

# ARTICLES

## PRIVATE GOVERNMENT AND THE TRANSPARENCY DEFICIT

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*Modern government is comprised of a complex admixture of public and private actors. From the provision of public services, to growing movements to sell off national parks, to the very task of legislating, the public is unlikely to encounter an area of government that is untouched by privatization. But public transparency mechanisms, including the seminal Freedom of Information Act (FOIA), rely upon an outdated, rigid conception of the private-public dichotomy. They fail to provide the public with any meaningful access to what we call the “private government,” which includes the private actors who bear an increasing responsibility for performing governmental functions. A paradigm shift is required, from a focus on who creates or possesses a document, to the public impact and importance of the document.*

*We propose to turn the primary tool of privatization—the private law contract—into a mechanism for injecting public oversight into contractual delegation. Specifically, we outline a framework for a statute which would require agencies to retain ownership of information created pursuant to a contractual relationship or to justify, ex ante, why the public interest in public access is outweighed by other considerations. The agency-owned records would be subject to the full panoply of ordinary FOIA provisions and any decision to exempt records*

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*from the ownership requirement would be subject to judicial review. Our proposal mitigates some of the problems inherent in asking private entities to open their books to FOIA scrutiny and properly places the onus on public agencies to fulfill their roles as protectors of the public.*

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## INTRODUCTION

There has been a dramatic expansion of private actors carrying out governmental functions, largely by taking advantage of deregulation, outsourcing, and marketized approaches to the regulation that remains.<sup>1</sup> Business

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1. While we focus herein on mechanisms of privatization in the United States, these are truly global issues, and the solutions we present may be adapted and scaled to address these issues around the world. See, e.g., Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 *FORDHAM URB. L.J.* 1611, 1612 (2001) (“[G]overnments from the United States and Canada to Malaysia and New Zealand are being challenged to reinvent, downsize, privatize, devolve, decentralize, deregulate and de-layer themselves, subject themselves to performance tests, and contract themselves out.”); John B. Goodman & Gary W. Loveman, *Does Privatization Serve the Public Interest?*, *HARV. BUS. REV.* (Nov.–Dec. 1991), <https://hbr.org/1991/11/does-privatization-serve-the-public-interest> (“By the end of the 1980s, sales of state enterprises worldwide had reached a total of over \$185 billion . . . . In 1990 alone, the world’s governments sold off \$25 billion in state-owned enterprises—with continents vying to see who could claim the privatization title.”); see ROBERT KUTTNER, *CAN DEMOCRACY SURVIVE GLOBAL CAPITALISM?* xiii (2018) (“A quarter century ago in the glow

norms and market values have become central even to noneconomic institutions such as public safety providers, welfare, prisons, and safety net regulation generally.<sup>2</sup> Many administrative agencies now regularly contract with private parties, specifying terms at the outset, and maintaining a varying degree of supervisory authority. As a practical matter, however, it is the private contractors who now deliver not only many of the services formerly reserved to government, but exercise roles once traditionally considered to be “core governmental functions,” such as the management of prisons.<sup>3</sup> In sum, since the 1970s, economic thinking has pervaded—indeed dominated—public administration and the politics of law.<sup>4</sup>

The artificial bright line historically drawn between public and private—through deeply entrenched doctrines such as the “state action” doctrine<sup>5</sup>—frequently takes private actions out of the constitutional due process orbit and beyond the reach of important “quasi-constitutional” civil rights statutes, such as the Freedom of Information Act (FOIA).<sup>6</sup> The rigidity of the private-

of postcommunist triumphalism, many were predicting that globalization would link democracy with capitalism in a splendid convergence. Instead, we are witnessing a primitive backlash against both the global market and liberal democracy.”).

2. For examples of many of the administrative law issues currently involved in such areas, particularly those involved with outsourcing, see Alfred C. Aman, Jr. & Carol J. Greenhouse, *Prison Privatization and Inmate Labor in the Global Economy: Reframing the Debate Over Private Prisons*, 42 *FORDHAM URB. L.J.* 355 (2014); also see Alfred C. Aman, Jr. & Joseph C. Dugan, *The Human Side of Public-Private Partnerships: From New Deal Regulation to Administrative Law Management*, 102 *IOWA L. REV.* 883 (2017). Cf. Mariana Valverde, Fleur Johns & Jennifer Raso, *Governing Infrastructure in the Age of the “Art of the Deal”: Logics of Governance and Scales of Visibility*, *POL. & LEGAL ANTHROPOLOGY REV.*, Sept. 2018, at 118 (“For a long time, bridges, tunnels, public hospitals, commuter train lines, and similar projects were called public works—not only because they serve public purposes but also because they were planned and largely funded by government agencies.”).

3. Alfred C. Aman, Jr., *The Transnationalization of Domestic Law: A Perspective from the United States*, *IND. UNIV. MAURER SCH. LAW, Legal Stud. Research Paper Series, Research Paper No. 401, 1, 2* (2018), <http://ssrn.com/abstract=3260875>.

4. *Id.* at 10–11.

5. Alfred C. Aman, Jr., *Information, Privacy, and Technology: Citizens, Clients, or Consumers?*, in *FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION ESSAYS IN HONOUR OF SIR DAVID WILLIAMS* 325, 336 (Jack Beatson & Yvonne Cripps eds., 2000) (“The public function approach can be seen as an extension of the United States Supreme Court’s state action concept, where entities performing functions for the government are deemed state actors for constitutional purposes. Arguably, if these entities can be termed ‘state actors’ under the Constitution, they should be subject to access as governmental agencies under the [Freedom of Information Act (FOIA)].”).

6. Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People’s Elusive “Right to Know”*, 72 *MD. L. REV.* 1, 18 (2012) (arguing that FOIA has “First Amendment

public divide fails to appreciate that the modern state exercises its authority in complex ways.<sup>7</sup> It further fails to recognize that privatization is very much a form of governmental action. The defining characteristic of modern privatization has been not just the mere contracting for the provision of services, but the delegation (often without fanfare or public input) of public authority to private entities.<sup>8</sup> “[T]he notion [that] the public relates to ‘state based authority,’ and the ‘private’ to other actors” no longer accurately describes the current governing regimes.<sup>9</sup> The “government” with which the average citizen interacts is a complex admixture of private and public actors, empowered by an intricate web of statutes, regulations, contracts, and less formal partnerships. As a consequence, private actors provide services, make decisions, and even craft terms of legislation and regulation.<sup>10</sup>

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foundations” and a “quasi-constitutional character”); *see also* Courthouse News Serv. v. Brown, 908 F.3d 1063, 1069 (7th Cir. 2018) (Hamilton, J.) (internal brackets and quotations omitted) (“A major purpose of the First Amendment was to protect the free discussion of governmental affairs. Free speech carries with it some freedom to listen . . .”).

7. *See* Janet McLean, Lecture, *The Transnational Corporation in History: Lessons for Today?*, 79 IND. L.J. 363, 363 (2004) (“Corporations and states are commonly represented as having an oppositional relationship. Corporations represent the private; states represent the public . . . But these commonly held views are ahistorical and tend to ignore the complex relationships between states and corporations.”).

8. *See, e.g.*, Valverde et al., *supra* note 2, at 120 (“[O]fficial discourse [on public-private partnerships] avoids language that might describe an increase in private sector power in favor of gestures toward ‘innovation’ and misleading terms, such as *transferring risks to the private sector*—which, in turn, is presented as inherently innovative and therefore ‘good.’”); Horatia Muir Watt, *Private International Law’s Shadow Contribution to the Question of Informal Transnational Authority*, 25 IND. J. GLOBAL LEGAL STUD. 37, 39 (2018) (“[P]ublic international law is now . . . increasingly confronted with conflicts articulated as collisions of jurisdictions and applicable law. Among these, private or hybrid authorities and regimes now occupy a significant place.”).

9. Timo Walter & Oliver Kessler, *The Public and Its Problems: How the EU’s Capital Market Union Defines the Bounds of Legitimate Knowledge and Redraws the Boundaries of (Public) Authority*, 25 IND. J. GLOBAL LEGAL STUD. 157, 158 (2018).

10. Privately-created standards began as ways to coordinate “limited and eminently technical” issues, such as measurement methodologies and equipment standards, to ensure compatibility across countries and industries. Naoli Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 ECOLOGY L.Q. 479, 490 (1995). But such standards have grown increasingly ambitious and multifaceted, and as they have expanded in scope, have become frequently “incorporated by reference by national or international regulators, giving what began as voluntary standards the force of law.” ALFRED C. AMAN, JR. & CAROL J. GREENHOUSE, *TRANSNATIONAL LAW: CASES AND PROBLEMS IN AN INTERCONNECTED WORLD* 401 (2017). “Free public access to [the text incorporated by reference into regulations] is reliably provided only in the Office of

This, in turn, impacts jobs, public safety, transportation, access to justice, healthcare, welfare, and much more.<sup>11</sup>

FOIA, especially as originally conceived and drafted, is ill-suited to provide access to privately-created or privately-held information—regardless of the public nature, importance, or funding of the information.<sup>12</sup> FOIA's structure, at present, reflects the unyielding and imprecise private-public dichotomy.<sup>13</sup> Nonetheless, as we shall argue, FOIA represents a transparency ethic

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the Federal Register's reading room . . . Otherwise a reader may be required to pay substantial access fees set by drafting organizations, significantly obstructing public access, particularly by individuals and small businesses." ABA SECTION OF ADMIN. LAW & REGULATORY PRACTICE, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 106A, at 17 (2016). Equitable participation in such quasi-legislative processes is all but nonexistent; rather, only those with the resources or cache to be invited have a say. These practices have drawn a growing body of critical literature, including, for example, Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, in THE POLITICS OF GLOBAL REGULATION 44 (Walter Mattli & Ngaire Woods eds., 2009); Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497 (2013); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 433–36 (2006) ("Both state legislatures and Congress delegate authority to [Standard Setting Organizations] to formulate standards . . . [which are] then incorporated directly into law."); David A. Wirth, Symposium, *The International Organization for Standardization: Private Voluntary Standards as Swords and Shields*, 36 B.C. ENVTL. AFF. L. REV. 79, 79 (2009).

11. We use the term private government throughout this article to emphasize the governmental roles fulfilled by private entities in the context of outsourcing. Scholars often differentiate the public actions with which we are concerned from those carried out by the private sector, often described as a form of "governance" or an example of "governmentality." The usage of "governance" implies that the activities being carried out by the private entity involved represents an alternative to government, as "if equal to its effects [but] by different means." A binary distinction between government and governance is inadequate for our purposes since we are concerned with the source of governing authority, not just its endpoint in implementation. In the expanded FOIA context that is the subject of this Article, we are concerned with firms that ultimately rely on authority derived from the state. In most of our examples, that authority derives from a contract initiated by the state with a private entity. When governance (in the usual sense of this term) involves a transfer of state authority to non-state actors, "states govern through civil society entities, not merely in tandem with or in the context of society." AMAN & GREENHOUSE, *supra* note 10, at 14–15 (drawing on Ole Jacob Sending & Iver B. Neumann, *Governance to Governmentality: Analyzing NGOs, States and Power*, 50 INT'L STUD. Q. 651 (2006) (arguing against the "conventional binarisms of government and governance, state and society, and 'hard law' and 'soft law'").

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

13. See generally Paul R. Verkuil, *supra* note 10, at 402–21 (articulating a historical description of the erosion of the private-public dichotomy but arguing that, at least to a limited

which warrants preserving and advancing so as to shed light on the modern private state. Moreover, when adjusted to properly focus on the nature of the document instead of its producer or holder, FOIA provides some promise as an adaptable model for private contractors.

Alternative forms of privatization without contracts, such as public asset sales, education vouchers, deregulation, marketization, and various hybrids, are gaining momentum among privatization advocates.<sup>14</sup> Because of this shift, activities that may at one point have been considered as purely “private” take on public character due to their vast public impact, such as industrial activities that are harmful to the environment or untoward labor practices that undermine the legitimate economy. Increasingly, governments have made the deliberate decision to scale back regulatory and enforcement mechanisms and to instead defer to market forces, i.e., private companies and other private actors, to set these norms. These forms of privatization pose even more problems to a comprehensive transparency regime,<sup>15</sup> and further demonstrate the embeddedness of private government throughout structures of public authority.

Can citizens more effectively be involved in governing such processes?<sup>16</sup> We think they can, though at this point such involvement appears increasingly aspirational.<sup>17</sup> The transparency deficit we identify deepens the well-documented “democracy deficit” by undermining the accountability of public officials and the transparency of public actions—the core values and structures of democratic society.<sup>18</sup> Protecting important rights for prisoners and those in need of healthcare or welfare assistance, not to mention citizens

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extent, “[t]he public-private distinction still has a role to play in locating limits on the transfer of political power to private hands”).

14. See *infra* Part III.

15. E.g., Kristen E. Eichensehr, *Public-Private Cybersecurity*, 95 TEX. L. REV. 467, 515 (2017) (addressing problems in cybersecurity, including the prevalence of informal arrangements between law enforcement and private persons/entities); Chris Edwards, *Privatization, DOWNSIZING THE FED. GOV'T* (Jul. 12, 2016), <https://www.downsizinggovernment.org/privatization> (collecting examples of privatization, many of which would not require contracts).

16. ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT* 1 (2004).

17. *Id.*

18. *Id.*; Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 949 (2006) (“But transparency is also necessary because a state that fails to design a system capable of disclosing information essential for a government to be held accountable by an informed public is undemocratic.”); Andrea Ballesterio S., *Transparency in Triads*, 35 POL. & LEGAL ANTHROPOLOGY REV. 160, 160 (2012) (“[T]ransparency technologies are intended to correct the democratic deficits of existing forms of law, bureaucracy, and even subjectivity. Here, *transparency* is as a form of intervention into a world constituted by relations that can be molded, corrected, and regimented.”).

who might have benefitted more from direct regulation as opposed to marketized approaches, has proven difficult, especially once public services and regulatory responsibilities have been shifted and entrusted to private providers.<sup>19</sup> Indeed, issues of widespread public importance, such as public safety, transportation, and environmental preservation, face growing threats where public regulators have either been withdrawn due to deregulation or left underfunded.<sup>20</sup> Private entities, even when wielding public authority, operate in nearly complete secrecy.<sup>21</sup> Even the extent of private government is largely unknown by the public.<sup>22</sup> Holding the private government accountable, as well as the public officials who empower it, requires that its decisions be known and subject to political and, where appropriate, judicial review.

Modern government treats individuals “not just as citizens, but clients and consumers as well.”<sup>23</sup> The complex variety of interactions mandates complex responses;<sup>24</sup> a one-size-fits-all approach is insufficient to address transparency problems posed by the different forms of privatization. Accordingly, we draw from several approaches to identify solutions for confronting new or unfamiliar regimes of private government. When practicable, we propose to turn the primary tool of privatization—the private law contract—into a mechanism for injecting public oversight into private government. Where privatization occurs without a contract, we rely upon the broader social contract to justify and propose methods for mandating affirmative disclosure of information that has significant public impact. These include proposals to include transparency clauses in asset sales contracts and to expand affirmative disclosure regimes, ranging from financial disclosures to product labelling.

The character of public power is not fundamentally altered by placing it into private hands. To the contrary, its public character persists, as should be attendant on a broader conception of public law generally and adminis-

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19. See, e.g., Matthew D. Bunker & Charles N. Davis, *Privatized Government Functions and Freedom of Information: Public Accountability in an Age of Private Governance*, 75 JOURNALISM & MASS COMM. Q. 464, 470–71 (1998).

20. See discussion and sources cited *infra* Part III.

21. Cf. Feiser, *supra* note 12, at 23 (“As the federal government contracts with private entities to handle these services, citizens are finding it very difficult to obtain important information related to the government . . .”).

22. *Id.*

23. Aman, *supra* note 5, at 333.

24. See Goodman & Loveman, *supra* note 1 (“Privatization . . . is not one clear and absolute economic proposition. Rather it covers a wide range of different activities, all of which imply a transfer of the provision of goods and services from the public to the private sector.”).

trative law in particular. The primary method of protecting that public character—the democratic process and judicial enforcement mechanisms that are unique to public entities<sup>25</sup>—is insulated (if not completely erased) by privatization.<sup>26</sup> Part I explains FOIA's shortcomings, particularly as applied to nominally-private activity. Part II discusses how FOIA may be enhanced to shed light on private government. Part III looks beyond traditional contractual delegation to explore how other transparency-enhancing mechanisms may be adapted to phenomena such as asset sales and noncontractual delegations of state authority. Part IV identifies several lessons we can learn from the case studies, beginning with thoughts on the broader democratic implications of the burgeoning private government. Privatization, in all of its forms, can obscure quintessentially public decisions and endanger democratic processes. Decisionmakers can too easily avoid political responsibility for their actions by treating them as if they are the product of the market and not themselves. Our proposals highlight this problem and suggest a hopeful path for democratizing private government.

## I. FOIA AND "PRIVATE" GOVERNMENT

Considering the reticence with which FOIA was passed and signed, it is no surprise that FOIA's limitations have undermined its usefulness for ensuring government transparency. Its limitations make FOIA, in its current state, all but unavailable for people seeking information from private contractors performing important governmental tasks.

Part I discusses this background before considering several attempts to extend, replace, and refine FOIA in Part II. Despite its limitations, FOIA represents a model—and a transparency ethic—that is worth preserving. That is, for all of the warranted criticism FOIA has received, FOIA remains reflective of a broader "right to know."<sup>27</sup> And despite its shortcomings, its passage was part of a concerted effort to address "a surfeit of secrecy and an information drought."<sup>28</sup> These remain critical threats to representative democracy. The same forces that led to FOIA may again animate a solution appropriate for addressing the opacities and realities of the twenty-first century private-public hybrid government.

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25. This includes both causes of action designed specifically to be brought against public entities, such as those brought pursuant to the Administrative Procedure Act or 42 U.S.C. § 1983, and lawsuits brought by agencies and other public entities.

26. See, e.g., Feiser, *supra* note 12, at 25 ("[S]imply by filtering records out of their possession, federal agencies can circumvent the [FOIA] and its spirit of open government.").

27. Sullivan, *supra* note 6, at 20.

28. *Id.* at 21.



A. “*I May Be Making a Mistake*”

FOIA’s principal aim is to protect the “citizens’ right to be informed about ‘what their government is up to.’”<sup>29</sup> Concerns for government transparency hearken back to the Framers. As James Madison noted, “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 which knowledge gives.”<sup>30</sup>

Nevertheless, when President Lyndon Johnson initially considered the legislation, some 140 years after Madison, he was personally opposed to it. He ultimately signed the bill into law, stating publicly: “[W]ith a deep sense of pride that the United States is an open society in which the people’s right to know is cherished and guarded.”<sup>31</sup> But privately, he had reservations. One account of the signing claims that Johnson remarked: “I may be making a mistake.”<sup>32</sup> But President Johnson had little to fear from the new bill.

FOIA was, as one commentator noted, a “weak and complicated law, weakened further by the Justice Department’s emasculation of the House report . . . [and] further weakened by the [Justice Department’s] memorandum explaining the statute and weakened even further by agency regulations implementing it.”<sup>33</sup>

Even as applied just to the government, FOIA faced criticism from agencies (on one side of the debate) and open access advocates (on the other) from

29. U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 772–73 (1989) (quoting EPA v. Mink, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)). See generally Fred H. Cate, D. Annette Fields & James K. McBain, *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 (1994) (discussing the history of FOIA and arguing for the expansion of the central purpose test in applying the statute).

30. Letter from James Madison to W. T. Barry (Aug. 4, 1822), in THE WRITINGS OF JAMES MADISON, no. 9, at 103 (Gaillard Hunt ed. 1910).

31. SUBCOMM. ON ADMIN. PRACTICE & PROCEDURE OF THE S. COMM. ON THE JUDICIARY, 93RD CONGRESS, FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 1, 1 (Comm. Print 1974).

32. Mark P. Schlefer, *I Helped Draft the Freedom of Information Act 50 Years Ago. Here’s What I Learned About Government Secrecy*, WASH. POST (July 1, 2016), [https://www.washingtonpost.com/opinions/the-freedom-of-information-acts-accidental-beginnings/2016/07/01/ce18e820-3d5e-11e6-80bc-d06711fd2125\\_story.html](https://www.washingtonpost.com/opinions/the-freedom-of-information-acts-accidental-beginnings/2016/07/01/ce18e820-3d5e-11e6-80bc-d06711fd2125_story.html) (“To his everlasting credit, Johnson signed the bill over the objection of his Cabinet. The fact that he picked the Fourth of July for signing it suggests that, despite his comment, he did not think he was making a mistake.”).

33. See Samuel J. Archibald, *The Freedom of Information Act Revisited*, 39 PUB. ADMIN. REV. 311, 315 (1979).

day one<sup>34</sup> and continuous academic critique ever since.<sup>35</sup> Still, it has accomplished undeniable good and it sets forth a transparency ethic for us that is worth pursuing—looking at its limitations shows that the transition from public to private can extend beyond services to public authority itself.<sup>36</sup> To this extent, however, it is important that we revisit its weaknesses, but in today’s context of an increasingly private government.

### B. FOIA’s Limitations

FOIA codifies a rigid conception of the private-public dichotomy. Private providers almost always fall outside of the scope of FOIA, even when they provide public services pursuant to contracts with public agencies.<sup>37</sup> While Congress wanted FOIA to reach entities that “perform governmental functions and control information of interest to the public,”<sup>38</sup> the statute, by its terms, reaches only “agency”<sup>39</sup> and “agency record[s].”<sup>40</sup> And while

34. *E.g.*, Ralph Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L.L. REV. 1, 15 (1970).

35. *E.g.*, Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1014–15 (2008) (collecting authorities); Laurence Tai, *Fast Fixes for FOIA*, 52 HARV. J. ON LEGIS. 455 (2015).

36. With FOIA, the United States became only the third country in the world to pass a comprehensive public access regime. In 2018, over fifty years on from FOIA’s passage, FOIA ranked just 69th nationally on the Global Right to Information Rating, a leading index that measures the strength of a country’s public access framework. CTR. FOR LAW & DEMOCRACY & ACCESS INFO. EUR., *By Country*, GLOBAL RIGHT TO INFORMATION RATING, <https://www.rti-rating.org/country-data/> (last visited Mar. 31, 2019). This may be attributed in no small part to the increasing frequency with which private organizations perform public functions and the effectiveness of the exemptions in the present legislation. CTR. FOR LAW & DEMOCRACY & ACCESS INFO. EUR., *United States*, GLOBAL RIGHT TO INFORMATION RATING, <https://www.rti-rating.org/country-detail/?country=United%20States> (last visited July 25, 2019) (assessing zero points because “FOIA does not apply to any private corporations,” including “private bodies that perform a public function and . . . private bodies that receive significant public funding”).

37. 5 U.S.C. § 552 (2012).

38. H.R. REP. NO. 93–876, at 8 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6267, 6274; *see* 5 U.S.C. § 552(f)(1) (“[A]gency’ . . . includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency . . .”).

39. “Agency” is defined in 5 U.S.C. § 551(1) (2012).

40. This brief summary draws from Feiser, *supra* note 12, at 23; JUNE SEKERA & DANIEL AGOSTINO, GLOBAL DEV. & ENV’T INST. AT TUFTS UNIV., FREEDOM OF INFORMATION ACT (IN)APPLICABILITY TO GOVERNMENT CONTRACTORS (2017), [http://www.ase.tufts.edu/gdae/Pubs/rp/Sekera\\_FOIA\\_Report\\_2017.pdf](http://www.ase.tufts.edu/gdae/Pubs/rp/Sekera_FOIA_Report_2017.pdf).

“agency” is defined to include “government controlled corporation” as an item separate from, but alongside, “government corporation,” the courts quickly shut down the idea that financial control, on its own, could suffice.<sup>41</sup> Rather, active, “substantial federal supervision” over an entity’s operations is required to satisfy the agency definition.<sup>42</sup>

Even if a private entity meets this tough standard and qualifies as a “government-controlled corporation” (and thus as an “agency”), the “agency record” element imposes an additional hurdle. As interpreted by the courts, a record is an “agency record” only where it is both possessed by an agency and controlled for official use.<sup>43</sup> Thus, even if a private company holds an agency record, or if an agency holds a privately-created record, if it is not held for “official use,” the record does not qualify for FOIA disclosure.<sup>44</sup>

Finally, even if a private company meets the “agency” definition and has a record that is an “agency record,” FOIA contains nine express exemptions that further limit disclosure.<sup>45</sup> These include documents relevant to national

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41. Feiser, *supra* note 12, at 37–42.

42. Feiser notes that one critical battleground was over the definition of “government-controlled corporation.” Feiser, *supra* note 12, at 37–42. Feiser observed that, in *Forsham v. Harris*, for example, the Supreme Court acknowledged that federal grantees could be considered “agencies,” but decided that grantee status would be insufficient without “substantial federal supervision.” *Id.* at 38 (citing *Forsham v. Harris*, 445 U.S. 169, 180 n.11 (1980)).

43. Feiser, *supra* note 12 at 43–44.

44. This test insulates private service providers from FOIA’s disclosure requirements without any inquiry into the function they are performing or whether the function was delegated by an agency pursuant to statutory authority. Government agencies may thus “avoid the Act’s requirements by transferring records out of the government’s hands” with impunity. Feiser, *supra* note 12 at 36. But much as courts applying civil discovery rules have looked to pragmatic definitions of “control” to require parties to produce documents technically in the hands of nonparties, so too is it possible to come up with a principled solution that would sufficiently protect the public’s interest in critical government dealings while preventing bona fide business documents from routine disclosure. *E.g.*, *Williams v. Angie’s List*, No. 1:16-cv-00878-WTL-MJD, 2017 WL 1318419, at \*2–3 (S.D. Ind. Apr. 10, 2017) (holding that company had to turn over nonparty-held background data from sale platform because the company “cannot avoid producing these data with the excuse that it has outsourced critical components of their employees’ work tasks, all while taking full advantage of the benefits of that outsourcing relationship,” looking to pragmatic indicia to decide whether the company had “control” over the data). Taking a cue from *Williams*, we believe the state may not avoid providing information from the public merely because it has outsourced “critical components” of public governance.

45. 5 U.S.C. § 552(b) (2012).

security,<sup>46</sup> internal agency personnel documents,<sup>47</sup> certain information exempt by statute,<sup>48</sup> trade secrets,<sup>49</sup> certain interagency memoranda,<sup>50</sup> and certain law enforcement documents,<sup>51</sup> among others. The controversial and overinclusive nature of these exemptions is well analyzed in the literature,<sup>52</sup> but it suffices for present purposes to observe that these exemptions (1) further undermine the transparency ethic embodied in FOIA and (2) may actually be useful in fine-tuning FOIA to adequately account for competing interests as applied to private companies.

As currently interpreted, whether information is subject to FOIA turns primarily on who creates and who possesses a particular record. This focus codifies a faulty normative premise—namely, that whether the public has the right to access information should turn on who makes or holds a particular record. It also codifies the faulty public-private dichotomy, relying upon the assumption that agencies are governmental or “public” and all other providers are “private.” We argue that the public’s right to access must be determined by reference to the nature of the information itself.<sup>53</sup>

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46. *Id.* § 552(b)(1).

47. *Id.* § 552(b)(2).

48. *Id.* § 552(b)(3).

49. *Id.* § 552(b)(4).

50. *Id.* § 552(b)(5). One particularly absurd invocation of this exemption involves the Federal Communications Commission’s (FCC’s) refusal to release emails regarding Chairman Ajit Pai’s “Harlem Shake” YouTube video, designed in collaboration with conservative news website Daily Caller to promote his efforts to repeal the FCC’s “net neutrality” rule. Jon Brodtkin, *Ajit Pai’s “Harlem Shake” Video Preparations Must Remain Secret, FCC Says*, ARS TECHNICA (Apr. 6, 2018, 12:14 P.M.), <https://arstechnica.com/tech-policy/2018/04/fcc-wont-reveal-the-secrets-behind-ajit-pais-anti-net-neutrality-dance-video/>; Mikael Thalen, *FCC Finally Releases Emails on Ajit Pai’s ‘Harlem Shake’ Video*, DAILY DOT (Dec. 17, 2018, 2:33 P.M.) <https://www.dailydot.com/layer8/fcc-emails-ajit-pai-harlem-shake/>.

51. 5 U.S.C. § 552(b)(7) (2012).

52. *E.g.*, Martin E. Halstuk, *When Secrecy Trumps Transparency: Why the OPEN Government Act of 2007 Falls Short*, 16 COMMLAW CONCEPTUS J. COMM. L. & POL’Y 427, 446 (2008) (focusing on overbroad interpretation of certain exemptions); William R. Sherman, *The Deliberation Paradox and Administrative Law*, 2015 BYU L. REV. 413, 425 (2015); Zachary D. Reisch, Note, *The FOIA Improvement Act: Using a Requested Record’s Age to Restrict Exemption 5’s Deliberative Process Privilege*, 97 B.U. L. REV. 1893, 1895 (2017); *cf.* Christine N. Walz & Charles D. Tobin, *The FOIA “Exclusions” Statute: The Government’s License to Lie*, COMM. LAW. J. MEDIA INFO. COMM. & L., Mar. 2014, at 10 (criticizing FOIA “exclusions” which permit government, under certain circumstances, to respond to requests with “we have no records,” even when records exist). This trend has continued with the Supreme Court’s decision in *Food Marketing Institute v. Argus Leader Media*, No. 18–481, slip op. at 5–12 (U.S. June 24, 2019), endorsing a broad interpretation of the confidential commercial information component of Exemption 4.

53. *See* discussion *supra* note 44.

An appropriate framework should balance inquiries such as: Does the information relate to governmental functions? Does it have a non-incidental impact on the public? Was the information created pursuant to an agreement with the government, or was it produced pursuant to solely private transactions? Is this the type of information that agencies have produced in the past or would be expected to produce given their statutory mandate? To put it simply, we think it uncontroversial to suggest that if a document is important enough to the public interest beyond private pecuniary concerns,<sup>54</sup> it should not matter for purposes of a governmental transparency framework who creates or holds a particular record.<sup>55</sup>

Our goal is to fundamentally shift the discussion from *who* is creating information (e.g., an agency versus a private corporation) to *what* information is being created (e.g., records concerning toxic waste disposal versus a land purchase or corporate takeover). We do not solve every problem related to these issues, but we believe that our proposals would effect a modest evolution in terms of private record disclosure.

Private companies already provide many essential services affecting marginalized people—such as, for example, those in prisons or on some form of welfare.<sup>56</sup> And they are increasingly providing essential services affecting all echelons of society, such as air traffic controllers,<sup>57</sup> public safety providers, primary and secondary education, infrastructure, and other tasks formerly thought of as primarily public. All strata of a society now have a vested interest in ameliorating and mitigating the growing problem of “private government” transparency.<sup>58</sup>

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54. Cf., e.g., Tai, *supra* note 35, at 470 (expressing concern over use of FOIA to further purely business ends by collecting information on competitors); Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REG.: AEI J. GOV. & SOC'Y, Mar./Apr. 1982, at 14, 16 (arguing that FOIA has “been used largely as a means of obtaining data in the government’s hands concerning private institutions”).

55. See Aman, *supra* note 5, at 334–36.

56. See generally Aman & Dugan, *supra* note 2.

57. See, e.g., H.R. 2997, 115th Cong. (2017); H.R. REP. NO. 115–296 (2017); Shaun Courtney, *The Astroturf is Greener on the Other Side of the Air Traffic Debate*, BLOOMBERG BNA (Sept. 8, 2017), <https://www.aviationcrossamerica.org/news/2017/09/08/the-astroturf-is-greener-on-the-other-side-of-air-traffic-debate/>. Transparency advocates looking for an opportunity to generate bipartisan interest may, for example, focus on the possibility of privatizing air traffic controllers. That should cause concerns across the political spectrum. If outsourcing of services for the indigent and marginalized fails to generate widespread concern about public accountability and transparency, transparency advocates could take such an opportunity to demonstrate how hidden governance can impact everyone.

58. One analyst, surveying the literature, estimates that expenditures on private contractors rose from approximately \$300 billion in 2003–2004 to approximately \$500 billion in

## II. EXTENDING, REPLACING, AND REFINING FOIA

Over the past fifty years or so, scholars have proposed myriad solutions for altering FOIA to better promote the transparency ethic. These proposals fall largely into two categories, ranging from ad hoc transparency bills targeting particular industries or subject areas to comprehensive rewrites that dispatch with the FOIA framework. After analyzing solutions in each of these areas, we propose a third option, refining FOIA via a contractual administrative model that restores to agencies the power to assess, at least initially, what information produced pursuant to a contract should be made public.

### A. Extending FOIA

Current ad hoc proposals for extending FOIA demonstrate the complexities of contracting out. The scope of public-private contracts ranges from nearly-complete displacement—and replacement—of public authority to merely recruiting private assistance with clerical or maintenance matters. That is not to say that the latter is risk-free when it comes to threats like graft or budgetary improprieties. But a contract for maintaining a city pool carries with it a *de minimis* risk of undermining fundamental due process protections compared to, for example, a contract to operate and provide health services for a private prison. Likewise, minimal public authority is divested when the government retains supervision over a construction contract. The converse is true when the government passes off responsibility for designing and administering social safety net programs or stands aside while private firefighters take charge of firefighting and management.<sup>59</sup>

Ad hoc solutions proposed by scholars and politicians help identify the most extreme boundaries of contracting out, where what is being contracted is more than a service—it is power, discretion, and authority. These contributors subscribe, as we do, to the notion that transparency is essential to inject

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2012. JUNE SEKERA, *Outsourced Government—The Quiet Revolution*, GLOBAL DEV. & ENV'T INST. TUFTS UNIV. 1, 5 (2017), [http://www.ase.tufts.edu/gdae/Pubs/rp/Sekera\\_ContractorData\\_Brief\\_2017.pdf](http://www.ase.tufts.edu/gdae/Pubs/rp/Sekera_ContractorData_Brief_2017.pdf). Sekera notes that private contractors outnumber federal employees two-to-one. *Id.* at 2. While that margin has fluctuated since 1984, reaching peak imbalance in 2010 (2.28 to one), *id.* at 4, Sekera also observes, as we have in Aman and Dugan, *supra* note 2, at 886, that the trend is “toward increased contracting out of basic governmental functions.” Sekera, *supra*, at 4.

59. See, e.g., Alexis C. Madrigal, *Kim Kardashian's Private Firefighters Expose America's Fault Lines*, ATLANTIC (Nov. 14, 2018), <https://www.theatlantic.com/technology/archive/2018/11/kim-kardashian-kanye-west-history-private-firefighting/575887/> (“[B]eginning in the mid-1980s and accelerating in recent years, Forest Service budget cuts and increasingly prevalent wildfires opened the door for private contractors to assume roles formerly held by government employees.”).

a bit of democracy and process into these high-stakes contracts. For example, scholars have identified and proposed fixes to address transparency deficits in environmental law,<sup>60</sup> government contract pricing,<sup>61</sup> international intellectual property law,<sup>62</sup> military operations,<sup>63</sup> and private prisons,<sup>64</sup> to name just a few.

And ad hoc proposals can make for practical case studies. For example, various iterations of Senator Benjamin Cardin's Private Prison Information Act have been introduced in recent years and summarized by the Congressional Research Service as follows:

This bill specifies that a record related to a non-federal prison, correctional, or detention facility must be considered a federal agency record for purposes of the Freedom of Information Act (FOIA).

A non-federal prison, correctional, or detention facility must disclose information under FOIA unless the information is exempt from disclosure or the disclosure is prohibited by law.

The term "non-federal prison, correctional, or detention facility" means: (1) a private prison, correctional, or detention facility; or (2) a state or local prison, jail, or other correctional or detention facility.<sup>65</sup>

Senator Cardin's proposal instructs agencies to expand FOIA to private prisons in the following way:

60. *E.g.*, Sarah Lamdan, *Beyond FOIA: Improving Access to Environmental Information in the United States*, 29 GEO. ENVTL. L. REV. 481, 510–11 (2017); Sarah Shik Lamdan, *Sunshine for Sale: Environmental Contractors and the Freedom of Information Act*, 15 VT. J. ENVTL. L. 227, 248 (2014) [hereinafter Lamdan, *Sunshine for Sale*] (proposing a contract-based solution to remedy the transparency deficit for environmental contractors).

61. David Allen Dulaney, *Where's the Harm? Release Unit Prices in Awarded Contracts Under the Freedom of Information Act*, ARMY LAW., Nov. 2010, at 37, 47.

62. David S. Levine, *Bring in the Nerds: Secrecy, National Security, and the Creation of International Intellectual Property Law*, 30 CARDOZO ARTS & ENT. L.J. 105, 107, 141 (2012).

63. Seth F. Kreimer, *Rays of Sunlight in A Shadow "War": FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1143 (2007); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1024–25 (2005); Jay A. Yagoda, Note, *Seeing is Believing: The Detainee Abuse Photos and "Open" Government's Enduring Resistance to their Release During an Age of Terror*, 21 U. FLA. J.L. & PUB. POL'Y 273, 303–04 (2010). *But see* Devin S. Schindler, *Between Safety and Transparency: Prior Restraints, FOIA, and the Power of the Executive*, 38 HASTINGS CONST. L.Q. 1, 3 (2010) (arguing for limited review of the president's decisions on whether to release "inflammatory but nonconfidential information" in the name of national security).

64. *E.g.*, Nicole B. Cásarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249, 267, 270 (1995); Mike Tartaglia, Note, *Private Prisons, Private Records*, 94 B.U. L. REV. 1689, 1708 (2014).

65. CONG. RESEARCH SERV., *S.3422—Private Prison Information Act of 2016 Summary*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/3422/text?q=%7B%22search%22%3A%5B%22S.+3422%22%5D%7D&r=1&s=2> (last visited Apr. 20, 2019).

Compliance with this section by an applicable entity *shall be included as a material term in any contract*, agreement, or renewal of a contract or agreement with the applicable entity regarding the incarceration or detention of Federal prisoners or detainees in a non-Federal prison, correctional, or detention facility.<sup>66</sup>

Senator Cardin's proposal would fill an important gap in treating private prison providers the same as public prison providers with respect to transparency while continuing to protect private companies from disclosing bona fide business information under the existing FOIA exemptions.<sup>67</sup> Under Cardin's proposal, private prison providers would have a clear directive, *ex ante*, of what is expected and the benefit of a robust corpus of case law explaining what the FOIA responsibilities will entail. The bill leaves no room for debate that private prison operators would be subject to the full panoply of FOIA disclosure requirements and protections.

Senator Cardin's proposal demonstrates a unique melding of the private and public. It fundamentally requires use of private law (specifically, contract law) to inject a measure of public law into a contractual delegation of public responsibility. Moreover, contracts speak in the familiar vernacular of mutual obligations, and transparency should be considered an enforceable term just like any other contract term. Perhaps this approach would be more palatable to government contract seekers, which would almost certainly contest and resent efforts for top-down, traditional legislation or rulemaking.

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66. Private Prison Information Act of 2016, S. 3422, 114th Cong. § 3(d)(2)(A) (emphasis added).

67. As we explain throughout the piece, we are committed to the idea, argued persuasively by politicians, policymakers, and scholars, that some tasks—and, particularly, private prisons—are too intimately connected with public authority and responsibility to be wholly delegated to the private sector. See, e.g., André Douglas Pond Cummings & Adam Lamparello, *Private Prisons and the New Marketplace for Crime*, 6 WAKE FOREST J.L. & POL'Y 407, 414 (2016) (concluding private prisons are not economically or morally logical); Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589, 615 (2012) (finding that private prisons create an incentive to increase prison populations); Antonio Iglesias, Note, *Abolishing the Private Prison Industry's Evolving Influence on Immigrant Oppression*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 293, 319 (2019) (discussing that private prisons encourage immigrant mistreatment); Alex Thomsson, *How Sen. Elizabeth Warren Would Try to Ban Private Prisons*, POLITICO (June 21, 2019, 4:34 P.M.), <https://www.politico.com/story/2019/06/21/elizabeth-warren-2020-election-private-prisons-1296863> (outlining a plan to ban private prisons). This Article approaches the debate from the standpoint of improving the public's access to information relevant to oversight and accountability. There is, too, a growing literature proposing the abolition of prisons altogether as a means to address "the suffering wrought by overincarceration, overcriminalization, and the racialized violence that haunts punitive policing and imprisonment." Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1238–39 (2015) (arguing that this literature warrants serious consideration). Expounding upon these arguments is beyond the scope of this Article except to the extent that the debate underscores the crucial role of the public in democratic oversight of incarceration, whether public or private.



Such a proposal demonstrates that while public power can easily be contracted away, it can just as credibly be asserted in the same fashion. This does not mean that access to privately-created documents pursuant to a government contract needs to be an absolute right; however, as we have suggested above, the strength of the right may be conceived of as a sliding scale. That is, transparency mandates should reflect the extent to which a contract delegates public authority, such as whether the contract allows for discretion, whether the contractor will be interacting directly with the public, the extent to which the vulnerable or disenfranchised may be impacted, and so forth. Senator Cardin's proposal reflects the considered judgment that these factors weigh in favor of transparency as applied to private prisons.<sup>68</sup>

Tackling the transparency deficit on an issue-by-issue basis yields many benefits, not the least of which are in-depth, robust analyses of problem areas. Such solutions tend to be well-reasoned, workable, and compelling—the product of careful consideration of the costs and benefits, both pecuniary and otherwise.<sup>69</sup>

Second, piecemeal solutions may more plausibly gain traction in a Congress that is highly unlikely to reach a consensus on a comprehensive FOIA overhaul.<sup>70</sup> Targeting particularly sensitive areas additionally permits advocates to assemble a compelling body of evidence that may in turn be used to put pressure on elected officials. Moreover, once a statute is implemented to increase transparency for a particular industry, we may use the resulting data as a real-world experiment to draw conclusions about what worked and what requires further fine-tuning. To that end, transparency advocates may likewise seek state FOIA amendments in jurisdictions friendly to such efforts and use the resulting data to craft federal solutions.

Third, we may look at trends in these scholars' focuses to identify solutions that may work more broadly, as well as to look at areas of particular concern. An ad hoc approach to remedying the transparency deficit left by FOIA carries with it drawbacks; however, many are simply the flip side of the benefits listed above. First, and most obviously, these solutions are underinclusive

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68. Cf., e.g., Chandra Bozelko, *Open Record Laws Should Apply to Private Prisons, Too*, HILL (Aug. 9, 2017, 5:00 P.M.), <http://thehill.com/blogs/pundits-blog/crime/345959-open-record-laws-should-apply-to-private-prisons-too> (discussing Senator Cardin's proposal and the revelations on substandard performance, conditions, and treatment that have been unearthed from the limited data presently available on private prisons).

69. See, e.g., Lamdan, *Sunshine for Sale*, *supra* note 60, at 258 (accounting for costs and benefits of contractual transparency requirements versus public participation models).

70. See, e.g., Sheryl Gay Stolberg & Nicholas Fandos, *In Congress, Only Gloom is Bipartisan*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html>.

and somewhat arbitrary, likely allowing many key areas of private governance to proceed unscrutinized.

Second, and less obvious, is transparency fatigue. Transparency is not cost free. It has, moreover, many opponents in those who benefit from the status quo.<sup>71</sup> A gradual approach to transparency improvements (such as on a subject-by-subject basis) would provide special interests, lobbyists, and recalcitrant politicians with opportunities to stymie further gains at every turn. We advocate that the larger debate over the soul of this country, and the need to return the public into the private, should happen sooner rather than later. Piecemeal debates may cause the political process to devolve into gamesmanship.<sup>72</sup>

Theoretically, as a case study in efforts to address the private government transparency deficit, an ad hoc FOIA extension properly focuses on what it is that private entity is doing, such as operating a prison or putting out wildfires, instead of who is doing the action. But in picking and choosing some private contractors and not others, a piecemeal approach by its very nature fails to treat the private government as such—as an arena which presumptively merits attention just the same as public government because of its character as a manifestation of essentially public action. Proposals such as Senator Cardin's are accompanied by substantial research and explanation for why the particular type of private contractor (prison operators, in this example) must be subject to public oversight via FOIA transparency. But they are not accompanied by an explanation for why other private contractors are not similarly treated. We seek herein to outline a framework which would require such considered decisionmaking.

### B. Replacing FOIA

Some theorists argue that any document pertaining to official governmental purposes should be open to the public, regardless of whether it is privately

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71. See, e.g., Sekera, *supra* note 57; KUTTNER, *supra* note 1.

72. Cf., e.g., Karen Bogenschneider & Elizabeth Gross, *From Ivory Tower to State House: How Youth Theory Can Inform Youth Policy Making*, 53 FAM. REL. 19, 22 (2004) (“A comprehensive, long-term perspective too often is constrained by categorical funding streams, brief legislative sessions, and election demands for immediate results. Given these pressures, policy makers are forced into looking for quick solutions to complex problems, which result in piecemeal, magic-bullet approaches.”); Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93, 105 (1954) (criticizing the NLRB for preferring adjudication over other types of decision as “fragmentary in character, placing primary emphasis on the special facts of the single case, and focusing attention on one small facet of what is often a complex problem” and noting that such approaches “make[] perspective difficult [and] tend[] to obscure the fact that policy is being made and to discourage direct discussion of the wisdom of the policy”).

or publicly produced. The greatest merit to such proposals is that they properly focus on the nature of the document insofar as it concerns the government and the people, instead of restricting considerations to the producer of the document. If a document is created in furtherance of a congressional mandate, the critical inquiry should focus on that relationship.

But scholars who have proposed such comprehensive overhauls of FOIA—including but not limited to a complete rejection of the current framework—“hedge[] on the details,” in part because it is unclear what such an overhaul would involve.<sup>73</sup> This becomes all the fuzzier when we look to expanding a transparency framework to private government.

Several such scholars argue that the reactive, request-driven FOIA regime should be jettisoned in favor of proactive disclosure requirements.<sup>74</sup> We support and agree with the rationale underlying such proposals insofar as they seek to remedy FOIA’s shortcomings in government-held documents; as Professor Pozen argues, the current system “is arguably reactionary in a more substantive, political sense insofar as it empowers opponents of regulation, distributes government goods in a regressive fashion, and contributes to a culture of contempt surrounding the domestic policy bureaucracy while insulating the national security state from similar scrutiny.”<sup>75</sup> Affirmative disclosure is a critical part of any public transparency regime, and we touch on some areas below where affirmative disclosure may be expanded. Unlike our later discussion of affirmative disclosure, which provides targeted areas where corporations should be required to *create* information of public importance (largely summaries of prior activities, such as political, safety, or environmental actions), Professor Pozen’s proposal targets mandatory disclosure of government-held, already-created information.

As our focus here is on private transparency, however, we must take into account the distinction between publicly and privately held information. For all our arguments that the disclosure regime should focus on the importance of information to the public and not the character of the creator or holder, we also seek solutions that may be politically viable. Indeed, in some cases it may be useful for the corporations themselves to have the protections that might flow from greater transparency when they are engaged in public duties. Moreover, while we believe the public importance should be driving disclosure requirements, we would be remiss to ignore altogether the differences

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73. David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1156 (2017); *cf.*, *e.g.*, Daxton R. “Chip” Stewart & Charles N. Davis, *Bringing Back Full Disclosure: A Call for Dismantling FOIA*, 21 COMM. L. & POL’Y 515, 517–19, 529 (2016).

74. *E.g.*, Pozen, *supra* note 73.

75. *Id.* at 1101.

between public and private service providers.<sup>76</sup>

To wit, several of the justifications offered by Professor Pozen for affirmative disclosures—which are well-developed and persuasive as applied to Professor Pozen’s target area: traditional, publicly-held FOIA documents—do not fit nearly as neatly into the private provider context. For example, Professor Pozen argues that agencies may utilize already implemented government online records systems to proactively distribute relevant documents.<sup>77</sup> By their nature, private records holders are substantially less likely to have, or be willing to develop, turn-key ready disclosure systems that could be adapted to the types of disclosures addressed here. Private entities communicate with the public differently (through commercial advertisements, sales contacts, stock offerings, and the like) than public agencies, and these differences would increase political resistance and private cost should an affirmative disclosure regime be imposed on private companies. Our affirmative disclosure proposal below would filter privately-created information through the existing agency framework, taking advantage of the structures identified by Professor Pozen.

Other concerns, which Professor Pozen worries may make affirmative disclosure requirements difficult in the public context, may prove insurmountable if applied across the board to private record holders. Specifically, as Professor Pozen argues, affirmative disclosure requirements, just as the current request-driven system, may “suffer from inattention [and] narrow construction”;<sup>78</sup> these issues are all the more likely to be exacerbated when profits are on the line for private entities.

Finally, Professor Pozen warns of a regime which “produce[s] so much information as to overwhelm outside audiences, ultimately degrading rather than enhancing media coverage and public comprehension.”<sup>79</sup> Given the amount of privately-produced information, this risk seems to be the greatest consideration against any broad affirmative disclosure requirement imposed on private record holders. Private companies will have every incentive to bury the proverbial needle in the haystack while resisting meaningful disclosure of any damaging information. Public agencies, while perhaps frequently reticent to willingly disclose wrongdoing,<sup>80</sup> at a minimum have an undeniable

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76. These differences, of course, suggest that private providers may not be suitable substitutes for public providers with regard to critical human services. *E.g.*, Aman & Dugan, *supra* note 2.

77. Pozen, *supra* note 73, at 1150–51, 1053–54.

78. *Id.* at 1151.

79. *Id.* at 1152.

80. See Aram A. Gavoort & Daniel Miktus, *Oversight of Oversight: A Proposal for More Effective FOIA Reform*, 66 CATH. U.L. REV. 525, 533 (2017) (“[A]gencies have strong disincentives to comply with FOIA . . .”).

public mandate to do so, and political mechanisms exist for rectifying any failures to disclose.

Moreover, assuming an affirmative disclosure policy for government-created information manages to take root, it is not completely clear that a private affirmative disclosure policy would be particularly helpful. The public disclosure would provide notice of the fact of the contractual delegation, following which interested parties could seek the relevant, privately-held documents created pursuant to that delegation. We contend below that federal, state, and local governments can and should expand mandatory private disclosures through already-existing devices such as permitting requirements, activity disclosures, and shareholder disclosures.<sup>81</sup> These, as expanded, would target the types of information most important to the public at large, leaving FOIA-style requests as a means to dig deeper into certain issues or as a compliment to the proposed public affirmative disclosure system.<sup>82</sup> That is, we see our proposed “private FOIA” system as potentially complementary to a public affirmative disclosure system, such as that proposed by Professor Pozen.<sup>83</sup>

Other scholars propose a different type of “comprehensive” reform proposal. Laurence Tai’s suggestion, for example, focuses neither on extending FOIA to a specific industry nor on addressing anomalous transparency gaps left in FOIA.<sup>84</sup> Rather, proposals such as Tai’s and others address narrow performance issues that undermine FOIA’s ability to effectively operate in its current scope.<sup>85</sup> Tai proposes adjusting FOIA’s fees and fee-shifting provisions to make compliance with commercial FOIA requests more cost-effective while ensuring that FOIA remains viable for private and public interest requesters.<sup>86</sup> These issues, while undoubtedly important to the viability of the reforms we discuss here, are beyond the scope of this Article. These proposals demonstrate that FOIA’s incentive structure may be adjusted to work

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81. See *infra* Part III.A.

82. See *id.*

83. See *id.*

84. See Tai, *supra* note 35, at 455.

85. *E.g.*, Gavoor & Miktus, *supra* note 80, at 542 (arguing that FOIA’s “provisions permitting or requiring agency interpretation are inefficient because they are internally inconsistent with its de novo standard of review” and should be replaced with “more specific terms and provisions, thereby removing the necessity for agency interpretation”); Ira Bloom, *Freedom of Information Laws in the Digital Age: The Death Knell of Informational Privacy*, 12 RICH. J.L. & TECH. 9, 1–2 (2006) (noting risk of intrusion into individuals’ privacy interests due to abuse of digital state and federal FOIA databases).

86. Tai, *supra* note 35, at 455 (proposing to “allow[] agencies to retain processing fees, increase[] these fees, especially for commercial and expedited requests, and strengthen[] FOIA’s attorney fee-shifting provisions”).

substantial justice without overburdening the administrative state with purely commercial requests.

Comprehensive overhauls to the existing FOIA framework are aspirational. But as a practical matter, particularly in the short term, the devil truly lies in the details—and undoubtedly in the difficulty of achieving bipartisan support for any large changes in this political climate.<sup>87</sup> These proposals, in their current forms, are not necessarily readymade for the types of private governance we have been discussing.<sup>88</sup>

The scholarship thus far proposes encouraging affirmative disclosure regimes to remedy many of FOIA's shortcomings as currently applied to public governmental actors. But the difficulties in mapping such a regime on to private operators confirm that private government, while parallel to public government and wielding important authority, operates in a different space from public government, with different expectations and goals.<sup>89</sup> An affirm-

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87. Pozen, *supra* note 73, at 1156–57 (arguing that request-driven model should be abandoned in favor of proactive disclosure model but declining to argue “whether FOIA requests ought to be phased out wherever feasible or retained in some modified form” and remaining “genuinely ambivalent about how far to take [the article’s] arguments”); *cf.*, e.g., Stewart & Davis, *supra* note 73, at 537 (positing similar affirmative disclosure thesis, but leaving the “details and intricacies” of disclosure “portals,” as well as “getting the legislative language just right to balance the incentives and consequences,” to future scholars); Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 577, 578–79 (2009) (arguing that “FOIA’s fundamental limitation is its failure to impose affirmative responsibilities on agencies” but acknowledging that “[r]eimaging the Freedom of Information Act is far beyond the scope of this brief [a]rticle”).

88. See authorities cited *supra* note 87.

89. The burgeoning literature on transnational law helps to explore and explain the interrelatedness of the degrees and shade of public and private, recognizing that the dichotomy has disintegrated into “new forms of authority, legitimacy, and political mobilization.” AMAN & GREENHOUSE, *supra* note 10, at 44. Transnational law appreciates that the “principal vehicles of transnational governance” extends beyond traditional sources of law (constitutions and statutes) to, for example, “treaties and agreements; supply chain contracts and industry codes and standards; and the voluntary norms and procedures associated with global governance institutions.” *Id.*; see also Henry Mintzberg, *The U.S. Cannot Be Run Like a Business*, HARV. BUS. REV. (Mar. 31, 2017), <https://hbr.org/2017/03/the-u-s-cannot-be-run-like-a-business> (“A healthy society balances the power of respected governments in the public sector with both responsible businesses in the private sector and robust communities in what I call the plural sector—the clubs, religions, community hospitals, foundations, NGOs, and cooperatives with which so many of us engage.”); Oren Perez, *Purity Lost: The Paradoxical Face of the New Transnational Legal Body*, 33 BROOK. J. INT’L L. 1, 3 (2007) (“The classic doctrines of international law, with their focus on sovereignty, state consent, custom, and treaty, do not provide a satisfactory explanation for many of the practices and institutional structures that fill the global

ative disclosure model makes sense for public agencies because they are designed, from the ground up, for public service.<sup>90</sup> This goal serves as a ready justification for using existing public disclosure-oriented portals to facilitate such a transformative reform. By contrast, the private organizations which collectively operate in the private government are designed primarily (solely?) for profit.<sup>91</sup> As such, their organizational structures are ill-suited to a broad affirmative disclosure regime, at least without sacrificing the putative benefits (largely economic efficiency) of private-public partnerships.<sup>92</sup> While a reactionary FOIA-type framework and additional mandatory reporting requirements may help to mitigate the transparency deficit with respect to private organizations recruited to serve the public good, these differences demonstrate that transparency and democracy are almost unavoidably sacrificed when public services are contractually delegated.

As we demonstrate below, particularly in Part IV, private government has limitations.<sup>93</sup> Thus, while we endeavor to close the transparency deficit, we believe that the profit-directed ends of private organizations dictate that, ultimately, politicians and courts will have to draw a line between what may properly be delegated and what must be off-limits. To reiterate, current governing practice prioritizes outsourcing and offloading responsibility for public actions ranging from firefighting to airport security<sup>94</sup> to legislation incorporating by reference international “standards” which may preclude even

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legal universe. The contemporary legal terrain seems to be characterized by overlapping jurisdictions, inconsistent doctrinal interpretations, and competing worldviews.”).

90. Cf. Mintzberg, *supra* note 89.

91. Cf. *id.*; Verkuil, *supra* note 10, at 468 (“The values behind public service help animate the public-private distinction. When private contractors perform inherent government functions, they jeopardize core values of public law and weaken government’s capacity to do the common good.”); McLean, *supra* note 7, at 375–77 (describing metamorphosis of the corporation from origin as a “creation[] of the state” with “public purpose” to modern characterization grounded in “public/private distinction”).

92. For a comprehensive critique of these alleged benefits, see, for example, KUTTNER, *supra* note 1, and David Hall & Tue Anh Nguyen, *Economic Benefits of Public Services*, REAL-WORLD ECON. REV., June 19, 2018, at 101 (“There is now extensive experience of all forms of privatization, and many studies, surveys, overviews and meta-reviews, whose results repeatedly find no evidence that the private sector is intrinsically more efficient.”).

93. See *infra* Part IV; see also, e.g., Peter Whoriskey & Dan Keating, *Overdoses, Bedsores, Broken Bones: What Happened When a Private-Equity Firm Sought to Care for Society’s Most Vulnerable*, WASH. POST (Nov. 25, 2018), [https://www.washingtonpost.com/business/economy/opioid-overdoses-bedsores-and-broken-bones-what-happened-when-a-private-equity-firm-sought-profits-in-caring-for-societys-most-vulnerable/2018/11/25/09089a4a-ed14-11e8-baac-2a674e91502b\\_story.html](https://www.washingtonpost.com/business/economy/opioid-overdoses-bedsores-and-broken-bones-what-happened-when-a-private-equity-firm-sought-profits-in-caring-for-societys-most-vulnerable/2018/11/25/09089a4a-ed14-11e8-baac-2a674e91502b_story.html).

94. Cf., e.g., Rene Marsh & Eli Watkins, *CNN Exclusive: TSA Considering Eliminating Screening*

the well-to-do from meaningfully participating in essentially-political processes.<sup>95</sup> These forms of “outsourcing,” and the divergent forms of privatization we address below extend far beyond the provision of services to delegation of discretionary decisionmaking on matters of quintessentially political importance. If nothing else, the transparency proposals we contemplate should help generate the evidentiary record upon which both voters and courts may rely in drawing this line.

### C. Refining FOIA

We have already discussed Senator Cardin’s proposal for extending FOIA to private prisons—a proposal that injects public law (the FOIA framework) into public-private outsourcing relationships by using the quintessential mechanism of private law: the contract.<sup>96</sup> Senator Cardin’s proposal provides a roadmap that can and should be generalized to most if not all areas of privatization by contract. And we surmise that there is no reason for FOIA to stop at contracts—similar frameworks may be amenable to inclusion in trade agreements and treaties. In short, wherever the government is a party to an agreement, it has the prerogative and responsibility to include pro-transparency provisions, and we propose a path to help this occur.

Scholars, including Aman, for some time now have recognized that private companies could be required, via contract, to open their activities to public scrutiny.<sup>97</sup> Professor Sarah Lamdan, for example, has built on this

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at *Smaller Airports*, CNN (Aug. 1, 2018, 5:14 P.M.), <https://www.cnn.com/2018/08/01/politics/tsa-considering-eliminating-screening-at-smaller-airports/index.html>. *But see* Verkuil, *supra* note 10, at 445–48 (describing the relocation of airport screening from the private sector to the public in the wake of the September 11, 2001; if, however, the 2001 attacks provided the impetus for reassessing private control of airport security, then perhaps the renewed movement to privatize and trim down government involvement in airport security may be due in part to the long lull in catastrophic terrorist attacks since 2001).

95. See discussion *supra* note 10.

96. See *supra* Part II.A.

97. Alfred C. Aman, Jr., *Privatization and Democracy: Resources in Administrative Law*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 261–62 (Jody Freeman & Martha Minow eds., 2009); e.g., Lamdan, *Sunshine for Sale*, *supra* note 60, at 251–52; Jody Freeman, Symposium, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285, 1328 (2003) (“Although contracts between government and service providers take the form of traditional private-law contracts, and need to be attractive enough in their terms to entice private providers to bid for them, these agreements tend to be more unilateral in design than contracts between two private parties: government generally establishes the terms and providers generally agree to them. Thus, there is room to introduce more give-and-take in the process.”). In particular, we build upon Professor Freeman’s project of ex-



idea to argue that such a private FOIA provision could permit closer supervision of the environmental impact of contractor activities.<sup>98</sup> We seek to generalize a private FOIA regime beyond particular areas, such as private prisons or the environment, and in so doing propose a modification to address several concerns interposed in opposition to this concept. Specifically, we propose below a private FOIA wherein the contracting agency retains *ownership*, following *ex ante* consideration of transparency factors, of the critical public information. The resulting “FOIA requests” would seek information not directly from the private company but instead from the agency regarding the contractor’s activities. We discuss below what this may look like, and how it can balance countervailing considerations of nongovernmental privacy, like trade secrets and efficiency.

Given that outsourcing occurs by contract, there is a great deal of flexibility when it comes to negotiating those contracts with prospective private providers. Two readily available, legally-binding mechanisms exist to encourage transparency provisions—passage of a contracting-out statute or, as a less attractive alternative (because the policy could be altered with a mere switch in administration), an executive order. Such an executive order could enhance OMB’s review of agency actions by requiring, along with cost-benefit concerns, a transparency analysis as well—the lack of FOIA or provisions excluding FOIA should be evaluated as a cost to be justified.<sup>99</sup> A further

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plaining how private law can inject the public into outsourcing contracts, what she calls “publicization,” *id.* at 1285, by drilling down into how to make private governance more transparent—a condition precedent to increased accountability. We also take this opportunity to demonstrate, through the transparency case studies, that privatization can extend to sovereignty and authority itself, and we further develop the limitations acknowledged by Professor Freeman on the publicization-by-contract idea.

98. Lamdan, *Sunshine for Sale*, *supra* note 60, at 251.

99. Imposing systemic regulatory changes (such as the one we propose) by executive order is far from unprecedented. To take one example, consider Executive Order 12,866, which famously requires agencies to promulgate only those regulations “required by law” or “compelling public need” and to “assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.” Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,735 (Oct. 4, 1993). It further requires the Office of Management and Budget (OMB) and the Office of Information and Regulatory Affairs (OIRA) to evaluate all major regulatory actions to ensure that the cost-benefit calculus is followed. *See id.* For one particularly rosy review of Executive Order 12,866, with an interesting explanation for the Order’s staying power across administrations from both major parties, see the thoughts of George W. Bush’s OIRA Administrator, Susan E. Dudley, *Happy Birthday, Executive Order 12866!*, FORBES (Sept. 24, 2018, 8:57 A.M.), <https://www.forbes.com/sites/susandudley/2018/09/24/happy-birthday-executive-order-12866/#1ef863fb3eef>. One of Dudley’s primary explanations is

possibility, particularly in light of a political climate in which transparency is regarded as an anathema, is for individual agencies to adopt, as internal operating procedures or formal regulations, the expectation that outsourcing contracts contain such a provision.<sup>100</sup>

As proposed by many FOIA reformers, we could begin with the premise that any non-exempt document created pursuant to a government contract is subject to FOIA, but still permit the agencies, *ex ante*, to expressly define and justify exceptions and exclusions where other legitimate interests outweigh those of public disclosure. It may be the duties are not significant from a public point of view—a contract to mow lawns for example.<sup>101</sup> But a statute could set out the broad criteria involved, and a decision to bypass some or all of FOIA would need reasons that could be subject to judicial review and public scrutiny.

that cost-benefit principles, and more generally principles of government responsibility, transcend partisan lines. So too do (or should) issues of government transparency. *Id.*

100. See Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1245 (2017) (“[W]e argue that, far from condemning internal administrative law, the APA embraced it . . . Unfortunately, this feature of the APA is one that courts often have ignored . . . At the same time, pressures for centralized White House control have led to the displacement of agencies’ own internal law into versions of internal law that stem from central offices within the executive branch.”).

101. It is important to note that the existing law exempts “matter[s] relating to public . . . contracts” from the APA’s procedural requirements. 5 U.S.C. § 553(a)(2) (2012). There is no differentiation made between types or the importance of contracts—a contract to outsource the painting of agency hearing rooms is the same as a contract to outsource the agency’s regulatory duties. Cf. Arthur Earl Bonfield, *Public Participation in Federal Rulemaking Related to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540, 571 (1970) (“First, rulemaking of the kind exempted by subsection (a)(2) intimately affects millions of Americans in their daily lives, and is one of the most important and frequently used means by which our national government seeks to solve our pressing social, economic, and environmental problems . . . Second, the exemption of rulemaking relating to ‘public property, loans, grants, benefits, or contracts’ also creates a special danger that certain important government agencies may, as entities, become out of touch with and unresponsive to public needs.”). It is as if all contracting out is trivial. But that exception was written at a time when it was assumed that the statutory duties of the agency would be carried out only by the agency itself. See, e.g., Alfred C. Aman, Jr., *An Administrative Law Perspective on Government Social Service Contracts: Outsourcing Prison Health Care in New York City*, 14 IND. J. GLOBAL LEGAL STUD. 301, 315 (2007) (explaining genesis of the APA exemption and the evolution of “[r]eliance on the market for the actual provision of government services [which] coincide[d] with technological changes that have spurred deregulation throughout the 1980s and 1990s . . .”). The erosion and eventual evisceration of that assumption underscores the need for the types of provisions we discuss here—and, ultimately, the need for a new administrative law which is built from the ground up to address the modern reality of private governance.

The Cardin bill could thus be generalized to apply to all agencies that contract out all or a portion of their duties to a private entity, whether or not they involve private prisons. This would put the onus on the agencies to include contractual provisions incorporating FOIA in any outsourcing contract they negotiate. At a minimum, our statutory or regulatory framework would require that transparency and public access be addressed as part of the bargaining process. To the extent the “FOIA provision” is omitted or significantly modified, it needs to be explained. Meaningful judicial review requires some explanation of why a decision was made.

Whether the contractual provision should emulate Senator Cardin’s “incorporate FOIA” provision, contain other language, or perhaps be open to different types of transparency requirements (consistent with reasonable exercise of agency discretion) is a question that can be determined ad hoc. Are different levels of transparency appropriate based upon the nature of the activities being outsourced? Perhaps at this stage, such complexity can be deferred since the existing FOIA exemptions may be tinkered with to address private interests.<sup>102</sup>

In addition to the private interest concerns, which we have largely addressed above and which may be adequately accommodated by the current exemption-based framework, the greatest hurdle our proposed system faces is system gridlock. Already, FOIA requests overburden underfunded agencies.<sup>103</sup> Adding a private FOIA framework on top, complete with judicial

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102. For example, a provision could read as simply as:

All contracts entered into by an Agency as defined in 5 U.S.C. §§ 551(1), 552(f)(1) shall presumptively include the following provision: “All information produced pursuant to this contract is subject to disclosure consistent with the provisions in 5 U.S.C. § 552.”

*Except* that such an Agency may omit or modify this provision if the Agency determines that the contract is not substantially likely to produce information that would be subject to disclosure if produced by the Agency itself. An Agency omitting or modifying this provision must additionally make publicly available a statement justifying the omission or modification within seven (7) days of the execution of the contract. The statement shall be published in the Federal Register and subject to judicial review consistent with 5 U.S.C. § 706.

We argue that the existing, politically acceptable structures from FOIA may be used to shed greater light on the “submerged” state, SEKERA, *supra* note 58, at 1, recognizing that retooling of the exemption-based structure is already necessary to ensure that even critical government-created documents will be publicly disclosed. *See* authorities cited *supra* note 52.

103. Stephanie Alvarez-Jones, Note, “*Too Big to FOIA*”: *How Agencies Avoid Compliance with the Freedom of Information Act*, 39 CARDOZO L. REV. 1055, 1057 & nn.8–10 (2018) (“Backlogs and insufficient resources present significant challenges to the execution of agencies’ duties under FOIA. The failure to update the law to keep up with modern technology and the

review for contractual exemptions, threatens to further burden these systems. And in an era where the administration strips down agencies as a means to deregulate—leaving agencies without the resources to fulfill their statutory mandates—these concerns are not without significant force.<sup>104</sup>

These are not insurmountable concerns. They do not justify the status quo. Nor do they justify making a Cardin FOIA provision mandatory in all outsourcing contracts. As we have suggested, not all outsourcing is created equal. Consistent with the principle that transparency should reflect the public impact of the information (and not the private or public label attached to the purported decision maker), documents relating to private-public school partnerships should be easily accessible, but those pertaining to a gardening contract perhaps could be partially exempt. However, these concerns highlight the delicate balance that our proposed framework must strike. We propose a few methods to mitigate these concerns.

First, a critical part of our framework is outlining the types of information that should be nonnegotiable. We can sketch a few categories that seem to fit this definition: information which directly impacts public services (i.e., policies guiding direct government-public interactions<sup>105</sup>) and information upon which an agency intends to rely on formal or informal decisionmaking. These two categories, which we believe could be fleshed out sufficiently to serve as workable guideposts, suffer from some of the same problems as those posited by reformers who wish to completely overhaul the FOIA framework—they could prove nebulous in practice. We could add a third, with the caveat that it may need to be otherwise tempered by robust exemptions:

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courts' persistent application of outdated recordkeeping standards to modern electronic databases, are even greater hindrances to the law's purpose.”)

104. See, e.g., Jody Freeman, The 2017 Roscoe Pound Lecture, *The Limits of Executive Power: The Obama-Trump Transition*, 96 NEB. L. REV. 545, 550 (2017) (“It appears as if this budget seeks to dramatically cut funding for the agencies, signaling President Trump’s de-regulatory agenda.”). As one practical example, President Trump has taken an exceedingly leisurely approach to appointing agency leaders. See, e.g., Lisa Rein, *Slow Pace of Trump Nominations Leaves Cabinet Agencies ‘Stuck’ In Staffing Limbo*, WASH. POST (Apr. 25, 2017), [https://www.washingtonpost.com/politics/slow-pace-of-trump-nominations-leaves-cabinet-agencies-stuck-in-staffing-limbo/2017/04/25/0a150aba-252c-11e7-b503-9d616bd5a305\\_story.html](https://www.washingtonpost.com/politics/slow-pace-of-trump-nominations-leaves-cabinet-agencies-stuck-in-staffing-limbo/2017/04/25/0a150aba-252c-11e7-b503-9d616bd5a305_story.html); *Tracking How Many Key Positions Trump Has Filled So Far*, WASH. POST (Apr. 20, 2019), <https://www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/>. As one scholar observes, such “extensive vacancies” “contribute to agency inaction, foster confusion among nonpolitical employees, and undermine agency legitimacy.” Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 914 (2009).

105. Among the areas implicating direct government-public interactions are, for example, public safety operations, including fire, policing, and transportation; prison operations; welfare administration; and school administration.

information which, if created by the agency itself, would be subject to disclosure under FOIA, and a fourth: information created with funding provided by the federal government.

These latter two categories may prove the easiest to administer. They would also encourage agencies, if they wished to create categorical exceptions, to provide robust, *ex ante* analyses for why certain categories of documents should not be subject to the private FOIA. For example, agencies might reasonably exclude from the private FOIA provisions information created pursuant to, or involving the purchase of, contracts for office supplies or building maintenance. The traditional “public FOIA” would remain in full effect, but the private contractor would not have to open up its books or otherwise respond to public requests for information. The categorical nature of these exclusions would encourage early resolution of any debates about the reasonableness of the exclusions, subject to some form of review, without necessitating—or at least minimizing—case-by-case objections. Clear congressional directives would further aid in managing these concerns.<sup>106</sup>

Finally, as a promising alternative to forcing private contractors to open up their books upon request, Congress or the president via executive order, can and should put the onus on agencies not only to negotiate for transparency provisions, but to negotiate for actual ownership of information created pursuant to a public-private contract.<sup>107</sup> This solution would advance several important goals. First, it would properly diversify the cost analysis that agencies are already required to take under existing law by requiring agencies to account for the delegation of control and decisionmaking that necessarily accompanies contractual delegation. Second, it would at least acknowledge detractors’ concerns that “productive and innovative private organizations” may have regarding the “invasion of privacy, the added work, and the expense required to comply.”<sup>108</sup> Third, it would again reinforce the duties of

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106. Similarly, the executive could negotiate for similar transparency provisions in international treaties and documents promulgated by transnational authorities.

107. And, though not necessarily a matter of privatization by contract, statutes or regulations incorporating private-created standards by reference should require the government to retain ownership not only over the texts themselves, but of the supporting documentation and any other records of debates, hearings, or reports to allow for meaningful judicial review and political scrutiny. Cf. ABA SECTION OF ADMIN. LAW & REGULATORY PRACTICE, *supra* note 10, at 1 (proposing a resolution urging Congress to amend the APA “to require ‘meaningful free public availability’ of all text incorporated by reference into proposed and final substantive rules of general applicability” and to “ensure that private organizations would, where appropriate, have access to compensation for financial losses attributable to this requirement”).

108. Jeffrey A. Ware, Note, *Clarke v. Tri-Cities Animal Care & Control Shelter: How Did Private Businesses Become Government “Agencies” Under the Washington Public Records Act?*,

government agencies to serve the public and avoid assigning private companies with the somewhat counterintuitive tasks of looking beyond their profit-driven ends.

All three sets of concerns—transparency, private privacy interests, and directing accountability concerns to the public sector—could be assessed, openly and in advance, to ensure that the publicly-relevant information would be subject to the ordinary public FOIA rules, with no need to intrude upon the private entity's books. To the extent such a rule would force private companies to take special measures to transfer ownership of the relevant information without disclosing irrelevant trade secrets or the like, we observe that private companies are already accustomed to having to comply with special bidding and certification procedures, for example, when seeking business from governmental entities.<sup>109</sup> Our proposal would simply expand and provide another layer to these obligations.

In this way, our proposal gets at the heart of the problem of privatization by injecting public authority into an otherwise private state. The legitimate need for such measures suggests that the accountability limitations of private government—the result of delegation of sovereign authority—are part of the character of the private providers themselves and ultimately reach a terminus where the state must be returned. And our proposals are merely a stepping stone to achieving the embeddedness that we ultimately maintain is essential under larger principles of fairness, due process, and democratic legitimacy. To whom is the government accountable? The profit-driven, unelected private sector, or the multi-concerned public?<sup>110</sup> If nothing else, forcing the state-as-delegator to own—literally—its contractual delegations will at least enable the voting public to make this decision for itself.

### III. PRIVATIZATION BEYOND CONTRACTING

The private FOIA scheme we have proposed is limited to privatization by contract. While most privatization is accompanied by contract, many crucial private-public relationships are less formal, though equally impactful. This is particularly the case once we expand our lens to look at nontraditional “private governance,” to include issues such as environmental protection and

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33 SEATTLE U. L. REV. 741, 766 (2010).

109. See, e.g., Robert S. Metzger & Michael J. Scanlon, *Sarbanes-Oxley and Government Contractors: Beyond the Regulatory Burden We Knew*, 41 PROCUREMENT LAW., Winter 2006, at 10 (observing that government contractors are already impacted by and complying with acts like Sarbanes-Oxley).

110. Cf. KUTTNER, *supra* note 1, at 309 (“The challenge is for public institutions to be as resilient as commercial ones, and to mobilize the latent power of popular democracy to keep finance in its proper role as servant of the rest of the economy.”).

labor regulation.<sup>111</sup> And we may expand our lens with good reason. A great many of the global deregulatory regimes in these areas have been foisted upon domestic and local governments by transnational organizations designed and captured by purely private financial interests.<sup>112</sup>

Thus, we now turn to situations where the individual acts not necessarily as a consumer of privatized governmental services, but as a citizen *qua* citizen who is impacted by the regulations (or absence of regulations) imposed upon private entities who pay wages, affect the environment, and sell goods and services. In other respects, the government purports to act just as any other private entity, contracting to sell its resources and enterprises to the highest bidder.<sup>113</sup>

But the government is, of course, not just any other market participant.<sup>114</sup> Rather, it has a historical and normative responsibility to address collective problems. Where it instead delegates or “privatizes” the responsibility for doing so to nonpublic entities, the private actors’ actions must be subject to public scrutiny. The other approaches we have discussed may be used to

111. See generally AMAN & GREENHOUSE, *supra* note 10, at 51–208 (collecting authorities). We may add to these two issues the regulation of airworthiness of commercial airliners, with the ongoing saga of whether the Boeing 737 MAX was rushed to market without appropriate vetting. See, e.g., Dominic Gates, *Flawed Analysis, Failed Oversight: How Boeing, FAA Certified the Suspect 737 MAX Flight Control System*, SEATTLE TIMES (Mar. 21, 2019, 9:46 A.M.), <https://www.seattletimes.com/business/boeing-aerospace/failed-certification-faa-missed-safety-issues-in-the-737-max-system-implicated-in-the-lion-air-crash/> (“The FAA, citing lack of funding and resources, has over the years delegated increasing authority to Boeing to take on more of the work of certifying the safety of its own airplanes. Early on in certification of the 737 MAX, the FAA safety engineering team divided up the technical assessments that would be delegated to Boeing versus those they considered more critical and would be retained within the FAA.”); Matthew Yglesias, *The Emerging 737 Max Scandal, Explained*, VOX (Mar. 29, 2019, 9:10 A.M.), <https://www.vox.com/business-and-finance/2019/3/29/18281270/737-max-faa-scandal-explained>.

112. AMAN & GREENHOUSE, *supra* note 10, at 51–208 (collecting authorities); KUTTNER, *supra* note 1, at 197–201.

113. Cf., e.g., Wentong Zheng, *Untangling the Market and the State*, 67 EMORY L.J. 243, 245 (2017) (“[T]he government is also emerging as a major participant in market activities. Among other things, governments own corporations, employ workers, and buy large amounts of goods and services.”).

114. Compare *id.* at 245, with FOIA Counselor, *FOIA Update: Disclosure of Prices*, U.S. DEPT OF JUSTICE (Jan. 1, 1981), <https://www.justice.gov/oip/blog/foia-update-disclosure-prices> (“There is a different standard in dealings with the government. In the private sector, disclosure of salaries or prices is usually at the option of the parties. But the common principle—where the government is a party—is that neither individual privacy nor private commercial interest justifies secrecy as to government commitments of public funds.”).

shed light on some of the actions of this private state. In other words, transparency needs and solutions are not one size fits all.

To plug the transparency gaps in situations that do not necessarily involve privatization by contract, we embrace the spirit of the categorical and ad hoc solutions we discussed earlier. We describe these situations with case studies that should serve as examples for analogous scenarios. Section A proposes expanding the use of mandatory public disclosures to convey important information in areas of public impact. Section B discusses the need for ad hoc solutions to address the future privatization of public sector enterprises, such as U.S. Postal Service (USPS), AMTRAK, or public utilities. The examples we touch on underscore the difficulties in relying upon private corporations to take into account important public interest factors (such as long-term environmental impact) that may be antithetical to the bottom line. They also reinforce what Part II made clear: privatization, broadly considered, can have deleterious impacts far beyond the marginalized and underprivileged. Poisoned lakes, opaque financial systems, and minimized public greenspace can impact the affluent and indigent alike.

#### A. *Mandatory Disclosures*

Mandatory disclosure schemes come in many shapes and sizes. In the environmental context, for example, laws and regulations require environmental impact statements in conjunction with certain high-impact activities; workplace hazard disclosures; product labeling, covering a range of important information; and accounting disclosures as part of investment or tax reporting.<sup>115</sup> FOIA is not currently designed to reach these areas, as it is designed only to allow private persons to access documents that have already been created. Disclosure laws require the companies to compile or create the information to begin with.

One theory underlying these mandatory disclosures is the refrain that we have been repeating throughout: this information is of such great importance to the public that it must be disclosed regardless of who created it.<sup>116</sup> Disclosures, either to the government, which may act upon them or disseminate them as appropriate, or directly to the public, serve as another means of providing information about what the government is up to where the government has effectively delegated its authority to monitor or regulate to private companies. Where the government requires disclosures of information,

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115. See Peter H. Sand, *The Right to Know: Freedom of Environmental Information in Comparative and International Law*, 20 TUL. J. INT'L & COMP. L. 203, 204-05 (2011).

116. See discussion *supra* note 44.



it surely could instead insist upon governmental audits or inspections to acquire the same information. The choice of a disclosure system is accurately characterized as a less intrusive and lower cost means of regulation. Such systems can and should be expanded to other critical areas where private companies engage in regulable—but unregulated or underregulated—activities that likewise impact the public.

A key theoretical justification for such disclosures first requires acknowledging the true public-private history of the corporate entity. As Professor Jane McLean explains, the notion of a “purely private” company is a wholly modern idea, divorced from the history of the corporation as a public-oriented creature.<sup>117</sup> This is consistent, moreover, with the limited liability compromise. Private entities garner substantial benefits from incorporation, not the least of which is protection from personal liability for the individual shareholders. But this status is a creature of “positive and not natural law”;<sup>118</sup> “corporations are created by states or by the operation of law.”<sup>119</sup> These tradeoffs provide ample ground for insisting upon democracy-enhancing transparency benefits, particularly where a single, multinational company can impact the return of the national economy, influence employee compensation, and either protect or destroy the environments upon which citizens depend for water. Phrased differently, the balance has skewed too heavily in favor of untouchable corporate personhood and against the government’s ability to protect public rights. One consequence of this rhetoric of the natural corporate person is that governments have become hamstrung by doctrines initially designed with individual protection in mind. Transparency, moreover, is simply the first—though potentially dispositive—hurdle in empowering the citizen to make the democratic decisions as to where lines must be drawn as far as regulations on corporate responsibility. Citizens cannot fix problems or respond to facts, risks, and vulnerabilities about which they do not know.

The practical challenges in establishing a functioning transparency framework to restore a bit of public oversight over corporatist interests are twofold: the first is identifying areas where disclosure is desirable and appropriate, considering the value of the information to the public against the cost of its aggregation and production as well as any legitimate need for privacy. The second is constructing a system for disclosure. The forms of environmental disclosure listed above cover a wide range of subject and forms, including direct-to-public disclosures (product labelling), disclosure targeted

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117. McLean, *supra* note 7, at 375.

118. *Id.* at 376.

119. *Id.* at 377.

to particularly interested groups (workplace disclosures), and disclosures filtered through the government (environmental impact reports and disclosures in financial reports). Disclosure laws therefore provide a broad arsenal of tools that may be targeted to strike the best balance of private and public interests, emphasizing the need to identify and remedy underserved public interests.

We seek here to sketch several possible subjects warranting further disclosure and methods to accomplish that disclosure. This task is worthwhile in a case study on delegations of sovereignty and the implications that corporate opacity has in a free-market dominated democracy. When corporations act without accountability, and when those same corporations have captured the domestic and transnational governing authorities that dictate social responsibility standards, the democracy deficits deepens. We highlight these problems and possible ways forward while leaving to future scholars the task of delineating the details.

### 1. *Financial Reports*

Companies, as part of investor disclosures and tax documents, are already required to disclose a wide array of information to the government and directly to investors. For example, the Emergency Planning & Community Right-to-Know Act<sup>120</sup> imposes “mandatory reporting requirements of toxic industrial emissions.”<sup>121</sup> The data is compiled and made publicly available on a website. As Professor Peter Sand observes,

The net effect of all these developments has been to bring important environmental data held by the private/corporate sector into the public domain and thus “to render information less a private good (for enterprise) than a public one.” Among the most effective “multiplier” instruments for this purpose, because they affect all public companies listed on the stock market, are environmental disclosure requirements in corporate financial accounting (stakeholder/shareholder risk disclosure). For example, the U.S. Securities and Exchange Commission (SEC) has since 1971 required filings of environmentally relevant information as part of its regulations concerning mandatory annual reports under Form 10-K.<sup>122</sup>

This model is readily adaptable to other types of information of critical public importance, as a consequence of the use of public stock markets or the privilege of incorporation (and attendant limitations on personal liability).<sup>123</sup> As

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120. 42 U.S.C. § 11001 (2012).

121. Sand, *supra* note 115, at 209–10.

122. *Id.* at 228–29.

123. The Dodd-Frank Act, for example, requires that publicly-listed companies provide disclosures on mine safety, payments to foreign governments by companies who mine or drill, and the use of conflict minerals from the Congo region. David M. Lynn, *The Dodd-Frank Act's*

just a few additional examples, we may decide that markets and shareholders should know where companies are donating their money and require disclosures of all moneys donated above a certain threshold to any 501(c)(3) or (4) companies. Or perhaps companies should disclose labor and employment practices, detailing the percentage of employees employed at or near minimum wage. We could also require disclosures as to corporate structure, including the use of wholly- or majority-owned subsidiaries, domestic or foreign; use of independent contractors; and other information regarding international operations.

The idea that this information may be critical to investors (as a helpful starting place) is far from novel. Beginning as early as the 1970s, investors began looking to the ethics of investing as both a moral and economic matter, with the idea that a corporation's unethical behavior could well produce deleterious results—if not necessarily in the short term, then in the long term.<sup>124</sup> For example, institutional investors divested from companies operating in apartheid-era South Africa in an effort to change their behavior.<sup>125</sup> Business practices premised solely on short-term benefits to investors may have perilous long-term results—both in terms of the corporation's responsibility to its investors and its larger impact on society. For example, British Petroleum,

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*Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues*, 6 J. BUS. & TECH. L. 327, 327–28 (2011). These are important examples of the types of behaviors that may be subject to disclosure through financial reports, though the execution of these provisions has drawn criticism. For example, the conflict mineral provision has been criticized for “creat[ing] a de facto embargo on mineral trade.” Jeremy C. Jeffrey, *Tungsten Is Forever: Conflict Minerals, Dodd-Frank, and the Need for A European Response*, 18 NEW ENG. J. INT’L & COMP. L. 503, 503–04 (2012). This is because, under the act, companies must comply with disclosure and auditing obligations whenever they cannot affirmatively confirm that they did not use conflict minerals from the Congo region. *Id.* at 504. According to one analysis, “[c]orporations . . . find it easier to simply purchase minerals elsewhere than deal with the procedures required to ensure minerals are conflict-free,” *id.*, harming the artisanal miners who instead are frequently forced to sell their minerals on the black market, *id.* at 510–11. These types of unintended consequences mandate careful balancing of incentives—but this should not dissuade efforts to expand transparency provisions. A competing analysis has concluded that Dodd-Frank regulations have “improve[d] conditions in the DRC,” Remi Moncel, *Cooperating Alone: The Global Reach of U.S. Regulations on Conflict Minerals*, 34 BERKELEY J. INT’L L. 216, 230 (2016), and points to the beneficial carrot of permitting companies that go through the effort of verifying the ethicality of their supply chain to brand themselves as “conflict free,” *id.* at 229 (“The new regulations have prompted companies to map their supply chains to an unprecedented extent.”).

124. *E.g.*, Inv. Strategies Comm., *Investing with a Conscience*, 21 EXPERIENCE, no. 1, 2011, at 12, 12.

125. *See id.* at 13.

in its conduct leading to the 2011 oil disaster in the Gulf of Mexico, “apparently felt that the returns to the shareholder required some kind of cost control over safety so there were a number of decisions as reported in the press where certain kinds of safety devices were not installed or were not repaired in order to increase the returns. That clearly was a bad long-term choice.”<sup>126</sup> The more information the market may receive about such practices, the greater the ability the investing and consuming public has to vote with its wallet and express its disapproval.

While it is already an established practice to require useful public disclosures as part of securities regulation—a scheme which could be expanded to include other information of similar import to the environmental disclosures already required—we may similarly expand information disclosures as part of the privilege of incorporation or doing business with a municipality.<sup>127</sup> Indeed, one of the clearest drawbacks to piggybacking disclosures with investment documents is that many corporations are closely held, and the actions of these companies are no less important than those of publicly traded corporations. Moreover, requiring disclosures as part of an incorporation scheme would require regulations at the state level, where national coordination is far more difficult.<sup>128</sup> Nonetheless, incorporation provides substantial benefits (personal liability protection) to the private entity’s stakeholders, and states can and should demand some information in return for those benefits. This information could easily be included as part of tax filings or other regularly filed documents, and likewise be properly cabined to companies of a certain size or engaged in certain industries. In short, the information produced by financial markets need not reflect only economic considerations but should reflect important social information as part of the public’s right to know.

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126. *Id.* at 15.

127. As one potentially promising case study unfolding at this time, the City of Los Angeles has recently passed a new law requiring that contractors disclose any connections to the National Rifle Association, on the grounds that “providing public funds to NRA-linked contractors undermines efforts to promote gun safety in Los Angeles.” Jonathan Stempel, *NRA Sues Los Angeles Over Law Requiring Disclosure of Ties to Gun Rights Group*, REUTERS (Apr. 24, 2019, 9:40 A.M.), <https://www.reuters.com/article/us-los-angeles-nra-lawsuit/nra-sues-los-angeles-over-law-requiring-disclosure-of-ties-to-gun-group> idUSKCN1S01XF.

128. *But see* Moncel, *supra* note 123, at 231–33 (describing the “California Effect,” which is the ability of one political subdivision “to impose its regulatory policies on other [subdivisions] and on companies in a way that leads to a global harmonization of standards and practices,” frequently “because businesses find it economically advantageous to standardize their practices globally to follow a single rule” and then “lobby their home governments to level the playing field with their domestic competitors”). In other words, Moncel suggests that regulation at a local level can result in a race to the top.

## 2. *Permitting*

All sorts of private projects require permits and concomitant disclosures, such as environmental impact studies and the like.<sup>129</sup> A great many of these requirements are imposed at the federal and state level. But particularly at the state and local levels, governmental authorities could demand more information as part of, for example, granting a large development permit to a “big box” store. Already it is not unheard of for groups to rally and challenge openings of stores like Walmart, citing any number of legitimate concerns.<sup>130</sup> The information required should shine even more light on corporations that wish to operate in states and communities, allowing the localities more information in deciding whether to welcome such corporations with open arms.

As with reporting requirements, permitting disclosures may include not only information about the contours of the particular project, but also information about the company’s employment and labor history, environmental history, political activity, and the like. In the end these disclosures would serve not so much as a means of deciding which entities could occupy certain spaces, but would inform the public about the nature of their new neighbor’s behaviors and allow the public to evaluate them accordingly.

Permitting can also be a source of opacity, particularly when it takes the form of broad exemptions from critical environmental regulations.<sup>131</sup> The

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129. See generally Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 149–60 (2014) (“Permitting is one of the workhorses of the administrative state from top to bottom, and for centuries it has reached into every corner of life in America.”).

130. See, e.g., Andre M. Larkins, *Community Rights: Fighting the Walmart Invasion of Small Town America with Legal Intelligence*, 17 SCHOLAR: ST. MARY’S L. REV. & SOC. JUST. 407, 410–12 (2015) (“[C]ommunities nationwide have successfully opposed unwanted Walmart invasions for over two decades . . . In Red Bluff, California, residents waged a ten-year legal campaign to defend their small town community from the inherent side effects of traffic, noise, and pollution that accompany superstore operations. Citizens in Windsor Township, Pennsylvania, went to court and scuttled Walmart’s plans to build a 197,000 square foot supercenter that did not conform to city zoning regulations. In Deschutes County, Oregon, residents filed suit and defeated Walmart’s attempt to circumvent its local requirement for preconstruction road improvements.”); Neita Cecil, *Court Rules Against Walmart Permit*, DALLES CHRONICLE (Dec. 13, 2018), <http://www.thedalleschronicle.com/news/2018/dec/13/court-rules-against-walmart-permit/> (describing successful legal challenge by public group to decision of Oregon Department of State Lands to grant wetland fill permit to Walmart; litigation remains ongoing).

131. See, e.g., Ian Urbina, *U.S. Said to Allow Drilling Without Needed Permits*, N.Y. TIMES (May 14, 2010), <https://www.nytimes.com/2010/05/14/us/14agency.html> (“The federal Minerals Management Service gave permission to BP and dozens of other oil companies to drill in the Gulf of Mexico without first getting required permits from another agency that assesses

EPA has issued over 300 “general permits” permitting companies to discharge pollutants but without the safeguards, limitations, and transparency that ordinarily accompanies permits issued under the National Pollutant Discharge Elimination System.<sup>132</sup> Permitting, while yielding potential for corporate transparency and meaningful public oversight, can also produce cronyism, rent-seeking, and corruption. This makes it a double-edged sword unless properly constrained by a statutory framework that allows for robust private enforcement and processes that give way only under exigent circumstances (for example, when time for a full permit procedure might be impossible due to the timeframe). Nonetheless, we think that the permitting example should be part of the equation—a tool, particularly for state and local governments, to ensure that the public has a voice and insight into how limited community resources are utilized.<sup>133</sup> And even in the EPA permitting example, scholars have acknowledged that “general permits can fill a useful role in implementing the . . . permit program,” but only when properly calibrated “to provide for greater public participation and government oversight.”<sup>134</sup>

As opposed to a free-for-all scenario, at the very least the presence of a permitting scheme allows for flexibility and tinkering in the margins to achieve an optimal balance between efficiency and public protection—in

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threats to endangered species—and despite strong warnings from that agency about the impact the drilling was likely to have on the gulf.”). *See generally* Jeffrey M. Gaba, *Generally Illegal: NPDES General Permits Under the Clean Water Act*, 31 HARV. ENVTL. L. REV. 409 (2007) (discussing the administrative process required to obtain a general permit).

132. Gaba, *supra* note 131, at 410–11. The consequences of abusive issuance of National Pollutant Discharge Elimination System (NPDES) permits can be enormous because, as one scholar explains,

The [Clean Water Act] contains a provision known as the “permit shield” that protects the holder of a valid permit from citizen suits and enforcement actions so long as the holder complies with the provisions of its permit . . . The issue in the recent case law revolves primarily around what it means to comply with one’s permit and whether a permit holder may invoke the permit shield defense even without adequately disclosing pollutants in the application process.

Stephanie Rich, *Troubled Water: An Examination of the NPDES Permit Shield*, 33 PACE ENVTL. L. REV. 250, 250 (2016).

133. Biber & Ruhl, *supra* note 129, at 138–39,

[T]he reality is that the permitting system has evolved into a far more flexible, nuanced, and innovative institution in the modern administrative state than Epstein’s dismal vision would suggest is possible. No doubt agencies abuse the permit power in specific cases and there is room for improvement in the permitting system as a whole, but the actual experience of permitting as practiced by agencies is rich with evidence that the problems motivating Epstein’s pessimistic assessment are neither inevitable nor insurmountable.

134. Gaba, *supra* note 131, at 412.

much the same way that we argue that FOIA may be the flexible bastion of public accountability once it is properly calibrated to focus on the nature of information disclosed instead of the creator or holder of information. As the permitting example demonstrates, it is worth thinking of privatization broadly to identify other areas of private conduct that warrant public disclosure and scrutiny. For example, if we conceive of environmental protection as a critical governmental activity, we should also regard information on the production of industrial emissions as vital public records.

### 3. Labelling

Labelling can take many forms, and it is certainly not limited to the environmental, origin, or nutritional labelling with which the consuming public is already very familiar. Among these familiar labels: “Made in the USA,” “Organic,” “No CFCs,” “Please Drink Responsibly,” to list just a few. But consider also some less prominent but equally pervasive labelling schemes: “Investments May Lose Value” on investment product advertisements, “Please Use Short-Term Lending Responsibly” on payday loan advertisements, and “Prior results do not guarantee future performance” on attorney advertisements. These public disclosures provide the public with important information about the products provided by private entities.

Such direct-to-public disclosures need not be limited to information about specific products. For example, though likely a longshot as a practical matter, a company could be compelled to disclose in television or web advertisements the fact that it has been investigated for human rights and labor violations at factories abroad. Such a system could spark a race to the top, whereby companies seek to establish a high-quality track record that they could then tout to the public. This is similar to companies touting organic or made in America products.

In addition to the obvious political problems in crafting such a system are practical problems: what should be mandated and why? Who would monitor and ensure the accuracy of such disclosures? As demonstrated by controversies over “organic” or “non-GMO” labelling, which may be abused to spotlight products with no measurable health or environmental benefits, companies may promote “achievements” that actually provide no material benefit to the public.<sup>135</sup> Except where clear objective measurements exist, these difficulties would need to be carefully navigated to ensure fairness.

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135. See generally Greg Northen, Comment, *Greenwashing the Organic Label: Abusive Green Marketing in an Increasingly Eco-Friendly Marketplace*, 7 J. FOOD L. & POL'Y 101, 102–03 (2011) (describing the rush of food producers to take advantage of health/organic movements via misleading or incomplete claims and resulting regulatory efforts to stymie such efforts).

Nonetheless, we maintain that more modest advancements in labelling may be readily achievable by requiring corporations to disclose settlements with enforcement authorities, perhaps in advertisements and certainly on official websites. Modern governance relies heavily on voluntary corporate self-regulation and compliance. Where abuses of corporate privilege amount to social wrongdoing—that is, pure profit-seeking at the expense of public health, safety, and the like—the public right to know is undoubtedly triggered. Labelling is just one way of subjecting violators to meaningful public oversight, by not letting such violations occur in obscurity.

As above, a legitimate concern is that too much labelling will make the information ineffective.<sup>136</sup> Ultimately, this will take a delicate balancing of considerations in what to require and where. But this is a theme throughout many critiques of transparency proposals. Admittedly, there is a great risk that private interests, ever deft at elevating profit-driven concerns above all else, will overload any transparency mechanism with so much information that the sheer volume will bury the most critical details in the morass of data. This is not unlike the needle-in-a-haystack approach to responding to civil discovery, where the responding party buries meaningful documents in a slew of irrelevant or unhelpful files. But just as technology should enable for

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136. See, e.g., Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 749 (2011) (arguing that “mandated disclosure rarely works” such that “we need to abandon the idea that people’s autonomy is bolstered by supposedly empowering them to make choices through mandated disclosure”). Professor Sand suggests that any failure is largely due to the “lack of capacity on the side of disclosees to make optimal use of the information available.” Sand, *supra* note 115, at 213. Ben-Shahar and Schneider raise important concerns that warrant consideration, especially in light of the costs of implementation of mandated disclosure regimes. Indeed, all of our proposals in this and the preceding Part are subject generally to balancing of costs and benefits, as long as both costs and benefits extend far beyond mere pecuniary measurements to include transparency, accountability, disproportionate impact, and other important yardsticks. But as Sand points out, the issues identified by Ben-Shahar and Schneider are largely systemic, perhaps remediable by heightened education and broader public information efforts (such as by civic groups). Useless or ineffective disclosures of course should never be encouraged, and empirical evidence should always be evaluated both before and during implementation of such requirement—yet another role for which agencies and administrative law procedures are uniquely suited, and another avenue for the state to be injected into these otherwise private issues. A comprehensive response to Ben-Shahar and Schneider is beyond the scope of this Article; it is enough for present purposes to echo the thoughts of Richard Craswell, who responds that “understanding the different possible goals of disclosure is essential to any decision about which disclosures ‘work.’ . . . If [Ben-Shahar and Schneider] can one day articulate (and defend) their own criteria for what would count as a ‘success,’ they will advance our understanding by even more than they already have.” Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 WASH. L. REV. 333, 380 (2013).



greater disclosure, so too will it ultimately allow for better dissemination of the most critical details by investigators. We optimistically suggest that journalists and activists will catch up to the new normal we propose and will become adept at sorting the needles from the hay.

### B. *Privatization of Governmental Enterprises & Land*

Privatization, we have explained, is frequently not accompanied by a contract.<sup>137</sup> For example, some privatization advocates have proposed privatizing USPS or AMTRAK.<sup>138</sup> Such examples demonstrate that the approaches to transparency described above are not one-size-fits-all. There may be no choice but to deal with such examples in an ad hoc fashion. But perhaps we could construct a principled framework for dealing with such situations. Take the USPS example: whatever USPS looks like in private form, the operator should still be required to disclose information to the extent it continues to provide governmental and monopolistic services. This means that where USPS acts as merely a competitor to FedEx and UPS in the parcel industry, the private operators could protect their information as any other company may do. But to the extent these private companies would service mail routes, a governmental and monopolistic service, all information relating to those services must remain publicly available.

Perhaps one may question what “transparency” could look like in an asset sale. After all, these are conceived as a one-way transaction, a transfer following which the government no longer has an active role. But the characterization of asset sales as a one-time transfer does not paint a complete picture. In a great many areas of privatization, the private owner of the divested enterprise remains subject to ongoing governmental regulation, such as where a government divests itself of utilities or mass transit. It is thus not entirely accurate to suggest that the government will be hands-off after the transaction is complete.

How, then, do we justify imposing any more transparency obligations on the private owner of a divested enterprise than those already imposed on other private operators in a regulated sector? The very fact that the government—and therefore the public—once owned the asset may make it worthy of special treatment upon privatization. In fact, the government has an obligation to the public to responsibly manage and, when appropriate, transfer or dispose of public assets.

To this end, we especially emphasize the need for transparency at the pre-transfer and transfer stages. Clearly, the public has every right to know the

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137. See *supra* note 15 and accompanying text.

138. *E.g.*, Edwards, *supra* note 15.

“who, what, when, why, and how” of a transfer of a public good, and public access to such fundamental information should not be impeded. That special situation does not apply to privately-founded, but heavily regulated, enterprises.

Moreover, assets are frequently publicly held because the public has a special interest in the assets. The fact that an asset is publicly held should be prima facie evidence of its public importance. This should support the imposition of substantial transparency obligations, even post-sale, to enable the public to properly evaluate the transaction and, if warranted, apply pressure on the government to rectify any injustice that may be committed by the private asset holder. It is not difficult to articulate some of these special circumstances justifying transparency expectations when considering just a few of the public assets that Trump and others have proposed privatizing. For example, public parks have been publicly held because they may have special cultural significance to many different peoples, protection of which would be made more difficult by private ownership, or special ecological significance, which may be endangered by private ownership.<sup>139</sup> Mass transportation has traditionally fallen under public purview because of the special competitive challenges that the industry would face<sup>140</sup> and to ensure nondiscriminatory service.<sup>141</sup> Air traffic controllers serve a critical public safety function along the lines of other uncontroversial public safety providers and face similar competitive difficulties.<sup>142</sup>

The list of unique justifications for public control of certain assets is far from complete and far beyond the scope of this Article. It suffices to say that

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139. See Donald C. Baur, W. Robert Irvin & Darren R. Misenko, *Putting “Protection” Into Marine Protected Areas*, 28 VT. L. REV. 497, 524 (2004) (“[T]he National Park System (Park System) has evolved to represent the natural, scenic, cultural, and historic heritage of the United States . . . All of the areas in the Park System serve public recreational and educational functions.”).

140. Cf. Reasa D. Currier, *Public Transit: Looking Back and Moving Forward a Legislative History of Public Transportation in the United States and Analysis of Major Issues for the Authorization of the Surface Transportation Bill*, 37 TRANSP. L.J. 119, 121, 141 (2010) (noting that, in the 1950s, “the majority of the nation’s transit systems were privately owned and operated and on the brink of fiscal and physical collapse” but since 1964 “[t]he many economic, environmental, and energy conservation benefits that public transportation provides have become increasingly more quantifiable and understood both by the general public and by local, state, and federal lawmakers”).

141. See, e.g., Gilbert Paul Verbit, *The Urban Transportation Problem*, 124 U. PA. L. REV. 368, 369–88 (1975); Michael Lewyn, “*Thou Shalt Not Put a Stumbling Block Before the Blind*”: *The Americans With Disabilities Act and Public Transit for the Disabled*, 52 HASTINGS L.J. 1037, 1037–84, 1100 (2001).

142. See Ross W. Neher, *ATC Privatization: A Solution in Search of a Problem*, 83 J. AIR L. & COM. 521, 533–44, 559–60 (2018).

we believe this uniqueness justifies unique public rights to transparency. We recognize that at times the fact that a particular asset was privately held may simply be an accident of history; this may be accounted for with flexibility that provides for robust public participation, judicial review to assure that this flexibility may not be abused, or both. But again, having this information is a minimal prerequisite for democratic participation. Officials and corporate interests transferring public assets in backroom deals may never be held to account for the unfair results. Even *ex post* disclosure frequently will not suffice, particularly when the resource divested is a common carrier service or public safety provider. Thus, statutes should mandate *ex ante* notice and opportunities to be heard so that input may be given as to the ownership or due process rights that may persist after the good, land, or service is privatized.

#### IV. THE TRANSPARENCY DEFICIT AND DEMOCRACY

The preceding three parts have made the case that privatization creates a transparency deficit. The way to combat that deficit, we argue, is to inject more of the public into the burgeoning private government—specifically via transparency mechanisms designed to bring private documents into public hands. We have demonstrated that FOIA, the United States' primary public transparency mechanism, is underinclusive. It mandates disclosure of some documents of immense public importance while permitting other, even more important documents, to remain wholly secret—based upon unfounded assumptions about the public character of privately-created or -held documents. The fundamental conversation, we maintain, must switch from who produces or possesses certain information to how important the information is to the public.

In this final Part, we argue that hidden privatization threatens democratic rule and due process, drawing on the lessons learned from the case studies outlined above. Exposing private government is not simply an academic exercise nor merely a matter of unearthing private wrongdoing. Rather, we argue that private government is an anathema to democracy itself.

##### A. *A Democracy in Crisis*

Why does it matter whether the public has access to private documents of public import? We have provided some examples of privatized services of immense public importance—prisons, education, security, just to name a few. The United States, as well as other democratic countries, are at a crossroads with regard to privatization.<sup>143</sup> There are ultimately three general

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143. See generally KUTTNER, *supra* note 1.

paths forward: (1) reject privatization altogether, returning control and responsibility of public services to the government; (2) embrace privatization, reducing the government to an ineffectual shell; or (3) something in between.

Option one is overly idealistic and impractical. That does not mean, however, that we should relinquish the idea of active and fervent public governance in the name of total privatization, à la option two. Rather, we maintain that a healthy dose of transparency is an important component of option three—something in between a rejection of privatization and a complete relinquishment of public governance.

The dominating characteristic of this modern, global era of privatization is a stringent sense of cost consciousness.<sup>144</sup> Under this modern scheme, governments treat economics and finance as concerns equal to personal dignity, fundamental fairness, and public well-being.<sup>145</sup> As a result, business norms and market values have become central to traditionally noneconomic enterprises, including education, prison operation, and welfare administration. Private companies not only provide these services, but also determine their complexion, characteristics, and scope, all pursuant to contracts entered into without any direct public input or regular process for seeking such input. In many ways, particularly in the United States, the state has modeled itself after the multinational corporation, outsourcing tasks to private companies rather than doing them directly. This does not necessarily mean that the state itself is weak or in the process of withering away. Rather, states frequently make these market-oriented regulatory choices in an effort to maximize global competitiveness.

“Whereas the rhetoric implies complementarity (more private sector equals less government, for example), the diverse complexity of the state’s roles in privatization, as well as the variety of businesses and business models involved, defy neat boundaries.”<sup>146</sup> In the United States, “models and metaphors of law are based on a vision of state power that imagines it as a vertical hierarchy, the federal government *over or above* the states; the states *over or above*

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144. See generally ALFRED C. AMAN JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA* (1992).

145. See, e.g., *id.* at 1 (“Government . . . was no longer viewed as an appropriate means of solving societal problems . . . ‘Less government’ became the prescribed solution for problems ranging from civil rights to the price of natural gas at the wellhead.”); Alfred C. Aman, Jr., Snyder Lecture, *Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest*, 6 *IND. J. GLOBAL LEGAL STUD.* 397, 400 (1999) (“One can conceptualize these various deregulatory reforms and voluntary regulatory regimes as something akin to the delegation of responsibility and policymaking power to the market . . . There is an expectation that the impersonal, abstract forces of the market will achieve certain policy goals and do so relatively inexpensively.”).

146. Aman & Greenhouse, *supra* note 2, at 367.

local communities; and looking outward from the United States, transnational organizations over national organizations. The market metaphors are primarily lateral, or horizontal<sup>147</sup>; they involve deregulation, no regulation or outsourcing of government responsibilities to private providers. Either way, these models are misleading. Markets are neither self-governing nor necessarily democratic.

Delegations to the market, in their many forms, are also not necessarily democratic. In fact, the ongoing marketization of public services threatens core democratic values, such as representation, participation, and transparency. Markets and democracy are not the same. Each has fundamentally different characteristics and consumers are not, nor should they be, too easily equated with citizens. As Justice Stevens observed in dissenting from the Supreme Court's landmark *Citizens United* decision:

[T]he distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process.<sup>148</sup>

These distinctions are manifest wherever citizens act not as “consumers” with choices between products, but instead have no option but to turn to the government. Welfare recipients, for example, cannot choose between providers to provide the basic assistance they require to subsist and to which they are entitled pursuant to law. One effort to privatize the welfare system yielded chaos, injured citizens, and broke promises. In 2007, the State of Indiana contracted with IBM for the responsibility of determining welfare eligibility.<sup>149</sup> But when one unexpected emergency after another followed—“massive flooding in parts of Indiana in 2007 and the Great Recession of 2008”<sup>150</sup>—the result was a massive upswing in welfare claims.<sup>151</sup> The inflexibility of the contractual arrangement left the entire welfare system exposed and unable to respond to the life-and-death needs of the state's welfare recipients.<sup>152</sup> “As a 2011 Los Angeles Times article stated, ‘documents were

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147. AMAN, *supra* note 16, at 3.

148. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 394 (2010) (Stevens, J., concurring in part and dissenting in part) (5–4 decision).

149. For a detailed look at this case study, see Alfred C. Aman, Jr., *Globalization and the Privatization of Welfare Administration in Indiana*, 20 IND. J. GLOBAL LEGAL STUD. 377 (2013).

150. *Id.* at 389.

151. *Id.* at 412.

152. *Id.*

lost, [and when] cases piled up . . . workers started routinely denying applications just to reduce the backlog.”<sup>153</sup> The private administrators erroneously terminated benefits, leaving critically ill and other welfare recipients in dire need of support.

State law obligated the Indiana government to fulfill certain responsibilities to the indigent. But it had contracted these responsibilities out to a private entity, unable to fulfill or look beyond its contractual commitments to address the needs of the citizens it was hired to serve. Indiana found itself hamstrung—a consequence of its own decision to privatize responsibility for its public programs. And unlike the consumer, the citizen-welfare recipient is entitled to due process protections, such as full and timely consideration of welfare applications and nonarbitrary termination of welfare benefits.<sup>154</sup> In the end, IBM failed to protect these due process rights and could not capably replace the state as provider of public services.

The decision to contract out policymaking authority for welfare, schools, or prisons, to highlight again just a few common examples, has several implications for democratic governance:

- First, and most obviously, political decisions made by private contractors are no longer made by democratically-elected leaders. Nor are they made any longer by administrative bodies instituted by democratically-elected leaders, whose decisions may be subject to judicial review and whom are subject to various forms of indirect accountability. As Aman has observed elsewhere, “the resort to privatization and outsourcing . . . in such contexts can easily mask the essentially political decisions involved. For example, a decision to outsource prisoner healthcare to private providers does not eliminate the fundamental political decisions involving just how much tax revenue we are willing to spend on these services.”<sup>155</sup>
- Second, the character of the decision maker has changed. Gone are the public servant decision makers, who are entitled and expected to balance a variety of public interest considerations.<sup>156</sup> In their stead stand for-profit corporations which, by their very nature, prioritize

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153. *Id.* at 411 (quoting Matea Gold, Melanie Mason & Tom Hamburger, *Indiana's Bumpy Road to Privatization*, L.A. TIMES (June 24, 2011), <http://articles.latimes.com/2011/jun/24/nation/la-na-indiana-privatize-20110624>) (alteration in original).

154. *See* *Goldberg v. Kelly*, 397 U.S. 254 (1970).

155. Aman & Dugan, *supra* note 2, at 890.

156. *Cf.* discussion, *supra* note 99 (explaining OMB's mandate to prioritize traditional cost-benefit model).

profit. And the course of unsatisfactorily-performing private companies is not as easily changed as by an annual or biannual election.<sup>157</sup> The state must honor its contracts even if the electorate becomes disenchanted with the results or else suffer financially by breaching the contracts.<sup>158</sup>

- Third, public ownership of information—and, in some instances, assets—is replaced by private ownership. For all of the transparency concerns expressed with regard to publicly-owned information, it is uncontroversial to suggest that the voting public owns the information produced by its government.<sup>159</sup> The specific contours of public accessibility to these documents may generate legitimate debate, but the background principle to that debate is the expectation that the public is entitled to be informed by its government.<sup>160</sup> By contrast, any private citizen's ad hoc claim to a private company's internal document would be met, properly perhaps, with a hearty guffaw.

Transparency is not a silver bullet to address the complex problems wrought by privatization. It is, however, integral to ensuring an informed vote and to restore some measure of accountability to the private contractors and the public officials who installed the contractors in their positions.

One alternative to combat these problems is to abolish, or substantially scale back, privatization altogether and restore to the state the sole power and responsibility for governmental services and operations. That is, the state itself would be required to directly perform tasks ranging from road work to publicly-owned stadium and park management.

But “[p]ublic-private partnerships do not inherently violate legal or normative principles.”<sup>161</sup> In fact, “some of these partnerships may be essential

157. Professors Eva Hartmann and Poul Kjaer have referred to public welfare states as providing “strong shock absorption capacity,” an essential characteristic of which is flexibility to respond to public needs. Eva Hartmann & Poul F. Kjaer, *The Status of Authority in the Globalizing Economy: Beyond the Public/Private Distinction*, 25 IND. J. GLOBAL LEGAL STUD. 3, 3 (2018). By contrast, private authority can be strikingly inflexible.

158. The IBM case study discussed above demonstrates these dangers. Even when the state may be correct that a private provider is failing to live up to its contractual promises, the taxpayers and recipients of public services bear the brunt of the costs and litigation risks stemming from the mistakes. *See supra* notes 149–154 and accompanying text.

159. *Cf.* 17 U.S.C. § 105 (2012) (“Copyright protection . . . is not available for any work of the United States Government . . .”).

160. *Cf.* 5 U.S.C. § 552 (2012) (presuming appropriateness of disclosure absent applicable exemption).

161. Aman & Dugan, *supra* note 2, at 889. The transparency and democratic accounta-

for effective 21st-century governance.”<sup>162</sup> “Frankly, hazards also inhere in the conventional model of public services delivered by public agencies”; even publicly-operated prisons frequently suffer from systemic abuses of power, for example.<sup>163</sup>

Even in such situations, however, we have already identified important distinctions between dysfunctional private governance (pursuant to a contractual delegation) and dysfunctional public governance: public government must account for the array of societal interests, while the private contractor prioritizes profit above all else.<sup>164</sup> Private opacity is expected and generally accepted; public decisions are expected to be made openly, as shown by the public pressure that led to FOIA.<sup>165</sup> Finally, private actors may be held only indirectly accountable through multiple levels of decision makers, and frequently only after messy and expensive litigation.<sup>166</sup> Many public servants, however, face routine electoral pressures or are controlled by those who face regular elections.

Our proposals herein have aimed to inject a few essential features of public governance—primarily in the form of transparency—into the realm of private contracting. In the process, we shift the dominant paradigm from one that looks at the type of decision maker (public agency or private contractor) to the type of decision made (routine and tangentially related to public well-being or essential and historically public). Thus, while we do not believe privatization could feasibly be cast aside in its entirety, shedding some light upon private government can help compensate for the democracy deficit inflicted by passing along critical governmental functions to private actors.

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bility of public-private partnerships can be enhanced by legislative reforms such as those suggested in this article. See discussion and authorities cited *supra* note 67. The primary aim of our transparency proposals is to bring these areas to light.

162. Aman & Dugan, *supra* note 2, at 889.

163. *Id.* at 889 n.26 (emphasis removed).

164. See, e.g., Mintzberg, *supra* note 89 (“Business has a convenient bottom line, called ‘profit,’ which can readily be measured. What is the bottom line for terrorism: The number of countries on a list, or of immigrants deported, or of walls built? How about the number of attacks that *don’t* happen? Many activities are in the public sector precisely because their intricate results are difficult to measure.”).

165. See *supra* Part I.A.

166. See, e.g., Landyn Wm. Rookard, Comment, *Don’t Let the Facts Get in the Way of the Truth: Revisiting how Buckhannon and Alyska Pipeline Messed Up the American Rule*, 92 IND. L.J. 1247, 1273–74 & n.220 (2017) (describing barriers facing public interest litigants from Supreme Court’s narrow interpretation of “prevailing party” fee shifting statutes); Landyn Wm. Rookard, Note, *A Referee Without a Whistle: Magistrate Judges and Discovery Sanctions in the Seventh Circuit*, 91 IND. L.J. 569, 569–70 & nn.5–8 (2016) (citing authorities and describing excessive expense and delay in civil litigation).



The ultimate goal is to permit the public to become sufficiently informed and to subject the public state, governing through private entities, to heightened scrutiny. Perhaps then, a more serious discourse may emerge as to whether these current trends should be slowed or even reversed.

### B. *Reexamining the Private-Public Dichotomy*

We have explained that the dominant legal paradigms assume that the terms “private” and “public” may be easily defined—that, at least in theory, the private may be neatly separated from the public.<sup>167</sup> This dichotomy, it turns out, is far from neat and requires some explication.<sup>168</sup> Part of the murkiness of these terms is by design. As attendees of a recent conference on privatization observed, private contractors—who by nature advocate for greater privatization—have used a wide-ranging variety of terms to describe their societal role:

While the term “privatization” has been used successfully in campaigns to outsource government to private corporations, it is beginning to lose its luster. Corporate interests and privatization advocates are developing a new “warm and fuzzy” vocabulary. They are using terms like “public private partnerships,” “pay for success,” and “blended financing”. Government contractors don’t call themselves contractors; they call themselves “solutions” and “partners”.<sup>169</sup>

Terminology then, is important to consider the implication of the labels chosen by pro-private and pro-public advocates.

In the United States, the term “privatization” likely evokes the idea of “contracting out.” As explained by Aman, “[p]rivatization in the United States usually takes the form of giving over to the market the provision of services once provided by government.”<sup>170</sup> This form of privatization “resonates with primarily an economic conception of globalization based on markets and the competition they engender.”<sup>171</sup> The focus in such a contract on what was spelled out in the contract and, as we have discussed above, not the public’s expectations as to the job that needs to be done.

Internationally, privatization frequently means something different. In many countries, the state is a primary owner of public service providers such

167. See *supra* Part I.A.

168. E.g., Aman & Greenhouse, *supra* note 2, at 366; Verkuil, *supra* note 10, at 402–21.

169. RESTORING PUBLIC CONTROL OF PUBLIC GOODS CONFERENCE REPORT, GLOBAL DEV. & ENVTL. INST. AT TUFTS UNIV., 1, 4 (Jan. 2018), <http://ase.tufts.edu/gdae/Pubs/rp/PublicEconomy/PublicGoodsConferenceReport.pdf>.

170. Alfred C. Aman, Jr., *Privatization, Prisons, Democracy, and Human Rights: The Need to Extend the Province of Administrative Law*, 12 IND. J. GLOBAL LEGAL STUD. 511, 513 (2005).

171. Alfred C. Aman Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L.J. 1477, 1477–78 (2001).

as utilities or mass transportation.<sup>172</sup> In other countries, particularly those with a recent history of colonization, the state remains a public owner of critical land resources.<sup>173</sup> Privatization in these situations is frequently characterized by the sale of these public assets, contrasted with the ongoing contractual delegation of authority frequently found in the United States.

But recent developments indicate that the United States may be joining the global selling off movement soon.<sup>174</sup> They also demonstrate the distinction between contracting out and asset sales. For example, Washington D.C.'s National Airport and Dulles International Airport are both currently owned by the federal government but leased and operated by private parties—a classic example of contracting out.<sup>175</sup> The Trump Administration, however, has proposed a different tact: selling the airports altogether.<sup>176</sup> This is part of a larger passel of contemplated sell-offs, which also includes National Park Service-operated properties, power transmission facilities, and a drinking water source for D.C. and Virginia.<sup>177</sup> Such sell-offs still involve contracts, of course (that is, contracts to sell), but not the conventional ongoing contractual relationships that characterize the formal delegation of public authority and services.

Our proposals above acknowledge and address privatization in its many forms. We have drawn distinctions between the phenomena of contracting out, contracting in, the sale of public assets, and other forms. We have also shown that the public loses effective “control” over something whenever the state steps out and private companies step in, be it in owning property or other assets, assuming responsibility (such as for providing services), or acquiring public decisionmaking power.

And as Part III demonstrates, much “privatization,” though not conventionally labelled as such, happens without any contract at all. Regulations incorporate by reference privately-promulgated quality and performance

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172. Aman & Greenhouse, *supra* note 2, at 370 n.43.

173. *E.g.*, AMAN & GREENHOUSE, *supra* note 10, at 414–22.

174. *Cf. Sale of the Century*, ECONOMIST (Jan. 13, 2014), <https://www.economist.com/blogs/freexchange/2014/01/privatisation-state-owned-assets> (“Emerging countries have led the march on privatisation [by asset sale] in recent years. The governments of rich countries with lots of debt have plenty they could also sell . . .”).

175. Michael Laris, *Trump Administration Wants to Sell National and Dulles Airports, Other Assets, Across U.S.*, WASH. POST (Feb. 13, 2018), [https://www.washingtonpost.com/local/traffic-and-commuting/trump-administration-wants-to-sell-national-and-dulles-airports-other-assets-around-us/2018/02/12/3cff381e-100a-11e8-9065-e55346f6de81\\_story.html](https://www.washingtonpost.com/local/traffic-and-commuting/trump-administration-wants-to-sell-national-and-dulles-airports-other-assets-around-us/2018/02/12/3cff381e-100a-11e8-9065-e55346f6de81_story.html).

176. *Id.* Some of Trump's divesture proposals involve sales to state or local governments, and not necessarily private parties.

177. *Id.*

standards.<sup>178</sup> Agencies and statutes delegate regulation and enforcement authority to private professional and trade organizations.<sup>179</sup> State and federal legislators adopt legislation proposed and drafted by private interest groups. Agencies and legislators justify decisions with studies performed and funded by private companies.<sup>180</sup> The list goes on.

What is really going on here is that the authority of the state is entrusted to each of the private entities. That is, the “monopolistic power of the state”<sup>181</sup> has been passed, albeit in incremental fashion, to private actors. Where a statute or regulation incorporates by reference a privately-created standard, the state cedes the authority to the standards organization. The same is true when the state relies upon private certifications.

In a slightly different manner, when agencies abdicate their statutory and ethical responsibilities, the state again shifts its authority to the now-unregulated entities.<sup>182</sup> This happens in a very real way: agencies hold the authority to act and in fact are required to do so by statute, but by declining to exercise it they rely upon corporations and other private entities to fill the void.<sup>183</sup> Here, informal mechanisms like corporate responsibility policies and trade group responsibility platforms fill the void—and these are unfailingly cali-

178. See discussion *supra* note 10.

179. *E.g.*, Andrew Stoltmann & Benjamin P. Edwards, *FINRA Governance Review: Public Governors Should Protect the Public Interest*, 24 PIABA B.J. 369, 369–70 (2017) (“The Financial Industry Regulatory Authority (FINRA) plays a vital role in regulating the securities industry . . . Although it characterizes itself as ‘independent,’ FINRA’s current governance structure allows the securities industry to exert substantial control over FINRA’s operations. Our review of FINRA . . . reveal[s] significant conflicts and concerns.”).

180. See, *e.g.*, *In re Restoring Internet Freedom*, 33 FCC Rcd. 311, 314 (2018) (relying almost exclusively on industry data and comments in reversing “net neutrality” policy); *id.* at 536 (Clyburn, Comm’r, dissenting) (“[T]he majority’s reliance on broadband providers[] assertions of reductions in investment is highly-flawed [sic].”).

181. Anthony D’Amato, *The Path of International Law*, 1 J. INT’L LEGAL STUD. 1, 13 (1995).

182. *E.g.*, *In re Restoring Internet Freedom*, 33 FCC Rcd. at 533 (Clyburn, Comm’r, dissenting) (“[I am outraged] because the FCC pulls its own teeth, abdicating responsibility to protect the nation’s broadband consumers . . . [A] soon-to-be-toothless FCC[] is handing the keys to the internet . . . over to a handful of multi-billion-dollar corporations.”).

183. See, *e.g.*, *supra* note 111 and accompanying text. Professor Kuttner raises the poignant example of deregulation—at the behest of a profitable but restrained banking industry—after a period of prosperous “managed capitalism” immediately following World War II. KUTTNER, *supra* note 1, at 71. This opened the floodgates to a thirty-year “race to the bottom” in which the United States and Europe ceded their rights as sovereign nations to make decisions on labor standards, currency standards, and trade policy, among others, to nominally transnational organizations and treaties, which had been entirely captured by corporate interests. *Id.* at 221.

brated to ward off public scrutiny and proper regulations by paying lip service to upholding the greater good.<sup>184</sup> Decisions which are supposed to be dedicated to elected officials and appointed bureaucrats are instead made behind closed doors in swanky boardrooms. As Professor Robert Kuttner has explored in detail, international commitments to deregulation “represent lost sovereignty—nominally to a transnational institution, but effectively to ‘the market’—as personified by the invisible hands of large banks and multinational corporations.”<sup>185</sup> Professor Kuttner characterizes the United States in particular as welcoming the opportunity to cede its “sovereignty when the effect is to liberate finance and commerce from binding national rules.”<sup>186</sup> In addition to the fact that “[World Trade Organization (WTO)] procedures are far less transparent or observant of due process than are the procedures of national democracy,”<sup>187</sup> the very nature, existence, and persistence of such arrangements are obscured if not completely hidden from public view. The public is not even aware that essential governmental decisions—like currency controls, labor standards, and trade policies—have been delegated to international organizations captured by corporate interests espousing an extreme form of neoliberalism. This particular brand of privatization lurks beneath the surface and poses immense challenges for transparency and democracy.

The literature exploring how contracting out human services effects a shift in authority is already robust. We have only built upon that corpus here. But as Professor Claire Cutler has lamented in a slightly different context, “[O]ne of the major deficiencies in mainstream approaches to transnational legal scholarship is the failure to acknowledge the rise of private power and authority in the international political economy.”<sup>188</sup> Much less has been written about the authority implications of other forms of privatization.<sup>189</sup>

We have identified transparency deficits brought about by the forms of privatization discussed above and sketched proposals to address these deficits. Through this unique pragmatic vehicle—our case studies are meant to provide practical transparency-enhancing solutions—we have proposed an expanded FOIA as a firewall against the effects of unchecked privatization that threaten the democratic underpinnings of public authority.

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184. See AMAN & GREENHOUSE, *supra* note 10, at 282–325.

185. KUTTNER, *supra* note 1, at 197.

186. *Id.*

187. *Id.*

188. A. Claire Cutler, *The Judicialization of Private Transnational Power and Authority*, 25 IND. J. GLOBAL LEGAL STUD. 61, 67 (2018).

189. *But see, e.g.*, AMAN & GREENHOUSE, *supra* note 10, at 414–23; SASKIA SASSEN, EXPULSIONS: BRUTALITY AND COMPLEXITY IN THE GLOBAL ECONOMY (2014).

## CONCLUSION

Government contracting exists as a way to reduce costs—and this includes the cost of complying with transparency requirements. To the extent extending basic public protections prices the private sector out of providing a particular service (e.g., prisons), that may be a fair indication that the public sector should provide the service. In other words, while the modern reality of public-private partnerships will only expand and require compromise, it has and should have limits. The mere fact that governmental activities and responsibilities of all kinds and at all levels—global, national, state, and local—have been entrusted to private providers does not mean that the public has relinquished its right to depend upon the government to ensure quality services, democratic decisionmaking, and due process. Such public rights are inherent to a democracy. If the cost of transparency raises the cost of privatization beyond the cost at which the public sector may provide a service, then the public would best be served by public providers.

Just as a company should not be able to avoid discovery requirements by outsourcing, so too an agency should be prohibited from avoiding providing public information merely because it was created by or rests in the hands of private parties. Congress could mandate that agencies take transparency into consideration when contracting just like it requires agencies to take other cost-benefit analyses into account. Any restrictions on public access should properly be counted as a “cost,” particularly where a document would be open to public access had the contracting agency created it. Requiring an agency to justify *not* including a transparency provision would be consistent with the purposes underlying FOIA and the need for flexibility and discretion in contracting.

The anti-institutional bias which emerged in the late 1970s has resulted in a full-throated transfer of sovereignty—the authority to make decisions which impact and bind the general public—to private companies and domestic and transnational authorities captured by those private entities. The roles of citizen and consumer have crossed. The public is in desperate need of information to assess the actions of both the private and public state, and to respond rationally. The legitimacy of modern democracy demands nothing less.