American University International Law Review

Volume 26 | Issue 4 Article 3

2011

Transparency in the Administration of Laws: The Relationship Between Differing Justifications for Transparency and Differing Views of Administrative Law

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TRANSPARENCY IN THE ADMINISTRATION OF LAWS: THE RELATIONSHIP BETWEEN DIFFERING JUSTIFICATIONS FOR TRANSPARENCY AND DIFFERING VIEWS OF ADMINISTRATIVE LAW

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INTRODUCTION

In a 1958 American movie, *The Blob*, an alien life form begins to absorb everything in its path. Teenagers, led by a young Steve McQueen, alert the town to the danger. Unlike the blob, transparency is neither alien nor to be feared; but like the blob, it is expanding, becoming larger and more diffuse by incorporating more ideas into it. At times, like the blob, transparency has become a term that invokes something difficult to describe.[1]

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1. Available definitions fail to capture the complexity of the meaning of the term. *See* BLACK'S LAW DICTIONARY (9th ed. 2009) (defining transparency as "lack of guile" and informing that the use of the word is popular in organizational policies, practices, and lawmaking).

This article outlines differing justifications for transparency and their connection with varying views of the administration of laws. This outline may give some form to the concept of transparency and help to identify, like the blob, what it now contains. Suggested are connections between the justifications for transparency and the views of administration.

I. DIFFERING JUSTIFICATIONS FOR TRANSPARENCY

For purposes of explanation, this article discusses three justifications for transparency, including (1) transparency and the effective administration of laws, (2) transparency and open government and democratic accountability, and (3) transparency and human rights. Each of these justifications gives different reasons for transparency provisions. These justifications conflict with one another, in part, because they require different approaches to transparency and suggest different roles for transparency in administration. The examples principally come from freedom of information and open meeting laws, whistleblower protection, public financial disclosure, and other governmental ethics regulations. This article also looks to information disclosure as a type of consumer protection regulation.

A. TRANSPARENCY AND EFFECTIVE ADMINISTRATION

Many justifications for transparency relate to how transparency provisions improve government administration. These provisions can be seen as instruments to accomplish more effectively a number of administrative goals,[2] though these goals can themselves represent the diverse and sometimes conflicting values discussed below. The character of these transparency provisions and the weight given to them in administration depend upon which values are being pursued. Furthermore, governments of different countries and administrators in different types of organizations may subscribe to some but not all

2. *See, e.g.*, Transparency and Open Government Policy: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 26, 2009) (announcing the Obama Administration's commitment to increase the U.S. government's transparency because "transparency promotes accountability," informs citizens about the creation of or changes in laws and policies, and allows the government to request public feedback).

of these values. However, as general aspects of administration, many governments, both democratic and nondemocratic, adopt some version of them.

Transparency can support bureaucratic and governmental legitimacy. Most governments, including authoritarian ones, will perceive a benefit from explaining governmental actions in a way that connects those actions to the welfare of the state and its subjects. At the same time, all governments and most organizations exercise some discretion in determining what will be known and what will be kept secret.[3] Thus, one way of considering transparency in different legal systems is to address what criteria will be used to exercise that discretion. Few bureaucracies or governments are likely to publicly adopt criteria that would seem self-serving in the eyes of its subjects or clients. Thus, transparency can be seen as a way of supporting governmental legitimacy.

Transparency can also be viewed as enabling market choices. First, governments can disseminate government-held information regarding, for example, product testing, safety standards and performance, and scientific assessments of the advantages and risks of different products and services. Similar government-held information may address financial institutions and services. Such information allows a more economically efficient allocation of resources in the market.[4] In doing so, governments address one type

3. Leaders of democratic as well as non-democratic countries may prefer secrecy. This is illustrated in statements made by former British Prime Minister Tony Blair, in his 2010 memoir. Expressing his regret at supporting Britain's freedom of information law, Mr. Blair wrote: "You idiot. You naïve, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it . . . . For political leaders, it's like saying to someone who is hitting you over the head with a stick, 'Hey, try this instead,' and handing them a mallet." TONY BLAIR, A JOURNEY: MY POLITICAL LIFE 511-12 (2010).

4. *See, e.g.*, Thomas Bernauer & Vally Koubi, *Taking Firms and Markets Seriously: A Study on Bank Behavior, Market Discipline, and Regulation* (Ctr. for Comparative & Int'l Studies, Working Paper No. 26, 2006) (examining regulations of the U.S. banking sector during the 1990s and concluding that these regulations increased transparency within the sector, which in turn enhanced competition among banks both within the United States and worldwide because banks' compliance (or non-compliance) with strict capital requirements was made a matter of public record). The subsequent 2008 financial crisis demonstrated that important information regarding market risks were not transparent.

of market failure: incomplete or unavailable information.

Second, governments can impose transparency requirements on private participants in the market, such as reporting requirements regarding the sale of securities, or labeling requirements for products and disclosure requirements for services. These requirements address market failures in providing information relevant to market decisions.[5]

Moreover, transparency can enhance government regulation by making regulatory standards more visible, by alerting the public to violations of regulations, and by creating incentives for compliance.[6] The availability of information can incorporate public scrutiny as an aspect of government regulation.

Transparency also allows a government to deal with the problem of agency, i.e., the risk that its officials will pursue their own interests rather than those of the government as articulated in law or policy. Foremost in this regard are anti-corruption provisions such as public financial disclosure. Disclosures about government activities encourage the participation of citizens in reporting misconduct and perhaps in helping to define the concept of 'conflict of interest.'[7] Advocates of whistleblower protection often justify transparency on this ground.

Finally, transparency can improve administration by encouraging the bureaucratic self-assessment that is likely to accompany the collection, organization, and disclosure of information. The criticism that follows public access can improve agency research and analysis

5. *See* Eric T. Swanson, *Have Increases in Federal Reserve Transparency Improved Private Sector Interest Rate Forecasts?*, 38 J. MONEY, CREDIT, & BANKING 791 (2006) (evaluating extensively the effect of increases in Federal Reserve transparency from 1990 through 2003 on the ability of private financial companies to predict short term interest rates, and concluding that increased transparency led to improvements in private sector predictions of performance).

6. *E.g.*, GEORGE KOPITS & JON CRAIG, INT'L MONETARY FUND, TRANSPARENCY IN GOVERNMENT OPERATIONS 2-4 (1998), *available at* http://imf.org/external/pubs/ft/op/158/op158.pdf (focusing on fiscal transparency and asserting that such transparency is constructive for both the economy and society because transparency exposes "unsustainable" governmental policies and enhances public trust in government by creating a "well-informed electorate").

7. Public financial disclosures place the responsibility for the determination of conflict-of-interest standards with the public. ROBERT G. VAUGHN, CONFLICT-OF-INTEREST REGULATION IN THE FEDERAL EXECUTIVE BRANCH 52-53 (1979).

as well as agency practices and procedures.

However, several aspects of transparency can limit how well these provisions improve administration. One of these aspects is the information cost problem created by access to too much information, a problem often identified with labeling requirements where the value of each piece of information decreases as more information is disclosed.[8] In addition, the value of transparency involves more than the availability of information. *When* information is available is often as important as *whether* it is available.

Because the above justifications conceive of transparency as an instrument, transparency has worth only as far as it is perceived to further a value in administration. Moreover, that determination, that exercise of discretion, is made by government officials within a particular bureaucracy. Recent evaluations of transparency demonstrate the difficulty of measuring it. For example, the Collaboration on Government Secrecy attempts to measure success by assigning a "grade" to Obama's transparency initiatives,[9] while others look to a host of different, oft-criticized "transparency indexes."[10] In short, transparency assessments can vary depending on whether they focus on access to records, information, opinions, or policy.

B. TRANSPARENCY AND OPEN GOVERNMENT

A different justification for transparency emphasizes these

8. *E.g.*, *'Information overload' feared ahead of vote on food labelling*, EURACTIV (Mar. 3, 2010), http://www.euractiv.com/en/health/information-overload-feared-ahead-vote-food-labelling-news-301207 (reporting on proposed food labeling legislation by the European Commission and noting that "[t]here is a general concern that the proliferation of labelling . . . will undermine efforts to share simple information with the public").

9. One such grade can be found on the website of the Collaboration on Government Secrecy. COLLABORATION ON GOVERNMENT SECRECY, http://www.wcl.american.edu/lawandgov/cgs/about.cfm (last visited July 1, 2011).

10. *E.g.*, William De Maria, *Measurements and Markets: Deconstructing the Corruption Perception Index*, 21 INT'L J. PUB. SECTOR MGMT. 777, 777-90 (2008) (criticizing the commonly relied upon "corruption perception index" issued by one non-governmental organization—Transparency International—as a flawed measure of countries' transparency because it does not measure actual levels of corruption or actual lack of transparency, instead focusing on perception of corruption, and uses paternalistic definitions of corruption in its measurements that tend to ignore cultural differences unique to each country).

provisions as supporting open government and democratic accountability. In a democratic state, the public has a right to know about the actions of government institutions and officials. Information is necessary if citizens are to hold government officials and institutions legally accountable for misconduct or error. Such information is also the foundation of political accountability.[11] Information enables citizens to organize and to seek changes in government policy or to use democratic procedures to change government policies or elected representatives, and to seek the removal of persons directing government administration.

Given the importance of transparency to democratic accountability, it is not a coincidence that the majority of freedom of information and whistleblower protections laws have been adopted since the fall of the Soviet Union.[12] Many of these laws have been enacted in states formerly part of the Soviet Union or within its sphere of influence in Eastern Europe.[13]

11. An often repeated quote by James Madison, fourth President of the United States, captures this notion. Madison said: "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." Letter from James Madison to W.T. Barry, *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES 276 (Philadelphia, J.B. Lippincott & Co. 1867). Moreover, John Adams, second President of the United States, a decade before the revolution of 1776, wrote:

> And liberty cannot be preserved without a general knowledge among the people, who have a right, from the frame of their nature, to knowledge, as their great Creator, who does nothing in vain, has given them understandings, and a desire to know; but besides this, [citizens] have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean, of the characters and conduct of their rulers.

A Dissertation on the Canon and Feudal Law, *in* 3 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 456 (Boston, Charles C. Little & James Brown 1851).

12. John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85, 97-98, 112-13 (2006) (explaining that freedom of information laws passed by newly formed democracies, such as the post-Soviet states, Spain, and Thailand, tend to be strong and far-reaching because they are often passed in "reaction to previous authoritarian rule").

13. *Id.* at 112 (commenting that Hungary and Ukraine were the first of the post-Soviet states to pass freedom of information laws after the collapse of the Soviet Union).

This justification can also support laws that encourage or require the disclosure of information by persons in the private sector. For example, private sector employees may be aware of the corruption of government officials. Disclosures by private sector employees regarding product safety violations or corporate fraud or misconduct support government regulation but they also identify weaknesses in government administration or in the applicable laws—an identification likely to lead to changes through legal or political accountability.[14] In this regard, transparency obligations applicable to the private sector support open government and democratic accountability.

Yet, disclosures can undermine accountability. The information cost problem discussed earlier applies here as well. Selective disclosures of limited or partial information as well as inaccurate information can flood the information marketplace, thwarting accountability.[15] The development and applications of standards for the exercise of discretion regarding disclosures often lie in the hands of those officials most at risk from such disclosures. As noted, the timing of disclosure alters the importance and the meaning of what is disclosed. Requirements for transparency can influence the standards for collecting and retaining potential embarrassing information. The scandal regarding the email practices of the Bush White House is one recent example.[16]

These justifications regarding open government and democratic

14. *See, e.g.*, Dennis J. Ventry, Jr., *Whistleblowers and* Qui Tam *for Tax*, 61 TAX LAW. 357, 359, 371-72 (asserting that enhanced enforcement of tax laws by private actors would serve a "powerful monitoring" function where there is a lack of enforcement by public officials).

15. *See generally* Jerry Brito, *Hack, Mash & Peer: Crowdsourcing Government Transparency*, 9 COLUM. SCI & TECH. L. REV. 120, 122-27 (2008) (criticizing the U.S. government for its failure to disclose significant amounts of allegedly public data via the internet and for the poor accessibility and searchability of the government's data that does appear online). By making the public aware of the government's activities, it is more likely that the government will be held accountable for such actions. *See id.* at 157.

16. *See Millions of Missing Bush Admin. E-mails Found*, MSNBC.COM (Dec. 14, 2009, 6:55 PM), http://www.msnbc.msn.com/id/34419592/ns/politics/ (reporting the recovery of twenty-two million emails that the Bush White House failed to properly record and preserve and positing that the recovered emails will not be publicly available until 2014 because they must be subjected to the "National Archives' process for releasing presidential and agency records").

accountability carry weight within democratic states but, even in these states, that weight can be influenced by the character of state obligations. The more expansive the role of the state in the vindication of social and economic rights, the broader the scope of transparency provisions necessary to hold the government accountable. Furthermore, the broad scope of transparency provisions will sweep in many private-sector institutions and actors.

C. TRANSPARENCY AND HUMAN RIGHTS

Finally, international human rights support transparency provisions, such as freedom of information and whistleblower statutes, as well as the requirement that governments disseminate information. The most commonly referenced of these human rights is the right to freedom of expression. Perhaps the best known articulation of this human right is Article 19 of the Universal Declaration of Human Rights.[17] Article 13 of the American Convention of Human Rights[18] is similar. Applying the American Convention, the Inter-American Court of Human Rights has determined that Article 13 imposes an affirmative obligation on governments to provide a mechanism by which persons can acquire information about government activities.[19] The Court believed that the right of free expression includes the right to acquire and to receive information.[20]

17. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 19, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through nay media and regardless of frontiers.").

18. *See* Organization of American States, American Convention on Human Rights art. 13, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (providing for the "right to freedom of thought and expression," mandating respect for such right, and limiting the means by which governments and private actors may permissibly restrict it).

19. *See* Claude Reyes v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶¶ 86-87 (Sept. 19, 2006) ("[F]or the individual to be able to exercise democratic control, the State must guarantee access to the information of public interest that it holds."). Petitioner Reyes was an economist working for a non-governmental organization interested in obtaining information regarding sustainable development. Reyes sought but was denied access to information held by the Chilean government regarding a forestry project approved by the Chile's Foreign Investment Committee. *See id.* ¶¶ 3, 49.

20. *Id.* ¶¶ 75-77.

As with other justifications, the human rights framework for the free flow of information also supports anti-corruption transparency provisions. The model whistleblower law drafted for the Office of Legal Cooperation of the Organization of American States—to enforce the whistleblower provision of the Inter-American Convention Against Corruption—explicitly recognizes the connection between transparency and human rights, particularly the right of freedom of expression.[21] Corruption often leads to human rights violations because government officials use the power of the state to sustain corruption or to silence critics.

A human rights justification emphasizes the conduct of government officials. It permits advocates of transparency to draw on existing organizations and procedures intended to protect and to advance human rights. Human rights are universal in that they are rights that attach to human beings simply because of their humanity. Freedom of expression is a universal right but societies may apply it differently given their culture and their needs.[22] The right of freedom of expression is a value in and of itself. For this reason, human rights are a less instrumentalist justification for transparency.

21. *See* Organization of American States, Inter-American Convention Against Corruption art. 3, ¶ 8, *opened for signature* Mar. 29, 1996, S. TREATY DOC. NO. 105-39, 35 I.L.M. 724 (requiring states parties to "create, maintain and strengthen . . . [s]ystems for protecting public servants and private citizens who, in good faith, report acts of corruption"); *see also* ORGANIZATION OF AMERICAN STATES MODEL LAW PROTECTING FREEDOM OF EXPRESSION AGAINST CORRUPTION art. 1 (2002), *available at* http://www.whistleblower.org/storage/documents/OAS_Model_Law_and_Explanatory_Notes.pdf ("The purpose of this law is to implement Article III, Section 8 of the Inter-American Convention Against Corruption by protecting those public servants and private citizens who exercise their human right to freedom of expression, by acting on their duty to disclose and challenge corruption."); Robert G. Vaughn, Thomas Devine & Keith Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 GEO. WASH. INT'L L. REV. 857-73 (2003) (describing the development of the O.A.S. model whistleblower law and providing explanations of and justifications for its key provisions).

22. *See generally* Vaughn, Devine & Henderson, *supra* note 21, at 873-97 (surveying whistleblower protection laws in a number of countries, including the United States, Canada, Australia, Great Britain, South Africa, and Sweden, and comparing them to the O.A.S. model law).

II. DIFFERING VIEWS OF ADMINISTRATION

Differing views of administration influence the application of justifications for transparency because these views propose conflicting purposes for administration. A description of these differing views relies on the work of two administrative law scholars, Thomas Sargentich and Gerald Frug.[23] Although they write from different perspectives—one from liberal theory and the other from critical legal studies—they have similar conceptions of these views of administration. The following description summarizes their viewpoints but does not capture the complexity or subtleties of their work.

Both theories identify the exercise of discretion as a central problem of administration. How do we justify and control this discretion; how do we convince ourselves that we have nothing to fear from bureaucracy? In regard to the limitations of the power of bureaucracies, Sargentich refers to the "ideals" of administrative law—the Rule of Law Ideal, the Public Purposes Ideal, and the Democratic Process Ideal.[24]

A. THE RULE OF LAW

The Rule of Law Ideal limits administrative discretion through statutes, regulations, or other standards.[25] To be an effective

23. *See In Memory of Tom Sargentich*, AM. U. WASH. C. OF L., http://www.wcl.american.edu/llmlawandgov/tom_sargentich.cfm (last visited July 1, 2011) (recognizing one of Sargentich's greatest accomplishments as the founder and director of the LL.M. Program on Law and Government at the American University Washington College of Law); *Gerald E. Frug*, HARVARD L. SCH., http://www.law.harvard.edu/faculty/directory/index.html?id=22 (last visited July 1, 2011) (delineating Frug's research and career interests in legal problems in local government and legal theory); *see* Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) (introducing and critiquing justifications for the large scale bureaucracy that characterizes both administrative and corporate legal systems).

24. *E.g.*, Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385 (contending that administrative law reform centers around these conflicting "ideals," which provide a framework through which the administrative process can be understood and improved).

25. *Id.* at 397, 399. The author focused specifically on limitations imposed by the non-delegation doctrine followed in the United States, which prohibits Congress from shirking its responsibility to legislate by permitting agencies to

limitation, the applicable rules and standards must be known. Therefore, transparency provisions, particularly freedom of information provisions, abhor secret law. In some countries the greatest benefit of freedom of information provisions is, perhaps, the availability of the standards guiding administrative action.[26]

Transparency provisions must also grapple with the issue of discretion. How much discretion should be given to administrative officials to withhold documents or information and what standards should guide that discretion? In addition, approaches to interpretation of these standards by administrative officials and by the courts or other institutions also introduce discretion into the application of selected standards.[27]

B. PUBLIC PURPOSES

The Public Purposes Ideal emphasizes the policymaking and discretionary choices of administrators.[28] While the Rule of Law Ideal shuns discretion, the Public Purpose Ideal embraces it. Administrators must act in the public interest and such action requires the exercise of discretion. That discretion is limited by the expertise of administrators and by the standards used to determine the public good. In the United States, these standards have, over the last three decades, increasingly come to involve the application of some form of cost-benefit analysis. [29] Sargentich and Frug, however,

engage in legislative functions. *See id.* at 400-01.

26. *See, e.g.*, *id.* at 387-89 (surveying instances of administrative reform in the United States where standards trumped discretion, including the Supreme Court's invalidation of the legislative veto and pronouncement that laws controlling administrative agencies must be "adopted in a manner consistent with [the Constitution's] bicameralism and presentation requirements"). *But see* Kenneth Culp Davis, *Informal Administrative Action: Another View*, 26 AM. U. L. REV. 836, 838-40 (1977) (expressing frustration about the difficulty inherent in striking a balance between standards and discretion, but ultimately acknowledging that standards provide important "guidance" to those in command).

27. *See* Davis, *supra* note 26, at 839 (specifying that the administrator of a standard must not only decide whether the rule will allow or require officers to exercise discretion, but also whether the standard will limit such discretion by delineating those limitations).

28. *See* Sargentich, *supra* note 24, at 411.

29. *See* William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 176 (2009) (making clear that governments have implemented cost-benefit analysis into the administrative lawmaking process to ensure a "net-benefit" to

criticize expertise and cost-benefit analyses as ineffective limitations on the exercise of administrative discretion.[30]

Moreover, this view of administration incorporates secrecy as a central value. Secrecy permits deliberations based on expertise and rational analysis. Thus, the deliberative process privilege and executive privilege are protections of the candid discussions needed in policy making. Secrecy also insulates this rational, expert process from improper political interference.

Transparency provisions, as an aspect of administration, confront the same weaknesses of the Public Purpose Ideal. For example, a focus on the clearinghouse function of government and the obligation of the government to organize and disseminate information relies on expertise and cost-benefit analysis.[31] Likewise, the need to centralize information policy and the importance of the management and administration of information stress expertise and policy analysis in the hands of administrators.

society and limit needless and wasteful costs); Sargentich, *supra* note 24, at 412-13 (admitting that cost-benefit analysis is a "valuable tool[] for justifying and criticizing administrative decision making," where it is often employed, such as in rulemaking); *see also* Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 416-17 (1981) (commenting on the "infiltrat[ion]" of cost-benefit analysis throughout the administrative law framework and clarifying that the cost-benefit practice began with the Carter and Regan administrations in the United States, but has become so common that certain statutes now require it).

30. Frug, *supra* note 23, at 1349-51 (framing judicial "'balancing'" tests that compare "the interests of the individual affected by bureaucracy [with] the interests of the bureaucracy itself" as cost-benefit analyses). These tests, according to Frug, do not actually provide guidance to courts, but instead force courts to make determinations about the individualized findings of fact with regards to the interests involved. *Id.*; *see also* Sargentich, *supra* note 24, at 416-19 (denouncing cost-benefit analysis as unrealistic because it purports to be rational but requires the impossible task of considering all possible consequences of a particular action, and can be distorted by comparing set costs against abstract benefits such as public goods).

31. *See* Sargentich, *supra* note 24, at 402, 420-21 (acknowledging that the structure of the U.S. administrative law system permits a large amount of agency discretion and, with respect to disclosure regulation, takes important "externalities" into account where the government must determine how much information to release to the public in a particular situation in order to let the public make its own, rational, and informed decisions).

C. DEMOCRATIC PROCESS

The Democratic Process Ideal limits discretion through the application of the political process to administration. Politics can be introduced into administration through direct public participation in administrative decisions or through the intervention of state officials with broader responsibilities to the government and to its citizens.[32]

Direct participation poses several difficulties. These difficulties flow from the need to determine who participates and how they do so. These determinations will be made by administrators whose discretion is to be controlled by these participants. An oversight model raises some of the same issues.

Participation in either of these applications of politics by individuals or non-governmental groups requires information. If control of discretion through politics requires information, transparency provisions must be sensitive to "information equity"—that all groups affected by administrative decisions will have sufficient information to participate in the political process.[33] Many highly regarded transparency laws fall short under the standard of information equity.

Transparency provisions rarely provide for participation or establish a right to participation, and thus do not address or articulate standards for participation.[34] A critic could conceive transparency as a weak substitute for participation or, in other words, information as a bureaucratic substitute for influence.

32. *See id.* at 425-28 (clarifying that the Democratic Process Ideal focuses on the need for a representative government and stresses the importance of public participation in the political process because both help to hold government officials responsible and ensure that administrative agencies will more effectively take citizens' interests into account).

33. This emphasis on "information equity" may be less about egalitarian values and more about ensuring political control of bureaucratic discretion. If the political process serves to limit discretion, then all groups affected by such discretion require the information necessary to participate in that process.

34. *See, e.g.*, Funk, *supra* note 29, at 171-72 (noting that Ireland's refusal to sign on to the Lisbon treaty signaled the beginning of a revolt against the European Union's practice of fostering neither transparency nor participation). *But see id.* at 182-97 (examining in detail three U.S. laws that provide for participation and transparency in rulemaking proceedings: the Federal Advisory Committee Act, Government in the Sunshine Act, and Negotiated Rulemaking Act).

CONCLUSION

Justifications for transparency and views of administration of laws are clearly related to one another. The explication of that relationship begins with recognition of the common thread that administrative discretion weaves through both. This explication will surely vary from one country to another and will rely heavily upon the insights of comparative law and comparative analysis.

This article ends with a few general observations about the connections between justifications for transparency and views of administration.

(1) Transparency is linked to contemporary debates about administration.[35]

(2) Transparency, like administration, is concerned with the problem of the exercise of discretion.[36]

(3) Transparency and administration incorporate perspectives that necessarily conflict with one another.

(4) Transparency and administration help to identify many differing perspectives, to illuminate conflicts and choices otherwise obscured, to remind us of the limits of any single approach, and to highlight the compromises and frustrations that cannot be avoided.

(5) The meaning of the terms 'transparency' and 'administration' shift with the perspectives from which they are examined.

(6) Not all views of transparency and administration can guide the future; no particular vision of transparency and administration can be fully adopted.

(7) Important tasks of comparative analysis are to describe suppressed normative visions and to recognize the conflicts of values that might otherwise be lost in discussions of transparency.

35. *See generally id.* at 172-77, 197-98 (presenting a brief synopsis of transparency developments within the U.S. administrative law system and ultimately concluding that an effective administrative system, in the United States or any other country, cannot be achieved without transparency and, in turn, the participation of interested parties).

36. *See supra* notes 26-28 and accompanying text.