

KEYNOTE ADDRESS: THE POWER OF AN INFORMED PUBLIC

Katherine McFate^{*†}

In addition to being the President of the Center for Effective Government (CEG), I co-chair the Coalition for Sensible Safeguards, an alliance of over 150 organizations dedicated to defending and improving our regulatory system. Since 2011, the House of Representatives has produced a steady stream of anti-regulatory bills, some directed at rolling back specific rules related to environmental and health and safety protections, some designed to further slow and undermine the rulemaking process and the implementation of existing protections. So I deal with the minutiae of regulatory issues on a weekly basis.

Rather than take you down into the legislative weeds, I thought it might be interesting to start with the big picture, to think about the role that access to information has played historically, first in consolidating state power, then in reinforcing the sovereignty of “the people” in the process of democracy and reining in the exercise of corporate and private wealth in the political process. Sometimes you need to understand where you have been to think about where you need to go. Why is public access to information an essential component of effective democracy? How is access to information critical to reining in corporate power and setting standards that safeguard public health and improve the quality of life?

I. INFORMATION AND STATE POWER

In a monarchy or hereditary centralized state, the absolute ruler has the authority to extract tribute from his (or her) subjects,¹ but to collect levies, tithes, or taxes requires a census of subjects and information about the produce, goods, or wealth each subject holds. For the state to actually

* McFate is President and CEO of the Center for Effective Government, formerly OMB Watch, a national policy and advocacy organization committed to advancing open, effective government that protects people and the environment and reflects the priorities of an informed public. The organization was established in 1983 to monitor and push for improvements in the executive branch. For more information, see *Our History: Highlights*, CENTER FOR EFFECTIVE GOV'T, <http://www.foreffectivegov.org/ourhistory> (last visited Apr. 27, 2014).

† Please note that this Article is based heavily on a transcript of the author's keynote address at The Vermont Law Review 2013 Symposium, *The Disclosure Debates: The Regulatory Power of an Informed Public*, held on September 27, 2013. The author and the Vermont Law Review have made stylistic changes to improve readability.

1. See, e.g., *Hennessy v. Richardson Drug Co.*, 189 U.S. 25, 34–35 (1903) (explaining that the term *citizen* is appropriate to democracy, and that the term *subject* plays an analogous role in monarchies).

collect on its claims requires an extensive royal bureaucracy to find, count, and collect tribute or a set of loyal vassals with its own collection capacity.

In other words, the state's ability to exert dominion over its subjects depends on its ability to collect and use information about them in an ongoing fashion. Small wonder then that when serfs, tenant farmers, or peasants rose up against their rulers, one of their first acts was to burn down the tax office or destroy tax records.² To "blind" state officials by taking their records was to neuter their power. So, the control of information has always been necessary to the effective exercise of state power.

A central authority might also "sub-contract" the collection of revenue or some other state function to an individual or a group. For example, a court favorite might receive a concession on the sale of wine or a license to import certain goods or the right to collect tolls on royal roads. The holder had the responsibility to collect the revenue and was the primary beneficiary, but the state, as ultimate authority, could always rescind the concession. This created a triangulated relationship between the ruler, subjects, and concessionaires. The interest of the license holder was to maximize the amount collected from below and to minimize the portion passed up. The interest of the ruled was to avoid payment.

If the burden demanded became too severe, the subjects might protest to the ruler for relief. And if the concessionaire was seen as short-changing the ruler or creating unrest with overly burdensome levies, his position (and perhaps his life) would be lost.

By the 1600s, the British Crown had created a new mechanism for sub-contracting activities: corporate charters granted to a group of *investors* special royal authority to carry out an activity considered to be helpful to the interest of the Crown or the common good (since the two were perceived to be interchangeable).³ Charters outlined the division of profits between the Crown and investors, and shielded the investors from being prosecuted for debt (by limiting their liability). So even in their early incarnation, corporations blurred the line between private profit and public interest. Theoretically, corporations conducted actions in the common good, but the monarchs (or their agents) determined whether this part of the charter had been fulfilled.

2. See JAMES C. SCOTT, *SEEING LIKE A STATE* 24 (1998).

3. Cf. Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 783-84 (2005).

A. Democracy, Information, and Political Power

Representative democracy was revolutionary because citizens replaced the Crown as the source of sovereignty and legitimacy. In the newly formed United States, the federal government had to gather information about its citizens to even begin operations. This is because the number of representatives each state sent to the national legislative body depended on the number of voters within its boundaries, and the right to be a voter depended on being a white male, of a certain age, with a certain amount of property. Property determined participation, which changed an individual citizen's calculus for sharing information.

But the Founding Fathers also established rights of privacy. Federal and State Constitutions gave the people's elected representatives the authority to decide what could be taxed and at what levels. Citizens were also guaranteed rights against illegal search and seizure of goods.⁴ This protection was written into the Constitution because the colonists had strong memories of royal tax collectors *legally* entering their homes and searching and confiscating untaxed contraband.⁵ While there were taxes and tariffs on all manner of things in Colonial America, small scale "tax revolts" were not uncommon.

Now complaints about "overburdened" subjects became part of a struggle between different branches and levels of government. American yeoman sometimes petitioned both the President and Congress for "relief" from taxes or user fees or tolls in the same way they might have in the past petitioned the Crown. Sometimes the relief sought was due to the tolls or prices charged by the holder of a charter or license or concession. But in a democracy there is political accountability. The people affected by odious laws had some recourse: they could vote against individuals they felt were not representing their interests.

In the early days of the American republic, individual states retained the right to give out charters, and there were many provisions limiting the ability of private corporations to amass power. As in England, charters set limits on borrowing and ownership, and state governments reserved the right to revoke corporate charters or change their terms.⁶ But charters

4. U.S. CONST. amend. IV.

5. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 561 (1999) (suggesting that the framers were motivated to create constitutional search and seizure provisions, partially in response to an episode in Boston "where customs officials had used general writs of assistance (which Americans perceived as a form of general warrant) as authority to search for *untaxed* imported goods." (emphasis added) (footnotes omitted)).

6. *E.g.*, *White v. Syracuse & Utica R.R.*, 14 Barb. 559, 560 (N.Y. Sup. Ct. 1853); *Schenectady & Saratoga Plank Rd. Co. v. Thatcher*, 11 N.Y. 102, 114-15 (1854).

encouraged commercial enterprise by allowing individuals to pool their resources and take risks with their wealth, since limited liability meant an individual and his heirs would not be saddled with debt if an enterprise failed. By 1800, about 250 to 300 corporate charters had been granted in the United States.⁷ These entities grew with the new republic, but states and citizens jealously watched any entity that threatened their newfound sovereignty.

B. Size Matters

Industrialization and the Civil War changed the scale of corporate activities. Scaling up to conduct a war that engulfed most of the country involved provisioning and munitions manufacture. Mass production required large, fixed investments. The Union Army required the production of uniform goods on a scale previously unknown. Because of the urgency of the army's need, the government had to contract with companies already engaged in these businesses, but with most wartime suppliers there were constant complaints about the quality of goods delivered and their prices. Both George Washington and Abraham Lincoln, for example, complained of "price gouging" by suppliers.

The Civil War—along with the building of the transcontinental railway—took the U.S. into the industrial age. And as new technologies shaped the country, corporate fortunes were made. Large manufacturing conglomerates had emerged by the 1880s and 1890s, and dominated entire industries and the national economy. Andrew Carnegie made his fortune in railroads, bridges, oil, and steel. John D. Rockefeller controlled kerosene production and the oil industry by the end of the nineteenth century. An innovator in vertical integration, J.P. Morgan consolidated electricity suppliers to create General Electric, as well as iron and steel to create U.S. Steel Corporation. The "robber barons" built their power by "integrating" industries vertically and horizontally—that is, by removing competition through cartels, mergers, and economic coercion. Rockefeller argued the country should move from "competitive" to "cooperative" capitalism.⁸ Opponents called it monopoly capitalism and complained about the behind-the-scenes, secret, uncompetitive and unfair activities of the "big trusts."

7. The exact number is unclear. See JAMES WILLARD HURST, *THE LEGITIMACY OF BUSINESS CORPORATIONS* 14 (1970) (estimating 317 private corporations); Simeon E. Baldwin, *Private Corporations: 1701-1901, in TWO CENTURIES' GROWTH OF AMERICAN LAW 1701-1901*, at 261, 268 (1901) (estimating no more than 250 private corporations).

8. RON CHERNOW, *TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR.* 154 (1998).

This period of the accumulation of immense wealth (the “Gilded Age”) is generally considered to be one of the most corrupt in American history, as wealthy men hired private armies of Pinkerton detectives to break strikes,⁹ openly bribed politicians and judges at the state and federal levels, and made private alliances with one another to crush competition and guard their wealth and privilege.¹⁰ For example, Rockefeller made secret deals with railroad companies that gave him a better price for transporting Standard Oil’s oil than the goods of small producers. The same arrangements privileged big grain dealers over the growing number of homesteaders in the Midwest and West.

But “the people” pushed back. Organized money was met with organized popular resistance. And information became a tool of democratic reform.

II. INFORMATION AND REFORM

Three organized movements pushed back on the monopolizing power of the trusts: The People’s Party (also known as “Populists”), the Progressive movement, and the labor movement.

A. The Populists (1880 to the 1890s)

The People’s Party grew out of the discontent of farmers in the South and Midwest, who were squeezed by low prices, high costs of transportation and storage, and high debt load. Small farmers found their already tight margins cut to nothing when railroads charged them high fees to carry their produce to market, banks charged high interest rates, and futures deals locked in low prices. The harmful impacts of monopoly control became obvious as “short-line” railroads around the country were bought up and consolidated, reducing choice and increasing prices.

The People’s Party was a response to the widespread belief that both Democratic and Republican politicians were controlled by bankers and large landowners. The 1892 party platform of the People’s Party called for the abolition of national banks, a graduated income tax, direct election of Senators, civil service reform, a working day of eight hours, and public control of all railroads, telegraphs, and telephones. The People’s Party won four states in the 1892 presidential election and governed in North Carolina.

9. Chester McArthur Destler, *Entrepreneurial Leadership Among the “Robber Barons”*: A Trial Balance, 6 J. ECON. HIST. 28, 43 (1946).

10. *Cf. id.* at 43, 49.

But in 1896 and 1900, they backed the Democratic candidate and lost, and the Party fractured and faded.

But it was largely because of their spotlight on price-fixing and other monopolistic practices that anti-trust legislation was passed. The Interstate Commerce Act of 1887 was the start of federal regulation of big business.¹¹ In 1890, the Sherman Antitrust Act was passed.¹² The Act made it illegal to form a monopoly to restrain trade and gave the Justice Department authority to stop this behavior and impose remedies (like breaking up Standard Oil).¹³ The enforcement of antitrust laws was used as a tool throughout the Progressive Era: Theodore Roosevelt sued forty-five companies under the Sherman Act, Howard Taft sued seventy-five.¹⁴ *These lawsuits were only possible because the state gathered and used information about the business practices of cartels, differential pricing, and deliberate efforts to undermine competition within industries.*

B. Early Labor Organizing

For the first sixty-five years of the Republic, labor “combinations” that organized to improve the wages and working conditions of workers were considered illegal combinations, and the individuals involved in strikes and boycotts were punished, as they had been in England. It was not until 1842 that the Massachusetts Supreme Court ruled that unions were legal.¹⁵ As the number of immigrant laborers entering the U.S. to fill the demand for industrial workers increased in the second half of the nineteenth century, demands for better laws regulating the employment relationship grew.

Between 1897 and 1904, membership in unions rose from half-a-million to two million.¹⁶ Two decades later, four million workers (over 20% of the workforce) had participated in a strike.¹⁷ Key national labor federations—the Knights of Labor, American Federation of Labor, and the

11. See Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 379, 383, *repealed by* ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 803, 804.

12. See Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-38 (2012)).

13. See *id.* §§ 1-2, 4, 26 Stat. at 209 (codified as amended at 15 U.S.C. §§ 1-2, 4).

14. Animesh Ballabh, *Antitrust Law: An Overview*, 88 J. PAT. & TRADEMARK OFF. SOC'Y 877, 886 (2006).

15. *Commonwealth v. Hunt*, 45 Mass. 111, 128-30 (1842) (ruling that labor combinations were legal provided that they were organized for a legal purpose and used legal means to achieve their goals).

16. Larry J. Griffin et al., *Capitalist Resistance to the Organization of Labor Before the New Deal: Why? How? Success?*, 51 AM. SOC. REV. 147, 149 (1986); see, e.g., WALTER LICHT, *WORKING FOR THE RAILROAD: THE ORGANIZATION OF WORK IN THE NINETEENTH CENTURY* 264-65 (1983).

17. ROBERT H. ZIEGER, *AMERICAN WORKERS, AMERICAN UNIONS 1920-1985*, at 6 (1994).

International Workers of the World—were founded between the Civil War and World War I.

Most unions focused on establishing workers' compensation for the families of those hurt or killed in work-related accidents, establishing maximum work hours in a day, minimum wages, one rest day per week, and a prohibition on night work. At this time, there were two million industrial accidents and thirty-five thousand deaths a year,¹⁸ demonstrating why unions focused on workers compensation.

But courts were generally unsympathetic to labor's goals and in 1908, the U.S. Supreme Court ruled that a nationwide boycott was an unlawful combination to restrain trade in violation of antitrust laws.¹⁹ The Clayton Act of 1914 clarified that "the labor of a human being is not a commodity or article of commerce."²⁰ and so was not covered by the Sherman Antitrust Act, but local prosecutions of labor continued until the New Deal.

C. The Progressive Era (1890 to 1920)

With the rise of the Progressive movement, information was reified. "Muck-raking" journalists in popular and periodical newspapers exposed the misbehavior of big business and pressured legislators to act. And the Progressive movement was built from an educated middle class that believed in science and rationality.²¹ Progressives believed that government needed to better serve the needs and interests of the American public, and this meant replacing tenements and improving health and safety and labor standards. They spoke of "industrial hygiene" and wanted "scientific" public managers and experts to run government and industry. They promoted the idea that better information would generate better policy.

When Progressives were in the White House (specifically, Presidents Theodore Roosevelt, William Howard Taft, and Woodrow Wilson), the federal government took a more active role in regulating the safety and purity of food products, cosmetics, and medicines, passing the Federal Meat

18. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 482 (2d ed. 1985).

19. *Loewe v. Lawlor*, 208 U.S. 274, 292, 304–05 (1908).

20. Clayton Act, ch. 323, § 6, 38 Stat. 730, 731 (1914) (codified at 15 U.S.C. § 17 (2012)).

21. *Cf.* LAWRENCE GOODWYN, *THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA*, at XVII–XVIII (1978); JOHN D. HICKS, *THE POPULIST REVOLT: A HISTORY OF THE FARMERS' ALLIANCE AND THE PEOPLE'S PARTY* 404–06 (1959); CONNIE LESTER, *UP FROM THE MUDSILLS OF HELL: THE FARMERS' ALLIANCE PROGRESSIVE POPULISM, AND AGRICULTURE IN TENNESSEE, 1870-1915*, at 94 (2006); ROBERT C. MCMATH, JR., *AMERICAN POPULISM: A SOCIAL HISTORY, 1877-1898*, at 209 (1993).

Inspection Act and the Pure Food and Drug Act in 1906.²² After a tragic mine accident, a 1910 statute also established the Bureau of Mines in the Department of Interior, which allowed investigations into the causes and prevention of mining accidents, but failed to provide the Bureau with the power to act on the information obtained.²³

Progressives also gave the federal government a revenue base to enforce these reforms by ratifying constitutional amendment that authorized highly progressive federal income taxes,²⁴ direct popular election of Senators,²⁵ and women's suffrage.²⁶

Aside from the Progressive Presidents, Louis Brandeis may be the best known progressive public servant. Brandeis had a distinguished career as an advocate for the public's interests—taking on public interest cases pro bono, fighting monopolies, and using antitrust laws to restrict their power—before being appointed to the Supreme Court and serving from 1916 to 1939. Brandeis shaped legal arguments and U.S. jurisprudence on access to information and regulatory protections. In 1913, he wrote the oft-quoted famous statement that “sunlight is said to be the best of disinfectants; electroc light the most efficient policeman.”²⁷

III. NEW DEAL INSTITUTIONS: ESTABLISHING OVERSIGHT AUTHORITY

Despite the flurry of activity regulating products and workplaces, Progressives left the financial system alone. The failure to regulate the stock market and financial institutions led to the unprecedented rise and fall of the stock market that heralded in the Stock Market Crash of 1929 and the ensuing Great Depression. As the economic crisis dragged on and hardship deepened, the populace became more restless for action, and Franklin Delano Roosevelt (FDR) provided it. Congressional investigations identified risky, unethical, and fraudulent activity and independent federal agencies were set up to collect the information required to monitor and regulate the activities of private entities.

In the wake of the financial crisis, the Federal Deposit Insurance Corporation was created in 1933 (as an independent agency) to guarantee

22. Pure Food and Drug Act, ch. 3915, § 1, 34 Stat. 768, 768 (1906), *repealed by* Federal Food, Drug, and Cosmetic Act, ch. 675, § 901(a), 52 Stat. 1040, 1059 (1938); Federal Meat Inspection Act of 1906, ch. 3913, 34 Stat. 669, 679 (current version at 21 U.S.C. § 610 (2012)).

23. *See* Act of May 16, 1910, ch. 240, §§ 1–2, 5, 36 Stat. 369, 369–70 (codified as amended at 30 U.S.C. §§ 1, 3, 7 (2006)).

24. U.S. CONST. amend. XVI.

25. U.S. CONST. amend. XVII.

26. U.S. CONST. amend. XIX.

27. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW BANKERS USE IT* 92 (1914).

depositors' bank accounts up to a certain level. The Securities and Exchange Commission, another independent federal agency, was created in 1934 to protect investors from stock market fraud and manipulation.²⁸ A law passed in 1938 empowered the Federal Trade Commission, established as an independent agency in 1914, to regulate “unfair or deceptive” trade practices²⁹—even if these actions did not result in “injury to competition.”³⁰ The Glass-Steagall Act prohibited federally chartered banks from engaging in investment banking or selling insurance.³¹

In the public health arena, the Pure Food and Drug Act was amended in 1938 to require manufacturers to obtain FDA approval before marketing new drugs (although existing drugs were “grand-fathered in”).³² After another mine accident, the Bureau of Mines was finally given the authority to inspect mines (but not to set safety standards). Instead of documenting disasters after the fact, the federal government began to monitor corporate activity to *prevent* disasters and risky, exploitative behavior by corporate entities.

The New Deal also strengthened regulations on the employment relationship. The National Labor Relations Act of 1935 guaranteed the right of private sector employees to organize and join unions, engage in collective bargaining, and to strike if necessary; and created the new Labor Relations Board to oversee union elections. The Fair Labor Standards Act of 1938 set maximum hours and minimum wages for most categories of workers.

Presidents Truman, Eisenhower, and Nixon left the New Deal largely intact and even expanded some regulated areas.

IV. CONSUMERS AND THE PUBLIC INTEREST: CONTESTED SCIENCE

The social movements and disruptive politics of the 1960s and 1970s brought on a new wave of progressive reforms. In some ways, this moment

28. Securities Exchange Act of 1934, ch. 404, § 4(a), 48 Stat. 881, 885 (codified as amended at 15 U.S.C. § 78d(a) (2012)).

29. Act of Mar. 21, 1938, ch. 49, sec. 3, § 5(a), 52 Stat. 111, 111 (current version at 15 U.S.C. § 45(a)(1) (2012)).

30. William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 728–29 (1972).

31. See Banking Act of 1933, ch. 89, §§ 16, 20–21, 32, 48 Stat. 162, 184–85, 188–89, 194 (codified as amended at 12 U.S.C. §§ 24, 78, 377–378 (2012)), *partially repealed by* Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 101(a)–(b), 113 Stat. 1338, 1341 (1999). See generally Joseph Jude Norton, *Up Against “The Wall”: Glass-Steagall and the Dilemma of a Deregulated (“Reregulated”) Banking Environment*, 42 BUS. LAW. 327, 327 & n.2 (1987).

32. See Federal Food, Drug, and Cosmetic Act, ch. 675, § 505, 52 Stat. 1040, 1052–53 (1938) (current version at 21 U.S.C. § 355 (2012)).

began with access to information. The Freedom of Information Act was passed in 1966, establishing the principle that citizens have a right to see the information their government collects and the actions it undertakes in their name—unless a compelling national security or privacy case can be made for secrecy.³³ In 1968, the Truth in Lending Act said private entities should not be allowed to deliberately deceive consumers.³⁴ “Buyers beware” be damned.

The Federal Election Campaign Act of 1971 requires disclosure of the individuals contributing more than \$100 to political campaigns and requires people to list their name, address, and occupation.³⁵ Amended in 1974, 1976, and 1979, disclosure of political spending continues to be a hotly contested political issue in Congress, the courts, and state and local politics. The amendments in 1974 not only limited campaign contributions but created the Federal Election Commission to collect information on such contributions and monitor elections.

This trifecta of open information legislation codified the cultural notion that citizens have a right to information, and that information will allow and empower citizens to make their *own* choices and hold their government to account. And to ensure government follows the preferences of the *people*, citizens needed to know what other interests might be trying to influence decision makers through campaign contributions and lobbyists.

A. New, Comprehensive Public Protections

But Congress understood information was not enough. At the same time federal legislation was freeing information, it was establishing new standards to protect the public from emerging health and environmental risks resulting from newly created chemicals. And even more importantly, it created mission-driven federal agencies to implement and enforce these standards. In more than twenty statutes enacted between 1962 and 1977, Congress created and reorganized federal agencies to provide better protection for consumers and workers.³⁶

In 1962, an amendment to the Safe Food and Drug Act required drug manufacturers to prove their drugs are safe before putting them on the

33. Freedom of Information Act, Pub. L. No. 89-487, § 3(c), (e)(1), 80 Stat. 250, 251 (1966) (current version at 5 U.S.C. § 552(a)(3)(A), (b)(1)(A) (2012)).

34. Truth in Lending Act, Pub. L. No. 90-321, § 112(1), 82 Stat. 146, 151 (1968) (codified at 15 U.S.C. § 1611(1) (2012)).

35. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 304(b)(2), 86 Stat. 3, 15 (codified as amended at 2 U.S.C. §§ 434(b)(3)(A) (2012)).

36. THOMAS O. MCGARITY, FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL 23 (2013). This is the best history of the politics of regulation available.

market. The 1966 National Traffic and Motor Vehicle Safety Act gave the National Traffic Safety Administration the authority to create and enforce automobile and highway safety standards. In 1969, the Federal Coal Mine Health and Safety Act finally allowed the Bureau of Mines to set coal mine safety standards and to inspect mines. The 1970 Occupational Health and Safety Act set general workplace safety standards, funded inspections, and required states to improve workers' compensation benefits. The Clean Air Act in 1970 created the Environmental Protection Agency to develop air quality standards, national emission limits for air pollution, performance standards for new production facilities, and resources to oversee state efforts to attain these standards.

The 1972 Clean Water Act gave the EPA the authority to put limits on the sewage and pollution that could be released into water sources. The 1972 Consumer Product Safety Act created a commission to make and enforce standards and labels for consumer products and toys. The 1976 Medical Device Amendment said that manufacturers had to prove their products were safe and effective before they could enter the market. In 1977, the Federal Mine Safety & Health Act and the Surface Mine Control & Reclamation Act improved mine safety and reduced "strip" mining. There were more. In short, Federal agencies had the mission, the expert staff, and the resources to *protect* the public rather than simply investigate after the harm had been done.

But perhaps as importantly as this long list of legislation, civil justice reform established rights for injured citizens, so they could get compensation for injuries from faulty products. The liability of corporations for products and policies was expanded, class action lawsuits were allowed, and criminal penalties could be imposed if businesses knew their products were risky and did nothing. Now individual citizens could be their own advocates and regulatory policemen.

B. The Backlash

If the system put in place during the "public interest" period was working as designed, the protections available to Americans today would look very different. But as Thomas McGarity demonstrates brilliantly in his new book, *Freedom to Harm: The Lasting Legacy of the Laissez Faire Revival*, corporate business interests and their trade associations and lobbyists did not accept this regulation of their power willingly.³⁷

37. *Id.* at 65.

Over the past forty years, conservative business interests have built an intellectual infrastructure to support “unfettered markets” (that is, markets with very limited regulation of corporations) and legal theories that emphasize the costs to business rather than public health concerns. Legal rulings and tort “reform” have weakened citizens’ ability to use civil fines to punish scofflaws and negligent manufacturers. And instead of directly trying to repeal popular laws like the Clean Air Act and Clean Water Act, corporate interests have worked to make the rule-making process slower and more laborious with multiple cost-benefit analyses and review, and they have allowed regulated businesses to appeal the judgments of agency experts in the courts.

Some corporations have also invested heavily in funding alternative “scientific” studies (think about the tobacco companies producing studies to question the relationship between smoking and lung cancer). They have learned that carefully directed money can compromise the scientific research. Good science usually wins in the end as the weight of evidence grows, but funding “alternative” research can slow the consensus by decades, especially with sympathetic (and non-expert) judges reviewing the results. Today, instead of fighting to keep information secret, anti-regulatory corporate interests have invested in creating mis-information to muddy the consensus about the health effects of their products.

A case study of how industry has been able to thwart the intent of a public interest law is the Toxic Substance Control Act.³⁸ When it was passed in 1976, there were 62,000 chemicals in use in the U.S.; about 60,000 of them were “grandfathered in”—that is, they did not have to be tested for safety.³⁹ Today, there are 84,000 chemicals in use. But over the past thirty-eight years, only 200 chemicals have been adequately tested by the Environmental Protection Agency (EPA) for their impacts on human health, and only five have been prohibited from commercial use (and then a court overturned the ban on asbestos in 1991).⁴⁰ Chemical companies do

38. See Toxic Substance Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified as amended at 15 U.S.C. §§ 2601-2629 (2012)).

39. Ronald White, *West Virginia Chemical Spill Highlights Need for Improved Chemical Protections*, CENTER FOR EFFECTIVE GOV'T (Jan. 14, 2014), <http://www.foreffectivegov.org/blog/west-virginia-chemical-spill-highlights-need-improved-chemical-protections>; see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-458, CHEMICAL REGULATION: OPTIONS EXIST TO IMPROVE EPA'S ABILITY TO ASSESS HEALTH RISKS AND MANAGE ITS CHEMICAL REVIEW PROGRAM 1-2 (2005), available at <http://www.gao.gov/new.items/d05458.pdf> (“[A]bout 62,000 [chemicals] were already in commerce when EPA began reviewing chemicals in 1979.”).

40. See White, *supra* note 39; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 39, at 18, 27; *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1207-08, 1230 (5th Cir. 1991) (vacating EPA's prohibition on “the manufacture, importation, processing, and distribution in commerce of most asbestos-containing products”).

not question the right of the state to ban toxic substances; they fight the science that demonstrates the toxicity of the chemicals they are using. With the exception of the pharmaceuticals, the American regulatory system is not built on the precautionary principle (the burden is on the manufacturer to show the product is safe before it can be marketed). We let kids and workers and pregnant women be exposed to toxic chemicals for decades, while expensive experiments are conducted by industry to determine what exposure limits are responsible for preventable diseases.

V. REGULATION, INFORMATION, AND EMPOWERED CITIZENS

When the struggle over public protections retreats into warring scientific experts, it becomes hard to engage the public. For information to be a useful civic engagement tool, it has to be accessible. It has to be presented in a way that feels “actionable” to the public. Unfortunately, public information too often is not presented in a way that improves public understanding and awareness. This task has been left to the nonprofit public interest advocacy community.

Here is an example. The Clean Water Act requires water utilities to provide customers with water quality reports. Until about six months ago, the back of your water utility bill disclosed exactly what was in the water. However, it was difficult to figure out what it showed. We looked at a lot of these bills, and we never saw one that a nonscientist could figure out. By law, the companies have to send this information to customers, but most cannot make out what it says. You do not know if your water has borderline levels of arsenic or lead. Without an advocacy group like Clean Water Action testing and interpreting water quality reports, citizens typically will not be able to use the information the government demands that water utilities provide.

Here is an early example of citizen groups—with the help of community organizers—making effective use of government information. The Home Mortgage Disclosure Act of 1975 required that banks disclose the addresses of the people to whom they loaned money for mortgages.⁴¹ Neither banks nor the government displayed this information in an actionable way—but fair housing groups around the country mapped that data over census data and showed that bankers were not giving mortgages to residents of low-income areas or majority African-American neighborhoods. Community organizations took this information and

41. Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, § 304(a)(1)–(a)(2)(A), 89 Stat. 1124, 1125–26 (codified as amended at 12 U.S.C. § 2803(a)(1)–(a)(2)(A) (2012)).

organized campaigns to demand that banks in their communities stop red-lining. The information showed disparate lending practices, which mobilized people to act.

Information was ammunition; information made the case for reforms. But citizen demands for action made the change. These same groups took bank information and mapped foreclosure patterns after the financial meltdown. Other groups have mapped the prevalence of predatory lending institutions in minority and low-income communities.

Another example: In response to highly publicized disasters and work by environmental justice advocates in the 1970s and 1980s, the Emergency Planning and Community Right-to-Know Act (EPCRA) was passed in 1986.⁴² The Act does not ban toxic combustible chemicals or the facilities that use them; it simply requires facilities using toxic chemicals to disclose information and help draft “emergency plan[s]” in case of disaster—so that first responders and nearby residents know what to do.⁴³ Instead of imposing stricter safety standards or prohibiting some chemicals, the Act just said a plant had to have a plan and make that plan available to the public.

But five years later, after the World Trade Center attack, the EPA took this data off their website.⁴⁴ CEG had collected it on an Environmental Right to Know public website and we have kept it up. Frankly, our data set is not terribly user-friendly for non-experts. But it does allow anyone who knows the facility or the toxic chemical he or she is searching for to find and print information. And since Hurricane Sandy, the West, Texas explosion, and the Geismar, Louisiana incident, we’ve started producing maps that show the geography of risk. When we started adding in the proximity of toxic facilities to hospitals and schools, the information suddenly became more meaningful to citizens and more actionable. Local grassroots activists now have a story with which to mobilize people in high-risk neighborhoods. The visuals show the problem.

Perhaps one of the most contentious and important political battles today is over the harvesting of natural gas through hydraulic horizontal drilling—or fracking. The natural gas industry contributes billions of dollars to the economy and has lowered U.S. energy prices and the cost of manufacturing. However, it has huge environmental and natural resource

42. Emergency Planning and Community Right-To-Know Act of 1986, Pub. L. No. 99-499, 100 Stat. 1728 (codified as amended at 42 U.S.C. §§ 11001–11050 (2006)).

43. *See id.* § 303(a), (d), 100 Stat. at 1731–32 (codified at 42 U.S.C. § 11003(a), (d) (2006)).

44. *See* Susan Nevelow Mart, *Disappearing Government Information and the Internet’s Public Domain*, 36 ADMIN. & REG. L. NEWS 5, 5 (2011) (“After September 11, the EPA removed risk management plans (RMPs) [from its site] . . .”).

costs—it contaminates underground water supplies, uses billions of gallons of water, and the methane leakage produces more greenhouse gas problems than oil drilling.

The debate about the production and use of natural gas should be a national conversation, but in 2005, a clause was inserted in a thousand-page energy bill late one night that exempts fracking from federal oversight (the “Halliburton” or “Cheney” exemption).⁴⁵ Here’s how fracking works: a deep well is drilled vertically through the water table and then horizontally into shale rock; millions of gallons of water are mixed with toxic “fracking” chemicals and injected at high pressure into the well to fracture the shale rock and release gas, which goes up the well. The used water is stored above ground and sometimes leaks, poisoning ground water. The wells sometimes leak, poisoning water and polluting the air with methane. We think citizens near these wells have a right to know what is in the fracking liquid so they can regularly test their water to see if it is being contaminated. A lot of people in states with fracking agree.

In 2012, CEG examined state efforts to pass laws requiring oil and gas companies to disclose the chemicals in fracking fluids (which would make it easier for citizens to test for impacts). We found about half of the thirty states with some fracking activity had passed disclosure laws in the past couple of years. You might interpret this as good initial progress in responding to citizen demands. You would be wrong. Most laws had huge “confidential business information” loopholes that would exempt companies from reporting most of the most sensitive chemicals and instead of making disclosure of the fracking chemicals a condition of getting a permit to drill, disclosure was not required until months after a well was built and operating. So the disclosure would only help identify problems after the fact, not prevent the contamination and health risks from happening in the first place.

After a huge fight between environmentalists and drillers in Texas, the compromise was that the state government would require companies to disclose the chemicals used rather than issuing strong regulations. And the conservative state legislative exchange, American Legislative Exchange Council (ALEC), started promoting disclosure legislation as a way for legislators to say they were doing something about fracking, without putting real safeguards or protections in place. Disclosure laws were viewed as a bone to throw constituents. But, over the past two years, some of the disclosure and monitoring laws are getting stronger—water and air quality baselines get set before the drilling and serve as a marker—so that if

45. 42 U.S.C. § 300h(d)(1)(B)(ii) (2006).

properly established, disclosure can build the foundation to establish needed protections in the future. However, this will not happen without an engaged citizenry.

One final disclosure example from a current debate in Washington: How to pay for the government we want. There are two questions here: What do we want our national government to do? And how are we going to pay for it? Or perhaps, who is going to pay for it? Corporate taxes should be part of this conversation. Corporations have record high profits—over 12% of GDP—and yet pay the smallest amount of the federal budget ever—less than 10%.⁴⁶ Under President Dwight D. Eisenhower, taxes on corporate profits paid for approximately 30% of the federal budget, when corporate profits represented only 6% of the economy.⁴⁷ In fact, thanks to a variety of tax loopholes and exemptions, corporations on average pay 15% less than the published tax rate of 35% on profits (after salaries and bonuses have been paid) and many profitable corporations pay no taxes at all.⁴⁸ The country could collect a higher portion of a multinational corporation's actual taxes if corporations were prohibited from creating shell companies to hide assets (for example, by requiring every incorporated company to report its owners), and if they had to report the employees, activities, and sales by country (making it harder for companies to park profits in overseas tax haven countries). Better corporate disclosure requirements would allow us to better resource our regulatory and enforcement structure, so that the public protections that are already on the books could be more adequately enforced and updated to reflect scientific knowledge.

Bills have been introduced to close overseas tax havens, and require the disclosure of ownership information and information about foreign operations. National People's Action has a campaign to require corporations to annually report the state level taxes they pay.⁴⁹ Other advocacy groups are demanding corporations fully report their lobbying and political contributions to their shareholders; some corporations are voluntarily providing this information.

Another campaign, called the Taxpayer Empowerment Agenda, is demanding that the details of privatization deals be disclosed to the public

46. SCOTT KLINGER ET AL., THE DISAPPEARING CORPORATE TAX BASE: HOW TO RECLAIM LOST TAX REVENUE TO REBUILD STATE BUDGETS 21 tbl. (2014), available at <http://www.foreffectivegov.org/disappearing-corp-tax-base>.

47. *Id.*

48. *See id.* at 6. (citing ROBERT S. MCINTYRE ET AL., THE SORRY STATE OF CORPORATE TAXES, at i (2014), available at <http://www.ctj.org/corporatetaxdodgers/sorrystateofcorptaxes.pdf>).

49. *See Make Corporate Tax Dodgers Pay Their Fair Share*, NAT'L PEOPLE'S ACTION, <http://npa-us.org/make-corporate-tax-dodgers-pay-their-fair-share> (last visited Apr. 27, 2013) (campaigning for corporate disclosure).

with time for comment and discussion.⁵⁰ In a democracy, the public needs to agree that shifting from civil servants to private contractors in the provision of a public good makes sense. This is not a judgment call for a few public officials to make in secret.

CONCLUSION: AN ENGAGED CITIZENRY IS THE BEST DISINFECTANT

In 1913, Louis Brandeis famously wrote: “Sunlight is said to be the best of disinfectants.”⁵¹ Earl Devaney, the head of the Recovery Accountability and Transparency Board that oversaw the dispersal of \$787 billion in stimulus funds, repeated this line when explaining how fraud and fund misuse had been dramatically when federal funds were tracked in.⁵²

Access to information is an important tool of democratic accountability. Governments need information to provide citizens with protection from harmful products and practices. Citizens need to understand what their government is doing in their name. Access to information has also been a key element of determining who pays for government and how society’s assets are distributed. In pre-democratic times, monarchs extracted tribute from their subjects, and subjects paid or protested or concealed their wealth. Today, the institutions of representative democracy are the mechanism by which we as a society decide how to divide the fruits of our economy and determine who should pay for the structures that allow our society to function (our financial, legal, transportation, communications, and educational systems).

The history of our country arced toward openness and inclusion. This has not been an easy or uncontested journey. There have been periods of rapid advance, followed by resistance and reassertion of secrecy and privilege.

This feels like a tough time for small “d” democrats. We have the most lop-sided concentration of wealth in our country’s history, intense inequality. Many lament that our political rules are “rigged” and worry that our children will not have the opportunities we have.

The new technologies of information management, connectivity, and ubiquitous collection of personal data do create new opportunities for surveillance and control, but they also give ordinary citizens amazing new

50. *The Taxpayer Empowerment Agenda*, PUB. INT. (July 2, 2013), <http://www.inthepublicinterest.org/article/taxpayer-empowerment-agenda>.

51. BRANDEIS, *supra* note 27, at 92.

52. *Preventing Stimulus Waste and Fraud: Who are the Watchdogs?: Hearings Before the H. Comm. on Oversight & Gov’t Reform*, 111th Cong. 13 (2009) (statement of Earl E. Devaney, Chairman, Recovery Act Accountability & Transparency Bd.).

capacities to connect with each other, and to share and access new kinds of accountability-provoking information. They give ordinary citizens multiple ways to engage, and to concentrate and target citizen power.

All the periods of advancement in this country came when we had a mobilized, engaged citizenry challenging and the status quo, social convention, and established authority. Information is a crucial ingredient in feeding reform movements, but the real social disinfectant, the source of social healing, is an engaged citizenry.