

## Article

# A Corporate Right to Privacy

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Do corporations have a constitutional right to privacy? Could a corporation claim a constitutional right to the nondisclosure of its information, as AT&T might have argued in its recent Freedom of Information Act case? Might a corporation have a privacy claim if the Securities and Exchange Commission required it to disclose health information about its CEO, as Apple resisted disclosing information about Steve Jobs's declining health? Does the ACLU have a right to privacy that is violated by the government's mass collection and surveillance of its phone call metadata? *Should* corporations have such a right to privacy?

The Supreme Court has never squarely answered the corporate right to privacy question. A 1950 case, *United States v. Morton Salt Co.*, has been cited for the proposition that corporations have no constitutional right to privacy, but that was not the holding of the case, which notably predated the Court's declaration of a constitutional right to privacy.<sup>1</sup> More recently in

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*FCC v. AT&T*, in which AT&T claimed a “personal privacy” exemption under the Freedom of Information Act (FOIA) to shield its documents from public disclosure, the Court decided the case as a matter of statutory interpretation, specifically noting that the corporation had made no constitutional privacy claims.<sup>2</sup> Other federal and state courts have diverged on the issue of a corporate constitutional right to privacy—some courts have rejected claims in opinions with little or flawed reasoning, and some have recognized a limited corporate right to privacy under the Federal Constitution in contexts like discovery and subpoenas, but have left the contours of the corporate right undefined.<sup>3</sup>

This Article explores this question and attempts to provide a principled approach for answering it. Scholars have mined the depths of other topics such as whether corporations should have privacy rights at common law,<sup>4</sup> whether trade secret law resembles common law privacy torts,<sup>5</sup> and, most relatedly, whether corporations should have Fourth Amendment protections.<sup>6</sup> Others have conducted an economic analysis of privacy.<sup>7</sup> And scholars have examined privacy concerns, constitutional and otherwise, in various specific contexts such as litigation

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1. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950) (establishing the standard under the Fourth Amendment for judicial enforcement of administrative subpoenas); *see infra* Part I.A.

2. *FCC v. AT&T*, 131 S. Ct. 1177, 1184 (2011). The case turned on the meaning of the word “personal” for purposes of the FOIA “personal privacy” exemption. The Court concluded that corporations may not claim the FOIA personal privacy exemption because although the statute defines “person” to include corporations, adjectives like “personal” do not necessarily reflect the ordinary meaning of their corresponding nouns and the context of the statute does not support a reading that would include corporations. *Id.* at 1181–85.

3. *See infra* Part I.B.

4. Anita L. Allen, *Rethinking the Rule Against Corporate Privacy Rights: Some Conceptual Quandaries for the Common Law*, 20 J. MARSHALL L. REV. 607 (1987).

5. KIM LANE SCHEPPELE, *LEGAL SECRETS* 231–47, 253–56 (1988).

6. *See, e.g.*, William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, 76–80 (2002); Christopher Slobogin, *Citizens United & Corporate & Human Crime*, 14 GREEN BAG 2d 77, 83–84 (2010); Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 814–19 (2005) [hereinafter Slobogin, *Subpoenas*].

7. *E.g.*, RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 231–47 (1981); Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381 (1996); Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978).

discovery,<sup>8</sup> subpoenas,<sup>9</sup> bank secrecy,<sup>10</sup> and FOIA exemptions, including the recent *FCC v. AT&T* case concerning the “personal privacy” exemption.<sup>11</sup> Yet scholars have all but overlooked whether a corporate constitutional right to privacy exists as such.<sup>12</sup>

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8. Jordana Cooper, *Beyond Judicial Discretion: Toward a Rights-Based Theory of Civil Discovery and Protective Orders*, 36 RUTGERS L.J. 775, 779–81, 810–13 (2005); Elizabeth A. Rowe, *Trade Secret Litigation and Free Speech: Is It Time To Restrain the Plaintiffs?*, 50 B.C. L. REV. 1425, 1426 (2009); see also Ronald J. Allen & Cynthia M. Hazelwood, *Preserving the Confidentiality of Internal Corporate Investigations*, 12 J. CORP. L. 355, 357 (1987). See generally JEROME G. SNIDER ET AL., *CORPORATE PRIVILEGES AND CONFIDENTIAL INFORMATION* (2014) (describing the application of privacy case law to corporate litigation).

9. See, e.g., Slobogin, *Subpoenas*, supra note 6, at 809–10; Abraham Tabaa, Note, *Protecting Privacy Expectations and Personal Documents in SEC Investigations*, 81 S. CAL. L. REV. 781, 815 (2008).

10. See, e.g., Bradley J. Bondi, *Don't Tread on Me: Has the United States Government's Quest for Customer Records from UBS Sounded the Death Knell for Swiss Bank Secrecy Laws?*, 30 NW. J. INT'L L. & BUS. 1, 1, 3–7 (2010); Laura Szarmach, Note, *Piercing the Veil of Bank Secrecy? Assessing the United States' Settlement in the UBS Case*, 43 CORNELL INT'L L.J. 409, 431 (2010).

11. See Daniel Greenwood, *FCC v. AT&T: The Idolatry of Corporations and Impersonal Privacy* (Hofstra Univ. Legal Research Paper Series, Research Paper No. 11-16, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1884965](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884965); Scott A. Hartman, Comment, *Privacy, Personhood, and the Courts: FOIA Exemption 7(C) in Context*, 120 YALE L.J. 379 (2010); Maeve E. Huggins, Comment, *Don't Take It Personally: Supreme Court Finds Corporations Lack Personal Privacy Under FOIA Exemptions*, 19 COMMLAW CONCEPTUS 481 (2011); Kathleen Vermazen Radez, Survey, *The Freedom of Information Act Exemption 4: Protecting Corporate Reputation in the Post-Crash Regulatory Environment*, 2010 COLUM. BUS. L. REV. 632, 650–51, 663 (2010). Commentators on the recent *AT&T* case asserted with little explanation that corporations have no, and ought to have no, right to privacy. E.g., Dahlia Lithwick, *Privacy Rights Inc.*, SLATE (Oct. 14, 2010, 6:42 PM), <http://www.slate.com/id/2270956/>; Nell Minow, *Supreme Court to Consider Corporate "Privacy" Rights*, DAILY VIEWPOINT (Nov. 18, 2010), <http://www3.gmiratings.com/home/2010/11/supreme-court-to-consider-corporate-privacy-rights/>; Alan B. Morrison, *Privacy for People, Not Corporations*, POLITICO (Dec. 30, 2010, 4:31 AM), <http://www.politico.com/news/stories/1210/46901.html>.

12. There is a very small literature examining this question and it is limited in approach. See EDWARD J. BLOUSTEIN, *INDIVIDUAL & GROUP PRIVACY* 140–46 (2d prt. 2004), discussed *infra* Part III.A; RUSSELL B. STEVENSON, JR., *CORPORATIONS AND INFORMATION: SECRECY, ACCESS, AND DISCLOSURE* 6, 69–75 (1980) (discussing corporate interest in preserving the security of information and arguing that a corporate right to privacy is “on its face an absurdity” because privacy involves human values that a corporation cannot claim); William C. Lindsay, Comment, *When Uncle Sam Calls Does Ma Bell Have To Answer?: Recognizing a Constitutional Right to Corporate Informational Privacy*, 18 J. MARSHALL L. REV. 915 (1985) (arguing that corporations should have a constitutional right to informational privacy under *Whalen v.*

The question of whether corporations have, or should have, a constitutional right to privacy merits more consideration. Privacy can facilitate both socially beneficial and harmful activity.<sup>13</sup> Businesses would be impaired without some ability to control access to their information and affairs.<sup>14</sup> Trade secret, corporate privileges, and other statutory and common law protections may fill this need, though, and constitutional privacy interests may not be implicated in these business circumstances.<sup>15</sup> Some corporations are not large businesses, however; they may be formed by small groups of individuals associating to pursue social, political, or religious goals. The corporation may be better positioned or the only effective actor to vindicate the privacy interests of these individuals acting in association. Further, the freedom to associate, a right that is understood to extend to groups including corporations, is linked to the concept of privacy.<sup>16</sup> In *NAACP v. Alabama ex rel. Patterson*, in which the Supreme Court held that state-compelled disclosure of the civil rights group's membership list was invalid as restraining the members' freedom of association, the Court recognized "the vital relationship between freedom to associate and privacy in one's associations."<sup>17</sup> Constitutional rights are interdependent with and constrain government power.<sup>18</sup> Thus, there are rea-

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*Roe*, 429 U.S. 589 (1977)). Stevenson asserts that "[c]orporations can no more be injured by an invasion of their 'privacy' than they can swear, scratch, make love, or engage in any of the other flesh-and-blood activities that the walls of privacy serve to protect from unwanted observation." STEVENSON, *supra*, at 69.

13. ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 40 (1998) ("Privacy can be used for good or ill, to help or to harm."); DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* 99 (2008) ("Privacy facilitates many activities, from the worthy to the wicked.")

14. See, e.g., *Privacy and the Rights of Federal Employees: Hearing on S. 3779 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 818 (1967) ("If all written memos and policy discussions were subject to immediate publication, or if private organizations knew they were under continuous monitoring by government agents, much of the debate would automatically become formalized. . . . [G]radual accommodation of divergent views within the organization would be hampered.")

15. See SCHEPPELE, *supra* note 5, at 231–47.

16. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

17. *Id.*

18. Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 343–45 (1993); see also Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 725 (1998) ("Most often, rights police the kinds of justifications government can act on in different spheres rather than protecting atomistic interests in autonomy, or liberty, or dignity. Rights there-

sons to believe a constitutional right to privacy may be an important check against government power for individuals who act together through the corporate form, but that according such a right to all corporations would be unfounded and could powerfully shield them from investigation or regulation.<sup>19</sup>

Any extension of the right to corporations indeed requires particularly careful analysis as the Federal Constitution includes no express reference to a right to privacy and it is one of the least defined rights in the law.<sup>20</sup> Courts have found roots for privacy in a variety of provisions and their “penumbras.”<sup>21</sup> In *Griswold v. Connecticut*, the Supreme Court’s first recognition of an independent right to privacy, the Court famously located the right in “zones of privacy” emanating from the First, Third, Fourth, Fifth, and Ninth Amendments.<sup>22</sup> Since then, the Court has expanded this line of cases concerning autonomy in making certain important decisions by relying on the Equal Protection Clause of the Fourteenth Amendment and the Due Process

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fore serve as tools courts use to evaluate the social meanings and expressive dimensions of governmental action.”); *cf.* RONALD DWORKIN, *Rights as Trumps*, in THEORIES OF RIGHTS 153–67 (Jeremy Waldron ed., 1984) (characterizing rights as “trumps” that protect individual interests against collective goals or majoritarian preferences); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184–205 (1977) (same); JOHN HART ELY, DEMOCRACY AND DISTRUST 36 (1980) (conceiving of rights as “trumps” that “can cut across or ‘trump’ powers”). For a discussion of what it means for a right to have constitutional status, see Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1087 (2013) (“[T]he attributes of constitutionality behave more like sticks in a bundle than like a set of necessary bases and the payoffs that follow . . .”).

19. This Article uses the term “rights” as understood in popular usage; a right privileges or protects the interest or claim of the right holder, but is not absolute because in a particular instance a rival interest could prevail. See Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 154 (2003).

20. See RICHARD CLAYTON & HUGH TOMLINSON, PRIVACY AND FREEDOM OF EXPRESSION 1 (2010). Privacy law is a patchwork of legal sources: the Constitution, state constitutions, federal and state statutes, and common law. See generally ALAN F. WESTIN, PRIVACY AND FREEDOM 330–64 (1967) (discussing various historical developments in U.S. privacy law). Depending on the circumstances, different legal doctrines may govern the resolution of a claimed privacy right. This Article concerns a right of privacy under the Federal Constitution.

21. *Griswold v. Connecticut*, 381 U.S. 479, 483–84 (1965). See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1308–12 (2d ed. 1988) (discussing the sources of protected rights of “personhood”); WESTIN, *supra* note 20, at 349–56 (describing *Griswold* in the context of a historical review of American privacy law).

22. 381 U.S. at 484.

Clauses of the Fifth and Fourteenth Amendments.<sup>23</sup> The Court has also raised the possibility of a separate privacy interest premised on nondisclosure of information that stems from the Fourth and Fourteenth Amendments.<sup>24</sup>

This Article argues that most corporations in most circumstances should not have a constitutional right to privacy. There is simply no natural person, or persons, associated in a corporation with a privacy interest at stake and a need for the corporation to vindicate it. Yet because corporations are not monolithic, but rather exist along a spectrum, this Article also highlights that some nonprofit and private corporations could present a stronger claim in limited circumstances given their varying purposes and dynamics, particularly in social, political, and religious realms.<sup>25</sup>

The Article develops this analysis in three parts. Part I shows it is an open question in Supreme Court jurisprudence whether corporations have a constitutional right to privacy and provides the first scholarly treatment of the growing body of conflicting law in the lower courts on this unresolved issue. Part II examines corporate rights jurisprudence, showing that the Court has not developed a coherent method or test for these determinations, but has often relied on a view of the corporation as an association in extending rights to corporations on a derivative basis. Building on the underlying framework of the jurisprudence, and the closest articulations of a test the Court has made, this Article asserts that in determining whether to accord a right to a corporation, we should look to whether the purpose of the right is served by according it to the corporation in question—that is, whether it is necessary in order to protect natural persons—and whether the right is of a type that inheres only in an individual in his or her individual capacity.

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23. See *Lawrence v. Texas*, 539 U.S. 558, 564–76 (2003) (discussing privacy case law history).

24. See *infra* Part III.A.

25. As this Article was in the publication process, the Supreme Court handed down its opinion in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), holding that federal regulations requiring employers to provide insurance coverage for certain forms of contraception violate the Religious Freedom Restoration Act of 1993 (RFRA) as applied to certain closely held corporations, each owned and controlled by members of a single family with sincerely held religious beliefs. Notably, the Court based its decision on statutory grounds under RFRA rather than the First Amendment. For a critical discussion of the case, see Margaret Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. (forthcoming 2015) (on file with author).

Using this approach, Part III explores whether the right to privacy should extend to corporations. Specifically, the analysis looks to whether a corporate right to privacy would protect the privacy interests of the people involved, such as shareholders, directors, and officers, or other participants such as employees. This approach keeps in focus that people are the object of constitutional protection; granting rights to corporations makes sense only as a means to protect people and carry out the purpose of the right. Finally, Part III explores deeper issues raised by the inquiry—whether there is something specific about the right to privacy or the corporate form that would categorically foreclose all corporations from having such a right—and considers what the future may hold in this area.

### I. THE OPEN QUESTION OF CORPORATE PRIVACY

The existing case law addressing whether corporations have a constitutional right to privacy is in disarray and has, to date, escaped scholarly attention. Above all, the existing case law shows that the Supreme Court has not squarely answered the question and that there is a small, but growing body of conflicting law in the lower federal courts and state courts on this unresolved issue. This Part examines the case law, which shows the growing importance of the issue and the need for a more coherent approach to the corporate privacy question and to corporate rights jurisprudence more generally.<sup>26</sup>

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26. Although there is a short line of cases that use the term “commercial privacy” in their rationale, these cases concern trade secret or unfair competition law and do not clearly implicate a constitutional right. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 487 (1974) (“A most fundamental human right, that of privacy, is threatened when industrial espionage is condoned or is made profitable; the state interest in denying profit to such illegal ventures is unchallengeable.” (footnote omitted)); *E.I. duPont de Nemours & Co. v. Christopher*, 431 F.2d 1012, 1016 (1970) (“Commercial privacy must be protected from espionage which could not have been reasonably anticipated or prevented.”); BLOUSTEIN, *supra* note 12, at 129, 145–46 (citing *Kewanee Oil* in support of a corporation’s right to protect trade secrets); M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1131, 1134 n.13 (2011) (noting that the invasion of “commercial privacy” in *duPont* might have been better described as unfair competition); Rowe, *supra* note 8, at 1434–35 (noting that although *Kewanee Oil* and *duPont* “appear to have laid the foundation for commercial privacy in trade secret jurisprudence, the concept has remained undefined”).

A. SUPREME COURT: *UNITED STATES V. MORTON SALT CO.*

*Morton Salt* is the Supreme Court's primary decision that, at least notionally, addresses whether corporations have a constitutional right to privacy.<sup>27</sup> In it, the Court stated, "corporations can claim no equality with individuals in the enjoyment of a right to privacy."<sup>28</sup> That phrase, and the few paragraphs of discussion around it, has received little to no scrutiny, however, and later courts have relied on it to inconsistently reject and recognize a corporate right to privacy.<sup>29</sup> This section explores the ways in which *Morton Salt* left open the question of whether corporations have a constitutional right to privacy.

The case concerned whether the Federal Trade Commission could require Morton Salt, a corporation, to file reports showing compliance with an earlier order to stop engaging in certain trade practices.<sup>30</sup> Much of the Supreme Court's opinion focused on three of Morton Salt's claims regarding jurisdiction and the Administrative Procedure Act; only a small sliver addressed Morton Salt's other argument, that the order was "novel and arbitrary and violate[d] the Fourth and Fifth Amendments to the Constitution."<sup>31</sup>

The Court began that sliver of explanation by framing privacy, the "right to be let alone," as only concerning Fourth Amendment search and seizure protections and the Fifth Amendment privilege against self-incrimination.<sup>32</sup> This narrow

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27. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974), is occasionally also cited in connection with the concept of corporations' constitutional privacy. *E.g.*, *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 486 n.10 (Minn. 1985). *California Bankers* concerned the constitutionality of the Bank Secrecy Act of 1970, which required financial institutions to keep records of some customers and large transactions. *Cal. Bankers*, 416 U.S. at 30–41. The Court focused on the plaintiffs' specific claims rather than a right to privacy as such, holding the First Amendment claim was premature, the Fourth Amendment claim failed because the regulations did not impose an unreasonable reporting requirement (citing *Morton Salt*), and the Fifth Amendment claim failed because corporations have no privilege against self-incrimination and the banks did not have standing to assert claims on behalf of customers. *Id.* at 41–43, 52, 56–57, 66–67, 71.

28. *Morton Salt*, 338 U.S. at 652.

29. *See infra* Part I.B.

30. *Morton Salt*, 338 U.S. at 634.

31. *See id.* at 638, 651–54. *Morton Salt* is often cited for its rule regarding the scope of issues that may be litigated in a subpoena enforcement proceeding. *See, e.g., In re McVane*, 44 F.3d 1127, 1135 (2d Cir. 1995).

32. *Morton Salt*, 338 U.S. at 651–52 (citations omitted). There is a history of Fourth and Fifth Amendment claims in this vein. *See* POSNER, *supra* note 7,



view reflects the early state of privacy jurisprudence at the time.<sup>33</sup> Notably, this case predated the Court's recognition in *Griswold v. Connecticut* of an independent right to privacy based on a variety of Bill of Rights provisions creating a "zone of privacy" and the Court's case law concerning a constitutional right to privacy in nondisclosure of personal information.<sup>34</sup> Thus, *Morton Salt* tells us little, if anything, about whether the Court would conclude that corporations have a right to privacy, as currently understood.

Further, besides predating the Court's privacy jurisprudence, *Morton Salt* also presented particularly weak circumstances for finding a privacy interest with the corporation's attempt to completely avoid the Commission's valid request for information about its trade practices. With the Court's narrow framing of privacy in place, it very quickly rejected Morton Salt's Fourth and Fifth Amendment claims.<sup>35</sup> The Court cited *Oklahoma Press*, in which it had ruled in similar circumstances that no actual search or seizure occurred where the Commission properly subpoenaed corporate records pursuant to a valid statute.<sup>36</sup> Like Morton Salt, the corporations there had not objected to a specific defect in the breadth or terms of the request for corporate records, and so the Court rejected their claims as effectively seeking total immunity from the statute.<sup>37</sup> The Court also cited *Hale v. Henkel*, which established that corporations cannot claim a Fifth Amendment privilege against self-incrimination, and that corporations are not beyond the reach of congressional and judicial power.<sup>38</sup>

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at 311 ("Long before the tort right of privacy came before the Supreme Court, and even before Warren and Brandeis wrote their famous article on privacy, the Court was confronted with claims to the protection of privacy under the Fourth and Fifth Amendments.").

33. See *infra* Part III.A for a discussion of Supreme Court privacy jurisprudence. See also Daniel B. Yeager, *Search, Seizure, and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249, 277–78 (1993) ("In the 1940s and '50s, the Court spoke often of the Fourth Amendment's protection of a right of privacy.").

34. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). See *infra* Part III.A for a discussion of Supreme Court privacy jurisprudence.

35. *Morton Salt*, 338 U.S. at 651–54.

36. *Id.* at 651–52 (citing *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186 (1946)).

37. *Okla. Press*, 327 U.S. at 195–96; see *Morton Salt*, 338 U.S. at 653–54.

38. *Morton Salt*, 338 U.S. at 651–52 (citing *Hale v. Henkel*, 201 U.S. 43, 70 (1906)); see also *Okla. Press*, 327 U.S. at 196 ("Petitioners' plea that the Fourth Amendment places them so far above the law that they are beyond the reach of congressional and judicial power as those powers have been exerted

The subsequent paragraph of the opinion, following the Court's compact rejection of Morton Salt's claims, is home to the Court's oft-quoted statement that "corporations can claim no equality with individuals in the enjoyment of a right to privacy":

While they may and should have protection from unlawful demands made in the name of public investigation, corporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favours from government often carry with them an enhanced measure of regulation. Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.<sup>39</sup>

Taken out of context the "no equality" phrase has been wrongly understood as establishing that corporations have no right to privacy.<sup>40</sup> The plain language of the phrase does not establish such a proposition; it says only that such a right is not equal to that of individuals. In addition, the above paragraph shows that before the "no equality" phrase, the Court recognized that there are some limits to the government's access to corporate information in investigations.<sup>41</sup> Thus, the language, textual

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here only raises the ghost of controversy long since settled adversely to their claim.").

39. *Morton Salt*, 338 U.S. at 652 (citations omitted).

40. In dicta in two concurrences, a Supreme Court Justice has taken *Morton Salt* as establishing that corporations have not just an unequal right, but no right to privacy. *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284 (1989) (O'Connor, J., concurring in part and dissenting in part); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 184 (1951) (Jackson, J., concurring). Without providing a citation, Justice Rehnquist stated in a dissent in which he argued against negative free speech rights for corporations: "This argument is bolstered by the fact that the two constitutional liberties most closely analogous to the right to refrain from speaking—the Fifth Amendment right to remain silent and the constitutional right of privacy—have been denied to corporations based on their corporate status." *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 34 (Rehnquist, J., dissenting). In addition, other courts have also cited *Morton Salt* or other cases for the proposition that corporations have no right to privacy. See *infra* note 43; see also RESTATEMENT (SECOND) OF TORTS § 652IA, cmt. c (1977) (citing *Morton Salt* for the proposition that "[a] corporation has no such right of privacy").

41. For the proposition that corporations "may and should have protection from unlawful demands made in the name of public investigation," *Morton Salt*, 338 U.S. at 652, the Court cited *American Tobacco*, an opinion by Justice Holmes holding that the Federal Trade Commission did not have unlimited access to corporations' papers in connection with an investigation about possi-

context, and more general jurisprudential context show the Court did not hold that corporations have no right to privacy, but rather suggested that corporations have a Fourth Amendment right unequal to that of individuals.<sup>42</sup>

In sum, with its dated view of privacy and “no equality” phrasing, *Morton Salt* did not squarely resolve whether corporations have a constitutional right to privacy. While it rejected equality in privacy protection for corporations with regard to Fourth Amendment protection for the type of agency order it was addressing, it did not answer the question more generally or with regard to other privacy interests.

#### B. POST-*MORTON SALT*: CONFLICT IN THE FEDERAL AND STATE COURTS

Lower courts have relied on *Morton Salt* in reaching divergent answers to the question of whether a corporation may claim a constitutional right to privacy. Their disparity underscores that *Morton Salt* left much unresolved and their reasoning—often conclusory, formalistic, or undeveloped—shows that the area needs greater illumination.

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ble unfair competition practices. *FTC v. Am. Tobacco Co.*, 264 U.S. 298 (1924). There, the Court noted that while the Commission could access documentary evidence it could not consistent with the Fourth Amendment “direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime” because it would be “contrary to first principles of justice.” *Id.* at 306.

42. As a matter of precedential weight, it is worth noting that some jurists and commentators might additionally view the *Morton Salt* reasoning, based on the “concession” view of the corporation, as problematic. The “concession” view of corporations as creatures of the state, artificial beings subject to enhanced regulation, was developed and popularized between the seventeenth and nineteenth centuries, but the Supreme Court had largely shifted away from that view by 1950, and the Court has since called it an “extreme position.” See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (characterizing the argument that “corporations, as creatures of the State, have only those rights granted them by the State” as an “extreme position”); see also, e.g., Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1011–12 (discussing the decline of the concession view in the mid-nineteenth century). For arguments that the “concession” view of the corporation should be rehabilitated, see David Ciepley, *Neither Persons nor Associations: Against Constitutional Rights for Corporations*, 1 J.L. & CTS. 2 (2013); Reza Dibadj, *(Mis)conceptions of the Corporation*, 29 GA. ST. U. L. REV. 731 (2013); Stefan Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327 (2014).

## 1. Cases Rejecting a Corporate Constitutional Right to Privacy

Nearly a dozen courts have cited *Morton Salt*, with little explanation, for the proposition that corporations do not have a constitutional right to privacy.<sup>43</sup> The Ninth Circuit has come to

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43. *Arnold v. Pa. Dep't of Transp.*, 477 F.3d 105, 111 (3d Cir. 2007) (stating that “[t]he District Court correctly found that, as an entity, Baker clearly had no privacy interest capable of protection at stake here” and citing *Morton Salt* (internal quotation marks omitted)); *Crum & Crum Enters., Inc. v. NDC of Cal., L.P.*, Civ. No. 09-145 (RBK), 2011 WL 886356, at \*3 (D. Del. Mar. 10, 2011) (stating “business entities do not have a right to privacy” and citing *Arnold* with internal citation to *Morton Salt*); Fla. Ass’n of Prof’l Lobbyists, Inc. v. Div. of Legislative Info. Servs., 431 F. Supp. 2d 1228, 1236 (N.D. Fla. 2006) (rejecting privacy claims of lobbying firms because the federal constitutional right to privacy extends only to natural persons, and citing *California Bankers Ass’n v. Shultz*, 416 U.S. 21, 65 (1974), with internal quotation to *Morton Salt*); *Muratore v. Dep’t of Treasury*, 315 F. Supp. 2d 305, 310–11 (W.D.N.Y. 2004) (quoting as binding authority Justice O’Connor’s concurrence in *Browning-Ferris* which relied on *Morton Salt*: “[T]he Supreme Court has held that ‘a corporation has no . . . right to privacy.’ A demand for ESI’s corporate documents, then, does not implicate the Fourth Amendment.” (citation omitted)); *Doe v. Veneman*, 230 F. Supp. 2d 739, 750 n.5 (W.D. Tex. 2002) (“[A] business organization is a person only by legal fiction. It is not an individual with Constitutionally protected rights.” (citing *Morton Salt*, 338 U.S. at 651–52)), *overruled on other grounds*, 380 F.3d 807 (5th Cir. 2004); *Clinton Cmty. Hosp. Corp. v. S. Md. Med. Ctr.*, 374 F. Supp. 450, 456 (D. Md. 1974) (holding that a corporation cannot assert an injury to its aesthetic enjoyment of the environment under NEPA, and citing *Morton Salt* for the proposition that “[i]t is clear that corporations do not enjoy a right to privacy”); *Warner-Lambert Co. v. Execuquest Corp.*, 691 N.E.2d 545, 548 (Mass. 1998) (denying a corporation a state statutory right to privacy, stating that “[c]ases from other jurisdictions unanimously deny a right of privacy to corporations,” and citing *Morton Salt*); *Health Cent. v. Comm’r of Ins.*, 393 N.W.2d 625, 630 (Ct. App. Mich. 1986) (stating that “the right of privacy is primarily designed to protect the feelings and sensibilities of human beings and does not protect artificial entities” and citing *Morton Salt*); *see also Oasis Nite Club, Inc. v. Diebold, Inc.*, 261 F. Supp. 173, 175 (D. Md. 1966) (stating that as a corporation the plaintiff “cannot be said to possess a right of privacy” and citing *Morton Salt*, despite the case at hand being a civil suit between private parties) (internal quotation marks omitted); *Ass’n for Pres. of Freedom of Choice, Inc. v. Emergency Civil Liberties Comm.*, 236 N.Y.S.2d 216, 218 (N.Y. Sup. Ct. 1966) (rejecting a corporation’s claim for privacy and citing *Morton Salt* for the proposition that “[t]here are statements in cases decided elsewhere that a corporation has no right of privacy”); *supra* note 40 (discussing dicta in two Supreme Court concurrences that reference *Morton Salt* as establishing that corporations have no right to privacy); *cf. Regency Catering Servs., Inc. v. City of Wilkes-Barre*, 640 F. Supp. 29, 30–31 (M.D. Pa. 1985) (rejecting a catering corporation’s privacy claim based on city disclosure of mouse infestation because constitutional privacy cases involved “intensely personal aspects of the private lives of individuals” and plaintiff failed to cite any case which held a corporation could claim a right to privacy); *In re Food Int’l, Inc.*, Nos. 97-27194 JKF, 98-2173, 1999 WL 1052525, at \*6 (Bankr. W.D. Pa. Nov. 19, 1999) (following *Regency Catering* in

the same result, while providing a bit more reasoning. In *Fleck & Associates, Inc. v. City of Phoenix*, the Ninth Circuit rejected a corporation's claim that a city ordinance prohibiting the operation of live sex act businesses violated its constitutional right to privacy.<sup>44</sup> The corporation, a social club for gay men, specifically identified the source of its privacy right as the liberty guarantee described in *Lawrence v. Texas*.<sup>45</sup>

The Ninth Circuit started its analysis with *Morton Salt's* statement that "corporations can claim no equality with individuals in the enjoyment of a right to privacy."<sup>46</sup> It then reasoned that because corporations are not entitled to "purely personal guarantees"<sup>47</sup> and because "it is hard to imagine a constitutional guarantee that could be more inherently personal and therefore unavailable to a corporate entity" than privacy, corporations have no right to privacy.<sup>48</sup> The court quoted Chief Justice Marshall's well-known characterization of a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law."<sup>49</sup> And in its own words, the court further explained: "Corporations are not self-defining autonomous creatures worthy of respect and dignity in the relevant sense. Neither do they have private lives, let alone 'private lives in matters pertaining to sex' as Fleck would have it."<sup>50</sup> Thus, the court formalistically reasoned that because a corporation is an artificial being and not the type of creature that has a private life, corporations do not have a cognizable right to privacy. For this reason, the court ruled that the corporation had failed to plead "the invasion of any cognizable right," and so had failed to establish standing.<sup>51</sup>

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rejecting a privacy claim of a restaurant corporation that had an incident publicized about its cook allegedly spitting in a police officer's food).

44. 471 F.3d 1100 (9th Cir. 2006).

45. *Id.* at 1104 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

46. *Id.* (quoting *Morton Salt*, 338 U.S. at 652).

47. *Id.* (quoting *Bellotti*, 435 U.S. at 778 n.14).

48. *Id.* at 1104–05.

49. *Id.* at 1105 (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819)).

50. *Id.*

51. *Id.* at 1104. The court stated that Fleck's claim was "really just a claim that Fleck should be allowed to champion the liberty interests of its customers," and that it could not do so under traditional standing doctrine because it failed to meet the constitutional requirements for standing. *Id.* at 1105. Fleck also could not obtain associational standing because it did not have "members" as required by the doctrine because its "members" were merely customers and the purpose of the "association" was for profit, not to "ex-

## 2. Cases Recognizing a Limited Corporate Constitutional Right to Privacy

In contrast to the various state courts, federal district courts, and the Ninth Circuit, which have stated that corporations lack a right to privacy, either with a conclusory approach or based on the notion that corporations are artificial and unlike natural persons, the D.C. Circuit and California state courts have recognized a limited corporate right to privacy.<sup>52</sup> These cases accord a lessened privacy right to corporations, giving a nod to *Morton Salt's* “no equality” phrase, but nonetheless recognizing a right.<sup>53</sup>

The beginning of this line of cases goes back over thirty years and involves a battle with the Church of Scientology over sealing and returning seized documents. In *United States v. Hubbard*, the D.C. Circuit found that the Church, a corporation and third party to the underlying litigation, had a privacy interest in preventing its seized documents from becoming public.<sup>54</sup> The court left undefined the source of the privacy interest, but stated that it was at least partly a constitutional matter.<sup>55</sup>

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press the collective views and protect the collective interests’ of their members.” *Id.* at 1105–06 (quoting *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 345 (1977)).

52. A 1979 case from the District of Puerto Rico also suggested that corporations enjoy a limited privacy right. *Colegio Puertorriqueño De Niñas, Liceo Ponceño, Inc. v. Pesquera De Busquets*, 464 F. Supp. 761, 765–66 (1979). There, several private schools and a professional organization of private schools claimed that a state inquiry into the cost of running the schools violated their privacy rights under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. *Id.* at 763. The court examined the right to privacy case law and stated: “The foregoing does not mean that corporations or other entities which do not possess human individuality do not enjoy privacy rights. However, their sphere of protected privacy is lesser in scope than that of individuals.” *Id.* at 765 (citation omitted). The court concluded that the state inquiry there did not transgress the bounds of any constitutional guarantees, including a privacy interest in nondisclosure under *Whalen v. Roe*, 429 U.S. 589 (1977). *Pesquera De Busquets*, 464 F. Supp. at 766–68.

53. *See supra* Part I.A.

54. 650 F.2d 293, 307 (D.C. Cir. 1980).

55. *Id.* at 302–03 (“Although we decline the Church’s invitation expressly to ground the Church’s protectible interests in the Constitution’s provisions, we find the kinds of interests asserted to have some constitutional footing, both cognate to and supportive of, constitutional rights.”). The court supported this assertion by noting that corporations have rights under the Fourth Amendment which “protect[s] legitimate expectations of privacy,” and it also generally referred to the right to privacy as stemming from the Fourteenth and Fifth Amendments which protect against deprivations of liberty and “encroachment upon a constitutionally recognized sphere of personal privacy.” *Id.* at 304–05.

Referencing *Morton Salt* as well as a mix of state and federal cases,<sup>56</sup> the court concluded that while the “public attributes of corporations may indeed reduce *pro tanto* the reasonability of their expectation of privacy,” a bright line could not be drawn at the corporate structure.<sup>57</sup> Instead, “the nature and purposes of the corporate entity and the nature of the interest sought to be protected will determine the question whether under given facts the corporation *per se* has a protectible privacy interest.”<sup>58</sup> Finally, without deeper explanation or greater specificity, the court emphasized that the corporation at hand was a church: “[W]hether acting for itself or on behalf of its members, surely the privacy interests of a ‘church’ must be assessed somewhat differently from the privacy interests of other sorts of ‘corporations.’”<sup>59</sup>

Although later vacated on other grounds, another case from the D.C. Circuit also recognized a corporation as having a constitutional privacy interest in the nondisclosure of documents.<sup>60</sup> In *Tavoulaareas v. Washington Post Co.*, non-party Mobil Oil sought to seal its documents obtained in discovery and not used at trial.<sup>61</sup> The panel reasoned that a court might implicate a constitutional privacy interest in nondisclosure when it forces disclosure of personal information in the discovery context, and in those circumstances a corporation’s interest would be “essentially identical” to an individual’s.<sup>62</sup>

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56. *Id.* at 305–06. The *Hubbard* court referred to privacy as having been embraced both in D.C. and in California, seemingly because the documents seized from the Church of Scientology were from church buildings in Los Angeles. Since *Hubbard*, California courts have clarified that corporations may not claim a right to privacy under the California Constitution. *Roberts v. Gulf Oil Corp.*, 147 Cal. App. 3d 770, 791 (1983).

57. *Hubbard*, 650 F.2d at 306.

58. *Id.*

59. *Id.* (“[A]t least certain types of organizations—corporate or non-corporate—should be able to assert in good faith the privacy interests of their members.”).

60. *Tavoulaareas v. Wash. Post Co.*, 724 F.2d 1010 (D.C. Cir. 1984), *vacated on other grounds*, 737 F.2d 1170 (D.C. Cir. 1984) (en banc) (per curiam).

61. *Id.* at 1014–15, 1023, 1028–29.

62. *Id.* at 1021–22, 1025–29 (recognizing that corporations have an unequal Fourth Amendment expectation of privacy, but that qualification is “to allow adequate policing of corporate conduct” which is not the purpose of discovery; “The purpose of discovery is not affected by the fact that a party to the suit is a corporation.”). On rehearing, the en banc court vacated the panel decision and remanded the case to the district court for reconsideration in light of a then-recent Supreme Court case, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). The en banc court left open its view of the panel’s decision regarding privacy; subsequently, other courts have continued to cite or discuss the pan-

The California line of cases has relied on and amplified the D.C. Circuit case law. Most notably, in *Roberts v. Gulf Oil Corp.*, concerning a subpoena duces tecum seeking information from a corporate taxpayer about its property, a California appellate court held that corporations do not have a right to privacy under the California Constitution, nor a fundamental right to privacy, but do have a “general right to privacy.”<sup>63</sup> The court lodged this in “some combination of the Fourth Amendment, the Fourteenth Amendment’s protection against arbitrary or unjustifiable state deprivations of liberty and the Fifth Amendment.”<sup>64</sup> The court quoted at length from *Morton Salt*, and then citing the D.C. Circuit’s *Hubbard* case, stated: “Although corporations have a lesser right to privacy than human beings and are not entitled to claim a right to privacy in terms of a fundamental right, some right to privacy exists. Privacy rights accorded to artificial entities are not stagnant, but depend on the circumstances.”<sup>65</sup>

The *Roberts* court then recognized two factors for determining the strength of a business entity’s privacy right: (1) the strength of the nexus between the entity and the human beings, and (2) the context of the controversy.<sup>66</sup> Applying this test, the court noted that “[w]ithout denigrating the fact that a corporation does enjoy a right to privacy in some circumstances,” Gulf Oil did not in the case at hand because there was no nexus to an individual’s privacy and a privacy right would have been “unreasonable” in the context of determining Gulf Oil’s “fair share of taxes.”<sup>67</sup>

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el’s decision in *Tavoulaareas*, despite its procedural infirmity. See, e.g., *Lankford v. City of Hobart*, 27 F.3d 477, 479 (10th Cir. 1996); *Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548, 550–51 (E.D. Cal. 1990), *overruling recognized on other grounds*, *Chatman v. Felker*, No. Civ. S-03-2415 JAM, 2009 WL 173515 (E.D. Cal. 2009); *Avirgan v. Hull*, 118 F.R.D. 257, 262 (D.D.C. 1987). But see *Nat’l Fed’n of Fed. Emps. v. Greenberg*, 983 F.2d 286, 293 (D.C. Cir. 1993) (“The court, sitting *en banc*, vacated the panel’s decision in *Tavoulaareas*, and it therefore has no precedential value.”).

63. *Roberts v. Gulf Oil Corp.*, 195 Cal. Rptr. 393, 406–12 (Ct. App. 1983). The court reasoned that Gulf Oil’s rights were not so fundamental as to require meticulous scrutiny because “[t]he interest of a taxpayer to be free from incursions into his or her files is not of the same constitutional significance as the personal right to determine whether to beget a child.” *Id.* at 410 (citing *Morton Salt*).

64. *Id.* at 410 (citations omitted).

65. *Id.* at 411.

66. *Id.*

67. *Id.* at 412. The court wove a bit of concession theory into its analysis (“Gulf is a corporation which exists at the pleasure of the state.”), but its con-



Other California courts have followed *Roberts*,<sup>68</sup> although sometimes assuming that corporations have such a right without deciding the issue on the merits.<sup>69</sup> Although the California case law consists of multiple cases spanning decades, the courts have not developed a framework for better understanding the

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clusion seems largely driven by the context of a corporation asserting a privacy right to prevent a tax assessor from obtaining information to determine its corporate taxes.

68. *Lazaro v. Lomarey, Inc.*, No. C 09-02013 RMW (PVT), 2010 WL 3636207, at \*2 (N.D. Cal. Sept. 14, 2010) (granting motion to compel against corporate defendant, but noting that corporations have some right to privacy); *Saca v. J.P. Molyneux Studio Ltd.*, No. CIV-S06-2818 MCE EFB, 2008 WL 62181, at \*4–5 (E.D. Cal. Jan. 4, 2008) (noting that “[t]he privacy rights of businesses are accorded . . . less weight” and including business entities’ privacy interests in balancing analysis); *Whittall v. Henry Schein, Inc.*, No. CIVS051629 WBJ BCH, 2006 WL 902571, at \*3–4 (E.D. Cal. Apr. 5, 2006) (balancing “[b]oth corporate and individual privacy rights . . . at issue”); *S.B.C.C., Inc. v. St. Paul Fire & Marine Ins. Co.*, 112 Cal. Rptr. 3d 40, 50 (Ct. App. 2010) (interpreting an insurance provision using the phrase “a person’s right to privacy” with reference to California’s line of privacy cases stemming from the context of discovery and subpoenas); *Ameri-Med. Corp. v. Workers’ Comp. Appeals Bd.*, 50 Cal. Rptr. 2d 366, 383–84 (Ct. App. 1996) (holding respondents had a legitimate interest in determining whether non-reimbursable fees were included in a medical bill pertinent to their workers’ compensation claim, but they “[did] not have an automatic right to unfettered access to books and records regarding the medical clinic’s overall business operation” and the clinic corporation “retain[ed] a privacy interest in financial and employment information”).

69. *Conn. Indem. Co. v. Superior Court*, 3 P.3d 868, 874–75 (Cal. 2000) (assuming without deciding that corporate entities had constitutional privacy rights where the trial court had not yet ruled on the privacy claims in a case concerning the validity of subpoenas issued by a city council investigating groundwater contamination); *420 Caregivers, LLC v. City of Los Angeles*, 163 Cal. Rptr. 3d 17, 42 (Ct. App. 2012) (assuming, without deciding, that medicinal marijuana collectives “have certain privacy expectations in the records subject to disclosure” pursuant to a city ordinance, but holding there was no invasion of privacy “given the heavily regulated area in which the collectives operate”); *Zurich Am. Ins. Co. v. Superior Court*, 66 Cal. Rptr. 3d 833, 846–47 (Ct. App. 2007) (“While we recognize there are serious questions as to the application of a federal right of privacy to corporations, we follow the approach adopted by the court in *Connecticut Indemnity Co. v. Superior Court*, and decline to address the merits of the issue in this case . . .” (citation omitted)); see also *Hecht, Solberg, Robinson, Goldberg & Bagley v. Superior Court*, 40 Cal. Rptr. 3d 446, 457 (Ct. App. 2006) (assuming without deciding that a limited liability partnership has privacy rights). In rejecting a corporation’s privacy claim under the Fifth and Fourteenth Amendments, a recent case in the Southern District of Florida likewise seemed to assume that a corporation could claim such a right to privacy. See *Palmat Intl., Inc. v. Holder*, No. 12-20229-CIV, 2013 WL 594695, at \*4–5 (S.D. Fla. Feb. 14, 2013) (rejecting an individual and corporation’s claim that releasing bank records pursuant to a treaty between Argentina and the United States would violate their right to informational privacy under the U.S. Constitution).

constitutional footing or definition of the right for corporations, the different forms of constitutional privacy or contexts in which a corporation's privacy interests might be implicated, and what it means to grant the corporation a privacy right at the entity level.

## II. APPROACHES TO CORPORATE CONSTITUTIONAL RIGHTS

The preceding Part showed that whether corporations have a constitutional right to privacy is an open question, and it highlighted the divergent approaches and results in the lower courts that have previously gone unexamined. Courts have struggled to find a coherent way of thinking about this challenging issue as it involves the amorphous and indeterminate right to privacy and the theoretical and doctrinal difficulty of corporate rights analysis.

The importance of this observation is two-fold: first, it shows there is an opportunity for scholarly insight to be brought to bear on this jurisprudential issue and second, it illustrates the deeper problem that courts lack a coherent approach to determining the scope of corporate constitutional rights. The remainder of this Article aims to shed light on the corporate privacy question, and in so doing, to provide more generalizable insights for other timely topics such as corporate speech and free exercise rights.<sup>70</sup>

As a starting point, in order to understand why most corporations in most circumstances should not have a right to privacy, it is helpful to first understand why corporations receive any constitutional protection and how the Supreme Court has approached these questions in the past.

### A. CORPORATE RIGHTS JURISPRUDENCE

The U.S. Constitution does not specifically mention corporations. As a matter of constitutional text, no explanation is provided regarding the application of constitutional provisions

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70. For a discussion of whether business corporations have free exercise rights, see Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1 (2013); James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565 (2013); Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL'Y & LAW 303 (2014); Mark Tushnet, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 CORNELL L. REV. ONLINE 70 (2013), <http://cornelllawreview.org/files/2013/12/99CLRO70-November.pdf>.

to corporations.<sup>71</sup> It was thus left to the courts to decide whether corporations were the subject of constitutional protections, or holders of rights, and whether those rights were coextensive with the scope of individual rights.

The Supreme Court first addressed these questions in the early nineteenth century in cases involving Article III diversity jurisdiction, the Contract Clause, and the Privileges and Immunities Clause of Article IV. The Court showed a willingness to extend constitutional protections to corporations in order to protect rights of the people composing the corporation. For example, in the 1809 case *Bank of the United States v. Deveaux*, the Supreme Court stated that the corporate entity was not a “citizen” for purposes of Article III diversity jurisdiction, but that it could look to the natural persons composing a corporation and find that diversity jurisdiction exists where there is complete diversity of state citizenship between the shareholders of a corporate party and the opposing party.<sup>72</sup> In the 1819 case of *Trustees of Dartmouth College v. Woodward*, the Court held that a state legislature’s act to unilaterally alter a corporate charter violated the Contract Clause.<sup>73</sup> The Court explained that although incorporation required a government grant, the corporation had been “endowed by private individuals” and represented a contract covered by the protection of the Contract Clause.<sup>74</sup>

The Court’s willingness to extend protections to corporations in order to protect the constitutional rights of the individuals behind the corporation was limited, however. In the 1839 case of *Bank of Augusta v. Earle*, the Court ruled that while corporations may, according to the citizenship of their individual members, be treated as “citizens” for purposes of Article III diversity jurisdiction, they are not “citizens” for purposes of Ar-

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71. ASHUTOSH BHAGWAT, *THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS* 10–15 (2010) (noting the absence of textual reference or explanation of the treatment of corporations in the Constitution).

72. *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809), *overruled by* *Louisville, Cincinnati, & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497 (1844) (holding that a corporation is treated as a “citizen” of the state in which it is incorporated for purposes of diversity jurisdiction); *Marshall v. Baltimore & Ohio R.R.*, 57 U.S. (16 How.) 314 (1854) (establishing a conclusive presumption that all shareholders of a corporation are citizens of the state of incorporation for purposes of diversity jurisdiction).

73. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 650 (1819).

74. *Id.* at 632–39, 641–50.

ticle IV's Privileges and Immunities Clause.<sup>75</sup> The Court expressed concern that if it were to look through the corporate form to the persons composing the corporation, it would undermine the limited liability protections that were gaining acceptance at the time and give those operating through the corporate form "far higher and greater privileges than are enjoyed by the citizens of the state itself."<sup>76</sup> Thus, in some instances, the characteristics of the corporate form prevented the Court from according corporations some constitutional protections.

In the later part of the nineteenth century, the Court recognized equal protection and due process protections for corporations under the Fourteenth and Fifth Amendments.<sup>77</sup> The Court gave little explanation for these rulings, but justified this extension of constitutional protection on the basis that it protected the property interests of the people associating through the corporate form.<sup>78</sup> Justice Field explained, for example: "Private corporations are, it is true, artificial persons, but with the exception of a sole corporation, with which we are not concerned, they consist of aggregations of individuals united for some legitimate business."<sup>79</sup> Further, "[i]t would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation."<sup>80</sup>

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75. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586 (1839).

76. *Id.*

77. *See Noble v. Union River Logging R.R.*, 147 U.S. 165, 274 (1893); *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 188–89 (1888); *Santa Clara Cnty. v. S. Pac. R.R.*, 118 U.S. 394, 396 (1886) (headnotes). For a discussion of the *Santa Clara* case, see Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1642–45.

78. *See Blair & Pollman, supra note 25; Pollman, supra note 77*, at 1644–45.

79. This quote comes from Justice Field's lower court opinion, sitting by designation in *County of San Mateo v. Southern Pacific Railroad*, 13 F. 722, 743 (C.C.D. Cal. 1882), which was related to *County of Santa Clara v. Southern Pacific Railroad*, 18 F. 385, 402 (C.C.D. Cal. 1883). *See also Pembina Consol. Silver Mining & Milling Co.*, 125 U.S. at 189 ("[C]orporations are merely associations of individuals united for a special purpose . . ."); Blair & Pollman, *supra note 25*, (manuscript at 12–20) (discussing the rationale of Supreme Court jurisprudence from the late nineteenth century recognizing corporations as having equal protection and due process protections under the Fourteenth and Fifth Amendments concerning property interests).

80. *Cnty. of San Mateo*, 13 F. at 744.

Notably, the Court again extended these protections in the context of protecting the property interests of shareholders and based on a view of the corporation as an association. Again the Court also limited the scope of protection where the right, or a portion of the right, at issue could not be held derivatively by the corporation. The Court, for example, clarified that while due process protections extend to protect corporate property, the liberty protected by the Fourteenth Amendment is “the liberty of natural, not artificial persons.”<sup>81</sup> Further, as with Article IV, the Court held that corporations are not “citizens” for purposes of the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>82</sup> Thus, while the Court extended protections to corporations to protect the property interests of the persons associating through the corporate form, it did not confuse corporations with “citizens,” and it recognized limits to maintain states’ power to regulate corporations for the public good.<sup>83</sup> Justice Field explained that due process protection extended to corporations for property “because the property of a corporation [was] in fact the property of the corporators,” but that life and liberty protections did not because “the lives and liberties of the

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81. *Nw. Nat’l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906); *see also* *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 527 (1939) (noting “the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (explaining that corporations “cannot claim for themselves the liberty which the Fourteenth Amendment guarantees,” but they can claim protection for their business and property); *W. Turf Ass’n v. Greenberg*, 204 U.S. 359, 363 (1907) (“[T]he liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial, persons.”); Ruth H. Bloch & Naomi Lamoreaux, *Corporations and the Fourteenth Amendment* 4–23 (unpublished manuscript) (on file with author) (discussing how the Court parsed the Fourteenth Amendment in the late nineteenth and early twentieth centuries so that the due process protection for liberty did not extend to corporations).

82. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 178–82 (1868).

83. *See* Bloch & Lamoreaux, *supra* note 81, at 8–23 (explaining that the Court “articulated limits on the applicability to corporations of the due-process and privileges-and-immunities clauses” in the same cases that extended the Fourteenth-Amendment guarantee of equal protection to corporations); *see also* *Blake v. McClung*, 172 U.S. 239, 257 (1898) (“Nor must we be understood as saying that a State may not, by its courts, retain within its limits the assets of a foreign corporation, in order that justice may be done to its own citizens; nor, by appropriate action of its judicial tribunals, see to it that its own citizens are not unjustly discriminated against . . . .”); *Paul*, 75 U.S. at 181 (explaining that applying the Privileges and Immunities Clause to corporations would be “utterly destructive of the independence and the harmony of the States”).

individual corporators are not the life and liberty of the corporation.”<sup>84</sup>

In the early twentieth century, the Court recognized corporations as subject to corporate criminal liability.<sup>85</sup> In *Hale v. Henkel*, the Court held that corporations enjoy Fourth Amendment protections against unreasonable searches and seizures but may not claim the Fifth Amendment privilege against self-incrimination.<sup>86</sup> The Court justified Fourth Amendment protection for corporations again on the basis that corporations are associations of individuals with rights: “A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body.”<sup>87</sup> But the Court explained that a corporation cannot claim the Fifth Amendment privilege against self-incrimination because that right “is purely a personal privilege of the witness.”<sup>88</sup> The Court explained “[i]t was never intended to permit him [the corporate agent] to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person.”<sup>89</sup> The Court thus drew a line between the rights that corporations derived from the people composing them and the rights that belonged to people only as individuals.

Over time, the Court’s distinction between the property and liberty protections for corporations faded. This started in 1936 with the Court’s selective incorporation and extension of speech and press rights to newspaper corporations in *Grosjean v. American Press Co.*,<sup>90</sup> and was further developed in the 1950s and 60s when the Court began to recognize associational and speech rights of nonprofit organizations such as the NAACP<sup>91</sup>

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84. *Cnty. of San Mateo*, 13 F. at 747.

85. *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 494–96 (1909).

86. 201 U.S. 43, 69–70, 75–76 (1906).

87. *Id.* at 76.

88. *Id.* at 69.

89. *Id.*

90. 297 U.S. 233, 242–51 (1936).

91. *See NAACP v. Button*, 371 U.S. 415, 428 (1963) (validating the NAACP’s claim that a state statutory ban on improper solicitation of legal business abridged “the freedoms of the First Amendment, protected against state action by the Fourteenth”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (validating the NAACP’s freedom of association and noting that “freedom to engage in association for the advancement of beliefs and

and continued to extend speech and press rights to media corporations such as The New York Times.<sup>92</sup> The cases involving media corporations paid little attention to the corporate identity of the parties, but rather emphasized the purpose the press serves “as a vital source of public information.”<sup>93</sup> The NAACP cases relied heavily on the associational nature of the particular corporation, which was understood as engaging in “cooperative, organizational activity”<sup>94</sup> and asserting the rights of its members rather than having personhood of its own.<sup>95</sup>

Following this recognition of constitutional protections for media corporations and nonprofit membership corporations came the Court’s extension of First Amendment protections to corporations through the commercial speech doctrine<sup>96</sup> and in the context of corporate political spending.<sup>97</sup> This period from the 1970s to the present has represented a significant expansion of constitutional protections for ordinary business corporations, as the Court has come to see them as capable of asserting rights to participate in the marketplace of ideas and as a source of information that is useful to consumers.<sup>98</sup> While these decisions are subject to important criticism on a number of grounds, for the purposes at hand we can observe that the Court has continued to rely on the associational rationale in extending rights to corporations, deriving rights for corporations from those of its members or participants, in addition to depending on the rights of consumers and listeners in hearing the speech or information of the corporation.<sup>99</sup> The commercial

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ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech”.

92. *N.Y. Times v. Sullivan*, 376 U.S. 254, 264 (1964).

93. *Grosjean*, 297 U.S. at 250; *see also id.* at 243 (emphasizing the importance of “the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests”); *id.* at 245–51 (discussing the history and importance of freedom of press).

94. *Button*, 371 U.S. at 430.

95. *Patterson*, 357 U.S. at 458.

96. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

97. *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978).

98. *See Blair & Pollman, supra note 25*, (manuscript at 40–50) for further analysis of the Court’s notable expansion of constitutional protections for business corporations from this period.

99. *See id.* (manuscript at 35–54); Adam Winkler, *Citizens United*, Per-

speech cases, for instance, are grounded in consumers' right to receive information,<sup>100</sup> and corporate political spending cases refer to corporations as "associations" and "associations of citizens," as in *Citizens United v. FEC*, and base their reasoning in large part on the rights of listeners.<sup>101</sup>

#### B. METHOD FOR DETERMINING CORPORATE RIGHTS

As we have seen, the Court has confronted issues concerning the applicability and scope of constitutional protections for corporations for over two hundred years. In all of this time, it has failed to articulate a test or standard approach for its rulings. Sometimes the Court has looked to the purpose and history of the right at issue to determine whether to accord it to a corporation, while at other times the Court simply accorded a right to corporations without explanation or in a conclusory oral remark.<sup>102</sup> Often the Court's reasoning reflects a concept of the corporation—as a concession from the state, as an aggregate of people, or as a real entity—that seemingly justifies the grant or denial of the right. None of these conceptions of the corporation succeed, however, in both accurately describing the wide range of modern corporations and justifying why corporations would hold rights.<sup>103</sup>

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sonhood, and the Corporation in Politics (unpublished manuscript) (manuscript at 3–5) (on file with author).

100. *E.g.*, *Va. State Bd. of Pharmacy*, 425 U.S. at 763–65.

101. *Citizens United*, 130 S. Ct. at 900, 904, 907, 908 (referring to corporations as "associations" and "associations of citizens"); *see id.* at 900 ("Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster. The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not natural persons." (citations omitted) (internal quotation marks omitted)); *Bellotti*, 435 U.S. at 777 ("It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.").

102. For discussions of the Supreme Court's various approaches to determining the scope of corporate rights, see Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 629 (1990); Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 908–30 (2011); Pollman, *supra* note 77, at 1635–61.

103. For further discussion of these conceptions of the corporation and the difficulty of using them as a justification for determining the scope of corporate rights, see Pollman, *supra* note 77. For an argument that corporate constitutional rights should be determined with reference to the Article III standing doctrine, see Brandon L. Garrett, *The Constitutional Standing of*



In addition, the so-called doctrine of corporate personhood does not provide guidance for determining the scope of corporate rights. Contrary to public belief,<sup>104</sup> the Court's jurisprudence extending constitutional protections to corporations does not do so on the basis that corporations themselves, as legal entities, are like natural persons. Rather, the doctrine of corporate personhood merely stands for the principle that a corporation can be accorded protections in order to protect the rights of the individuals associated through the corporate form.<sup>105</sup> It does not provide a method for determining the scope of protections—that is, the doctrine does not instruct courts to formalistically apply the legal conclusion that the corporation is a “person” as a mode of reasoning. The Ninth Circuit made this mistake in *Fleck*, reasoning that corporations have no constitutional right to privacy because corporations are not the type of creature that has privacy; they are not “self-defining autonomous creatures worthy of respect and dignity” and they have no “private lives.”<sup>106</sup> To be sure, if we define privacy as autonomy or liberty

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*Corporations*, 163 U. PA. L. REV. (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2330972](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330972).

104. *E.g.*, PAUL KENS, THE SUPREME COURT UNDER MORRISON R. WAITE, 1874–1888 124 (2010) (“The standard interpretation today is that the *Santa Clara* case established a doctrine of corporate personhood that eventually gave corporations most of the rights held by natural persons.”); Adam Winker, *Yes, Corporations Are People*, SLATE (Mar. 17, 2014, 11:52 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/03/corporations\\_are\\_people\\_and\\_that\\_s\\_why\\_hobby\\_lobby\\_should\\_lose\\_at\\_the\\_supreme.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/03/corporations_are_people_and_that_s_why_hobby_lobby_should_lose_at_the_supreme.html) (noting popular misunderstanding of corporate personhood). For an example of common phrasing in the media, see Adam Schiff, *The Supreme Court Still Thinks Corporations Are People*, THE ATLANTIC (July 18, 2012, 3:11 PM), <http://www.theatlantic.com/politics/archive/2012/07/the-supreme-court-still-thinks-corporations-are-people/259995> (noting the Court concluded in *Citizens United* that “corporations are people—at least as far as the First Amendment is concerned”).

105. *See* KENS, *supra* note 104, at 124; *see also* Blair & Pollman, *supra* note 25. The discussion of rights in this Article focuses on the treatment of corporations under the Constitution, not the separate topic of the status of corporations as legal entities with the ability to do certain things such as hold property, contract, sue and be sued, and the policy of limited liability. For a discussion of the distinction between corporate constitutional rights and the entity status or legal personality of corporations, see Pollman, *supra* note 77, at 1638–39.

106. *See* *Fleck & Assocs. v. City of Phx.*, 471 F.3d 1100, 1105 (2006). Likewise, in considering whether corporations may claim the “personal privacy” exemption under FOIA, the Supreme Court similarly noted that “[personal privacy] suggests a type of privacy evocative of human concerns—not the sort usually associated with an entity like, say, AT&T.” *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1183 (2011). Notably, that case did not call upon the Court “to pass on the scope of a corporation’s ‘privacy’ interests as a matter of constitutional

in intimate human decisions or activities and we look at the corporation only as an artificial entity, not representing human interests, it would follow that the corporation is not an apt privacy right holder—corporations have no soul, they cannot engage in sexual activity, etc. But this misses the mark. This formalistic reasoning is divorced from the reason corporations receive rights in the first instance. As Part II.A above has shown, corporations do not receive rights because the characteristics of the entity so closely resemble a natural human so as to merit granting the right; rather corporations receive rights because, as forms of organizing human enterprise, they have natural persons involved in them, and sometimes it is necessary to accord protection to the corporation to protect their interests.<sup>107</sup>

Perhaps the closest the Court has come to providing a corporate rights test was in a footnote in *First National Bank of Boston v. Bellotti*, in which the Court stated that it examines whether a right is “purely personal” in determining whether it applies to corporations:

Certain “purely personal” guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the “historic function” of the particular guarantee has been limited to the protection of individuals. Whether or not a particular guarantee is “purely personal” or is unavailable to

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or common law,” but it nonetheless reflects the potential for unmeasured reasoning based on the likeness between corporations and humans. *Id.* at 1179. Scholars have also suggested this line of thinking when discussing corporate rights. See, e.g., STEVENSON, *supra* note 12, at 51 (“Corporations—and other organizations—can make no *direct* claim to the benefits of those social and legal rules, for their fictional ‘personalities’ do not partake of the characteristics wherein the rules find their basis.”); *id.* at 69 (“As a jurist with a sense of humor once put it, ‘[I]f you don’t have any privates, you’re not entitled to any privacy.’”).

107. The notion that the corporation holds a right to protect human interests has led some to term corporate rights as “derivative.” Meir Dan-Cohen has, for example, explained that a derivative right serves “to safeguard or enhance the enjoyment of certain rights by others.” Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CALIF. L. REV. 1229, 1246 (1991); see MEIR DAN-COHN, RIGHTS, PERSONS, AND ORGANIZATIONS 58–60 (1986) (“A may have a right because of either of two reasons. A right may be recognized in A out of concern for A himself. In such a case, A has an *original right*. A right in A may also result from a concern not for him but for B. In this case, A will be said to have a *derivative right*.”); cf. HENRY N. BUTLER & LARRY E. RIBSTEIN, THE CORPORATION AND THE CONSTITUTION 143 (1995) (“It follows, for example, from the fact that the corporation is a nexus of contracts rather than a creature of state law, that personal rights in the Constitution should be applied to individuals connected with the firm rather than to the firm itself.”).

corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.<sup>108</sup>

The Court has not consistently used this approach or shown that it would be possible to do so in the context of corporations. First, the Court has not explained what it means by a “purely personal” right. Further, basing the determination of whether a right is “purely personal” on the “historic function” of the guarantee is problematic insofar as the Court has not consistently done this in the past,<sup>109</sup> and, in instances where the Court or individual justices have looked to history, widely varying historical narratives have been given about the founders’ views of corporations and their rights.<sup>110</sup>

Although the Court has failed to articulate one, a consistent framework for analyzing corporate claims to constitutional protections is possible. We can follow the underlying logic of the Court’s jurisprudence, set out above in II.A, and read the *Bellotti* footnote in a consistent light. The notion of a “purely personal” right can thus be understood as referring to whether a right can be held in association or derivatively. As the Court explained when it refused to extend a corporation the Fifth Amendment privilege against self-incrimination, that right inheres only in an individual in his or her individual capacity.<sup>111</sup> It is simply not the type of right that can be exercised in association with others or asserted derivatively. Another example of such a right would be the right to vote. It is only meant to inhere in an individual acting

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108. 435 U.S. 765, 778 n.14 (1978) (citation omitted); *see also* *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284 (1989) (O’Connor, J., concurring).

109. *See, e.g.*, Mark Tushnet, *Corporations and Free Speech*, in *THE POLITICS OF LAW* 253, 256 (David Kairys ed., 1982) (arguing the Court did not look to the historic function of the Fourteenth Amendment when it “converted an amendment primarily designed to protect the rights of blacks into an amendment whose major effect, for the next seventy years, was to protect the rights of corporations”).

110. *E.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 906 (2010) (acknowledging that “[t]he Framers may not have anticipated modern business and media corporations”); *cf. id.* at 925–26 (Scalia, J., concurring) (arguing that despite small numbers the corporation was “a familiar figure in [early] American economic life,” and that it is unclear that corporations were “despised” and that the Framers would have excluded them from the First Amendment even if they were despised (internal quotation marks omitted)); *id.* at 948–50 (Stevens, J., dissenting) (arguing that the Framers “conceived of speech more narrowly than we now think of it,” and understood corporations as being subject to “comprehensive[] regulat[ion] in the service of the public welfare”).

111. *See supra* text accompanying notes 86–89.

in his or her individual capacity and it cannot be asserted as a right by another. By contrast, corporate rights are, by their nature, derivative and instrumental.<sup>112</sup> Incorporation creates a separate legal identity. Rights do not originate in corporations qua corporations. They are accorded to corporations only when necessary to protect the rights of natural persons involved in the corporation, or on an instrumental basis to protect the rights of other persons affected as listeners or consumers. The Court has at times lost sight of this logic and its limits, but it is, at core, on this basis that a bank was treated as a “citizen” of a state for purposes of diversity jurisdiction, the corporate charter of a private college may be protected under the Contract Clause, and the NAACP has a claim to freedom of association.<sup>113</sup>

Thus, this Article asserts that in determining whether to accord a right to a corporation, we must look to whether the purpose of the right is served by according it to the corporation in question—that is, whether it is necessary to protect natural persons—and if the right is of a type that inheres only in an individual in his or her individual capacity.<sup>114</sup> This requires analyzing the purpose of the right and the natural persons involved in the corporation. Furthermore, the derivative nature of rights for corporations requires paying attention to distinctions between different corporations because not all can be fairly regarded as representing any particular natural person or group of natural persons from whom rights can be derived.<sup>115</sup>

### III. A CORPORATE RIGHT TO PRIVACY?

With the problem and methodology now framed, we turn to whether corporations should have a constitutional right to privacy. This analysis begins by examining the purpose and nature of the right to privacy, to the extent this can be gleaned

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112. Blair & Pollman, *supra* note 25 (manuscript at 1).

113. See *supra* Part II.A for a discussion of these and other corporate rights cases decided by the Supreme Court.

114. For a more detailed discussion of the merits of this approach, see Pollman, *supra* note 77. See also Martin Petrin, *Reconceptualizing the Theory of the Firm—From Nature to Function*, 118 PENN ST. L. REV. 1 (2013). Notably, this approach addresses the preliminary inquiry for rights determinations—whether corporations hold that particular right at all; it does not answer under what circumstances or level of scrutiny a countervailing interest might prevail.

115. Blair & Pollman, *supra* note 25 (manuscript at 1).

from Supreme Court jurisprudence and scholarly conceptions. The challenge, then, is to better understand whether the purpose (or purposes) of the right to privacy would be served by according it to corporations and whether privacy is a right that inheres only in an individual capacity.

#### A. THE PURPOSE AND NATURE OF THE RIGHT TO PRIVACY

The notion of privacy has long factored into constitutional adjudication as a value protected by various provisions of the Constitution,<sup>116</sup> including, for example, the Fourth Amendment, which turns on a reasonable expectation of privacy test.<sup>117</sup> But it was not until 1965 in *Griswold v. Connecticut* that the Supreme Court announced an independent constitutional right to privacy.<sup>118</sup> The Court famously found the right in the “zones of privacy” or “penumbras” of several guarantees in the Bill of Rights, “formed by emanations from those guarantees that help give them life and substance.”<sup>119</sup> The Court specifically identified the First, Third, Fourth, Fifth, and Ninth Amendments as guarantees that create zones of privacy.<sup>120</sup>

After *Griswold*, a trickle rather than a torrent of other Supreme Court privacy cases have followed. The relatively small number and uniqueness of these cases have made the area difficult to generalize. The Court itself has sorted the cases and the interests acknowledged therein as forming two branches: decisional privacy and informational privacy.<sup>121</sup>

The decisional privacy cases, or what might be categorized as privacy cases concerning autonomy in decisions or actions, include the right of persons to be free from government intrusions in areas of reproductive freedom, sexuality, and family relationships. This line of cases includes the widely known, landmark decisions of *Griswold* (striking down a state law that prohibited use of contraceptives),<sup>122</sup> *Roe v. Wade* (disallowing

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116. See, e.g., FREDERICK S. LANE, AMERICAN PRIVACY: THE 400-YEAR HISTORY OF OUR MOST CONTESTED RIGHT 153–55 (2009).

117. Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 504 (2007).

118. 381 U.S. 479, 484–85 (1965).

119. *Id.* Justice Goldberg’s concurrence, joined by Chief Justice Warren and Justice Brennan, advanced the Ninth Amendment as a source of authority for privacy rights, absent an express reference to privacy in other provisions. *Id.* at 486–99 (Goldberg, J., concurring).

120. *Id.* at 484 (majority opinion).

121. *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977).

122. *Griswold*, 381 U.S. 479.

many restrictions on abortion),<sup>123</sup> and *Lawrence v. Texas* (invalidating a state law criminalizing certain sexual conduct by persons of the same sex).<sup>124</sup>

On the whole, these cases have provided a rather murky view of the purpose of the right to privacy. It is unclear whether a proper understanding would draw the line narrowly around particular areas or activities, such as the right of privacy in sexual relations, or more broadly to encompass a more inclusive, vague notion like personal or fundamental liberty.<sup>125</sup> The latter view arguably finds support in the fact that since *Griswold* the Court has grounded privacy cases in the Equal Protection Clause and the right to liberty under the Due Process Clause of the Fifth and Fourteenth Amendments.<sup>126</sup>

The other branch, a right to informational privacy or non-disclosure of personal information, occupies a precarious position as the Supreme Court has only assumed without deciding that the right exists, and a party has never prevailed on that claim in the Supreme Court.<sup>127</sup> This line of cases started in 1977

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123. *Roe v. Wade*, 410 U.S. 113 (1973).

124. *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)). For other cases protecting the right to make autonomous decisions, see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion) (abortion); *Turner v. Safley*, 482 U.S. 78 (1987) (marriage by prisoners); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (plurality opinion) (use of contraceptives by minors); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (use of contraceptives by single people); *Stanley v. Georgia*, 394 U.S. 557 (1969) (possession of pornography within one's home); *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage). For cases discussing privacy that predate the Court's recognition of an independent privacy right, see *Prince v. Massachusetts*, 321 U.S. 158, 165–67 (1944) (acknowledging the "private realm of family life"); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (describing the forced sterilization of convicts as the deprivation of a basic liberty); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (discussing the freedom to decide how to educate one's children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (protecting the freedom to educate one's children in different languages).

125. Some scholars have questioned whether these cases are best understood as presenting privacy harms in the first instance. See, e.g., Calo, *supra* note 26, at 1137.

126. See *Lawrence*, 539 U.S. at 564–76 (discussing privacy case law history).

127. Lower courts have more significantly developed the jurisprudence on a right to nondisclosure of information. The majority of circuit courts have recognized that the Constitution does provide some protection against the disclosure of private information. See *Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 789–90 (9th Cir. 2002); *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995); *James v. City of Douglas, Ga.*, 941 F.2d 1539, 1543 (11th Cir. 1991) (per curiam); *Daury v. Smith*, 842 F.2d 9, 13 (1st Cir. 1988); *Barry v. City of*

with *Whalen v. Roe*, marking the first time the Court suggested that a constitutional right to privacy includes a right to avoid disclosure of information.<sup>128</sup> In *Whalen*, patients claimed that a New York statute authorizing the state to collect the names and addresses of people prescribed dangerous drugs had violated their privacy.<sup>129</sup> The information collected was stored in a central computer file and only a small number of public health officials had access to the information.<sup>130</sup> In discussing the privacy claim, the Court observed that “[t]he cases sometimes characterized as protecting ‘privacy’” actually concerned “at least two different kinds of interests”: an interest in “making certain kinds of important decisions” without government interference and an “interest in avoiding disclosure of personal matters.”<sup>131</sup> The patients claimed that the state statute threatened to impair both their interest in making health care decisions and in nondisclosure of information.<sup>132</sup>

While the Court recognized that a duty to avoid unwarranted disclosures of data collected and used for public purposes “arguably has its roots in the Constitution,” the Court concluded that the statute in question did not violate “any right or liberty protected by the Fourteenth Amendment.”<sup>133</sup> The Court relied on the statute being “manifestly the product of an orderly and rational legislative decision” regarding the state’s interest in controlling distribution of dangerous drugs and on the statute containing provisions for securely maintaining the information and preventing its public disclosure.<sup>134</sup>

After *Whalen*, the Court again referred to a right to nondisclosure of information in *Nixon v. Administrator of General Services*.<sup>135</sup> There, the Court upheld the Presidential Recordings

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New York, 712 F.2d 1554, 1559 (2d Cir. 1983); Denver Policemen’s Protective Ass’n v. Lichtenstein, 660 F.2d 432, 435 (10th Cir. 1981); Fadjo v. Coon, 633 F.2d 1172, 1175 (5th Cir. Jan. 1981); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980). *But see* Am. Fed’n of Gov’t Emps., AFL–CIO v. Dep’t of Hous. & Urban Dev., 118 F.3d 786, 791 (D.C. Cir. 1997) (“The Supreme Court has addressed the issue in recurring dicta without, we believe, resolving it.”); J.P. v. DeSanti, 653 F.2d 1080, 1088–90 (6th Cir. 1981) (rejecting a constitutional right to nondisclosure of personal information).

128. 429 U.S. 589 (1977).

129. *See id.* at 591.

130. *Id.* at 593–95.

131. *Id.* at 598–600.

132. *Id.* at 600.

133. *Id.* at 605–06.

134. *Id.* at 597–605.

135. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977).

and Materials Preservation Act, under which President Nixon was forced to turn over his official records for archivists to screen them, returning to him materials that were “personal and private in nature” and determining terms and conditions for eventual public access to the other materials.<sup>136</sup>

Nixon had challenged the Act’s constitutionality based in part on his right to privacy in the materials under the First, Fourth, and Fifth Amendments.<sup>137</sup> The Court acknowledged the privacy interest in nondisclosure, citing *Whalen*,<sup>138</sup> and Nixon’s “legitimate expectation of privacy in his personal communications,”<sup>139</sup> but concluded his privacy interests were outweighed in the circumstances by the public’s interest in the documents and by his status as a public figure.<sup>140</sup> The Court also noted that his claim related “only to a very small fraction of the massive volume of official materials with which they [were] . . . commingled”;<sup>141</sup> thus Nixon lacked an expectation of privacy in the majority of the materials. Also weighing against his claim was the fact that segregating the materials without screening was a “virtual impossibility,” and the Act provided procedures to minimize the intrusion.<sup>142</sup> Although the Court did not find a meritorious claim in Nixon’s case, the Court’s balancing approach gave credence to a privacy right in nondisclosure.

In 2011, in *NASA v. Nelson*,<sup>143</sup> the Supreme Court recalled the *Whalen* and *Nixon* line of cases, but again held there was no violation of a constitutional right to privacy in the case at hand. Contract employees at NASA’s Jet Propulsion Laboratory claimed that two parts of forms used for background checks violated their right to informational privacy—specifically, a section of a form that asked employees about treatment or counseling for recent illegal drug use and certain open-ended questions on a form sent to the employee’s references.<sup>144</sup>

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136. *Id.* at 429–30.

137. *Id.* at 455.

138. *Id.* at 457 (“One element of privacy has been characterized as ‘the individual interest in avoiding disclosure of personal matters . . . .’” (quoting *Whalen*, 429 U.S. at 599)).

139. *Id.* at 465.

140. *Id.*

141. *Id.* at 459.

142. *Id.* at 465 (noting the “unblemished record of the archivists for discretion”).

143. *NASA v. Nelson*, 131 S. Ct. 746 (2011).

144. *Id.* at 752–53 (detailing one form that asked if the reference had “any reason to question the employee’s honesty or trustworthiness,” and if the ref-



In discussing the claimed privacy right, the Court acknowledged that “[i]n two cases decided more than 30 years ago, this Court referred broadly to a constitutional privacy ‘interest in avoiding disclosure of personal matters’” and had since “said little else on the subject.”<sup>145</sup> While many lower courts had addressed the issue in the interim,<sup>146</sup> the Court acknowledged that its own case law had been sparse: “[a] few opinions have mentioned the concept in passing and in other contexts, [b]ut no other decision has squarely addressed a constitutional right to informational privacy.”<sup>147</sup> The Court then assumed without deciding that “the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*”—and held that “whatever the scope of this interest,” the challenged portions of the government background check, subject to the Privacy Act’s safeguards against public disclosure and as part of the government’s reasonable management of its internal affairs as employer, did not violate that right.<sup>148</sup> Perhaps because the Court has “proceed[ed] with caution” where it has only “scarce and open-ended guideposts of substantive due process to show [it] the way,”<sup>149</sup> the Court has left open the broader issues concerning informational privacy and its purpose. As Justice Scalia lamented, by repeatedly assuming the right without deciding it, “the Court actually *applies* a constitutional informational privacy standard without giving a clue as to the rule of law it is applying.”<sup>150</sup>

Scholarly conceptions of privacy have added depth and context that aid in understanding the values or purpose being served in the Court’s privacy jurisprudence. One mapping of

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erence had “any adverse information concerning the employee’s violations of the law, financial integrity, abuse of alcohol and/or drugs, mental or emotional stability, general behavior, or conduct or other matters” (citations omitted) (internal quotation marks omitted).

145. *Id.* at 751, 756 (quoting *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977); *Nixon*, 433 U.S. at 457)).

146. *Id.* at 756 n.9 (“Many courts hold that disclosure of at least some kinds of personal information should be subject to a test that balances the government’s interests against the individual’s interest in avoiding disclosure. The Sixth Circuit has held that the right to informational privacy protects only intrusions upon interests that can be deemed fundamental or implicit in the concept of ordered liberty. The D.C. Circuit has expressed grave doubts about the existence of a constitutional right to informational privacy.” (citations omitted) (internal quotation marks omitted)); *see also supra* note 127.

147. *Nelson*, 131 S. Ct. at 756 (citations omitted).

148. *Id.* at 751, 756–57.

149. *Id.* at 757 n.10 (citations omitted) (internal quotation marks omitted).

150. *Id.* at 768 (Scalia, J., concurring).

privacy literature, from Daniel Solove, identifies six general types or understandings of privacy, with some overlap: (1) a right to be let alone (Samuel Warren and Louis Brandeis's influential formulation); (2) limited access to self; (3) secrecy or concealment of certain matters; (4) control over personal information or information about oneself; (5) personhood (protection of one's personality, individuality, dignity); and (6) intimacy.<sup>151</sup> Another categorization, from Helen Nissenbaum, identifies two common approaches in the literature: privacy as a constraint on access and privacy as a form of control.<sup>152</sup> One might understand these approaches as corresponding to, or supporting, an interest in the nondisclosure of information and an interest in decisional autonomy, which serve various values such as liberty, selfhood, democracy, innovation, space for intimate relations, and social welfare.<sup>153</sup> The idea driving many of these identified values is that privacy allows people to explore, innovate, and make personal choices in a certain sphere to which they control access and without fear that they might be viewed as unconventional or unpopular and face reprisals, ridicule, or denial of benefits.<sup>154</sup>

A few scholars have conceived of privacy in a way that explicitly includes groups or organizations, either envisioning group privacy as an analogue to individual privacy or an extension of it. Alan Westin's definition notably included the privacy

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151. SOLOVE, *supra* note 13, at 13. Solove has argued that these conceptions are each either too narrow or too broad because of their failure to include or exclude matters we typically view as private. *Id.* at 37. Solove has thus tried to shift focus away from the term "privacy" and instead toward specific activities that pose privacy problems, taking a pluralistic approach rather than searching for a unified concept based on core characteristics. *Id.* at 39–40.

152. HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* 69–70 (2010); *see also* ALLEN, *supra* note 13, at 34 (blending ideas of the access and control views); WESTIN, *supra* note 20, at 7 (illustrating the control view by defining privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"); Ruth Gavison, *Privacy and the Limits of Law*, 89 *YALE L.J.* 421, 423 (1980) (illustrating the access view by defining privacy as relating to "our concern over our accessibility to others").

153. *E.g.*, NISSENBAUM, *supra* note 152, at 74–75; SOLOVE, *supra* note 13, at 12, 78–80, 98.

154. NISSENBAUM, *supra* note 152, at 75, 77. Some scholars like Solove contend, however, that as a descriptive matter, there is no unitary or overarching value that privacy law protects; rather, "[t]he value of privacy in a particular context depends upon the social importance of the activities it facilitates." SOLOVE, *supra* note 13, at 10, 98.

of “individuals, groups, or institutions.”<sup>155</sup> He viewed privacy in terms of social limitation or control and argued that, like individuals, organizations have a parallel need to “decide when and to what extent their acts and decisions should be made public.”<sup>156</sup> Westin argued that organizational privacy is more than “the collective privacy rights of the members as individuals” and that it is required to enable groups to “play the role of independent and responsible agents . . . in democratic societies,” such as fulfilling needs for affiliation, group expression, operation of private enterprise, and criticism of government policies.<sup>157</sup>

Edward Bloustein subsequently identified a need to develop a theoretical framework of group privacy, which he referred to as the “right to huddle.”<sup>158</sup> Bloustein’s seminal work, *Individual & Group Privacy*, attempted to provide such a framework by discussing the marital relationship, lawyer-client relationships, the physician-patient privilege, political and social organizations, business organizations, and governmental organizations.<sup>159</sup> According to Bloustein, group privacy is an extension of individual privacy—protecting individuals’ need to come together and act in concert to attain their objectives.<sup>160</sup> “Group privacy’ is an attribute of individuals in association

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155. WESTIN, *supra* note 20, at 7.

156. *Id.* at 42.

157. *Id.*

158. BLOUSTEIN, *supra* note 12, at 123. Some sociologists have also defined privacy to include groups. See AMITAI ETZIONI, *THE LIMITS OF PRIVACY* 196 (1999) (privacy is “the realm in which an actor (either a person or a group, such as a couple) can *legitimately* act without disclosure and accountability to others”); SOLOVE, *supra* note 13, at 23; Arnold Simmel, *Privacy Is Not an Isolated Freedom*, in *NOMOS XIII: PRIVACY* 71, 81 (J. Roland Pennock & John W. Chapman eds., 1971) (“We become what we are not only by establishing boundaries around ourselves but also by a periodic opening of these boundaries to nourishment, to learning, and to intimacy. But the opening of a boundary of the self may require a boundary farther out, a boundary around the group to which we are opening ourselves.”); Ernest van den Haag, *On Privacy*, in *NOMOS XIII: PRIVACY*, *supra* at 149.

159. BLOUSTEIN, *supra* note 12, at 123–86 (discussing the Fourth and Fifth Amendments, trade secret law, and statutory protections such as the trade secret exemption of FOIA, to identify the underlying principles that corporations constitute a barrier to statism and must be able to maintain trade secrets to compete with each other, and that many statutes requiring disclosure invade group privacy in the interest of protecting the public).

160. *Id.* at 125. “The right to be let alone protects the integrity and the dignity of the individual. The right to associate with others in confidence—the right of privacy in one’s associations—assures the success and integrity of the group purpose.” *Id.* at 181.

with one another within a group, rather than an attribute of the group itself.”<sup>161</sup>

Neither Westin nor Bloustein specifically analyzed whether corporations could claim a right to privacy under the U.S. Constitution. But their work is foundational in describing group privacy and explaining that it serves multiple functions. It can serve to vindicate the privacy interests of individuals that exist without regard to their relationship to the organization, or to vindicate privacy interests of individuals that relate to the existence of the organization. Presumably, a group right to privacy may also serve a mixture of these functions—protecting a religious organization, for example, might protect each member’s privacy in free exercise as well as protecting members’ privacy in pursuing this activity in collective form.

In sum, while the Supreme Court and the privacy literature have not coalesced around a singular definition of privacy or its purpose, the Court has identified two privacy interests—an interest in making certain decisions without government interference and an interest in avoiding disclosure of personal information—and we can understand these as informed by the values that privacy scholars have identified and the notion that group privacy may protect privacy in one’s associations in an individual and collective sense.

#### B. SHOULD THE RIGHT TO PRIVACY EXTEND TO CORPORATIONS?

The next analytical step is to examine whether it would serve the purpose of the privacy right to provide it to corporations. To be consistent with the fundamental rationale for extending corporations rights, as discussed in Part II.A, this requires an understanding of corporate dynamics and the participants involved in the corporation, rather than a reified concept or metaphor for the corporation.<sup>162</sup> This keeps the focus on carrying out the purpose of the right and granting a corporate right only when it would actually protect human interests.<sup>163</sup>

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161. *Id.* at 124.

162. *See supra* Part II; *see also* Pollman, *supra* note 77.

163. For a discussion of reification versus decomposing the firm into various participant groups, see WILLIAM A. KLEIN ET AL., BUSINESS ORGANIZATION AND FINANCE 117–18 (2010) (“[R]eification is a device for making something that is in fact complex seem simple, and that can be dangerous. In reality, only individuals enjoy the benefits, or bear the burdens and the responsibilities, of actions affecting other individuals.”).

As soon as one opens the hood to look at the corporation, one confronts the reality that corporations come in a variety of types, not necessarily resembling each other. Coca-Cola, The New York Times, the American Civil Liberties Union, a small family-run company, a church, and a small charity group are all, or might be, corporations. Line drawing between corporations is a challenge the Supreme Court has often avoided or refused, such as in *Citizens United v. FEC*,<sup>164</sup> but the significant variation in the purpose and dynamics of corporations necessitates more nuanced analysis because the purpose of a constitutional right may not be served by according it to all corporations.

Given this significant variation between corporations and the need for an organizing schema, this section divides its analysis between (1) public corporations and (2) private and nonprofit corporations. This organization is not meant to suggest that any of these categories should be broadly accorded rights. Rather it reflects a rough, but potentially meaningful way of starting the analysis. It separates public corporations, which generally have a business purpose and thousands of people involved in distinct roles, from nonprofit and private corporations, which may have more wide-ranging purposes, sizes, and roles. Further, in this latter category of private and nonprofit corporations, the connection between the individuals and the corporation may be much closer than in the case of public corporations, the dynamics may resemble an association, and the purpose of the corporation may be more likely to implicate privacy values.<sup>165</sup> Thus, each section below analyzes the corporate dynamics and participants involved in the type of corporation—public, private or nonprofit—to determine whether any

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164. See *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (ruling broadly as to all corporations).

165. Regarding the terminology of this categorization, all states recognize that corporations may be for-profit or nonprofit. Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017, 2024 (2007). Within the for-profit category, corporations may be public or private. The line between these is generally understood as referring to whether the company is publicly reporting under federal securities regulations—not to whether, in a theoretical sense, the corporation has public or private dimensions. See, e.g., Securities Exchange Act of 1934 § 12(g), 15 U.S.C. § 78l(g)(1) (2012) (defining when an issuer of securities must register such securities with the Securities and Exchange Commission); 17 C.F.R. § 240.12g-1 (2014) (defining when an issuer of securities is exempt from the registration requirement of section 12(g)); KLEIN ET AL., *supra* note 163, at 106 (referring to “public” corporations—that is, large firms with many shareholders and with active trading of shares”).

people likely have a privacy interest at stake and whether the purpose of the privacy right would be served by derivatively according it to the corporation.<sup>166</sup>

### 1. Public Corporations

Public corporations have shareholders, directors and officers, as well as other stakeholders, such as employees and customers. As explained below, there is little possibility of a cognizable privacy interest at stake that would justify granting public corporations a constitutional right to privacy.

#### a. Shareholders

The privacy interests of shareholders in public corporations are not likely implicated by disclosures of corporate information or the decisions or activities the corporation engages in. The reasons for this are in the very nature of the relationship between shareholders, managers, and the public corporation.

Public corporations have large-scale, dispersed, passive investment.<sup>167</sup> Corporate assets are held by the corporation, not the shareholders.<sup>168</sup> Stock ownership provides limited rights. Shareholders have the right to the residual interest in the firm and they have certain voting rights—the right to elect the board of directors and to vote on a few fundamental issues, such as merger or dissolution.<sup>169</sup> Although corporate scholars

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166. Looking at the categories of participants involved in the corporation is a way to systematically analyze in a theoretical setting whether any people behind the corporation have privacy interests at stake. It is not meant to reify the categories themselves or suggest an exact equivalence between the corporation's interests and the interests of each of its individual participants in all respects. Cf. DAN-COHEN, *supra* note 107, at 64 (“[T]he organization serves as a kind of ‘moral buffer’: harming the organization is not exhaustively reducible to the harming of particular individuals.”).

167. For a classic work documenting the shift by the early twentieth century of shareholders from owners to passive investors, see ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 1–7 (1932).

168. Margaret M. Blair, *Locking In Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 *UCLA L. REV.* 387, 391 (2003). Economists and corporate law scholars have argued that shareholders cannot meaningfully be conceived of as “owners” of the firm as they own stock, not the corporation itself. See Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 *J. POL. ECON.* 288, 288 (1980); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 *S. CAL. L. REV.* 1189, 1191 (2002).

169. HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 11, 288–89 (1996) (stating that voting “is not to provide a means for conveying the patrons’ preferences to the firm’s management, but rather to make it more diffi-

have long debated the locus of power in a firm, as a practical matter it is uncontroversial that shareholders do not have effective control of the operations of the firm or authority to act on behalf of the corporation; management authority is statutorily vested in the board.<sup>170</sup>

In light of these basic premises, shareholders of public corporations do not expect to be active participants in the business.<sup>171</sup> In fact, shareholders are often too dispersed and numerous to exercise even their limited voting rights in a meaningful way.<sup>172</sup> Further, public companies have liquid shares and shareholders may exit; share ownership may be short-term.<sup>173</sup> As such, public corporations cannot be identified with a single, lasting group of individual shareholders. Moreover, many shareholders are actually organizations—institutional investors such as banks, pension funds, mutual funds, etc.<sup>174</sup> Individual claimants whose money is invested are second-order investors and commonly have diversified portfolios.<sup>175</sup> These individuals might not even disclose their names to the companies, whose registers would show the stock as held by the organization.<sup>176</sup>

In this way, one would expect most shareholders to be unattached to the public corporation except as to an indirect and often diversified economic interest. One way of thinking about this might be through the lens of the “shareholder wealth maximization norm,” which maintains that the purpose of the firm is to maximize shareholder wealth and shareholders are generally assumed to have a homogenous economic interest in the firm.<sup>177</sup> Under this view, shareholders would only care about

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cult for the firm to exploit those patrons as a class . . . [t]o give the electorate some crude protection from gross opportunism on the part of those in power.”)

170. DEL. CODE ANN. tit. 8, § 141(a) (2014); *see also* KLEIN ET AL., *supra* note 163, at 110, 123.

171. KLEIN ET AL., *supra* note 163, at 106.

172. HANSMANN, *supra* note 169, at 11.

173. KLEIN ET AL., *supra* note 163, at 109 no. 6.

174. *See, e.g.*, Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445, 447–51 (1991) (discussing the rise of institutional investors).

175. *See* Jill E. Fisch, *Securities Intermediaries and the Separation of Ownership from Control*, 33 SEATTLE U. L. REV. 877, 879–83 (2010) (“Most institutional investors are highly diversified, enabling them to reduce or eliminate the effect of firm-specific risk on their overall returns.”).

176. *See* Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227, 1236–38 (2008).

177. HANSMANN, *supra* note 169, at 288 (“[I]n virtually all cases the group

corporate disclosures that resulted in economic harm to the firm, and their concerns would be solely economic in nature. As the purpose of a constitutional privacy right is not to serve such an economic function, shareholders' privacy interests would not be implicated in public corporations or by corporate actions.

And, even if one were to take a different view—that shareholders do not have homogenous interests in the public corporation and its purpose is not shareholder wealth maximization—the fact would still remain that corporate law does not treat shareholders as “owners” or “principals” with the ability to control corporate operations,<sup>178</sup> and shareholders have limited opportunities for participating in public corporations in a way that might implicate their privacy interests.

More specifically, as far as information flows, because shareholders are not active participants in the business, they typically do not provide or create information in their limited involvement that would implicate privacy interests. Shareholders may vote on particular matters and thus may transmit their decisions on those issues, but they are not of a personal or intimate nature. This would typically be as straightforward as a “yea” or “nay” vote on a fundamental corporate change, such as a merger or the election of the board of directors. Shareholders could also submit a proposal for a particular corporate action to be voted on with the company's proxy materials if the proposal meets certain requirements.<sup>179</sup> Common topics for shareholder proposals are changes to corporate governance, such as majority voting, or corporate social responsibility issues, such as human rights.<sup>180</sup> Even if a shareholder bought stock to try to advance a social or political purpose, however, the shareholder would still typically be an organization such as PETA or an institutional investor and the goal would generally be to raise public awareness and thereby pressure corporate management, not to keep the proposal private.<sup>181</sup>

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of individuals to whom ownership is given is extremely homogenous in its interests.”).

178. See Lynn A. Stout, *New Thinking on “Shareholder Primacy”* 11 (UCLA Sch. of Law, Law & Econ. Research Paper Series, Paper No. 11-04, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1763944](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1763944).

179. 17 C.F.R. § 240.14a-8 (2014).

180. Lee Harris, *The Politics of Shareholder Voting*, 86 N.Y.U. L. REV. 1761, 1769–70 (2011).

181. Paul Rose, *Common Agency and the Public Corporation*, 63 VAND. L. REV. 1355, 1368 (2010).



The only situation of shareholder interaction that might implicate privacy interests would be “behind-the-scenes” shareholder activism. This scenario typically involves an institutional investor making a shareholder proposal and engaging in private negotiations with corporate management.<sup>182</sup> In a sense, the interaction resembles Bloustein’s description of group privacy as protecting a need to come together and act in concert to attain group objectives.<sup>183</sup> Yet, the shareholder in this instance is usually an institutional investor,<sup>184</sup> and one would be hard-pressed to locate a human involved with any awareness of a privacy interest at stake. Further, it is common practice for corporations to consult the SEC concerning whether proposals may be excluded from the corporate proxy. Thus, while the shareholder might seek confidential negotiations to further group objectives, the shareholder would not reasonably expect privacy given that the corporation itself, as represented by directors or officers, might voluntarily disclose information concerning the interaction to the government.<sup>185</sup>

Thus, in view of the very limited opportunities for participation and information exchange, it is highly unlikely that public company shareholders would create or be privy to information of a type that would implicate privacy protection.

*b. Directors and Officers*

Directors and officers present a somewhat closer question.<sup>186</sup> Both directors and executive officers make high-level de-

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182. *Id.*; see also Willard T. Carleton et al., *The Influence of Institutions on Corporate Governance Through Private Negotiations: Evidence from TIAA-CREF*, 53 J. FIN. 1335, 1335 (1998) (reviewing private negotiations between TIAA-CREF and firms in its portfolio during the 1992–1996 period).

183. See BLOUSTEIN, *supra* note 12, at 140–46.

184. *Shareholder Activism*, ROCK CTR. FOR CORPORATE GOVERNANCE (Apr. 28, 2012), <https://rockcenter.law.stanford.edu/videos/shareholder-activism> (providing a detailed account of shareholder activism and the institutional investors who are involved).

185. Regarding information flow in the other direction, shareholders receive information that is widely disseminated in the public markets, and shareholders generally have the right under state corporation codes to investigate the corporation’s records for a “proper purpose.” See, e.g., DEL. CODE ANN. tit. 8, § 220 (2014), <http://delcode.delaware.gov/title8/c001/sc07/index.shtml>. Proper purposes for investigation are limited to those related to the shareholders’ interest in the firm. *Id.* Again, this is unlikely to implicate shareholder privacy interests.

186. Many directors and officers are, of course, also shareholders; this analysis considers privacy interests rooted in their primary role as directors or officers.

cisions for the corporation and have information about themselves made public.<sup>187</sup> The public disclosure of director and executive names, ages, employment history, and in some instances compensation packages, is mandated by federal securities regulations.<sup>188</sup> In addition to specific line-item disclosure requirements, the Securities Act of 1933 and the Securities Exchange Act of 1934 include “gap-filling” rules that require the disclosure of any further “material” information necessary to make the required statements not misleading.<sup>189</sup> Underlying these disclosure obligations is a policy concern for protecting investors and promoting market integrity.<sup>190</sup>

While most of the information disclosed about officers and directors is not of the type that would likely implicate a privacy right,<sup>191</sup> one potential exception to this is the disclosure of director or officer health information. This example made media headlines in recent years with news of Steve Jobs’s health and questions about whether Apple Inc. had to disclose otherwise private health information regarding its board member and chief executive officer.<sup>192</sup> Jobs was not the only example in this

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187. For a discussion of the roles of directors and officers, see KLEIN ET AL., *supra* note 163, at 116, 135–37; Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 5 (2002); Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 801–04 (2001).

188. See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 15 U.S.C. § 78n (2012) (requiring corporations to disclose additional information regarding executive compensation in their annual proxy statement); 17 C.F.R. §§ 229.401–404 (2013). Other information about executives that must be publicly disclosed includes involvements in bankruptcy proceedings and criminal convictions. See Joan MacLeod Heminway, *Personal Facts About Executive Officers: A Proposal for Tailored Disclosures To Encourage Reasonable Investor Behavior*, 42 WAKE FOREST L. REV. 749, 755–59 (2007).

189. 17 C.F.R. §§ 230.408(a), 240.12b-20 (2013).

190. See, e.g., Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 ALA. L. REV. 473, 479–80, 480 n.25 (2007); Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1, 9 (1983). For criticism of mandatory disclosure, see, for example, Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 692–96 (1984).

191. See Victoria L. Schwartz, *Disclosing Corporate Disclosure Policies*, 40 FLA. ST. U. L. REV. 487, 496–97, 497 n.34 (noting the distinction between loss of privacy and infringement upon a right to privacy).

192. For an argument that the SEC should impose a rule requiring disclosure of medical information about a “luminary” that is material to the corporation, see Allan Horwich, *When the Corporate Luminary Becomes Seriously Ill: When Is a Corporation Obligated To Disclose that Illness and Should the Secu-*

regard; other instances of a key executive falling ill have raised the same issue of whether it must be publicly disclosed.<sup>193</sup> Google co-founder Sergey Brin has even preemptively announced that he has a gene mutation that increases his likelihood of contracting Parkinson's disease.<sup>194</sup>

To date, the SEC has not provided specific guidance about whether and when disclosures of executives' personal health conditions are required, and commentators' views on this topic have varied.<sup>195</sup> The key determination is whether the information is "material"—that is, whether "there is a substantial likelihood that a reasonable investor would attach importance" to the information in making an investment decision.<sup>196</sup> A court could find that personal information about an executive is material, such as a serious illness that would affect their ability to do their job.<sup>197</sup> Scholars have also discussed the possibility that other personal information could be material due to its impact on an executive's job performance or because it reflects an executive's integrity and values such as "a possible criminal prosecution,"<sup>198</sup> "a messy divorce, extramarital affairs, legal difficulties, addictions, and various problems with a child."<sup>199</sup> Further, where an executive is iconic or has a reputation especially tied to the corporate brand, personal facts about that executive are

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*rities and Exchange Commission Adopt a Rule Requiring Disclosure?*, 5 N.Y.U. J.L. & BUS. 827 (2009).

193. See *id.* at 829–30 (discussing instances involving the CEOs of Time Warner, Inc., McDonald's Corp., Kraft Foods, Inc., and Bear Stearns & Co.).

194. Miguel Helft, *Google Co-founder Has Genetic Code Linked to Parkinson's*, N.Y. TIMES (Sept. 19, 2008), <http://www.nytimes.com/2008/09/19/technology/19google.html>.

195. For academic proposals on this topic, see Patricia Sánchez Abril & Ann M. Olazábal, *The Celebrity CEO: Corporate Disclosure at the Intersection of Privacy and Securities Law*, 46 HOUS. L. REV. 1545 (2010); Heminway, *supra* note 188, at 789–802; Horwich, *supra* note 192, at 862–70; Tom C.W. Lin, *Executive Trade Secrets*, 87 NOTRE DAME L. REV. 911 (2012); Tom C.W. Lin, *Undressing the CEO: Disclosing Private, Material Matters of Public Company Executives*, 11 U. PA. J. BUS. L. 383 (2009); Schwartz, *supra* note 191; Alexis Brown Stokes, *An Apple a Day Keeps Shareholder Suits at Bay: An Examination of a Corporate Officer's Legal Duty to Disclose Health Problems to Shareholders*, 17 TEX. WESLEYAN L. REV. 303 (2011).

196. 17 C.F.R. §§ 230.405, 240.12b-2 (2013); Heminway, *supra* note 188, at 756–57.

197. See Jayne W. Barnard, *Sovereign Prerogatives*, 21 J. CORP. L. 307, 323–25 (1996) (discussing the potential materiality of a CEO's serious illness); Heminway, *supra* note 188, at 757 (same).

198. Heminway, *supra* note 188, at 759, 763.

199. Schwartz, *supra* note 191, at 490.

more likely to be material.<sup>200</sup> A few notable corporate luminaries have identities that have been particularly intertwined with that of a public corporation, such as Bill Gates, Steve Jobs, Martha Stewart, and Google co-founders Larry Page and Sergey Brin. Although the public corporation is composed of a complex set of relationships and individuals, corporations with luminaries like these are in the position of having individuals whose reputations are directly linked to the corporate image.<sup>201</sup>

Thus, the executive health example shows that a corporate right to privacy could support cognizable human interests. That is, if the corporation can successfully claim a privacy right, its executives might be able to keep their health information private from the public. Protecting an executive's personal information might help ensure that highly qualified individuals seek executive positions and that they can work effectively, without worries about compelled disclosure of personal information.<sup>202</sup> Further, health information conceivably fits within various conceptions of privacy discussed above, such as the Supreme Court's recognition of a privacy interest in the nondisclosure of information. Indeed, the Supreme Court's first case discussing the privacy interest in nondisclosure, *Whalen*, involved personal health information.<sup>203</sup> In denying the claim there, the Court specifically relied on the fact that the statute

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200. Heminway, *supra* note 188, at 763; *cf.* Schwartz, *supra* note 191, at 512–16 (providing examples of corporate disclosure and nondisclosure of executives' personal information).

201. For instance, when Martha Stewart's company went public, the prospectus warned investors that the corporation was "highly dependent" on one individual, Stewart, as "the personification of our brands as well as our senior executive and primary creative force." *The Cult of Personality vs. Needs of the Market; Martha Stewart, the Company, Is Poised To Go Public. But Is It a Good Thing?*, N.Y. TIMES (Oct. 12, 1999), <http://www.nytimes.com/1999/10/12/business/cult-personality-vs-needs-market-martha-stewart-company-poised-go-public-but-it.html>. Commentators noted the company was based entirely on Stewart and questioned whether the company would suffer severely if she were "hit by a bus—or by a scandal." *Id.* Indeed, five years later when Stewart became embroiled in an insider trading investigation and served a ten-month sentence for making false statements and obstructing the investigation, the company suffered financially along with its founder's personal legal woes. See *United States v. Stewart*, 433 F.3d 273, 273 (2d Cir. 2006); *United States v. Stewart*, 305 F. Supp. 2d 368, 368 (S.D.N.Y. 2004); Geraldine Szott Moohr, *What the Martha Stewart Case Tells Us About White Collar Criminal Law*, 43 HOUS. L. REV. 591, 594–97 (2006) (discussing the repercussions to Stewart's company from the investigation of her trade and subsequent conviction).

202. Heminway, *supra* note 188, at 774.

203. For a discussion of *Whalen*, see *supra* text accompanying notes 128–34.

in question provided for securely maintaining the information, only providing it to a small number of public health officials, and preventing its public disclosure. That would not be the case in the instance of executive health information because if the SEC were to require disclosure due to the information's materiality to the investing public it would by definition make the information public. Furthermore, the government interest in such a disclosure would arguably be less than it was in *Whalen* where the statute concerned the state's interest in controlling the distribution of dangerous drugs.

The executive health example also shows why an individual may not be able to fully vindicate her privacy interests in an individual capacity. Various laws protect some aspects of individual privacy. For instance, the Americans with Disabilities Act of 1990 (ADA) may preclude some disclosures about health,<sup>204</sup> FOIA contains a "personal privacy" exemption,<sup>205</sup> and the Privacy Act bars disclosure of records held by government entities without the prior written consent of the individual to whom the record pertains.<sup>206</sup> But in circumstances where federal securities laws require corporate disclosure and this patchwork of protections does not cover the information, the individual may not be able to keep the information to herself unless the corporation can vindicate the right. That is, requiring affected individuals to come forward in their own names would undermine the very interest they would be trying to protect.

On the other hand, as it is the information of just one identifiable person, it is not clear that the corporation itself would have to be accorded the right so long as it could assert the right on behalf of the affected individual.<sup>207</sup> Moreover, the example also demonstrates that directors and executive officers of public corporations are public figures, and competing interests may exist amongst participants in the corporation that could weigh against according the corporation a right. When people assume certain top-ranking positions within a public corporation, they

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204. See Horwich, *supra* note 192, at 832–33 (noting that the contours of the conflict between the securities disclosure regime and the ADA are not well understood).

205. 5 U.S.C. § 552(b)(7)(C) (2012). Under the Court's recent ruling, individuals but not corporations may claim the "personal privacy" exemption. *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1185 (2011).

206. Privacy Act of 1974, 5 U.S.C. § 552a (2012). The Privacy Act does not include the corporation in its definition of "individual." *Id.* § 552a(a)(2).

207. For a discussion of third party standing and its limitations, see Garrett, *supra* note 103.

know that means certain information about themselves will become public. Corporate icons like Steve Jobs are especially identifiable as public figures, and the very reason why they might have to disclose health information is because they are viewed as so integral to the corporation's success that it would be considered material to a reasonable investor.<sup>208</sup> Although most directors and officers do not receive such a high level of public attention and may not be luminaries about whom such extensive information would be disclosed, their high-level positions in public corporations lessen their reasonable expectations of privacy in information relevant to their involvement in the corporation.<sup>209</sup> Further, the tension between privacy and disclosure arises in this instance from the competing interests of the corporate participants themselves—officers/directors and shareholders. Disclosure generally serves shareholder interests by promoting investor protection and market integrity. For these reasons, officers and directors present a closer question, but would likely fail to demonstrate a cognizable constitutional privacy interest that would justify granting public corporations a right to privacy.

*c. Employees and Other Stakeholders*

Employees in public corporations, apart from executive officers, are typically further from the core of the corporation's decision making and any critical information that might implicate privacy interests. Public corporations often employ thousands of individuals and the employee ranks change frequently.

Furthermore, in many legal contexts, employee interests actually stand in conflict with those of the employing corporation. For instance, the privacy rights of the employee are often set against employers' business justifications for monitoring

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208. See Horwich, *supra* note 192, at 827–33.

209. See Lior Jacob Strahilevitz, *Toward a Positive Theory of Privacy Law*, 126 HARV. L. REV. 2010, 2014 (2013) (“[P]rivacy protections for people voluntarily in the public eye in the United States are basically negligible.” (citing Scott J. Shackelford, *Fragile Merchandise: A Comparative Analysis of the Privacy Rights for Public Figures*, 49 AM. BUS. L.J. 125, 147 (2012))); *cf.* Nixon v. Adm’r of Gen. Servs., 433 U.S. 425, 465 (1977) (“In sum, appellant has a legitimate expectation of privacy in his personal communications. But the constitutionality of the Act must be viewed in the context of the limited intrusion of the screening process, of appellant’s status as a public figure . . .”).

employees.<sup>210</sup> This creates some dissonance with the idea of deriving a privacy right for corporations from their employees.

Other stakeholders in the public corporation are also in a position too attenuated to support a derivative corporate privacy right. A stakeholder, broadly speaking, is a party that can affect or be affected by the corporation's actions.<sup>211</sup> As with employees, in many legal contexts the stakeholder's interests actually stand in conflict with those of the shareholders or directors and officers. For instance, customers are often counted as stakeholders, and a whole area of the law deals with consumer privacy—laws and regulations that seek to protect consumers' loss of privacy due to failures or limitations on corporate customer privacy measures.<sup>212</sup> Consumer privacy laws recognize that corporations sometimes have an opposing interest in sharing consumer data for commercial advantage.<sup>213</sup> Therefore, one

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210. Corey A. Ciocchetti, *Monitoring Employee E-Mail: Efficient Workplaces vs. Employee Privacy*, 2001 DUKE L. & TECH. REV. 0026, ¶¶ 1–2 (listing examples of employer monitoring that may include surveillance of employee telephone calls, the time each employee spends on bathroom breaks, and workplace e-mail), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1025&context=dltr>; Alan F. Westin, *Privacy in the Workplace: How Well Does American Law Reflect American Values?*, 72 CHI.-KENT L. REV. 271, 271 (1996).

211. R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 53 (1984) (stating that a stakeholder is “any group or individual who can affect or is affected by the achievement of an organization's purpose”). Some would define stakeholder more narrowly, such as someone having an asset at risk. See, e.g., Max B.E. Clarkson, *A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance*, 20 ACAD. MGMT. REV. 92, 105–07 (1995).

212. See, e.g., Stephen F. Ambrose, Jr. & Joseph W. Gelb, *Consumer Privacy Litigation and Enforcement Actions*, 60 BUS. LAW. 723 (2005); J. Howard Beales, III & Timothy J. Muris, *Choice or Consequences: Protecting Privacy in Commercial Information*, 75 U. CHI. L. REV. 109 (2008). For a discussion of corporations' use of consumer data, see SIMSON GARFINKEL, DATABASE NATION (2000); A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461 (2000).

213. As privacy scholar Neil Richards has explained:

[C]ompanies big and small generate vast fortunes from the collection, use, and sale of personal data. . . . “[B]ehavioral advertising” is a multibillion-dollar business, and is the foundation on which the successes of companies like Google and Facebook have been built. One recent study concludes that this form of surveillance is so ingrained into the fabric of the Internet “that a small number of companies have a window into most of our movements online.”

Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1938 (2013) (footnote omitted). Further, “[g]overnment and nongovernment surveillance support each other in a complex manner that is often impossible to disentangle.” *Id.* at 1940.

could not assume that a corporate right would protect consumers' interests or that a corporation would assert such a right in defense of its customers.<sup>214</sup>

That being said, while employees' and stakeholders' interests often stand in conflict with those of other corporate participants, their interests may sometimes align vis-à-vis the government, and the corporation may be better situated to vindicate those interests. For instance, when the government subpoenaed Google to produce a list of URLs available through its site and the text of users' search queries, questions arose about the privacy of Google's users.<sup>215</sup> The government had sought the information to test blocking and filtering software for minors.<sup>216</sup> Google objected on a variety of bases, including the potential for "loss of user trust" that would harm Google's business goodwill.<sup>217</sup> The federal district court separately raised, *sua sponte*, privacy concerns about Google's users because identifiable information may be found in text strings, and because of the prevalence of internet searches for sexually explicit material.<sup>218</sup> Ultimately, the court determined it did not have to rule on the privacy issue in that case because it granted the government's motion to compel only as to the sample URLs and not as to the search queries.<sup>219</sup>

Similarly, in the recent case *Amazon.com LLC v. Lay*, Amazon disputed the North Carolina Department of Revenue's demand for all in-state customer sale information as part of a tax investigation.<sup>220</sup> Among other claims, Amazon asserted that "the privacy and First Amendment rights of itself and of its

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214. See Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 598, 600 (2009) (arguing that third-party business record holders can fight for their customers' privacy rights, but acknowledging that "third parties in possession of business records may be willing to cooperate with the police" and that "recent headlines about how telecommunications providers voluntarily assisted the NSA in collecting third-party records (quite possibly in violation of statutory privacy laws) reaffirm that sometimes third-party providers will cooperate eagerly with the government").

215. *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 677, 687–88 (N.D. Cal. 2006).

216. *Id.* at 678.

217. *Id.* at 683–84.

218. *Id.* at 687.

219. *Id.* at 687–88. For a discussion of applying the First Amendment in the criminal procedure context, such as to subpoenas for book records or search query data that implicate First Amendment activities, see Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 166–76 (2007).

220. *Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154, 1154–55 (W.D. Wash. 2010).



customers” would be violated by forcing it to disclose personal identifiers.<sup>221</sup> Represented by the ACLU, Amazon customers intervened anonymously in the suit, alleging their own First and Fourteenth Amendment claims.<sup>222</sup> The court held that the state’s request implicated the First Amendment rights of “Amazon’s customers and the Intervenor,” and the state was prohibited from forcing Amazon to disclose the identities and specific purchase information of its residents.<sup>223</sup>

These cases illustrate that corporations have an important role to play in safeguarding their customers’ privacy interests. Further, the importance of this role is growing at a rapid pace, with the increasing pervasiveness of corporations storing the personal data of customers and users.<sup>224</sup> But customers’ interests are generally too attenuated or divergent from a corporation’s to support a *derivative* privacy right for the corporation—customers are outside the corporation—and so the rationale for according the right to the corporation would have to be instrumental.<sup>225</sup> In that regard, a parallel might be drawn to the commercial speech doctrine. As discussed in Part II.A, the rationale for protecting commercial speech has not been to protect the speech right of the corporation as speaker or the natural

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221. *Id.* at 1159, 1162; Complaint for Declaratory Relief Pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202 at 1, 3, Amazon.com LLC v. Lay, 758 F. Supp. 2d 1154 (W.D. Wash. 2010) (No. 2:10-cv-00664), available at <http://www.acluofnorthcarolina.org/files/Amazon%20Complaint.pdf> (“If Amazon is forced to comply with this demand, the disclosure will invade the privacy and violate the First Amendment rights of Amazon and its customers on a massive scale. . . . Amazon asserts the privacy and First Amendment rights of itself and of its customers so that Amazon may sell—and customers may read, hear or view—a broad range of popular and unpopular expressive materials with the customers’ private content choices protected from unnecessary government scrutiny.”).

222. Order Granting Intervenor’s Motion To Intervene and Motion To File Complaint in Intervention Using Pseudonyms at 4, Amazon.com LLC v. Lay, 758 F. Supp. 2d 1154 (2010) (No. 2:10-CV-00664).

223. *Amazon.com*, 758 F. Supp. 2d at 1167–69. For a discussion of First Amendment “reader privacy” and the importance of “intellectual privacy,” see Neil M. Richards, *The Perils of Social Reading*, 101 GEO. L.J. 689 (2013).

224. See Richards, *supra* note 223, at 698–703; Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 320–21 (2008).

225. Thorny issues of standing could also arise. For a discussion of various standing doctrines, see Garrett, *supra* note 103; Glenn D. Magpantay, *Associational Rights and Standing: Does Citizens United Require Constitutional Symmetry Between the First Amendment and Article III?*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 667 (2012); Tacy F. Flint, Comment, *A New Brand of Representational Standing*, 70 U. CHI. L. REV. 1037 (2003).

persons behind the corporation, but rather to protect consumers who have an interest in hearing the information. Similarly in the context of informational privacy, according protection to the corporation might serve to protect the customers who face collective action problems and who may not be willing to come forward or even know that their personal information is at risk of being disclosed.<sup>226</sup> Such a basis for according protection to corporations would be narrow, however, because it would only exist to serve such an instrumental purpose related to customers—not a derivative right generally accorded to public corporations. At best, this might be ground for a narrow doctrine or elaboration of the *Whalen v. Roe* line of cases to address these concerns.<sup>227</sup>

To sum up the analysis for public corporations, by looking at the various participants involved—shareholders, directors and officers, employees and other stakeholders—and the dynamics within the corporation, we see that there is little possibility of a cognizable privacy interest at stake that would justify granting public corporations a constitutional right to privacy. The role of shareholders in public corporations is economic in nature and shareholders have limited opportunities to participate and exchange information in a way that would implicate privacy interests. Directors and officers have information about themselves publicly disclosed, but it is only rarely of a type that might give rise to privacy concerns of a constitutional dimension and it is not clear that the corporation itself would need a right to privacy to vindicate the privacy right of the individual. Further, any privacy interests of public company directors and officers are diminished or constrained by their status as public figures and shareholders' competing interests. Employees and other stakeholders are typically further from the core of the

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226. An example of this dynamic might be the situation faced by the nearly 400,000 users of the company Lavabit's encrypted e-mail service. The service came to national attention when the government tried to compel disclosure of its master encryption keys after it was revealed that Edward Snowden had a Lavabit account. See Jennifer Granick, *Hands Off Encryption! Say New Amici Briefs in Lavabit Case*, JUST SECURITY (Oct. 26, 2013, 12:26 PM), <http://justsecurity.org/2013/10/26/hands-encryption-amici-briefs-lavabit-case>; Orin Kerr, *Lavabit Challenges Contempt Order in the Fourth Circuit: An Analysis of Its Arguments*, VOLOKH CONSPIRACY (Oct. 11, 2013, 1:29 AM), <http://www.volokh.com/2013/10/11/lavabit-challenges-contempt-order>.

227. Existing doctrine might also constrain this possibility—most notably, the Fourth Amendment's third party doctrine provides that information loses protection when knowingly revealed to a third party. See, e.g., Kerr, *supra* note 214, at 563.

corporation's decision making and any critical information that might implicate privacy interests. Their privacy interests often stand in conflict with the other corporate participants, and so would not support a derivative right for the corporation. Corporations may have an important role to play in protecting the privacy of outside stakeholders, such as customers, but such an analysis would be limited to a more narrow, instrumental rationale for protection in that limited circumstance. All in all, this analysis explains in a deeper way why it is unnecessary to accord a constitutional right to privacy to public corporations: there is not a person involved who needs the corporation itself to hold that right in order to protect their constitutional privacy interests.

## 2. Nonprofit and Private Corporations

Turning now to other types of corporations besides the large, publicly held business corporation, we see that their purposes and dynamics vary widely. This section starts with brief background about these other types of corporations and then examines the potential privacy implications in these kinds of corporations. This analysis keys up a fundamental question about the corporate form and privacy, explored in the next section.

Nonprofits are characterized by being subject to “the nondistribution constraint,” which prohibits a nonprofit from distributing a profit to individuals who exercise control over it—hence nonprofits do not have indicia of ownership or shareholders.<sup>228</sup> Participants include a board of directors, and potentially also officers, employees, members, and donors.<sup>229</sup> Nonprofit activities and size may vary widely. Nonprofits may serve the mutual benefit of their members or patrons, like credit unions and social clubs, or they may serve the public, like libraries, schools, and museums.<sup>230</sup> Nonprofits range in size from organi-

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228. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838, 844 (1980) (noting that the nondistribution constraint does not prohibit the nonprofit from earning a profit or paying salaries and perquisites to employees, rather it prohibits distributing any profit to individuals who exercise control over the nonprofit).

229. Nonprofits may have members who elect the board of directors, but this is not a requirement as they can have self-perpetuating boards. *Id.* at 841–42.

230. *See id.* at 840–42. Some nonprofits receive most of their income from donations, such as the Red Cross and Salvation Army, whereas others receive income by charging for their services, such as hospitals and the American Au-

zations with billions of dollars in assets and thousands of employees, such as universities and foundations, to groups that have virtually no assets and just a couple of people involved.<sup>231</sup>

Private corporations are by contrast for-profit and not subject to the non-distribution constraint. Private corporation structure is thus like that of public corporations with regard to having a board of directors, officers, and shareholders, but in the small private corporation the shareholders are not typically a vast group of dispersed investors and there may be significant overlap in the roles of shareholders, directors, and officers.<sup>232</sup> Like nonprofits, private corporations vary widely with regard to the size of their assets and the number of people involved. Some well-known examples of large private corporations are Cargill, Koch Industries, and Mars.<sup>233</sup> One of the largest, Cargill, had over 140,000 employees and revenues over \$130 billion in 2013.<sup>234</sup> But most private corporations are dramatically smaller than these large examples and than public corporations.<sup>235</sup> Incorporation is relatively simple and inexpensive, so some very small businesses are formed as corporations despite otherwise resembling a sole proprietorship or family business.<sup>236</sup>

In many instances nonprofit and private corporations may be like public corporations in that there is little possibility of a cognizable human privacy interest at stake that would be protected by granting the corporation a right to privacy. The role of shareholders in private corporations is economic and not likely

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tomobile Association. *Id.* Depending on their purpose, nonprofits may receive substantial federal and state tax benefits. *See, e.g.,* Malani & Posner, *supra* note 165, at 2026.

231. *See* Usha Rodrigues, *Entity and Identity*, 60 EMORY L.J. 1257, 1261, 1293–311 (2011).

232. *See* Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 BERKELEY BUS. L.J. 263, 266 (2008).

233. *See America's Largest Private Companies*, FORBES (Nov. 3, 2010), [http://www.forbes.com/lists/2010/21/private-companies-10\\_rank.html](http://www.forbes.com/lists/2010/21/private-companies-10_rank.html).

234. CARGILL, <http://www.cargill.com/company/glance/index.jsp> (last visited Oct. 15, 2014).

235. *See, e.g.,* Wells, *supra* note 232, at 274.

236. One type of private corporation, the closely held corporation, is in fact known by its characteristic small number of shareholders who are also often participants in the management, direction, and operations of the corporation, and by its lack of a ready market for the corporate stock. 18 C.J.S. *Corporations* § 9 (2007). Some closely held corporations are personal or family ventures, with all of the stock held by a single family or group of friends and family. *See* Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271, 273–74 (1986).

to implicate decisional autonomy; in their role as investors they do not participate in the corporation in a way that generates personal information nor is there a requirement to publicly disclose their information.

Indeed, private corporations are not required to publicly report under federal securities law, and therefore they are not subject to disclosure requirements about their directors and officers.<sup>237</sup> Thus, even when private corporations have individuals who are strongly associated with the organization, such as Mark Zuckerberg, the famous CEO of the formerly private company Facebook, there is little likelihood of a privacy claim arising to protect their interests.

Nonprofits are likewise not subject to public reporting under federal securities law, and, as noted, by definition they do not have shareholders.<sup>238</sup> Certain nonprofits, as tax-exempt organizations, must file an annual information return with the Internal Revenue Service.<sup>239</sup> This annual return, Form 990, is intended to help the IRS detect tax abuse, and it requires a variety of information including a listing of officers, directors, trustees, key employees, and highest compensated employees, and reporting of certain compensation related to such persons.<sup>240</sup> In most instances any such information that is publicly disclosed is not of a type that would implicate a privacy interest of constitutional dimension.<sup>241</sup>

A crucial distinction exists, however, between public corporations on the one hand and *some* nonprofits and private corporations on the other. The nexus between the individuals involved in a nonprofit or private corporation may be much closer than in the case of public corporations—the dynamic more associational amongst all of the participants—and the purpose of the nonprofit or private corporation may be in a realm more

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237. See Securities Exchange Act of 1934 § 12(g), 15 U.S.C. § 78l(g)(1)(B) (2012); 17 C.F.R. § 240.12g-1 (2014).

238. See *supra* note 237.

239. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, INSTRUCTIONS FOR FORM 990 RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX, 3 (2013), available at <http://www.irs.gov/pub/irs-pdf/i990.pdf>.

240. *Id.* at 25; see also Lloyd Hitoshi Mayer, *Nonprofits, Politics, and Privacy*, 62 CASE W. RES. L. REV. 801, 809 (2012) (identifying Form 990 as a channel through which tax-exempt organizations provide information to the IRS).

241. See Mayer, *supra* note 240, at 809–11 (discussing the public disclosure of information provided by tax-exempt organizations to the IRS and exceptions to such disclosure, such as information that identifies an organization's donors).

likely to implicate recognized privacy values—social, political, or religious. A public corporation typically has primarily a business purpose, with thousands of people involved in distinct roles and heterogeneous interests and motives apart from a general economic interest in the firm.<sup>242</sup> By contrast, a nonprofit corporation may have members associating together for a purpose that has traditionally been viewed as part of the private realm of individuals and their personal lives.<sup>243</sup> A private corporation may have primarily a business purpose, but be entirely composed of shareholders, directors, and employees with family or marital ties.<sup>244</sup> The corporate documents may directly reflect the family's collective finances and activities, including information about the family members' social associations, religious affiliation, and political allies.

Thus, as corporations are not monolithic organizations, one might imagine a spectrum—at one end there are corporations with characteristics that suggest individuals could be involved with privacy interests at stake that would be supported by a corporate right to privacy. The privacy interest could stem from the corporation being an organization that holds personal information or perhaps from the purpose or activities of the organization itself being related to a liberty or autonomy interest, such as a small religious or political group. Because of the wide-ranging variations in these sorts of organizations, and the indeterminacy of privacy, various factual scenarios could raise the potential for implicating privacy interests for the group.<sup>245</sup>

The great bulk of these scenarios raise issues that could be presented as First or Fourth Amendment claims, and there is arguably no need to bring a right to privacy claim as such. For

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242. See *supra* Part III.B.1.

243. See, e.g., Hansmann, *supra* note 228, at 837 (noting nonprofit institutions such as social clubs and churches).

244. See Benjamin Means, *Nonmarket Values in Family Businesses*, 54 WM. & MARY L. REV. 1185, 1193–94 (2013) (arguing that “family businesses are an extension of family relationships”).

245. For example, one scholar has argued that libraries and bookstores might have used the right to informational privacy to challenge section 215 of the USA PATRIOT Act. Michael J. O'Donnell, *Reading for Terrorism: Section 215 of the USA PATRIOT Act and the Constitutional Right to Information Privacy*, 31 J. LEGIS. 45, 48 (2004). The provision has stirred a great deal of controversy as it allowed FBI officials to seek a court order compelling any “tangible item” relevant to counterintelligence or counterterrorism investigations, including book records, without notice to individuals whose records had been obtained. *Id.* at 45–47. The article did not examine whether status as a group or corporation would have affected the ability of libraries and bookstores to bring the right to privacy claim it suggested.

example, the ACLU recently claimed that the government violated its First and Fourth Amendment rights by requiring Verizon to turn over on a daily basis the metadata of all of its customers' phone calls, including the metadata of all ACLU phone calls.<sup>246</sup> The ACLU deputy director stated the government's action "represents a gross infringement of the freedom of association and the right to privacy,"<sup>247</sup> but the complaint itself framed the ACLU's claims simply as First and Fourth Amendment violations without a specific claim to an independent right to privacy.<sup>248</sup>

The concept of privacy is also bound up in the constitutional "freedom to associate," a right that is understood to cover groups, including corporations.<sup>249</sup> This right has roots in the First Amendment's freedom of speech and assembly, which protect group autonomy.<sup>250</sup> The key modern case recognizing the freedom to associate is *NAACP v. Alabama*, in which the Supreme Court held that state-compelled disclosure of the group's membership list was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association."<sup>251</sup> In so holding, the Court stated that members of the nonprofit corporation had a right to "pursue their lawful private interests privately and to associate freely with others in doing so," and it recognized "the

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246. Complaint at 2, *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) (No. 13 Civ. 3994), available at [https://www.aclu.org/files/assets/nsa\\_phone\\_spying\\_complaint.pdf](https://www.aclu.org/files/assets/nsa_phone_spying_complaint.pdf).

247. *ACLU Files Lawsuit Challenging Constitutionality of NSA Phone Spying Program*, AM. CIVIL LIBERTIES UNION (June 11, 2013), <https://www.aclu.org/national-security/aclu-files-lawsuit-challenging-constitutionality-nsa-phone-spying-program>.

248. Complaint, *supra* note 246. The court held that the ACLU had standing, but that the NSA's metadata collection did not violate the First or Fourth Amendment because of the third party doctrine, under which a person who conveys information to a third party forfeits his right to privacy in the information. *Clapper*, 959 F. Supp. 2d at 738, 751.

249. For a discussion of the history and evolution of the related and sometimes overlapping rights of freedom of association, assembly, associational privacy, and expressive association, see Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 982–1002 (2011). See also JOHN D. INAZU, *LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* 9–10 (2012) (discussing the link between privacy and association in the Court's freedom of association jurisprudence).

250. See Bhagwat, *supra* note 249, at 984–94.

251. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

vital relationship between freedom to associate and privacy in one's associations.<sup>252</sup>

But while the concept of privacy is enmeshed in the freedom to associate and other rights, the right to privacy has evolved separately and it may not be entirely overlapping.<sup>253</sup> What if, for example, the government did not seek the NAACP membership list, but rather the donor list to the William J. Clinton Presidential Library Foundation? When Congress sought this information several years ago, nonprofits like the Heritage Foundation and the Southern Poverty Law Center protested that this was covered by the NAACP case.<sup>254</sup> Other commentators pointed out this was actually unclear because the NAACP case relied on the rationale that the members would face retaliation or physical danger if the list was disclosed—facts that were arguably absent for the library foundation.<sup>255</sup> After *Citizens United*, the calls for public disclosure of information relating to politically active nonprofits and their donors have only increased.<sup>256</sup> Some commentators have discussed this issue in terms of privacy, rather than just First

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252. *Id.* at 462, 466.

253. Scholars have argued for a more robust freedom of association or right to assembly. For instance, John Inazu has expressed concern that the Court's modern association jurisprudence takes an overly narrow view of groups that qualify as "expressive" and does not offer rigorous protections. *See* INAZU, *supra* note 249, at 3–4.

254. Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821, 840–41 (2002).

255. *Id.* at 841; *see also* Dale E. Ho, NAACP v. Alabama and False Symmetry in the Disclosure Debate, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 412 (2012) (arguing that, under one interpretation, the Court balanced the state's interest in "monitoring corporate activity" against the harm disclosure would cause NAACP members).

256. *See, e.g.*, Democracy is Strengthened by Casting Light on Spending in Elections Act (the DISCLOSE Act), H.R. 5175, 111th Cong. §§ 211, 301 (2010); S. 3295, 111th Cong. §§ 211, 301 (2010); Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, 10 ELECTION L.J. 363, 401–05 (2011); Donald B. Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing*, 10 ELECTION L.J. 427, 439–47 (2011). In *Citizens United v. FEC*, the Court confirmed the constitutional validity of disclosure requirements with the exception of when a reasonable probability exists that members or supporters of a group would be subject to harassment or reprisals if their identities were disclosed. 130 S. Ct. 876, 913–17 (2010); *see also* Richard Briffault, *Two Challenges For Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RTS. J. 983, 999 (2011) (discussing the Court's disclosure jurisprudence and the possibility of changing the standards for an exemption).



Amendment chilling effects or freedom of association.<sup>257</sup> To be sure, competing interests could properly outweigh such a privacy right, but the possibility exists that a privacy right would at least be implicated.<sup>258</sup>

To raise another possibility, what if the government did not simply ask a nonprofit for its membership list, but instead infiltrated and spied on the group? The history of the FBI and other law enforcement engaging in this kind of surveillance is wide-ranging, from infiltration of political groups like the Socialist Worker Party to mosques and other religious organizations.<sup>259</sup> As with the *ACLU v. Clapper* case, scholarship and case law have primarily focused on whether the surveillance violates the First Amendment by chilling the exercise of free speech or religion.<sup>260</sup> But, what if the government also collected and disclosed personal information regarding the members without a legitimate law enforcement purpose? Depending on the facts at hand, the group would plausibly have a privacy claim.

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257. See William McGeeveran, *Mrs. McIntyre's Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859, 861 (2011) (applying information privacy theory to election law); Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of Citizens United*, 120 YALE L.J. 622, 661–66 (2010) (arguing that denying corporations the right to anonymity in political speech is constitutionally legitimate because “corporations lack the kind of dignitary interests that justify privacy for individuals”).

258. See Mayer, *supra* note 240, at 812 (discussing the Joint Committee on Taxation’s recognition that “tax-exempt organizations have a right to privacy,” but noting that the committee’s staff concluded that public interest generally outweighed this right); see also WESTIN, *supra* note 20, at 25 (“The functions of privacy in liberal systems do not require that it be an absolute right. The exercise of privacy creates dangers for a democracy that may call for social and legal responses. . . . Thus the constant search in democracies must be for the proper boundary line in each specific situation and for an over-all equilibrium that serves to strengthen democratic institutions and processes.”).

259. See Linda E. Fisher, *Guilt By Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 643 (2004) (discussing religious and political surveillance); David A. Harris, *Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities After 9/11*, 34 N.Y.U. REV. L. & SOC. CHANGE 123, 132–41 (2010) (discussing the FBI’s use of informants in mosques and other religious institutions); Shirin Sinnar, *Questioning Law Enforcement*, 77 BROOK. L. REV. 41, 46–62 (2011) (describing FBI and Customs and Border Patrol interviews of U.S. Muslims).

260. See, e.g., *Williams v. Price*, 25 F. Supp. 2d 623, 629–30 (W.D. Pa. 1998) (finding surveillance chilled the plaintiff’s freedom to confer with his attorney); Sinnar, *supra* note 259, at 67–71.

In sum, this examination suggests that, as with public corporations, there is little possibility of a cognizable privacy interest at stake that would justify granting nonprofit or private corporations a constitutional right to privacy. However, it is harder to rule out the possibility because some nonprofits and private corporations may be appropriately described as associations of people and their activity may be in a realm more likely to implicate recognized privacy values. To a great extent this analysis underscores that in most circumstances, most corporations should not be accorded a constitutional right to privacy—and it is a stretch to find scenarios that could not be more simply characterized as freedom of association, or First or Fourth Amendment claims, which may provide more clearly established grounds. But the lines between these rights are not always well delineated, and the right to privacy may play an important role for some corporations in limited contexts.<sup>261</sup>

### C. IMPLICATIONS FOR FUTURE JURISPRUDENCE

One of the key contributions of this Article is measured analysis explaining why most corporations in most circumstances should not have a claim to a constitutional right to privacy. The preceding section also raises the idea that there may be limited instances when some nonprofit and private corporations could have a stronger claim for constitutional privacy, and this puts into focus the remaining question to be explored here: is there something specific about the right of privacy or the

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261. Little work to date has explored whether a coherent distinction can be drawn between allowing a group to claim the freedom to associate versus a right to privacy—this could be a fruitful area for exploration as they may be mutually supporting rights, and categorically denying all corporations a right to privacy could undermine associational rights. Inazu has suggested that privacy in association cases protect the boundaries of group autonomy whereas the right to privacy represented by *Griswold* serves as a guarantor of individual autonomy. INAZU, *supra* note 249, at 10. But there is reason to question this distinction as the Court has often grounded the association cases in notions of protecting members, *see* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958), and at times the Court has focused its privacy cases on protecting a relation, *see* *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Further, a common view of the underlying motivation for group rights is support of individual autonomy, which suggests there is not always a bright line between supporting individual autonomy and supporting group autonomy. *See* Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47, 50–51 (2010). Linda Fisher has suggested that “[t]he overlapping constitutional right to informational privacy is . . . distinguishable [from the freedom of association] in that it focuses on protecting personal information from unreasonable dissemination, rather than on avoiding interference with expressive activities.” Fisher, *supra* note 259, at 643.

corporate form that would foreclose all corporations from claiming the right, even in the most compelling examples? This question underlies how the Court should address cases that arise in this area, and more fundamentally, this question speaks to deeper issues that corporate rights raise.

As a purely predictive matter, a strong possibility exists that the Court would categorically deny all corporations the constitutional right to privacy. Several indicators point in this direction. First, the Supreme Court's privacy jurisprudence is a limited patchwork of cases that do not clearly have binding application outside the confines of the particulars in precedent cases.<sup>262</sup> That is to say, the right to privacy is a thin reed for a party to rely upon, arguably the recognition of a group right would represent an expansion of the doctrine, and jurists may be inclined to narrowly construe the right to avoid murky issues of substantive due process.<sup>263</sup> The Court might prefer that groups seek legislative action to address changing privacy concerns rather than accord corporations the imprimatur of privacy as a constitutional right.<sup>264</sup> In addition, the Court has once referred to the right to privacy just before mentioning the "purely personal" framework, suggesting that it would put the right to privacy in the same conceptual category as the privi-

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262. See *supra* Part III.A for a discussion of Supreme Court privacy jurisprudence.

263. For criticism of the Supreme Court's privacy decisions, see, for example, ROBERT H. BORK, *THE TEMPTING OF AMERICA* 95–100, 110–26, 169–70 (1990); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973); Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 *SUP. CT. REV.* 173 (1979).

264. See Michael W. McConnell, *The Right To Die and the Jurisprudence of Tradition*, 1997 *UTAH L. REV.* 665, 670–72, 686 (supporting the traditionalist approach to adjudication of unenumerated rights and arguing that "[a] jurisprudence grounded in text and tradition is not hostile to social change, but it assigns the responsibility to determine the pace and direction of change to representative bodies"). Critics sometimes argue that unenumerated rights invite judges to substitute their own personal values for those of the Constitution. See, e.g., BORK, *supra* note 263, at 89. But see Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 *U. CHI. L. REV.* 381, 381, 390 (1992) (noting that the distinction between enumerated and unenumerated rights is "bogus" and "makes no sense, because it confuses reference with interpretation"); see also David Alan Slansky, *Two More Ways Not To Think About Privacy and the Fourth Amendment*, *CHI. L. REV.* (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2474936](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474936) (challenging the idea in the Fourth Amendment context "that any protections needed against government infringements of privacy in the Information Age are best developed outside of the courts and outside of constitutional law").

lege against self-incrimination—a right that inheres only in a natural person’s individual capacity.<sup>265</sup>

Thinking beyond predictions, however, such a categorical denial of the right to corporations is not a foregone conclusion, nor should it be. As this Article’s analysis suggests, corporations seldom have a claim to a constitutional right to privacy, and so corporations as a broad category should not be accorded a right to privacy. A categorical denial, however, would foreclose the possibility for organizations that support values protected by privacy to receive protection as new situations arise and as the right to privacy evolves.

As explained in Part I.A., *Morton Salt*, decided in 1950, predated the Court’s modern privacy jurisprudence and did not make a broad ruling on the issue. Further, an aspect of the Court’s privacy jurisprudence is interpersonal, suggesting a foundation for recognizing a corporation as holding the right to protect individuals involved. Specifically, in *Griswold v. Connecticut*, the Court framed the issue of the validity of the state law forbidding use of contraceptives as about the “intimate relation of husband and wife and their physician’s role in one aspect of that relation.”<sup>266</sup> The Court notably did not focus the privacy protection on the individual, but rather on the “marriage relationship.”<sup>267</sup> The *Griswold* Court also referenced other areas supporting group autonomy such as *NAACP v. Alabama* and the “freedom to associate and privacy in one’s associations.”<sup>268</sup> And the Court mentioned *Sweezy v. New Hampshire*, in which it stressed “the freedom of the entire university community” in reversing the contempt conviction of a professor who refused to respond to questions during an investigation into subversive activities.<sup>269</sup> The Court included these examples to illustrate the existence of “penumbras” of the guarantees in the Bill of Rights

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265. See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 778–79 n.14 (1978) (“Corporate identity has been determinative in several decisions denying corporations certain constitutional rights, such as the privilege against compulsory self-incrimination, [and] equality with individuals in the enjoyment of a right to privacy . . .” (citations omitted)); see also *Hale v. Henkel*, 201 U.S. 43, 74–75 (1906) (categorically denying corporations the Fifth Amendment privilege against self-incrimination).

266. 381 U.S. at 482.

267. *Id.* at 486.

268. *Id.* at 483 (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)).

269. *Id.* at 482 (discussing *Sweezy v. New Hampshire*, 354 U.S. 234, 249–50, 261–63 (1957)).

that “help give them life and substance.”<sup>270</sup> For our purposes, these examples suggest an understanding that protecting a group or association—or corporation—can support an individual’s freedom and privacy in some limited instances.<sup>271</sup> It also raises the specter that while denying corporations the right to privacy would be the correct result in most circumstances, it could undercut the association jurisprudence.

Further, as problems of information privacy have become increasingly urgent, scholars are beginning to explore how privacy has a social impact and how individuals can no longer effectively manage their privacy at the individual level through notification and consent.<sup>272</sup> The argument for rethinking the third party doctrine and the relationship between consumers and corporations also underscores the idea raised above that corporations may serve as a useful check on the government.<sup>273</sup>

As for the implications of the corporate form on the expectation of privacy, the debate about whether the corporation is by nature public or private has raged for over a century and there is no sign of it being settled.<sup>274</sup> Corporations have both public and private dimensions.<sup>275</sup> Some theorists would draw

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270. *Id.* at 484.

271. See *Patterson*, 357 U.S. at 459 (“The Association . . . is but the medium through which its individual members seek to make more effective the expression of their own views.”); see also *Hills*, *supra* note 19, at 187–88 (discussing how organizations advance individual autonomy).

272. See Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1881–82 (2013) (noting privacy “fosters a certain kind of society, since people’s decisions about their own privacy affect society, not just themselves”); see also Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1918–27 (2013) (arguing that innovation depends upon privacy); Richards, *supra* note 213, at 1945–52 (arguing that privacy protects intellectual pursuits); Strahilevitz, *supra* note 209, at 2012–20 (2013) (arguing that privacy protection has distributive effects).

273. See *supra* notes 13–19 and accompanying text; see, e.g., *United States v. Jones*, 132 S. Ct. 945, 956–57 (2012) (Sotomayor, J., concurring) (questioning the premise “that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties” because in modern times “people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks”); see also Neil M. Richards & Jonathan H. King, *Big Data Ethics*, 49 WAKE FOREST L. REV. 393, 413–19 (2014) (discussing how shared information can remain confidential).

274. See William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264–66 (1992); Alan Wolfe, *The Modern Corporation: Private Agent or Public Actor?*, 50 WASH. & LEE L. REV. 1673, 1673 (1993).

275. ERIC W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* 131 (2013).

the line between public and private much closer to one side or the other. And, as one commentator noted, “[t]he line is drawn differently in different times and different places.”<sup>276</sup> What is important for the rights analysis at hand is the observation that the public/private distinction is not automatic. It varies by context and observer. This suggests that the public dimensions of the corporate form would not automatically foreclose a right to privacy, though it could lessen such an expectation and the separate legal identity of the corporation should not be forgotten.

### CONCLUSION

The debate over the notoriously nebulous and controversial constitutional right to privacy has left largely unexamined whether that right applies to one of the key actors in society—corporations. This Article takes up that question, first identifying and critically examining the growing and discordant case law on the issue and then analyzing whether the purpose of the privacy right would be served by according corporations that right.

This analysis illuminates why most corporations should not have a constitutional right to privacy. Simply put, in most circumstances according the right would not serve its purpose because people are not involved in a way that warrants that protection. To grant corporations a right to privacy where no one’s constitutional privacy interests would be served by doing so would not only be misguided, it would further muddle and undercut the already confused area of corporate rights. This Article’s analysis also shows, however, that a categorical denial may also be unwise in our world of wide-ranging corporations, particularly given the evolving and indeterminate concept of privacy we have. Certain corporations reflect an associational dynamic, with tightly connected individuals pursuing activity, social, political, or religious in nature, that has long been valued in fostering our societal goals of liberty and democracy.

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276. Wolfe, *supra* note 274, at 1683.