CORPORATE RIGHTS AND INDIVIDUAL INTERESTS: THE CORPORATE RIGHT TO PRIVACY AS A BULWARK AGAINST WARRANTLESS GOVERNMENT SURVEILLANCE

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INTRODUCTION

Public concern over government access to the user-generated records of commercial Internet service providers (ISPs) has increased[1]

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following the 2013 leak of confidential National Security Agency (NSA) documents.[2] Government programs revealed in the leak include "PRISM," through which the government had been targeting the servers of major ISPs[3] for the purposes of foreign intelligence surveillance.[4]

The leak of internal NSA documents became a surveillance scandal, generating public concern and raising corporate hackles.[5] This has thrust privacy to the forefront of the national debate, particularly issues of online privacy.[6] Each day, Americans engage in billions of online interactions and leave a treasure trove of metadata[7] in their wake.[8] When aggregated, this data can reveal deeply personal information about Internet users.[9] Moreover, the mass accretion of personal

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1 *See, e.g.*, Byron Acohido, *Analysis: NSA's Data Grab Ought to Boost Privacy Concerns*, USA TODAY, Oct. 30, 2013, http://www.usatoday.com/story/cybertruth/2013/10/30/nsas-data-grab-should-boost-privacy-concerns/3315789.

2 *Timeline of NSA Domestic Spying*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/nsa-spying/timeline (last visited May 18, 2015).

3 *Id.*

4 Glenn Greenwald & Ewen MacAskill, *NSA Prism Program Taps in to User Data of Apple, Google and Others*, GUARDIAN (June 7, 2013, 3:23 PM), http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data. PRISM was one of the most high-profile programs conducted under the authority of 50 U.S.C. § 1881a, referred to in this Note as "Section 702." See *infra* Part III.A for discussion of this statutory scheme.

5 *See, e.g.*, Glenn Greenwald, *Major Opinion Shifts, in the US and Congress, on NSA Surveillance and Privacy*, GUARDIAN (July 29, 2013, 7:33 AM), http://www.theguardian.com/commentisfree/2013/jul/29/poll-nsa-surveillance-privacy-pew. When Cisco, a technology company that manufactures computer network equipment, posted disappointing earnings in the third quarter of 2013, executives blamed the NSA scandal. Tom Gjelten, *Profit, Not Just Principle, Has Tech Firms Concerned with NSA*, NPR (Nov. 20, 2013, 3:19 AM), http://www.npr.org/blogs/alltechconsidered/2013/11/20/246232540/profit-not-just-principle-has-tech-firms-concerned-with-nsa. The Chief Legal Officer of Google, David Drummond, claimed the company was "outraged" by the NSA program. *Snowden Leaks: Google 'Outraged' at Alleged NSA Hacking*, BBC (Oct. 31, 2013, 8:41 AM), http://www.bbc.co.uk/news/world-us-canada-24751821.

6 *See, e.g.*, Aarti Shahani, *Pew: Nearly One-Third Of Americans Hide Information Online*, NPR (Mar. 16, 2015, 11:12 AM), http://www.npr.org/blogs/alltechconsidered/2015/03/16/393337446/pew-nearly-one-third-of-americans-hiding-information-online ("Almost a third of Americans have taken steps to hide or shield their information online since Edward Snowden publicized National Security Agency surveillance practices.").

7 Metadata is a generic term for information about information. NAT'L INFO. STANDARDS ORG., UNDERSTANDING METADATA (2004). It is often used to describe data such as Internet protocol (IP) addresses and records of login activity. Lincoln Spector, *Is Your ISP Spying on You?*, PCWORLD (Sept. 3, 2012, 7:42 AM), http://www.pcworld.com/article/261752/is_your_isp_spying_on_you_.html.

8 According to Pew Internet, as of January 2014, 87% of adults use the Internet. *Internet User Demographics*, PEW INTERNET, http://www.pewinternet.org/data-trend/internet-use/latest-stats (last visited May 18, 2015). According to data collected between 2000 and 2013, Internet usage among Americans has tended to increase across all activities. *What Internet Users Do on a Typical Day*, PEW INTERNET, http://www.pewinternet.org/data-trend/internet-use/internet-use-over-time (last visited May 18, 2015) (click on "Excel spreadsheet" to download the findings).

9 *See* CHRIS CONLEY, ACLU OF CAL., METADATA: PIECING TOGETHER A PRIVACY SOLUTION 6 (2014) [hereinafter ACLU METADATA REPORT], *available at* https://www.aclunc.org/sites/default/files/Metadata%20report%20FINAL%202%2021%2014%20cover%20%2B%20

information in the hands of private actors[10] makes this information more readily accessible for government actors.[11]

This leak has also prompted consideration of two Fourth Amendment doctrines that limit constitutional privacy protections: the "third-party" and "non-contents" doctrines.[12] Under the third-party doctrine, information voluntarily disclosed to third parties—even if only intended for a limited purpose, and without an individual's actual knowledge—is presumptively exempt from Fourth Amendment protections.[13] Under the related non-contents rule, courts distinguish between the content of communications, which is usually constitutionally protected, and the information used in or created by the transmission of that content—such as a phone number or the routing

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inside%20for%20web%20%283%29.pdf ("Although just one piece of metadata can provide a meaningful glimpse into a person's private life, aggregate metadata can reveal far more."); *see also* Laura K. Donohue, Op-Ed., *NSA Surveillance May be Legal—But It's Unconstitutional*, WASH. POST, June 21, 2013, http://www.washingtonpost.com/opinions/nsa-surveillance-may-be-legal—but-its-unconstitutional/2013/06/21/b9ddec20-d44d-11e2-a73e-826d299ff459_story.html ("In the ordinary course of life, third parties obtain massive amounts of information about us that, when analyzed, have much deeper implications for our privacy than before.").

10 So-called "big data," the aggregation, analysis, and sale of personal information, is big business. *See* FTC, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY, at i (2014), *available at* http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databroker report.pdf. The success of the Internet service giant Google in part depends on its aggregation and analysis of a tremendous amount of user-generated data. Google Analytics—a service offered to third-party companies—allows Google to track Internet users across any site that employs the service in order to generate targeted advertisements. *See* Peter Bright, *Surfing on the Sly with IE8's New "InPrivate" Internet*, ARS TECHNICA (Aug. 27 2008, 8:10 AM), http://arstechnica.com/information-technology/2008/08/surfing-on-the-sly-ie8s-inprivate-Internet.

11 For example, multiple federal law enforcement agencies have long been known to purchase use of private databases from corporations that aggregate personal data, so called "big data brokers." Chris Jay Hoofnagle, *Big Brother's Little Helpers: How ChoicePoint and Other Commercial Data Brokers Collect and Package Your Data for Law Enforcement*, 29 N.C. J. INT'L L. & COM. REG. 595 (2004); Richard Behar, *Never Heard Of Acxiom? Chances Are It's Heard Of You*, FORTUNE (Feb. 23, 2004), http://archive.fortune.com/magazines/fortune/fortune_archive/2004/02/23/362182/index.htm; Shane Harris, *FBI, Pentagon Pay for Access to Trove of Public Records*, GOV'T EXECUTIVE (Nov. 11, 2005), http://www.govexec.com/defense/2005/11/fbi-pentagon-pay-for-access-to-trove-of-public-records/20630. *See generally* Sam Kamin, *Little Brothers Are Watching You: The Importance of Private Actors in the Making of Fourth Amendment Law*, 79 DENV. U. L. REV. 517, 517 (2002) (arguing that "the more privacy an individual surrenders to private actors, the less privacy he will have from the government").

12 *The Administration's Use of FISA Authorities: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 25–26 (2013) (testimony of James Cole, United States Department of Justice) (discussing the non-contents and third-party doctrines as support for the contention that warrantless government access of metadata is constitutional).

13 *See* United States v. Miller, 425 U.S. 435, 443 (1976) ("This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.").

information used to deliver an email—which is presumptively not.[14] When interpreted expansively, these doctrines effectively eviscerate an individual's right to privacy in an ISP's records and allow the government unfettered warrantless access.[15] While it appears settled that individuals cannot assert a constitutional right to privacy in "non-contents" metadata, or in information that has been "voluntarily" shared with a corporation,[16] it remains to be seen whether a corporation could assert its own constitutional privacy rights to shield these records from warrantless government surveillance. Such a doctrinal development could close the gap in privacy protections left by Fourth Amendment exceptions that arose before the advent of the Internet.

The Roberts Court has demonstrated its inclination to recognize expanded rights for corporations. In *Citizens United v. Federal Election Commission*,[17] the Supreme Court held that the First Amendment bars the Federal Government from curtailing core political speech based on the speaker's corporate form.[18] The idea of the corporation as a bearer of constitutional rights did not originate in *Citizens United*, but it appears to have been given new life by the Court's decision.[19] Furthermore, although the Supreme Court held in *Federal Communications Commission v. AT&T, Inc.*[20] that corporations do not have "personal" privacy rights for purposes of the Freedom of Information Act, the

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14 *See* Smith v. Maryland, 442 U.S. 735, 742 (1979) (holding that an individual does not have a legitimate expectation of privacy in numbers dialed on a telephone); Warshak v. United States, 490 F.3d 455, 474–75 (6th Cir. 2007) (discussing the constitutionally-significant difference between contents of an email and other user information accessed by an ISP); Orin S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother That Isn't*, 97 NW. U. L. REV. 607, 611 (2003) (characterizing "the addressing and routing information that the networks use to deliver the contents of communications" as "envelope information" in contradistinction to "content information").

15 *Cf.* Susan Freiwald, *First Principles of Communications Privacy*, 2007 STAN. TECH. L. REV. 3, 49 (2007) ("By focusing merely on whether third parties have access to our communications data, or whether that data can be characterized as non-contents, courts have authorized increasingly powerful surveillance methods without meaningful judicial oversight.").

16 It has been suggested that many electronic records are unlike the business records at issue in *Miller*, and that extending the doctrine to the ISP-user relationship is inapposite. *See, e.g.*, Patricia L. Bellia & Susan Freiwald, *Fourth Amendment Protection for Stored E-mail*, 2008 U. CHI. LEGAL F. 121, 147–49 (2008) (arguing that users do not assume the risk of warrantless disclosure simply by using an ISP's services). Similarly, the non-contents doctrine can be difficult to apply in the context of Internet activity, where it is less clear what the "content" of a user's action is. *See* Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1019 (2010) ("Drawing the content/non-content distinction is somewhat more complicated because the Internet is multifunctional.").

17 558 U.S. 310 (2010).

18 *Id.* at 365.

19 Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1642–49 (2011) (discussing the history of the doctrine of corporate personality and the Court's various applications).

20 131 S. Ct. 1177 (2011).

Court pointedly reserved judgment on the corporation's constitutional right to privacy.[21]

Further, the most recent word on corporate rights from the Supreme Court, *Burwell v. Hobby Lobby Stores, Inc.*,[22] signaled the Court's willingness to recognize more "personal" rights for corporations. Justice Alito, writing for the majority, held that the term "person" in the Religious Freedom and Restoration Act of 1993 (RFRA) extended to the plaintiffs: closely held, for-profit corporations.[23] Therefore, according to the Court's analysis, corporations enjoy the heightened free exercise protections offered by RFRA.[24]

Hobby Lobby, *AT&T*, and *Citizens United*—together with a number of other cases—indicate that corporations may be able to shield their customers' information from warrantless government surveillance by protecting their own privacy interests in this information.[25] While the constitutional right to privacy evolved chiefly in the context of an individual's privacy rights,[26] corporations can hold other individual rights that are constitutional in nature.[27] Further, although Internet users may not be able to protect their information due to Fourth Amendment exceptions, there is a residual privacy interest in this information.[28] A corporation has a manifest interest in protecting the private information of its customers due to the corporation's own interest in protecting trade secrets[29] and maintaining good customer

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21 *Id.* at 1184–86 ("[T]his case does not call upon [the Court] to pass on the scope of a corporation's 'privacy' interests as a matter of constitutional or common law.").

22 134 S. Ct. 2751 (2014).

23 *Id.* at 2769.

24 *Id.* ("Furthering [a for-profit corporation's] religious freedom also 'furthers individual religious freedom.'").

25 See *infra* Part II.B for discussion of these cases.

26 The paradigmatic constitutional privacy cases mostly concern individuals. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (holding that the personal right to privacy protected by the constitution protects a woman's decision to terminate a pregnancy); Katz v. United States, 389 U.S. 347 (1967) (announcing the reasonable expectation of privacy test, and holding that an individual has a protectable privacy interest in communications made from a public telephone booth); Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing a constitutional right to privacy "emanating" from the Bill of Rights, and holding that this right protects a married couple's right to contraception).

27 *See infra* Part II.B.

28 *Cf.* Gonzales v. Google, Inc., 234 F.R.D. 674, 684 (N.D. Cal. 2006) (noting that "even if an expectation by Google users that Google would prevent disclosure to the Government of its users' search queries is not entirely reasonable, the statistic . . . that over a quarter of all Internet searches are for pornography, indicates that at least some of Google's users expect some sort of privacy in their searches" (citation omitted)).

29 For example, telecommunications providers have been reticent to disclose their information collection and retention policies, since this information could constitute trade secrets. Susan Freiwald, *Cell Phone Location Data and the Fourth Amendment: A Question of Law, Not Fact*, 70 MD. L. REV. 681, 719 (2011).

relations, and hence, profits.[30] This Note argues that the corporate right to privacy fills an existing gap in privacy rights: although under current doctrine users do not have a Fourth Amendment right to privacy in the records they generate, the corporations keeping these records do. Accordingly, corporations can and should assert this limited, instrumental right to privacy to forestall widespread, suspicionless government surveillance of online transactions.[31]

Part I of this Note discusses background on the theoretical and precedential bases for corporations as bearers of legal rights. Part II presents a brief overview of the constitutional right to privacy and summarizes case law relevant to a corporation's right to privacy. Part III proposes that corporations have a constitutional right to privacy in records containing potentially sensitive customer information, even where individual customers would not have a constitutional privacy claim, and concludes with the argument that government surveillance programs violate this right.

I. CORPORATIONS AS BEARERS OF LEGAL RIGHTS

The proposition that there can be a constitutional right to privacy for corporations rests on three premises: (1) corporations are legal persons and are entitled to bear legal rights, including constitutional rights; (2) corporations have distinct privacy interests and property interests that are protected by a right to privacy; and (3) corporate rights relate to the rights of individuals involved in those corporations. The following subparts touch on each of these premises, providing background on corporate personhood, the history of the corporation as bearer of constitutional rights, the nature of a business entity's privacy interests, and case law addressing a corporate right to privacy.

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30 Gjelten, *supra* note 5.

31 Elizabeth Pollman has recently argued that constitutional privacy rights should not extend to public corporations because the rights of natural persons are too attenuated, and ultimately "it is unnecessary to accord a constitutional right to privacy to public corporations [because] there is not a person involved who needs the corporation itself to hold that right in order to protect their constitutional privacy interests." Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 77 (2014). However, the conditions addressed in this Note speak to an instance in which individuals may need a public corporation to hold the right if the underlying individual right is to be vindicated. As Pollman herself notes, "[a]ccording 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." *Id.* at 76.

A. *Corporate Personhood*

In the United States, a corporation is a legal entity with an existence separate from its owners and managers.[32] In addition to endowing a business organization with certain rights, including limited liability for its owners, incorporation provides an organization with a "legal personality."[33] This fictional personality is what enables a corporation to exercise privileges grounded in private law,[34] including the right to sue and be sued,[35] the right to enter into contracts in its own name,[36] and the right to hold property.[37] Legal recognition of the corporation's legal personality is uncontroversial;[38] what has been hotly debated in recent years is the extent to which a corporation's legal personality can or should support its ability to hold constitutional rights.[39] Broadly speaking, three theories of the corporate personality

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32 Dante Figueroa, *Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America*, 50 DUQ. L. REV. 683, 701 (2012) ("Jurisdictions within the United States adopted the traditional view of the corporation that existed at the time of independence from England, which conceived the corporation 'as a separate juridical unit.'" (quoting Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 322 (1990))).

33 Pollman, *supra* note 19, at 1661.

34 "Private law" concerns the legal relations between private actors, and stands in contrast to "public law" which concerns the legal role of government in relationship to individuals, corporations, and other governments. John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640 (2012).

35 *See, e.g.*, Guthridge v. Pen-Mod, Inc., 239 A.2d 709, 711 (Del. Super. Ct. 1967) ("Under the law corporations like people, may sue or be sued . . . .").

36 *See, e.g.*, Van Allen v. Assessors, 70 U.S. 573, 584 (1865) (characterizing it as "familiar law" that a corporation "can deal with the corporate property as absolutely as a private individual can deal with his own").

37 Pollman, *supra* note 19, at 1638. Under the Dictionary Act, corporations are presumptively "persons" for the purposes of statutory construction. 1 U.S.C. § 1 (2012) ("In determining the meaning of any Act of Congress, unless the context indicates otherwise— . . . the words 'person' and 'whoever' include corporations . . . as well as individuals . . . ."). A corporation that is incorporated in the United States is considered a person under Section 702. *See* 50 U.S.C. § 1801(i) (2012) ("'United States person' means . . . a corporation which is incorporated in the United States . . . .").

38 Pollman, *supra* note 19, at 1663. The American legal system adopted the metaphor of the corporate legal personality from the English legal system, and the doctrine of legal personality has been accepted since the seventeenth century. EDWARD J. BLOUSTEIN, INDIVIDUAL & GROUP PRIVACY 141 (1978).

39 *See, e.g.*, Teneille R. Brown, *In-Corp-O-Real: A Psychological Critique of Corporate Personhood and* Citizens United, 12 FLA. ST. U. BUS. REV. 1, 7 (2013) ("[A] large majority of Americans sharply disapprove of [*Citizens United*] and its expansion of corporate personhood rights."); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 659 (1990) (arguing that granting constitutional rights to corporations "is creating unaccountable Frankensteins that have superhuman powers but are nonetheless constitutionally shielded from much actual and potential law enforcement as well as from accountability to real persons"); Robert Sprague & Mary Ellen Wells, *The Supreme Court as Prometheus: Breathing Life into the Corporate Supercitizen*, 49 AM. BUS. L.J. 507, 556 (2012) ("Corporate supercitizen status could now additionally threaten public life through similar

have informed how courts conceptualize a corporation's legal rights: concession theory; aggregate entity theory; and natural entity theory.[40]

Under the concession theory, the corporation is conceptualized as a mere "concession of the state," the existence of which is wholly defined by its charter.[41] According to this theory, a corporation's legal rights should be limited because its existence is a privilege granted by the state of incorporation.[42] The concession theory has become anachronistic as the law has progressed[43] and corporations have become more than administrative formalities.[44] However, concession theory has been an important refrain in case law addressing the extent of corporate rights.[45] This theory survives in legal precedent[46] even if it has lost favor in the academy.[47]

Other theories of a corporation's legal existence take a more expansive view of a corporation's rights. The aggregate entity theory conceives of the corporation as a collection of individual members, the shareholders, who contract to achieve shared goals.[48] The aggregate entity theory suggests that the rights of a corporation are derivative of the rights of the people who compose the corporation.[49] Some have argued that this view is somewhat outdated, as corporations evolved and the aggregate body of shareholders became so large and dispersed that individual shareholders could no longer be said to control the corporation.[50] However, the Court recently endorsed a variant of

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monopolistic behaviors in the political arena given the newly recognized status of corporations as persons enjoying unrestricted rights of political free speech.").

40 Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 99–102 (2009).

41 *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819) ("Being the mere creature of law, [a corporation] possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.").

42 Ripken, *supra* note 40, at 108.

43 *Id.*

44 Pollman, *supra* note 19, at 1661.

45 *See, e.g.*, Bellis v. United States, 417 U.S. 85, 89 (1974) ("[A] corporation has limited powers granted to it by the State in its charter, and is subject to the retained 'visitorial power' of the State to investigate its activities.").

46 This is reflected by the Supreme Court's repeated assertion that the public characteristics of a corporation subject it to reasonable regulatory intrusion by the state. *See infra* notes 127–34 and accompanying text.

47 *See* Reza Dibadj, *(Mis)conceptions of the Corporation*, 29 GA. ST. U. L. REV. 731, 733 (2013) (recognizing that although concession theory is "simple and intuitive," advocacy of it is "a discouraging uphill battle").

48 Pollman, *supra* note 19, at 1641.

49 Ripken, *supra* note 40, at 110.

50 *Id.* at 111–12; *see also* Pollman, *supra* note 19, at 1630 ("[V]iewing the corporation as just an aggregate of its shareholders can be incongruent with modern times, particularly in the large public company context. Shareholders in publicly traded corporations are not a static set of identifiable human actors and they do not control day-to-day corporate decision-making.").

aggregate entity theory in *Burwell v. Hobby Lobby Stores, Inc.*,[51] and Justice Alito's opinion for the Court specifically references the theory's applicability to the Fourth Amendment.[52]

The natural entity theory, which is commonly associated with the phrase "corporate personhood," posits that a corporation has a separate legal existence that entitles it to a bundle of rights similar to those of natural persons.[53] This theory reflects a modern sense that a corporation is independent of its state of incorporation and even of the individuals who collectively own the corporation.[54] Of the competing views on the legal nature of a corporation, the natural entity theory is the perspective that supports granting the most expansive array of rights to corporations.[55]

Corporate theory has evolved along with the corporation itself,[56] a shift that has affected the metaphorical language employed by courts over the years,[57] but which has not been essential to the law's conception of the corporation as a bearer of rights.[58] As argued by philosopher John Dewey, it is a tautology to predicate a corporation's rights based on the extent to which a corporation is a person, because legal personhood is a construct defined by the rights it commands,[59] and one that shifts

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51 134 S. Ct. 2751, 2759 (2014) ("[W]e reject [the] argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships.").

52 *Id.* at 2768 ("When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company.").

53 Ripken, *supra* note 40, at 102 ("[I]f the corporation is a real person in society, it should bear the same legal, social, and moral responsibilities that natural persons carry, as well as the same rights and protections.").

54 *Id.* at 115.

55 Mayer, *supra* note 39, at 581 ("[The natural entity theory] most favors corporate constitutional rights."); Pollman, *supra* note 19, at 1642 ("This view of corporations as 'real' and 'natural' suggested inherent, inviolable rights.").

56 Ronald J. Colombo, *The Corporation As a Tocquevillian Association*, 85 TEMP. L. REV. 1, 22 (2012) ("[C]hanges in corporate theory have largely matched the evolving realities of the corporation.").

57 Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1752 (2001) ("The twentieth century . . . has seen an increasing extension to corporations of Bill of Rights privileges—most, though not all, of which limit their protections to 'persons' or 'people.'").

58 *See* Pollman, *supra* note 19, at 1630, 1646–49 (pointing to instances of the Supreme Court drawing on multiple theories of corporate existence in the same opinion, and concluding that "[t]he only unifying strand between these disparate cases was the recognition of corporations as capable of holding rights or liabilities"); *see also* Mayer, *supra* note 39, at 579 ("[T]he Court currently lacks a coherent or defensible theory of the corporation.").

59 John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 655 (1926) ("[F]or the purposes of law the conception of 'person' is a legal conception; put roughly, 'person' signifies what law makes it signify."); *see also* Eric Posner, *Stop Fussing Over Personhood*, SLATE (Dec. 11, 2013, 10:09 AM), http://www.slate.com/articles/news_and_politics/view_from_

meanings based on context.[60] Simply put, it is quite possible—and preferable as a legal matter[61]—to accept that "corporate personhood" signifies that a corporation is an entity capable of bearing rights, including constitutional rights, without asserting that a corporation is a natural person entitled to a full suite of constitutional rights.[62] The muddled jurisprudence discussed below reflects that, in deciding whether to grant a "personal" right to a corporation, courts are often distracted by whether a corporation "behaves" like a person, rather than deciding whether extension of the right to corporations serves the societal goals underpinning that right.

B. *The Constitutional Rights of Corporations*

Corporations have been recognized as holders of constitutional rights since the early 1800s,[63] and Supreme Court recognition of corporate personhood as a matter of constitutional analysis is often

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chicago/2013/12/personhood_for_corporations_and_chimpanzees_is_an_essential_legal_fiction.html ("The law does not turn something into a person by calling it one.").

60 In one example of this, states are not considered persons under 42 U.S.C. § 1983 while certain state agencies and municipalities are, a peculiarity arising from the legal ramifications of the definition and not the "person-like" nature of the entities. *Compare* Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989) ("[A] State is not a person within the meaning of § 1983."), *with* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 663 (1978) (local governments are not immune from suit under § 1983).

61 *See generally* Pollman, *supra* note 19 (arguing that judicial legitimacy and transparency would be well served by pared-down reconceptualization of corporate personhood as a concept that allows for corporations to hold rights for protection of natural humans involved); *What We Talk About When We Talk About Persons*, *supra* note 57, at 1747 ("Judges not only fail to invoke philosophical support for their ideas of personality, but also inconsistently apply jurisprudential theory in resolving problems of legal personhood, approaching it more as a legal conclusion than as an open question.").

62 *See* Dewey, *supra* note 59, at 672–73; *see also* Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 867 (2007) ("[C]orporate personhood has played a smaller role in crafting corporate constitutional rights than many believe."). As used in this Note, the term "corporate personhood" is merely the recognition that a corporation has a separate legal existence, and that this existence provides a basis for ascribing rights to the corporate entity. *See* Pollman, *supra* note 19, at 1671 ("Viewed properly, the doctrine of corporate personhood is only a starting point for analysis of whether corporations should hold a particular right at issue."); Posner, *supra* note 59 (noting that a primary function of corporate personhood is to "protect people from corporate wrongdoing and enable them to benefit from the goods and services that only corporations can provide"). This Note does not purport to refine the contours of a corporation's legal existence, but rather suggests the definition of a particular corporate right. Furthermore, in the context of this Note, there is no need to establish the extent to which a corporation is similar to a natural person, since the property and contract rights protected by a corporate right to privacy are well established without reference to natural entity theory.

63 *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 654 (1819) (holding that New Hampshire Act violated the Contracts Clause of the Constitution because it impaired Dartmouth College's ability to enforce its contracts).

traced to the nineteenth century case *County of Santa Clara v. Southern Pacific Railroad Co.*,[64] or rather to a statement made by Chief Justice Waite in connection with that case that the Fourteenth Amendment applied to corporations as well as natural persons.[65] Although the Court unanimously agreed on this point,[66] it rested its decision on a different ground,[67] and did not discuss the reasoning or authority underlying its proclamation regarding corporate personhood.[68] Shortly after *Southern Pacific Railroad Co.*, the Court reaffirmed that corporations are persons within the meaning of the Fourteenth Amendment.[69] In spite of this early grant of constitutional rights and recognition of corporate personhood, the Court did not extend Bill of Rights[70] protections, other than Fifth Amendment Due Process rights,[71] to corporations until the 1950s.[72]

Although in the latter half of the twentieth century the Supreme Court observed that corporations should presumptively be treated the same as natural persons for the purposes of constitutional analysis,[73] the Court has not consistently taken this approach,[74] even within the context of a single case,[75] or with reference to a single constitutional provision.[76] In *Hale*, for example, the Court relied on the differences

64 118 U.S. 394 (1886) (holding that California could not tax railroad company's fences separately from the rest of its property where their value could not be assessed).

65 *Id.* at 396 (statement of Waite, C.J.) ("The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."). Unusually, the Chief Justice made this statement before oral argument, and it was documented in the headnotes of the opinion. Pollman, *supra* note 19, at 1643.

66 *S. Pac. R.R. Co.*, 118 U.S. at 396.

67 *Id.* at 416 (certain railroad property did not fall within state's taxation authority).

68 Pollman, *supra* note 19, at 1644.

69 *Id.* at 1646 (quoting Minn. & St. Louis Ry. Co. v. Beckwith, 129 U.S. 26, 28 (1889)). The Court also affirmed that corporations are entitled to constitutional protection of their property rights. Pollman, *supra* note 19, at 1646 (quoting *Minn. & St. Louis Ry. Co.*, 129 U.S. at 28).

70 *See* U.S. CONST. amends. I–X.

71 The Fifth Amendment determines when the government can deprive a person of life, liberty, or property; namely, when the person has been afforded "due process" or, in the case of property, with "just compensation." U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

72 Mayer, *supra* note 39, at 600–01 (observing that recognition of Bill of Rights protections for corporations coincided with the rise of modern regulatory agencies and "new property").

73 Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 687 (1978) ("[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.").

74 *See supra* note 58.

75 Hale v. Henkel, 201 U.S. 43, 76 (1906) ("In organizing itself as a collective body [an association of individuals] waives no constitutional immunities appropriate to such body.").

76 A corporation has certain Fifth Amendment Due Process rights, but cannot assert a Fifth Amendment right against self-incrimination. *Compare* Noble v. Union River Logging R.R. Co.,

between natural persons and corporations as a basis for holding that corporations are not entitled to the Fifth Amendment protection against self-incrimination.[77] It reasoned that a corporation, unlike an individual, could not assert such a right[78] because a corporation is a creature of the state, invented for the public benefit.[79] However, the Court went on to hold that, because corporations are associations of individuals, they should not be denied Fourth Amendment protections.[80] The Court has since found that the Fifth Amendment's Double Jeopardy Clause—as distinct from its Self-Incrimination Clause—applies to corporations as well as to individuals.[81] The Court later used aggregate entity theory to justify denial of the Fifth Amendment privilege against self-incrimination.[82] More recently, in *Citizens United*, the Court found that differences between an individual and a corporation were of little significance when it came to regulation of core political speech.[83] The majority opinion in that case reinforces the concept of the corporation as a personified entity rather than a concession of the state.[84]

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147 U.S. 165, 176 (1893) (a corporation cannot be deprived of its property without due process of law), *with Hale*, 201 U.S. at 75 (a corporation may not assert a Fifth Amendment right against self-incrimination). *See also* Winkler, *supra* note 62, at 868–72 (discussing the Court's schizophrenic reasoning with regards to corporations' First Amendment rights, noting the Court has not always referred to corporate personhood).

77 *Hale*, 201 U.S. at 74–75.

78 *Id.* at 75 ("While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.").

79 *Id.* at 74–75.

80 *Id.* at 75–76.

81 *Compare* United States v. Martin Linen Supply Co., 430 U.S. 564, 567 (1977) (corporations constitutionally protected from Double Jeopardy), *with* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978) (holding that privilege against self-incrimination is a "purely personal" right and does not extend to corporate entities).

82 Bellis v. United States, 417 U.S. 85, 90 (1974) ("In view of the inescapable fact that an artificial entity can only act to produce its records through its individual officers or agents, recognition of the individual's claim of privilege with respect to the financial records of the organization would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege, and largely frustrate legitimate governmental regulation of such organizations.").

83 Citizens United v. FEC, 558 U.S. 310, 365 (2010).

84 *Id.* at 354 ("By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."). Justice Stevens's dissent also relies on a person metaphor, emphasizing the intuitive fact that corporate persons are inherently different from human speakers. *Id.* at 394 (Stevens, J., concurring in part and dissenting in part) ("The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case. In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it."). By contrast, Justice Scalia's concurrence emphasizes the correctness of the decision under an associational theory of corporate

Although Supreme Court jurisprudence does not present a consistent theory under which to analyze whether and in what circumstances a corporation will be treated as a natural person for the purposes of constitutional analysis,[85] it has clearly established that corporations have constitutional rights.[86] The analytical framework suggested by the Supreme Court's jurisprudence concerns not only the compatibility of the corporate form with a given constitutional right, but also the extent to which a challenged action burdens constitutionally protected rights.[87] With this in mind, the Court has consistently affirmed corporations' Fourth Amendment rights against unreasonable search and seizure.[88]

II. THE CORPORATE RIGHT TO PRIVACY

A corporate right to privacy is an apparent affront to common sense, as the interests protected by privacy—such as dignity, autonomy, and emotional security—are generally conceived of as individual interests.[89] However, as discussed in Part I, corporations are unique legal

personhood. *Id.* at 392 (Scalia, J., concurring) ("[T]he individual person's right to speak includes the right to speak *in association with other individual persons*. . . . The association of individuals in a business corporation . . . cannot be denied the right to speak on the simplistic ground that it is not 'an individual American.'").

85 Elizabeth Pollman has outlined a coherent and flexible structure in her recent article, arguing 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." Pollman, *supra* note 31, at 32. Pollman argues that, "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." *Id.* at 80.

86 In addition to cases discussed in the foregoing Section, see Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 433–34 (2001) (disproportionate punitive damages assessed against corporation violate guarantees of Eighth and Fourteenth Amendments); Ross v. Bernhard, 396 U.S. 531, 532–33 (1970) (affirming that corporations—and, by extension, shareholders in derivative actions—are entitled to trial by jury under the Seventh Amendment); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (exercise of eminent domain against coal mining company constitutionally impermissible taking).

87 *See* Brief for Respondents, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (10th Cir. 2014), 2014 WL 546899, at *25 (citing *Bellotti* and *Citizens United* as support for the proposition that the Court need not decide whether corporations "have" religious exercise rights because the relevant question is "simply whether [challenged government action] burdens religious exercise").

88 See *infra* Part II.B for discussion of these cases.

89 *See, e.g.*, *Privacy Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/privacy (last visited May 18, 2015) (defining privacy as "the state of being alone," and "the state of being away from other people").

entities permitted to exercise personal rights.[90] Furthermore, privacy can be as important for organizations as it is for individuals.[91] The ability to shield certain actions and information from the public makes it possible for organizations to carry out the functions for which they are formed.[92] In the context of business organizations, the correlation between privacy and profits led to the formation of trade secrets laws,[93] which govern the protection of confidential information that confers a competitive advantage to the business.[94] There is demonstrable acceptance that businesses should be afforded zones of privacy, and although trade secret law does not define the scope of a corporation's constitutional rights,[95] it lends credence to the idea that corporations, like individuals, should be shielded by privacy rights in certain spheres. This can inform the constitutional limits of government intrusion into a corporation's affairs.

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90 1 NIMMER ON INFORMATION LAW § 8:17; *see also* Lee A. Bygrave, *A Right to Privacy for Corporations?* Lenah *in an International Context*, 8 PRIVACY L. & POL'Y REP. 130 (2001), *available at* http://www.austlii.edu.au/au/journals/PrivLawPRpr/2001/58.html ("Legal doctrine . . . is full of concepts and rules that arose initially to service the needs of individuals but later have come to also service the needs of corporations.").

91 ALAN F. WESTIN, PRIVACY AND FREEDOM 42 (1967) ("Just as with individuals . . . organizations need the right to decide when and to what extent their acts and decisions should be made public."); *accord* NAACP v. Alabama, 357 U.S. 449, 462 (1958) ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association . . . .").

92 WESTIN, *supra* note 91, at 51 ("[P]rivacy is a necessary element for the protection of organizational autonomy, gathering of information and advice, preparations of positions, internal decision making, inter-organizational negotiations, and timing of disclosure. Privacy is thus not a luxury for organizational life; it is a vital lubricant of the organizational system in free societies.").

93 *Id.* at 43 ("The law will usually protect [trade] secrets against disclosure to competitors by former employees or through business espionage, and against demands for access by labor unions or legislative committees."); *see, e.g.*, Unif. Trade Secrets Act, 14 U.L.A. 433 (1985) (defining "trade secret," what constitutes "misappropriation" of such secrets, and establishing remedies for misappropriation of trade secrets).

94 *See* Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CALIF. L. REV. 241, 248 (1998) ("To qualify as a trade secret, information must meet three requirements: (1) it must confer a competitive advantage when kept secret; (2) it must be secret in fact; and (3) in many states, it must be protected by reasonable secrecy safeguards."). Although trade secret law is best conceived of as an intellectual property doctrine, *id.* at 244, it is one illustration of the law recognizing the rights of business organizations to keep information private in order to protect its property rights. *See id.* at 255. Informational privacy is one aspect of the constitutional right to privacy. *See infra* Part II.A.

95 *Cf.* Dow Chem. Co. v. United States, 476 U.S. 227, 232 (1986) ("State tort law governing unfair competition does not define the limits of the Fourth Amendment.").

A. *The Fourth Amendment and the Constitutional Right to Privacy*

Over the course of the twentieth century, privacy came to be defined as a fundamental right for individuals,[96] and also as the touchstone for determining whether government action violates the Fourth Amendment.[97] The Fourth Amendment shields "persons, houses, papers, and effects" from unreasonable government searches or seizures.[98] In *Katz v. United States*,[99] the Court held that the government violates the Fourth Amendment when it intrudes in areas in which citizens have a reasonable expectation of privacy.[100] Overturning a previous ruling that held warrantless wiretaps to be constitutional where the government had not physically intruded on the suspect's property,[101] the Court found that the government had violated the Fourth Amendment by its warrantless use of an electronic device to listen in on a target's telephone conversation.[102] *Katz* announced a new test for determining whether a particular government activity constitutes an unreasonable search.[103] Courts now engage in a two-prong inquiry, deciding: (1) whether a challenged government action has violated a subjective expectation of privacy; and (2) whether the expectation is one that society is willing to recognize as reasonable.[104] When a government action would invade a legitimate expectation of privacy, the government usually must obtain a warrant in order for the search to be "reasonable."[105]

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96 *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (holding that the Bill of Rights creates "zones of privacy").

97 Katz v. United States, 389 U.S. 347 (1967) (announcing the "reasonable expectation of privacy" standard).

98 U.S. CONST. amend. IV. Although this amendment refers to "[t]he right of the people," *id.*, the Fourth Amendment has been held to apply to corporations as well as natural persons. *See infra* Part II.B.

99 389 U.S. 347.

100 *Id.* at 360–62 (Harlan, J., concurring).

101 Olmstead v. United States, 277 U.S. 438, 466 (1928). In sharp contrast, the Court in *Katz* said specifically that "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Katz*, 389 U.S. at 353.

102 *Katz*, 389 U.S. at 348–51.

103 *Id.* at 361 (Harlan, J., concurring) ("[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

104 Kyllo v. United States, 533 U.S. 27, 34 (2001); *accord* Bond v. United States, 529 U.S. 334, 338 (2000); California v. Ciraolo, 476 U.S. 207, 211 (1986); Smith v. Maryland, 442 U.S. 735, 740 (1979).

105 *Katz*, 389 U.S. at 357 ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (footnote omitted)).

However, Fourth Amendment protections are not unconditional.[106] The Supreme Court has developed many exceptions to the usual requirements of the Fourth Amendment, including administrative search exemptions and the special needs doctrine.[107] The government can dispense with usual Fourth Amendment requirements when conducting administrative searches—such as health and safety inspections—of private residences or commercial property,[108] although such searches cannot be used to investigate criminal activity.[109] Similarly, the special needs doctrine allows government agents to conduct warrantless searches where a state interest—aside from an ordinary need for law enforcement—compels deviation from the standard constitutional requirements.[110] To demonstrate a valid special need, the government must show that there is a real and pressing problem that can be adequately addressed by the search.[111] Even where the government can demonstrate a special need, the need is evaluated in light of the privacy interest at stake and the severity of the intrusion.[112]

The "right to privacy" protected by the procedural requirements of the Fourth Amendment is not expressly enshrined in the Constitution, but the Bill of Rights has been construed as providing "penumbral" privacy protections,[113] one shade of which emanates from the Fourth Amendment.[114] The constitutional right to privacy is a broad and multifaceted right, one facet of which is the right to keep private information private.[115]

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106 United States v. U.S. Dist. Ct. for the E.D. Mich. (*Keith*), 407 U.S. 297, 314 (1972) (observing "the Fourth Amendment is not absolute in its terms").

107 *See generally* Theodore P. Metzler et al., *Warrantless Searches and Seizures*, 89 GEO. L.J. 1084 (2001) (providing an overview of the many exceptions to Fourth Amendment requirements).

108 *Id.* at 1151–52 ("The probable cause requirement for administrative warrants is less stringent than that required in criminal investigations because the privacy interests at stake are deemed less critical.").

109 *Id.* at 1152–53.

110 *Id.* at 1156–61.

111 *Id.* at 1155.

112 *Id.* at 1156–57.

113 Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." (citation omitted)). The right to privacy for individuals is now usually located in the Fourteenth Amendment's Due Process Clause. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003).

114 *Griswold*, 381 U.S. at 485 ("The Fourth Amendment [creates] a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.'").

115 For a discussion of a corporation's right to nondisclosure of confidential information, see William C. Lindsay, Note, *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) (analyzing a still-unanswered question: does a corporation assert a constitutional right to privacy in the context of a Freedom of Information Act request?). As discussed *infra* in Part III.C, in the

In *Whalen v. Roe*,[116] the Supreme Court recognized a constitutional right to nondisclosure of confidential information.[117] In *Whalen,* physicians and plaintiffs challenged the constitutionality of New York statutes that required doctors to record and report the names and addresses of every patient who had been written a prescription for certain controlled drugs.[118] The district court enjoined enforcement of the reporting provisions, finding that they invaded "one of the zones of privacy" with "a needlessly broad sweep."[119] The Supreme Court reversed, finding that while the kind of statute at issue in the case had the potential to impair both the interest in avoiding disclosure of certain personal information, and independence in decisionmaking, the New York act did not threaten either interest significantly enough to violate the Constitution.[120] While recognizing the threat to privacy posed by the accumulation of personal data in government computer files,[121] the Court found that the New York statute was sufficiently protective of the privacy interests of affected individuals.[122]

The Supreme Court discussed the constitutional right to nondisclosure again when evaluating the constitutionality of a statute requiring preservation of presidential tape recordings and documents in *Nixon v. Administrator of General Services*.[123] While acknowledging that the President had a right to privacy in his personal communications, the Court declined to find that there had been a violation of this right where only a few government personnel would have access to the private information.[124] Although *Whalen* and *Nixon* appear to recognize a right

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context of government surveillance of customer information held by a corporation, the constitutional right to nondisclosure may not apply. *See infra* Part III.C.

116 429 U.S. 589 (1977).

117 *Id.* at 598–600 (discussing the constitutionally protected "zone of privacy" and suggesting that, whatever its textual roots, the constitutional interests include both an "interest in the nondisclosure of private information and also [an] interest in making important decisions independently").

118 *Id.* at 591.

119 *Id.* at 596.

120 *Id.* at 599–600.

121 *Id.* at 605 ("We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures." (footnote omitted)).

122 *Id.* ("New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy.").

123 433 U.S. 425 (1977).

124 *Id.* at 465 ("[T]he limited intrusion of the screening process, of appellant's status as a public figure, of his lack of any expectation of privacy in the overwhelming majority of the materials, of

to nondisclosure of confidential information, these cases indicate the right is limited to preventing unreasonable public disclosure of personal information.[125] In any case, any constitutional right to informational privacy is limited and tenuous.[126]

B. *Corporations' Fourth Amendment Rights and the Constitutional Right to Privacy*

The Supreme Court has held for over a century that corporations have cognizable Fourth Amendment rights: in *Hale v. Henkel*,[127] the Court found a grand jury subpoena duces tecum was too broad to be reasonable,[128] and that the request for records therefore impinged upon a corporation's Fourth Amendment rights.[129] The Court reasoned that corporations are merely associations of individuals who do not waive their constitutional rights by organizing into the corporate form.[130] Although *Hale* involved a criminal investigation,[131] the Court has most frequently considered the Fourth Amendment's application to businesses in the context of the government's right to conduct regulatory or administrative searches of commercial property.[132] While generally upholding regulatory statutes that allow for administrative

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the important public interest in preservation of the materials, and of the virtual impossibility of segregating the small quantity of private materials without comprehensive screening.").

125 Furthermore, because the Supreme Court has recently held that corporations do not have "personal privacy" rights for statutory purposes, FCC v. AT&T, Inc., 131 S. Ct. 1177, 1185–86 (2011), this logic might apply for constitutional purposes as well. *Cf.* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978) (constitutional rights which are "purely personal" do not extend to corporate entities).

126 *See, e.g.*, NASA v. Nelson, 562 U.S. 134, 147 (2011) ("assum[ing] for present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance," i.e., informational privacy, but finding no imposition on this interest).

127 201 U.S. 43 (1906).

128 The subpoena was a veritable dragnet, requesting "all understandings, contracts, or correspondence between the [corporation], and no less than six different companies, as well as all reports made and accounts rendered by such companies from the date of the organization of the [corporation], as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different states in the Union." *Id.* at 76–77.

129 *Id.* at 76.

130 *Id.* ("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. Its property cannot be taken without compensation.").

131 *Id.* at 70.

132 *See, e.g.*, New York v. Burger, 482 U.S. 691, 693 (1987) (considering constitutionality of regulatory statute allowing warrantless search of automobile junkyard); Donovan v. Dewey, 452 U.S. 594, 602–03 (1981) (considering warrantless inspections required by the Mine Safety Act); United States v. Biswell, 406 U.S. 311, 311–13 (1972) (considering warrantless search of a gun dealer's storeroom pursuant to Gun Control Act).

searches of commercial property,[133] the Court has consistently held that commercial property is protected by the Fourth Amendment, and that Fourth Amendment rights extend to corporations.[134]

Although *United States v. Morton Salt Co.*[135] is sometimes cited as authority for the proposition that corporations do not have a constitutional right to privacy,[136] the holding is in fact more cabined. In *Morton Salt*, the Supreme Court held that a Federal Trade Commission (FTC) order that required corporations to submit reports showing their continued compliance with a cease and desist order did not violate the Fourth Amendment prohibition against unreasonable searches and seizures.[137] The Court explicitly rejected the natural entity theory, holding that corporations are "endowed with public attributes," and have a public duty stemming from these attributes.[138] *Morton Salt* did not wholly deny that corporations have Fourth Amendment rights,[139] but it stands for the principle that certain regulatory actions by the government do not offend the constitutional rights of corporations.[140]

Subsequent Supreme Court cases make clear that the Fourth Amendment applies even to administrative searches of private commercial property.[141] The Court has imposed Fourth Amendment limitations on administrative actions according to a judicially created

133 *Donovan*, 452 U.S. at 598 ("[U]nlike searches of private homes, which generally must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment, legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment." (footnote omitted) (citing *Biswell*, 406 U.S. at 311)). Administrative search warrants are usually required, although the probable cause requirement for these warrants is reduced. Metzler et al., *supra* note 107, at 1151–53.

134 *See* G. M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977) (collecting cases supporting the proposition that commercial property is protected by Fourth Amendment, and corporations have some Fourth Amendment rights).

135 338 U.S. 632 (1950).

136 Bygrave, *supra* note 90 (citing Oasis Nite Club, Inc. v. Diebold, Inc., 261 F. Supp. 173, 175–76 (D. Md. 1966) (plaintiff corporation did not possess a right to privacy as a matter of common law).

137 *Morton*, 338 U.S. at 654.

138 *Id.* at 652 ("[Corporations] have a collective impact upon society, from which they derive the privilege of acting as artificial entities.").

139 *Id.* ("[Corporations] may and should have protection from unlawful demands made in the name of public investigation . . . .").

140 *Id.* ("Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless lawenforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest."); *accord* Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 66 (1974). In one example of this, the Court held that industries that have a history of government oversight cannot be said to have a reasonable expectation of privacy in their stock. Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978) ("Certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." (citation omitted)).

141 *See* Donovan v. Dewey, 452 U.S. 594, 598 (1981) ("Our prior cases have established that the Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property." (citing *Marshall,* 436 U.S. at 311)).

reasonableness standard that balances the corporation's need for privacy and the public's need for effective enforcement of regulatory schemes.[142] In *See v. City of Seattle*,[143] the Court held that a fire inspector needed a warrant in order to enter a locked commercial warehouse to which the owner would not consent to entry.[144] The decision emphasized that demands for access had to be reasonable in light of public need,[145] and that the reasonableness of administrative entry is subject to judicial review.[146]

Marshall v. Barlow's, Inc.[147] provides an example of a statutory regulation that exceeded the needs of the public.[148] In *Marshall*, the Court held that a warrantless random labor inspection conducted pursuant to the Occupational Safety and Health Act (OSHA) was unreasonable, and thus the section of the statute authorizing those searches was unconstitutional.[149] Although the nominal plaintiff was a corporation, the Court did not make any reference to the corporation's right to privacy as an interest separate from that of its owner, and *Marshall* was decided by reference to the business owner's reasonable expectation of privacy,[150] and the Warrant Clause's[151] applicability to commercial property.[152] *Marshall* and other Supreme Court decisions make clear that the Fourth Amendment applies to administrative searches of private commercial property.[153] The Court in *Marshall*

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142 *See Marshall*, 436 U.S. at 321 ("The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute."); See v. City of Seattle, 387 U.S. 541, 545 (1967).

143 387 U.S. 541.

144 *Id.* at 545 ("[A]dministrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.").

145 *Id.* ("The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved.").

146 *Id.* ("[T]he decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field.").

147 436 U.S. 307.

148 *Id.* at 321.

149 *Id.* at 325.

150 *Id.* at 322 ("Nor do we agree that the incremental protections afforded *the employer's privacy* by a warrant are so marginal that they fail to justify the administrative burdens that may be entailed." (emphasis added)).

151 The Warrant Clause of the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV. While warrants are presumptively required in the criminal context before a search is performed by a law enforcement officer, a government agency's administrative inspection does not always require a warrant. 32 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE & PROCEDURE § 8146 (1st ed. 2006).

152 *Marshall*, 436 U.S. at 311 ("The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes.").

153 *See* Donovan v. Dewey, 452 U.S. 594, 598 (1981) ("Our prior cases have established that the Fourth Amendment's prohibition against unreasonable searches applies to administrative

implicitly recognized that a corporation has this right, even if that right is directly derivative of the right of the human owner.[154] Furthermore, *Marshall* indicated that a corporation has the right to exclude the government from its premises for the purposes of controlling access to information about the company, hinting at a recognition of a Fourth Amendment right in the corporate context that went beyond the right against physical entry.[155]

One does not have to speculate about the Fourth Amendment's intangible application to corporations; since *Katz,* the Court has held that corporations have constitutionally cognizable privacy interests under the reasonable expectation of privacy standard.[156] In *Dow Chemical Co. v. United States*,[157] the Supreme Court upheld a statute allowing the Environmental Protection Agency to take aerial photographs of Dow Chemical's industrial plant complex.[158] However, the Court recognized that the corporation, not its individual owners, had a legally cognizable expectation of privacy under the *Katz* formulation.[159] Dow's Fourth Amendment claim was rejected not based on its corporate form, but rather on the basis of the "open fields" doctrine.[160] The Court found that Dow had an expectation of privacy in some of its property that society was prepared to recognize as

inspections of private commercial property." (citing *Marshall*, 436 U.S. at 311)); See v. City of Seattle, 387 U.S. 541, 545 (1967) ("[A]dministrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.").

154 The Court refers to "Mr. Barlow" throughout the opinion, *see, e.g.*, *Marshall*, 436 U.S. at 310, 314, but referred to "Barlow's" in its holding. *Id.* at 325.

155 Mayer, *supra* note 39, at 609 ("[*Marshall*] represented the protection of New Property—information about workplace operations that the corporation sought to conceal from government—and it demonstrated the importance of the intangible Bill of Rights in the modern political economy."). *Hale*, *Marshall*, and *See* were all decided before privacy became the touchstone for Fourth Amendment analysis. The Supreme Court has recently clarified that, while the *Katz* test can provide additional privacy protections, it does not eliminate extant Fourth Amendment protections. Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013) ("[T]hough *Katz* may add to the baseline, it does not subtract anything from the [Fourth] Amendment's protections . . . ."). Therefore, while privacy has become the relevant focal point in Fourth Amendment analysis, *Katz* certainly does not diminish the force of precedent holding that corporations have Fourth Amendment rights where there has been a physical invasion.

156 Brief for Respondent AT&T, Inc., FCC v. AT&T, Inc., 131 S. Ct. 1177, 1185 (2011) (No. 09-1279), 2010 WL 5069526, at *20–22 (collecting cases in support of the assertion that the Supreme Court "has held that corporations have privacy interests under the Fourth Amendment").

157 476 U.S. 227 (1986).

158 *Id.* at 239.

159 *Id.* at 236 ("Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe.").

160 *Id.* The open fields doctrine holds that activities conducted outside in an unenclosed field are presumptively excluded from Fourth Amendment protections. *See* Oliver v. United States, 466 U.S. 170, 178 (1984) ("[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.").

reasonable.[161] However, the Court declined to extend the definition of the protected curtilage,[162] a concept tied to an individual's dwelling, into the context of commercial property.[163] Thus, using the *Katz* reasonable-expectation-of-privacy test, the Court found Dow had a cognizable privacy interest,[164] but due to the open fields exception it declined to categorize aerial surveillance of Dow's outdoor property as a Fourth Amendment "search."[165]

The Court has been less accepting of government invasions of corporate privacy that do not involve administrative searches.[166] In *G.M. Leasing Corp. v. United States*,[167] agents of the Internal Revenue Service (IRS)—who were in pursuit of G.M.'s delinquent general manager—searched and seized cars titled in G.M.'s name,[168] entered a locked building where corporate documents were stored, and seized documents and other G.M. property.[169] The IRS returned the original records and documents, but not before making photocopies.[170] The Court held that the seizure of vehicles was not unconstitutional because it took place in a public place,[171] but that the seizure of G.M.'s books and records "involved intrusion into the privacy of [G.M.]'s offices."[172] The Court was concerned that the government's "intrusion into [G.M.]'s privacy" was not the result of a regulatory search, but rather the result of the IRS's attempts to levy tax assessments.[173] Because the search was the result of routine enforcement of tax laws,[174] the Court declined to find

161 *Dow Chem. Co.*, 476 U.S. at 236.

162 Curtilage refers to "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver*, 466 U.S. at 180 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)). The *Dow* Court did not see fit to extend this concept to encompass corporate property. *Dow Chem. Co.*, 476 U.S. at 236.

163 *Dow Chem. Co.*, 476 U.S. at 236 ("The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant.").

164 *Id.* at 236.

165 *Id.* at 239.

166 *See* G. M. Leasing Corp. v. United States, 429 U.S. 338, 359 (1977) (warrantless entry into corporate building and seizure of corporate documents and records in furtherance of tax investigation violated the Fourth Amendment).

167 429 U.S. 338.

168 *Id.* at 344.

169 *Id.* at 346.

170 *Id.*

171 *Id.* at 351–52 (alluding to the open fields doctrine).

172 *Id.* at 352.

173 *Id.* at 354; *see id.* at 355 ("Indeed, one of the primary evils intended to be eliminated by the Fourth Amendment was the massive intrusion on privacy undertaken in the collection of taxes pursuant to general warrants and writs of assistance.").

174 *Id.* at 354 (the IRS's action "involves nothing more than the normal enforcement of the tax laws").

that there were exigent circumstances[175] or special needs to justify warrantless entry into G.M.'s offices.[176]

Supreme Court jurisprudence establishes that a corporation cannot be denied certain constitutional rights based solely on its corporate form,[177] and that corporations have baseline Fourth Amendment privacy rights.[178] However, Supreme Court cases do not as yet provide a satisfactory answer as to whether and in what circumstances a corporation will be able to successfully assert a constitutional right to privacy in confidential information,[179] leaving lower courts to grapple with the issue.[180]

C. *Circuit Court Cases*

The District of Columbia Circuit considered a corporation's constitutional right to privacy over thirty years ago in *United States v. Hubbard*.[181] In *Hubbard,* the Church of Scientology sought to protect confidential records seized in connection with a criminal

175 The exigent circumstances doctrine allows government agents to search or seize without a warrant when exigent circumstances require immediate action; for example, when there is imminent danger that evidence will be destroyed. Metzler et al., *supra* note 107, at 1111.

176 *G. M. Leasing Corp.*, 429 U.S. at 358–59.

177 *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 349 (2010) (government cannot within the First Amendment "ban political speech simply because the speaker is an association that has taken on the corporate form"); *G. M. Leasing Corp.*, 429 U.S. at 354 ("[W]e find no justification for treating petitioner differently [for purposes of Fourth Amendment analysis] . . . simply because it is a corporation."); Hale v. Henkel, 201 U.S. 43, 76 (1906) ("In organizing itself as a collective body [a corporation] waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation."); *cf.* FTC v. Am. Tobacco Co., 264 U.S. 298, 305 (1924) ("The mere facts of . . . being organized as a corporation do not make men's affairs public . . . .").

178 *See, e.g.*, Dow Chem. Co. v. United States, 476 U.S. 227, 236 (1986); *G. M. Leasing Corp.*, 429 U.S. at 359; *cf.* Marshall v. Barlow's, Inc., 436 U.S. 307, 325 (1978); *Hale*, 201 U.S. at 75–76.

179 *Hale* dealt with compelled production of books and records in the context of a grand jury subpoena, but held merely that a request for records cannot be unreasonably overbroad. *Hale*, 201 U.S. at 75–76. Although it supports the proposition that corporations have some privacy interests in their records, this century-old case does not provide a great deal of guidance regarding the constitutional reasonableness of government surveillance.

180 In addition to the circuit court cases discussed below, at least one California state court has asserted that corporations have a "general right to privacy" under the Federal Constitution. In *Roberts v. Gulf Oil Corp.,* 195 Cal. Rptr. 393 (Ct. App. 1983), a corporate taxpayer tried to assert that its constitutional right to privacy shielded it from the subpoena duces tecum of a county assessor. *Id.* at 396. The California Court of Appeal held that Gulf Oil did not have a right to privacy in the specific context of a tax assessor requesting necessary information, but that corporations were entitled to a general right to privacy under the Federal Constitution. *Id.* at 411–12. The court asserted that, when considering whether to grant a right to privacy to nonhuman entities, courts should consider the "strength of the nexus" between the corporation and human beings as well as the context of the controversy. *Id.* at 411.

181 650 F.2d 293 (D.C. Cir. 1980).

investigation.[182] The *Hubbard* Court did not base its decision directly on the Church's constitutionally protected rights, but rather considered the interests of the Church in reference to a constitutional framework.[183] While citing *Morton Salt* for the proposition that corporations' "public attributes" may diminish their legitimate expectations of privacy, the *Hubbard* Court rejected that the corporate form was a sufficient basis for denying privacy protections.[184] This opinion supports that the proper focal point in a corporate constitutional rights case is not simply the corporate form, but the broader constitutional right at issue. Further, the opinion reflects an expansive view of corporate privacy rights, affirming that corporations can assert privacy rights under the Fourth Amendment[185] while proposing that the Amendment is not the only source of a corporation's constitutional protections against government intrusion.[186]

The District of Columbia Circuit confirmed this stance more directly four years later in *Tavoulareas v. Washington Post Co.*,[187] by holding that a corporation had a constitutionally protected privacy interest in avoiding public disclosure of sensitive information.[188] The case arose out of a libel suit brought by the president of Mobil Oil Corporation (Mobil) against The Washington Post (the Post).[189] Mobil

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182 *Id.* at 302.

183 *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.").

184 *Id.* at 306 ("[O]ne cannot draw a bright line at the corporate structure. The public attributes of corporations may indeed reduce pro tanto the reasonability of their expectation of privacy, but 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." (footnote omitted)).

185 *See id.* at 304 ("That the fourth amendment which is now recognized to protect legitimate expectations of privacy can be invoked by corporations to suppress the fruits of a search of corporate premises demonstrates an understanding that a compulsory search of even corporate premises may constitute an intrusion upon privacy." (footnotes omitted)).

186 *Id.* at 304–05 ("[T]he value assigned by our society to protection against governmental invasions of privacy is not measured solely by the fourth amendment's exclusionary rule. The fourteenth amendment's protection against arbitrary or unjustifiable state deprivations of personal liberty also prevents encroachment upon a constitutionally recognized sphere of personal privacy. The fifth amendment's protection of liberty from federal intrusion upon this sphere can be no less comprehensive." (footnote omitted)).

187 724 F.2d 1010 (D.C. Cir.), *vacated on other grounds*, 737 F.2d 1170 (D.C. Cir. 1984) (en banc) (per curiam). A 1985 student Note observed that, "[n]otwithstanding legitimate corporate interests, only one court has ruled that corporations have a constitutional privacy right to nondisclosure of confidential information." Lindsay, *supra* note 115, at 915. Westlaw searches indicate that the *Tavoulareas* case is still the only case in which a federal court has extended the constitutional right of nondisclosure to corporations.

188 *Tavoulareas*, 724 F.2d 1010.

189 *Id.* at 1012.

contended that some of the deposition testimony taken by the Post contained sensitive proprietary information and succeeded in getting a protective order for much of it.[190] However, after trial, the Post moved to unseal all of the documents filed with the court,[191] and a district court ordered that the confidential deposition testimony be unsealed.[192] The circuit court reversed, finding that Mobil had a constitutional interest in protecting sensitive commercial information.[193] Citing *Whalen* and *Nixon* as support, the court performed a balancing test, weighing Mobil's privacy interests against the severity of the intrusion and the reasons for disclosure.[194] The court found that there was not a sufficiently compelling reason to intrude on Mobil's "constitutionally protected privacy interest."[195] After the initial opinion, rehearing was granted en banc, and the D.C. Circuit remanded, instructing the district court to apply a new standard for determining whether there was good cause to continue the protective order.[196] In spite of this anticlimactic disposition, *Tavoulereas* is germane for the analytical framework it suggests; a balancing test for the constitutional corporate right to privacy.

The District of Columbia Circuit is not the only circuit court of appeal to have addressed the right to privacy in business records, nor the most recent. In *Patel v. City of Los Angeles*,[197] the Ninth Circuit held that nonconsensual police inspection of a motel's guest records pursuant to a municipal code constituted a Fourth Amendment search and violated the motel's right to privacy.[198] In *Patel*, motel owners[199] brought a facial challenge to a provision of the Los Angeles Municipal

190 *Id.* at 1013–14.

191 *Id.* at 1014.

192 *Id.* at 1015.

193 *See Tavoulareas*, 724 F.2d at 1015 ("While we acknowledge that discovery is presumptively open under the Federal Rules of Civil Procedure, we believe that statutory, common law, and constitutional privacy interests require protecting the confidentiality of Mobil's sensitive commercial information.").

194 *See id.* at 1022–29 ("The Supreme Court, in both *Whalen* and *Nixon* determined the propriety of a governmental intrusion by balancing the need for the intrusion against its severity." (citations omitted)).

195 *Id.* at 1029.

196 *See* Tavoulareas v. Wash. Post Co., 737 F.2d 1170, 1171 (D.C. Cir. 1984) (en banc) (per curiam).

197 738 F.3d 1058, 1061 (9th Cir. 2013), *cert. granted*, 135 S. Ct. 400 (Oct. 20, 2014) (No. 13–1175).

198 *Id.* at 1061 ("Record inspections under [the challenged municipal code section] involve both a physical intrusion upon a hotel's papers and an invasion of the hotel's protected privacy interest in those papers . . . .").

199 Although plaintiffs were not a corporation, *Patel* deals with the right to privacy in commercial records and the reasoning applies to corporate as well as individual proprietors because, as previously discussed, the corporate form in and of itself is not a sufficient basis for denying constitutional rights. *See supra* note 177.

Code that required hotel and motel operators to keep records about their guests, either on paper or electronically, and allowed police officers onsite access to inspect the records upon request.[200] Plaintiffs challenged the warrantless inspection requirement of the code.[201] The Ninth Circuit held that plaintiffs had a reasonable expectation of privacy in guest records stemming from the motel's private property interests.[202] While observing that the records mainly contained private information about the guests, not the motel,[203] and that the guests themselves did not have a cognizable privacy interest in the motel's records,[204] the Ninth Circuit found that the motel retained an objectively reasonable expectation of privacy in the records of its guests because businesses usually do not disclose such "commercially sensitive information."[205] The court asserted that warrantless police inspection of guest records would constitute a Fourth Amendment search under either a privacy-based or a property-based analysis, and that the analysis was the same whether the records were digital or paper.[206] Citing *Marshall* and *See*, the court found the fatal flaw of the municipal code section to be the lack of opportunity for judicial review of requests for access prior to the imposition of sanctions for failure to comply.[207]

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200 *Patel*, 738 F.3d at 1060.

201 *Id.* The section stated that guest records "shall be made available to any officer of the Los Angeles Police Department for inspection." *Id.* at 1061 (quoting L.A. Mun. Code § 41.49).

202 *See id.* ("By virtue of those property-based interests, the hotel has the right to exclude others from prying into the contents of its records, which is also the source of its expectation of privacy in the records.").

203 *Id.* at 1062 ("That the hotel records at issue contain information mainly about the hotel's guests does not strip them of constitutional protection."); *id.* at 1062–63 ("That the inspection may disclose 'nothing of any great personal value' to the hotel—on the theory, for example, that the records contain 'just' the hotel's customer list—is of no consequence." (quoting Arizona v. Hicks, 480 U.S. 321, 325 (1987))).

204 *Id.* at 1062 ("*[G]uests* lack any privacy interest of their own in the hotel's records. But that is because the records belong to the hotel, not the guest, and the records contain information that the guests have voluntarily disclosed to the hotel." (citing United States v. Miller, 425 U.S. 435, 440 (1976); United States v. Cormier, 220 F.3d 1103, 1108 (9th Cir. 2000))).

205 *Id.* ("That expectation of privacy is one society deems reasonable because businesses do not ordinarily disclose, and are not expected to disclose, the kind of commercially sensitive information contained in the records—e.g., customer lists, pricing practices, and occupancy rates.").

206 *Id.* ("A police officer's non-consensual inspection of hotel guest records plainly constitutes a 'search' under either the property-based approach of *Jones* or the privacy-based approach of *Katz*. . . . Whether the officers rifle through the records in paper form, or view the records on a computer screen, they are doing so to obtain the information contained in the records." (citation omitted)).

207 *Id.* at 1064–65. The court also noted that since exigent circumstances would permit a police officer to inspect guest records without a warrant regardless of the existence of a municipal mandate, this potential alternative source of authority for inspecting the hotel's records did not undermine the court's analysis. *Id.* at 1065.

Although they cannot serve as a definitive guide, these lower court cases, when coupled with Supreme Court cases, indicate that corporations have a constitutional right to privacy in some commercially sensitive information.[208] Alleged violations of this right can be assessed by evaluating the severity of the intrusion and the needs of the state.[209]

III. THE IMPLICATIONS OF A CONSTITUTIONAL PRIVACY RIGHT FOR CORPORATIONS

Whatever the limits of their right to privacy,[210] corporations should at least be able to assert a constitutional right to privacy in records that contain sensitive information about their customers. Recognition of this right would be a boon for individual privacy rights in light of current surveillance practices of the U.S. government as well as the degree of control some corporations currently have over the privacy of individuals. Moreover, it would be consistent with the interests of the corporations themselves.

A. *Government Surveillance Under FISA Section 702*

Beginning in June of 2013, a leak of classified material brought to light several clandestine government surveillance programs, including a security initiative through which government agencies collect domestic telephone metadata.[211] Other recently revealed surveillance programs, most notably the so-called PRISM program,[212] are conducted pursuant to Section 702 of the Foreign Intelligence Surveillance Act (FISA).[213]

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208 *See id.* at 1062; United States v. Hubbard, 650 F.2d 293, 304 (D.C. Cir. 1980).

209 *See* Tavoulareas v. Wash. Post Co., 724 F.2d 1010, 1029 (D.C. Cir. 1984).

210 *See generally* Pollman, *supra* note 31.

211 *See The Administration's Use of FISA Authorities: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 1 (July 17, 2013) [hereinafter FISA Hearing]. This Note will refer to the program as the "telephony metadata program." Corporations targeted by this program would likely not be able to assert a right to privacy in their records, in part because telecommunications companies are in a closely regulated industry, and, thus, have diminished expectations of privacy, *see* New York v. Burger, 482 U.S. 691, 700 (1987), and in part because it appears telecommunications providers knowingly consent to having their records searched. *See, e.g.*, Secondary Order, In re FBI, No. BR 13-80, at 4 (FISA Ct. Apr. 25, 2013), *available at* http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order (ordering Verizon to produce certain records of telephony metadata to the FBI).

212 *See, e.g.*, Donohue, *supra* note 9.

213 PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 7

Through these programs, U.S. intelligence agencies collect data from both the servers of ISPs and the telecommunications "backbone"—the infrastructure used to send telephone and Internet communications.[214] When an analyst wants to gain access to the records of a new target under a Section 702 program, the request must be reviewed by a supervisor who affirms the analyst's reasonable belief that the proposed target is in fact a foreign national who is outside of the country at the time the data is being collected.[215] Under these programs, a government analyst may not intentionally target: (1) a person known to be inside the United States;[216] (2) a person reasonably believed to be outside the United States if the purpose is actually to target someone in the United States;[217] or (3) an American citizen located outside of the United States.[218] Surveillance can last for only one year,[219] and the program is subject to the oversight of the Foreign Intelligence Surveillance Court (FISC).[220] FISC does not, however, have to approve individual targets.[221] The preservation of records collected pursuant to Section 702 is governed by complex minimization procedures that must be periodically approved by FISC.[222]

Even if it has been conducted in accordance with FISA, critics have argued that Section 702 programs are constitutionally suspect because they permit the government to conduct surveillance and accumulate data without first obtaining individualized or particularized court orders.[223] The President's Review Group on Intelligence and

(2014) [hereinafter PCLOB 702 REPORT], *available at* https://www.pclob.gov/library/702-Report.pdf.

214 *Id.*

215 50 U.S.C. § 1881a(a) (2012).

216 *Id.* § 1881a(b)(1).

217 *Id.* § 1881a(b)(2).

218 *Id.* § 1881a(b)(3).

219 *Id.* § 1881a(a).

220 *Id.* § 1881a(i). FISC must certify that the program's strictures are in accordance with FISA and the Fourth Amendment. § 1881a(i)(3)(A).

221 *Id.* § 1881a(i); Donohue, *supra* note 9 ("[§ 1881a allows] the government to use electronic surveillance to collect foreign intelligence on non-U.S. persons it reasonably believes are abroad, without a court order for each target.").

222 *See Id.* § 1881a; PCLOB 702 REPORT, *supra* note 213, at 136–38.

223 Professor Laura K. Donohue, professor of law at Georgetown and director of Georgetown's Center on National Security and the Law, argued that compliance with FISA no longer implies compliance with the Fourth Amendment, as "FISA has ceased to provide a meaningful constraint," and that the Supreme Court "has never recognized a foreign intelligence exception to the warrant requirement when foreign-targeted searches result in the collection of vast stores of citizens' communications." Donohue, *supra* note 9. Similarly, the ACLU contends that the PRISM program, even if conducted according to FISA, is unconstitutional as it allows the mass acquisition of communications without individualized court orders, minimization and limitation measures are inadequate to protect communications of U.S. citizens and residents, and the program does not limit surveillance to counterterrorism efforts. FISA Hearing, *supra* note 211, at 92–99 (prepared statement of Jameel Jaffer, American Civil Liberties Union).

Communications Technologies, an independent panel created in August 2013, conducted a review of Section 702 surveillance programs and concluded that they put Americans' communications at risk of inadvertent interception because: (1) a U.S. person's communications can be collected if they are in contact with a legally targeted non-U.S. person; (2) it can be difficult to tell if a user is a U.S. person based on her communications; and (3) the exception that the communications of known U.S. persons may be retained if they contain information of "foreign intelligence value" is vague and "can easily lead to the preservation of private information about even known [U.S.] persons."[224]

In addition to legal questions about the implementation of certain surveillance programs, there are serious policy concerns intrinsic to government collection of user-generated ISP data. Collecting the content of an individual's Internet communications—a practice sanctioned by Section 702—is a marked imposition on privacy, as we generally assume that the content of our emails and other messages is only being read by the persons with whom we are communicating.[225] But customer data held by ISPs also includes "non-content" information that the user may not realize she is generating, and this data may reveal information even more sensitive than the content itself.[226] Location information, and other kinds of "communicative metadata,"[227] can reveal enormously sensitive aspects of an individual's behavior, including the people she talks to, the items she purchases, and the places she visits.[228] Aggregation of information can allow for an even more complex picture of an individual, as discrete data points form a mosaic

224 PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMMC'NS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD 148–49 (2013) [hereinafter REVIEW GRP. REPORT], *available at* http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

225 Of course, given the surveillance programs discussed in this Note, this assumption may be wrong. Moreover, ISPs scan the content of our communications for their own purposes, or to better comply with law enforcement. *See, e.g.*, Hayley Tsukayama, *How Closely Is Google Really Reading Your E-mail?*, WASH. POST SWITCH BLOG (Aug. 4, 2014), http://www.washingtonpost.com/blogs/the-switch/wp/2014/08/04/how-closely-is-google-really-reading-your-e-mail ("Google routinely uses software to scan the contents of e-mails, including images, to feed its advertising and to identify malware.").

226 *See, e.g.*, ACLU METADATA REPORT, *supra* note 9, at 7; Elizabeth Dwoskin, *In a Single Tweet, as Many Pieces of Metadata as There Are Characters*, WALL ST. J. DIGITS BLOG (June 6, 2014, 4:46 PM), http://blogs.wsj.com/digits/2014/06/06/in-a-single-tweet-as-many-pieces-of-metadata-as-there-are-characters; Alex Hern, *Phone Call Metadata Does Betray Sensitive Details About Your Life—Study*, GUARDIAN (Mar. 13, 2014, 7:08 AM), http://www.theguardian.com/technology/2014/mar/13/phone-call-metadata-does-betray-sensitive-details-about-your-life-study.

227 "Communicative metadata" are forms of metadata that "are inherently communicative, directly revealing potentially intimate details about an individual without requiring any extra effort." ACLU METADATA REPORT, *supra* note 9, at 5.

228 *Id.*

of her life.[229] As Former NSA General Counsel Stewart Baker has said, metadata can convey "everything" about a person's life.[230]

In spite of the individual privacy interests at stake, and questions as to the legality of some Section 702 programs, there are obstacles to mounting a legal challenge. Foreign targets of these programs likely cannot successfully assert Fourth Amendment rights,[231] and U.S. persons whose information may be gathered "incidentally"[232] under the program may not have standing[233] to challenge the constitutionality of the program.[234] Moreover, even if an individual could establish standing, she may not have a constitutional right to privacy in much of the information collected by the government due to the third-party doctrine—as the user has voluntarily transmitted the information to the ISP[235]—and the non-contents doctrines—as the government is interested in collecting metadata.[236] Corporations, by contrast, may be

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229 *Id.* at 6.

230 *Former CIA Director: 'We Kill People Based on Metadata,'* RT (May 13, 2014, 10:11 PM), http://rt.com/usa/158460-cia-director-metadata-kill-people ("[M]etadata absolutely tells you everything about somebody's life. If you have enough metadata, you don't really need content." (internal quotation marks omitted)). Former Director of National Intelligence, General Michael Hayden agreed, adding, "[w]e kill people based on metadata." *Id.* (internal quotation marks omitted).

231 Foreign nationals located outside of the United States are most likely not entitled to Fourth Amendment rights in this context. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 274–75 (1990) (rejecting Fourth Amendment claim of foreign national searched while residing outside of the country); Donohue, *supra* note 9 ("[T]he Supreme Court has held that the Fourth Amendment does not protect foreigners from searches conducted abroad.").

232 FISA Hearing, *supra* note 211, at 3 ("To the extent the program captures information pertaining to U.S. citizens, such interception can only be incidental, and the handling of such information is governed by court-approved minimization procedures.").

233 Standing is a constitutional doctrine that requires a plaintiff to establish that he has suffered an injury, that the defendant was the cause of the injury, and that a favorable disposition of the case can redress the plaintiff's injury. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

234 This has been a stumbling block to challenges to government surveillance conducted pursuant to Section 702. *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1142–43 (2013) (human rights organization lacked Article III standing to mount constitutional challenge to § 1881(a) since injury was "speculative" and not "fairly traceable" to challenged section).

235 James Cole, a witness from the Department of Justice, testified before the House Judiciary Committee as to his belief that "People generally do not [have a legitimate expectation of privacy] when [records] are in third-party hands because other people already have them. So the expectation of privacy has been severely undermined." FISA Hearing, *supra* note 211, at 26 (testimony of James Cole).

236 Mr. Cole conceded the difficulties of the content–non-content distinction, suggesting instead that the nature of information forms a "continuum" between these two categories. *Id.* at 63 ("I think there is metadata that was described by the court in Smith v. Maryland, which is the telephone records that we have been talking about today. . . . There is content, which is the actual—the conversations themselves that people have, and there are any number of things that may fall in between those, and it is not just a third category. It is probably a continuum."). Although he was testifying about the telephony metadata collection program rather than the Section 702 programs, Mr. Cole's position represents the Federal Government's position on the

able to resist warrantless government review of records containing sensitive information by asserting their own rights, rights predicated on their own interests.

B. *Corporations Have Constitutional Privacy Rights in Commercially Sensitive Data*

The only consistent basis for denying a corporation constitutional rights has been the visitorial power of the government:[237] primarily the right to regulate industry for public welfare.[238] Outside of the context of regulation, constitutional rights generally extend to a corporation as they would to a natural person[239] except where a corporation is found to be so different from a natural person in terms of its interests and abilities that ascribing the right would be absurd.[240] While a corporation may not be able to successfully assert "personal" privacy interests due to obvious differences from natural persons,[241] the corporate form

constitutional permissibility of warrantless surveillance of non-content records. President Obama characterized the Section 702 and telephony metadata collection programs as entailing "modest encroachments on privacy," and emphasized that the content of American's communications were not being surveilled, assuring the American public, "Nobody is listening to your telephone calls . . . . That's not what this program's about." Peter Baker & David E. Sanger, *Obama Defends Mining of Data*, N.Y. TIMES, June 7, 2013, at A11 (internal quotation marks omitted).

237 *See, e.g.*, G. M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977) ("The Court . . . has recognized that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context.").

238 *See* discussion *supra* Part II.B.

239 As observed by the Third Circuit, "the Supreme Court generally has considered issues of the application of constitutional rights to corporations in negative terms: asking whether corporate status should defeat an otherwise valid claim of right." United States v. Rad-O-Lite of Phila., Inc., 612 F.2d 740, 743 (3d Cir. 1979).

240 For example, in the context of the Fifth Amendment right against self-incrimination, the Court seemed to imply that ascribing the right would lead to an absurd result, since allowing a corporate officer to assert a right against self-incrimination on the corporation's behalf would seem to offend logic. Hale v. Henkel, 201 U.S. 43, 69–70 (1906) ("The right of a person under the 5th Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. . . . The amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*; and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation."). Some, including former Supreme Court justices, have argued that corporations have been granted constitutional rights even when the corporate form makes the grant inappropriate. *See* Citizens United v. FEC, 558 U.S. 310, 394 (2010) (Stevens, J., concurring in part and dissenting in part) ("In the context of election to public office, the distinction between corporate and human speakers is significant. . . . The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process.").

241 The differences between a corporation and an individual are often intuitive. Indeed, several Supreme Court justices have alluded to these intuited differences. *See, e.g.*, FCC v. AT&T, Inc., 131 S. Ct. 1177, 1185 (2011) (rejecting the argument that the corporation had a statutory right to

arguably heightens the interest in preventing economic loss if the purpose of incorporation was to create a business organization.[242]

Thus, even if corporations do not have a cognizable interest in the information itself,[243] ISPs have an interest in excluding the government from accessing user information because such access can impact their bottom lines.[244] ISPs ask their users to surrender much personal information, and are entrusted with facilitating the personal communications of their users.[245] Therefore, it is crucial for these companies that they are trusted to keep this information confidential—otherwise they cannot continue eliciting disclosure.[246] American

"personal privacy" and quipping, "[w]e trust that AT & T will not take it personally"); *Citizens United*, 558 U.S. at 466 (Stevens, J., concurring in part and dissenting in part) (contending that corporations are different from natural persons in that they "have no consciences, no beliefs, no feelings, no thoughts, no desires").

242 *See, e.g.*, Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 263 (2014) (noting that "business corporations are formed for economic purposes").

243 It would be difficult to assert that the corporation is harmed on the basis of the information being sensitive as to the corporation, unless the information constitutes trade secrets that could be exposed to nongovernmental actors. *See* NIMMER, *supra* note 90 ("Where business rights of privacy arise, there is a close nexus between the issue of privacy and the issue of whether there is a right to protect trade secret or confidential information.").

244 According to Daniel Castro, a senior analyst for the Information Technology and Innovation Foundation, American technology companies are at risk of being banned from certain countries and facing higher costs of business due to the revelation of the PRISM program. Gjelten, *supra* note 5. Castro believes that revelations about the government spying "will be potentially devastating." *Id.* The President's Review Group on Intelligence and Communications Technologies also envisioned economic fallout resulting from U.S. surveillance policies. REVIEW GRP. REPORT, *supra* note 224, at 155 ("If we are too aggressive in our surveillance policies under section 702, we might trigger serious economic repercussions for American businesses, which might lose their share of the world's communications market because of a growing distrust of their capacity to guarantee the privacy of their international users. Recent disclosures have generated considerable concern along these lines."); *see also id.* at 212 (citing two studies estimating large sales decreases for American cloud computing companies due to media coverage of the surveillance programs).

245 *See, e.g.*, *Privacy Policy*, GOOGLE, http://www.google.com/intl/en/policies/privacy (last visited May 21, 2015) ("We collect information about the services that you use and how you use them, like when you watch a video on YouTube, visit a website that uses our advertising services, or you view and interact with our ads and content."). The presumably noncomprehensive list of information Google collects includes device information, such as a user's operating system and hardware; log information, such as search queries and IP addresses; location information based on WiFi access points and cellular towers; unique application numbers; local storage; and cookies and anonymous identifiers. *Id.*

246 *See, e.g.*, Gonzales v. Google, Inc., 234 F.R.D. 674, 684 (N.D. Cal. 2006) ("The expectation of privacy by some Google users may not be reasonable, but may nonetheless have an appreciable impact on the way in which Google is perceived, and consequently the frequency with which users use Google."); WESTIN, *supra* note 91, at 50 ("Normally [the issue of personal data] is discussed as a matter of individual rather than of organizational privacy . . . . But organizations also need to protect such information against many of the claims to access made by . . . public agencies if they are to continue to get frank and full information from reporting sources. This fact makes confidential treatment of the data an independent organizational need, not an assertion of privacy solely on behalf of those furnishing the information.").

technology companies that are known to have been the targets of government surveillance are at risk of losing business,[247] particularly from overseas customers who may be the direct targets of government surveillance.[248] There is also a risk that government surveillance could cause a corporation to breach its privacy agreements with customers[249] or its contracts with business partners, and that this could result in liability for the company.[250] Even if a corporation's constitutional right to privacy is more limited than that of an individual,[251] corporations have constitutional rights to privacy in the their commercial property,[252] and in the information contained in records about their customers.[253]

Corporations should be able to protect sensitive customer information from warrantless government surveillance not only because it affects corporate interests,[254] but also because, in certain cases, corporations are in the best position to champion the public's interest in controlling disclosure of their information, both for doctrinal and practical reasons.[255] When corporations are denied constitutional rights, it is usually on the basis of public interest.[256] The interests of ISPs that

247 Canadian data centers are courting overseas customers who are concerned about the U.S. government's spying on data networks managed by American corporations. Hugo Miller, *Outrage over NSA Spying Sends Data Clients to Canada*, VANCOUVER SUN, Jan. 11, 2014, at C8.

248 Gjelten, *supra* note 5.

249 *See, e.g.*, *Privacy Policy*, *supra* note 245 ("We will ask for your consent before using information for a purpose other than those that are set out in this Privacy Policy."). Google disclaims that it "will share personal information with companies, organizations or individuals outside of Google if we have a good-faith belief that access, use, preservation or disclosure of the information is reasonably necessary to: meet any applicable law, regulation, legal process or enforceable governmental request," and also claims to "guard against unauthorized access to systems." *Id.*

250 The revelation of surveillance programs has already exposed the targeted companies to legal liability—all nine of the companies whose servers have supposedly been accessed under the PRISM program were listed as defendants in a class action suit brought by the founder of Freedom Watch and others. Amended Complaint, Klayman v. Obama, Civ. No. 13–0881 (RJL) (D.D.C. Dec. 16, 2013), 2013 WL 6579813.

251 *See* Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 65 (1974) ("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." (citations omitted)); NIMMER, *supra* note 90 ("[N]o constitutional right of privacy exists in most settings for entities as compared to individuals . . . .").

252 *See, e.g.*, Dow Chem. Co. v. United States, 476 U.S. 227, 235 (1986) ("Plainly a business establishment or an industrial or commercial facility enjoys certain protections under the Fourth Amendment." (citing Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); See v. City of Seattle, 387 U.S. 541 (1967))).

253 *See* Patel v. City of Los Angeles, 738 F.3d 1058 (9th Cir. 2013), *cert. granted*, 135 S. Ct. 400 (Oct. 20, 2014) (No. 13–1175).

254 Gjelten, *supra* note 5 (reporting on financial impact of revelation of the PRISM program).

255 *See supra* notes 231–36 and accompanying text.

256 *See, e.g.*, Hale v. Henkel, 201 U.S. 43, 74–75 (1906) ("[T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its

seek to shield sensitive user information from government surveillance, corporations' interests are substantially aligned with the interests of their customers,[257] and the extension of privacy rights to such corporations serves rather than impedes a public interest—preventing potential governmental overreach.[258]

C. *Corporate Privacy Rights and Section 702*

Regardless of the contours of the corporate personality, to the extent that a corporation has its own existence, that existence is predicated on the ability to protect property, business interests, and obligations to stakeholders,[259] interests the Supreme Court has long recognized as constitutionally cognizable.[260]

Section 702 programs constitute an intrusion into both the privacy of the corporations they affect and the individuals they target. While the government's interest in national security is undeniable,[261] when balanced against the constitutional right to privacy, security probably does not, for constitutional purposes, rationalize the far-reaching data

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charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation.").

257 *Cf.* Pollman, *supra* note 31, at 74 ("[W]hile . . . [customers'] 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.").

258 Of course, national security is also a public interest, but without extending a right of privacy to corporations, there may be no party to advocate for privacy interests. *Id.* at 76 ("[A]ccording 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.").

259 The term "stakeholders," as this Note uses it here, includes the officers and employees who make up the corporation, shareholders who invest in the corporation, and customers who use the services of the corporation. *Cf.* Pollman, *supra* note 31, at 64–77.

260 Cases dealing with constitutional protection for corporate property include Donovan v. Dewey, 452 U.S. 594, 598 (1981) (noting that private commercial property is subject to Fourth Amendment protections); Hale v. Henkel, 201 U.S. 43, 76 (1906) ("In organizing itself as a collective body [a corporation] waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation."); Noble v. Union River Logging R.R. Co., 147 U.S. 165, 176 (1893) (a corporation cannot be deprived of its property without due process of law); and Van Allen v. Assessors, 70 U.S. 573, 584 (1865) (characterizing it as "familiar law" that a corporation "can deal with the corporate property as absolutely as a private individual can deal with his own"). For an early case also specifically recognizing "business interests," such as attracting clients, see Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535–36 (1925) (recognizing that corporations enjoy Fourteenth Amendment protection for "business and property," and characterizing their interest in preventing "arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property" as "clear and immediate").

261 *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (noting that "terrorism or other special circumstances" might compel "heightened deference [for] the judgments of the political branches with respect to matters of national security").

mining that Section 702 collection entails.[262] Although Section 702 collection targets foreign nationals,[263] it also actively collects information from U.S. individuals and ISPs in a way that is more than "incidental."[264] The Court has said that the government cannot conduct warrantless surveillance of domestic targets in the name of national security without prior judicial review.[265] Section 702 programs do not require judicial preclearance, and thus fall below an established baseline for Fourth Amendment protections.[266]

Just as the right to privacy can protect interests considered fundamental for individuals, such as personal autonomy and dignity,[267] a right to privacy for corporations can protect the core interests of a business corporation. Section 702 surveillance programs impair the property and contract interests of its incidental corporate targets.[268] For the reasons discussed in previous Sections, a corporation has a constitutionally cognizable privacy interest in at least some circumstances.[269] Extending a constitutional right to privacy is appropriate because this kind of surveillance can hamper a corporation's ability to carry out the functions for which it was formed.[270] A corporation's right to privacy in the sensitive records of its customers should be balanced against the government's interest, and should be curtailed only as a result of a recognized exception to the

262 *Cf.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (finding the legitimate interest of the government in protecting access to contraception). Although the analysis in *Hobby Lobby* was predicated on the Religious Freedom Restoration Act of 1993, not the Constitution, that statute required the Court to balance the government interest against the burden on the plaintiff-corporations, much as a constitutional analysis would be conducted. *See id.*

263 *See* 50 U.S.C. § 1881a (2012).

264 *See* REVIEW GRP. REPORT, *supra* note 224, at 148–49 (opining that current procedures do "not adequately protect the legitimate privacy interests of United States persons when their communications are *incidentally* acquired under section 702" and "incidental interception is significantly more likely to occur when the interception takes place under section 702 than in other circumstances").

265 *See* United States v. U.S. Dist. Ct. for the E.D. Mich. (*Keith*), 407 U.S. 297, 321 (1972) ("[W]e conclude that the Government's [domestic national security] concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance.").

266 *Id.* at 317 ("The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to . . . overlook potential invasions of privacy and protected speech.").

267 *See, e.g.*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992) (recognizing that the constitutional right to privacy shields "choices central to personal dignity and autonomy").

268 *See supra* notes 244–50 and accompanying text.

269 *See, e.g.*, *supra* Part III.B.

270 *See, e.g.*, Heyman, *supra* note 242 (noting that "business corporations are formed for economic purposes").

Fourth Amendment.[271] Section 702 programs likely fail this balancing test: there is potential and demonstrable injury as a result of warrantless government surveillance programs,[272] and the government interest advanced by these programs is an ill-defined and intangible interest in national security.[273] Nor do these programs fall into a recognized exception to the Fourth Amendment: a special needs search ought not be justified by the government's need for "foreign intelligence information" because this term is both broad and vague.[274]

Finally, corporations might also be able to assert a privacy interest based on an independent right to nondisclosure of private information as declared in *Whalen* and *Nixon*.[275] However, in the context of the Section 702 programs, this argument has several potentially fatal flaws. First, the right itself is tenuous: the Supreme Court has identified it, but has never protected an interest based on this right,[276] and circuit courts diverge as to the breadth of the right.[277] A second stumbling block is the

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271 Katz v. United States, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (footnote omitted)).

272 *See supra* notes 244–50 and accompanying text.

273 *See supra* notes 265–66 and accompanying text.

274 *See* FISA Hearing, *supra* note 211, at 96 (prepared statement of Jameel Jaffer, American Civil Liberties Union) ("[Section 702] allows the government to conduct dragnet surveillance if a significant purpose of the surveillance is to gather 'foreign intelligence information.' . . . [T]he phrase 'foreign intelligence information' has always been defined extremely broadly to include not only information about terrorism but also information about intelligence activities, the national defense, and even the 'foreign affairs of the United States.'"); REVIEW GRP. REPORT, *supra* note 224, at 149 ("[T]he very concept of information of 'foreign intelligence value' has a degree of vagueness and can easily lead to the preservation of private information about even known U.S. persons whose communications are incidentally intercepted in the course of a legal section 702 interception."); *cf.* Paton v. La Prade, 469 F. Supp. 773, 782 (D.N.J. 1978) (invalidating a mail cover statute because "[n]ational security as a basis for the mail cover is unconstitutionally vague and overbroad").

275 *See generally* Lindsay, *supra* note 115.

276 Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 465 (1977); Whalen v. Roe, 429 U.S. 589 (1977).

277 The Sixth Circuit has narrowly construed the right to informational privacy as protecting only fundamental liberty interests. *See* Bloch v. Ribar, 156 F.3d 673, 683–84 (6th Cir. 1998) ("Unlike many other circuits, this court has narrowly construed the holdings of *Whalen* and *Nixon* to extend the right to informational privacy only to interests that implicate a fundamental liberty interest."). The Eighth Circuit has held that the constitutional right to informational privacy is violated when disclosure results in "shocking degradation," "egregious humiliation," or "a flagrant breech [sic] of a pledge of confidentiality which was instrumental in obtaining the personal information." Alexander v. Peffer, 993 F.2d 1348, 1350 (8th Cir. 1993). The Fifth Circuit has construed the right of informational privacy as protecting against disclosure of personal information, *unless* a legitimate state interest outweighs that right. *See* Fadjo v. Coon, 633 F.2d 1172, 1176 (5th Cir. 1981) ("An intrusion into the interest in avoiding disclosure of personal information will thus only be upheld when the government demonstrates a legitimate state interest which is found to outweigh the threat to the plaintiff's privacy interest."). *Id.* The Tenth Circuit also balances the right of nondisclosure against the interests of the state. *See* F.E.R. v.

fact that Section 702 surveillance would probably not be considered "disclosure" of the kind that would be cognizable, since in both *Whalen* and *Nixon*, the Court found that the respective invasions of privacy were outweighed by the government's interest because the information was not subject to public disclosure.[278] The third potential issue in squaring this doctrine with warrantless government surveillance of customer data is that a corporation probably does not have enough of an independent "personal" interest in the confidential information of its customers to assert the right to nondisclosure.[279] In this context, a corporation's right of privacy rests more securely on Fourth Amendment principles than it does on a tenuous right to nondisclosure of personal information.[280]

CONCLUSION

The interests protected by the right to privacy are multifaceted, and not limited to protecting the emotional security of individual human beings; privacy also shields interests related to property, autonomy, and confidentiality, all of which are of profound importance to corporations. Aside from the corporation's stand-alone interest in protecting pecuniary interests, a corporate right to privacy in the personal records of customers vindicates a public interest in ensuring that government surveillance is bounded by the Constitution. Corporations are better situated to assert a right to privacy in the context of Section 702 programs, in part because corporations, not the targeted users, are the custodians of user data, and in part because of the evolution of Fourth Amendment doctrine. Thus, recognizing a corporate right to privacy in sensitive customer records serves the purposes of protecting the corporation's stand-alone interests, acting as a check on government

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Valdez, 58 F.3d 1530, 1535 (10th Cir. 1995). The Tenth Circuit's inquiry into whether there has been a violation of the "constitutional right to privacy in preventing disclosure by the government of personal matters" consists of determining: (1) whether the party had a legitimate expectation of privacy in the information; "(2) whether disclosure of this information served a compelling state interest, and (3) whether the state could have achieved its objectives in a less intrusive manner." *Id.*

278 *Nixon*, 433 U.S. at 465 (finding that archivists' history of discretion weighed against recognizing the president's right to nondisclosure); *Whalen*, 429 U.S. at 601–02 (finding that the disclosures required to a small number of Department of Health employees did not "amount to an impermissible invasion of privacy" where there was no public disclosure of the information). *But see* Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 576 (1995) ("[T]he interest in nondisclosure has been held [by lower courts] to apply to the government's request for information regardless of whether the public will ever gain access to the personal data.").

279 *See* FCC v. AT&T, Inc., 131 S. Ct. 1177 (2011).

280 Corporations have a well-established right against unreasonable searches and seizures. *See* discussion *supra* Part II.B.

surveillance, and protecting the more personal and emotional aspects of the right to privacy of the customers.