussed above—meaning they too generally lack an accompanying regulatory mandate. The thinking goes that if law

213. Matthew R. Kipp & Paul B. Lewis, *Legislatively Directed Judicial Activism: Some Reflections on the Meaning of the Civil Justice Reform Act*, 28 U. MICH. J.L. REFORM 305, 305 (1995).

214. Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (2018).

215. *Civil Justice Reform Act Report*, UNITED STATES COURTS, <https://www.uscourts.gov/statistics-reports/analysis-reports/civil-justice-reform-act-report> [<https://perma.cc/DDU9-NFSM>] (last visited March 31, 2021). District judges and magistrates must also submit “all bankruptcy appeals pending more than six months, all Social Security appeal cases pending more than six months, and all civil cases pending more than three years on September 30, 2020.” *Id.*

216. *See id.*

217. 28 U.S.C. § 480 (2018).

218. As of 2018, at least thirteen states require disclosure of IA files, which include Washington, North Dakota, Minnesota, Wisconsin, Ohio, Connecticut, Maine, Utah, Arizona, Alabama, Georgia, Florida, and Colorado. *See Disciplinary Records*, WNYC, <https://project.wnyc.org/disciplinary-records/> [<https://perma.cc/A73V-C87E>] (last visited March 31, 2021); Jeffrey A. Roberts, *Eight Things to Know About Colorado’s New Law Requiring Disclosure of Police Internal Affairs Records*, CFOIC (Apr. 13, 2019), <https://coloradofoic.org/eight-things-to-know-about-colorados-new-law-requiring-disclosure-of-police-internal-affairs-records/> [<https://perma.cc/JUM9-JKN5>].

enforcement officers know that their problematic behavior will be disclosed to the public, they will be hesitant to engage in the behavior in the first place. Whether such a result is borne out—that is, whether transparency actually regulates—is an entirely separate question.

III. LIMITS AND PROMISES OF TARGETED TRANSPARENCY AS REGULATION

For transparency to regulate effectively, it must be well-designed. In this, as in most regulatory regimes, the devil is in the details. Yet, much can be learned from the disclosure literature as applied to targeted transparency as regulation. To begin, limits on efficacy stem from breaks in the chain between information release and public reaction. These limitations originate from problems of communication, comprehension, and information overload. But in the disclosure literature there are also promising avenues for targeted transparency as regulation. Certain design models have proven effective, and some factors can improve outcomes. This Part explores the practical constraints that stand in the way of effective targeted transparency as regulation, and it highlights factors that could truly allow transparency to regulate.

A. *Disclosure's Limits Apply to Government*

Targeted transparency as regulation, like disclosure requirements applied to private actors, presumes that government officials will be deterred from engaging in problematic conduct by the fear that the public will learn about their conduct. In the disclosure context, Ben-Shahar and Schneider pen a scathing indictment of disclosure as a regulatory tool.²¹⁹ In sum, they allege that disclosure “chronically fails to accomplish its purpose. Even where it seems to succeed, its costs in money, effort, and time generally swamp its benefits. And mandated disclosure has unintended and undesirable consequences, like driving out better regulation and hurting the people it purports to help.”²²⁰

Moreover, in the government context, Professor Zarsky points out that the chain of logic required for targeted transparency as regulation to function properly can occur only if two underlying assumptions are correct: (1) the general public actually cares about the actions of the government; and (2) the government actors engaging in the problematic conduct will indeed react to public shaming by adhering to society’s moral standards.²²¹

219. Ben-Shahar & Schneider, *supra* note 2, at 651.

220. *Id.*

221. Zarsky, *supra* note 52, at 1534-35 (discussing the role shaming plays in the context of transparency in predictive modeling).

Targeted transparency as regulation therefore suffers under many of the same constraints as disclosure laws do, including the growing trend of public apathy. It instead assumes an official's malfeasance contradicting a well-established social norm will necessarily generate enough public condemnation and/or induce enough embarrassment to induce an official to act differently. In other words, the theory posits that "[d]isclosure itself generates pressure for more reform."²²²

1. Public Access

One of the most notable limits on transparency's ability to regulate government conduct lies in the public's access to information produced by disclosure mandates. While the information disclosed through these mandates is certainly made available to the public, the sheer amount of data can be an enormous barrier to effective regulation.

Take NEPA, for example. The CEQ released a report in 2019 about the average length of EISs produced under NEPA's mandate between 2013 and 2017.²²³ In the report, the CEQ found that the EPA published a notice for final EISs for 631 proposed projects over the course of four years.²²⁴ It further found that on average, the EISs each contained 669 pages.²²⁵ While a quarter of those EISs were less than 299 pages, one quarter of them were at least 729 pages or longer.²²⁶ Thus, the breadth of information produced from NEPA alone illustrates the infeasibility of meaningful incentives through public oversight.

In that same vein, with the growing pervasiveness of around-the-clock news cycles,²²⁷ the public's access to mandated disclosures is perhaps even more inhibited by its failing short-term memory. This increasing phenomenon seems to be made possible by information overload; that is, perhaps the public is just too saturated with information to actually take anything in. A 2013 study conducted by researchers at the Royal Institute of Technology concluded as much. The study suggests that this "constant flux of information often results in a mental 'overload' that can come to the detriment of short-term memory retention."²²⁸ In short, it's simply becoming harder just to keep up these days.

222. SCHUDSON, *supra* note 28, at 253 (quoting LARRY SABATO, ELECTIONS AMERICAN STYLE 171-72 (1987)).

223. COUNCIL ON ENVTL. QUALITY, EXEC OFFICE OF THE PRESIDENT, 20503, LENGTH OF ENVIRONMENTAL IMPACT STATEMENTS 1 (2013-2017) (2019),

224. *Id.*

225. *Id.*

226. *Id.*

227. Jonah Hahn, *Extra! Extra! Click All About It!*, HARV. POL. REV., Jan. 9, 2015, <http://harvardpolitics.com/covers/extra-extra-click/> [<https://perma.cc/B966-XFRW>].

228. John Ericson, *Information Overload: How the Internet Inhibits Short-Term Memory*, MED. DAILY (Sept. 22, 2013), <https://www.medicaldaily.com/information-overload-how-internet-inhibits-short-term-memory-257580> [<https://perma.cc/9NGP-4BY3>].

Indeed, when Cable News Network (CNN) launched in 1980, it became the world's first, and arguably most prominent, twenty-four hour television news network.²²⁹ Prior to CNN's launch, the news media operated in a much smaller sphere.²³⁰ Whether it be newspapers or network television (of which there were only three options) the American public naturally got its news from only a small handful of sources at designated, and much more limited, times.²³¹ While CNN operated in relative anonymity for over a decade, it gained prominence within the public sphere during the 1991 Persian Gulf War, thus changing the news media landscape forever.²³²

The rise of CNN was not just a blip on the radar either. Rather, it was a dramatic shift in the very fabric of the news media and, in turn, the way the public consumes both news and information generally. During its rise in the early-1990s, CNN "demonstrated that saturation coverage of public affairs had the potential to be more than a market niche."²³³ As David Logan explains, "CNN's all-news focus has since been replicated by Fox and MSNBC, with numerous spin-offs."²³⁴ Today, the public can choose from a host of twenty-four hour television and radio news programs and countless more online publications to fulfill its news-related needs.

With so many options and so many stories, information disclosure mandated by policies meant to regulate government behavior can often get lost in the shuffle. Indeed, in a 2018 poll by Gallup and the Knight Foundation, 58% of respondents said that "staying well informed is difficult," whereas only 38% found it to be easy.²³⁵ Saturating the public with this amount of information, however, will likely diminish the efficacy of at least one of the underlying mechanisms that allow disclosure to regulate behavior.

As discussed in Part II,²³⁶ one of the most salient disclosure mechanisms, particularly in the government context, is through incentivizing the discloser to improve their behavior before they have to disclose it. But if the government discloser knows that revealing

229. *This Day in History, June 01: CNN Launches*, HISTORY, <https://www.history.com/this-day-in-history/cnn-launches> [https://perma.cc/8YXR-6QBL] (last visited March 31, 2021).

230. David A. Logan, *All Monica, All of the Time: The 24-Hour News Cycle and the Proof of Culpability in Libel Actions*, 23 U. ARK. LITTLE ROCK L. REV. 201, 201-02 (2000).

231. *Id.* (acknowledging that "tens of millions [of Americans] tuned into the evening broadcasts of the three networks").

232. *Id.* at 202. Indeed, during the Persian Gulf War, "CNN garnered the highest ratings of all the networks during that period." *Id.*

233. *Id.*

234. *Id.*

235. Sintia Radu, *Information Overload Exhausting Americans*, U.S. NEWS (Jan. 30, 2018), <https://www.usnews.com/news/best-countries/articles/2018-01-30/information-overload-exhausting-americans-survey-says> [https://perma.cc/65KJ-KSVA]. Further, the report noted that "[t]he explosion of information is a defining feature of the modern media landscape [and] [m]any Americans find this transformation daunting." *Id.*

236. See *supra* Part II.

their bad behavior will quickly be lost among a sea of other sensationalized stories, little incentive exists to change prior to the mandated disclosure. In other words, if the public will not notice, or will likely forget, does it really matter anyway? The short, and undoubtedly more pessimistic, answer is that it probably does not.

To be sure, that is not to say that this mechanism will always fail. Although some disclosers need an external incentive (i.e., the public as watchdog) to change their behavior, that certainly is not always the case. For some disclosers, just knowing that the public may read about their poor behavior is probably enough, irrespective of how long the behavior is remembered.

2. *Public Misunderstanding*

Even if the public wades through the breadth of information produced through disclosure policies, and even if it is not fatigued by it, there is still a risk that the information is not understandable. A noteworthy gap forms in targeted transparency as regulation when the public is presented with incomprehensible data. To be sure, utilizing overly technical or even nonsensical methods of providing information begs the question: if the public cannot understand these disclosures, what good are these policies for effectuating meaningful changes in behavior?

Wendy Wagner and Will Walker present a compelling perspective about the effects of disseminating un-digestible information in their book *Incomprehensible!*²³⁷ In exploring the growing trend toward transparency, they poignantly note that “our current legal architecture typically focuses on demanding that the information is complete, while neglecting the equally important requirement that it be comprehensible to its target audience.”²³⁸ Throughout their work, Wagner and Walker discuss the structural problems in data presentation across a myriad of legal arenas. Their discussion of incomprehensibility within the administrative realm is particularly apt here:

Rationality requirements direct [administrative] agencies to prepare full cost-benefit analyses on significant rules, assess impacts on small businesses, and conduct various other related assessments of the likely impact of their rules. These requirements, however, are once again afflicted with this same blind spot of lacking a strong incentive for the agency to make the analyses comprehensible. While the summary tables do provide quick, “at a glance” ledgers of monetary costs and

237. WENDY WAGNER & WILL WALKER, *INCOMPREHENSIBLE!: A STUDY OF HOW OUR LEGAL SYSTEM ENCOURAGES INCOMPREHENSIBILITY, WHY IT MATTERS, AND WHAT WE CAN DO ABOUT IT* 7 (2019). The authors explain that the focus of their work lies in the first step of communication: “ensuring the speaker is held responsible for being reasonably comprehensible.” *Id.* at 8.

238. *Id.*

benefits, for example, the underlying methods and analyses tend to be highly discretionary and malleable. As a result, the true decisions can be buried in gratuitously complicated discussions.²³⁹

What is more, Wagner and Walker back up this claim. They go on to note that this is exactly what case studies have found: Cost-benefit analyses are “very lengthy (reaching into the hundreds or thousands of pages), highly technical, and so laden with assumptions that the summary tables provide an unreliable overview of the contents of the larger document.”²⁴⁰

Another example of the pitfalls of public misunderstanding can be seen in the launch of USASpending.gov. Established by the Federal Funding Accountability and Transparency Act, USASpending.gov was created under the basic premise of “provid[ing] the public with information about how their tax dollars are spent.”²⁴¹ In essence, the website provides the public with a platform to browse how the federal government, and more specifically, the administrative state, spends its money.

Although USASpending.gov’s accuracy has been heavily critiqued,²⁴² additional questions remain as to whether it presents data in an understandable form. In exploring this question, Suzanne Piotrowski says that the website generally succeeds.²⁴³ Yet, she notes that the tool is not without its drawbacks: “[i]f the end user did not have some basic understanding of the missions of the different agencies and the differences between grants and contract, navigating the website and understanding the search results would prove more difficult.”²⁴⁴

Perhaps much of the information produced by disclosure policies may be discernable to members of the public with a certain base knowledge. But disseminators of disclosure could very well thwart the regulatory promise of these transparency policies merely by burying damning information or presenting it in an un-digestible, incomprehensible manner.

3. Public Apathy

Yet another barrier to the success of targeted transparency as regulation is highlighted in Professor Zarsky’s chain of logic: namely,

239. *Id.* at 189.

240. *Id.*

241. Suzanne J. Piotrowski & Yuguo Liao, *The Usability of Government Information: The Necessary Link Between Transparency and Participation*, in *THE STATE OF CITIZEN PARTICIPATION IN AMERICA* 17 (2012).

242. See, e.g., Sean Moulton, *Data Quality and Access to Inspector General Work Can and Should Be Improved*, POGO (Mar. 28, 2019), <https://www.pogo.org/testimony/2019/03/data-quality-and-access-to-inspector-general-work-can-and-should-be-improved/> [<https://perma.cc/G63V-DPJU>].

243. Piotrowski & Liao, *supra* note 241, at 17.

244. *Id.* at 19-20.

whether the general public actually cares about the actions of the government.²⁴⁵ Rarely does negative publicity seem to make an impact these days, and this makes sense. With the convergence of public misunderstanding and information overload, public apathy naturally flows.

In terms of information overload, the sheer amount of information accessible to the public, coupled with the twenty-four-hour news cycle, is dizzying. Often times it can be easier to shut down than try to keep up. And this is an overwhelmingly common trend. To be sure, according to a Pew Research Center survey conducted in 2018, “[a]lmost seven-in-ten Americans (68%) feel worn out by the amount of news there is these days, compared with only three-in-ten who say they like the amount of news they get.”²⁴⁶

This general sentiment of apathy stemming from information-overload fatigue seems to be becoming more pervasive. It has grown to the point that psychologists even have a specific term describing the phenomenon— “compassion fatigue.” Psychologist Charles Figley defines compassion fatigue as “a state of exhaustion and dysfunction, biologically, physiologically and emotionally, as a result of prolonged exposure to compassion stress.”²⁴⁷

While compassion fatigue has been discussed for decades in the caregiver context, it also thrives in the realm of the public’s relationship with the news media.²⁴⁸ As reporter Elisa Gabbert explained, “[w]hen war and famine are constant, they become boring— we’ve seen it all before. The only way to break through your audience’s boredom is to make each disaster feel worse than the last.”²⁴⁹ She notes that a 1995 study conducted by the Pew Research Center reached similar conclusions: “When it comes to world news, the events must be ‘more dramatic and violent’ to compete with more local stories.”²⁵⁰ The public’s growing indifference can perhaps destroy the mechanisms by which transparency seeks to regulate.

Of course, a host of anecdotal evidence also supports this conclusion. For instance, current Secretary of Treasury Steven Mnuchin found himself in hot water with the news media early on in his tenure. In March 2018, documents obtained through FOIA by watchdog organizations revealed that Mnuchin had racked up

245. Zarsky, *supra* note 52, at 1534-35.

246. Jeffrey Gottfried & Michael Barthel, *Almost Seven-in-Ten Americans Have News Fatigue, More Among Republicans*, MEDIUM (Jun. 5, 2018), <https://medium.com/trust-media-and-democracy/almost-seven-in-ten-americans-have-news-fatigue-more-among-republicans-425b7553ead5> [<https://perma.cc/FXB3-UU74>].

247. Elisa Gabbert, *Is Compassion Fatigue Inevitable in an Age of 24-Hour News?*, GUARDIAN (Aug. 2, 2018), <https://www.theguardian.com/news/2018/aug/02/is-compassion-fatigue-inevitable-in-an-age-of-24-hour-news> [<https://perma.cc/96CM-L3M7>].

248. *Id.*

249. *Id.*

250. *Id.*

\$1 million in taxpayer-funded trips.²⁵¹ These documents showed that Mnuchin had taken eight separate trips on military aircrafts between spring and fall of 2017.²⁵² This revelation was heavily reported.²⁵³

The news media was not alone in its investigation into Mnuchin. Counsel to the Treasury Department's Office of Inspector General also conducted an investigation into Mnuchin's travel.²⁵⁴ Although the counsel concluded that Mnuchin's travel was technically legal, he did note a "disconnect between the standard of proof" required by the governing policy "and the actual amount of proof provided by Treasury and accepted by the White House in justifying these trip requests."²⁵⁵ Despite the coverage this scandal received, along with several others to which Mnuchin was a party, he continued to serve in his post as Secretary of Treasury.

To be sure, we recognize that citizens were not able to oust Mnuchin directly because, as Secretary of Treasury, he could not be removed by voters alone. But public apathy raises the bar for what sort of actions are deemed egregious enough to mount public pressure, prompting resignation or removal. Take for example, former-EPA Administrator Scott Pruitt. He finally resigned his post after months of controversies ranging from the "scrub[bing]" of controversial events from his calendar to the installation of a soundproof booth in his office.²⁵⁶ But it took more than a dozen ethics inquiries or reviews into his actions for him to finally step down.²⁵⁷

As public apathy continues to grow, along with the public's access to information and the incomprehensibility of the data disclosed, the effectiveness of policies utilizing disclosure as a means of regulation is called further into question.

B. Targeted Transparency as Democracy Enhancing

Despite these serious barriers to the efficacy of targeted transparency as regulation policies, there remains, perhaps, an

251. Carolyn McAtee Cerbin, *Treasury's Steven Mnuchin Has Racked Up \$1M in Taxpayer-Funded Trips*, *Watchdog Says*, USA TODAY (Mar. 15, 2018), <https://www.usatoday.com/story/news/politics/onpolitics/2018/03/15/mnuchin-has-racked-up-1-m-taxpayer-funded-trips-watchdog-says/430846002/> [<https://perma.cc/Q4AJ-23ES>].

252. *Id.*

253. See, e.g., *id.*; Natasha Bach, *Steve Mnuchin's Travels on Military Plane Has Reportedly Cost Taxpayers \$1 Million*, FORTUNE, (Mar. 16, 2018), <https://fortune.com/2018/03/16/steve-mnuchin-travel-military-planes-cost-taxpayers-1-million/> [<https://perma.cc/KBA5-CMFS>].

254. *The Travels of Secretary Steven Mnuchin*, CREW (March 5, 2018), <https://www.citizensforethics.org/travels-treasury-secretary-steven-mnuchin/> [<https://perma.cc/EX6G-YRJG>].

255. *Id.*

256. Jeremy Diamond, Eli Watkins & Juana Summers, *EPA Chief Scott Pruitt Resigns Amid Scandals, Citing 'Unrelenting Attacks'*, CNN (Jul. 5, 2018), <https://www.cnn.com/2018/07/05/politics/scott-pruitt-epa-resigns/index.html> [<https://perma.cc/4SAE-AKS8>].

257. *Id.*

important role for these types of disclosure laws. To begin, traditional government transparency laws are under increasing attack. Breaking from the historical norm, recent scholarship has applied a consequentialist, cost-benefit type of analysis to across-the-board open government laws like FOIA and open-meetings laws. Far from celebrating them as unquestionable democratic goods, these critiques forcefully demonstrate that transparency mandates must be carefully crafted to avoid negative unintended consequences.

Targeted transparency as regulation provides an alternative—a targeted disclosure law meant to accomplish a particular goal. Moreover, targeted transparency as regulation requirements are much easier to measure and adjust. Without discarding our other transparency tools, targeted transparency as regulation may provide additional ways to enhance our transparency system to operate more as intended. The literature on disclosure demonstrates that certain design elements in disclosure laws make them more effective. These elements can be incorporated into targeted transparency as regulation requirements to maximize the possibility of their success.

1. Targeting Government Transparency

In 1982, then-Professor, later-Justice Antonin Scalia wrote a short piece for the American Enterprise Institute, entitled *The Freedom of Information Act Has No Clothes*.²⁵⁸ In it, he somewhat famously declared that FOIA “is the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored.”²⁵⁹ He argued that FOIA’s absolute rights for the public, stringent deadlines, and procedural preferences for requesters in court all exact unjustified costs on the government, based on an “obsession” with “do-it-yourself oversight by the public and its surrogate, the press.”²⁶⁰

But for the longest time, Professor Scalia was essentially the only one. Over the decades, FOIA and other generalized government transparency measures enjoyed largely unquestioned expansion.²⁶¹ As Thomas Hale and Anne-Marie Slaughter put it, “[W]ho could be opposed to transparency? Who could be in favor of opacity or, worse

258. See Antonin Scalia, *The Freedom of Information Act Has No Clothes*, Mar./Apr. AEI J. ON GOV'T & SOC'Y 14 (1982).

259. *Id.* at 15.

260. *Id.* at 16-19.

261. See, e.g., David E. Pozen, *Seeing Transparency More Clearly*, 80 PUB. ADMIN. REV. 326, 327 (2019) (“In the estimation of . . . countless commentators, transparency is not just a regulatory technique. It is also a fundamental policy goal in its own right, a value to be prized and maximized.”); Adam Candeub, *Transparency in the Administrative State*, 51 HOUS. L. REV. 385 (2013) (“In the administrative context, there is basic agreement about transparency’s moral or political purposes.”); Fenster, *Transparency Fix*, *supra* note 8, at 449-50 (“The existing literature advocating and developing transparency as a concept has failed to map out transparency as a diverse and contested political field; instead, it has assumed transparency’s status as a universal norm and debated the technical and legal issues of optimal administration and application.”).

still, obscuration? Small wonder that transparency has become the rallying cry of good global governance.”²⁶² Modern political theory has recognized transparency as a “necessary condition” or “predicate for effective representative government.”²⁶³ The Supreme Court has called FOIA a “structural necessity in a real democracy.”²⁶⁴ Some have argued for a constitutional underpinning protecting the right to access government information,²⁶⁵ while others have called the legislation that protect those rights “super-statutes” for their enduring effect on law and policy.²⁶⁶ FOIA-style transparency laws proliferated across the globe, now numbering more than one hundred twenty,²⁶⁷ and all fifty states have an analogous FOI or public records law.²⁶⁸

To be sure, many have recognized important limits on the power of transparency,²⁶⁹ as well as harms that might result from the excesses of transparency, such as privacy and security related concerns.²⁷⁰ Moreover, the difficulty in executing transparency systems has been widely acknowledged.²⁷¹ Much scholarship and policy reform efforts have focused on improving responsiveness of government, enforceability of mandates, and usability of information.²⁷² Advocates

262. Thomas N. Hale & Anne-Marie Slaughter, *Transparency: Possibilities and Limitations*, 30 FLETCHER FORUM OF WORLD AFFAIRS, 153, 162 (2006).

263. Fenster, *Opacity*, *supra* note 1, at 898.

264. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004).

265. See, e.g., Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L. Q. 2 (arguing that the First Amendment may provide some protections for access to information); Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive 'Right to Know'*, 72 MD. L. REV. 1, 22 (2012) (arguing for FOIA's “quasi-constitutional” status).

266. See David Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 314 n.204 (2010).

267. See *By County*, GLOBAL RIGHT TO INFO. RATING, <https://www.rti-rating.org/country-data/> [https://perma.cc/63DU-AJA7] (last visited March 31, 2021).

268. See *State Freedom of Information Laws*, NAT'L FREEDOM OF INFO. COALITION, <https://www.nfoic.org/coalitions/state-foi-resources/state-freedom-of-information-laws> [https://perma.cc/94BT-Z5T9] (last visited March 31, 2021).

269. See generally Fenster, *Opacity*, *supra* note 1, at 885-86 (describing the faulty assumptions of communication between government and the public that hinder transparency's efficacy in promoting democratic participation); Fenster, *Transparency Fix*, *supra* note 8, at 449-50 (providing a typology of the various types of transparency movements and their respective successes and failures).

270. See Fenster, *Opacity*, *supra* note 1, at 902, 906-07 (discussing the harms that would result from complete transparency, explaining that skeptics of strong transparency protections are worried about harms to national security, law enforcement, personal privacy, and other legitimate interests that are at stake).

271. See Seth Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1014-15 (2008) (enumerating the dominant criticisms of FOIA as being that the law is unnecessary, ineffective, or too costly).

272. See, e.g., Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 241-42 (2013) [hereinafter Kwoka, *Deferring to Secrecy*] (suggesting options for more robust judicial review of agency decisions to withhold records under FOIA); Laurence Tai, *Fast Fixes for FOIA*, 52 HARV. J. ON LEGIS. 455, 455 (2015) (suggesting revamping the cost structure for FOIA requests), Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 577, 579 (2009) [hereinafter Herz, *Law Lags Behind*] (suggesting more robust affirmative disclosure requirements).

routinely critique the law as too slow, exemptions too broad, and enforcement too weak.²⁷³

In the last couple of decades, serious scholarship has emerged painting a more nuanced picture of the theoretical role of transparency and also weighing its efficacy in accomplishing the democratic purposes it was designed to promote. Mark Fenster opened up the conversation about the fit between FOIA's means and its ends when he identified "two core frustrations" about transparency laws: (1) they are not tailored to disclosures that were most meaningful, and (2) the manner of disclosure is not required to be most useful to the public.²⁷⁴ He suggested focusing not on the disclosures, but rather on the "effects of disclosure on accountability" of government.²⁷⁵ He later theorized that the very idea of transparency is in some ways set up to fail, as it is "impossible to achieve as an administrative norm in its strongest, metaphorical form."²⁷⁶

Fenster and Seth Kreimer have also done important work situating FOIA among other transparency mechanisms. Kreimer famously established the existence of and named an "ecology of transparency," in which FOIA operates to augment other mechanisms of transparency, thereby creating benefits that are difficult to quantify and unaccounted for by critics who assert that the law is too costly for its benefit.²⁷⁷ Fenster examined alternatives to legal mandates for disclosure, such as open data movements and leaks, and concluded that each suffers from deep imperfections, alongside the well-known imperfections with respect to FOIA.²⁷⁸ These accounts certainly complicate the simplistic understanding of more transparency as an unmitigated democratic good and deepen our understanding of both the potential and limits of transparency as a democratic tool.

Yet, a recent set of critiques have gone farther. They have more fundamentally questioned the assumptions that broad government transparency mandates—even when well-executed—improve public welfare through increased democratic participation. As the recent introduction to an edited volume entitled *Troubling Transparency*

273. See, e.g., Letter from Susan Harley, Deputy Director, Public Citizen's Congress Watch Division, to U.S. House Committee on Oversight and Reform (Mar. 13, 2019), <https://docs.house.gov/meetings/GO/GO00/20190313/109092/HHRG-116-GO00-20190313-SD007.pdf> [<https://perma.cc/YU5Z-7KD9>]; Nick Schwellenbach & Sean Moulton, *The "Most Abused" Freedom of Information Act Exemption Still Needs to Be Reined In*, POGO (Feb. 6, 2020), <https://www.pogo.org/analysis/2020/02/the-most-abused-foia-exemption-still-needs-to-be-reined-in/> [<https://perma.cc/G5BT-3JZW>]; Tamar Ziff, *What Is the FOIA? Does it Ensure Government Transparency?*, CREW (Sept. 28, 2017), <https://www.citizensforethics.org/foia-ensure-government-transparency/> [<https://perma.cc/FU3M-ES33>].

274. Fenster, *Opacity*, *supra* note 1, at 933.

275. *Id.* at 941.

276. Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 632 (2010).

277. Seth Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1015-17 (2008).

278. Fenster, *Transparency Fix*, *supra* note 8, at 501-03.

asserts, skepticism has “developed to the point where we might say that government transparency, as a democratic ideal, is contested not only in practice but also in theory.”²⁷⁹

The most compelling articulations of these critiques can be found in a series of articles authored by David Pozen. First, Pozen made the case that FOIA (at least as it currently stands) not only fails a basic cost-benefit calculation in general, but in fact may on balance produce more harm specifically to the very democratic processes it was intended to benefit.²⁸⁰ He makes the case by pointing to the glut of corporate and commercial requesters flooding FOIA offices,²⁸¹ the relatively insulated national security state that evades stringent judicial review under FOIA,²⁸² and the perceived incompetence that stems from FOIA’s administration by the rest of the administrative state focused on social welfare.²⁸³ As he states the case:

“[V]iewed by many as one of the crown jewels of liberalism,” the Act has proven a regressive tool that serves corporate and “crusading” agendas while hobbling relatively visible efforts to regulate health, safety, the economy, the environment, and civil rights. FOIA does the least work where it is most needed and, at least from a normative standpoint that values effective and egalitarian governance above transparency per se, does too much work everywhere else.²⁸⁴

Pozen’s ultimate conclusion is not necessarily to scrap FOIA, but that the basic structure of the law—on demand, request, and response, no prerequisite transparency—is not inherent to democratic values. Rather, other alternatives, most notably affirmative disclosure requirements, may better meet democratic information needs.²⁸⁵

Yet, Pozen’s overall critique is not limited to FOIA. Rather, it goes to the heart of transparency as an overarching goal. In a subsequent piece, he documents the “ideological drift” of transparency; that is, while it started out as a liberal democratic value, transparency has now been harnessed by business, neoliberal, free-market interests in furtherance of a basically deregulatory agenda.²⁸⁶ This is true (as discussed above²⁸⁷) in the disclosure context where mandatory disclosures are often extolled as a substitute for regulation,²⁸⁸ as well

279. TROUBLING TRANSPARENCY, *supra* note 24, at 1.

280. *See generally* Pozen, *Beyond*, *supra* note 25, 1098-102.

281. *See id.* at 1112-18. *See also* Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1376-81 (2016).

282. *See also* Kwoka, *Deferring to Secrecy*, *supra* note 272.

283. *See generally* Pozen, *Beyond*, *supra* note 25.

284. *Id.* at 1111.

285. *Id.* at 1107-08.

286. Pozen, *Ideological Drift*, *supra* note 1. *See also* Fenster, *supra* note 276, at 632 (A neoliberal effect of transparency “produces a cyclical, ironic dynamic: the populist demand for popular control of the state in turn leads to a more expansive state that in turn creates a larger bureaucratic organization that in turn leads to calls for more popular control”).

287. *See supra* Section I.C.

288. Pozen, *Ideological Drift*, *supra* note 1, at 138.

as in the FOIA context²⁸⁹ as Pozen's previous work argued. As well as in constitutional developments where, for example, the Supreme Court was persuaded that disclosure laws can be a less restrictive means for curbing influence over elections than substantive campaign finance laws, which were struck down.²⁹⁰

In the end, Pozen uses these powerful critiques to call for more tailored transparency mechanisms. These approaches include specifically "information-forcing measures [that are] integrated into broader regulatory strategies" (which he dubs, "transparency plus").²⁹¹ In a later *cri de coeur*, a more general sociological approach to transparency studies examines the "iterated interactions between formal legal structures and informal developments in the communities that supply, demand, and interpret information."²⁹²

To be sure, Pozen is by no means the only scholar that has called for more tailored transparency mechanisms and requirements, greater evaluation of those mechanisms' successes and failures, and consideration of alternatives to traditional request-and-response models to FOI laws. Most such proposals attempt to better align transparency policy means with government accountability ends. Some scholars have called for very specific transparency mandates with attention to the audience, such as whether there is an organized civil society around the particular issue, whether market pressure can be exerted, or whether institutions are susceptible to political discourse.²⁹³ Others have suggested that mandated disclosures target "accountability-related information" such as agencies' decision-making process and performance.²⁹⁴ Still others have looked specifically at affirmative disclosure²⁹⁵ or called for better empirical evidence of the success of transparency policies.²⁹⁶

So why does this account of the scholarly critiques of traditional government transparency tools matter? The short answer is that targeted transparency as regulation provides a framework, previously unidentified in the literature, for evaluating alternative transparency

289. *Id.* at 157, 162.

290. *Id.* at 133-34.

291. *Id.* at 163.

292. Pozen, *supra* note 261, at 330.

293. *See, e.g.,* Hale & Slaughter, *supra* note 262, at 160 (noting the three "underappreciated forces" that make transparency policies successful in promoting accountability are market pressure, institutional values, and dialogue with society).

294. *See, e.g.,* Shkabatur, *supra* note 152, at 81 (arguing for a tight link between transparency policies in open data and online information movements and government accountability). Fenster, *Opacity*, *supra* note 1, at 941 (proposing evaluating transparency policy in light of the value of disclosure to the public).

295. *See, e.g.,* Herz, *Law Lags Behind*, *supra* note 272, at 585-86 (suggesting strengthening affirmative disclosure requirements).

296. *See, e.g.,* Fenster, *Opacity*, *supra* note 1, at 938 ("But two key obstacles impede imposition of optimal disclosure requirements: we have no clear method to evaluate and compare costs and benefits, and we have no institution that appears competent and willing to analyze and adjudicate disclosure disputes.").

regimes. In short, targeted transparency as regulation is one answer to these calls for more tailored, more evaluated, more tested, more structured transparency in furtherance of democracy. Put another way, if we look at targeted transparency as a form of regulation, we have a full body of regulatory disclosure literature to draw on, learn from, and model as we move forward.

That is not to say that this Article establishes targeted transparency as regulation's success in this regard. Indeed, the limitations of disclosure law discussed in the previous Section are likely to apply with full force—and in some instances greater force—in the context of regulating government activity. Yet, targeted transparency as regulation at the very least avoids the pitfall of merely assuming that transparency will lead to greater public participation, government accountability, and other democratic goals. Thus, the starting point is to identify factors that have made disclosure successful as a regulatory tool in some instances and where those factors might hold promise for targeted transparency as regulation.

2. *Form and Content for Success*

To begin, the disclosure literature itself provides important insights into crafting regulatory policy through information release, many of which translate directly to the context of targeted transparency as regulation. Three principal insights can be applied here. First, the need for a dedicated group of information recipients who are interested and capable of understanding the released information; second, the requirement of a simple, comprehensible form of transparency; and third, the identification of a defined feedback loop through which disclosure will promote accountability. This Section will discuss each in turn.

Information intermediaries are well-established enhancing factors for disclosure policy. The basic problem intermediaries have the potential to solve is the public's lack of time and expertise necessary to understand disclosed information.²⁹⁷ Paula Dalley established the essential role of information intermediaries to the success of the securities disclosure regime, explaining that although investors and consumers would ideally read and act on disclosures directly, "few investors have the time or expertise to make appropriate use of the available information."²⁹⁸ In the government context, advocates have recognized the same important functions for intermediaries. The

297. See *supra* Part II.A (discussing intermediaries); see also Ben-Shahar & Schneider, *supra* note 2, at 665 (summarizing, in part, the problem with many mandated disclosure policies as: "First, disclosers do not always provide, and disclosees do not always receive, information. Second, disclosees often do not read disclosed information, do not understand it when they read it, and do not use it even if they understand it. Third, mandated disclosure does not improve disclosees' decisions.").

298. Dalley, *supra* note 13, at 1101.

Sunlight Foundation, a transparency focused NGO, noted that intermediaries can “help concerned but time-crunched citizens act according to their beliefs without all of the overhead of being a full-time politico.”²⁹⁹ An active and interested audience for disclosures is, indeed, a logical prerequisite for disclosure policy that will matter.³⁰⁰

To be sure, there are dangers in overreliance on intermediaries. As one commentator put it, “Disclosure often gives intermediaries new power.”³⁰¹ Indeed, the intermediaries can have interests that are different from the interests of the general public or sometimes even be captured by relationships with the disclosers.³⁰² Moreover, some commentators suggest that these interested groups will find ways to get the information they need whether or not there are mandated disclosure or transparency laws, thus obviating the necessity for laws tailored to them.³⁰³ Overall, most scholars agree that transparency or disclosure policies must have an audience that is not assumed but real.³⁰⁴

What does that look like in the context of targeted transparency as regulation? It means that for any targeted, proactive disclosure policy that applies to the government meant to improve public decision-making and operations (i.e., targeted transparency as regulation), a counterweight in civil society must be identified. Moreover, when crafting the targeted transparency as regulation policy, that significant civil society contingent should be consulted to ascertain the information that is needed and how it must be disclosed to be effective as a monitoring or enforcement regime. If we want transparency to operate as regulation of government activity, we cannot simply assume that disclosures will be read by the public and acted upon.

Beyond simply identifying a reader for the disclosure, all targeted transparency as regulation policies should aim to specify a simple, comprehensible form for the release of government information.³⁰⁵ One key limitation of transparency models, such as FOIA, is that they require the disclosure of that which government already has in its possession, but not the creation, compilation, description, or

299. Etzioni, *supra* note 7, at 193.

300. FUNG ET AL., *supra* note 15, at 11 (describing disclosure policies as “sustainable” only if there are individuals and groups who will use the information).

301. GRAHAM, *supra* note 2, at 142.

302. Shkabatur, *supra* note 152, at 89 (noting this dynamic with regard to FOIA).

303. Ben-Shahar & Schneider, *supra* note 2, at 731 (asserting that “it is not clear that mandated disclosures help such groups fulfill their mission” but acknowledging nonetheless that there are areas where disclosures aimed at sophisticated intermediaries produces desirable effects).

304. See Hale & Slaughter, *supra* note 262, at 162.

305. See Dalley, *supra* note 13, at 1104 (“First, disclosure will only be useful if its recipients can process and understand the disclosed information” and citing as an example the 1998 SEC regulation requiring disclosure documents to be written in “plain English.”).

unearthing of information that is particularly useful.³⁰⁶ That is, if government does not already have a document that would be useful to the public, it does not have to create it for public consumption. Even FOIA's affirmative disclosure provisions do not require the creation of records. Already existing agency orders, policy statements, and staff manuals must be published, but no such documents must be made in the first place according to FOIA.³⁰⁷

Targeted transparency as regulation requirements, on the other hand, could specify not only exactly what information must be gathered and compiled, but also how it should be presented and released. Fenster has suggested that required disclosures should be considered for their "value . . . to the public, in terms of both the timing and content of the disclosure" as weighed against possible costs.³⁰⁸ That is, we could identify that information most salient and require it to be disclosed in a time and manner most useful to the public. This is particularly true when specific information intermediaries are involved in the process of creating disclosure requirements; they can provide input into the form and content necessary for efficacy.

3. *Accountability Mechanisms*

Another important aspect of success in disclosure policies has been having a defined mechanism for accountability. The mechanisms revealed in the disclosure literature provide a starting point, but accountability has been a theme in the transparency literature as well.³⁰⁹ Indeed, as documented above,³¹⁰ government accountability is the *raison d'être* for transparency laws. As such, the three mechanisms of disclosure that can affect discloser behavior identified above³¹¹ can be applied to reveal opportunities in the government transparency context to better promote accountability.

To begin, the dominant mechanism in the disclosure literature for changing disclosers' behavior is the feedback loop between the public and the disclosers. That is, the public will learn the relevant information and react in a way that forces changes in behavior. To be sure, the limits of this mechanism already discussed are very real even

306. Herz, *Law Lags Behind*, *supra* note 272, at 584-85 ("Two other limitations are inherent in the statute's structure and approach. . . . Second, FOIA imposes no obligation to generate, compile or interpret information. The statute applies solely to 'records' which exist independently of the statute. Thus, it creates some disincentive to create records and is only a minimal step toward providing citizens with knowledge, as opposed to information.")

307. 5 U.S.C. § 552(a)(2)(E) (2018). The only exception is in subpart (E), where FOIA requires agencies to publish "a general index of the records referred to under subparagraph D" which implicitly indicates that agencies must create such an index, something the agency would not normally otherwise do. *See id.*

308. Fenster, *Opacity*, *supra* note 1, at 941.

309. *See, e.g.*, Hale & Slaughter, *supra* note 262, at 154; Shkabatur, *supra* note 152, at 81 & *passim*; Fenster, *Opacity*, *supra* note 1, at 899.

310. *See supra* Section I.B.

311. *See supra* Section II.A.

in the private disclosure regimes, and in the public sphere the barriers to success are generally even greater.³¹² In particular, one problem identified with transparency as to government, rather than disclosures by private business, is the lack of defined feedback loop. For private business, consumers or investors have a more discrete set of actions they can take if they do not approve of the released information, whereas voters have only very general recourse that does not specifically address any particular executive branch action of which they may not approve.³¹³ That is, voting is based on so many factors that a single subject matter that is disclosed is unlikely to change voter behavior in a traceable way, and thus unlikely to prompt changes in behavior by elected, much less unelected, officials.

Yet, voting is not the only democratic feedback mechanism. So long as a more direct link is established between the public's mechanism for reaction and the government entity disclosing the relevant information, successful democratic feedback is possible. As Mary Graham documented, possible public pathways to accountability after a disclosure include not only voting, but also lobbying legislative actors, decisions by boards and commissions, commenting on regulations, petitioning for enforcement actions, bringing lawsuits, and public demonstrations.³¹⁴

The APA's notice-and-comment procedures provide a useful example. It allows for disclosures that facilitate three democratic feedback opportunities that are tied to the specific disclosures: a public comment process, opportunities for public mobilization through protest, and a cause of action to sue agencies over unlawful actions in federal court.³¹⁵ While none of these mechanisms is of course perfect,³¹⁶ they each have played an important role in many instances. In particular, APA lawsuits during the Trump administration provide some evidence of the accountability power of disclosure.³¹⁷

To begin, technological innovations have greatly increased public participation in the comment process as a direct democratic accountability mechanism for proposed regulatory actions. Indeed, one tangible benefit of the launch of Regulations.gov can be seen in the increased accessibility of citizen participation in administrative

312. See *supra* Section III.B.2.

313. Etzioni, *supra* note 7, at 195-96 (explaining that "most times that transparency reveals the defects of a given policy, such information cannot be converted into action that affects that policy" largely because policy information "serves mainly as one source of information and judgment about the overall reputation of the representative in question" about whom the voter will make a decision).

314. GRAHAM, *supra* note 2, at 144.

315. See *supra* notes 148-51 and accompanying text.

316. Indeed, some have called it downright unsuccessful. See Shkabatur, *supra* note 152, at 87 ("Although the notice and comment process was envisioned as a landmark of public accountability, it has nonetheless evolved into a system that is widely considered inaccessible and nontransparent.").

317. See *infra* notes 334-40 and accompanying text.

rulemaking. Prior to the launch, agencies published proposed rules in the Federal Register.³¹⁸ Accordingly, citizens interested in proposed rules had to have the most recent Federal Register to provide meaningful comments.³¹⁹ And while some libraries carried the Federal Register, by the time they received and cataloged it, the public comment periods had often passed before it could even be placed on the shelves.³²⁰ The difficulties of access naturally equated to deflated citizen participation. For instance, in 1989, the EPA listed nine proposed rules it deemed “significant” under the Resource Conservation and Recovery Act (RCRA).³²¹ Of these nine rules, the EPA only received approximately twenty-five comments per rule.³²² The other sixty-three proposed rules under the RCRA that year only received an average of six comments per rule.³²³ This level of participation was not limited to the EPA. Indeed, other agencies received similarly dismal numbers of citizen comments.³²⁴ In a 1996 study of fourteen rulemakings, the largest number of comments submitted on a proposed rule totaled only 2,250.³²⁵

With the launch of Regulations.gov, the public was given the opportunity to take a more active role in providing feedback to proposed administrative rules. Take the Department of Transportation, for example. When it first began placing its proposed rules on Regulations.gov in 1998, it received only 4,341 comments to 137 rules.³²⁶ But only two years later in 2000, it received 62,944 comments to 99 rules, marking a nearly twentyfold increase in the number of comments received for each rule.³²⁷ More notably, the EPA

318. Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 949 (2006).

319. *See id.*

320. *Id.*

321. *Id.* at 950.

322. *Id.*

323. *Id.*

324. *See id.* As Professor Coglianese noted:

Researchers have found similar comment levels in studies of other rules and other agencies. Political scientist Marissa Golden examined comments submitted on eleven randomly selected regulations proposed between 1992 and 1994 by the EPA, the National Highway Traffic Safety Administration (NHTSA), and the Department of Housing and Urban Development (HUD). The number of comments submitted on these rules ranged from one to 268, with a median of twelve comments submitted per rule. In another study, political scientist William West examined comments on forty-two rules completed by fourteen different agencies in 1996. The number of comments ranged from zero to 2,250, with the median rule garnering only thirty-three comments.

Id.

325. Lauren Moxley, *E-Rulemaking and Democracy*, 68 ADMIN L. REV. 661, 667 (2016) (noting that “[t]hree studies analyzing participation across multiple agencies in 1989, 1992-1994, and 1996, found that the median number of comments submitted for each rule was twenty-five, twelve, and thirty-three, respectively”).

326. Coglianese, *supra* note 318, at 955.

327. *Id.* at 955-56.

received more than 2.5 million comments on a proposed rule for greenhouse gas performance standards in 2012.³²⁸ These numbers provide evidence that Regulations.gov has successfully opened the world of citizen feedback within the rulemaking realm.

To be sure, the comment process is far from perfect. Costs of reviewing large numbers of comments,³²⁹ an influx of canned or even “spam” comments,³³⁰ and technological problems have been cited as barriers to full participation.³³¹ Moreover, whether agencies can meaningfully review and incorporate these volumes of public comments is an open question.³³² As a counterweight, the public comment process can also trigger opportunities for public protest, mobilization, and outreach, such as the efforts of MoveOn.org and others that activate communities to participate in agency actions.³³³ Regardless, the notice required in a notice-and-comment rulemaking is not stand-alone disclosure. Rather, it is disclosure with a defined mechanism for public accountability feedback.

Moreover, commenting is not the only feedback loop for APA disclosures. The APA also provides a private cause of action for agency actions that are contrary to law, unsupported by the factual record, or constitute an abuse of agency discretion.³³⁴ While APA review is deferential and agencies prevail more often than not, APA review is still meaningful, resulting in reversals about a third of the time.³³⁵

328. Melissa Mortazavi, *Rulemaking Ex Machina*, 117 COLUM. L. REV. ONLINE 202, 207 (2017).

329. *Id.*

330. Gregory D. Jones, *Electronic Rulemaking in the New Age of Openness: Proposing a Voluntary Two-Tier Registration System for Regulations.gov*, 62 ADMIN. L. REV. 1261, 1273 (2010) (“spam” comments include “bulk uploads of thousands of repetitive comments from servers of private organizations”) (quoting CYNTHIA R. FARINA ET AL., *ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING* 29 (2008)).

331. For instance, in 2017, the Federal Communications Commission’s (FCC) online portal, the Electronic Comment Filing System (ECFS), crashed after nearly 24 million comments were submitted in one rulemaking because of the sheer volume of comments submitted simultaneously. STAFF OF S. SUBCOMM. ON INVESTIGATIONS, ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS 1, <https://www.hsgac.senate.gov/imo/media/doc/2019-10-24%20PSI%20Staff%20Report%20-%20Abuses%20of%20the%20Federal%20Notice-and-Comment%20Rulemaking%20Process.pdf> [<https://perma.cc/9EXC-MHTZ>].

332. Jones, *supra* note 330, at 1273; *see also* Dorit Rubenstein Reiss, *Tailored Participation: Modernizing the APA Rulemaking Procedures*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 321, 325 (2009); Adam Looney, *How to Effectively Comment on Regulations*, BROOKINGS INST. 1 (Aug. 2018), https://www.brookings.edu/wp-content/uploads/2018/08/ES_20180809_RegComments.pdf [<https://perma.cc/P7JN-38CL>] (noting that for citizens to provide meaningful comments, “[s]imply stating that you support or oppose a policy is not as persuasive as explaining how the policy would positively or negatively affect your specific situation”).

333. *See, e.g., People-Powered Petitions, MOVE ON*, https://sign.moveon.org/?source=front_nav&utm_content=nav&utm_source=front [<https://perma.cc/Z9KM-ALKQ>] (last visited March 31, 2021).

334. 5 U.S.C. §§ 702-706 (2018).

335. *See* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 137 (2010) (finding that similar reversal rates occur across various standards of review).

Interestingly, during the Trump administration where other types of accountability (such as shaming discussed above) have been particularly impotent, APA lawsuits have been a relatively successful avenue for accountability. Some reporters call these “political lawsuits,”³³⁶ but the fact is that just two years into his presidency, the Trump administration had lost at least sixty-three lawsuits brought under the APA, including lawsuits concerning immigration, housing, and the environment.³³⁷ Notably, states have been increasingly active in suing the Trump administration under the APA, exemplifying another aspect of democratic feedback: federalism concerns between the states and the federal government.³³⁸ Indeed, the record seems to suggest that the APA does in fact provide a democratic accountability mechanism for reasoned decision-making. What we can learn from the APA, then, is that one way to make targeted transparency as regulation measures effective is to pair them with a defined democratic feedback loop.³³⁹

Of course, not all targeted transparency as regulation depends on a feedback loop. Rather, the other two mechanisms identified in the literature can operate successfully—sometimes more successfully—without the need for a reaction on the part of the public-disclosees.³⁴⁰ This impact can happen either because the discloser-government actor wants to avoid a bad public reaction and/or the shaming that will come with disclosure, and thus changes his or her behavior. Or it can happen because the information required to be disclosed is, in fact, new even to the discloser, who then has an incentive to improve upon that metric or react to the new information.³⁴¹

In the private disclosure context, “[r]evealing risks affects one of the most valuable assets of any organization: its reputation.”³⁴² For

336. Lorelei Laird, *Political Lawsuits Bring the Administrative Procedure Act to the Forefront*, ABA JOURNAL (Mar. 5, 2018), http://www.abajournal.com/news/article/political_lawsuits_bring_the_administrative_procedure_act_to_the_forefront [https://perma.cc/9KNP-9CMH].

337. Fred Barbash & Deanna Paul, *The Trump Administration Has Lost in Court at Least 63 Times. Here’s Why*, MERCURY NEWS (Mar. 19, 2019), <https://www.mercurynews.com/2019/03/19/the-trump-administration-often-loses-in-court-heres-why/> [https://perma.cc/5H4Y-BTW7].

338. Reid Wilson, *States Sue Trump Administration at Record Pace*, HILL (Feb. 12, 2020), <https://thehill.com/homenews/state-watch/482620-states-sue-trump-administration-at-record-pace> [https://perma.cc/QA3X-KCDK].

339. Hale & Slaughter, *supra* note 262, at 154 (“When these [accountability] tools—which include market pressure, personal and institutional values, and even dialogue with society—are available, transparency mechanisms can go beyond mere monitoring and provide actual enforcement.”).

340. *See supra* Section II.A (discussing the three mechanisms).

341. Dalley, *supra* note 13, at 1096-97, 1126 (explaining that requirement for publicly traded companies to disclose whether their audit committee has a financial expert and whether senior executives are subject to an ethics code was more than likely designed “to force companies to appoint audit committee experts and adopt ethics codes” rather than simply act on market forces).

342. GRAHAM, *supra* note 2, at 3.

government officials, an agency's reputation is an important source of agency authority, autonomy, and power.³⁴³ Indeed, as one set of scholars described, "[a] growing body of research has acknowledged the importance of reputational considerations in decision making by public entities."³⁴⁴ Moreover, ethical considerations are a "cardinal concern" in public agencies, and public officials have "the responsibility to set the example in society."³⁴⁵ Some empirical evidence suggests that public organizations, because of their social mission and procedural formality, are more likely to hew closely to ethical standards and to value ethical integrity.³⁴⁶ Thus, for government agencies, these other mechanisms by which targeted transparency as regulation can change behavior may be quite powerful indeed.

Given these strong influences, targeted transparency as regulation design should very carefully consider precisely what information will be generated and revealed. There is always a risk that "political dynamics often produce gerrymandered transparency," that is, that the transparency requirements skew the truth or are easy to game.³⁴⁷ Yet, well-crafted requirements can truly force information gathering and comprehension by the very government officials most likely to be influenced by facing the reality of the situation. NEPA is a great example of a policy that attempts this sort of intervention, and of course, as discussed above, NEPA has provided for some successes and some failures.

However, other missed opportunities are apparent; FOIA's affirmative disclosure provisions are a case in point. As Jennifer Shkabatur has persuasively argued, "online transparency policies—and not only their rhetoric—should focus on accountability-related information."³⁴⁸ By that, Shkabatur means "structured information on their decisionmaking processes and on their performance—the two categories of information that are most pertinent for public accountability purposes."³⁴⁹ But FOIA's affirmative disclosure policies—the only truly transsubstantive agency proactive disclosure requirements—do not require the release of "government information. Rather, they provide for disclosure of law. The idea, frequently stated, was to avoid the existence of 'secret law.'"³⁵⁰

343. Daniel P. Carpenter & George A. Krause, *Reputation and Public Administration*, 72 PUB. ADMIN. REV. 26, 30.

344. ARILD WÆRAAS & MOSHE MAOR, ORGANIZATIONAL REPUTATION IN THE PUBLIC SECTOR 17 (2014).

345. James S. Bowman & Claire Connolly Knox, *Ethics in Government: No Matter How Long and Dark the Night*, 68 PUB. ADMIN. REV. 627, 635-36.

346. Clinton H. Richards, *Private and Public Sector Ethics*, 4 J. BUS. & ECON. RES., no. 5, 35, 37 (2006).

347. FUNG ET AL., *supra* note 15, at 172.

348. Shkabatur, *supra* note 152, at 81.

349. *Id.*

350. Herz, *Law Lags Behind*, *supra* note 272, at 586.

So what do they provide? One subset of these provisions requires certain documents to be published in the Federal Register: an organizational description, procedural rules, and substantive regulations.³⁵¹ A second provision, known as the “reading room” provision (because the agencies used to meet this obligation by placing the materials in a physical room in their offices to which the public had access), requires a separate set of materials to be made “available” for public inspection: final orders in the adjudication of cases, guidance documents, and staff manuals.³⁵² But the interesting thing is that these categories are simply types of documents that detail the law, rules, regulations, and requirements that affect the public. They do *not* go to accountability—how and why decisions are made and how well the agency is performing.

The reading room provision was significantly amended as part of the 1996 FOIA (EFOIA) amendments.³⁵³ These amendments first required that the reading room documents now be made available “in an electronic format” (which in practice means on the agency’s website) and also added a category of records to be proactively disclosed: frequently requested records.³⁵⁴ As the Senate Report explained in justifying the mandate, agencies should not be “[e]ncumbered by requests for routinely available records or information that can more efficiently be made available to the public through affirmative dissemination means.”³⁵⁵ That is, at base, EFOIA was an attempt at making agency responses to traditional FOIA requests more efficient. It was not an attempt to target the release of information most important to public accountability, just information that the public asks for most frequently for *any* reason.

But interestingly, the rhetoric around these amendments tied them to accountability. When signing the new legislation into law, President Bill Clinton acknowledged FOIA’s role in fostering civic engagement, stating that the law “underscore[d] the crucial need in a democracy for open access to government information by citizens.”³⁵⁶ Yet, they are not tailored accountability mechanisms at all.

To get beyond these types of disclosure requirements and truly achieve targeted transparency as regulation, disclosure mandates must specify information to be gathered, sorted, understood, and presented to the public in a way that is likely to affect government behavior for the better. Targeted information about government decision-making and performance is the best place to start.

351. 5 U.S.C. § 552(a)(1) (2018).

352. § 552(a)(2).

353. Winders, *supra* note 112, at 914.

354. *Id.* at 921.

355. *Id.* at 916.

356. President’s Statement on Signing the Electronic Freedom of Information Act Amendments of 1996, 2 PUB. PAPERS 1743 (Oct. 2, 1996).

CONCLUSION

Targeted transparency as regulation is not wholly new, but it has never before been examined as a distinct phenomenon. It shares attributes of the government transparency laws—accountability is the touchstone of its public purpose. It also shares attributes of private disclosure mandates—regulatory effects are its design. By revealing this distinct category of laws, we are able to shed light on their design, execution, and efficacy using the disclosure literature as applied in the transparency context.

Doing so is not just a theoretical exercise. Targeted transparency as regulation laws provide one—but certainly not the only—possible avenue for increased exploration in light of forceful arguments about the efficacy of traditional transparency tools. Because accountability is an inherent requirement of democracy, an additional tool in our arsenal for government oversight is meaningful. Moreover, applying a disclosure framework counsels toward stringent evaluative mechanisms for how well targeted transparency as regulation laws effectuate their goals. Holding transparency laws to higher performance standards elevates the transparency field itself.

