Corporate Secrecy and a Due Process Right to Access

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Americans are in a crisis of information access. While government and corporations are producing more data than ever before, we have shockingly little access to it, leading to serious, if not fatal, injuries. In 1964 Charles Reich wrote The New Property*, a seminal article that led to the expansion of due process rights in the United States that may offer a solution to this problem. Reich argued that the United States' government and commercial sectors had amassed incredible power, creating a societal imbalance that could be rectified if citizens were granted some form of "new property".*

Such circumstances—where corporate and government overlap has gravely diminished individuals' rights to data—are eerily reminiscent of a half century ago, when Reich and his contemporaries were concerned with growing corporate and governmental powers. Today the power imbalance is largely due to government privatizing essential government functions and sweeping up unfathomably granular data behind company walls. Corporations and government have employed a variety of new legal tools to expand secrecy, including broader claims of trade secrecy, First Amendment defenses to disclosure requirements, and ballooning the Freedom of Information Act's Exemptions that could be ameliorated with a new due process right.

This Article outlines why and how courts should expand on Reich's groundbreaking idea by recognizing a similar due process right of access to government records. First, this Article examines the circumstances that led to The New Property *and the expansion of due process rights in the 1960s. It then turns to today's landscape and shows how a similar imbalanced informational environment exists. It follows by asserting that the Supreme Court should expand due process and create a right to records. It concludes by detailing three specific areas in which recognizing this right would ensure a healthy democracy.*

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INTRODUCTION

In 1964 legal and political scholar Charles Reich wrote a famous article for the Yale Law Journal titled *The New Property*, which identified the expanded role of government in American life and called for new property rights. These new due process rights, such as social security and welfare, were meant to empower individuals deprived of certain protections that, he argued, should be provided for in a democracy. Reich justified many of these changes by referencing the imbalance in power between government agencies—and, to some extent, corporations—and the public. In the past half century, because of Reich's article, property rights have broadened immensely, "and the term 'property' has grown to comprise every form of possession—intangible, as well as tangible."[1]

1. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984), the Court found that trade secrets could be "property" protected by the Constitution, reasoning that "[t]rade secrets have many of the characteristics of more tangible forms of property. For property-based defenses of trade secret law, see,

Similar to the imbalances of the 1960s, today corporations hold immense power over another type of vital property - troves of information that reveal intimate aspects of our lives.[2] Citizens are regularly required to cede more and more personal information to government contractors, with little to no accountability or knowledge about how their information is used. Where government and corporate power over that information dwarfs citizen control, a new right to information is necessary. Under a new due process right of access, companies should be required to release at least some of that data to the citizens. This right would not aim to strip corporations of profit or undo the concept of secrecy, but rather, it would aim to create some balance to access in the name of protecting individuals against the deprivation of an life, liberty, or property. While a trade secret owner would still be entitled to control information to encourage investment and company growth, individuals must be able to access at least some of that same data that pertains to them that is not only profitable to corporations but crucial to their health, safety, and well-being.

For example, when the Department of Homeland Security contracts with a company to detain immigrant children, the company's contracts and various reports on detainees should not be withheld from the public simply because they are collected by a corporation.[3] Similarly, when contractors in New York, Arkansas, and Idaho deploy faulty algorithms to make determinations about a person's health-care needs, the resulting records (maintained by a government contractor) should not be withheld.[4] And when states contract with companies to seize control over various public resources like water, records should similarly not be withheld.[5] Unfortunately, more and more government agencies, including the

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for example, Charles Tait Graves, *Trade Secrets as Property: Theory and Consequences*, 15 J. INTELL. PROP. 39, 41–42 (2007); Miguel Deutch, *The Property Concept of Trade Secrets in Anglo-American Law: An Ongoing Debate*, 31 U. RICH. L. REV. 313, 320 (1997); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003). For criticisms of the property conception in general, and *Ruckelshaus* in particular, see Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. UNIV. L. REV. 365, 374–75 (1989).

2. Recently, Charles Tait Graves and Sonia Katyal wrote about a series of cases where the public has been declined to access information.

3. Aura Bogado, *We're Suing ICE for Keeping Contract Details Secret*, REVEAL (Feb. 21, 2019), https://revealnews.org/blog/were-suing-ice-for-keeping-contract-details-secret/ [https://perma.cc/M2EC-4RN9]; Ghita Schwarz, *How ICE Shields its Financial Dealings with Private Prison Contractors from Public Scrutiny*, CTR. FOR CONST. RTS. (Jan. 29, 2016), https://ccrjustice.org/home/blog/2016/01/29/how-ice-shields-its-financial-dealings-private-prison-contractors-public [https://perma.cc/SS74-KY2H].

4. Colin Lecher, *What Happens When an Algorithm Cuts Your Health Care*, VERGE (Mar. 21, 2018, 7:00 AM), https://www.theverge.com/2018/3/21/17144260/healthcare-medicaid-algorithm-arkansas-cerebral-palsy [https://perma.cc/Z8AX-B8EW]; K.W. v. Armstrong, 180 F. Supp. 3d 703, 708 (D. Idaho 2016).

5. Crinesha Berry & Astor Heaven, *City Claims Google's Water Use Is A Trade Secret and Exempt from Oregon's Public Records Laws*, CROWELL (Nov. 23, 2021), https://www.crowelltradesecretstrends.com/2021/11/city-claims-googles-water-use-is-a-trade-secret-and-exempt-from-oregons-public-record-laws/ [https://perma.cc/Y6HZ-HHUN]; Cal. State Water Res. Control Bd., *Protection of Confidenti al and Sensitive Information*, https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/dd_jardins/ddj_232.pdf [https://perma.cc/X7Q2-P4BS]

Department of Energy (DOE), IRS, NASA, HHS, and others are all expanding their use of contractors, while denying access to the public.[6] Disclosure in these circumstances would be paramount, not only under FOIA but under a new constitutional property theory of due process.

For the past two decades, a growing choir of academics has begun to scrutinize government agencies' increased use of technology and secrecy and have called for some protection. For instance, Danielle Keats Citron, has written extensively about the limits of due process protections in today's landscape of government automation and algorithms.[7] Others like Deirdre Mulligan & Kenneth Bamberger have commented on specific cases where unemployment benefits, recidivism, and health administration are being incorrectly evaluated by federal and state agencies employing algorithmic systems.[8] Academic literature by Sonia Katyal and Charles Tate Graves has focused on the growing problem of trade secrecy.[9] But the problem is not limited to algorithms and automation nor is it limited to the discrete problem of trade secrecy. Also, if not more importantly, the problem is due to a growing power imbalance: where government increasingly relies on private contractors and both institutions are increasingly able to wield the ever-expanding landscape of legal secrecy. Citizen access to this critical information has become increasingly more impermeable, even as it becomes more granular and personal. This paper aims to tackle and unveil this lopsided dynamic and justify a call for a new due process protection.

The first Section of this Article examines the genesis of Reich's article and the nearly simultaneous creation of FOIA, illuminating the historical parallels between the invention of due process rights and America's primary statute guaranteeing the right to information. This history underscores the parallels that both legal inventions were trying to correct: the imbalance between government and individual power. In

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6. U.S. Gov't Accountability Office, *A Snapshot of Government Wide Contracting for FY2022*, WATCHBLOG (Aug. 15, 2023), https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2022 [https://perma.cc/DM2T-2ZTD].

7. Danielle Keats Citron, *Technological Due Process*, 85 WASH U. L. REV. 1249, 1253, 1276–77 (2008) (discussing the problem of due process failures when database technologies are used by agencies).

8. Deirdre K. Mulligan & Kenneth A. Bamberger, *Procurement as Policy: Administrative Process for Machine Learning*, 34 BERKELEY TECH. L.J. 773, 776, 783–85, 792 (2019); RASHIDA RICHARDSON, JASON M. SCHULTZ & VINCENT M. SOUTHERLAND, LITIGATING ALGORITHMS 2019 US REPORT: NEW CHALLENGES TO GOVERNMENT USE OF ALGORITHMIC DECISION SYSTEMS 11, 19 (2019), https://ainowinstitute.org/publication/litigating-algorithms-2019-u-s-report-2 [https://perma.cc/2XAF-9EZG]; Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine Learning Era*, 105 GEO. L.J. 1147, 1162–65 (2017); DAVID FREEMAN ENGSTROM, DANIEL E. HO, CATHERINE M. SHARKEY & MARIANO-FLORENTINO CUELLAR, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES (2020), https://law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf [https://perma.cc/AS7W-TYG3].

9. Charles T. Graves & Sonia K. Katyal, *From Trade Secrecy to Seclusion*, 109 GEO. L.J. 1337, 1343 (2021); Christopher Morten & Amy Kapczynski, *The Big Data Regulator, Rebooted: Why and How the FDA Can and Should Disclose Confidential Data on Prescription Drugs and Vaccines*, 109 CALIF. L. REV. 493 (2021); Hannah Bloch-Wehba, *Access to Algorithms*, 88 FORDHAM L. REV. 1265, 1283–84 (2020) (discussing "proprietary algorithmic governance").

the next Section, the Article outlines the modern-day imbalance of power between government and corporations having near total control over information versus the public's lack of access to it and the two factors that contribute to this landscape. These factors are, first, the burgeoning privatization of core governmental functions and, second, new legal strategies permitting increased levels of corporate and government secrecy. These legal strategies are a key focus of this Article, especially the redefinition of Exemption 4 of FOIA (which permits the withholding of "confidential business information") in the Supreme Court's recent *Argus Leader* decision, as these cases illuminate how pervasive the imbalance is in our legal system and how much power they revoke from citizens' control over information critical to their lives - all justifying a new right to counteract them.

The final Section of this Article hopes to offer some solutions, even if hypothetical. First, it argues that, in total, the imbalance of power we currently exist under is analogous to the context that justified Reich's theory, which called for a new property right. It proceeds to argue that a *new* property right to access information should be considered and relies on several recent cases in fact applying this reasoning to uphold a due process right to access where there was a deprivation caused by government contractors withholding data. This Section also outlines three core contexts where this right should especially be guaranteed, including in cases where companies are at risk of violating citizen's civil rights and liberties, where companies are responsible for core government responsibilities and where companies are tasked with multiple government functions, approaching monopolistic behaviors.

I. CONTEXT AND IMPACT OF REICH'S *NEW PROPERTY* & FOIA

A. Context of Reich's New Property *and FOIA*

Every decade of America's government agencies has seen immense growth. For instance, the years between the Civil War and Great Depression saw a dramatic expansion in administrative institutions as the government responded to rapid modernization and industrial development.[10] Franklin D. Roosevelt's New Deal era "generated another round of regulatory innovation" responding to the societal challenges of the Great Depression.[11] But by the late 1960s, the United States' administrative state had grown even larger, creeping into the most intimate crevasses of a person's daily life.[12] What had once been a handful of administrative agencies morphed into an administrative state with thousands of departments employing hundreds of thousands of government workers.[13] This unprecedented

10. Reuel Schiller, *Administrative Law: Historical Origins of America's Administrative Exceptionalism*, 1 JUDGES' BOOK 5, 6 (2017).

11. *Id.*

12. O. John Rogge, *An Overview of Administrative Due Process*, 19 VILL. L. REV. 1, 1 (1973) ("Over the past hundred years, we have become administratively managed with increasing frequency and regularity.").

13. *Id.*

growth afforded the administrative state more power over the most fundamental elements of its citizens' lives than ever before.

It was at this time that Professor Charles Reich began to warn that America's bloated administrative state had exacted profound costs on individuals, particularly those from lower-income families, by violating their due process through surveillance and data collection.[14] These costs, Reich argued, were property violations that the Constitution had the opportunity to remediate by providing individuals with due process rights that could protect them against government takings. This Section investigates that power imbalance in the post-New Deal era between citizens and the administrative state and the proposal made by Professor Reich to solve it.

In the post-New Deal America, citizens' access to government agencies and their records was rarely granted. Agency employees were trusted as experts hired to express specialized "knowledge that comes from specialized experience"[15] that should not be questioned or interrogated by the average citizen.[16] The "expertise model was the brainchild of the New Dealers who offered science and economics as a solution to the market failures that created the Depression."[17] By deferring to administrative expertise, politics were believed to be, "largely absent" from aspects of social welfare during the 1940s and 1950s.[18] This model was intentionally designed to avoid imposing arbitrary action on an individual's life and decrease the possibility of politics corrupting administrative judgments. To support the "expertise model," courts at that time regularly gave agencies leeway to govern, permitting the administrative state to grow "dramatically in the postwar period."[19]

Over time, doubts about the integrity of this model began to set in. Policy thinkers began to question whether the expertise model was, in fact, neutral and distanced politics from citizens' lives or whether that was just an instrumental narrative to amassing power without accountability. Toward the end of the New Deal era, a report by a special committee appointed by President Franklin D.

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14. Ryan Calo & Danielle Keats Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L. J. 797, 823 (2021).

15. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1678 (1975).

16. Reuel Schiller, *Regulation and the Collapse of the New Deal Order, or How I Learned to Stop Worrying and Love the Market*, 2017 U.C. HASTINGS SCHOLARSHIP REPOSITORY 18, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2494&context=faculty_scholarship [https://perma.cc/BPV9-68 X4].

17. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy of the Administrative State*, 78 N.Y.U. L. REV. 461, 471 n.37 (2021) ("Landis was responsible for much of the characterization of agencies as experts and the reliance on their professionalism to solve the nation's economic woes without inviting the abuse of discretion."); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 10–17, 33, 39, 46–47, 98–99 (1938).

18. Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 NORTHWESTERN UNIV. L. REV. 361, 370 (2020).

19. Schiller, *supra* note 10. This is a far cry from recent Supreme Court decisions dramatically hemming in agency control. *See* Sackett v. E.P.A., 598 U.S. 120 (2023).

Roosevelt stated "the need" for "procedural reform in the field of administrative law."[20] In 1946 Congress responded to this call by passing the Administrative Procedure Act (APA).[21] While vague, the statute provided for some protections, such as judicial review of administrative decisions. But even that was not enough to fix the growing problem. Soon after, scholars argued that agency experts performed even more poorly than before and that the APA failed to afford adequate protection.[22]

What began as small cracks in the expertise model in the 1950s slowly turned into a chasm a decade later. By the time Reich was writing in the 1960s, "the idea of agencies as experts had fallen apart" and the need for "national welfare" to protect against agency failures had become paramount.[23] The political left, in particular, began to severely scrutinize the administrative state.[24] In 1960, a member of John F. Kennedy's transition team issued a scathing report on the administrative state, cataloging concerns about agency incompetence, bias, and corruption.[25]

Policy experts cited in the report, began to debunk the idea that agencies were somehow neutral and incapable of impacting individuals' lives. Their writings helped build the accepted wisdom that every agency action "had the potential to affect individual liberty in the most basic sense [and i]f they did not pose literal threats to constitutional due process, they raised the same sorts of concerns for fairness and participation."[26] Additionally, scholars, like Gabriel Kolko, Theodore Lowi, Charles Reich, and Ralph Nader, "began writing articles suggesting that elite interests used the administrative state to stifle competition and enrich themselves."[27] Other academics, like Robert Felmeth, David Sive, and Simon Lazerus, also argued that "agencies . . . had abandoned the public interest in favor of either powerful interest groups or their own bureaucratic interests."[28]

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20. S. Doc. No. 8, at 1 (1941) [hereinafter Attorney General Committee's Report] (internal quotations omitted); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1265 (1985) (describing origins of the APA).

21. Administrative Procedure Act of 1946, Pub. L. No. 404, § 7, 60 Stat. 237.

22. Schiller, *supra* note 10.

23. Bressman, *supra* note 17, at 475.

24. Schiller, *supra* note 16, at 18.

25. JAMES LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960). Agency capture refers to the circumstance where a government agency operates essentially as an advocate for the industries it regulates. *Id.*

26. *Id.*

27. Schiller *supra* note 16, at 19 (citing GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY (1963)); THEODORE J. LOWI, THE END OF LIBERALISM 288–89 (1969); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L. J. 1245 (1965); Charles A. Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) [hereinafter Reich, *The New Property*]. Nader's Center for the Study of Responsive Law published a series of monographs that were deeply skeptical about the ability of administrative agencies to further the public interest. *See* EDWARD F. COX, ROBERT C. FELLMETH & JOHN E. SCHULZ, 'THE NADER REPORT' ON THE FEDERAL TRADE COMMISSION (1969); JOHN C. ESPOSITO, THE VANISHING AIR (1970); ROBERT C. FELLMETH, THE INTERSTATE COMMERCE OMISSION: THE PUBLIC INTEREST AND THE ICC (1970); JAMES S. TURNER, THE CHEMICAL FEAST: RALPH NADER'S STUDY GROUP REPORT ON THE FOOD AND DRUG ADMINISTRATION (1970).

28. Schiller, *supra* note 16, at 20 (citing Paul Sabin, *Environmental Law and the End of the New*

At the same time, Reich and his contemporaries brought to light that a growing number of corporations in the 1960s wielded unchecked power, that, in combination with the state, blunted the public's ability to understand the world around them.[29] Reich wrote, "The issue between the giant corporation and the public should not be allowed to obscure the truth that the only dependable foundation of personal liberty is the economic security of private property."[30] This problem of corporate obfuscation, according to Reich, stemmed from the dynamic of "government [acting] as an employer, or as a dispenser of wealth, [and], the corporations allied themselves with, or actually took over, part of government's system of power".[31] In this way, "[w]hen the corporations began to stop competing, to merge, agree, and make mutual plans, they became private governments," asserted Reich.[32] By "s[eeking] the aid and partnership of the state…by their own volition became part of public government."[33] He concluded clearly that "it is the *combined power of government and the corporations* that presses against the individual."[34]

This consolidated relationship between government and the private sector—and the power imbalances it yields—have striking similarities to today's ecosystem, where numerous agencies have been accused of over-dependence on private actors who have "sought out business opportunities in crucial [public sector] areas where, after decades of privatization, the state has receded."[35] Elon Musk's near-total influence over the United States' space program is just one key example.[36] Similarly, today, companies like Amazon, Google, and Meta have been criticized and even recently sued for their monopolistic behavior, as these companies wield power over multiple aspects of government as well as the economic markets.[37]

Deal Order, 33 L. AND HIST. REV. 965 (2015); Reuel Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1416 (2000); MICHAEL W. MCCANN, TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM 106–21 (1986)).

29. Reich, *The New Property*, *supra* note 27, at 773 (discussing ways in which corporations and government passed power onto each other creating a system of "combined power" that "presses against the individual").

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 772.

34. *Id.* at 773.

35. Ronan Farrow, *Elon Musk's Shadow Rule*, NEW YORKER (Aug. 21, 2023), https://www.newyorker.com/magazine/2023/08/28/elon-musks-shadow-rule [https://perma.cc/RU6J-N7EA]; *see also* The Daily, *An Arms Race Quietly Unfolds in Space*, N.Y. TIMES (Feb. 8, 2024) ("Eric, this makes me wonder, how much the US, in its efforts to do those two things you just described out in space, is ultimately reliant on contractors, the private sector, and in particular Elon Musk, right . . . Right now, there's no question that SpaceX and Elon Musk plays an extraordinarily dominant role in the ability to launch to orbit, and the military is excessively reliant on SpaceX. So at this moment, it's an uncomfortable domination by SpaceX. Of the 9,400 objects in orbit right now, 5,235 of them are SpaceX Starlink satellites. So almost all of the satellites in orbit from any nation in the world are Elon Musk. But the Department of Defense realizes that it can't be so reliant upon one company for launch.").

36. *Id.*

37. David McCabe, *U.S. Accuses Amazon of Illegally Protecting Monopoly in Online Retail*, N.Y.

It is this "combined" power of government and corporations that Reich warned about in *The New Property* more than fifty years ago and that made him demand a rebalancing. He explained that the dynamic between private and public sectors created grave structural imbalance in the delicate equilibrium of power between the state and individuals. As Danielle Citron and Ryan Calo recently noted, Reich knew that it was the poor and marginalized that often suffered most from these administrative mistakes.[38] The suggested panacea offered by Reich and his contemporaries was clear: the government had to recognize individual rights for citizens to "combat the scourge of agency capture."[39]

B. Reich's Remedy for the Power Imbalance: New Property

Reich set forth this seminal argument in *The New Property*, where he argued that, by reconceptualizing property rights, the government could yield new benefits belonging to all citizens. These "new property" entitlements, he argued, arose from the government's bloated "wealth" that had resulted from expansive new administrative contracts, subsidies, and use of public resources and services.[40] Reich further explained that in such a society where government could so easily control and abuse its citizens through administrative power in ways that were previously unimaginable, countervailing property rights were not just optimal but necessary.

Reich used Lockean principles of the social contract to make this point. According to Locke, citizens had an obligation to obey the government in exchange for the government securing the natural rights of each person, including a right to property. It followed that sovereigns violating this social contract could be justifiably overthrown. Reich, trying to honor a modern version of this social contract, argued that citizens should still adhere to the social contract, but, because they had lost so much liberty through the growing administrative state invading the most intimate aspects of their lives, some "property" benefits were required in return.[41] Put another way, Reich argued that the government's rapacious growth in the 1960s was due to its citizens' increasing reliance on the state, which individuals had not been compensated for as promised in the social contract. Therefore some new form of due process rights were owed to citizens. "By viewing benefits this way, citizens could assert a panoply of procedural rights against the overbearing and corrupt agencies that he believed routinely trampled on people's individual liberties."[42]

Reich urged courts to expand the concept of property and treat welfare benefits, public employment, and government contracts as well as licenses as types

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TIMES (Sept. 26, 2023), https://www.nytimes.com/2023/09/26/technology/ftc-amazon.html [https://perma.cc/J7UN-MUCU].

38. Citron & Calo, *supra* note 14, at 843.

39. Schiller, *supra* note 16.

40. Kali Murray, *Charles Reich's Unruly Administrative State*, 129 YALE L.J. F. 714 (2020).

41. Reich, *The New Property*, *supra* note 27, at 733. ("[The benefits dispensed by government] are steadily taking the place of traditional forms of wealth-forms which are held as private property.").

42. Schiller, *supra* note 16.

of "new property" similar to more traditional forms of property, such as land, which were more obviously protected.[43] Just as the government could not take private land through eminent domain without compensation, so too should these *new* properties be protected, and a person should not be deprived of them absent some sort of due process, such as an administrative hearing. Even so, he argued, there should be a "zone of privacy for each individual beyond which neither government nor private power can push—a hiding place from all-pervasive system of regulation and control."[44] *The New Property* essentially "defended an individual's right to privacy and autonomy against government prerogative."[45]

To justify this novel idea, Reich recounted facts from a state report illustrating the immense amount of power that the government wielded over citizens and the harms that it could inflict, as well as the types of rights needed to protect citizens against any such violations. In this scene, government investigators raided the home of a welfare recipient in the middle of the night, looking for possible fraud while flagrantly invading a family's privacy. In telling the events, Reich inherently implies that the transgressions that occurred were absurd, a Faustian bargain of government assistance in exchange for constitutional infractions:

> [The family was] awakened at three o'clock in the morning by loud knocking at their door. The son went to the door, which opened into the bedroom occupied by the mother and daughter. Two men pushed past him without identifying themselves as investigators from the Department of Public Aid, and said they were looking for the father who was reported to have returned home. Without apology they left but returned several weeks later at one o'clock in the morning, repeating the same performance, again without finding their man. This experience has had an unnerving effect on the entire family.[46]

Ironically, many modern-day government-contracted technologies can easily gather such intimate data and infringe citizens' rights but with much more ease and celerity.[47] Regardless, Reich's vignette illustrated how citizens, who had become increasingly and unavoidably dependent on government largess (Department of Public Aid), could easily become divested of certain rights by government overstepping, and such infringements had to be accounted for through due process

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43. Reich, *The New Property*, *supra* note 27, at 773 ("During the first half of the twentieth century, the reformers enacted into law their conviction that private power was a chief enemy of society and of individual liberty. Property was subjected to 'reasonable' limitations in the interests of society. The regulatory agencies, federal and state, were born of the reform. In sustaining these major inroads on private property, the Supreme Court rejected the older idea that property and liberty were one, and wrote a series of classic opinions upholding the power of the people to regulate and limit private rights.").

44. *Id.* at 785.

45. Sam Roberts, *Charles Reich, Who Saw "The Greening of America," Dies at 91*, N.Y. TIMES (June 1, 2019), https://www.nytimes.com/2019/06/17/books/charles-reich-dead.html [https://perma.cc/B36T-TCJV].

46. Reich, *The New Property*, *supra* note 27, at 762.

47. *See, e.g.*, KASHMIR HILL, YOUR FACE BELONGS TO US (Penguin Random House eds., 2023).

protections. "It takes a brave man to stand firm against the power that can be exerted through government largess," wrote Reich.[48] In this way, he argued that the imbalance of power could be remediated in favor of the individual, but only with intentional, clear rights afforded to them.

C. Impact of Reich's New Property

When the Supreme Court decided to expand due process rights in 1970, it did not have to entirely rely on Reich's argument. The roots of due process law "are embedded deep within legal history" and trace back prior to the American Revolution.[49] Indeed, scholars had found due process rights stemmed as far back as the Magna Carta, in which the very existence of the state relied upon citizens' "rights to life, liberty and property," so the expansion and growth of those rights were not unfounded.[50] But Reich's modern recasting of property rights was the unique invention doing all of the heavy lifting in order for the Court to expand due process rights to less traditional forms of property.[51] So it was not until 1970, *after* Reich published his article, that the Court, in the case *Goldberg v. Kelly*,[52] expanded due process rights to the case of a welfare recipient being deprived of benefits.[53]

In the landmark case, John Kelly, a disabled welfare recipient, challenged the state's practice of terminating welfare benefits without notice and a pretermination hearing. Writing for the majority, Justice William J. Brennan invoked Reich's theory declaring, "It may be realistic today to regard welfare benefits as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights

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48. *Id.* at 763.

49. Corinne D. Kruft, *McDaniels v. Flick: Terminating the Employment of Tenured Professors - What Process Is Due*, 41 VILL. L. REV. 607, 607 n.1 (1996) (discussing the history of due process).

50. The concept of "due process of law" stems from Chapter 39 of the Charter of 1215, where King John promised that "[n]o free man shall be taken or imprisoned or disseised . . . except by the lawful judgment of his peers or by the law of the land." Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, 18 NOMOS 3, 4 (1977). The phrase "law of the land" evolved into the constitutional concept of "due process of law." *Id.* at 5–6. The original "law of the land" concept, however, included both procedural and substantive components. *Id. See generally* Edward S. Corwin, *The Doctrine of Due Process Before the Civil War*, 24 HARV. L. REV. 366, 368–70 (1911) ("It has, been demonstrated that the phrase 'due process of law' is a variation of Magna Carta's 'according to the law of the land,' which restricted the enforcement procedures available to English monarchs.").

51. The Supreme Court was also not immune to the cultural upheavals of the 1960s that Reich's work was aiming to fix.

52. 397 U.S. 254, 262 n.8 (1970) (quoting Charles A Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)).

53. *Goldberg v. Kelly* was, in many ways, considered the high-water mark for due process protections. While *Roth* and *Sindermann* guaranteed some property interests in public employment, the Supreme Court did not identify what requirements are necessary to satisfy due process and, in some ways, backed away from the expansive understanding in that case. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10–8, at 678 (2d ed. 1988) ("The actual elaboration by the Supreme Court of protected interests and procedural safeguards has been an evolving process punctuated by vague generalizations and declarations of broad, overarching principles.").

that do not fall within traditional common-law law concepts of property."[54] A few years later, the Court once again relied on Reich's theory in *Board of Regents of State Colleges v. Roth*[55] and then again in *Perry v. Sindermann*, ultimately finding in these cases that due process supports broader concepts of property, like government employment, that extend beyond traditional forms of property[56] to a broad range of interests.[57]

It is worth noting, however, that *Goldberg v. Kelly* was in many ways considered the high-water mark for Reich's theory. In the years following *Goldberg*, courts largely restricted the reach of Reich's theory, including limiting what is a right versus a privilege. But due process rights are still recognized and applied today,[58] and in recent years, due process rights seem to be back on the rise in some contexts.[59] Indeed, some have argued that there is an uptick in due process claims as there is growing support for protecting economic rights under the Due Process Clause.[60]

In court today, to claim a property interest in a government benefit, a person "must have more than an abstract need or desire for it; [s]he must have a legitimate claim or entitlement."[61] To demonstrate there is a legitimate claim, a plaintiff must not simply point to the Constitution, they must show an entitlement is derived from some independent source, either a contract or a state or federal law. That said, the "absence of" a specific contract, statute, or regulation does not foreclose the possibility of a property interest having been created, even if it is "'highly relevant' to the due process question."[62] For instance, the government's conduct or representations may also create a legitimate claim of entitlement.[63] Thus, courts today have veered away from adopting "too narrow a conception of due process."[64]

So while a classic example of new property is government employment (the right at issue in *Roth*), other, more expansive examples have been embraced recently under Reich's theory, including "subsidies to farmers and businessmen, routes for

54. *Goldberg*, 397 U.S. at 263, n.8.

55. *Roth*, 408 U.S. at 577.

56. *Sindermann*, 408 U.S. at 601.

57. While the Court found in *Roth* that employment of a university professor was not guaranteed where no tenure was promised, the Court in *Sindermann* found a property interest where a college professor's contract was annually approved but the Board voted not to offer a new contract for the next year and did not allow him an opportunity to be heard to challenge his termination. *Sindermann*, 408 U.S. at 601.

58. *See, e.g.*, Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 60–61 (1999) (finding *Goldberg* inapplicable to denial of benefits by private insurer operating under workers' compensation law); Atkins v. Parker, 472 U.S. 115, 128–29 (1985) (refusing to apply *Goldberg* to reducing food stamp benefits); Matthews v. Eldridge, 424 U.S. 319, 349 (1976) (refusing to apply *Goldberg* to Social Security insurance benefits).

59. Am. Int'l Gaming Ass'n v. Louisiana Riverboat Gaming Comm'n, 838 So. 2d 5, 21 (La. Ct. App. 2002) ("We conclude that permits or licenses of this order do not qualify as "property.").

60. Amanda Shanor, *The Tragedy of Democratic Constitutionalism,* 68 UCLA L. REV. 1302, 1334–36 (2022) (discussing the increase of due process claims and Lochnerization of the Due Process Clause). Additionally, Shanor cites to *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) where the Court rejected a punitive damages award against Philip Morris on procedural due process grounds. *Id.* at 1336.

61. Doran v. Houle, 721 F.2d 1182, 1184.

62. *Id.* at 1183 (citing Sindermann, 408 U.S. at 602).

63. *Id.*

64. People v. Cowan, 47 Cal. App. 5th 32, 63 (2020).

airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals."[65] The expansion of these rights has persevered today, as our government's administrative state continues to grow, and the need for more protection grows alongside it. And Reich's article still is cited in numerous cases,[66] legal articles,[67] and treatises to this day, supporting the case for further expansion of due process protections for the public.

D. FOIA as Remedy for Power Imbalance

The Supreme Court, in expanding due process in *Goldberg,* was not the only branch of government trying, at that time, to rectify the power imbalance between government and individuals. During this same time period, several legislative initiatives were enacted by contemporaries of Reich in Congress that shared the goals of Reich's proposal, as they were also designed to limit the power of the administrative state in favor of the public. A prime example of this kind of legislative effort from this era was the Freedom of Information Act (FOIA).[68]

This Article spends significant space detailing the creation of FOIA because it originated at the same time as due process rights and had shared goals of granting power to citizens—underscoring the goals of Reich's argument. However, this Article also, and more importantly, focuses on FOIA because of its recent weakening, particularly in the case *FMI v. Argus Leader*. This weakening sounds an alarm that there is a grave inequity in society once more, this time involving informational power—similar to the kind of grievance Reich was trying to address. As FOIA, the main protection for transparency in the United States, is slowly chiseled away, we may ask "What would Reich do?" For this reason, this Article details the initial and parallel intention behind FOIA and its exemptions in order to show how significant its gutting has been to the current disparity of informational power and how it should be offset through a new right.

FOIA was first proposed in the 1960s by Representative John Moss, a Democrat from California, who, alongside Charles Reich, was listed as one of the "leading reformers of the 1970s."[69] Moss "was a down-the-line Great Society

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65. Hillcrest Prop., LLP v. Pasco Cnty., 915 F.3d 1292, 1298 (11th Cir. 2019).

66. *Cowan*, 47 Cal.App.5th at 63; *Hillcrest Prop., LLP*, 915 F.3d at 1298 n.8; George Washington Univ. v. Dist. of Columbia, 318 F.3d 203, 207 (D.C. Cir. 2003); Schneider v. Cal. Dep't of Corr., 151 F.3d 1194, 1201 n.3 (9th Cir. 1998); Doran, 721 F.2d 1182; Geneva Towers Tenants Org. v. Federated Mortg. Inv'rs, 504 F.2d 483 (9th Cir. 1974).

67. Danielle Keats Citron, *A Poor Mother's Right to Privacy: A Review* 98 B.U.L. REV. (2018); Kali Murray, *Charles Reich's Unruly Administrative State* 129 YALE L.J. 714, 714 (2020); Philip Howard, *From Progressivism to Paralysis*, 130 YALE L.J. 370, 384 (2021); Raymond H. Brescia, *Social Change and the Associational Self: Protecting the Integrity of Identity and Democracy in the Digital Age*, 125 PENN. ST. L. REV. 773, 815 (2021); Theresa Glennon, Alexis Fennell, Kaylin Hawkins, and Madison McNulty, *Shelter from the Storm: Human Rights Protections for Single Mother Families in the Time of Covid-19*, 27 WM. & MARY J. RACE GENDER SOC. JUST. 635, 682 n.334 (2021).

68. *Id.*

69. WILLIAM T. GORMLEY JR., TAMING THE BUREAUCRACY: MUSCLES, PRAYERS, AND OTHER STRATEGIES 40 (1989).

liberal" advocating for "consumer protection, securities reform, environmental protections and workers' rights at the same time as he crusaded for freedom of information."[70] In addition to FOIA, Moss coauthored multiple bills advocating for individual protection against corporate power, including the Consumer Product Safety Act in 1972[71] and the Magnuson-Moss Warranty Act in 1975.[72] In 1955, the House Government Operations Committee first created a special subcommittee—nicknamed the "Moss Subcommittee"—to investigate the possibility of expanding access to federal records.[73] Together with allies in both chambers, Moss pressed for more than ten years to pass a federal freedom of information bill.

Alongside other regulatory initiatives of the 1960s, FOIA was passed to "curtail agency arbitrariness [and corporate power] by promoting transparency" through due process-type protections that protected against corporate interests, the exact concern that Reich wrote about.[74] In particular, FOIA included the innovative "request" system (where individuals file FOIA requests for information) and the "citizen suit" (where individuals sue the government for an agency denial of a FOIA request) to allow public interest litigators to monitor and sue agencies "failing to live up to their statutory mandate."[75] These fixes were directly in conversation with Reich's criticisms of the administrative state that "every day decisions are made concerning highways, dams, air safety, navigation and hundreds of other issues" and "the public usually lacks enough information to evaluate the kinds of decisions planners make."[76]

Reich and Moss were not alone in advocating for these kinds of changes. President Eisenhower, for instance, hardly an advocate of transparency while in office,[77] issued his famous warning about the need for transparency in his military-industrial complex speech delivered in January 1961.[78] According to Eisenhower, "[o]nly an alert and knowledgeable citizenry" could oversee the "proper meshing of

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70. David E. Pozen, *Transparency's Ideological Drift*, 128 YALE. L. J. 100, 119–120 (2018) (citing MICHAEL R. LEMOV, PEOPLE'S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMER RIGHTS 47–68 (2011)).

71. Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207, § 30(a) (1972), 15 U.S.C. § 2079(a) (Supp. 1975).

72. Michael R. Lemov & Nate Jones, *John Moss and the Roots of the Freedom of Information Act: Worldwide Implications*, 24 SW. J. INT'L L. 1; BRUCE LADD, CRISIS IN CREDIBILITY (1968); MICHAEL LEMOV, PEOPLE'S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMER RIGHTS (2011).

73. This committee is committee was called the Subcommittee on Government Information.

74. Schiller, *supra* note 16.

75. *Id.*

76. Charles Reich, *The Law of a Planned Society*, 75 YALE. L.J. 1227, 1244 (1966).

77. Forum by Andrew Bacevich, Stephen Kinzer, Spying: From Eisenhower to Obama, John F. Kennedy Presidential Libr. and Museum, in Boston, Mass. (Mar. 31, 2014), https://www.jfklibrary.org/events-and-awards/forums/past-forums/transcripts/spying-from-eisenhower-to-obama [https://perma.cc/JY6C-ES36].

78. Dwight D. Eisenhower, President of the United States, Military-Industrial Complex Speech (Jan. 17, 1961) (transcript available at https://avalon.law.yale.edu/20th_century/eisenhower001.asp [https://perma.cc/VV6Z-QE89]).

the huge industrial and military machinery of defense."[79] Eisenhower continued to warn that citizens must be "knowledgeable" about the government's partnerships with these defense contractors.[80] The next year, in a special message to Congress, President Kennedy framed his vision for a "Consumer Bill of Rights," which included the "right to be informed" and to be "protected against fraudulent, deceitful, or grossly misleading information, advertising, labeling, or other practices."[81]

It was in this zeitgeist of transparency that FOIA was introduced in the Senate as S.1666 in June 1963, during the first session of the 88th Congress.[82] This version of the bill had just three exemptions, none of which addressed trade secrets or commercial information. But after the 89th Congress convened, an identical bill was refiled[83] and passed[84] in October 1965, and the hearings from May of that year are replete with testimony of representatives confirming FOIA must require disclosure of previously withheld information, including corporate records held by the government. Comments from the Interstate Commerce Commission expressly stated the need for disclosing records pertaining to private industry.[85] Ultimately, President Johnson signed this new law, FOIA into existence on July 4, 1966.[86]

Since that time, some of the most contested parts of FOIA have been its exemptions, particularly Exemption 4, which withholds trade secrets and confidential business information. It is important to consider the political context of the origins of this particular Exemption, which has the purpose of withholding corporate information in the hands of the government, protecting the consolidated

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79. *Id.*

80. *Id.*

81. John F. Kennedy, President of the United States, Consumer Bill of Rights (March 15, 1962) (transcript available at https://hoofnagle.berkeley.edu/2015/05/07/president-kennedy-consumer-bill-of-rights-march-15-1962/ [https://perma.cc/N835-CWWN]).

82. Note: a companion bill introduced simultaneously, S.1663, was a much broader overhaul of the APA and included identical language about records access as S.1663. Hearings about the records provisions sometimes use S.1663 to refer to S.1666. For simplicity, this Article refers to the bill introduced and revised during the 88th Congress as S.1666.

83. Although as discussed in the next Subsection, both bills included unexplained revisions to Exemption 4. S.1160 and H.R. 5012. As with S.1666, S.1160 was also incorporated into a broader bill, S. 1336, such that Senate hearings refer to the latter to discuss provisions in S. 1160. For simplicity, this Article refers to the Senate bill as S. 1160. S. In late March and early April 1965, the Moss Subcommittee held hearings over five days. The first transcript is available here: https://www.documentcloud.org/documents/6534585-HEARING-House-subcommittee-March-and-April-1965.html. And appendix here: https://www.documentcloud.org/documents/6232905-House-subcommittee-hearing-appendix-May-1965.html. Four more days of hearings were held; the transcripts of which are here: https://www.documentcloud.org/documents/6232883-House-subcommittee-hearing-May-1965.html.

84. Most significantly S.1160 was amended on May 9, 1966 to add Exemption 9, which addresses "geological and geophysical information and data, including maps, concerning wells. 5 U.S.C. § 552(b)(9). As discussed in the next Subsection, the amendment also slightly revised the language of Exemption 4.

85. Overdisclosure of accident reports required to be filed by railroad companies might lead to more personal injury claims. *Administrative Procedures Act: Hearings before the S. Subcomm. on Admin. Prac. and Proc. of the S. Comm. on the Judiciary*, 89th Cong. (1965).

86. Lyndon B. Johnson, President of the United States, Statement by the President Upon Signing S. 1160 (July 4, 1966), https://nsarchive2.gwu.edu//nsa/foia/FOIARelease66.pdf [https://perma.cc/GT5W-DCMJ].

interests of government and industry—the exact combination of power Reich and his contemporaries were concerned about. One route to understanding the origins of this contentious exemption is by considering how FOIA overhauled the APA, mentioned earlier in this Article, which was a weaker, earlier effort to open government and corporate records to public scrutiny. FOIA modified the APA in two meaningful ways.[87] First, it no longer required requesters to have a specific relationship to the information to justify disclosure.[88] Second, and most pertinent to this discussion, FOIA no longer permitted *all* confidential information to be withheld. The preceding APA provision empowered agencies to withhold nearly *all* records even remotely confidential via a single incredibly broad exception for "information held *confidential* for good cause found."[89]

FOIA, by contrast, enumerated nine discrete categories of exemptions sufficient to withhold records, including Exemption 4, which was originally intended to have a more constricted definition of "confidential business information" than the APA.[90] In its final form, Exemption 4 protects "trade secrets and commercial or financial information obtained from a person [and that is] privileged or confidential."[91] This specific language was an effort to sharpen the teeth of FOIA and permit for more disclosure than the APA. It was also written in response to the growing critique of the industrialization of the administrative state. In this way, FOIA's Exemption 4 was created to respond to the need for individuals to combat the opacity of the administrative state that was increasingly becoming privatized and that Reich and his contemporaries were increasingly concerned about.

The evidence of Exemption 4's teeth is partially borne out by the context in which the exemption was drafted. In essence, Exemption 4 did not emerge in a vacuum. As Moss and his allies were leading FOIA's charge for transparency and accountability in the executive branch, parallel fights were playing out in courtrooms and the halls of public opinion to hold corporate actors accountable, especially those with close ties to the government. For instance, consumer protection litigation and mass tort lawsuits trying to hold large corporate actors accountable exploded in the 1960s.[92] Massively popular works, such as Rachel Carson's *Silent Spring*, published in 1962, followed by Ralph Nader's *Unsafe at Any Speed* in 1965, spurred mainstream calls for greater oversight of corporations and their products.

Exemption 4's legislative history also bears out this story. Initially, nothing like

87. Electronic Frontier Found., *History of FOIA*, https://www.eff.org/issues/transparency/history-of-foia [https://perma.cc/3CLJ-5P37] (last visited Jun. 7, 2024) ("FOIA was originally championed by Democratic Congressman John Moss from California in 1955 after a series of proposals during the Cold War led to a steep a rise in government secrecy.").

88. *Id.*

89. Pub. L. No. 79–404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706 (2000)).

90. *See* Murray, *supra* note 40; Reich, *The New Property*, *supra* note 27, at 733; Schiller, *supra* note 16.

91. 5 U.S.C. § 522 (1946).

92. David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PENN. L. REV. 1565 (2017).

Exemption 4 was in the first draft of FOIA framework. A narrow version protecting just trade secrets was first proposed early in October 1963, and by 1966 the final version exempting "confidential business information" was ultimately inserted at the request of the National Association of Broadcasters (NAB). The NAB, which represents radio and television stations, lauded the bill's overall aims but wanted some protections for "information of a confidential business nature." The NAB proposed that "financial or other business matters" that are not technically trade secrets but that are similarly submitted "in confidence pursuant to statute or administrative rules or regulations, the disclosure of which would be a violation of personal privacy" should be protected.[93] While this broadened the reach of Exemption 4, the NAB's proposed language was clear that it "would not curtail information that is of legitimate concern to the public," and would only "remove from public scrutiny financial information which would be of concern only to competitors."[94] The NAB's proposed amendment was therefore aimed at achieving balance by not hindering the public from having sufficient access to corporate information.[95]

While the Exemption clearly covered conventional confidential records, like "business sales statistics, inventories, customer lists, and manufacturing processes,"[96] legislators were still unsure of its reach.[97] The Senate subcommittee counsel, for example, explicitly expressed concern that the exception was too permissive.[98] The Justice Department representative also took up the issue at length, saying disclosure of "private business data and trade secrets" under the proposed law "could severely damage individual enterprise and cause widespread disruption of the channels of commerce . . . ."[99] Similarly, on July 31, 1964, a senator moved to reconsider the bill, concerned that Exemption 4 might require disclosure of confidential wage data collected by the Bureau of Labor Statistics.[100] But the sponsor of the bill

93. Howard Bell, Vice President for Plan. and Dev. of the Nat'l Ass'n of Broadcasters, *Hearings Before the Subcomm. on Admin. Prac. and Proc. of Comm. on the Judiciary*, 90 (Oct. 30, 1963).

94. *Id.* As an example of a legitimate public concern that might justify disclosing such potentially sensitive business information as financial matters, the NAB offered the example of rates charged by public carriers. *Id.*

95. *Id.* at 91.

96. *Id.* A representative from the American Bar Association's administrative law committee recommended expanding the exemption to "trade secrets and other confidential business information in the nature of a trade secret," or, alternatively and as noted above, to include "considerable elaboration in the legislative history." *Id.*

97. *Id.* The Senate subcommittee counsel was concerned that the exemption would still permit for much corporate information to be made public. The subcommittee counsel posed the idea for a potential expansion of "trade secrets." *Id.*

98. *Id.* at 169, 187.

99. *Id.* at 199. Following the October 1963 hearings, a number of agencies addressed a possible exemption in written comments, which vary both in detail of treatment and proposed scope. Concerns continued that "not only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors."

100. Note that the senator who sponsored the proposed amendment to Exemption 4 suggested that, in lieu of an amendment to the text, it might be possible "to accomplish the objective of removing these potential ambiguities or uncertainties through a more complete exposition of the committee's

responded that Exemption 4, as written, was already "quite broad" and that the exemption could not be further expanded without becoming impermissibly too broad.[101]

Congress adjourned in October 1964 before the House could take up the bill,[102] but when the new Congress reconvened the bill was refiled[103] addressing not just the concerns about the breadth but simultaneously making sure Exemption 4 had proper limits.[104] Exemption 4 now read: (4) trade secrets and *commercial or financia*l information obtained from the public and privileged or confidential. This filing reflected one substantial revision: the words "commercial or financial" were added to qualify "information." While there was no accompanying report to explain this change, it narrowed Exemption 4 considerably[105] to only permit the withholding of commercial information (*i.e.*, data intimately related to the business or commercial aspects of the private actor—such as wage data). This is a pivotal addition to Exemption 4, showing that Congress wished to protect confidential information but also to create some clear limits on the kinds of business information agencies could withhold.

Still, confusion abounded. At least one agency witness at the time expressed frustration at not being able to find adequate definitions of "confidential" in the administrative legal context,[106] including in Black's Law Dictionary and *West's Words and Phrases*.[107] The subcommittee counsel represented that they would clarify its meaning in "the reports,"[108] but this never occurred. Deficiencies in the drafting of Exemption 4 were quickly noted. In the first FOIA implementation memo in 1967, the Attorney General lamented that "the scope of this exemption is particularly difficult to determine," both because "the terms used are general and undefined" and because "the sentence structure makes it susceptible of several readings, none of which is entirely satisfactory."[109] Professor Kenneth Davis, whose analysis has been cited by numerous courts, considered Exemption 4 "probably the most troublesome provision in the Act" because the committee reports "appear to involve a flagrant attempt to defeat the plain meaning of the words 'commercial or

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intention without actually having to amend S. 1666." *Id.* Once again, legislative history was proposed as an alternative to textual codification.

101. The suggestion that we add the words "in confidence" to the phrase "information obtained from the public" might result in agencies taking much information from the public "in confidence" in the future that has not customarily been considered confidential or privileged.

102. 110 Cong. Rec. D506 (daily ed. Oct. 3, 1964).

103. The bill was refiled as S.1160 and H.R. 5012. Both chambers' final reports retained the word "customarily" (despite its removal from the bill text) and "seem to read the words 'commercial or financial' as if they were not there." S. 1160, 89th Cong. (1965).

104. H.R. 5012, 89th Cong. (1965).

105. KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.19, at 146 (1970 Supp.).

106. *Bills to Amend the Administrative Procedure Act, and for Other Purposes*: *Hearing on S.1160, S. 1336, S. 1758, S. 1879 Before the S. Comm. on Admin. Prac. and Proc. of the S. Comm. on the Judiciary*, 89th Cong. 347, 362 (1965).

107. *Id.* at 362.

108. *Id.* at 347.

109. Memorandum on the Public Information Section of the Administrative Procedures Act, Op. Att'ys Gen. (1967), https://biotech.law.lsu.edu/cases/adlaw/foia/67agmemo.htm [https://perma.cc/9L2Q-3NBS].

financial.'"[110] Regardless, the history clearly demonstrates consistent efforts made by Congress to limit the reach of Exemption 4, such as by adding the term commercial and not expanding confidentiality to *any* record, thereby enabling disclosure of corporate information to the public.

Nevertheless, because the term "confidential" was not entirely defined in FOIA, courts starting from 1966 applied various tests to determine its bounds.[111] Courts of appeals first held that records were "confidential" if the government provided an express or implied promise of confidentiality to the submitting company.[112] Subsequent courts considered whether the information was of the type "customarily released" to the public.[113] In 1974, however, these earlier tests were supplanted by *National Parks & Conservation Association v. Morton*,[114] which put in place the "substantial harm" test for confidentiality under Exemption 4 and became the leading case on the issue until the Supreme Court's *Argus Leader* decision. In *National Parks*, the Court of Appeals for the District of Columbia Circuit held that records would be withheld as confidential if their disclosure would "cause substantial harm to the competitive position of the person from whom the information was obtained."[115] This test was in place for nearly half a century.

The *National Parks* test was not a particularly searching one, but it seemed to incorporate the intent of Moss and those around him aiming for substantial corporate transparency, balanced only by true economic harms that could befall a company through disclosure. Under *National Parks*, courts frequently found requested records could be disclosed, where declarations submitted by corporate executives were too vague or cursory to show a substantial harm would occur from disclosure[116] or if the information was too stale to pose substantial competitive harm.[117] On the other hand, records were withheld, but only where private actors showed harm would likely occur with the requisite specificity.[118]

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110. *See* DAVIS, *supra* note 105.

111. At least part of the confusion surrounding Exemption 4 must be attributed to what has been described as "the tortured, not to say obfuscating, legislative history of the FOIA." 9 to 5 Org. for Women Office Workers v. Bd. of Governors, 721 F.2d 1, 6–7 (1st Cir. 1983) (quoting American Airlines, Inc. v. Nat'l Mediation Bd., 588 F.2d 863, 865 (2d Cir. 1978)). Justice Stephen Breyer summed it up well by stating that the definition of "confidential" within the meaning of Exemption 4 has troubled the courts since the enactment of FOIA. *Id.*

112. Gen. Servs. Admin. v. Benson, 415 F.2d 878, 881 (9th Cir. 1969).

113. Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971). *See also* M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 471 (D.D.C. 1972).

114. Nat'l Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

115. *See id.* at 767.

116. *See, e.g.*, Niskanen Ctr., Inc. v. U.S. Dep't of Energy, 328 F. Supp. 3d 1, 12 (D.D.C. 2018).

117. *See, e.g.*, Calderon v. U.S. Dep't of Agric., 236 F. Supp. 3d 96, 114–15 (D.D.C. 2017), *appeal dismissed sub nom.*, Calderon v. United States Dep't of Agric., Foreign Agric. Serv., No. 17-5088, 2017 WL 4231169 (D.C. Cir. May 31, 2017).

118. PETA v. DHS, 901 F.3d 343, 354 (D.C. Cir. 2018) (affirming that private records about importation of primates were properly withheld under Exemption 4 because the company sufficiently showed competitors "could easily use this information to target and disrupt, whether by outbidding or other means, a specific supply chain in an effort to drive an importer from the market or steal importation capacity").

While *National Parks* was not perfect, the test provided some guidance on a definition of "confidential information" that struck a compromise, ensuring that not all information produced by a company could be considered confidential. It struck a balance between public good and private interests which seems consistent with the historical conversations that had occurred at the time Exemption 4 was being considered in the halls of Congress. While returning to *National Parks* may not be possible at the current moment, the case does show that courts had found for decades a narrower interpretation of Exemption 4, permitting for disclosure of information that would benefit the public.

This political and legal history of FOIA, especially Exemption 4, is crucial context to understand what a dramatic change has occurred recently through the Court's broad new interpretation of "confidential" in its 2019 case, *FMI v. Argus Leader*. *Argus Leader* has had sweeping impacts, diminishing government transparency and the public's ability to access government records. It is this contemporary imbalance to which this Article now turns, illustrating that a similar solution may be needed, as Reich and Moss recognized in their time.

II. CONTEMPORARY CONDITIONS CREATING AN INFORMATIONAL POWER IMBALANCE

Two factors have especially contributed to the disproportionate power the government and corporations wield over citizens' information. First, as the administrative state has grown significantly in the past twenty years, increasing its access to citizens' information, many essential government functions have been privatized and contracted out to corporations. Second, corporations and courts have engaged in a variety of legal strategies to limit the public's access to data. These strategies have included increased claims of trade secrecy, First Amendment defenses for denying disclosure, and—most influentially—expanding the scope of Exemption 4 and Exemption 3 of FOIA to withhold records. The impacts of these legal changes have vastly diminished citizen access to important data about public health, safety, and well-being. The resulting imbalance calls for a *new* new property right to information access, in the footsteps of Reich and the creators of FOIA.

A. Increased Privatization of Core Governmental Functions

Similar to concerns Reich raised in the 1960s, today's public has become steadily reliant and dependent on private corporations, as companies often work hand in hand with the government to provide core public services. A recent study found that four out of ten government workers are private contractors, which means four out of ten government workers creating government data (while completing a government task) make that data vulnerable to withholding from the public.[119]

119. *See* Kristin Tate, *The Sheer Size of our Government Workforce is an Alarming Problem*, THE HILL (Apr. 4, 2019), https://thehill.com/opinion/finance/438242-the-federal-government-is-the-largest-employer-in-the-nation/ [https://perma.cc/NZF4-LYTT]; Neil Gordon, *Contractors and the True*

Increasingly this withheld contractor data is crucial to individuals' self-governance. For instance, government contractors obtain various intimate data, including "biometric data being used for passport identification, voter registration, border control, and defense systems and operations."[120] And while government contractors are required to take security precautions to ensure that biometric data (for instance) remains confidential,[121] few restrictions limit the companies' ability to use that kind of data and the ability to store it indefinitely. Similarly, the federal government has even fewer limitations on its own use of that data, including sharing it with other contractors.[122]

As an Amicus Brief submitted in *Argus Leader* warned:

> [T]he government is increasingly relying on private-sector [technologies] to make decisions that directly affect people's rights and opportunities including setting pre-trial detention, bail, criminal sentences, and parole eligibility; charging an individual with a crime; removing a child from a home; and determining Medicaid benefits[;] . . . surveillance technology including extremely precise location tracking, interception of network traffic, surreptitious computer hacking. . . . These and other private-sector technologies increasingly define how government programs operate, how they affect individuals, and whether they may infringe on constitutional rights and liberties.[123]

Moreover, much of this information is often collected automatically, through corporate technologies that are also not transparent.[124]

Such intimate data of citizens' lives being shared with private industry would have likely seemed impossible to Reich and his contemporaries. At that time, a consumer might have reasonably assumed that any data collected on them would be reasonably vague, only collected through basic technologies, and, if the intrusive reach of a corporation was troublesome, goods or services could always be sought elsewhere. Today, however, "opting out" of interactions with these ubiquitous and monolithic companies is not easily feasible for citizens navigating technological government processes that intertwine corporate products with individuals' needs and government services, now essential to modern life.[125]

Size of Government, POGO (Oct. 5, 2017), https://www.pogo.org/analysis/2017/10/contractors-and-true-size-of-government [https://perma.cc/J6ZV-BPWG].

120. Tracy Pearson, *The Rise of Biometric Data Collection and Privacy Practices in Government Contracts and Beyond*, DUNLAP BENNET & LUDWIG (Apr. 10, 2023), https://www.dbllawyers.com/biometric-data-collection-in-government-contracts/ [https://perma.cc/68R8-HK3Z].

121. *Id.*

122. Boeing Co. v. Sec'y of Air Force, 983 F.3d 1321, 1335 (Fed. Cir. 2020) (citing 48 C.F.R. 252.227-7013(a)(16)) (acknowledging that contractors retain ownership interest in data collected, but the government receives the right to use the data for any purpose including sharing with other contractors).

123. Brief for the AI Now Institute, ACLU, Elec. Frontier Found., Ctr. on Race, Ineq., and the Law, and Knight First Amend. Inst. as Amici Curiae Supporting Respondent at 3–4, Food Mktg. Inst. v. Argus Leader Media, 588 U.S. 427 (2019).

124. *Id.*

125. Victoria Baranetsky, *Keeping the New Governors Accountable: Expanding the First Amendment Right of Access to Silicon Valley*, KNIGHT FIRST AMEND. INST. COLUM. UNIV. (Aug. 21,

For instance, an American in the 1960s could hardly picture corporate employees storming into a home, as Reich described in his vignette described in Section I, but today, many corporations easily reach into the privacy of Americans' homes through technology, far surpassing what was formerly deemed as a permissible reach for government. Corporations have shifted into the role of quasi-governors,[126] and citizens find themselves automatically entangled in relationships with corporations in which they are inextricably bound, making the lack of transparency ever more threatening. In this way, Reich's prescient remarks remind us to consider whether there are new justifications to extend his theory even further.

While this trend is not new, the rise of privatization has reached heights not seen before in American history, as companies reach far more expansively and much more deeply into intimate aspects of our lives. For instance, over a decade ago, Jody Freedman and Martha Minow highlighted the ascent of private vendors performing government functions, a trend that they dubbed "government by contract."[127] Freedman and Minow warned that this "government by contract" drift towards the private would diminish public accountability, as companies took over new roles in the fields of "military intelligence, environmental monitoring, [and] prison management."[128]

Today, that description of "government by contract" is now vastly outdated, as companies like Amazon, Palantir, Google, and others have stepped into the role of quasi-governors[129] and even quasi-surveyors now providing software to help conduct an even broader spectrum of government functions. In addition, these new technologies are used to conduct calculations impacting the most intimate aspect of an average citizen's life, from calculating baseline benefits of Medicaid to assessing educator performance reviews for government employees.[130] This new and more threatening breadth-and-depth approach is well demonstrated in a recent criticisms of Elon Musk's companies not only capitalizing on agency capture but also making him a critical arbiter in the war in Ukraine.[131]

But perhaps one of the best examples of this intense privatization and how it impedes access to crucial information exists in the realm of U.S. immigration. In the past thirty years, the federal government has outsourced the majority of

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2019), https://knightcolumbia.org/content/keeping-the-new-governors-accountable-expanding-the-first-amendment-right-of-access-to-silicon-valley [https://perma.cc/CC36-QZCB] (stating, "as technology companies have grown to occupy a quasi-governmental role in society, directly impacting individuals' civil rights and civil liberties and controlling other key government functions."). This also does not even account for cases of government collecting data about citizens from private actors. *See* Cathryn Virginia, *How the U.S. Military Buys Location Data from Ordinary Apps*, VICE (November 16, 2020), https://www.vice.com/en/article/jgqm5x/us-military-location-data-xmode-locate-x [https://perma.cc/9FKL-TK64].

126. *Id.*

127. GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., Harv. Univ. Press 2009).

128. *See id.*

129. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1599 (2018).

130. Deepa Varadarajan, *Trade Secret Fair Use*, 83 FORDHAM L. REV. 1401 (2014).

131. Farrow, *supra* note 35.

federally-run immigration detention centers to private corporations. With aggressive enforcement policies starting under the Trump Administration and continuing under the Biden Administration, the Department of Homeland Security's Immigration and Customs Enforcement (ICE) expanded the number of immigration detention centers by fifty percent.[132] Contracts were signed with private entities to open and operate over forty new detention facilities.[133] In January 2020, roughly ninety percent of people housed in immigration detention centers opened after 2017 were held in facilities owned or operated by private corporations.[134] Due to subsequent backlash and public criticism, in January 2021, the Biden Administration, issued an executive order directing agencies to phase out and not renew private prison and immigration detention contracts.[135] Unfortunately, not much changed. As of September 2021, seventy-nine percent of people detained each day in ICE custody were still detained in private detention facilities.[136]

Even worse than the private control over people in government custody, is the fact that when abuses take place in these facilities (which is often, and includes civil rights and civil liberties violations), obtaining information about these wrongs has been more complicated as the corporations have claimed that complying with public records requests for data would violate their trade secrets and confidential business information.[137] For instance, dozens of women have received unwanted surgery in ICE custody, while other detainees have been harassed and discriminated against - and gaining access to that information and accountability is difficult.[138]

Other agencies farm out seemingly more mundane tasks that nonetheless have serious implications for taxpayers. For instance, as of 2020, the Treasury Inspector General for Tax Administration found that the IRS had "assigned over 3.28 million taxpayer accounts totaling more than $30.1 billion in delinquencies to private collectors."[139] While these private collectors collected about $498.4 million from these accounts and have had net revenues of about $345.6 million, the IRS incurred

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132. Eunice Hyunhye Cho, *Unchecked Growth: Private Prison Corporations and Immigration Detention, Three Years into the Biden Administration*, ACLU (Aug. 7, 2023), https://www.aclu.org/news/immigrants-rights/unchecked-growth-private-prison-corporations-and-immigration-detention-three-years-into-the-biden-administration [https://perma.cc/QK5D-PDR5].

133. *Id.*

134. *Id.*

135. Eunice Hyunhye Cho, *More of the Same: Private Prison Corporations and Immigration Detention Under the Biden Administration*, ACLU (Oct. 5, 2021), https://www.aclu.org/news/immigrants-rights/more-of-the-same-private-prison-corporations-and-immigration-detention-under-the-biden-administration/ [https://perma.cc/N5PV-9APG].

136. *See* Cho, *supra* note 132.

137. *See* Bogado, *supra* note 3; Schwarz, *supra* note 3.

138. Tom Dreisbach, *Government's Own Experts Found 'Barbaric' and 'Negligent' Conditions in ICE Detention*, NPR (Aug. 16, 2023), https://www.npr.org/2023/08/16/1190767610/ice-detention-immigration-government-inspectors-barbaric-negligent-conditions [https://perma.cc/M5G2-ULXZ].

139. Michael Cohn, *Taxpayers Defaulted on Over Half of Payment Arrangements with Private Debt Collectors*, ACCT. TODAY (12:55 P.M., Dec. 31, 2020), https://www.accountingtoday.com/news/taxpayers-defaulted-on-over-half-of-payment-arrangements-with-private-debt-collectors [https://perma.cc/98LX-FLFH].

substantial costs from the program, including about $98.6 million in commissions paid to the collectors. Beyond fiscal concerns, the program has been criticized on behalf of taxpayers for its caustic impact on taxpayers.[140] Critics have "bemoaned the lack of required transparency and oversight in the private companies' procedures, in contrast to even previous private debt collection programs" leading to negative financial impacts on citizens.[141] Additionally, "the IRS has no plans to train private collection agencies" or create more transparent procedures.[142]

Similarly, many public utilities have been privatized often by either selling off a public utility or outsourcing services, such as trash collection, to a private contractor. Of all the public utilities being privatized, the privatization of water resources is perhaps the most politically sensitive and critically important to all citizens. Privatization of water services has led to higher water rates for consumers. On average, bills cost consumers about fifty-nine percent more.[143] Consumers also see more regular rate increases without any explanation or explanation to citizens.

With this shift also comes a restriction on important information involving the costs of vital water resources, such as *why* exactly these rates are increasing and what the processes are that make water expensive[144] as well as safe.[145] Companies like Google and others have also increasingly claimed that they consider any water and energy data they hold to be trade secret in order not to disclose information about the subject.[146] As the broad-ranging effects of climate change become more apparent and create a crisis around water security, the importance of water data will only grow in value and possible secrecy.[147]

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140. As an example, although the IRS is statutorily required to refrain from collecting money from taxpayers experiencing economic hardship, private debt collectors still pursue payment in these circumstances. Chris Gaetano, *IRS Adds 3 New Companies to List of Approved Private Collection Agencies*, N.Y. STATE SOC'Y OF CERTIFIED PUB. ACCT. (Sept. 23, 2021), https://www.nysscpa.org/news/publications/the-trusted-professional/article/irs-adds-3-new-companies-to-list-of-approved-private-collection-agencies-092321 [https://perma.cc/6EBF-DA3N].

141. *Id.*

142. *Id.*

143. Leticia Miranda, *Residents Push Back at High Sewage and Water Bills From Private Companies*, NBC NEWS (July 18, 2021), https://www.nbcnews.com/business/consumer/residents-push-bac k-high-sewage-water-bills-private-companies-n1271228 [https://perma.cc/MPL6-ULXR].

144. In Illinois, the private water utilities Illinois American Water and Aqua Illinois have been buying up depreciated water and wastewater systems across the state. In 2013, state legislators passed a law that allowed these water utilities to pass along acquisition costs—over $220 million—to their customers. As the law stands now, customers are left without a voice in determining whether or not their water system is privatized. *Id.*

145. Vivian Underhill, Gary Allison, Holden Huntzinger, Cole Mason, Abigail Noreck, Emi Suyama, Lourdes Vera & Sara Wylie, *Increases in Trade Secret Designations in Hydraulic Fracturing Fluids and their Potential Implications for Environmental Health and Water Quality*, 351 J. OF ENV'T MGMT. 1 (2024), https://www.sciencedirect.com/science/article/abs/pii/S030147972302399X [https://perma.cc/33DH-SX75].

146. Elizabeth Dwoskin, *Google Reaped Millions in Tax Breaks as It Secretly Expanded its Real Estate Footprint Across the U.S.*, WASH. POST (Feb. 15, 2019), https://www.washingtonpost.com/business/economy/google-reaped-millions-of-tax-breaks-as-it-secretly-expanded-its-real-estate-footprint-across-the-us/2019/02/15/7912e10e-3136-11e9-813a-0ab2f17e305b_story.html [https://perma.cc/LJT8-CZSU].

147. Gim Huay Neo & Saroj Kumar Jha, *Why Water Security is our Most Urgent Challenge*

B. Legal Strategies Undercutting Public Access to Corporate Information

In addition to the simple fact that the administrative state now gathers far more information than ever before and that contracting corporations have greater access to it, there is another factor creating a crisis of information imbalance. Companies and governmental agencies have argued for a variety of novel legal strategies to keep information secret.[148] These legal strategies contribute greatly to the imbalance of power that echoes the dynamics of Reich's time and puts the public at a significant disadvantage.

1. Expansion of "Trade Secrecy" Claims

It is important to note that secrecy, in some cases, is necessary and that not *all* privatized data requires transparency. Trade secret law legitimately arose to protect companies' confidential information (such as Coca-Cola's recipe or Tesla's mechanical blueprint) from competitors wishing to appropriate their innovations. Often when companies share trade secrets with the government (*i.e.,* information that would substantially harm their company if made known) the public should not have access to it. However, in the past decade, companies, especially in the technology sector, have begun asserting a swell of confidentiality and trade secrecy claims in cases that have little to do with competitive business information.

Corporations' exaggerated claims of confidentiality have been recently criticized as contrary to public policy by courts and commentators.[149] In the Northern District of California, where many technology cases involving Silicon Valley companies originate, the federal court has expressed especially harsh opprobrium about this trend. In a case brought against Uber, the Northern District criticized one company's "pattern of claiming broad swaths of solutions to general competing considerations and engineering trade-offs" as trade secrets.[150] Similarly, in another case involving trade secrecy, the court refused to permit "limitless swath[s] of information" to be cast as trade secrets and required the company to provide "sufficient particularity" to allege such claims.[151]

Today, WORLD BANK BLOGS (Oct. 12, 2023), https://blogs.worldbank.org/water/why-water-security-our-most-urgent-challenge-today [https://perma.cc/PLM8-HFNG]; Mira Rojanasakul, Christopher Flavelle, Blacki Migliozzi, Eli Murray, *America is Using Up Its Groundwater Like There's No Tomorrow*, N.Y. TIMES (Aug. 28, 2023), https://www.nytimes.com/interactive/2023/08/28/climate/groundwater-drying-climate-change.html [https://perma.cc/PRD4-UDA6].

148. *See* N.Y. C.L. Union v. Erie Cty. Sheriff's Office, No. 000206/2014, 15 N.Y.S.3d 713 (N.Y. Sup. Ct. March 17, 2015).

149. *See* Sharon K. Sandeen, *Through the Looking Glass: Trade Secret Harmonization As A Reflection of U.S. Law*, 25 B.U. J. SCI. & TECH. L. 451, 473 (2019) (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 39 (AM. LAW INST. 2019)) ("U.S. law has long recognized that it is not good public policy to tie-up information too much, particularly when there is a public interest in the information."); Waymo LLC v. Uber Techs., Inc., C 17-00939 WHA, 2017 WL 2123560, at *7 (N.D. Cal. May 15, 2017) (disapproving of overbroad trade secrecy claims on policy grounds).

150. Waymo LLC v. Uber Techs., Inc., No. C 17-00939 WHA, 2017 WL 2123560, at *7 (N.D. Cal. May 15, 2017).

151. Citcon USA, LLC v. RiverPay Inc., No. 18-CV-02585-NC, 2019 WL 2603219, at *2 (N.D.

Many scholars have also noted this trend of late. In an article published in 2021, *From Trade Secrecy to Seclusion*, the authors Charles Tait Graves and Sonia Katyal explain how private actors have pushed the traditional parameters of trade secret law beyond reasonable measures to use it as a tool for "open ended concealment."[152] Graves and Katyal, in their article, show how companies have manipulated civil litigation, criminal litigation, open-access requests, and other parts of the law to expand trade secrecy.[153] Chris Morten and Amy Kapczynski have similarly explained how companies have systematically thwarted access to medical information that is essential to public health and can even be deadly if withheld.[154] Deepa Varadarajan has written about how companies increasingly use trade secret law "to block a wide swath of information from the scrutinizing eyes of consumers, public watchdog groups, and potential improvers."[155]

As all these scholars note, the origins of trade secrecy arose in the nineteenth century from employer disputes with their employees who unjustly shared competitive corporate information, often with a competitor. "The most common form of the traditional case, a company sues a departing employee—and perhaps also the new employer—to enjoin the use or disclosure of trade secrets, to seek damages for misappropriation of a trade secret, or occasionally even to prevent the employee from taking a new job with a competitor."[156] This bar on information sharing was usually strictly tied to documents and information relevant to the income-producing aspects of the company.

Today, many trade secrecy claims still involve employees, but unlike traditional cases, where the trade secrecy claims were used to prevent disclosure of a valuable manufacturing process, design or formula, it is now common for trade secrecy claims to be alleged to protect much broader swaths of information, previously considered to be outside the bounds of what was considered a trade secret.[157] For

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Cal. June 25, 2019). *See e.g.*, Swarmify, Inc. v. Cloudflare, Inc., No. C 17-06957 WHA, 2018 WL 1142204, at *3 (N.D. Cal. Mar. 2, 2018) (Amazon in particular has been known to wield this tactic with exceptional tenacity); Violet Ikonomova, *State Won't Say How Much of Your Money It Wanted to Give Amazon — That's Gilbert's 'Trade Secret'*, DET. METRO TIMES (Apr. 24, 2018), https://www.metrotimes.com/news/state-wont-say-how-much-of-your-money-it-wanted-to-give-amazon-thats-gilberts-trade-secret-114 88702 [https://perma.cc/8EYA-MQUV] (explaining Amazon's controversial position that proposals from American cities to host Amazon headquarters are trade secrets).

152. Charles T. Graves & Sonia K. Katyal, *From Trade Secrecy to Seclusion*, 109 GEO. L.J. 1337, 1343 (2021).

153. *Id.* at 1345–1346 (citing CATHARINE L. FISK, WORKING KNOWLEDGE: EMPLOYEE INNOVATION AND THE RISE OF CORPORATE INTELLECTUAL PROPERTY, 1800-1930 at 29–39, 175 (2009) ("[T]he deeper origins of trade secret law also arose from different versions of employer control over worker mobility, limitations of the guild system in early English modernity, and prosaic property disputes in the area of wills and trusts.").

154. Christopher Morten & Amy Kapczynski, *The Big Data Regulator, Rebooted: Why and How the FDA Can and Should Disclose Confidential Data on Prescription Drugs and Vaccines*, 109 CALIF. L. REV. 493 (2021).

155. Deepa Varadarajan, *Trade Secret Fair Use,* 83 FORDHAM L. REV. 1401, 1401 (2014).

156. *See* Graves & Katyal, *supra* note 152, at 1346.

157. John Cook, *Amazon Drops Contentious Non-Compete Lawsuit Against Former AWS Exec*

instance, in one case, companies and the government alleged trade secrecy to prevent disclosure of data showing injuries to employees.[158] In that case, government contractors alleged that the work injury data impacted the bottom line, as it affected insurance costs and therefore should be withheld.[159] The Department of Labor concurred and withheld the data, despite decades of policy experts explaining the benefits and value in disclosure of this kind of data for public health and workplace safety.[160]

Examples of this kind of improper application and expansion of trade secrecy abounds, particularly in the field of public health. As Morten and Kapczynski point out, large domains of public health data are kept away from public view under trade secret justifications.[161] The authors provide examples to show how this withholding can be not only dangerous but lethal. For example, a multibillion-dollar drug for Merck called Vioxx was known to have links to heart attacks, strokes, and heart failure. Despite being aware of these risks for over three years, the FDA did not make the data publicly available, asserting some of the information was trade secret, leading to an estimated death count in the tens of thousands. To combat this trend, the authors argue for transparency of trade secrets, and deftly note Supreme Court precedent, which concluded "that even if certain health, safety and environmental data . . . were trade secrets, the Federal Government had the authority to disclose the data, as long as it did not provide assurances that it would not do so."[162]

Similarly, a more recent lawsuit, filed in 2022 by the University of Southern California (USC), shows how trade secrecy was brandished to hide important health-care information from the public.[163] USC filed a lawsuit against L.A. Care, a publicly operated health-care plan that serves nearly 2.4 million low-income Los Angeles County residents. Specifically, the university requested scorecards that L.A. Care annually compiles on health care quality, patient satisfaction rankings, and performance of each medical group in its plan. L.A. Care refused to disclose unredacted scorecards that reveal how contracted provider groups perform, claiming that the information was a trade secret, among other justifications.[164] "These are public records of a publicly funded entity and should not be kept secret," said Michelle Levander, founding director of the USC Annenberg Center for Health

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Who Left for New Job at Smartsheet, GEEKWIRE (June 17, 2017), https://bit.ly/2xE4SG8 [https://perma.cc/9GBX-LQ7M] (explaining Amazon filed a lawsuit against a former employee based on a noncompete clause, surprising the startup community by categorizing the move as "general bullying behavior," which other courts have criticized).

158. Ctr. for Investigative Reporting v. U.S. Dep't of Labor, 424 F. Supp. 3d 771, 777 (N.D. Cal. April 5, 2019).

159. *Id.* at 777.

160. *Id.* (showing the DOL was ultimately not successful in this argument but asserted it multiple times in separate lawsuits).

161. *See* Morten & Kapczynski, *supra* note 154.

162. *Id.* at 530 n.206 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1004–05 (1984).

163. *Lawsuit Seeks Records from Penalized L.A. County Health Plan*, NAT'L HEALTH L. PROGRAM (Apr. 20, 2022), https://healthlaw.org/news/lawsuit-seeks-records-from-penalized-l-a-county-health-plan/ [https://perma.cc/HA2L-DX25].

164. *Id.*

Journalism.[165] "The release of public scorecards for L.A. Care's provider groups would be a first step to opening up the black box of health care quality for low-income children and families in California," she argued.[166] Today, this case continues to be litigated.

Government records involving the environment have also been increasingly fraught with problematic claims of trade secrecy.[167] For example, fracking technology and its impact on the environment have long been asserted to be a trade secret by fracking companies.[168] Other companies have lobbied to codify some of these withholdings by law. For instance, the Federal Insecticide and Rodenticide Act, which governs pesticides regulation in the United States, allows pesticide manufacturers in the United States to withhold portions of their records marked as trade secrets.[169] Likewise the Toxic Substances Control Act, which provides the EPA with authority to regulate chemical substances, prohibits the agency from disclosing trade secrets or confidential business information.[170] These policies have resulted in grave withholdings. For instance, "[a]bout 95 percent of new chemical notifications that the EPA receives includes information protected as trade secret[s],"[171] and the EPA has withheld names of 17,585 chemicals that manufacturers have registered with the agency, as trade secrets.[172] As Madeeha Dean has written, "In this manner, trade secrecy directly conflicts with environmental regulation that relies on the collection and distribution of information about land, air, water, and human health."[173]

In addition to the concrete harms trade secrecy can inflict on public health and safety, it also has broader damaging impacts on democracy.[174] One of the main harms it inflicts is thwarting citizens from being able to meaningfully self-govern. By concealing important information from being disclosed to the public, "trade

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165. *Id.*

166. *Id.*

167. Madeeha Dean, *An Environmental FOIA: Balancing Trade Secrecy with the Public's Right to Know*, 109 CALIF. L. REV. 2423 (2021).

168. John M. Golden & Hannah J. Wiseman, *The Fracking Revolution: Shale Gas as a Case Study in Innovation Policy*, 64 EMORY L. J. 955, 962 (2015); Julie E. Zink, *When Trade Secrecy Goes Too Far: Public Health and Safety Should Trump Corporate Profits*, 20 VAND. J. ENT. & TECH. L. 1135, 1159–60 (2018); Elliott Fink, Note, *Dirty Little Secrets: Fracking Fluids, Dubious Trade Secrets, Confidential Contamination, and the Public Health Information Vacuum*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. 971, 983 (2019).

169. Dean, *supra* note 167.

170. *Id.* at 2426.

171. *Id.* at 2441.

172. *Id.*

173. *Id.* at 2423.

174. Kathryn E. Szmuszkovicz & Sean M. Roberts, *Protection of Confidential Inert Ingredient Information in a World of Disclosure*, CPDA Q., January–March 2010, at 1, 4, https://www.bdlaw.com/content/uploads/2018/06/protection-of-confidential-inert-ingredient-information-in-a-world-of-disclosure-cpda-quarterly.pdf [https://perma.cc/BZJ8-7DSR] ("A company submitting inert ingredient information has several opportunities to protect that information from disclosure – by claiming it as CBI, substantiating the CBI claim if requested, and even defending the CBI claim in court if necessary.").

secret owners get to have power without liability."[175] In other words, they have no accountability to the public for their negative impacts and may continue to cause ongoing harm without citizens being able to use their voting power to try to affect change. For instance, companies such as DuPont, Union Carbide, BF Goodrich, Imperial Chemical, and Monsanto have all continued to use dangerous chemicals even when they were well aware of their dangers, in part by claiming secrecy and confidentiality.[176] As Professor David Levine has explained, this dangerous form of information control easily leads to "opportunistic privacy," the "dubious use of [trade secrecy law] as an information control tool."[177] Thus, while some trade secrecy is necessary to a functioning economy, it has greatly, and incorrectly, expanded, harming democratic norms. But the expansion of trade secrecy is, indeed, just *one* legal strategy creating this harmful imbalance with regard to information access.

2. Increased First Amendment Claims Stymieing Corporate Transparency

Corporate arguments to withhold data are even more robustly protected in cases where companies increasingly assert First Amendment rights. Within the past five years, the Supreme Court has decided two cases that have dramatically weakened the already thin landscape of transparency law in America under the cloak of the First Amendment. In *Americans for Prosperity Foundation v. Bonta*[178] and *National Institute of Family and Life Advocates (NIFLA) v. Becerra*,[179] the Supreme Court cemented the ruling that disclosure laws (often passed to ensure government accountability and corporate responsibility) are unconstitutional under the First Amendment, unless they are gravely curtailed.

In *NIFLA*, the Supreme Court struck down a California law that required reproductive healthcare clinics to post truthful notices to customers that would reveal if any clinic staff were unlicensed.[180] *Bonta* similarly "sent shockwaves around the campaign finance and election law community," hemming in the disclosures that states were able to require of nonprofits.[181] These two opinions dramatically changed the landscape of what transparency laws would pass constitutional muster. They also weakened the powers of states that wished to regulate corporate practices. Today, many states have to discover means outside of passing disclosure laws in

175. Dean, *supra* note 167, at 2440.

176. *See* Zink, *supra* note 168, at 1145–56.

177. *See* David S. Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135, 157–58 (2007).

178. Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021).

179. Nat'l Inst. of Fam. and Life Advoc. v. Becerra, 585 U.S. 785, 768 (2018).

180. This law was especially important given that, "85% of the CPCs investigated in California misled women to believe that abortion is both traumatizing and dangerous." NARAL PRO-CHOICE AM., CRISIS PREGNANCY CENTERS LIE: THE INSIDIOUS THREAT TO REPRODUCTIVE FREEDOM (2015), https://reproductivefreedomforall.org/wp-content/uploads/2017/04/cpc-report-2015.pdf [https://perma.cc/G4HJ-RZ53].

181. American Bar Association, *Is The Tide on Campaign Finance Disclosure Quietly Shifting? A Look One Year After Americans for Prosperity v. Bonta* (Oct. 5, 2022), https://www.americanbar.org/events-cle/ecd/ondemand/426285948/ [https://perma.cc/BH3R-47ZY].

order to inform the public and effect desired changes. Some states have tried to accomplish their goals by turning to the passage of broad professional licensure laws or drafting transparency laws extremely narrowly.[182] But in most circumstances, disclosure requirements have been thwarted, harming the twin goals of transparency: accountability and creating an informed public.[183] This has occurred at the same time that our society is in the greatest need of, and has an unwavering hunger for, transparency laws, particularly since data collection, social media companies, artificial intelligence, and corporate power have grown.[184]

These Supreme Court cases also point out one of America's great ironies: while many conceive of transparency as a key component of free speech, it is not expressly protected under the First Amendment. For instance, in several narrow categories of the First Amendment law, transparency principles have been secured, such as in compelled speech,[185] professional speech,[186] and court access cases,[187] but in most other areas, access protections have largely been denied by the Supreme Court.[188]

But complaints about the lack of transparency protections have recently peaked, including in the halls of academia. For instance, following *NIFLA*, Professors Erwin Chemerinsky and Michele Goodwin wrote an incendiary piece criticizing the Supreme Court decision and its misunderstanding of the First

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182. *See, e.g.*, CAL. BUS. & PROF. CODE § 2052 (West 2019); COLO. REV. STAT. § 12-240-107 (2019); COLO. REV. STAT. § 12-240-135 (2019); VT. STAT. ANN. tit. 26, § 1314 (2019); CTIA-The Wireless Ass'n v. City of Berkeley (CTIA), 854 F.3d 1105 (9th Cir. 2017) (upholding transparency law requiring cell-phone retailers to inform consumers about radio-frequency radiation).

183. Still, various parties have continued to implement the holdings from these cases. For instance, news outlet the *Washington Post* filed a case in the District of Maryland citing *NIFLA* to escape disclosure and record keeping requirements in the Online Electioneering and Transparency and Accountability Act. Similarly, pregnancy centers have used NIFLA to stymy reporting about their health clinics. Other areas of stricken notices have included advertisements that warn consumers about sugar sweetened beverages as well as defense attorneys reporting on their work. In general, courts find these measures "unjustified or unduly burdensome disclosure requirement [that] might offend the First Amendment by chilling protected commercial speech." Am. Beverage Ass'n v. City & Cnty. of S.F., 916 F.3d 749, 753 (9th Cir. 2019) (quoting Zauderer v. Office of Disciplinary Couns., 471 U.S. 626, 651 (1985)).

184. Daphne Keller, *Platform Transparency and the First Amendment*, 4 J. FREE SPEECH L. 1 (2023).

185. *See*, *e.g.*, Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2347 (2020) (distinguishing "traditional or ordinary economic regulation of commercial activity that imposes incidental burdens on speech" from impermissible restriction); Sorrell v. IMS Health, Inc., 564 U.S. 552, 567 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.") (courts have generally been able to distinguish impermissible content-based speech restrictions from traditional or ordinary economic regulation of commercial activity that imposes incidental burdens on speech); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 472 (1997) (rejecting First Amendment challenge to law requiring citrus farmers to support joint ad campaign).

186. *NIFLA*, 585 U.S., at 769. *See also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

187. Richmond Newspapers, Inc. v. Va., 448 U.S. 555, 566–67 (1980) (quotations and citation omitted) (stating it has roots in the "days before the Norman Conquest").

188. *Compare* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 566–67 (1980) (quotations and citation omitted) (stating it has roots in the "days before the Norman Conquest") *with* David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L. J. 100 (2018) (explaining that there is no First Amendment protection for transparency); Margaret B. Kwoka., *FOIA*, *Inc.*, 65 DUKE L. J. 1361 (2016) (discussing the setbacks of transparency).

Amendment precedent, particularly *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).[189] Academics like Sonia Katyal, Katharina Pistor, Rebecca Wexler, Deepa Varadarajan, Hannah Bloch-Wehba, and Christopher Morten have all written accounts of the need for greater transparency given this new terrain. Complaints have even seeped into the walls of the Supreme Court. In 2018, Justice Kagan lamented in dissent that the Court had passed First Amendment cases knocking down regulatory powers, to the public's detriment:

> [T]he majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way. . . . And it threatens not to be the last. Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things.

But still companies continue to assert First Amendment claims to protect their businesses and their data collection against public access at grave cost to the public. For instance, the City and County of San Francisco passed an ordinance requiring disclosure of health warnings on advertisements for certain sugar-sweetened beverages.[190] The American Beverage Association filed suit challenging the ordinance as a violation of First Amendment rights. The Ninth Circuit, relying on *NIFLA*, concluded that Plaintiffs would likely succeed on the merits of their claim because the ordinance was an "unjustified or unduly burdensome disclosure requirement [that] might offend the First Amendment by chilling protected commercial speech."[191]

Similarly, in *Montana Citizens for Right to Work v. Mangan*,[192] plaintiffs brought a facial challenge of a "Fair Notice" law that required political committees to provide a candidate with a copy of any campaign ad published within ten days of an election that refers to, but does not endorse, the candidate. The court granted the challenge, holding that the disclosure law was aimed at specific speech that was not narrowly tailored and so was unconstitutional under the exacting scrutiny standard described in *Bonta*. Again, in *Lakewood Citizens Watchdog Group v. City of Lakewood*, a municipal disclosure ordinance was passed requiring disclosure by organizations engaging in express advocacy or electioneering communications of donors who gave over $250.[193] The Court granted a permanent injunction preventing the

189. Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 N.Y.U. L. REV. 61, 68 (2019) (where Chemerinsky and Goodwin compiled a non-exhaustive sample of disclosure laws potentially vulnerable under NIFLA). *See also* Robert Post, *NIFLA and the Construction of Compelled Speech Doctrine*, 97 IND. L. J. 1071 (2021).

190. Am. Beverage Ass'n v. City & Cnty. of S.F., 916 F.3d 749 (9th Cir. 2019).

191. *Id.* at 753 (quoting Zauderer v. Office of Disciplinary Couns., 471 U.S. 626, 651 (1985)).

192. Montana Citizens for Right to Work v. Mangan, 580 F. Supp. 3d 911 (D. Mont. 2022).

193. Lakewood Citizens Watchdog Grp. v. City of Lakewood, WL4060630 (D. Col. Sept. 7, 2021).

application of provisions to plaintiff because they failed to meet "exacting scrutiny" under *Bonta*.

In yet another case, the facial-recognition company Clearview AI made a First Amendment claim to defend itself against assertions that it violated privacy rights of individuals. Clearview had scraped over thirty billion photos from the internet to build its database, for sale to law enforcement across the country. As of March 2023, law enforcement reportedly used the database nearly a million times, including to surveil protesters around the United States.[194] As *New York Times* reporter Kashmir Hill writes, "To its critics, the company represents a grave new threat to privacy—making it possible for the government and corporate clients to identify nearly anyone with just a photograph."[195]

In response to these claims, the company hired Floyd Abrams, one of the most celebrated First Amendment attorneys in the country, to assert free speech arguments on its behalf to justify any potential privacy infractions and thwart any transparency of its algorithms.[196] Abrams and the rest of Clearview's team argued "that the entire process of making and selling its app—from scraping to making faceprints, to providing the app to customers—constitutes expression protected by the First Amendment."[197] While several courts have doubted that any violations of the First Amendment exist and that the privacy claims should be considered,[198] others are still considering whether to embrace Clearview's framework which would "provide it with a First Amendment get-out-of-jail-free card [for any possible accountability or transparency], leaving Clearview's secret, commercially motivated facial recognition business entirely insulated from most government regulation and consumer protection or civil rights lawsuits."[199]

3. Redefining and Overusing Exemptions to FOIA

The main transparency protection in the United States is the Freedom of Information Act, but that statute has also been hobbled in recent years by courts, the government, and corporations that, together, have all expanded FOIA's exemptions, particularly Exemptions 3 and 4, to withhold corporate information. Expanding Exemptions 3 and 4 has been perhaps the most significant legal strategy

194. James Clayton & Ben Derico, *Clearview AI Used Nearly 1m Times by US Police, It Tells BBC*, BBC NEWS (Mar. 27, 2023), https://www.bbc.com/news/technology-65057011 [https://perma.cc/GUY8-ZTK3].

195. Kashmir Hill, *Facial Recognition Start-Up Mounts a First Amendment Defense*, N.Y. TIMES (Nov. 8, 2020), https://www.nytimes.com/2020/08/11/technology/clearview-floyd-abrams.html [https://perma.cc/AR8V-WUNY].

196. *Id.*

197. Talya White & Jake Karr, *The First Amendment Should Protect Us from Facial Recognition Technologies—Not the Other Way Around*, TECH. POL'Y PRESS (Aug. 15, 2023), https://techpolicy.press/the-first-amendment-should-protect-us-from-facial-recognition-technologies-not-the-other-way-around/#:~:text=If%20you're%20wondering%20by,protected%20by%20the%20First%20Amendment [https://perma.cc/49PU-CDNP].

198. *In re* Clearview AI, Inc. Consumer Priv. Litig., 585 F. Supp. 3d 1111, 1120 (N.D. Ill. 2022).

199. White & Karr, *supra* note 197, at 150.

used to tilt informational power in the favor of corporations. In the FOIA case, *Argus Leader*, the Court expanded Exemption 4 to permit withholding of more "confidential business information" than ever before. One federal district court applying this case compared the battle for information under this new test to be like the struggle between David and Goliath.[200] Similarly, corporations have lobbied for countless new statutes that permit withholding under Exemption 3, trumping FOIA's presumption of openness. Through expansion of these exemptions, companies and the government have been able to withhold from the public more data than ever before.

a. Argus Leader's Interpretation of Exemption 4

FOIA Exemption 4 allows an agency to withhold "matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential."[201] Its purpose is to "balance the strong public interest in favor of disclosure against the right of private businesses to protect sensitive information."[202] In *Argus Leader*, the Supreme Court announced a new test for Exemption 4 and held that the records were "confidential" if the "information is both customarily and actually treated as private by its owner."[203] This rule was a sharp departure from the previous test that required companies to show a "substantial harm" would occur and instead essentially permits companies to withhold records under FOIA Exemption 4 by simply rubber-stamping records as "confidential." Applying this new reading under *Argus Leader*, government agencies have since withheld various records that were once deemed public, including government contracts, diversity reports, and environmental records.

At the same time, as privatization continues to grow and federal agencies farm out more responsibilities to corporate actors, they are able to shield increasing amounts of public records by using this new broadened version of Exemption 4. As the Department of Justice audaciously argued in a recent Exemption 4 case, "Exemption 4 is intended to protect the interests of *both* the government and *submitters of information* [i.e. corporations]" but this characterization of Exemption 4 conflicts with "FOIA['s basic purpose] to ensure an informed citizenry . . . [and holding] the governors accountable to the governed"[204] and the Exemption's legislative history.

The *Argus Leader* case arose from a South Dakota newspaper's FOIA request

200. *American Small Business League Provides Update on "David vs. Goliath" Department Of Defense Lawsuit*, PR NEWSWIRE (Feb. 13, 2019, 8:00 AM), https://www.prnewswire.com/news-releases/american-small-business-league-provides-update-on-david-vs-goliath-department-of-defense-lawsuit-300794695.html [https://perma.cc/54ME-3TJM].

201. Freedom of Information Act, 5 U.S.C. § 552(b)(4).

202. GC Micro Corp. v. Def. Logistics Agency, 33 F.3d 1109, 1115 (9th Cir. 1994), *overruled by* Animal Legal Def. Fund v. U.S. Food & Drug Admin., 836 F.3d 987 (9th Cir. 2016) (overruled on other grounds).

203. Food Mktg. Inst. v. Argus Leader Media, 588 U.S. 427, 440 (2019) (emphasis added).

204. N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

for the names and addresses of retail stores that participate in the Supplemental Nutrition Assistance Program (SNAP)—the national food assistance program—and each store's annual SNAP data. The USDA produced retailers' names and addresses but refused to disclose the store-level SNAP data, invoking FOIA's Exemption 4. The newspaper responded by suing the United States Department of Agriculture under FOIA, and the District Court employed the *National Parks* test, formerly used under Exemption 4. Applying that test, the Court agreed that the data should be disclosed because disclosing SNAP would not cause substantial harm to the companies. The Eighth Circuit agreed with the trial court's decision.[205]

In the 6-3 decision, written by Justice Neil Gorsuch, the Supreme Court discarded the *National Parks* "substantial harm" test rejecting it as "a relic of a 'bygone era of statutory construction'" that is "inconsistent with the terms of the statute."[206] The Court adopted its new standard, under which the government can withhold any commercial and financial information given by contractors, so long as the companies treat it as private.[207] Justice Gorsuch claimed that this new test comports with the ordinary meaning of the statute's terms.[208] The dissenting justices, however, asserted in an opinion written by Justice Breyer that the old standard was correct and that the majority "goes too far."[209] The majority's ruling, Justice Breyer feared, would "deprive the public of information for reasons no better than convenience, skittishness, or bureaucratic inertia."[210] He also noted that FOIA, as "a tool used to probe the relationship between government and business should not be unavailable whenever government and business wish it so."[211]

Since the decision was issued, various agencies have deployed the *Argus Leader* framework to withhold important public records because they have been touched by private actors. In a recent Ninth Circuit case, the National Association for Biomedical Research argued that Exemption 4 required the U.S. Fish and Wildlife Service to withhold data that the agency had freely released for more than a decade.[212] Courts employing *Argus Leader* are able to easily find such information confidential, so long as a company simply provides an affidavit attesting that the information is private. For instance, in a case involving the Food and Drug Administration, the government asserted that one such affidavit from one company alone was "sufficient to establish that the information is confidential within the

205. *Food Mktg. Inst.*, 588 U.S.

206. *Id.* at 431–36.

207. *Id.* at 439. *Argus Leader* also stated records are confidential if the information is "provided to the government under an assurance of privacy." *Id.* at 434, 440. While the Court stopped short of holding that "assurance of privacy" was a necessary prong, courts have held this information is probative. *See* Am. Soc'y for Prevention of Cruelty to Animals v. Animal & Plant Health Inspection Serv., No. 19 Civ. 3112 (NRB), 2021 WL 1163627, at *14–15 (S.D.N.Y. Mar. 25, 2021).

208. *Food Mktg. Inst.*, 588 U.S.

209. *Id.* at 440.

210. *Id.* at 440.

211. *Id.*

212. Opening Brief of Appellant, Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv., 802 F. App'x 309 (9th Cir. 2020) (No. 18-15997), ECF No. 28.

meaning of Exemption 4."[213] In line with that thinking, the Defense Department, in a case involving Lockheed Martin, has focused entirely on one company's *treatment* of the records.[214] In another Exemption 4 case, the district court held that bulletins prepared for the government agency by an outside vendor are considered confidential because the single vendor closely holds their formatting, design, and organization information.[215]

Courts have even gone so far as to state that even in cases where the confidential information was disclosed to a third party, the information may still be confidential under *Argus Leader*.[216] In other words, courts will not waive the document's status as confidential where it has already been partially disclosed.[217] For example, in *Seife v. FDA*, the Court noted that a drug manufacturer's clinical trial process and documents remained confidential even though the manufacturer publicly shared the information when it collaborated with third parties in an application for market approval.[218] Similarly, in *Stevens v. United States Department of State*, the Court held that even course materials distributed to paying students at a university were confidential because they were disclosed to a limited group and were never disclosed to the public at large.[219]

Companies and industry representatives are also proactively using *Argus Leader* to immunize their records from disclosure, including in "reverse FOIA" cases.[220] A reverse FOIA action occurs when the private actor submitting information to the government independently seeks to prevent the agency from disclosing records by filing a suit against the agency claiming that one of FOIA's exemptions properly withholds the information.[221] Reverse FOIA actions "effectively [shrink] [FOIA]'s disclosure mandate in an industry-protective manner."[222] For instance, in a recent motion to intervene to oppose the release of

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213. U.S. DEP'T OF JUST., FREEDOM OF INFORMATION ACT GUIDE, MAY 2004 (2004), https://www.justice.gov/archives/oip/foia-guide-2004-edition-exemption4#:~:text=Exemtion%204%20of%20the%20FOIA,government%20and%20submitters%20of%20information [https://perma.cc/3HRM-H59V].

214. Motion for Summary Judgment at 12, n.4, Am. Small Bus. League v. Dep't of Def., 411 F. Supp. 3d 824 (N.D. Cal. 2019) (No.18-01979) ("Thus, whether disclosure would in fact result in competitive harm is no longer the relevant question in determining whether information may be withheld pursuant to Exemption 4.").

215. Gellman v. Dep't of Homeland Sec., 613 F. Supp. 3d 124, 146–47 (D.D.C. 2020).

216. Seife v. FDA, 492 F. Supp. 3d 269 (S.D.N.Y. 2020); Stevens v. United States Dep't of State, 2020 U.S. Dist. LEXIS 51305, *1, *22–24 (N.D. Ill. Mar. 23, 2020).

217. *See generally* Seife, 492 F. Supp. 3d at 276.

218. Seife, 492 F. Supp. 3d at 276.

219. Stevens, 2020 U.S. Dist. LEXIS 51305, at *22–24 (records dealing with the State Department's relationship with the foreign campuses of American universities).

220. *See generally* U.S. DEP'T OF JUST., OFF. OF INFO. POL'Y, FREEDOM OF INFORMATION ACT GUIDE: EXEMPTION 4, at 355 (2019), https://www.justice.gov/archive/oip/foia_guide09/exemption4.pdf [https://perma.cc/WZ9W-QXGN].

221. *See* David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 39 ENV'T L. & POL'Y ANN. REV. 10777, 10778 (2009).

222. David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1116 (2017).

Federal Trade Commission documents, Facebook wielded the *Argus Leader* decision to obtain deference to its own practices of withholding data.[223]

Concerns over *Argus Leader* have been well documented, all echoing the cries of Reich and other administrative law cognoscenti of his time.[224] For instance, immediately after *Argus Leader*, members of Congress took to speaking out about the case. Senator Chuck Grassley was quoted on the Senate floor: "I am an advocate for the FOIA and the public's business being public, and this Supreme Court decision inhibited that."[225] The bill, called the Open and Responsive Government Act (S. 2220), meant to undo the impact of the *Argus Leader* and to "restore the public's right to access confidential commercial information through the Freedom of Information Act."[226]

Outcry about the expansion of Exemption 4 was even expressed in the judiciary. As federal district judge, in the Northern District of California, Judge William Alsup lamented in his first case applying the new Exemption 4 standard:

> The Court is sympathetic to plaintiff's steep uphill battle under the new Exemption 4 standard. Under *Food Marketing*, it appears that defendants need merely invoke the magic words—"customarily and actually kept confidential"—to prevail. . . . [T]he undersigned judge has learned in twenty-five years of practice and twenty years as a judge how prolifically companies claim confidentiality, including over documents that, once scrutinized, contain standard fare blather and even publicly available information. Nevertheless, we are not writing on a clean slate. *Food Marketing* mandates this result.[227]

As Judge Alsup language suggests, *Argus Leader* contradicts the spirit of FOIA and leans in favor of corporate self-interest.

While some parties have been successful in combating *Argus Leader*'s reach,[228] the

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223. Reply in Support of Facebook, Inc.'s Motion to Intervene at 8, Electronic Priv. Info. Ctr. v. FTC, 2019 U.S. Dist. WL 3237108 (Jul. 12, 2019) (No. 18-942). ("EPIC does not dispute that the redacted documents at issue here are documents that Facebook 'treated as private . . . and provided to the government under an assurance of privacy.'. . . Nothing more is required to invoke Exemption 4.") (quoting Food Marketing Institute v. Argus Leader Media, 588 U.S. 427, 439 (2019)).

224. Schiller, *supra* note 10. Some of these academics included Louis Jaffe, Kenneth Culp Davis, and Henry Friendly.

225. Beryll Lipton, *Supreme Court Ruling Draws Criticisms, Calls for Congressional Protection of FOIA*, MUCKROCK (July 2, 2019), https://www.muckrock.com/news/archives/2019/jul/02/scotus-argus-leader-analysis/ [https://perma.cc/9X6D-K56V]. He partnered with Senators Patrick Leahy, John Cornyn, and Dianne Feinstein to co-sponsor a bill in July 2019.

226. *Id.*

227. Am. Small Bus. League v. U.S. Dep't of Def., 411 F. Supp. 3d 824, 833 (N.D. Cal. 2019).

228. *See* N.Y. Times Co. v. U.S. Food & Drug Admin., 529 F. Supp. 3d 260, 285 (S.D.N.Y. 2021); WP Co. v. U.S. Small Bus. Admin., 502 F. Supp. 3d 1, 13 (D.D.C. 2020); Ctr. for Investigative Reporting v. Dep't of Lab., No. 18-cv-02414, 2020 WL 2995209 (N.D. Cal. June 4, 2020). In this case, the Department of Labor asserted work injury reports (300As) were confidential business information, but after the court rule the records did not fall under *Argus Leader*'s reach the U.S. Department of Labor, ultimately began proactively publishing the information. *See U.S. Department of Labor Releases Work-Related Injury and Illness Data*, OSHA (Sept. 4, 2020), https://www.osha.gov/news/newsreleases/national/09042020 [https://perma.cc/CSE5-M8JJ].

government has been persistent even in those cases. For instance, in 2017, the Center for Investigative Reporting (CIR) filed a FOIA request for a number of technology companies' forms, called EEO-1s, which are one-page diversity reports submitted to the Department of Labor (DOL) that break down companies' workforces by race, gender, and broad job category.[229] The agency ultimately relented in a 2018 settlement and disclosed the records. In 2019, CIR was successful in another lawsuit against DOL and again obtained EEO-1 reports from several companies that claimed the records were confidential business information under *Argus Leader*.[230] In 2022, CIR was forced to file yet another identical action after DOL insisted a third time that the records were still secret under Exemption 4. The District Court for the Northern District of California recently ruled that the records were not properly withheld as "commercial," but DOL appealed the decision in 2024 to the United States Court of Appeals for the Ninth Circuit, despite two courts now finding the records were not commercial.

b. Increased Usage of Exemption 3

Exemption 3 of FOIA has also increasingly been wielded to withhold corporate information. Exemption 3 of FOIA allows an agency to withhold information if the data is "*specifically exempted* from disclosure by statute."[231] If the statute specifically permits withholding of the data, the Court then considers if the statute "leave[s] *no discretion* on the issue" and if the statute "establishes *particular criteria* for withholding."[232] In addition to these two limiting requirements, Congress legislated a third requirement for Exemption 3 in 2009, to ensure the exemption did not become so broad as to swallow FOIA.[233] The 2009 Open FOIA Act requires that Congress include in the Exemption 3 withholding statute a citation to FOIA, to ensure that the new legislation was intended to override FOIA's presumption of disclosure.

Since 2009, Congress has taken the Open FOIA Act's requirement seriously and cited the Act in a number of withholding statutes to ensure their application,

229. Ctr. for Investigative Reporting v. U.S. Dep't of Lab., 424 F. Supp. 3d 771 (N.D. Cal. 2019).

230. Among the companies that withheld requested Diversity Reports was Palantir, a data analysis company that has been awarded billions of dollars in federal government contracts and is primarily known for supplying government intelligence agencies with some of the most invasive spying tools in their arsenals. In a letter to the U.S. Department of Labor, Palantir claimed that the reports contained confidential business information under Exemption 4. It explained that "competitors could identify where Palantir has made significant progress in hiring women and minorities and target recruitment strategies at specific job categories to steal this talent from Palantir." Will Evans & Sinduja Rangarajan, *Oracle and Palantir Said Diversity Figures Were Trade Secrets. The Real Secret: Embarrassing Numbers*, REVEAL (Jan. 7, 2019), https://revealnews.org/article/oracle-and-palantir-said-diversity-figures-were-trade-secrets-the-real-secret-embarrassing-numbers/#:~:text=Palantir%20told%20the%20U.S.%20Department,steal%20this%20talent%20from%20Palantir.%E2%80%9D [https://perma.cc/3VMH-ZQ9V]. When CIR eventually obtained Palantir's 2015 Diversity Report in 2019, it found that Palantir had only one woman in its management class to protect from potential corporate poachers. *Id.*

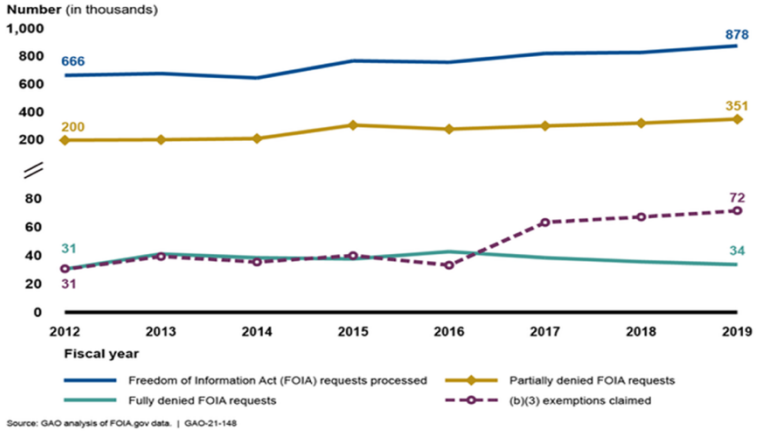
231. Freedom of Information Act, 5 U.S.C. § 552(b)(3) (emphasis added).

232. *Id.*

233. Because Congress is capable of passing broad Exemption 3 statutes to withhold any kind of data, the legislature has amended the exemption multiple times in its history to minimize the risk of it swallowing FOIA.

but concerns have arisen as an accelerating number of Exemption 3 statutes have been pushed through Congress by corporate lobbyists every year, often without the citation. Consistently, these statutes risk the withholding of important public information that is instrumental to citizens' health and livelihoods. For instance, Section 14(a) of the Toxic Substances Control Act[234] prohibits the EPA from disclosing any material that would qualify as trade secrets. Similarly, the Bank Secrecy Act permits for withholding of all sorts of corporate information, including who owns land in the United States (data that is historically considered public).[235] Federal Insecticide, Fungicide, and Rodenticide Act of 1964[236] permits an applicant to designate information as confidential or as a trade secret. The Federal Water Pollution Control Act[237] requires public availability of records "except upon a showing" that records would divulge trade secrets. Even the Clean Air Act[238] allows for withholding.

Even more damaging than the growing number of Exemption 3 statutes, though, is the growing number of times the exemption is employed. The DOJ calculated that between 2010 and 2019, ninety-one agencies reported withholding information under at least one of 256 statutes, meaning the exemption was employed more than 525,000 times.[239] The agency also found that overall, agencies' use of (b)(3) exemptions more than doubled from fiscal year 2012 to fiscal year 2019 while the number of FOIA requests processed increased thirty-two percent.[240]



234. Toxic Substances Control Act, § 8(e), 15 U.S.C. § 2607(e).

235. 31 U.S.C § 5311; Victoria Baranetsky, *Op-Ed: You Should Have the Right to Know Your Landlords' Name*, L.A. TIMES (Feb. 24, 2021, 3:10 AM), https://www.latimes.com/opinion/story/2021-02-24/rental-housing-shell-companies-landlords [https://perma.cc/S957-R6GG].

236. § 10(a)–(b), 7 U.S.C. § 136h(a)–(b) (2018).

237. Federal Water Pollution Control Act, § 308(b), 33 U.S.C. § 1318(b) (2018).

238. Clean Air Act, § 112 (r)(6)(Q), 42 U.S.C. § 7412(r)(6)(Q) (2018), *amended by* Act of Nov. 15, 1990, Pub. L. No. 101-549, 104 Stat. 2399.

239. Victoria Baranetsky & Andrew Langreich, *FOIA Exemption 3 Virtual National Training Conference, May 25–27, 2021*, AM. SOC'Y ACCESS PROS., https://5ca0117aa419e711b4d9-e9861d91199c45e810a1a14dba0f70ee.ssl.cf2.rackcdn.com/asapntc_bd381de09a8880e7df6fd669a70900e0.pdf [https://perma.cc/F9FJ-TCBD].

240. *Id.*

Additionally, in fiscal year 2019, government agencies used FOIA's nine exemptions a total of nearly 970,000 times. Of this total, agencies cited the (b)(3) exemption nearly 72,000 times, which was 7.4% of exemptions used government-wide.[241]

The Department of Justice also recently represented in a report that the exemption is often employed as a corporate shield. For instance, the statute used the most by the greatest number of agencies during 2010 through 2019 was 41 U.S.C. § 4702, which allows privileged or confidential commercial information on contractor proposals to be withheld.[242] In the last decade, forty-four different agencies cited the statute more than 3,000 times[243] to withhold urgent information that could answer questions like, "What is the status of COVID-19 testing? How effective [is] hydroxychloroquine? When did the government know that masks help prevent the spread of the disease?"[244] So just as the number of contractors has grown, so has the number of questions that have become unanswerable through FOIA. And while FOIA once appeared to be the right solution in 1966, the modern era calls for a different solution, as FOIA today is generally considered to be broken.[245]

III. SOLUTIONS TO THIS IMBALANCE OF POWER

The theoretical justification for a public right of access is ancient,[246] rooted in the idea that citizens must be able to access information to hold their representatives accountable because the citizenry is the ultimate governor.[247] The origins of this right date as far back as the seventeenth century in the English judicial system, predating the formation of the United States.[248] As the Supreme Court has noted,

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241. *Id.*

242. *Id.*

243. Out of the thousand instances in which this statute was cited, one instance was in *Ctr. for Investigative Reporting v. U.S. Customs and Border Prot.*, a case where the CIR sought records related to "the first implementation of President Donald Trump's intention to build an updated border wall." Complaint at 2, Ctr. for Investigative Reporting v. U.S. Customs and Border Prot., 436 F.Supp.3d 90 (D.D.C. 2019) (No. 1:18-CV-02901). This included Requests for Proposals ("RFPs") "to design and build prototypes for new border wall on the U.S.-Mexico border near Chula Vista, California." *Id.*

244. *Id.*

245. Anne Weismann, *The FOIA is Broken, but is it Beyond Repair?*, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON (June 30, 2020), https://www.citizensforethics.org/reports-investigations/crew-investigations/the-foia-is-broken-but-is-it-beyond-repair/ [https://perma.cc/Q3HV-CS4K].

246. *See* TARLACH MCGONAGLE, THE DEVELOPMENT OF FREEDOM OF EXPRESSION AND INFORMATION WITHIN THE UN (McGonagle & Donders eds., Cambridge Univ. Press 2015) ("[T]he relationship between freedom of expression and information is contiguous and complicated; logical and paradoxical. It is characterized by mutual dependencies . . . . [I]nformation can be seen as antecedent to expression. However, expression can also produce and disseminate information, which suggests a more complex and symbiotic relationship.").

247. Victoria Baranetsky, *Keeping the New Governors Accountable: Expanding the First Amendment Right of Access to Silicon Valley*, KNIGHT FIRST AMEND. INST. COLUM. UNIV. (Aug. 21, 2019), https://knightcolumbia.org/content/keeping-the-new-governors-accountable-expanding-the-first-a mendment-right-of-access-to-silicon-valley [https://perma.cc/C72N-GRPX].

248. *Id.*

under English common law, public access to court proceedings was "the rule in England from time immemorial."[249] English courts consistently held that a right to access government records exists where it would benefit the public. Scholars have noted, "[h]umans have a long history of seeking, receiving, and imparting information, hampered only by the availability."[250]

This legal concept is entrenched around the globe. The right to information was established under the Universal Declaration of Human Rights after World War II to address the censorious wrongs committed during the war. Article 19 of the Universal Declaration of Human Rights declares, "Everyone has the right to freedom of opinion and expression; this right includes freedom . . . to seek, receive and impart information."[251] Today, the right continues to be listed as an inalienable human right in various conventions and regional human rights instruments. In sharp contrast to other countries around the world, in the United States, there is little recognition of a right to access or a "right to know." This ironically occurs despite the fact that, as David Arcadia notes, this principle "underlies the First Amendment's structural role as a facilitator of democratic control."[252] While the First Amendment protects a right to access court records and hearings,[253] there is no explicit First Amendment protection for other kinds of records. In recent years, in the United States, any hopes of recognizing this kind of constitutional protection under the First Amendment have become even more unlikely because of cases like *NIFLA*, previously discussed.

Given these inadequacies with the First Amendment, this Article searches for a new legal strategy for protecting the public's right to know to rectify the grave power imbalance—just as Reich and his contemporaries sought to remedy it in their time. The final Section of this Article proposes an analogous solution along the lines of Reich's suggestion in *The New Property*.

A. Proposed Solution: A New Property Right to Information Access

With limited access to information, individuals are unable to make informed decisions that impact their rights, health, security, environment, education, and other crucial aspects of life. At the same time, companies prosper from this black box secrecy.[254] To combat this problem, various solutions have been proposed. Jamillah Bowman Williams has offered policy suggestions, such as encouraging

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249. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 566–67 (1980) (quotations and citation omitted) (stating it has roots in the "days before the Norman Conquest").

250. Sharon Sandeen and Ulla-Maija Mylly, *Trade Secrets and The Right to Information: A Comparative Analysis of E.U. and U.S. Approaches to Freedom of Expression and Whistleblowing*, 21 N.C. J.L. & TECH. 1, 10 (2020).

251. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

252. David S. Ardia, *Court Transparency and the First Amendment*, 38 CARD. L. REV. 835, 902 (2017).

253. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 566–67 (1980).

254. *See generally*, FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (Harvard University Press 2015).

companies to volunteer information.[255] David Levine has proposed that trade secrecy not be permitted for such entities, particularly under FOIA.[256] Others have argued for proactive rather than mandatory disclosure in the case of pharmaceutical clinical trial data submitted to the FDA.[257] This Article argues that courts should consider recognizing a new property right under the Due Process Clause, similar to when the Supreme Court adopted Reich's *New Property* theory in *Goldberg v. Kelly*. While some similar suggestions have been made by Danielle Keats Citron, Joshua Kroll, Kate Crawford and Jason Schultz, Deirdre Mulligan, and Kevin Bamberger, and others calling for due process fixes,[258] this Article's framework would recognize a broader property interest. It calls for a new property right, not simply tied to technology, but a due process protection that focuses on a deprivation of access to government data, especially where the private sector stands in for the government on matters that are paramount to the public interest.

To understand how courts today would extend *Goldberg* to the current information landscape we must first turn to the *Goldberg* line of cases. In its 5-3 opinion, the Court in *Goldberg* held that states must afford public aid recipients a pre-termination evidentiary hearing before discontinuing their aid. After this groundbreaking holding, the Court often questioned when and in what cases *Goldberg* should be extended to permit new property benefits. Justice Brennan's opinion strongly suggested that the importance of an interest to the individual—welfare, for example, being regarded as necessary to life—determines whether there is a property interest. Agreeing with the District Court, he wrote: "To cut off a welfare recipient in the face of 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it."[259] Applying this standard to information access courts may consider when a deprivation of information is paired with a brutal need for it.

Two years after deciding *Goldberg*, the Court was again faced with the question of whether to find a property right in a government benefit. This time, the benefit at issue was public employment. In *Board of Regents of State Colleges v. Roth*, 408 U.S.

255. *See* Jamillah Bowman Williams, *Diversity as a Trade Secret*, 107 GEO. L.J. 1684 (2019).

256. *See* Levine, *supra* note 177.

257. *See* Christopher J. Morten & Amy Kapczynski, *The Big Data Regulator, Rebooted: Why and How the FDA Can and Should Disclose Confidential Data on Prescription Drugs*, 109 CALIF. L. REV. 493.

258. Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1253, 1276–77 (2008) (discussing the problem of due process when technologies are used by agencies for decision making); Kate Crawford & Jason Shultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B.C. L. REV. 93, 93, 109 (2014) (discussing "procedural data due process" to combat big data processes which tends to harm privacy); Joshua A. Kroll, Joanna Huey, Solon Barocas, Edward W. Felton, Joel R. Reidenberg, David G. Robinson & Harlan Yu, *Accountable Algorithms*, 165 U. Pa. L. REV. 633, 656–57 (2017) (arguing for agency action with "procedural regularity," to be taken from "the Fourteenth Amendment principle of procedural due process"); Deirdre K. Mulligan & Kenneth A. Bamberger, *Procurement as Policy: Administrative Process for Machine Learning*, 34 BERKELEY TECH. L.J. 773, 776, 783–85, 792 (2019) (discussing measures of human decision making being introduced back into agency action).

259. Goldberg v. Kelly, 397 U.S. 254, 261 (1970).

564 (1972), a teacher employed by Wisconsin State University whose one-year contract was not renewed after its expiration argued that the university's failure to provide a hearing in connection with the decision for nonrenewal denied due process. While the Court found that the plaintiff did not have a property interest—or entitlement—in the continued employment with the state, it was critical that he did not have a reasonable expectation of being rehired.[260] The Court still continued to hold that the test would apply in other circumstances.

Roth provided two approaches to finding a property right. One approach was a clearer articulation of that which was taken in *Goldberg*: a government benefit is property if people have "more than an abstract need or desire for it" and rely on the benefit in "their daily lives."[261] The other approach recognizes a property right when state law creates a reasonable expectation to receive a benefit. The Court explained:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[262]

In the years that followed these landmark cases, the Court has generally taken the second approach, which looks to the content of law in determining whether a benefit constitutes property.

Consider now how these tests for determining a property right might work regarding the new "property" of data and a right to access that information. To be clear, accessing data itself is not typically considered a due process violation under the Fourteenth Amendment. Due process violations generally involve proactive government actions that deprive individuals of their rights or property without affording them the necessary legal procedures or protections, like a government seizing a property or searching a premise without a warrant or consent.

However, one could argue that denying access to contractor/government-collected data, in our modern world, often raises analogous due process violations, where there is a property interest in accessing certain government data relevant to a citizen's rights, benefits, or interests. This is especially concerning where a contractor's claim of trade secrecy creates a black box, denying the ability for one to assert those rights. For instance, modernizing Reich's example of a government agency searching a home, one could imagine modern law enforcement contracting with a technology company that sells smart home devices to collect intimate data from a home. The denial of access to this data might create a due process violation.

Using similar reasoning, academics have partially argued for due process in the

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260. The Court highlighted the "important fact in this case," that is, the contractual provision providing that Roth's employment would terminate on June 30, one year after commencement, without any guarantees for renewal. Board of Regents v. Roth, 408 U.S. 564, 578 (1972).

261. *Id.*

262. *Id.* at 577.

narrow context of accessing criminal data that could change the outcome of a criminal trial.[263] A good example of such a case was illuminated by Professor Rebecca Wexler, who wrote about Glenn Rodríguez, an inmate in upstate New York, who "was denied parole despite having a nearly perfect record of rehabilitation [because of an error in a] computer system called Compas" which the owning company considered to be proprietary information.[264] Wexler wrote:

> The root of the problem is that automated criminal justice technologies are largely privately owned and sold for profit. The developers tend to view their technologies as trade secrets. As a result, they often refuse to disclose details about how their tools work, even to criminal defendants and their attorneys, even under a protective order, even in the controlled context of a criminal proceeding or parole hearing.[265]

Denying access to such data effectively deprives the citizen of their life, liberty, and property interests without providing adequate procedural safeguards.

Indeed, courts have already begun evolving their thinking on this argument and have recently found in certain cases that withholding pursuant to trade secrecy has violated due process rights. In 2017, a federal court held that a teacher's union had a viable due process claim in a case where teachers were denied access to information about a contractor's algorithm that was used to evaluate teaching staff for the district. [266] "Because the school district had relied on a private contractor that claimed trade secret protection over the algorithm at issue, the school district argued that it could not provide more information to the teachers."[267] The court denied the motion, stating "when a public agency adopts a policy of making high stakes . . . decisions based on secret algorithms incompatible with minimum due process, the proper remedy is to overturn the policy, while leaving the trade secrets intact."[268]

Similarly, in the fall of 2023, the Federal Circuit in *Royal Brush Manufacturing v. United States* held more explicitly that "[b]ecause the [Due Process Clause of the]

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263. Brandon L. Garrett, *Big Data and Due Process*, 99 CORNELL L. REV. ONLINE 207 (2014).

264. Rebecca Wexler, *Op-ed: When a Computer Program Keeps You in Jail*, N.Y. TIMES (June 13, 2017), https://www.nytimes.com/2017/06/13/opinion/how-computers-are-harming-criminal-justice.html [https://perma.cc/9ZMX-RGUN]. *See also* Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343 (2018).

265. *Id.*

266. Hous. Fed'n. of Teachers. v. Hous. Indep. Sch. Dist., 251 F. Supp. 3d 1168, 1172 (S.D. Tex. 2017).

267. Cary Coglianse, *AI, Due Process, and Trade Secrets*, REGULATORY REV. (Sep. 4, 2023), https://www.theregreview.org/2023/09/04/coglianese-ai-due-process-and-trade-secrets/ [https://perma.cc/H62D-MDDA].

268. Hous. Fed'n. of Teachers, 251 F. Supp. 3d at 1172. This case is also similar to *K.W. v. Armstrong*, 180 F. Supp. 3d 703, 708 (D. Idaho 2016), where the ACLU sued a health agency for violating plaintiff's due process rights where its algorithmic decision-making tool created by a contractor produced arbitrary results. While access to the data was not at issue, the court urged the parties to agree to a plan to improve the tool and institute regular testing to improve accuracy, *id.* at 718, much like access to data would also do. *See also* Zynda v. Arwood, 175 F. Supp. 3d 791 (E.D. Mich. 2016) (finding due process violations from malfunctioning system creating havoc, including economic, instability, bankruptcy, unemployment fraud).

Constitution authorizes and indeed requires, the release of confidential business information in this case, the Trade Secrets Act does not stand in way of such release."[269] In that case, an importer had their contract for importing pencils canceled with U.S. Customs and Border Protection (CBP), and the importer requested the records the agency relied on to make its decision. CBP claimed the information stemming from a manufacturer was confidential. The Federal Circuit rejected this argument, reasoning that the Due Process Clause requires parties to be able to access the information the government relies on to make decisions that deny them opportunities.

Indeed, the state of Michigan has faced multiple financially crushing lawsuits (that continue to be litigated) involving the deprivation of due process when various private vendors were hired to streamline government procedures, employing technologies that led to fraudulent, corrupt, data decision-making severely impacting the health and liberty of individuals.[270] In these cases, litigants have asserted due process claims where private vendors' technologies have deprived individuals of access to data determining decisions around wrongly seized tax refunds and garnished wages,[271] erroneously terminating unemployment benefits,[272] and wrongly accusing persons of unemployment fraud in ninety percent of the formula's calculation.[273]

As these cases show, some courts have already begun to constitutionally recognize a due process right to information, particularly where blocking access to that data may further injure an individual of a public benefit. For instance, cities, states, and the federal government increasingly use private vendors to collect data through algorithmic systems to evaluate public employees, grade test scores of students, determine bonuses, and unemployment benefits.[274] That information can often be based on corrupt or biased data, producing fraudulent and harmful results that amount to "robo-adjudication[s]" also violating due process rights, as noted by scholars Danielle Citron and Ryan Calo.[275] In cases involving government contractors collecting critical information that can gravely impact civilians, courts have and may continue to find "brutal needs" under *Goldberg* to expand due process rights, especially as algorithmic decisions touch more intimate aspects of our daily lives.[276]

The approach suggested by *Roth* is also somewhat promising. Using *Roth*, courts could find that our public access laws create a reasonable expectation for the receipt of such information. In the United States, the right to information stems

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269. *Royal Brush Manufacturing, Inc. v. United States*, 75 F.4th 1250 (Fed. Cir. 2023).

270. *See, e.g.*, Bauserman v. Unemployment Ins. Agency, 330 Mich. App. 545 (Mich. Ct. App. 2019).

271. *See id.*

272. Cahoo v. SAS Analytics, 912 F.3d 887 (6th Cir. 2019).

273. *Id.*

274. Calo & Citron, *supra* note 14, at 819–32.

275. *Id.*; *see also* Zynda v. Arwood, 175 F. Supp. 3d 791, 797 (E.D. Mich. 2016).

276. It is worth noticing that most of these cases have involved state agencies, not federal ones. What we do know about federal agencies is that they rely on private vendors to create algorithms to make policies and decisions. Therefore, it is important to know that in theory, there are pathways to argue that due process demands access to information.

from several sources that have been repeatedly reiterated over the decades, building a reasonable expectation to such information.

To begin, in the 1943 U.S. Supreme Court case of *Martin v. City of Struthers*, the Court explained, "The right of freedom of speech and press has a broad scope . . . [and t]his freedom [to information] . . . necessarily protects the right *to receive it*."[277] Twenty years later, in *Griswold v. Connecticut*, the Court wrote, "The right of freedom of speech and press includes not only the right to utter or to print, but . . . the right to receive . . . ,"[278] and four years later it wrote in *Stanley v. Georgia*, "It is now well established that the Constitution protects the right to receive information and ideas."[279] Once again in 1980, the Court reiterated in *Board of Education v. Pico* that the right to receive information is "an inherent corollary of the rights of free speech and press" because "the right to receive ideas follows ineluctably from the sender's First Amendment right to send them."[280] In *Red Lion Broadcasting Co v. FCC*, the Court wrote, "It is the right of the public to *receive* suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here."[281] From these cases, it has long been recognized that the recipient (not just the speaker) of information is protected under the First Amendment.

Additionally, as this Article has argued, the right to receive information from the government could also be secured by establishing a reasonable expectation as required in *Roth*. There is a long jurisprudence recognizing the right of access to information, especially in criminal and civil proceedings in this country.[282] While case law acknowledges the special importance of access to courtrooms and court records in order for "the public to participate in and serve as a check upon the judicial process," this "essential component in our structure of self-government" may arguably extend to other bodies like the administrative state. As one court has stated, "[t]here is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."[283]

However, as the Supreme Court observed, "[p]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state [and federal] law."[284] Therefore, the most powerful claim to a due

277. Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

278. Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

279. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

280. Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982).

281. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

282. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Globe Newspaper Co. v. Commonwealth, 570 S.E.2d 809, 811 (Va. Sup. Ct. 2002) ("The right of access to judicial proceedings and records is well-established."); *see also* Baranetsky, *supra* note 247.

283. Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377, 384 (Va. Sup. Ct. 2001).

284. Board of Regents v. Roth, 408 U.S. 564, 577; *see also* Barnhill v. Johnson, 503 U.S. 393, 398 (1992) ("In the absence of any controlling federal law, 'property' and 'interest[s] in property' are creatures of state law.").

process right of access to information, under *Roth*, clearly stems from the federal and state public records laws passed across the country that find that "[a]n informed public is the most potent of all restraints upon misgovernment."[285] Public records statutes demonstrate entitlements establishing a due process right to access public record information.

In his signing statement of FOIA in 1966, President Lyndon Johnson wrote, "The legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of Nation permits."[286] FOIA has always allowed "individuals and organizations to access some business information collected by federal government agencies."[287] This kind of historical context fuels the suggestion that access to information is a property right under *Roth*.

Moreover, as to the claim that exemptions may bar a due process right, upon closer review, this argument does not seem as convincing. While Exemption 4 of FOIA permits the federal government to withhold limited "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential," this exemption has had multiple limits, as discussed above at length.[288] Similarly, nearly every state has enacted a public records act with limits to trade secrets, similar to the federal FOIA.[289] Hence, under state and federal law, when companies submit their confidential business information to government agencies, "they should be aware of the risk that their information could become such a public record."[290] This kind of history and notice would suggest that the public's right to access information is a property right under *Roth*'s approach.

Indeed, *Roth* and its progeny have often been used to expand new property rights and courts have said "nothing to limit the *Roth* principle[, instead] the Court has extended the principle to [ ] property on many occasions."[291] For example, *Roth* has been extended to a lake bed,[292] principal in a lawyer trust account,[293] escheat

285. Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936).

286. White House Press Release, Statement by President Lyndon B. Johnson upon Signing S. 1106 (July 4, 1966) (on file with Records of White House Offices, 1963-1969, White House Press Office Files, Box 49, 6/30/66-7/15/66, PR 210a - PR 2134a, LBJ Library ("No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.").

287. Christian Hawthorne, *Tips for Protecting Your Trade Secrets When Dealing with the Government*, A.B.A. (Aug. 30, 2018), https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2018/tips-for-protecting-your-trade-secrets-when-dealing-with-the -government/ [https://perma.cc/S4KU-MHKJ].

288. *Id.*

289. *Id.*

290. Brandi Snow, *Government in the Sunshine Act*, FREE SPEECH CTR. MIDDLE TENN. STATE UNIV. (1976), https://firstamendment.mtsu.edu/article/government-in-the-sunshine-act/ [https://perma.cc/YY2M-Y4NS].

291. Hillcrest Prop. LLP v. Pasco Cnty., 915 F.3d 1292 (11th Cir. 2019).

292. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

293. Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998).

claims,[294] hobby materials,[295] and creditor rights.[296] While the Supreme Court never has squarely addressed the question of whether a person can have a property interest in intangible property like public information, the Court has found other kinds of intangible interests to be property for purposes of the Fifth Amendment's Taking Clause.[297] For instance, the Court had no difficulty holding that trade secrets were property in *Ruckelshaus v. Monsanto Co.*, relying on a mixture of state law and reasoning under *Roth,* and Reich's theory.

In *Ruckelshaus*, Monsanto, the agrochemical company, asserted that the health, safety, and environmental data it had submitted to the EPA were property under Missouri law, which recognizes trade secrets, as defined in § 757, Comment b, of the Restatement of Torts, as property.[298] While the Court acknowledged that it had not previously found intangible information to be a property, it held that "to the extent that Monsanto has an interest in its health, safety, and environmental data cognizable as a trade secret property right under Missouri law, that property right is protected."[299]

Even in that case, the Court seemed to understand the property interest of the company *might be outweighed* by the public's property interest in disclosure. In its holding, the Court limited the compensable interest to the disclosed corporate information to only that which the EPA had *expressly* promised to treat as a trade secret. "In essence, the Court held that a highly regulated industry should reasonably expect that data submitted to the government for one purpose will be used by the government for other purposes."[300] In this passage, the Court acknowledges that trade secrets are assignable, just as the rest of a trust, and that these intangible property interests can shift.

Extending this theory, courts could similarly conclude that access to business information possessed by an agency is an individual's entitlement, particularly where it impacts a person's health, safety, or civil rights because public records laws permit access.[301] Put another way, "benefits arising from the statute" are entitlements because they are "conferred on" the public as "Congress intended to extend . . . [an] enforceable interest . . . [and] create a governmental obligation."[302] Under FOIA, members of the public requesting access are granted this entitlement, unlike corporations trying to protect their trade secrets. This is because, in the context of public record laws, citizens are given the right to sue the government for

294. Delaware v. New York, 507 U.S. 490, 503 (1993).

295. Parratt v. Taylor, 451 U.S. 527, 529 n.1 (1981), *overruled by* Daniels v. Williams, 474 U.S. 327 (1986).

296. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980) (principal in court registry); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978).

297. *See, e.g.*, Armstrong v. United States, 364 U. S. 40 (1960) (materialman's lien protected as property); Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555 (1935) (real estate lien protected as property); Lynch v. United States, 292 U. S. 571 (1934) (valid contracts protected as property).

298. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003–04 (1984).

299. *Id.* at 1002.

300. *Ruckelshaus*, 467 U.S. at 1002.

301. Arnett v. Kennedy, 416 U.S. 134 at 181–82 (1974).

302. Geneva Towers Tenants Org. v. Federated Mortg. Invs., 504 F.2d 483 (9th Cir. 1974).

information,[303] unlike companies defending their rights to withholding.[304]

Several courts have already shown how supposed "trade secrets" can be disclosed where there is a public interest. "By way of example, the Washington Supreme Court recently found in *Lyft, Inc. v. City of Seattle*, that the state's Trade Secrets Act did not create a blanket exception to the presumption that anything submitted to the government becomes a public record under Washington's Public Record Act."[305] In *Lyft*, a public records requester sought zip code data that Lyft and an Uber subsidiary (Raiser) submitted to the city. The trial court prohibited disclosure by concluding that the reports were trade secrets, but the Washington Supreme Court reversed and remanded.[306] The Supreme Court found that the state's Public Records Act had not been analyzed, as the trial court failed to give sufficient weight to the public's interest in disclosure, even if the information was a legitimate trade secret.[307]

Washington is not the only state that permits public records laws to override trade secret statutes, thereby permitting business information to be accessed through public records requests. "Like Washington, Nevada requires balancing the public's interest in disclosure against the privacy interests of the entity seeking to prevent disclosure, which may not always adequately protect trade secrets."[308] Similarly, "[i]n Massachusetts . . . , trade secrets are exempt from disclosure only in the limited context where the information is voluntarily provided to an agency upon a promise of confidentiality and for the purpose of developing governmental policy."[309] Other states that have specific requirements for trade secret exemptions, include Florida, Illinois, Utah, and Virginia, which demand information to be labeled "confidential" to prevent disclosure.[310] Some states, including Alabama, Michigan, New Mexico, Oklahoma, and Louisiana also only provide protection for business information submitted to agencies in certain limited circumstances.[311]

Given these laws, corporations, even after *Argus Leader,* must assume that *some* information submitted to the government will not remain secret once transferred. These statutory provisions create expectations that lean against disclosure. As one American Bar Association article suggests, "Given the risks of disclosure, businesses should take extra precautions when dealing with government entities to prevent public disclosure of their trade secrets."[312] The cautionary advice continues, "Before submitting trade secret information to any state or federal agency, businesses should

303. *Id.*

304. However, some courts have permitted for reverse-FOIA suits where companies or citizens use the law to protect their interests.

305. Lyft, Inc. v. City of Seattle, 418 P.3d 102 (Wash. 2018). *See also* Hawthorne, *supra* note 287.

306. Lyft, 418 P.3d at 102.

307. *Id.*

308. Hawthorne, *supra* note 287.

309. *Id.* ("The exemption is not applicable, however, to information submitted to a government agency as required by law or conditioned on receipt of a governmental contract or other benefit. Mass. Gen. Laws Ann. ch. 4, § 7.").

310. *Id.*

311. *Id.*

312. *Id.*

do their due diligence and consult with their attorneys to learn the risks associated with submitting any confidential information."[313]

In many of the cases, involving trade secrets and confidential business information currently pending before the federal courts, FOIA requesters are often simply trying to understand more about the data in their world that is essential to life—and based on the expectation that they would receive that information if it was in the government's control. For instance, in *Story of Stuff Project v. U.S. Forest Service*, the requester asked for information about Nestle's water infrastructure in national forests to understand the company's impact on water and national forests.[314] In *Climate Investigations Center v. DOE*, a requester wanted information from a coal plant's records to understand the company's impact on the environment.[315] In *Butler v. United States Department of Labor*, the requester sought documents about industrial equipment safety protocols. In *Cornucopia v. United States Department of Agriculture*, the requester was seeking inspections of organic dairy farm protocols.[316]

In all of these cases, while courts found that the disclosure of the requested information would detriment the companies,[317] the public need for information was vital, and, more importantly, it is the kind of information originally intended to be disclosed under the FOIA statute, particularly where it impacts a person's health and safety. When we turn back to the origins of the statute and the context in which Exemption 4 arose, it is apparent that Congress did not intend to withhold this kind of information. As the NAB's witness proposed, this exemption "would not curtail information that is of legitimate concern to the public, but it would remove from public scrutiny *financial* information which would be of concern only to competitors."[318]

In all of the cases above, the FOIA requester was interested in learning about a contractor's involvement with the government that directly impacted intimate aspects of his or her life and the environment. These cases requiring disclosure typically arise in circumstances involving corporate secrecy over environmental issues, public health, civil rights abuses, and various forms of safety regulations.

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313. *Id.*

314. Story of Stuff Project v. U.S. Forest Serv., 66 F. Supp. 3d 66 (D.D.C. 2019).

315. Climate Investigations Ctr. v. DOE, 331 F. Supp. 3d 1 (D.D.C. 2018).

316. In *Butler v. United States Department of Labor*, 316 F. Supp. 3d 330, 335 (D.D.C. 2018), the court found that documents containing industrial equipment safety protocols and pricing information were covered under Exemption 4. Similarly, in *Cornucopia Institute. v. United States Department of Agriculture*, 282 F. Supp. 3d 150 (D.D.C. 2017), the court found the government could withhold records involving inspections of organic dairy farm, protocols, and procedures under Exemption 4.

317. The courts reasoned that the requested information would allow competitors to "reverse engineer" trade secrets and confidential designs and found the documents posed "substantial competitive injury" by facilitating their owners' competitors' development of expensive technologies. *Story of Stuff Project*, 66 F. Supp. 3d 66; *Butler*, 316 F. Supp. 3d at 334.

318. *Freedom of Information: Hearing on S. 1666 and S. 1663 Before the Subcomm. On Admin. Prac. and Proc. of the Comm. on the Judiciary U.S. Sen.*, 88th Cong. (1963). As an example of a legitimate public concern that might justify disclosing such potentially sensitive business information as financial matters, the NAB offered the example of rates charged by public carriers. *Id.*

Many scholars have noted how the lack of access to government data created by corporate actors in these circumstances can lead to physical harm and even death,[319] so the request for access is "more than an abstract need or desire for it" and instead the public relies on access for security, health, and safety in "their daily lives," as was the case in *Roth*.[320] Given this, courts should recognize property rights in these circumstances where the agency structures that surround us have grown to influence and impact our life and "property" inextricably in tangible and intangible ways.

As Reich stated in 1964, the problem is truer today than it ever was before:

> If the individual is to survive in a collective society, he must have protection against its ruthless pressures. There must be sanctuaries or enclaves where no majority can reach. To shelter the solitary human spirit does not merely make possible the fulfillment of individuals; it also gives society the power to change, to grow, and to regenerate, and hence to endure. These were the objects which property sought to achieve, and can no longer achieve. The challenge of the future will be to construct, for the society that is coming, institutions and laws to carry on this work. Just as the Homestead Act was a deliberate effort to foster individual values at an earlier time, so we must try to build an economic basis for liberty today—a Homestead Act for rootless [people]. We must create a new property.[321]

Having outlined how this new property could meet the Supreme Court's standards—as some courts have already found—it will be useful to identify three areas where the public's due process right to access intellectual property would be most crucial.

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319. Christopher J. Morten & Amy Kapczynski, *The Big Data Regulator, Rebooted: Why and How the FDA Can and Should Disclose Confidential Data on Prescription Drugs*, 109 CALIF. L. REV. 493 (2021); Rebecca S. Eisenberg, *The Role of the FDA in Innovation Policy*, 13 CAL. MICH. TELECOMM. & TECH. L. REV. 345, 381, 383 (2007) (noting that data secrecy has been heavily criticized due to concerns of suppression of adverse effects in clinical trials and its effect on the flow of information).

320. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

321. Reich, *supra* note 27, at 787. Additionally, there are various theoretical concepts of "property," which include the type of property that can be transferred to others. Furthermore, while an access right may seem more like an easement to real property, Reich's concept appeared to have included something similar to access—such as the denial of a hearing. *Id.* at 777. Admittedly, there are some downsides to over-propertization, particularly around the propertization of data. *See, e.g.*, Lothar Determann, *No One Owns Data*, 70 HASTINGS L.J. 1, 43 (2018) ("New property rights in data are not suited to promote better privacy or more innovation or technological advances, but would more likely suffocate free speech, information freedom, science, and technological progress."); Jorge Contreras, *The False Promise of Health Data Ownership*, 94 N.Y.U. L. REV. 624, 632 (2019) (discussing concerns of over-propertization of data, including contradicting established case law like *Int'l News Serv. v. Asso. Press*, 248 U.S. 215, 216 (1918)); Jane B. Baron, *Property as Control: The Case of Information*, 18 MICH. TELECOMM. & TECH. L. REV. 367, 381 n.66, 397–99 (2012) (arguing that personal data does not fit current IP categories, and that propertizing data about ourselves can injure dignity); I. Glenn Cohen, *Is There a Duty to Share Healthcare Data?*, *in* BIG DATA, HEALTH LAW, AND BIOETHICS 209, 216–17 (I. Glenn Cohen et al., eds., 2018) (expressing utilitarian concerns about propertizing data); Barbara J. Evans, *Barbarians at the Gate: Consumer-Driven Health Data Commons and the Transformation of Citizen Science*, 42 AM. J.L. & MED. 651 (2016) (arguing that propertization undermines regulatory frameworks as fixes).

B. Crucial Areas for this Right

Increasingly, various legal strategies (summarized above) are manipulated to thwart public access to wide swaths of information crucial to self-government. Transparency around this data would afford individuals the opportunity to understand government decisions, detect improper motives, "prevent[] arbitrary administrative action" and hold those in power accountable.[322] This Article has explained the need for a due process right to access this data even where companies may assert confidentiality in order to benefit society. This Section will outline several areas where accountability is especially paramount: (1) where there are abuses of civil rights and civil liberties, (2) where private contractors take on core government functions, and (3) where contractors behave as governors by acting as monopolies that take over multiple government functions.

1. Civil Rights Violation Information

First, transparency for records and government data that sheds light on civil rights and civil liberties violations is crucial. By providing the public with more information about these violations, accountability measures are possible that would otherwise go unknown. One circumstance where these violations often occur is when the government hires contractors as a cost-saving measure, leading to the abrogation of serious civil rights and civil liberties.[323] Private contractors are often hired for their efficiency and ability to maximize profits and keep operating costs low. But cost-saving measures often include staffing reductions, inadequate training, insufficient programming, and minimal site maintenance[324] that all too often amounts to arbitrary and illogical results and violations of serious civil rights and civil liberties.[325]

Private companies managing United States Immigration Customs and Enforcement (ICE) detention centers, for example, have tried to stymie access to information involving breaches of federal health, safety, and security standards leading to the abuse of children.[326] In the past decade, ICE detention centers have

322. Bressman, *supra* note 17, at 473.

323. Molly Olmstead, *Report: Nearly Half of Funding for Child Migrant Care Went to Shelters With Histories of Abuse*, SLATE (June 20, 2018), https://slate.com/news-and-politics/2018/06/report-finds-long-history-of-abuse-in-child-migrant-shelters.html [https://perma.cc/S9KH-EREA]; Blake Ellis, Melanie Hicken & Bob Ortega, *Handcuffs, Assaults, and Drugs Called 'Vitamins': Children Allege Grave Abuse at Migrant Detention Facilities*, CNN (June 21, 2018), https://www.cnn.com/2018/06/21/us/undocumented-migrant-children-detention-facilities-abuse-invs/index.html [https://perma.cc/WSA 5-DZ45].

324. Eunice Hyunhye Cho, Tara Tidwell Cullen & Clara Long, *Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration*, ACLU (Apr. 30, 2020), https://www.aclu.org/wp-content/uploads/publications/justice-free_zones_immigrant_detention_report_aclu_hrw_nijc_0.pdf [https://perma.cc/ML57-LBR4].

325. Olmstead, *supra* note 323. Calo & Citron, *supra* note 14 (discussing various agency programs supplanted by less expensive artificial intelligence and algorithms that produce harmful errors, including healthcare issues like "[i]f a person was a foot amputee the . . . algorithm indicated that the person 'didn't have any [foot] problems'").

326. Matt Smith & Aura Bogado, *Immigrant Children Forcibly Injected with Drugs at Texas*

often been overcrowded, unsafe, and unsanitary places where detainees are denied proper medical treatment and forced to endure use of excessive force as punishment for minor infractions.[327] Particularly in these circumstances, accountability should be ensured, but companies have often tried to assert that such pertinent information is a trade secret. In one recent case, two contracting companies argued that information like "unit prices," "bed-day rates" and "staffing plans" of the private detention facilities was exempted as "trade secrets" by citing Exemption 4.[328] Access in these kinds of cases would be in line with democratic values.

2. When Corporations Take Over Core Governmental Functions

Transparency is also particularly important when the government delegates a core public function to a private actor. The U.S. Department of Defense (DOD) is a prime example of an agency assigning over core public functions to contractors. In 2016, the DOD conducted a state-by-state analysis of spending by the agency, including its sub-contract award costs. That year, the report shows that the DOD spent $378.5 billion on private contracts.[329] By 2018 the DOD spent $500 billion on private contracts, over a hundred billion dollars more than two years earlier. The following year, in 2019, DOD spent $550.9 billion on this line item.[330]

This consistent contractor growth year after year has shown a commitment by the government to spend more on contractors when executing its most essential duties: ensuring national security and safety. As described by the agency, "Operations over the past 30 years have highlighted the central role that contractors play in supporting U.S. troops, both in terms of the number of contractors and the type of work being performed."[331] For instance, "[d]uring recent U.S. military operations in Iraq and Afghanistan, contractors frequently accounted for 50 percent or more of the total DOD presence in-country."[332]

Shelter, Lawsuit Claims, TEX. TRIB. (June 20, 2018), https://www.texastribune.org/2018/06/20/immigrant-children-forcibly-injected-drugs-lawsuit-claims/ [https://perma.cc/SZZ4-KXFN]; Aura Bogado, Patrick Michels, Vanessa Swales & Edgar Walters, *Migrant Children Sent to Shelters with Histories of Abuse Allegations*, REVEAL (June 20, 2018) https://revealnews.org/article/migrant-children-sent-to-shelters-with-histories-of-abuse-allegations/ [https://perma.cc/FS6N-GBZJ]; Aura Bogado & Laura C. Morel, *Texas Deputy who Tased Migrant Child Placed on Administrative Leave,* REVEAL (June 10, 2021), https://revealnews.org/article/texas-deputy-who-tased-migrant-child-placed-on-administrative-leave/ [https://perma.cc/2SYC-V6ZV].

327. OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES (2019).

328. Det. Watch Network v. U.S. Immigr. & Customs Enf't, No. 14 CIV. 583 (LGS), 2019 WL 442453, at *1 (S.D.N.Y. Feb. 5, 2019).

329. By 2017, the DOD spent $407 billion on contracts with $271.7 billion on contracts for various products and services.

330. Alex Horton, *Use of Military Contractors Shrouds Costs*, WASH. POST (Jan, 30, 2020), https://www.washingtonpost.com/national-security/2020/06/30/military-contractor-study/ [https://perma.c c/76UQ-2QYL].

331. CONGRESSIONAL RESEARCH SERVICES, DEFENSE PRIMER: DEPARTMENT OF DEFENSE CONTRACTORS (2018).

332. CONGRESSIONAL RESEARCH SERVICES, DEFENSE PRIMER: DEPARTMENT OF

As recent years have shown, the increase in delegation of duties to contractors has often outpaced regulatory oversight.[333] There are many benefits to the expansion of private contracting of the military. As Congress has detailed, "These benefits include freeing up uniformed personnel to focus on military specific activities; providing supplemental expertise in specialized fields, such as linguistics or weapon systems maintenance; and providing a surge capability to quickly deliver critical support functions tailored to specific military needs."[334]

However, the costs of hiring private contractors is also high, and the costs are not limited to monetary expenditure. "There is a general lack of transparency in the operations of private security companies, particularly in high-risk environments where rule of law is weak or the jurisdictional authority unclear."[335] Transparency is especially important with private security because it "has the possibility of escalating rather than deterring violence, which further puts the ship and its crew at risk."[336] Also, private "hiring, vetting and training of private maritime security teams has yet to be standardized" which demands further oversight.[337] Last, "and perhaps most worrisome is the lack of reporting of serious incidents involving private security," including human rights violations that usually occur with subcontractors, which also should be documented and made transparent for accountability.[338]

Similarly, from fiscal years 2013 through 2018, the Department of Homeland Security "increased its reliance on contracts for services," particularly for "functions that are closely associated with inherently governmental, critical, or special interest, which could put the government at risk of losing control of its mission if performed by contractors without proper oversight by government officials."[339] The Government Accountability Office offered six pieces of advice to help with oversight, including "to provide greater transparency into requested and actual service requirement costs, particularly for those services requiring heightened management attention."[340]

A state's police power and national security defense programs are some of its most essential functions, and these require more transparency as contracting increases. However, other core public functions also require this kind of oversight

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DEFENSE CONTRACTORS (2023).

333. *Q&A: Private Military Contractors and the Law*, HUM. RTS. WATCH (May 5, 2004), https://www.hrw.org/news/2004/05/05/qa-private-military-contractors-and-law [https://perma.cc/2XFE-MXP5].

334. CONGRESSIONAL RESEARCH SERVICES, *supra* note 331.

335. UNIV. OF DENVER JOSEF KORBEL SCHOOL OF INT'L STUD., SIÉ CHÉOU-KANG CENTER FOR INT'L SEC. AND DIPLOMACY, TRANSPARENCY AND GOVERNANCE OF PRIVATE MILITARY AND SECURITY SERVICES (2012).

336. *Id.* at 3.

337. *Id.*

338. *Id.*

339. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-417, DHS SERVICE CONTRACTS: INCREASED OVERSIGHT NEEDED TO REDUCE THE RISK ASSOCIATED WITH CONTRACTORS PERFORMING CERTAIN FUNCTIONS (2020).

340. *Id.*

and accountability, such as public energy and resource management, education, health care, and prison management. Without oversight in these areas, major missteps may occur, putting in danger vital components of society as well as national security and civil rights concerns with no accountability.

3. When Corporations Function as Monopolies and take on Multiple Government Functions

Third, transparency is particularly important when companies take on multiple roles of governance through various contracts with different agencies, amounting to a quasi-governor through market dominance or monopoly. In the case of monopolies, oversight is required to protect against unfair practices, fraud, abuse of resources, and corruption. These concerns can come up in many circumstances involving contractors, but are especially likely to happen where companies are responsible for multiple duties of various agencies thereby controlling many aspects of public life without sufficient accountability.

"Without realizing it we have become a nation of monopolies," wrote Forbes magazine in 2019.[341] This prescient remark referred to a large part of our economy being owned by a handful of companies. For instance, that year three companies controlled about 80% of mobile telecoms, four had 70% of airline flights within the US, and three had 95% of all credit cards.[342] This kind of monopolistic marketplace is no different within and across federal agencies. The federal government "has [long] promoted competition between [contractors] seeking to meet its needs since at least 1781,"[343] but maintaining competition in government contracts today has grown to be a challenge.[344]

In 2011, the government published an alarming report warning about the increase of "alleged misconduct involving noncompetitive contracts."[345] Today, this trend continues. In 2023, Microsoft and Oracle were reported as having received at least twenty-five to thirty percent of all government sales over the last decade.[346] This kind of monopolistic behavior "is called Vendor-lock and lack of competition in the government's software estate."[347] According to a recent study, "monopolistic behaviors that major IT government vendors have engaged in include: imposing license restrictions that require the government to repurchase software in order to

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341. John Mauldin, *America Has a Monopoly Problem*, FORBES (Apr. 11, 2019), https://www.forbes.com/sites/johnmauldin/2019/04/11/america-has-a-monopoly-problem/?sh=18720c4b2972 [https://perma.cc/H932-DN5Z].

342. *Id.*

343. KATE M. MANUEL, CONG. RSCH. SERV., R40516, COMPETITION IN FEDERAL CONTRACTING: AN OVERVIEW OF THE LEGAL REQUIREMENTS, CONGRESSIONAL RESEARCH SERVICE (2011).

344. *Id.*

345. *Id.*

346. Nihal Kirshan, *Major Government Tech Contractors Use Monopolistic Vendor-Lock to Drive Revenue, Study Says*, FEDSCOOP (Jan. 30, 2023), https://fedscoop.com/major-government-tech-contractors-use-monopolistic-vendor-lock-to-drive-revenue-study/ [https://perma.cc/M46L-UERE].

347. *Id.*

use it in cloud environments run by competing tech companies; fixed, inflexible annual support fees, that cannot be reduced; and predatory software audits."[348]

In addition, many of these market-dominant corporations use strategic hiring to stack their corporate ranks with former senior government officials for the company's gain, creating conflicts of interest that further justify transparency requirements. For example, Facebook has hired staff from the White House, the Federal Trade Commission, the Department of Commerce, the Federal Communications Commission, Senate offices, and congressional committees.[349] Companies, like Pfizer, Google, BP, Citibank, AT&T, Boeing, and Comcast all do the same and often leverage these new hires for future contracts.[350]

Circumstances like these have led the government to recently bring antitrust lawsuits to disarm these companies. In 2020, the FTC launched an anti-trust suit against Facebook claiming the company had become a monopoly.[351] In 2023, the Justice Department, along with the Attorneys General of eight states, filed a civil antitrust suit against Google for monopolizing multiple digital advertising technology products in violation of the Sherman Act.[352] Later that same year, the Federal Trade Commission and seventeen states accused Amazon of monopolization by suffocating rivals and raising costs for both sellers and shoppers.[353] And just this past year, in March 2024, the Justice Department sued Apple in a landmark lawsuit claiming the company had engaged in illegal monopolization.[354] Still despite these efforts, many consider these tactics to be futile.[355]

When corporations take control of multiple vital aspects of government, such as determining our national security, take on police power, and care for our children, accountability is especially necessary to ensure that there is oversight that comes with such monolithic powers and that there are opportunities for redress.

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348. *Id.*

349. Kevin J. Martin, *Facebook Inc. Employment History*, OPEN SECRETS, https://www.opensecrets.org/revolving/rev_summary.php?id=70459 [https://perma.cc/C3MS-WN5U] (last visited Jun. 8, 2024).

350. *Id.*

351. Cecilia Kang, *U.S. Revives Facebook Suit, Adding Details to Back Claims of a Monopoly*, N.Y. TIMES (Aug. 19, 2021), https://www.nytimes.com/2021/08/19/technology/ftc-facebook-antitrust.html [https://perma.cc/K7VS-BCXY].

352. Barbara Ortutay, Erik Tucker & Frank Bajak, *Justice Dep't Sues Google Over Digital Advertising Dominance*, ASSOC. PRESS (Jan. 25, 2023), https://apnews.com/article/justice-department-sues-google-c6afce17327b30a098b1bd6a7e947b81 [https://perma.cc/KUH7-RS7N].

353. Alina Selyukh, *U.S. Sues Amazon In a Monopoly Case That Could be Existential for the Retail Giant*, NPR (Sept. 26, 2023), https://www.npr.org/2023/09/26/1191099421/amazon-ftc-lawsuit-antitrust-monopoly [https://perma.cc/3DSJ-UZK5].

354. Michael Liedtke, Lindsay Whitehurst, Mike Balsamo & Frank Bajak, J. Martin, *Justice Department Sues Apple, Alleging It Illegally Monopolized the Smartphone Market*, ASSOC. PRESS (Mar. 21, 2024), https://apnews.com/article/apple-antitrust-monopoly-app-store-justice-department-822d7e8f 5cf53a2636795fcc33ee1fc3 [https://perma.cc/2CVG-K7XM].

355. Editorial Board, *The DOJ's Antitrust Case Against Apple Is No Blockbuster*, WASH. POST (March 31, 2024), https://www.washingtonpost.com/opinions/2024/03/31/doj-apple-antitrust-lawsuit-case/ [https://perma.cc/696G-6CRC].

CONCLUSION

The legal concept of property has expanded over time from a basic set of tangible items to a wide realm of intangible "products and processes of the mind," such as works of literature and art, goodwill, trade secrets, and trademarks. As discussed by Supreme Court Justices Brandeis and Warren in their famous brief on the subject:

> This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.[356]

What Brandeis and Warren were highlighting was the need to change concepts as our society and structural rules change. Reich brought this proposal to life when he identified an imbalance in power and proposed new property rights as a means to address it. Relatedly, in 1966 when FOIA was passed, its stated purpose was to achieve a previously unattainable and novel goal: "to ensure an informed citizenry, [by obtaining access to data which is] vital to the functioning of a democratic society [and] needed to check against corruption and to hold the governors accountable to the governed."[357] Today, as more information is withheld and as there is increasing overlap in corporate and government control, we must consider whether a new property right should once again be recognized to ensure an informed citizenry, which is vital to the functioning of a democratic society.

356. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
357. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).