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# Law Enforcement's Lochner

Miriam H. Baer

## Article

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**Miriam H. Baer**†

## INTRODUCTION

One of the most highly anticipated decisions of the Supreme Court's October 2017 term, *Carpenter v. United States*,[1] revolved around an almost universally reviled piece of jurisprudence, the Fourth Amendment's third-party doctrine. Under this doctrine, individuals possess no reasonable expectation of privacy in the information they divulge to third parties.[2] As a result, the government can

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† Professor of Law, Brooklyn Law School. AB, Princeton University and JD, Harvard Law School. Assistant United States Attorney for the Southern District of New York, 1999–2004. This Article has benefitted greatly from the insights of Bill Araiza, Susan Bandes, Samuel Buell, Michael Cahill, Bennett Capers, Bryan Choi, Brandon Garrett, Joel Gora, Edward Janger, Andrew Jennings, Orin Kerr, Justin Murray, James Nelson, William Ortman, James Park, Frank Pasquale, Elizabeth Pollman, Sabeel Rahman, Daniel Richman, Alice Ristroph, Veronica Root Martinez, Matthew Tokson, Nelson Tebbe, Alan Trammell, Jenia Turner, Rory Van Loo, David Zaring, Verity Winship, and participants in Brooklyn Law School's Summer Faculty Workshop (2019); Crimfest! Conference (2019); NYC Criminal Law Colloquium (2020); National Business Law Scholar's Conference (2020); Corporate and Securities Litigation Summer Workshop (2020); and the Washington & Lee University School of Law Faculty Workshop (2020). Excellent research assistance was provided by Torie Rose DeGhett, Patrick Lin, and Samuel Coffin. The Author also thanks Brooklyn Law School, whose summer research funding supported the research and drafting of this Article. 

1. 138 S. Ct. 2206 (2018).

2. A person has no "legitimate expectation of privacy in information he voluntarily turns over to third parties." Smith v. Maryland, 442 U.S. 735, 743–44 (1979); *see also* United States v. Miller, 425 U.S. 435 (1976) (finding no reasonable expectation of privacy in account holder's bank records). The third-party doctrine is part of the larger framework established by Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347, 361 (1967). Harlan described a two-pronged test that asked first whether the individual demonstrated a subjective expectation of privacy and then queried whether that expectation was one that "society was prepared to recognize as 'reasonable.'" *Id.* Scholars have strongly criticized the third-party doctrine. *See, e.g.*, Neil Richards, *The Third-Party Doctrine and the Future of the Cloud*, 94 WASH. U. L. REV. 1441 (2017); Lucas Issacharoff & Kyle Wirshba, *Restoring Reason to the Third Party Doctrine*, 100 MINN. L. REV. 985 (2016); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth*

obtain this information and engage in substantial surveillance activity, largely unconstrained by the Constitution.[3] Government enforcers can easily determine where people eat, how they pay their bills, and many other intimate facts of life, all with the aid of a grand jury or administrative subpoena.[4]

This ease-of-access era may finally be nearing its end. In 2018, the Supreme Court announced in *Carpenter v. United States* that the government engaged in a Fourth Amendment "search" when it obtained at least seven days' worth of cell site location information (CSLI) from a cellular telephone provider's GPS satellite system.[5] Among the reasons this activity constituted a search was that the government's surveillance proved too broad and too "sweeping" to be left solely to the executive branch's discretion.[6] Since the Fourth Amendment presumptively requires a judicially approved search warrant for all searches,[7] *Carpenter*'s holding imposes a costly obligation on government enforcement agencies seeking CSLI.[8]

On its face, *Carpenter* narrowly affects only those investigations that rely heavily on cell-site or similar new-technology surveillance evidence.[9] It does not apply in emergencies[10] or to so-called

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*Amendment Privacy*, 75 S. CAL. L. REV. 1083 (2002). Professor Orin Kerr remains one of the doctrine's few defenders. *See* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009).

3. *See, e.g.*, *Katz*, 389 U.S. at 351 (explaining that the Fourth Amendment does not protect that which a person "knowingly exposes to the public").

4. United States v. Jones, 565 U.S. 400, 413–18 (2012) (Sotomayor, J., concurring).

5. *Carpenter*, 138 S. Ct. at 2215 (distinguishing technology that facilitates "rudimentary tracking" of targets and "more sweeping modes of surveillance").

6. *See id.*; *id.* at 2216 (describing CSLI as "detailed, encyclopedic, and effortlessly compiled").

7. *See Katz*, 389 U.S. at 357 (holding that searches conducted without warrants are per se unreasonable, "subject only to a few specifically established and well delineated exceptions").

8. Prior to *Carpenter*, an investigator seeking CSLI would file with a magistrate an attestation containing "specific and articulable facts" that the requested information was "relevant and material" to an ongoing investigation, pursuant to 18 U.S.C. § 2703(d). *See* Susan Freiwald & Stephen Wm. Smith, *The* Carpenter *Chronicle: A Near-Perfect Surveillance*, 132 HARV. L. REV. 205, 208 (2018) (explaining that § 2703(d)'s "'specific and articulable facts' threshold" was "substantially less demanding than that required for a probable cause warrant").

9. *See, e.g.*, Commonwealth v. McCarthy, 142 N.E.3d 1090, 1099 (Mass. 2020) (applying *Carpenter*'s teachings to "new surveillance technologies").

10. *Carpenter*, 138 S. Ct. at 2223 ("[T]he rule we set forth does not limit [the police's] ability to respond to an ongoing emergency.").

conventional law enforcement practices.[11] To the prosecutors and investigators who focus on corporate[12] and white-collar[13] crime—offenses whose investigations rest upon the fusty old technologies of subpoenas, audits, and interrogations—*Carpenter*'s relevance may seem quite the stretch.[14]

To *Carpenter*'s loudest dissenters, however, such complacency is grievously misplaced.[15] In their respective dissents, Justices Kennedy and Alito contend that *Carpenter* is a major paradigm shift and that it augurs the end of modern-day law enforcement as we know it. The now-retired Justice Kennedy cautions that the Court's new approach creates "serious risk in serious cases."[16] Justice Alito laments that the case and its likely progeny will jeopardize "many legitimate and valuable investigative [law enforcement] practices."[17] Both dissenting opinions express the fear that *Carpenter*'s mode of analysis will eventually impede future white-collar and regulatory investigations.[18]

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11. *Id.* at 2220 ("We do not . . . call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information.").

12. Federal regulatory statutes routinely include criminal provisions for willful violations of regulatory laws. *See* Eric Biber, *Law in the Anthropocene Epoch*, 106 GEO. L.J. 1, 55 (2017); Harry First, *Business Crime and the Public Interest: Lawyers, Legislators, and the Administrative State*, 2 U.C. IRVINE L. REV. 871, 881 (2012).

13. Although criminologists sometimes employ the "white collar" term to signify a particular class of offenders, *see, e.g.*, Sally S. Simpson, *Reimagining Sutherland 80 Years After White-Collar Crime*, 57 CRIMINOLOGY 189, 189–90 (2019), practitioners and legal scholars frequently use it to denote a non-violent offense involving deceit. *See, e.g.*, Andrew Verstein, *Violent White-Collar Crime*, 49 WAKE FOREST L. REV. 873, 878 (2014) (citing the Department of Justice's definition).

14. One reading of the majority opinion is that CSLI is so "different" from other records that it necessitates special treatment to prevent the government's abuse of power. *See Carpenter*, 138 S. Ct. at 2222 ("CSLI is an entirely different species of business record—something that implicates basic Fourth Amendment concerns about arbitrary government power much more directly than corporate tax or payroll ledgers."). A few sentences later, the Court assures its readers that subpoenas will remain an available tool "in the overwhelming majority of investigations." *Id.*

15. *Carpenter*'s celebrants have advanced equally strong arguments in favor of its importance. *See* Paul Ohm, *The Many Revolutions of* Carpenter, 32 HARV. J.L. & TECH. 357, 358 (2019) (declaring the case a "landmark opinion" and a "milestone for the protection of privacy").

16. *Carpenter*, 138 S. Ct. at 2223 (Kennedy, J., dissenting).

17. *Id.* at 2247 (Alito, J., dissenting).

18. "Must every grand jury subpoena *duces tecum* be supported by probable cause? If so, investigations of terrorism, political corruption, white-collar crime, and many other offenses will be stymied." *Id.* "[B]y invalidating the Government's use of court-approved compulsory process in this case, the Court calls into question the subpoena practices of federal and state grand juries, legislatures, and other investigative bodies, as Justice ALITO's opinion explains." *Id.* at 2234 (Kennedy, J., dissenting).

Should government enforcers be alarmed? To answer this question, one must accept two truisms. The first is that enforcement complements regulation; without it, legal commands become toothless.[19] The second is that enforcement relies heavily on information.[20] Absent broad and easy access to relevant information, regulators and prosecutors cannot identify future, current, or potential violations. Thus, Justices Kennedy and Alito's concerns may be prescient, particularly if *Carpenter* signals a change in the Court's treatment of doctrines and enforcement practices long considered settled. Moreover, should *Carpenter* be joined by *additional* changes in constitutional law (which I describe in greater detail below), white-collar and regulatory enforcers may have *very* good reason for concern.

An understudied group of constitutional procedural doctrines have long served as the foundation for regulatory, corporate, and white-collar enforcement. These rules sort themselves into three basic categories:

- *Internal investigations:* The private search and state action doctrines treat a business entity's internal investigation as "private" and "not state action" and therefore outside the purview of the Fourth and Fifth Amendments;[21]

- *Grand jury and administrative subpoenas:* The law of administrative and grand jury subpoenas (i.e., "formal demand[s] for tangible items") permits the government to pursue corporate targets with only the barest of constitutional constraints;[22] and

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Justices Thomas and Gorsuch also dissented, but on somewhat different grounds. Their opinions do not express the same degree of concern regarding the government's future ability to investigate and enforce the law. *See id.* at 2235 (Thomas, J., dissenting); *id.* at 2261 (Gorsuch, J., dissenting).

19. *See, e.g.*, Leandra Lederman & Ted Sichelman, *Enforcement as Substance in Tax Compliance*, 70 WASH. & LEE L. REV. 1679, 1681 (2013) ("An unenforced law is tantamount to no law at all.").

20. "Law enforcement, civil or criminal, depends on information." William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1029 (1995); *see also* Rory Van Loo, *The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance*, 72 VAND. L. REV. 1563, 1565 & n.1 (2019) ("Information is the 'lifeblood' of effective governance."); Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 124 (2014) ("For regulators, information is 'the fuel without which the administrative engine could not operate.'" (quoting BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 3.1 (3d ed. 1991))).

21. *See infra* Part II.A.

22. *See infra* Part II.B.

- *Corporate and collective non-persons:* The collective entity doctrine has long excluded corporations and other business entities from the Fifth Amendment's privilege against self-incrimination.[23]

These doctrines comprise the backbone of corporate and regulatory enforcement.[24] They enable enforcement personnel to serve documentary subpoenas with great ease. Moreover, they enable the government to credibly threaten corporate targets with debilitating outcomes unless those targets promptly report wrongdoing to the requisite authorities.

Two constitutional developments threaten this power. First, as *Carpenter* itself demonstrates, changes in technology have prompted the Court to revise its approach to determining what constitutes a Fourth Amendment search.[25] Doctrines once premised on a person's "reasonable" expectation of privacy and the property interests that once informed those expectations are increasingly taking greater account of how broadly and how deeply the government casts its information nets.[26] If the Court continues on this track, the degree and scope of government surveillance will eventually become the metric that matters most in deciding when a Fourth Amendment search has occurred.

Meanwhile, during roughly the same time period, the Court has substantially strengthened its support for a robust associational theory of corporate personhood, encouraging corporate defenders to

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23. *See infra* Part II.C.

24. As used here, the term "enforcement" refers to both criminal and civil proceedings. "[M]any important statutory schemes are hybrids, meaning that they are also capable of civil and criminal enforcement." Julie Rose O'Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021, 1028 (2018).

25. *See* Ohm, *supra* note 15, at 362 (citing concerns that technological improvements in corporate surveillance simultaneously increases police surveillance); Matthew Tokson, *The Normative Fourth Amendment*, 104 MINN. L. REV. 741, 777 (2019) (observing that Fourth Amendment jurisprudence "has been repeatedly destabilized by technological and social change"); Alan Z. Rozenshtein, *Surveillance Intermediaries*, 70 STAN. L. REV. 99, 105 (2018) (contrasting the ways in which technology has improved government surveillance while placing additional pressures on government institutions).

26. *See infra* notes 43–66 and accompanying text; *see also* Freiwald & Smith, *supra* note 8, at 219–22 (laying out factors, such as the intrusiveness and continuous nature of the surveillance, that contributed to the majority's conclusion in *Carpenter* that obtaining seven days' worth of CSLI constituted a Fourth Amendment search).

forge increasingly expansive claims on corporate constitutional rights.[27] This expanded vision of constitutional corporate liberty—already a strong focus of First Amendment scholarship—sets forth an attractive mechanism by which corporate defendants might persuade the Court to revisit doctrines that have long excluded[28] corporations from the protections of the Fifth Amendment's privilege against self-incrimination.[29]

Thus, at the very moment *personal* privacy rights have acquired renewed respect in the Fourth Amendment canon, *corporate* personhood rights have grown more robust. As these two areas of

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27. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (affirming and strengthening corporations' First Amendment rights of speech and corresponding rights to participate directly in elections); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (recognizing religious beliefs maintained by a closely held for-profit corporation seeking to invoke protections under the Religious Freedom Restoration Act). On the ways in which these cases represent at least a partial break from previous personhood cases and imply changes in the allocation of federal and state power over corporations, see, for example, Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 665 (2016), which argues that the Court's First Amendment opinions have shifted the treatment of corporations from singular entities to "associations" of participants.

An "associational" approach to personhood analyzes the entity as an association or aggregate of individuals whose individual rights are implicated by the entity's ability to exercise such rights. For an overview of competing treatments of corporate personhood and the ways in which corporate constitutional rights have mapped onto these theories, see Garrett, *supra* note 20, at 107–10. *See also infra* Part I.B.

28. "Certain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals." First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978).

29. Corporate defense attorneys and commentators have already recognized this potential. "[I]t is time to revisit the issue of a corporation's right against compelled self-incrimination . . . ." Mark Rochon, Addy R. Schmitt & Ian A. Herbert, *Is It Time To Revisit the Corporate Privilege Against Compelled Self-Incrimination?*, CHAMPION, Sept./Oct. 2019, at 50, 50.

At the same time, defense attorneys have separately homed in on *Carpenter*'s potential for restoring self-incrimination claims under the Fifth Amendment. Michael Price & Zach Simonetti, *Defending Device Decryption Cases*, CHAMPION, July 2019, at 42, 46 (arguing that in the same way *Carpenter* treats "digital" information differently, so too might courts create an exception for digital information in regard to the foregone conclusion doctrine).

For additional scholarly commentary, see Robert E. Wagner, *Miranda, Inc.: Corporations and the Right To Remain Silent*, 11 VA. L. & BUS. REV. 499, 514 (2017), which observes that *Citizens United* "may force recognition of Fifth Amendment rights for corporations that have previously been excluded"; and Christopher Slobogin, Citizens United *and Corporate Human Crime*, 41 STETSON L. REV. 127, 127 (2011), which acknowledges that *Citizens United* "could bolster the case for expanding corporate criminal procedure rights."

constitutional law evolve, it is more than sheer fantasy to imagine them converging in a manner that profoundly impacts the government's enforcement abilities.

What happens when the ground rules of corporate constitutional procedure give way? This Article sets out to answer this question. Part I analyzes the doctrinal headwinds that threaten the government's corporate enforcement practices. Part II examines with a critical eye the legal doctrines that best support the government's exercise of its investigative might. Part III projects a world in which these enforcement-friendly doctrines erode and forecasts the coping mechanisms enforcement agencies would be most apt to adopt. Part IV closes by analyzing this landscape through the lens of *Lochner v. New York*, the famous 1905 Supreme Court case that temporarily disabled the legislative enactment of welfare and employment laws at the turn of the twentieth century.[30]

*Lochner* remains a shorthand for many ills. For the scholars who invoke it today, it represents the private sector's successful exploitation of constitutional law to undercut government regulation and oversight.[31] With the judiciary's help, new-*Lochner* critics argue, corporations and their allies have employed constitutional rights to evade democratically imposed commitments.[32]

Numerous scholars have analyzed Lochnerism's rise in the First Amendment context.[33] Drawing on this literature, Part IV explains how and why "law enforcement's *Lochner*" echoes several of contemporary Lochnerism's worst vices, while appearing comparatively tame in other respects. Like its earlier manifestations, this law enforcement version of Lochnerism features the private sector's weaponization of constitutional rights. As such, it enables private actors to avoid accountability and oversight.[34] It accomplishes these ends by defanging the administrative state of its key enforcement tools.

Unlike conventional Lochnerism, however, the law enforcement version appears less absolute, less threatening, and less ensconced in

30. 198 U.S. 45 (1905); *see infra* Part IV.

31. *See, e.g.*, Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015).

32. *See infra* Part IV.

33. *See infra* Part IV.A.

34. *See, e.g.*, Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 337 (2017) (describing First Amendment Lochnerism as driven by fears that corporations will "exploit[] ... the First Amendment to promote a broad deregulatory agenda"); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990).

the laissez-faire ideology that fueled the original case.[35] It leaves statutes facially intact while attracting privacy advocates' allegiance. It appears just palatable enough to avoid sustained attack and yet, will be just as difficult to dislodge once it crystallizes into precedent.

This Article's aims are threefold. The first is to explain why two separate areas of constitutional jurisprudence threaten the eventual destabilization of an equilibrium that has enabled prosecutors and regulators to collect massive amounts of information. The second is to forecast how agencies would likely behave in the wake of such a destabilization. The third is to illuminate an important yet unexpected source of Lochnerism. In the same manner scholars have repeatedly urged readers to realize *Lochner*'s potency outside its original 1905 confines, this Article seeks to provoke greater scrutiny of the unintended harms an enforcement-style *Lochner* could cause.

## I. TWO DOCTRINAL HEADWINDS

Two trends in constitutional jurisprudence have unfolded over the past decade. First, goaded by changes in technology and expansive government surveillance techniques, the Court has gradually reduced the amount of deference it has ceded to government investigators under the Fourth Amendment. Second, during roughly the same time period, the Court has reinforced the Constitution's protection of corporations as "persons" under the speech and religion clauses of the First Amendment. This Part briefly recounts each of these developments and closes with a brief overview of their broader implications.

### A. THE FADING THIRD-PARTY DOCTRINE

*Carpenter* was announced by the Court on June 22, 2018.[36] It capped a decade over which the Court had slowly begun to reverse its permissive stance on technology-enhanced investigations of crime, many of which had relied on third parties to collect and produce information about consumers, employees, and other individuals.

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35. *Lochner* and its progeny's constriction of progressive legislation arose, in part, out of a belief that courts ought not to disturb private contractual arrangements or enact regulations with redistributive aims. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 875 (1987) (explaining that *Lochner* sought to impose a "constitutional requirement of neutrality" whose focus was the "preservation of the existing distribution of wealth and entitlements under the baseline of the common law"); William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth Century Statutory Interpretation in a Nutshell*, 61 GEO. WASH. L. REV. 1731, 1733–34 (1993) (describing a conservative "nostalgic" judiciary who felt "libertarian values of the common law . . . were under assault from new regulatory statutes").

36. United States v. Carpenter, 138 S. Ct. 2206 (2018).

For decades, the Court had repeatedly rejected the notion that the government's subpoena of customer records from financial institutions, telephone companies, or other third parties constituted a search under the Fourth Amendment.[37] According to the Court, the records in those cases did not even *belong* to the customer who challenged the government's surveillance activity; rather, they belonged to the third party who had been subpoenaed.[38] Thus, a customer could not complain that the government's unsupervised collection of such records violated *her* privacy, much less her Fourth Amendment rights.

During this time period, the Court employed a threshold definitional tool: if the investigative activity at issue was "not a search," it escaped the Fourth Amendment's presumptive warrant requirement.[39] Investigative activity that was deemed "not a search" fell outside the judiciary's oversight. Moreover, the Court used the reasonable expectation of privacy test to draw the boundary between searches and nonsearches.[40] "Privacy," in turn, appeared to devolve into impressionistic discussions of assumption of risk.[41] The

37. Smith v. Maryland, 442 U.S. 735, 743–44 (1979) (permitting pen register on grounds the account-holder enjoyed no reasonable expectation of privacy in the numbers contacted by a telephone line); *see also* United States v. Miller, 425 U.S. 435 (1976) (finding no reasonable expectation of privacy in bank records). Even where the corporate recipient is a target of the investigation, subpoenas traditionally have been treated as "constructive" searches under the Fourth Amendment. *Carpenter*, 138 S. Ct. at 2252–54 (Alito, J., dissenting); *see also* Louis Michael Seidman, *The Problem with Privacy's Problem*, 93 MICH. L. REV. 1079, 1092 (1995) ("Subpoenas amount to self-searches. They involve no violence, no disruption, no public humiliation or embarrassment."); *infra* Part II.B.

38. *Miller*, 425 U.S. at 440 ("[T]he documents subpoenaed here are not respondent's 'private papers' .... Instead, these are the business records of the banks.").

39. John F. Stinneford, *The "Not a Search" Game*, 38 HARV. J.L. & PUB. POL'Y 17, 18 (2014) (arguing that ever since *Katz*, the Court has employed the "not a search" conclusion to permit government surveillance techniques); *cf.* Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 316 (2012) (describing the Court's methodology as one that begins "with the threshold question of defining a search" before it decides whether the search is reasonable or how a violation should be remedied).

40. *See* Katz v. United States, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring). Later cases clarified that *Katz* was not intended to wholly exclude property considerations in determining whether a Fourth Amendment search had occurred. *See* United States v. Jones, 565 U.S. 400, 408–09 (2012).

41. *Miller*, 425 U.S. at 443 (stating that "the depositor takes the risk" that his affairs will be revealed by the bank to another). "The idea is seductively simple—in talking to other persons or inviting them into parts of your life, one always assumes the risk that the person might turn out to be a reporter, a cop, or some other form of false friend." Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1463 (2015) (explaining principle in "false friend" cases); *see also* Jane Bambauer, *Other People's Papers*, 94 TEX. L. REV. 205, 213 (2015)

individual who shared information or conducted business with a third party did so at her own peril.[42] If the information landed in the government's hands, she had no one to blame other than herself because she had assumed that risk.

This government-friendly approach encountered its first real setback in 2010, when the Court concluded in *United States v. Jones*[43] that the government had conducted a Fourth Amendment search by placing a GPS tracking device on an automobile and collecting information continuously from that device for thirty days.[44] The majority focused on the physical placement of the GPS on the car's undercarriage and decided that the government's attachment of the GPS onto the car rendered it a search.[45]

Whereas the majority opinion focused on the government's physical intrusion on personal property, the four-member *Jones* minority found that a search had occurred on account of the nature of the police's GPS-assisted surveillance.[46] According to the minority, the length and degree of GPS surveillance transformed the government's activity into a Fourth Amendment search.[47] This so-called "mosaic theory"[48] of government surveillance spelled trouble for future

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(explaining that an individual's assumption of risk arises when her information "[is] no longer under [her] exclusive control").

42. The doctrine's breadth and absoluteness has produced widespread critique. *See, e.g.*, Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549, 564 (1990) (bemoaning the fact that "[v]irtually every disclosure of information now leads to a complete loss of Fourth Amendment protection in that information").

43. 565 U.S. 400 (2012). Some might argue that the doctrine was first tested in 2001, when the Court determined that a police officer conducted a search of a home when he used a thermal heat imager to measure the amount of heat a section of a house was giving off. Kyllo v. United States, 533 U.S. 27 (2001).

44. "[T]he Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" *Jones*, 565 U.S. at 404 (advising that courts should consider property intrusions in addition to the reasonable expectation of privacy test when considering whether a search has occurred).

45. *Id.* ("The Government physically occupied private property for the purpose of obtaining information.").

46. "[F]or four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving. We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark." *Id.* at 430 (Alito, J., concurring).

47. *Id.*

48. The "mosaic" label derives from the idea that courts should measure the government's surveillance activity holistically to determine whether a Fourth Amendment search has occurred. *See* Kerr, *supra* note 39, at 313 (tracing the theory's emergence and discussion in legal discourse).

investigations. If the collection and aggregation of information could, at some point, trigger the conclusion that a given activity was a search, many of the government's surveillance techniques would become vulnerable to attack.[49]

Eight years later, the Court partially embraced the mosaic approach first described in *Jones*'s minority opinion.[50] Prosecutors in *Carpenter* sought to prove a defendant's participation in a string of robberies by obtaining cell site location information (CSLI) from his cell phone providers.[51] They did so not by obtaining a search warrant but rather by seeking a pro forma court order consistent with extant federal law.[52] The CSLI corroborated testimony regarding the defendant's presence.[53]

When the case landed before the Supreme Court, prosecutors argued that cell phone customers forfeited privacy rights in the locations they voluntarily shared with their service providers.[54] Privacy advocates vigorously disputed the government's characterization of cell phone ownership and use as voluntary and urged the Court to recognize a difference between the conveyance of one's location and other types of information.[55]

The Court held—in an opinion authored by Chief Justice Roberts—that the seven-day collection of location data constituted a search under the Fourth Amendment, which in turn required a warrant supported by probable cause.[56] Although *Carpenter* described

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49. On the many questions mosaic theory raises, see *id.* at 328–30, which delineates the issues courts are likely to encounter.

50. *See* Evan Caminker, *Location Tracking and Digital Data: Can* Carpenter *Build a Stable Privacy Doctrine?*, 2018 SUP. CT. REV. 411, 437 ("*Carpenter*... embraced a form of the mosaic approach championed by the shadow majority of concurring Justices in *Jones*."); Benjamin J. Priester, *A Warrant Requirement Resurgence? The Fourth Amendment in the Roberts Court*, 93 ST. JOHN'S L. REV. 89, 129 (2019) (discussing the Court's "implicit acceptance of the 'mosaic theory'" in *Carpenter*).

51. United States v. Carpenter, 138 S. Ct. 2206, 2212 (2018).

52. *Id.* at 2212–13, 2221. The government served a court order on the cell phone provider, pursuant to 18 U.S.C. § 2703(d), colloquially known as a "D" order. Alan Z. Rozenshtein, *Fourth Amendment Reasonableness After* Carpenter, 128 YALE L.J.F. 943, 944–45 (2019). By the time *Carpenter* reached the Supreme Court, numerous lower courts had already weighed in on the question of CSLI and search warrants, with mixed results. *See* Freiwald & Smith, *supra* note 8, at 211–16 (summarizing pre-*Carpenter* rulings on CSLI and warrant requirements in lower courts).

53. *Carpenter*, 138 S. Ct. at 2209.

54. Brief for the United States at 15–32, *Carpenter*, 138 S. Ct. 2206 (No. 16-402).

55. *See* Brief for Petitioner at 35–44, *Carpenter*, 138 S. Ct. 2206 (No. 16-402) (distinguishing CSLI from the kinds of data at issue in previous third-party doctrine cases based on the breadth and sensitivity of information revealed).

56. *Carpenter*, 138 S. Ct. at 2221.

itself as protecting one's privacy in the "whole of [one's] physical movements,"[57] the opinion highlighted the Court's growing concern with technologically assisted surveillance.[58] CSLI technology, according to the Court, threatened a type of surveillance that was "too permeating" to be permitted without a warrant.[59]

*Carpenter* ostensibly was framed narrowly; the majority opinion insisted that it was merely declining to "extend" third-party treatment to CSLI technology and that it did not mean to disturb "conventional" surveillance techniques.[60] Nevertheless, Justices Kennedy and Alito, in separate dissents, vehemently insisted that the majority had broken new ground and, in doing so, had inadvertently threatened the future success of a wide array of investigations.[61]

For example, Justice Kennedy focused on the question of who controlled and owned the information in question. To the extent anyone enjoyed a Fourth Amendment right in CSLI, it was the cell-site provider.[62] This type of argumentation had long been cited as a rationale for excluding Fourth Amendment protection in numerous white-collar contexts: if the government's surveillance did not pertain to anything that belonged to the customer, the customer could not seek refuge in the Fourth Amendment.[63] If, as *Carpenter* suggested, the

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57. *Id.* at 2219.

58. Because CSLI permitted the government to track the "whole" of a person's movements in real time and historically, it could reveal her religious habits, daily routine, medical visits, or political associations. *Id.* at 2217.

59. *See id.* at 2214 (stating that the purpose of the Fourth Amendment was "to place obstacles in the way of a too permeating police surveillance" (quoting United States v. Di Re, 332 U.S. 581, 595 (1948))).

60. *Id.* at 2220.

61. Justice Kennedy was particularly concerned that the Court's opinion subjected these as yet undefined categories of information to an additional balancing test. *Id.* at 2234 (Kennedy, J., dissenting) (arguing that the Court's "multifactor analysis . . . puts the law on a new and unstable foundation"). In his own dissent, Justice Gorsuch agreed that this new balancing test would fuel uncertainty and create difficulties for lower courts. *Id.* at 2267 (Gorsuch, J., dissenting).

62. "Customers like petitioner do not own, possess, control, or use the records, and for that reason have no reasonable expectation that they cannot be disclosed pursuant to lawful compulsory process." *Id.* at 2224 (Kennedy, J., dissenting). Kennedy's argument relied on *United States v. Miller*, 425 U.S. 435, 440 (1976) ("[T]hese are the business records of the banks."), and effectively raised what some refer to as a "standing" issue. *See* Rakas v. Illinois, 439 U.S. 128 (1978).

63. *Carpenter*, 138 S. Ct. at 2223–24 (Kennedy, J., dissenting) ("[W]hen the Government uses a subpoena to obtain . . . bank records, telephone records, and credit card statements from the businesses that create and keep these records, the Government does not engage in a search of the business's customers within the meaning of the Fourth Amendment.").

Court was inclined to abandon this mode of analysis, the resulting new order could profoundly impact numerous federal and local enforcement agencies and the many types of investigations on their dockets.[64]

Echoing Justice Kennedy's anxieties, Justice Alito's dissent analyzed *Carpenter*'s potential impact on the government's subpoena power.[65] If the *nature* of information sought from a third party about a given target was so "comprehensive" that it could convert a "third-party" record into the equivalent of John Doe's *personal* record, Justice Alito reasoned, then even the most conventional enforcement tools could conceivably cross the Fourth Amendment's threshold search test.[66] And *that* outcome would almost surely place a substantial amount of law enforcement activity in question.

Whether Justices Kennedy and Alito were prescient or alarmist will become clearer over future terms. As of this writing, one might say the alarmist label is the fairer appellation,[67] but relatively little time has elapsed since the *Carpenter* decision, and lower courts may yet become more adventurous as technology evolves.[68] For now, *Carpenter*'s most notable takeaway is its tone; the majority opinion conveys the Court's concern with the government's access to cheap and powerful surveillance tools.[69] Compared to the deference the Court once granted law enforcement agencies,[70] the *Carpenter* Court

64. *Id.* at 2223 (contending that the decision impacted federal, state, and local authorities broadly).

65. *Id.* at 2247–55 (Alito, J., dissenting) (tracking historical use of documentary subpoenas).

66. *Id.* at 2256.

67. Courts thus far have mostly resisted calls to extend *Carpenter* beyond CSLI. *See, e.g.*, United States v. Hood, 920 F.3d 87, 88–92 (1st Cir. 2019) (holding that *Carpenter*'s analysis did not extend to IP address data); United States v. Schaefer, No. 3:17-cr-00400, 2019 WL 267711, at *5 (D. Or. Jan. 17, 2019) (holding that the Fourth Amendment did not require the government to obtain a warrant for someone's eBay transaction history); United States v. Kubasiak, No. 18-cr-120, 2018 WL 4846761 (E.D. Wis. Oct. 5, 2018) (holding that *Carpenter* did not apply to several months of surveillance footage obtained from a mounted camera). *But see* United States v. Moore-Bush, 381 F. Supp. 3d 139, 143–50 (D. Mass. 2019) (finding eight-month use of pole camera was a search), *rev'd*, 963 F.3d 29 (1st Cir. 2020).

68. Defense attorneys have already scrutinized the majority opinion to determine how best to broaden its application. *See, e.g.*, Michael Price & Bill Wolf, *Building on* Carpenter*: Six New Fourth Amendment Challenges Every Defense Lawyer Should Consider*, CHAMPION, Dec. 2018, at 20, 22 (arguing that "it stands to reason that third-party data with privacy interests on par with CSLI should also receive Fourth Amendment protection").

69. "[C]ell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools." *Carpenter*, 138 S. Ct. at 2217–18.

70. *See supra* notes 37–42 and accompanying text; *see also infra* Part III.B.

appears far more skeptical of the government's enforcement needs. Moreover, it casts the government's information-collection activities in an extremely negative light. What was once viewed as good police work instead intimates a dangerously unconstrained sovereign.[71]

To that end, Justice Gorsuch's dissent may be most instructive.[72] Unlike Justices Kennedy and Alito, Justice Gorsuch evinced no concern that the majority's approach would undercut government surveillance power.[73] If anything, he argued that the majority failed by not jettisoning the third-party doctrine altogether.[74] In its place, Gorsuch's dissent appears to favor a back-to-basics approach that almost certainly threatens standard enforcement practices.[75]

In two short paragraphs, Justice Gorsuch reminded readers that the subpoena duces tecum had once been viewed "as an act of compelled self-incrimination implicating the Fifth Amendment" and that this privilege had originally been "understood to protect a person from being forced to turn over potentially incriminating evidence."[76]

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71. "It is undoubtedly true that combining many pieces of information about suspects can lead the government to learn intimate details about their lives. In the past, however, this was considered good police work rather than cause for alarm." Kerr, *supra* note 39, at 328. For a significantly more negative view of government enforcement power, see, for example, Alice Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555 (2015), which argues that the Fourth Amendment's animating purpose is to provide individuals with tools to resist a coercive state.

72. Although a dissent, Justice Gorsuch's separate opinion reads more like a concurrence. Caminker, *supra* note 50, at 428 (describing Gorsuch's opinion as a "concurrence dressed as a dissent" (emphasis omitted)). Justice Thomas also dissented; although he concurred in Justice Kennedy's property argument, he further argued that the Court should abandon the reasonable expectation of privacy test. *Carpenter*, 138 S. Ct. at 2235–36 (Thomas, J., dissenting) (arguing that the test "has no basis in the text or history of the Fourth Amendment").

73. For more on the concerns of Justices Kennedy and Alito, see *Carpenter*, 138 S. Ct. at 2223 (Kennedy, J., dissenting), stating that "[t]he new rule the Court seems to formulate puts . . . criminal investigations at serious risk"; and *id.* at 2247 (Alito, J., dissenting), claiming that the majority's holding threatened many "legitimate and valuable" law enforcement practices.

74. *See id.* at 2263 (Gorsuch, J., dissenting) (claiming that there is no "persuasive justification" for the third-party doctrine).

75. *See id.* at 2272 (arguing for a more traditional approach to the Fourth Amendment to vindicate all of the Amendment's protections).

76. *Id.* at 2271 (citations omitted). The early Court opinion that treated compulsory production of incriminating papers as the equivalents of both Fourth Amendment searches *and* compelled self-incrimination was *Boyd v. United States*. 116 U.S. 616, 634–35 (1886) ("[A] compulsory production of the private books and papers of the owner . . . is compelling him to be a witness against himself . . . and is the equivalent of a search and seizure . . . [under] the Fourth Amendment."). The Court eventually overruled major parts of the *Boyd* opinion. *See infra* notes 194–96 and accompanying text.

Although Justice Gorsuch framed these musings as mere observations, it is impossible to ignore his implied invitation to revisit the subpoena's status under both the Fourth and Fifth Amendments. The magnitude of such a move cannot be overstated: were the Court to decide documentary subpoenas were the equivalent of police-directed searches, much less that they constituted acts of "compelled self-incrimination" under the Fifth Amendment, federal and local enforcement agencies would likely freeze in temporary shock.[77]

### B. THE ASSOCIATIONAL THEORY OF CORPORATE PERSONHOOD

During roughly the same time period in which the Court revised its approach to defining a Fourth Amendment search, it executed far more controversial moves in the field of corporate constitutional rights. Over a series of opinions curtailing legislative and executive power, the Court reaffirmed and embraced the notion of a corporation as a constitutional "person" that enjoyed strong First Amendment protections in speech and religion, owing in part to its association with its owners and perhaps other "members."[78] Although the Court had previously entertained "association" theories of personhood, its renewed embrace was notable, both for the Court's willingness to apply personhood to a wider array of rights and for dicta suggesting those rights might protect constituencies beyond the corporation's shareholders.[79]

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77. Once they recovered from that shock, they would have to consider the strategies described *infra* in Part III.

78. As Professor Adam Winkler has argued, the Court's alternating treatment of the corporation as a legal entity in some instances and as an association in others extends back to the Court's early years following the nation's founding. ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 35–38 (2018) (discussing the first corporate rights case that took place in 1809).

79. The corporate personhood scholarship has identified three distinct theories: the associational or "aggregate" theory; the artificial entity theory (which treats the corporation solely as a creation of the state); and the "real" entity theory of personhood. *See* Jason Iuliano, *Do Corporations Have Religious Beliefs?*, 90 IND. L.J. 47, 55–56 (2015) (describing the three competing theories). *See generally* Martin Petrin, *Reconceptualizing the Theory of the Firm—From Nature to Function*, 118 PA. ST. L. REV. 1, 4–13 (2013) (explaining the origins of the competing theories); Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 798 (dubbing the three major theories of corporate personhood to be the "'artificial person' theory, the 'contractual' theory, and the 'real entity' theory"); Reuven S. Avi-Yonah, Citizens United *and the Corporate Form*, 2010 WIS. L. REV. 999, 1001 (proclaiming that the aggregate, artificial entity, and real entity theories can be discerned throughout millennia).

Courts often draw pluralistically on these theories. *See, e.g.*, Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in*

Facially, these cases revolve around issues other than corporate personhood. From their underlying reasoning, however, commentators have nevertheless deduced a recurring theme, which is that corporations and business entities must be accorded certain rights in order to protect the rights of those who freely associate with it and that even as entities, corporations need certain rights to carry out their stated functions.[80]

The first of these cases was the Court's 2010 decision in *Citizens United v. Federal Election Commission*.[81] Although the Court had previously recognized free speech rights extending to corporate activities,[82] *Citizens United* dramatically strengthened that right, as it struck

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Citizens United, 61 CASE W. RSRV. L. REV. 497, 515 (2010) ("Justice Kennedy utilized both the artificial-entity and aggregate-rights theories to conceptualize corporations and strike down corporate independent expenditure bans." (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 349–50 (2010))). For criticism of such oscillation, see Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1630, stating that "the conceptions of the corporation the Court has used in its ad hoc dispensation of rights are substantively flawed and incomplete. Moreover, oscillating between these conceptions demonstrates the weakness of this approach." For an early critique of the Court's personhood theories, see John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 655 (1926), which claims that the legal conception of a person is complicated due to the use of non-legal factors utilized to support certain reasoning and beliefs.

80. As others have pointed out, the cases described in this Section also invoke "real entity" principles to justify the expansion or application of certain rights. *See infra* note 86. Moreover, the Court's contemporary invocation of the associational theory has confused a number of corporate scholars. *See* Pollman, *supra* note 27 (noting that some business corporations lack associational elements or a democratic procedural system). As Professor Elizabeth Pollman argues, the associational theory is not particularly descriptive of many modern for-profit corporations. *Id.* at 673–74 (citing the lack of a true "associational dynamic in many business corporations," whose shifting shareholding population often have little interest in the company beyond the value of their shares); *see also* Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1678–79 (2015) (tracing the corporate form's history and explaining that "in many matters, [the large, publicly traded corporation's] interests could not be clearly identified with any particular group of individuals"). The aim of this Section is neither to embrace nor reject the Court's approach, but to document its emergence and consider its implications for constitutional corporate procedural rights.

81. 558 U.S. 310 (2010).

82. Korte v. Sebelius, 735 F.3d 654, 681 (7th Cir. 2013) (noting that "long before *Citizens United* reinvigorated the political-speech rights of corporations, . . . the Court confirmed that corporations have free-speech rights," and collecting cases); *see also supra* note 78. Brandon Garrett helpfully reconciles the debate over *Citizen United*'s "newness" by observing that although the *right* of corporate free speech was already established, *Citizen United*'s manner of protecting that right (in an absolute categorical way) broke with prior precedent. *See* Garrett, *supra* note 20, at 115–19 ("The [*Citizens*

down a campaign reform law that purported to restrict a corporation's election-related spending from its general treasury.[83] In finding the statute an unconstitutional restriction on speech, the Court emphasized the statute's effect, which was effectively to punish, for the communications of ideas, "associations of citizens" who happened to take advantage of the corporate form.[84] Accordingly, post-*Citizens United*, corporations could freely spend money from their general treasuries on political speech.[85] To corporate law scholars, this move reflected more than an interest in maximizing political speech; it reflected the Court's willingness to conceive of the corporation as an aggregate or association of members whose First Amendment rights merited protection.[86]

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*United*] Court abandoned the nuanced approach involving the application of narrow tailoring and compelling state interest law that had developed over prior decades.").

83. *See Citizens United*, 558 U.S. at 343 ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978))).

84. *Id.* at 349 ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."); *see also id.* at 354 (arguing that the restraint on corporate treasury expenditures effectively "ban[s] the political speech of millions of associations of citizens" (citing INTERNAL REVENUE SERV., STATISTICS OF INCOME: 2006, CORPORATION INCOME TAX RETURNS 2 (2009), https://www.irs.gov/pub/irs-soi/06coccr.pdf [https://perma.cc/M4DV-ABSY])).

85. *See* Garrett, *supra* note 20, at 119 ("Two years after *Citizens United*, ... the Court struck down a Montana state law regulating corporate political expenditures in a brief, less-than-one-page per curiam opinion—there was little to say once *Citizens United* had adopted a categorical approach to restrictions on corporate spending." (footnote omitted)).

86. For arguments *Citizens United* reflects the Court's embrace of the associational theory of personhood, see Atiba R. Ellis, Citizens United *and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 721 (2011), which states "the *Citizens United* decision relied not merely on the conventional view of corporate personhood; it sought justification for its decision with the idea that a corporation is an 'association of persons'"; and Owen Alderson, *Abandoning Corporate Ontology: Original Economic Principles and the Constitutional Corporation*, 22 U. PA. J. CONST. L. 561, 569 (2020), which states, "Justice Kennedy's majority opinion largely hinges on an explicitly aggregate view of the corporation."

For arguments that the case is more pluralistic in its discussion of personhood theory, see Petrin, *supra* note 79, at 17, stating that "the wording of the [*Citizens United*] decision suggests that the Court adopted both the aggregate and real entity theories as the basis for its decision"; and *id.* at 17–18 n.91, citing other scholars who see either or both theories on display.

Four years later, the Court revisited the question of corporate rights in *Burwell v. Hobby Lobby Stores, Inc.*,[87] which arose out of the provision of the Affordable Care Act (ACA) that effectively required certain employers to pay for their employees' contraception.[88] The petitioners in *Hobby Lobby* were closely held, for-profit corporations whose owners maintained religious objections to certain types of contraceptive devices.[89] The Court determined that the ACA's mandate impinged on the Religious Freedom Restoration Act (RFRA), which protects "persons" from laws that would otherwise burden their free exercise of religion.[90] Among the questions raised by the case were whether a corporation was a "person" protected under RFRA and whether the ACA consequently burdened a for-profit corporation's exercise of religion.[91]

*Hobby Lobby* answered each question in the affirmative.[92] In doing so, it embraced a broader and more robust theory of corporate rights: in order to protect Hobby Lobby's *owners* from the ACA's encroachment on religious freedom, it was necessary to treat their businesses as "persons" that exercised religious rights on their members' behalf.[93] Although the beneficiaries in *Hobby Lobby* were the firms'

87. 573 U.S. 682 (2014). The majority opinion does not mention *Citizens United*. *Id.* Nevertheless, scholars have pointed out that the "two decisions share at least one common theme: they recognize rights in for-profit corporations that have traditionally been thought of as belonging only to individuals, political entities, or religious organizations." David Rosenberg, *The Corporate Paradox of* Citizens United *and* Hobby Lobby, 11 N.Y.U. J.L. & LIBERTY 308, 309 (2017).

88. *See Hobby Lobby*, 573 U.S. at 697. The ACA provision in question required the employers to purchase health insurance plans that covered certain methods of contraception. *See id.* (citing 42 U.S.C. § 300gg-13(a)(4)).

89. *Id.* at 700–03 (providing details on the petitioners and their businesses).

90. *Id.* at 705 (quoting 42 U.S.C. § 2000bb-1(a)–(b)). The ACA contained provisions exempting religious non-profit organizations from complying with the contraceptive mandate. *Id.* at 692, 698–99 (citing 45 C.F.R. § 147.131(b)–(c) (2013)). The Court determined that for-profit companies were "persons" deserving of the same treatment under RFRA. *See id.* at 706.

91. *See id.* at 691.

92. *See id.* ("Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do.").

93. *Id.* at 706 ("A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another.").

On the intra-corporate conflicts this broad conception of personhood may eventually instigate, see Pollman, *supra* note 27, at 669–70, discussing difficulties and the lack of a state corporate law mechanism "to reconcile diverse religious, social, and

private owners, Justice Alito's opinion left open the possibility that a company might act on behalf of *other* constituents who voluntarily associated themselves with the company:

> 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. Protecting corporations from government seizure of their property without just compensation protects *all those who have a stake in the corporations' financial well-being.* And protecting the free-exercise rights of corporations ... protects the religious liberty of the humans who own and control those companies.[94]

The language may be dicta, but it is notable dicta, as it expands constitutional "membership" from a company's shareholders (already a heterogeneous group) to constituencies including its rank-and-file employees. Should the Court eventually return to the "membership" question more directly, it may well widen the corporation's ability to invoke constitutional rights on behalf of constituencies other than shareholders.[95]

Finally, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[96] the Supreme Court addressed whether the Colorado Civil Rights Commission had impinged on the religious freedoms of a baker who would not accept orders for same-sex wedding ceremonies and receptions.[97]

The case arose after the bakery's owner refused to bake a wedding cake for a gay couple.[98] The couple filed a complaint against the baker and his bakery with the Colorado Civil Rights Division, which found other instances in which the bakery refused service to same-sex

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political values and beliefs" among the diverse groups who voluntarily associate themselves with the corporation.

94. *Hobby Lobby*, 573 U.S. at 706–07 (emphasis added).

95. On *Hobby Lobby*'s (problematic) implications for Article III standing jurisprudence, see Garrett, *supra* note 20, at 103, stating that "the *Hobby Lobby* decision contains dicta suggesting that courts need not adhere to well-established categories of Article III standing, opening the door to all manner of ill-advised corporate standing"; and *id.* at 144–45, arguing that *Hobby Lobby*'s discussion of corporate constitutional rights effectively disregards the Court's Article III standing jurisprudence.

96. 138 S. Ct. 1719 (2018).

97. After investigating a same-sex couple's discrimination complaint, the Colorado Civil Rights Division referred the case to the Colorado Civil Rights Commission upon finding probable cause that the bakery and its owner had violated Colorado antidiscrimination law. *Id.* at 1725–26. In response, the baker argued that legal compulsion to create a cake for a same-sex wedding violated his First Amendment rights of speech and religion. *Id.* at 1726.

98. *Id.* at 1724.

couples.[99] The Commission found the defendants guilty of violating Colorado's anti-discrimination laws and ordered them to "cease and desist" their practice of refusing services to same-sex couples.[100] The Commission further ordered the company to change its policies so that they were consistent with the order, retrain its staff, and prepare and keep "quarterly compliance reports" for two years.[101]

After the case made its way through the Colorado courts, the Supreme Court granted certiorari and in a fairly narrow opinion, held that the Commission had evinced hostility to the baker's religious beliefs.[102] Of interest to corporate personhood scholars was the fact that the Court's opinion, with little to no discussion, appeared to treat the baker's *company*, the named plaintiff in the Supreme Court caption and the clear target of the Commission's remedial order, as the equivalent of *the individual* baker claiming the religious freedom.[103] (The baker, in turn, was the company's owner as well as its effective employee.) This interchangeability led Professor Adam Winkler to comment:

> [T]he [C]ourt seems to have quietly established that business corporations have religious liberty rights under the First Amendment to the Constitution. If that is right, then *Masterpiece Cakeshop* could be a groundbreaking decision with profound reverberations in American law.[104]

Professor Winkler's prediction may well play out in future contests. And if so, it will be interesting to see if the entity's religious rights arise out of the *owner*'s religious rights or its *employees*' rights (which in *Masterpiece Cakeshop* were fortuitously one and the same).

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99. *Id.* at 1725.

100. *Id.* at 1726.

101. *Id.* The compliance reports were to collect information on how many customers had been denied service and the "remedial actions taken." *Id.*

102. *Id.* at 1729 ("The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated [the baker's] objection."); *see also id.* at 1730 (claiming that the commissioner's comments "cast doubt on the fairness and impartiality of the Commission's adjudication" of the defendant's case).

103. Stefan J. Padfield, *Does Corporate Personhood Matter? A Review of, and Response to, Adam Winkler's* We the Corporations, 20 TRANSACTIONS: TENN. J. BUS. L. 1009, 1028 (2019) ("[T]he Court completely ignored the argument that the plaintiff in the case was a corporation rather than the individual baker . . . ."); Catherine A. Hardee, *Schrödinger's Corporation: The Paradox of Religious Sincerity in Heterogeneous Corporations*, 61 B.C. L. REV. 1763, 1776 (2020) ("In its opinion, the Court entirely ignores the corporate party to the litigation.").

104. Adam Winkler, Masterpiece Cakeshop*'s Surprising Breadth*, SLATE (June 6, 2018, 10:29 AM), https://slate.com/news-and-politics/2018/06/masterpiece-cakeshop-grants-constitutional-religious-liberty-rights-to-corporations.html [https://perma.cc/ZNK2-T84Y].

For this Article's purposes, it is sufficient to conclude that corporate rights have yet to hit their ceiling.

### C. WHEN PRIVACY MEETS PERSONHOOD

The developments described in Sections A and B have taken place on different tracks and in different contexts.[105] Superficially, the corporate personhood cases have little to do with government surveillance and the Fourth Amendment. Indeed, it is doubtful the authors of the majority opinions in one category have given much thought to the cases arising in the other.[106]

Nevertheless, it is helpful to visualize how these two doctrinal developments might converge and undermine enforcement. The issue is not simply that the Court has opted to treat the corporation as a person, nor is it that the Court has found a renewed respect for Fourth Amendment privacy. By themselves, neither of these developments spells immediate relief for corporations subject to myriad statutory and regulatory obligations.[107] Taken together, however, the sum represents far more than its constituent parts.

*Citizens United* and its progeny have attracted notice for the way in which they cloak corporations with absolute constitutional protections.[108] The power to protect one's "members" by claiming rights in speech and religion enables the rights-holder to sidestep statutory and regulatory obligations.[109] If the associational theory can be used

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105. *See generally* Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 114 (2007) (critiquing the siloed approach to analyzing First, Fourth, and Fifth Amendment claims).

106. It is ironic that *Carpenter*'s most vehement dissenters, Justices Kennedy and Alito, are collectively responsible for the majority opinions in the three personhood cases. *See Masterpiece Cakeshop*, 138 S. Ct. at 1723 (Kennedy, J.); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688 (2014) (Alito, J.); *Citizens United*, 558 U.S. at 319 (Kennedy, J.).

107. Indeed, in the year following *Citizens United*, the Court summarily dismissed AT&T's effort to claim Freedom of Information Act (FOIA) rights when it concluded that FOIA's privacy exemption protected "personal" privacy rights alone. *See* FCC v. AT&T Inc., 562 U.S. 397, 409–10 (2011) (rejecting corporation's argument that FOIA's "personal privacy" exemption included corporations).

108. As Kate Andrias observes, the Roberts Court's corporate First Amendment cases are "absolutist: once the speech interest is identified, the governmental interest is nearly always insufficient to justify the regulation." Kate Andrias, *Janus's Two Faces*, 2018 SUP. CT. REV. 21, 31.

109. *Id.* (arguing that cases such as *Citizens United* "enable individuals and corporations to opt out of democratically made decisions"); Sepper, *supra* note 31, at 1474 ("Businesses—and courts siding with them—go so far as to justify exempting employers from laws based on their employees' interests."); *see also* Garrett, *supra* note 20, at 121 (claiming that *Citizens United* suggests that organizations can invoke their

to protect additional constituents, such as the corporation's employees or officers, or to broadly protect "owners" with little to no reality check on what the corporation's heterogeneous shareholders actually desire,[110] it enlarges the corporation's ability to lodge constitutional objections to *other* activity, such as the government's routine and not-so-routine surveillance measures. Moreover, it enables corporations to test different theories of corporate privacy.[111] None of this is good news for government regulators or prosecutors.

More importantly, the Court's uber-protective personhood theory has arisen at precisely the same moment the Court has begun to reverse its deferential stance on government surveillance.[112] If it continues on the same trajectory, the Court's expansion of corporate rights will coincide with its reversal of doctrines that have, up until now, permitted the government's broad and unchecked use of surveillance and monitoring.[113]

In sum, at the very moment the Court seems poised to recognize stronger protections of *personal privacy*,[114] it seems equally willing to strengthen and enlarge the concept of *corporate personhood*.[115] One need not be clairvoyant to see the ways in which constitutional privacy and corporate personhood's convergence spells trouble for government enforcement efforts.

For example, if the collection of seven days' worth of location data constitutes a "search" because it fosters such a comprehensive record of an individual's actions,[116] how might the Court treat an "internal"

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members' interests for constitutional challenges). For more general discussion, see Jamal Greene, *The Supreme Court, 2017 Term–Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018), which explores the treatment of a right as an absolute shield, barring an exceptional circumstance.

110. *See supra* note 80.

111. One can imagine messy, fact-intensive litigation testing either the nature of the privacy right or the type of business entity claiming it. *See* Kayla Robinson, Note, *Corporate Rights and Individual Interests: The Corporate Right to Privacy as a Bulwark Against Warrantless Government Surveillance*, 36 CARDOZO L. REV. 2283, 2296 (2015) (referring to trade secrecy law as consistent with the claim that corporations are already "shielded by privacy rights in certain spheres"); Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 31 (2014) ("[A] constitutional right to privacy may be an important check against government power . . . according such a right to all corporations would be unfounded.").

112. *See supra* Part I.A.

113. *See supra* notes 37–42 and accompanying text (describing the Court's lenient approach to some surveillance techniques).

114. *See supra* Part I.A.

115. *See supra* Part I.B.

116. *See* Carpenter v. United States, 138 S. Ct. 2206, 2215 (2018).

corporate investigation nominally executed by a corporation's law firm but undertaken at the behest of a government agency? How would a lower court treat such an investigation if, with the assistance of computer and digital technology, the corporation's defense team were to construct a detailed and lengthy historical account of numerous corporate employees and their behavior within and throughout the workplace? Would hum-drum investigative tools such as grand jury and administrative subpoenas suddenly take on a new-technology hue, thereby triggering the enhanced scrutiny outlined in *Carpenter*?[117] Would corporate defendants, endowed with shiny new avatars of personhood, be more inclined to press these issues on behalf of their various "members"?[118]

Professor Christopher Slobogin is one of a handful of scholars to explore these issues.[119] According to Professor Slobogin, if First Amendment protections are designed to promote some sense of "security" from arbitrary government intrusions, then the corporate entity that seeks to protect its *First* Amendment freedoms should have stronger access to *Fourth* Amendment freedoms to challenge government subpoenas.[120] Moreover, Professor Slobogin reasons, "if corporations can possess and exercise a right to speak (per *Citizens United*) they ought to possess rights not to speak" and should also be permitted to claim the Fifth Amendment's privilege against self-incrimination.[121]

Whether corporations would prevail in precisely the manner Professor Slobogin imagines is beside the point. The more interesting observation is that the personhood cases have created a roadmap for reopening these issues *at all*. Doctrines once considered settled have recently become the subject of appeals and petitions for certiorari.[122]

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117. *See id.* (discussing "more sweeping modes of surveillance").

118. On the complicated standing issues likely to arise when the corporation purports to claim such rights, see Garrett, *supra* note 20, at 103. *See also* Pollman, *supra* note 27, at 642–43 (questioning the adequacy of state corporate law to resolve disputes that are likely to occur in the wake of the Court's corporate rights jurisprudence).

119. Slobogin, *supra* note 29, at 132–35. Garrett also considers the implications of *Citizens United* and *Hobby Lobby* for the Court's Fourth and Fifth Amendment precedents. *See* Garrett, *supra* note 20, at 144–45, 157–58.

120. Slobogin, *supra* note 29, at 133. Professor Slobogin's point hinges, in part, on whether one views a subpoena as an intrusion of any sort at all. I discuss the government's subpoena powers *infra* in Part II.B.

121. Slobogin, *supra* note 29, at 134.

122. Litigants have already begun to challenge the collective entity doctrine. *See* State v. Brelvis Consulting LLC, 436 P.3d 818, 827 (Wash. Ct. App. 2018) (arguing that *Hobby Lobby* requires reconsideration of whether closely held corporations are barred from invoking the Fifth Amendment's privilege against self-incrimination), *as amended*

Jokes about corporate privacy are suddenly no longer so humorous.[123] And investigative practices once conceptualized as mundane and ordinary suddenly appear more unstable and tenuous. I discuss these practices in more detail in Part II.

## II. CORPORATE & REGULATORY ENFORCEMENT'S GROUND RULES

Part I introduced two developments in constitutional law: the expansion of an associational theory of corporate personhood rights and a long-expected reassessment of Fourth Amendment jurisprudence that redefines government surveillance activity as subject to the Fourth Amendment's probable cause and warrant requirements.

This Part introduces several constitutional ground rules that undergird contemporary investigations of corporations and other business entities. Section A examines the fiction that denominates corporate investigations "private" and therefore outside the Constitution. Section B describes the substantial deference afforded to regulatory and grand jury subpoenas. Section C reviews the exclusion of business entities from the Fifth Amendment's privilege against self-incrimination. Collectively, these doctrines enable the government to identify, prosecute, and enforce a wide swath of regulatory and criminal prohibitions.

### A. "PRIVATE" INVESTIGATIONS

Not too long ago, Justice Alito remarked in *Hobby Lobby* that "extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the

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*on reconsideration* (Mar. 12, 2019), *rev. denied*, 448 P.3d 67 (2019); *In re* Twelve Grand Jury Subpoenas, 908 F.3d 525, 528–29 (9th Cir. 2018) (considering and rejecting appellant's argument that *Hobby Lobby* and other cases cast into question the Court's previous determination that collective entities are barred from raising the privilege), *cert. denied*, 140 S. Ct. 289 (2019); Appellant's Jurisdictional Memorandum at 6, State v. Buckeye Impact Grp., LLC, 119 N.E.3d 433 (Ohio 2019) (No. 2018-1837), 2018 WL 7050456, at *5–6, *6 n.5 (arguing that Ohio's constitution provides broader protections to entities and that the Supreme Court's *Hobby Lobby* reasoning "should be the driving force" in determining whether a limited liability company can invoke the privilege); *see also* Peter J. Henning, *Treating Corporations as People*, N.Y. TIMES (May 26, 2015), https://www.nytimes.com/2015/05/27/business/dealbook/treating-corporations-as-people.html [https://perma.cc/MF7P-VNAF] (describing additional cases).

123. In rejecting AT&T's argument that FOIA's personal privacy exemption applied to corporations, Chief Justice Roberts quipped at the end of the Court's unanimous opinion, "We trust that AT&T will not take it personally." FCC v. AT&T Inc., 562 U.S. 397, 410 (2011).

company."[124] Justice Alito's acknowledgement that employees enjoy "corporate privacy" is somewhat ironic in light of the Court's general approach to internal investigations.

When a corporation or other entity[125] searches an employee's papers or computer, the resulting investigation is deemed a "private" search; she receives no constitutional protection from the employer who rifles through her office files.[126] When that same corporation interrogates the employee—even under the threat of termination—her incriminating statements are not considered "compelled" under the Fifth Amendment because the privilege against self-incrimination protects individuals from *government* pressure but not private

124. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707 (2014). Although Justice Alito's statement purports to be a straightforward application of the associational theory of corporate personhood, it does not delve into the question of why the "association" protects employees as well as owners, much less how constitutional law should mediate rights-related disputes between owners and employees. *See* Blair & Pollman, *supra* note 80, at 1729–30 (observing the inconsistency of allowing the corporation to protect the owners' rights in religious liberty at the expense of its employees, "whose religious beliefs were not considered").

125. These rules do not rely on the business entity's particular form. *See* Blum v. Yaretsky, 457 U.S. 991, 1012 (1982) (holding that nursing homes' discharge of patients was not "state action" and therefore not subject to the Fourteenth Amendment's constraints).

126. Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (holding that there was no Fourth Amendment violation for a company's search and seizure of documents from its ex-employee's office); *see also infra* notes 133–35 and accompanying text. For a critique of *Burdeau* and its contemporary distortions, see Kiel Brennan-Marquez, *The Constitutional Limits of Private Surveillance*, 66 U. KAN. L. REV. 485, 499 (2018), claiming that the framework that emerged from *Burdeau* "cannot contend with the realities of private surveillance today." For earlier criticism, see John M. Burkoff, *Not So Private Searches and the Constitution*, 66 CORNELL L. REV. 627, 671 (1981), stating that, "[u]ltimately, the classic *Burdeau* state action barrier to application of constitutional limitations in the private search setting amounts to little more than an elaborate semantical construction based upon often incoherent doctrinal prescriptions"; and Charles B. Craver, *The Inquisitorial Process in Private Employment*, 63 CORNELL L. REV. 1, 47 (1977), stating that, "some commentators have argued that the constitutional restriction [of the Fourth Amendment] should be judicially extended to cover institutionalized private intrusions performed on a regular basis by company security agents." (citing Harvey L. Ziff, Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608 (1967)).

compulsion.[127] Whatever rights the employee enjoys in regard to her employer, those rights are statutory.[128]

By contrast, *government* investigators labor under significantly more restrictive rules.[129] The FBI agent who wishes to enter the corporation's premises and search an employee's desk must first secure a warrant.[130] The government prosecutor who wishes to question a person in custody must first advise that person of her right to remain silent.[131] And the government investigator who wishes to interview a *government* employee must refrain from threatening adverse employment consequences in response to the employee's exercise of her right to remain silent.[132]

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127. *See Burdeau*, 256 U.S. at 475–76 (rejecting a Fifth Amendment claim in regard to petitioner's records). The Court has never directly addressed corporate interrogations, although lower court decisions have drawn heavily on the Court's state-action jurisprudence to declare private interrogations unprotected. *See, e.g.*, United States v. Solomon, 509 F.2d 863, 867–70 (2d Cir. 1975) (upholding NYSE's interrogation of stockbroker as non-state action).

128. The foregoing is, of course, a description of the American experience; other countries are more protective of employee privacy. *See* Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697, 747–53 (2020) (describing the privacy rules that prevail in the European Union and other countries).

129. Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23, 73 (2010) (explaining that there are greater constitutional protections in investigations conducted by prosecutors as opposed to those conducted by public corporations); JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT 84 (2020) ("One of the advantages of a private investigation is that the usual restraints on the prosecution do not apply to the corporation's own internal investigation."); *see also* Miriam H. Baer, *When the Corporation Investigates Itself, in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 308 (Jennifer Arlen ed., 2018) (explaining the ways in which government prosecutors rely on corporate investigators' activities).

130. *See* United States v. Anderson, 154 F.3d 1225, 1230 (10th Cir. 1998) ("It is well established that an employee has a reasonable expectation of privacy in his office.").

131. Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.").

132. Garrity v. New Jersey, 385 U.S. 493, 497–98 (1967) ("The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."). For arguments that *Garrity* immunity should extend to private employees, see Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 355–56 (2007), in which Professor Griffin argues that the threat of "job loss . . . coerce[s] a statement within the meaning of the Fifth Amendment when an individual subjectively believes that she must speak or face job loss and when it is objectively reasonable for her to hold that belief."

Were the private-investigation label constrained to instances in which the government lacked any advance knowledge of the corporation's investigative activities, the distinction would be more defensible. *Burdeau v. McDowell*, a private search case decided by the Supreme Court in 1921, featured a corporation whose executives drilled open an ex-employee's safe, found evidence he was embezzling from the company, and disclosed the evidence to the local U.S. Attorney.[133] Government attorneys had no knowledge of the corporation's behavior until after it occurred.[134] The Supreme Court held that the search was private and that federal prosecutors could use the evidence despite the lack of a search warrant.[135]

Today's corporate investigation unfolds under a dramatically different framework. Employee theft is no longer the motivating concern.[136] Rather, in an effort to reduce criminal and regulatory exposure, corporations erect sophisticated internal compliance departments responsible for ensuring the firm's overall adherence to the law.[137] As part of this function, firms routinely monitor and report wrongdoing by their employees to government authorities.[138] Government enforcers, in turn, encourage corporations to enlarge their compliance departments because corporate self-policing partially

133. 256 U.S. 465, 473–74 (1921).

134. *Id.* at 475 (claiming that the government did not know the circumstances of the property's seizure until several months after the seizure had occurred).

135. *Id.* (reasoning that whatever wrong had occurred was committed by certain individuals against another). Later cases clarified that the government engages in no violation of the Fourth Amendment when it views evidence previously secured by a private party, even when that party violates state or local law. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 485–89 (1971) (holding that there was no constitutional violation when the defendant's wife voluntarily collected and turned over his clothes and firearms); Ben A. McJunkin, *The Private-Search Doctrine Does Not Exist*, 2018 WIS. L. REV. 971, 1022 ("The Court has long allowed the government to use privately volunteered evidence on the rationale that the Fourth Amendment does not reach private action.").

136. *See* Baer, *supra* note 129, at 308 (discussing the different motivations for internal investigations including leniency from government enforcers and maintenance of shareholder trust); William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643, 648–50 (2002) (discussing the implications of "reverse whistleblowing," where corporations sound the alarm on culpable employees in exchange for prosecutorial leniency towards the overall organization).

137. On the corporate compliance function's evolution, see Geoffrey Parsons Miller, *The Compliance Function: An Overview*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 981, 982–84 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018), and Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2127 (2016), describing the corporate compliance obligation as a form of "outsourcing" by government enforcement agencies.

138. Laufer, *supra* note 136, at 652 (discussing the practice known as "flipping").

relieves the government of its own policing obligations.[139] Moreover, corporate investigators enjoy a much better vantage point from which to identify and mitigate wrongdoing.[140]

To induce corporations to self-police, the government employs a combination of sticks and carrots. The strongest of the sticks is the threat of corporate-level prosecution.[141] If the corporation wishes to disable that threat, it must demonstrate its bona fides as a good corporate citizen. In concrete terms,

> the government uses corporate criminal liability as a lever to compel firms to monitor their own employees, discover wrongdoing, and report it to the government. In turn, the government allows firms to settle criminal matters . . . on somewhat more lenient terms.[142]

Thus, in today's world, the company that initiates a private investigation no longer acts, as it did in *Burdeau*, to protect itself from its *employee*.[143] Rather, it initiates surveillance in order to protect itself from the *government* and the government's ever-present threat of enforcement.

Notwithstanding the foregoing, courts have routinely labeled corporate investigations "private," provided prosecutors and regulators avoid direct interference in specific investigative activities.[144] So long as government officials refrain from directing *the particulars* of the

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139. *See* William S. Laufer, *A Very Special Regulatory Milestone*, 20 U. PA. BUS. L.J. 392, 398–99 (2017) (articulating the theory underlying the federal government's "conscription" of corporate "self-regulators" to investigate and report wrongdoing).

140. *See* Arlen & Buell, *supra* note 128, at 706–07 (describing the corporation's superior abilities to police itself); Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 144, 145 (Alon Harel & Keith N. Hylton eds., 2012) ("[Firms] generally are the most cost-effective providers of many vital forms of prevention and policing.").

141. *See generally* Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 59 (2007) ("The implications for [corporate criminal liability] are profound, as it vests prosecutors with extraordinary discretion . . . .").

142. Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 LAW & CONTEMP. PROBS. 193, 210–11 (2017).

143. Businesses still employ sophisticated security measures to guard against employee and consumer theft. For a comprehensive history of the industry that has developed to accommodate this need and the issues this raises, see David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1205–21 (1999), which describes evolution from early policing to private policing companies; and Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 579–85, which provides a "discussion of how pertinent examples compare to the private policing of today."

144. *See, e.g.*, Gilman v. Marsh & McLennan Cos., 826 F.3d 69, 77 (2d Cir. 2016) (determining that a corporation's interview of employees was not "state action" despite corporation's incentives to investigate itself).

investigation ex ante, courts are willing to agree the resulting investigation is "[un]attributable to the government."[145]

This rigid, formalistic approach ("Do not command Corporation *X* to search Employee *Y*'s emails.") overlooks the context in which an investigation unfolds. The DOJ's published leniency policy all but directs corporations to report suspected employee-wrongdoers to government authorities.[146] Corporations seeking leniency can expect their representatives to be grilled at length by prosecutors and regulators on how promptly they conducted their investigation, how broadly they extended it, and how deeply they drilled down in terms of document review and interviews with potential witness-employees.[147] If government enforcers announce they are unimpressed with the corporation's "self" reporting, sophisticated defense lawyers will take their cues and report back to the company's board of directors on the need for a longer, deeper dive into the corporation's affairs.[148] Only through cognitive dissonance can one call such an investigation "private" or independent of government oversight.

Recently, a federal court in the Southern District of New York called out this elaborate fiction. In *United States v. Connolly*,[149] a case

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145. D.L. Cromwell Invs., Inc. v. NASD Regul., Inc., 279 F.3d 155, 161 (2d Cir. 2002) ("[T]he Fifth Amendment . . . will constrain a private entity only insofar as its actions are found to be 'fairly attributable' to the government." (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982); and then citing Corrigan v. Buckley, 271 U.S. 323, 330 (1926))).

Cases that hold otherwise tend to feature prosecutorial overreach. *See, e.g.*, United States v. Stein, 541 F.3d 130 (2d Cir. 2008) (affirming lower court's determination that the U.S. Attorney's Office interfered to such a degree that the resulting behavior became "state action"); United States v. Stein, 440 F. Supp. 2d 315 (S.D.N.Y. 2006) (citing prosecutors' intervention in KPMG's indemnification practices and its communications to employees regarding FBI interviews).

146. *See* Brewster & Buell, *supra* note 142. *See generally* Baer, *supra* note 129 (discussing how policies of government regulators encourage corporations to investigate themselves).

147. Laufer, *supra* note 139, at 408–10 (describing "tease and threat" relationship between corporate actors and public enforcers).

148. *Cf.* Jessica K. Nall & Janice W. Reicher, *Achieving Credibility in Internal Investigations: Getting Inside the Enforcer's Mind*, CHAMPION, June 2013, at 24 (providing a "how-to" guide for defense attorneys seeking government leniency).

Many companies, when credibly accused of wrongdoing, will promptly hire former prosecutors at top law firms to investigate and report on the company's internal misconduct. *See* Brewster & Buell, *supra* note 142, at 206 (citing Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221, 1249–53 (2011)).

149. United States v. Connolly, 1:16-CR-00370, 2018 WL 2411216 (S.D.N.Y. May 15, 2018).

arising out of Deutsche Bank's LIBOR scandal,[150] Chief Judge Colleen McMahon addressed Gavin Black's motion to suppress inculpatory statements he had made to Paul Weiss, the outside law firm that spearheaded Deutsche Bank's internal investigation.[151] Black claimed that his statements were made under compulsion and that he had spoken with Paul Weiss's attorneys solely to avoid termination.[152] Had he been a government employee, he would have had a serviceable Fifth Amendment claim.[153] Here, however, the only pressure (to the extent it existed) originated with the company's private investigators.

At the outset, Black's chances of winning his suppression motion looked rather slim. In a May 2018 opinion, Chief Judge McMahon reasoned that there would be no "Fifth Amendment issue" if Deutsche Bank was merely pursuing its "own duties or interests" in interviewing its employees.[154] Moreover, Chief Judge McMahon continued,

> Black does not actually allege in his motion that the government *directed* Deutsche Bank to conduct an internal investigation. Nor does he allege that . . . the government *participated* in the interviews. . . . And Black does not assert that anyone *told him* he would be fired . . . if he refused to sit for an interview.[155]

From the language of the above passage, one might have expected the court to quickly dispose of Black's claims. Nevertheless, the court permitted an evidentiary hearing,[156] and one year later, its tone

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150. "LIBOR" denotes the London Interbank Offered Rate, an interest rate benchmark that is used to compute interest rates. "Each day, a group of banks that sit on the reference panel for the InterContinental Exchange ('ICE') determine at what interest rates they would be willing to lend to other banks." Christopher J. Click, *Death of a Benchmark: The Fall of LIBOR and the Rise of Alternative Rates in the United Kingdom and United States*, 22 N.C. BANKING INST. 283, 284–85 (2018). Between 2012 and 2016, Deutsche Bank was among those banks investigated and ultimately forced to pay massive penalties for manipulating the benchmark. Pierre-Hugues Verdier, *The New Financial Extraterritoriality*, 87 GEO. WASH. L. REV. 239, 249 (2019) (describing the LIBOR investigation).

151. For an overview of the case, see COFFEE, *supra* note 129, at 85–87; and David B. Massey, James Q. Walker, Lee S. Richards III, Shari A. Brandt, Audrey L. Ingram, Daniel C. Zinman, Arthur Greenspan & Rachel S. Mechanic, U.S. v. Connolly: *"Outsourcing" a Government Investigation—and How To Avoid It*, N.Y.U. PROGRAM ON CORP. COMPLIANCE & ENF'T (May 7, 2019), https://wp.nyu.edu/compliance_enforcement/2019/05/07/u-s-v-connolly-outsourcing-a-government-investigation-and-how-to-avoid-it [https://perma.cc/6KFN-GZJB].

152. *Connolly*, 2018 WL 2411216, at *8.

153. Griffin, *supra* note 132, at 353–54 (citing Garrity v. New Jersey, 385 U.S. 493 (1967)).

154. *Connolly*, 2018 WL 2411216, at *11.

155. *Id.* at *9 (emphasis added).

156. United States v. Connolly, 1:16-CR-00370, 2019 WL 2120523 (S.D.N.Y. May 2, 2019).

changed considerably.[157] In a highly publicized May 2019 opinion, Chief Judge McMahon dismantled the government's position that it was merely the fortunate recipient of a private party's investigation.[158]

*Connolly* was notable because the court described the investigation in painstaking detail, demonstrating just how far the so-called private investigation has evolved from the days of *Burdeau*.[159] During the years-long investigation, the company's outside counsel routinely updated government enforcers in telephonic and in-person meetings.[160] Law firm partners and associates "conducted nearly 200 interviews of more than fifty Bank employees," "extracted and reviewed 158 million electronic documents," and "listened to 850,000 audio files."[161] All of this was divulged to prosecutors and regulators who, in the court's view, engaged in relatively minimal investigation of their own.[162]

To an outsider, it appeared the government had effectively conscripted Paul Weiss (and, indirectly, Deutsche Bank) as its agent.[163] Chief Judge McMahon thus declared that the law firm's investigation was "fairly attributable" to the government and therefore triggered its employee's privilege against self-incrimination.[164]

Consider this ruling's implications. If an "internal" investigation is in fact state action, *all* of the fruits of that investigation—including the documents and emails obtained by corporate lawyers—become

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157. *Id.*

158. "[B]y no standard known to this Court . . . can the investigation . . . be accurately characterized as an 'internal' investigation." *Id.* at *9 n.5.

159. *Id.* at *3–10 (providing timeline of investigation).

160. "[F]or five years, Deutsche Bank and its outside counsel coordinated extensively with the three Government agencies—the SEC, the CFTC, and eventually the United States Department of Justice ('DOJ')—that were looking into possible LIBOR manipulation." *Id.* at *2–4.

161. *Id.* at *7 (citation omitted). The Court further advised: "When all was said and done, the LIBOR investigation was the largest and most expensive internal investigation in the respective histories of both Deutsche Bank and Paul Weiss." *Id.* at *8.

162. *Id.* at *10.

163. For arguments that corporate law firms owe allegiances to corporate targets and that these allegiances undermine their efficacy as investigators, see COFFEE, *supra* note 129, at 46, contending law firms may soft-pedal investigations, particularly where high-ranking officers are implicated in wrongdoing. For an earlier (and prescient) account of how this plays out, see Laufer, *supra* note 136, at 652, describing ways in which corporate investigators shield high-ranking employees by placing blame on lower-level employees.

164. "Private conduct is attributed to the government when 'there is a sufficiently close nexus between the state and the challenged action.'" *Connolly*, 2019 WL 2120523, at *10–11 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

the fruits of *government* action.[165] Suddenly, everything the government has collected via the corporate investigator becomes subject not only to Fourth Amendment jurisprudence, but also to *Carpenter*'s new gloss on what constitutes a Fourth Amendment search.

Readers will recall that the surveillance at issue in *Carpenter* consisted of a week's worth of location data.[166] Compare that with a year's worth of emails and telephonic meetings and any other workplace surveillance the employer may have performed. How can an internal investigation's extensive and digitized record of employee behavior *not* provoke the very kinds of privacy concerns that underscored *Carpenter*?[167] If seven days' worth of location data constitutes a search, how sure can any prosecutor be that the collection of 158 million electronic documents and 850,000 audio files would not also be deemed a search? Why would this mosaic escape the "search" moniker any more than the mosaic at issue in *Carpenter*?

Indeed, *Connolly* and *Carpenter* enjoy a symbiotic relationship. The possibility that a court might view an extensive investigation as a search increases defense counsel's incentives to challenge a corporate investigation's "private" label. To put it another way, the possibility of *Carpenter*'s expansion makes the *Connolly*-style challenge more likely. And decisions that a private investigation is in fact state action may well open the door for corporate and white-collar defendants to test *Carpenter*'s boundaries.[168]

### B. GRAND JURY AND ADMINISTRATIVE SUBPOENAS

Private investigations are helpful, but the government enjoys powers of its own. For decades, prosecutors and regulators have maintained an almost unfettered ability to demand documents and data of businesses through compulsory subpoenas.[169] The

165. COFFEE, *supra* note 129, at 84–87. Coffee's analysis focuses solely on the case's Fifth Amendment implications. In an earlier article, Harry First noted the Fourth Amendment arguments that might also arise from a corporate investigation that was later found to be "state action." First, *supra* note 129, at 78.

166. Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018).

167. "Financial records are of vast scope. Banks and credit card companies keep a comprehensive account of almost every transaction an individual makes on a daily basis." *Id.* at 2232 (Kennedy, J., dissenting).

168. Presumably, lawyers would argue that the company's internal surveillance technology renders its collection of information just as "easy, cheap, and efficient" as CSLI. *Cf.* at 2217–18 (majority opinion) (citing factors that allegedly distinguish CSLI from other forms of surveillance).

169. *See, e.g.*, United States v. R. Enters., 498 U.S. 292, 302–03 (1991) (declining to consider whether subpoenas violated the First Amendment); United States v. Morton Salt Co., 338 U.S. 632, 652–53 (1950) (ruling that subpoena order was within agency

justifications for these powers include the public's right to be apprised of relevant information,[170] as well as the so-called public nature of the records themselves.[171]

Currently, a federal investigator can serve a grand jury subpoena on any organization for documentary or digital evidence with almost no constitutional limitation other than a watered down version of the Fourth Amendment reasonableness requirement.[172] The Court accords administrative subpoenas roughly the same latitude[173] and allows regulators to satisfy their "official curiosity" that the company is acting in accordance with "the law and the public interest."[174] Similar

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authority and declining to set bounds on this authority); Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 218 (1946) ("No sufficient reason was set forth . . . for not enforcing the subpoenas . . . .").

170. Branzburg v. Hayes, 408 U.S. 665, 688 (1972). For criticism, see Andrew E. Taslitz & Stephen E. Henderson, *Reforming the Grand Jury To Protect Privacy in Third Party Records*, 64 AM. U. L. REV. 195, 204 (2014), arguing that the Court has never explained how the public's broad "right" to evidence can be reconciled with the "limited-government norm" that the Fourth Amendment's language aims to protect.

171. *See infra* notes 226–30 and corresponding text.

172. *See, e.g., R. Enters.*, 498 U.S. at 299. *See generally* Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805 (2005) (analyzing how the government can issue subpoenas without adhering to the strictures of the Fourth and Fifth Amendments).

173. *See, e.g., Morton Salt Co.*, 338 U.S. at 652 ("[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."); Judge Glock, *The Forgotten Visitorial Power: The Origins of Administrative Subpoenas and Modern Regulation*, 37 REV. BANKING & FIN. L. 205, 260–61 (2017) (noting that administrative subpoenas "are almost completely uninhibited by law, either before or after their issuance").

174. *Morton Salt Co.*, 338 U.S. at 652 ("[L]aw-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest."); *see also Okla. Press Publ'g Co.*, 327 U.S. at 208 (concluding that the "gist of the protection" for recipients of subpoenas under the Fourth Amendment "is in the requirement . . . that the disclosure sought shall not be unreasonable").

One of the reasons the Court has been so deferential is that it views the corporation's Fourth Amendment privacy right as weaker than that of a natural person. *See, e.g., Morton Salt Co.*, 338 U.S. at 652 ("[N]either incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret."); Dow Chem. Co. v. United States, 476 U.S. 227, 237–38 (1986) (holding that EPA's aerial surveillance of manufacturing plant was not a search because, among other things, company held a reduced expectation of privacy in its commercial property); *see also* Donovan v. Dewey, 452 U.S. 594, 598–99 (1981) (holding that owner's expectation of privacy in commercial space "differs significantly" from interests that arise in and around the home). *But see* Garrett, *supra* note 20, at 122 (contending that "corporations and individuals are treated much the same for Fourth Amendment purposes" once one takes account of the quasi-public nature of business records).

justifications, in turn, have paved the way for a wide array of regulatory enforcement activities, with some notable limitations.[175]

"Reasonableness," as applied to subpoenas, translates into a rule against requests that are overly broad, indefinite, or issued with malice or an intent to harass.[176] If a recipient challenges a subpoena on relevance grounds, it will lose "unless the district court determines that there is *no reasonable possibility* that the category of materials the Government seeks will produce information *relevant to the general subject* of the grand jury's investigation."[177] The inquiry is thus one of bare relevance: Is there a plausible connection between materials requested and the subject matter of the investigation? Aside from screening out harassment and bad faith, it functions as barely a standard at all.[178]

One might conclude that grand jury subpoenas receive deference on account of the grand jury's historical function as an institution of laypersons who protect against "arbitrary and oppressive governmental action."[179] But if that were the case, one would expect the Court to distinguish grand jury and administrative subpoenas, which it

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175. Van Loo, *supra* note 20, at 1619 (arguing that administrative subpoena powers, plus constitutive agency statutes, enable agencies such as the FTC to demand reporting from regulated entities and to examine their books).

The ability of regulators to demand information absent a subpoena and the entity's opportunity for "pre-compliance review" is complicated. For a few closely regulated industries, no review is necessary; the businessman who enters such an industry "consents to the restrictions placed upon him." Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973); Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978); *see also* City of Los Angeles v. Patel, 576 U.S. 409, 424 (2015) (identifying four such industries). For all others, the regulator must at least serve a subpoena and provide some avenue for "precompliance review." *See Patel*, 576 U.S. at 420 (requiring pre-compliance review "absent consent, exigent circumstances, or the like").

176. "Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass." *R. Enters.*, 498 U.S. at 299.

177. *Id.* at 301 (emphasis added).

178. Taslitz & Henderson, *supra* note 170 ("[C]ourts have rarely imposed any justification requirement upon grand jury records subpoenas . . . ."); *see also* Slobogin, *supra* note 172, at 816 (evidentiary standard for requesting records is "extremely easy to meet").

Notwithstanding the foregoing, the company *can* raise attorney-client privilege claims. *See In re* Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014) (holding that a contractor's internal investigation was protected by attorney-client privilege).

179. United States v. Calandra, 414 U.S. 338, 343 (1974). "Because the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial." *Id.* at 349.

mostly has not.[180] Moreover, if the grand jury's vaunted function were the true rationale for deference, one might expect the Court to test the premise that the grand jury (and not the prosecutor or investigator) devises, drafts, or oversees the service of subpoenas.[181] This, too, it has not done.[182] Thus, one cannot help but conclude that the real explanation for the Court's deference is instrumental: the Court grants the government broad subpoena powers because these powers support the government's enforcement mission.[183]

This steadfast respect for government enforcement needs has not always existed. In *Boyd v. United States*, an 1886 *in rem* case involving a company accused of importing plate glass without paying proper duties, the Court held unconstitutional the statute that compelled the company to produce invoices for court inspection.[184] The invoices, the Court concluded without argument, were the *private* effects of the company's owners; compulsion to produce the papers, therefore, was per se "unreasonable" under the Fourth Amendment and violative of the owner's Fifth Amendment privilege against self-incrimination.[185]

The *Boyd* Court undercut the government's investigative power in two steps. *First*, it treated a compulsory demand for documents as a Fourth Amendment search.[186] *Second*, it conceptualized that demand

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180. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206 (2018). The majority opinion does not mention a distinction between grand jury and administrative subpoenas in delivering its ruling, although Justice Alito takes care to analyze the history of grand jury subpoenas in his dissent. *Id.* at 2247–50 (Alito, J., dissenting).

181. "Although styled a 'grand jury investigation,' no one doubts that the prosecutor calls the shots. The prosecutor decides what matters to pursue, which targets to focus on, what witnesses to call, and what documents to subpoena." RONALD JAY ALLEN, WILLIAM J. STUNTZ, JOSEPH L. HOFFMANN, DEBRA A. LIVINGSTON, ANDREW D. LEIPOLD & TRACEY L. MEARES, CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL 1065 (3d ed. 2016); *see also* Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 2 (2004) (critiquing claim that grand jury acts independently); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 315 (1995) ("[T]here is no doubt that the prosecutor directs the investigation, not the [grand] juror.").

182. *See, e.g.*, *Calandra*, 414 U.S. at 346 (noting that "the grand jury's subpoena is not unlimited").

183. Slobogin, *supra* note 172, at 809 (citing oft-stated rationale that deference is necessary because the imposition of "rigorous Fourth Amendment requirements would stultify important government investigations").

184. Boyd v. United States, 116 U.S. 616, 638 (1886). For illuminating background on the case, see SAMUEL DASH, THE INTRUDERS: UNREASONABLE SEARCHES AND SEIZURES FROM KING JOHN TO JOHN ASHCROFT 48–54 (2004), recounting the agreement Boyd had struck with the federal government allowing him to replace, with duty-free shipments, plate glass he had previously provided to build Philadelphia's federal courthouse.

185. *Boyd*, 116 U.S. at 621–22.

186. *Id.* at 622.

as a violation of both the Fourth Amendment's "reasonableness" language *and* the Fifth Amendment's protection against compelled incrimination.[187] In other words, *any* demand—even one supported by probable cause and a judicially authorized warrant—was "unreasonable" if it compelled the recipient to relinquish his incriminating "private . . . papers."[188]

It is impossible to overstate *Boyd*'s implications: by tethering the Fourth Amendment to the Fifth, it threatened not only the subpoena power but also the government's ability to obtain private papers through judicially approved search warrants.[189] That is, it created an inviolable space into which government actors could *never intrude*.[190] It achieved this effect by casually characterizing the Boyd company's invoices as "a man's private papers,"[191] by ignoring the distinction

187. *Id.* at 621.

188. *Id.* at 633. *Boyd* carved out certain exceptions (for stolen property and contraband) but otherwise set up an inviolate space that excluded the government's search for "mere evidence." *Id.* at 623. This limitation persisted (albeit in increasingly narrower form) for a surprisingly long time. *See* Gouled v. United States, 255 U.S. 298, 309 (1921) (setting forth parameters of "mere evidence" rule). On the effects of *Gouled*, see Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 964–65 (2010), which explains how the mere evidence rule protected business records from government investigations.

The Court finally retired *Boyd* and *Gouled* in a series of cases that culminated roughly a century later. *See* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 310 (1967) (renouncing limitation on searches for "mere evidence"); Andresen v. Maryland, 427 U.S. 463, 471–72 (1976) (discarding argument that searches amounted to Fifth Amendment compulsion); Fisher v. United States, 425 U.S. 391, 398–99 (1976) (disclaiming any Fifth Amendment protection in the contents of documents).

189. "*Boyd* held, basically, that the government could not obtain documents in the possession of their legitimate owner—not through search and seizure, not through subpoena, not through the testimony of the documents' owner." Stuntz, *supra* note 20, at 1030 (highlighting *Boyd*'s absolute bar); *see also* Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 563 (1996) (stating that under *Boyd*, "[e]ven a valid warrant could not authorize the seizure of some private papers").

190. When the Court finally retired *Boyd*'s remnants, Justice Douglas lamented their disappearance. *Hayden*, 387 U.S. at 313 (Douglas, J., dissenting) (describing the "zone of privacy" that cannot be violated "by the police through raids, by the legislators through laws, or by magistrates through the issuance of warrants"); *see also* Miriam Baer, *Inviolate Spaces*, PRAWFSBLAWG (Feb. 29, 2016), https://prawfsblawg.blogs.com/prawfsblawg/2016/02/inviolate-spaces.html [https://perma.cc/4RXX-SFLS] (providing a brief overview of some of the criticisms levelled against overruling *Boyd*).

191. *Boyd*, 116 U.S. at 622 (describing the issue as one involving "a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property"). The papers clearly belonged to E.A. Boyd & Sons, the *business* that imported the glass. DASH, *supra* note 184, at 50–51.

between Boyd-the-owner and Boyd-the-entity, and by treating a judicial *demand* for the production of those papers as the equivalent of both a search and compelled incrimination.[192] As Professor William Stuntz long ago observed, had *Boyd* remained good law, it would have severely stunted the government's enforcement of regulatory and corporate criminal law.[193]

Fortunately for the government, the Court reversed several of *Boyd*'s components just a few decades later in *Hale v. Henkel*, an early Sherman Antitrust Act case.[194] Citing the grand jury's traditional function as a buffer "between the prosecutor and the accused,"[195] *Hale* retreated from the treatment of subpoenas as the equivalent of physical Fourth Amendment searches and initiated the requirement that subpoenas meet a weakened reasonableness requirement.[196]

*Hale*'s strength lay not in its reasoning but in its outcome. It was simply better for the government to be able to demand the "books, papers, tariffs, contracts, agreements, and documents" pertaining to everyday business transactions[197] than for the government to proceed without these powers.[198] The result may have been desirable,[199] but it

192. *Boyd*, 116 U.S. at 622. A century later, the Court explicitly reversed itself on this point. "We adhere to the view that the Fifth Amendment protects against 'compelled self-incrimination, not [the disclosure of] private information.'" Fisher v. United States, 425 U.S. 391, 401 (1976) (alteration in original) (quoting United States v. Nobles, 422 U.S. 225, 233 n.7 (1975)).

193. *See* Stuntz, *supra* note 20, at 1031 (explaining that the Supreme Court itself realized that "if it took *Boyd* seriously, government regulation would be impossible"); *id.* at 1052 ("*Boyd* came dangerously close to giving regulated actors a blanket entitlement to nondisclosure.").

194. Hale v. Henkel, 201 U.S. 43, 72 (1906) (citing post-*Boyd* courts' treatment of "the Fourth and Fifth Amendments as quite distinct, having different histories and performing separate functions").

195. *Id.* at 59.

196. *Id.* at 76 (warning that a subpoena cannot be "reasonable" if it is "too sweeping in scope"); *see also id.* at 72–73 (citing series of cases affirming newly formed Interstate Commerce Commission's powers to compel production of documents). Years later, the Court would also affirm the government's ability to seek business records in a search warrant. *See* Schenck v. United States, 249 U.S. 47, 50 (1919).

197. *Hale*, 201 U.S. at 72.

198. *See, e.g.*, Garrett, *supra* note 20, at 123; Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors To Go?*, 54 U. PITT. L. REV. 405, 416 (1993) ("[T]he Court justified [*Hale*] on the basis that a contrary holding would have a deleterious effect on prosecutions of corporate crime."). Henning refers to *Hale* and its progeny's reasoning as the "rationale of combatting corporate crime to justify [the Court's] decision." *Id.* at 418.

199. *But see* Richard A. Nagareda, *Compulsion "To Be a Witness" and the Resurrection of* Boyd, 74 N.Y.U. L. REV. 1575, 1577 (1999) (arguing that the Court's decisions "left Americans on the verge of the twenty-first century with less protection against

swung the Court from one extreme to the other. Whereas in *Boyd* the government enjoyed almost *no* authority to demand the production of business records, under *Hale* it attained almost *unfettered* authority to demand the production of papers.[200] The Court thus moved from one extreme to another.

If *Carpenter*'s privacy language means anything, the rules set forth in *Hale* and the cases that followed it may yet unravel, as the pendulum appears ready to reverse direction yet again.[201] If the degree and amount of surveillance is what triggers Fourth Amendment protection, it is difficult to imagine why courts would continue to apply a half-hearted reasonableness requirement to government-issued subpoenas that allow investigators to amass mountains of digitized information, some of it as "personal" as CSLI. Moreover, given the immense stakes, it is highly probable that corporations or their executives will enthusiastically jump at the opportunity to test this theory.[202]

### C. COLLECTIVE ENTITIES AND SELF-INCRIMINATION

*Hale* enabled government investigations in more ways than one. In addition to unlinking the Fourth Amendment's reasonableness language from the Fifth, the case also held that the privilege against self-incrimination was limited to natural persons.[203] Its exclusion of corporations from the privilege rested on several arguments. First, the Court was determined to protect the Interstate Commerce and Sherman Antitrust Acts.[204] If corporations could withhold documents and

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compelled self-incrimination than they enjoyed under the common law of the eighteenth century").

200. Slobogin, *supra* note 172, at 808 (concluding that the Court's reversal in *Hale* removed "virtually all Fourth Amendment strictures on document subpoenas").

201. Justice Alito's *Carpenter* dissent invokes this worry. "Today ... the majority inexplicably ignores the settled rule of *Oklahoma Press* [one of *Hale*'s progeny] in favor of a resurrected version of *Boyd*. That is mystifying." Carpenter v. United States, 138 S. Ct. 2206, 2255 (2007) (Alito, J., dissenting).

202. Corporations have already become adept at using privacy rhetoric to forestall government intrusions. *See, e.g.*, Rozenshtein, *supra* note 52, at 950–51 (discussing cases where for various reasons courts found that *Carpenter* did not apply).

203. Hale v. Henkel, 201 U.S. 43, 69 (1906) ("The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness."); *see also* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978) (citing the privilege as "purely personal" because of its "historic function").

204. *See, e.g.*, *Hale*, 201 U.S. at 70 (noting that litigation under the Sherman Act would be impossible if the court could "close the door of access to every available source of information").

prevent their executives from testifying, then "the privilege claimed *would practically nullify the whole act of Congress.*"[205]

Second, the Court explained, corporations owed their existence to a legislative charter, embedded in which was the sovereign's right "to investigate [the corporation's] contracts and find out whether [the corporation] has exceeded its powers."[206] In other words, because the corporation owed its existence to the state, it was an artificial entity that enjoyed no protection against self-incrimination.[207] The argument was somewhat misplaced; the investigation's driving force wasn't a *state* charter violation but rather a violation of the federal Sherman Antitrust Act.[208] But the Court realized this too, and tacked on an additional rationale for upholding the subpoena, namely the protection of interstate commerce.[209]

*Hale*'s reliance on state charters did not last very long. Half a century later, *Morton Salt*, an administrative subpoena case, declared:

> [C]orporations can claim no equality with individuals in the enjoyment of a right to privacy. . . . They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities.[210]

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205. *Id.* (emphasis added). For later commentary on *Hale*'s reasoning, see Bharara, *supra* note 141, at 65, observing that the collective entity doctrine "starkly demonstrates judicial embrace of an ends-justify-the-means legal philosophy."

206. *Hale*, 201 U.S. at 74–75.

207. On concession theory generally, see Vincent S.J. Buccola, *Corporate Rights and Organizational Neutrality*, 101 IOWA L. REV. 499, 507–08 (2016), which states, "Because a corporation . . . owes its very existence to a state privilege, namely the charter, state regulation is permissible where it would not be permissible to regulate natural persons."

According to Professor Reuven Avi-Yonah, one can find each of the three theories of personhood in *Hale*. Avi-Yonah, *supra* note 79, at 1015–17 (explaining the Court's incantation of all three views as an attempt to "strike a balance between the rights of the corporations, which can best be protected under either the aggregate or the real entity views, and the regulatory power of the state, which is best reflected in the artificial entity view").

208. *See* Avi-Yonah, *supra* note 79, at 1015 n.97 (observing the Court's shift between the state charter rationale and the need to protect interstate commerce).

209. *See Hale*, 201 U.S. at 75 (explaining that state franchises "so far as they involve questions of interstate commerce, must also be exercised" in accordance with Congress's power to protect interstate commerce).

210. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (citation omitted). For contemporary accounts of how corporations have developed "public" attributes and obligations, see Hillary A. Sale, *The New "Public" Corporation*, 74 LAW & CONTEMP. PROBS. 137 (2011), which explores the definition of "public corporation"; and Hillary A. Sale, *J.P. Morgan: An Anatomy of Corporate Publicness*, 79 BROOK. L. REV. 1629 (2014), which establishes "the groundwork for understanding publicness in the context of corporate governance."

Thus, by mid-twentieth century, the feature that justified the government's demand for documents was no longer a state charter; rather, it was the corporation's "collective impact on society," paired with the federal government's permission to "engag[e] in interstate commerce."[211]

Finally, some two decades later, the Court ignored the corporate form altogether. *Bellis v. United States*, a 1974 case, involved a subpoena served on the former partner of a law partnership.[212] Citing an earlier case, the Court reasoned that the documents in *Bellis* belonged to the "entity" and not to a specific individual.[213] The custodian of those records could not abuse the privilege by refusing to produce the *entity's* records.[214] Post-*Bellis*, the rule officially became known as the "collective entity" doctrine.[215] Although collective entities enjoyed rights against unreasonable searches (e.g., bursting into a law firm without a warrant), they retained no rights against compelled incrimination.[216]

Under the modern rule, all the government must establish is that the documents in question "belong" to an artificial entity; if so, the self-incrimination privilege disappears, and the entity and its representatives are obligated to produce its responsive documents.[217]

To understand what collective entities lack in terms of rights, it is important to consider what happens when a sole proprietor (or any

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211. *Morton Salt Co.*, 338 U.S. at 652.

212. Bellis v. United States, 417 U.S. 85, 85 (1974) (addressing constitutionality of subpoena served on former partner for partnership's financial records).

213. *Id.* at 88 (citing Wilson v. United States, 221 U.S. 361, 364 (1911)) (holding that a subpoena served on corporation's custodian did not violate custodian's Fifth Amendment privilege against self-incrimination because the records belonged to the corporation and the subpoena was served on the individual in his custodial capacity).

214. *Id.*

215. Garrett, *supra* note 20, at 129–30; *see also* Henning, *supra* note 198, at 416–17 (tracing "collective entity" doctrine back to *Hale* from 1906).

216. Ironically, it was *Hale* itself that recognized the entity's Fourth Amendment rights against unreasonable searches. Hale v. Henkel, 201 U.S. 43, 76 (1906) (holding that a corporation possesses rights against unreasonable searches and seizures because it is "but an association of individuals under an assumed name and with a distinct legal entity" (emphasis omitted)). Those rights persist today. *See, e.g.*, Airbnb, Inc. v. City of New York, 373 F. Supp. 3d 467, 482 (S.D.N.Y. 2019) ("[T]he entry by the state onto private premises for the purpose of seizing records or other effects represents a particularly acute intrusion on privacy." (citing Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 204 (1946))).

217. *Bellis*, 417 U.S. at 90. Entities can still raise arguments such as the attorney-client privilege. Upjohn Co. v. United States, 449 U.S. 383, 403 (1981).

other "natural person") receives a subpoena.[218] *That* person enjoys a privilege against self-incrimination,[219] but it is more limited than many realize. First, the privilege applies only to "*compelled* testimonial communications."[220] Thus, the *contents* of documents generated prior to the subpoena's issuance are unprotected.[221] Second, even if the *production* of the record could be characterized as a form of testimony (e.g., "this document exists, is authentic, and is in my possession"),[222] the judiciary has effectively truncated *that* aspect of the privilege by creating the "foregone conclusion"[223] and "required records" doctrines.[224]

The foregone conclusion doctrine is straightforward: if the government can conclusively establish the location and possession of certain documents (because, for example, the recipient previously disclosed them in a deposition), their existence is a "foregone conclusion," and the subpoena recipient cannot complain of any incidental information she may have provided by turning them over to authorities.[225] In other words, her act of production is not telling the government anything it does not already know.

The business records doctrine is more confusing and, frankly, more questionable. The Court announced it in *United States v.*

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218. *See, e.g.*, Braswell v. United States, 487 U.S. 99, 104 (1988) (discussing a situation where a "natural person" was subpoenaed); *see also* Henning, *supra* note 198, at 414 (discussing subpoenas of documents and those "privileges a witness can assert to resist producing documents").

219. Fisher v. United States, 425 U.S. 391, 399 (1976).

220. *Id.* at 409 (emphasis added).

221. *Id.*; *see also* Garrett, *supra* note 20, at 157–58.

222. "[T]he act of producing documents in response to a subpoena may have a compelled testimonial aspect." United States v. Hubbell, 530 U.S. 27, 36 n.19 (2000) (citing United States v. Doe, 465 U.S. 605, 613 (1984)) (identifying three statements that arise out of the act of production: that the documents existed, that they were in the recipient's possession or control, and that they were authentic).

223. If the document's existence and location is a "foregone conclusion," the demand does not trigger the "act of production privilege." *See* Orin S. Kerr, *Compelled Decryption and the Privilege Against Self-Incrimination*, 97 TEX. L. REV. 767, 773–76 (2019) (explaining foregone conclusion doctrine and lower court applications). *Compare Fisher*, 425 U.S. at 411 (involving tax records whose existence and location were known to the government), *with Hubbell*, 530 U.S. at 29 (noting requests that effectively compelled respondent's "testimonial" responses in compiling and producing documents).

224. *See In re* Special Feb. 2011-1 Grand Jury Subpoena, 691 F.3d 903, 905 (7th Cir. 2012); *see also* Daniel M. Horowitz & Stephen K. Wirth, *The Death and Resurrection of the Required-Records Doctrine*, 86 MISS. L.J. 513, 551–52 (2017) (describing the required records doctrine and its recent usage).

225. *See supra* note 223 and accompanying text.

*Shapiro*,[226] a New Deal price-control case, which recasts a business record as "public" and therefore discoverable whenever a regulatory regime requires the proprietor to maintain certain records.[227] Like *Hale*, the *Shapiro* decision relies almost exclusively on the government's enforcement needs,[228] and its explanation of what makes a document "public" is remarkably circular. The doctrine applies "to records required by law to be kept . . . which are the appropriate subjects of governmental regulation."[229] In other words, documents become "public" whenever the government believes they are the "appropriate" subjects of regulation.[230] Put less charitably, documents become "required" business records whenever the government feels like requiring them.

The act of production privilege and its exceptions are highly technical doctrines. Were the Court to roll back the collective entity doctrine, however, it would incentivize corporate targets to test these doctrines. A multinational corporation might fight a broadly worded subpoena on act of production grounds. A closely held corporation might challenge the government's claim that certain documents fell within the business records exception. Assuredly, corporate defendants would probably lose some—perhaps many—of these challenges.[231] But even the obligation of litigating these issues would cause headaches and delay for government enforcers.

### D. A FUTURE STORM

In the war on corporate and white-collar crime, constitutional corporate procedure is the government's best-kept secret. Between the private search and state action doctrines, the immense deference

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226. Shapiro v. United States, 335 U.S. 1, 16 (1948).

227. *Id.* at 17–18 (citing Wilson v. United States, 221 U.S. 361, 380 (1911)).

228. *Id.* at 15 (citing Congress's desire to place "teeth" in the Price Control Act through recordkeeping requirements). *But see* Nagareda, *supra* note 199, at 1643 ("To say . . . that Congress clearly considered important the enforcement of wartime price controls . . . is not to say that Congress may pursue such a policy by way of compelled self-incrimination.").

229. *Shapiro*, 335 U.S. at 17 (citing *Wilson*, 221 U.S. at 380).

230. *See, e.g.*, Bryan H. Choi, *For Whom the Data Tolls: A Reunified Theory of Fourth and Fifth Amendment Jurisprudence*, 37 CARDOZO L. REV. 185, 189 (2015) ("[T]he government simply stipulates that specific records must be kept by law, and then those records become categorically excluded from the privilege against self-incrimination."); Horowitz & Wirth, *supra* note 224, at 525; Michael Zydney Mannheimer, *Toward a Unified Theory of Testimonial Evidence Under the Fifth and Sixth Amendments*, 80 TEMP. L. REV. 1135, 1179–80 (2007).

231. Garrett offers the strongest arguments for discounting these negative outcomes. *See* Garrett, *supra* note 20, at 142–43, 149, 157–58.

accorded subpoenas under the Fourth Amendment's reasonableness language, and the Fifth Amendment's collective entity doctrine, the government maintains the ability to demand vast swaths of information from corporate entities with relatively little constitutional pushback.[232]

It does not take too much effort to see how the developments described in Part I spell trouble for the doctrines described in this Part. If *Carpenter*'s "permeating surveillance"[233] applies as readily to corporate investigations as it does to investigations of street crimes, it will electrify the line between private and public, inviting litigators to challenge the very arrangements that featured so prominently in *Connolly*.[234] By the same token, if *Carpenter*'s mosaic approach reflects deep-seated concerns with government surveillance and overreach, it is hardly fanciful to imagine future courts conducting more searching inquiries of grand jury and administrative subpoenas under the Fourth Amendment's reasonableness prong. And finally, if corporations—or some subset of them—can eventually employ the Court's personhood language to claim the same self-incrimination rights as natural persons, then numerous subpoenas may become potential fodder for litigation. I discuss the implications of this development further in Part III.

## III. THE RULES DISAPPEAR: MAPPING THE GOVERNMENT'S RESPONSE

The final section of Part II forecasts a world in which the Supreme Court revisits the rules of corporate constitutional procedure. It imagines a world in which (a) private search and state action doctrines become less accommodating of even indirect government participation in corporate investigations; (b) as a means of protecting privacy and preventing panoptic government surveillance, the Court alters its deferential stances on grand jury and administrative subpoenas, particularly in those cases where enforcers obtain and aggregate mountains of digital data;[235] and finally (c) the Court overturns the portion

232. *See* Arlen & Buell, *supra* note 128, at 725–26 (discussing the government's ability to gather documentary evidence).

233. Carpenter v. United States, 138 S. Ct. 2206, 2231 (2018).

234. *See* Luke Cass, United States v. Connolly*: Shifting the Internal Investigations Landscape*, QUARLES & BRADY LLP (May 22, 2019), https://www.quarles.com/publications/united-states-v-connolly-shifting-the-internal-investigations-landscape [https://perma.cc/9RCD-76EY].

235. For an early taste, see for example, *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 482 (S.D.N.Y. 2019).

of *Hale v. Henkel* that excludes the corporation from claiming the Fifth Amendment's privilege against self-incrimination. Over the past decade, litigants and commentators have already urged such reforms.[236]

These reforms would profoundly alter the balance of power between government enforcers and private industry. A revised definition of what constitutes a private investigation would at least partially dampen the government's enthusiasm for trading leniency in exchange for corporate surveillance. A Fourth Amendment reasonableness rule with teeth would place prosecutors and regulators on the defensive when they served overly broad or searching subpoenas. And a partial or total collapse of the collective entity doctrine would almost surely instigate costly litigation between entities and government lawyers over the scope and proper application of the act of production privilege and its related doctrines.

Lest this scenario appear too far-fetched, consider several points. First, the Court's most recent Fourth Amendment privacy decisions arise out of deep-seated concerns with technology-boosted surveillance.[237] Subpoenas and private investigations may appear conventional, but the government's use of technology to serve subpoenas and to aggregate and maintain massive amounts of information obtained from such subpoenas could eventually implicate the concerns that drove the Court's decision in *Carpenter*.[238]

Second, the Court's recent cases on corporate personhood feature language expansive enough to affect rights beyond the First Amendment. If the corporation-as-person enjoys the benefits of *First* and *Fourth* Amendment protections—either as a "real entity" or on behalf of its "members,"—then it may well graduate to one day

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236. *See supra* notes 29, 122 (describing litigation efforts). For more arguments advancing such reforms, see Robert M. Ackerman & Lance Cole, *Making Corporate Law More Communitarian: A Proposed Response to the Roberts Court's Personification of Corporations*, 81 BROOK. L. REV. 895, 911–12 (2016), criticizing the "fundamental inconsistency" between the collective entity doctrine and the Court's more modern view of corporate personhood; and Lance Cole, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities—Should Business Entities Have a Fifth Amendment Privilege?*, 2005 COLUM. BUS. L. REV. 1, 80, which explains the "original rationale for the collective entity doctrine" and why it is no longer supported.

237. *See* Bambauer, *supra* note 41, at 217 (observing that computing power "facilitates aggregation, persistence and searchability"); *Airbnb, Inc.*, 373 F. Supp. 3d at 481 (commenting that a local ordinance requiring home sharing company's production of data "realistically could arise only in a world of cyber-stored data, in which e-commerce companies maintain vast electronic databases as to their users, from which they can, if compelled, regularly reproduce voluminous stored data for regulators").

238. *See supra* Part I.A.

protecting the theoretical *Fifth* Amendment self-incrimination rights of the corporation's so-called members.[239]

Third, the doctrinal rules described in Part II are vulnerable precisely because they rely on increasingly contestable premises and affect vast swaths of people. As Part II's text and footnotes make clear, each of these doctrines has been roundly criticized by practitioners, jurists, and legal academics.[240] Moreover, these critiques resonate with broader critiques of government power and workplace privacy's erosion.[241]

Finally, this area in particular is prone to a domino effect: when one doctrine falls, the remainder become more vulnerable to attack. If courts decline to treat internal investigations as private searches, then government agencies will likely become more reliant on direct subpoenas and other interventions. When government subpoenas and other information-seeking efforts increase in scope and frequency, corporate entities are more inclined to challenge the Fourth and Fifth Amendment underpinnings of the subpoena power.[242] Each move invites another challenge.

With a few exceptions, the usual response to this thought experiment is to proclaim an enforcement apocalypse, much as Justices Alito and Kennedy forecasted in *Carpenter*[243] and the late Professor Stuntz predicted in his analysis of constitutional privacy.[244] The claim sounds something like this: if you take away these powers, the government won't be able to enforce the law, and if the government cannot enforce the law, corporate actors will become unaccountable and instigate

239. The practical mechanics of this transformation are beyond the scope of this Article. The point here is simply that the provision of rights in one context creates the impetus for challenging the denial of rights in others, even when the right in question is supposedly "personal." *Cf.* Darrell A.H. Miller, *Guns, Inc.:* Citizens United, McDonald, *and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 912 (2011) (observing the inconsistency of extending Fourth Amendment rights, which are also personal in nature, to corporations while depriving them of others).

240. For criticisms of the private search doctrine, see *supra* Part II.A and note 126. In regard to the deference accorded subpoenas, see *supra* Part II.B and notes 170, 178–83, 199. In regard to the collective entity doctrine and its related doctrines, see *supra* Part II.C and notes 230, 236.

241. *See generally* Ifeoma Ajunwa, Kate Crawford & Jason Schultz, *Limitless Worker Surveillance*, 105 CALIF. L. REV. 735, 772 (2017) (examining workplace surveillance's negative impact on privacy).

242. *See* First, *supra* note 129, at 78 (recognizing interplay between discovery techniques that raise First Amendment- and Fourth Amendment-based issues).

243. Carpenter v. United States, 138 S. Ct. 2206, 2233–34 (2018) (Kennedy, J., concurring); *id.* at 2256 (Alito, J., dissenting).

244. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 782 (2006); Stuntz, *supra* note 20, at 1019.

greater harms, triggering chaos and the collapse of the administrative state.

To interrogate this claim, this Part maps the government's predicted response to major changes in corporate constitutional procedure. In doing so, it highlights several of the coping strategies enforcement agencies would likely adopt and reaches the conclusion that enforcement would *not* fall apart in any spectacular fashion. Instead, it would slowly wither.

### A. RETREAT

When a change in an enforcement agency's information-gathering rules increases the costs of investigating and prosecuting misconduct, enforcers can choose from a menu of options. One option is to retreat—that is, to pull back or shift one's resources, and to quietly reduce one's investment in the investigation of certain violations of law. For a prosecutor or regulator, retreat may be the easiest and therefore most presumptive response.

Prosecutors and regulatory enforcers enjoy substantial discretion to shape their enforcement priorities.[245] The federal prosecutor's power to refrain from filing an indictment "has long been regarded as the special province of the Executive Branch" and therefore largely unreviewable by courts.[246] Regulators enjoy somewhat less discretion, but their enforcement decisions—short of outright nonenforcement[247]—are presumptively unreviewable.[248]

Concededly, this discretion is not absolute. Through its funding and oversight powers, Congress can direct resources towards or away from federal enforcement agencies and thereby constrain their

245. For more on the normative dimensions of such discretion, see Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 946–49 (2017).

246. Heckler v. Chaney, 470 U.S. 821, 832 (1985); *see also* United States v. HSBC Bank USA, N.A., 863 F.3d 125, 131 (2d Cir. 2017) (affirming government's discretion to enter into deferred prosecution agreements with corporate offenders); United States v. Fokker Servs., 818 F.3d 733, 740 (D.C. Cir. 2016) (overturning lower court's attempt to compel harsher deal between prosecutors and corporate offender).

247. An example of non-enforcement is the Obama administration's 2012 change in immigration policy that became known as Deferred Action on Childhood Arrivals, or DACA. *See generally* Stephen Lee & Sameer M. Ashar, *DACA, Government Lawyers, and the Public Interest*, 87 FORDHAM L. REV. 1879, 1879–80 (2019) (describing origins of DACA and its implementation).

248. *Chaney*, 470 U.S. at 832 ("[A]n agency's decision not to take enforcement action should be presumed immune from judicial review . . . .").

discretion.[249] But this power is limited as a practical matter and may be more or less effective when it is employed in one direction (reining in overreach) than the other (propelling enforcement). Moreover, as Professor Daniel Richman has pointed out, congressional oversight will vary according to enforcement context; smaller, single issue agencies of narrower jurisdiction will be more amenable to control than behemoths like the Department of Justice.[250] Finally, Congress is unlikely to weigh in on the type of retreat this Section envisions because it will occur largely at the staff level, reflecting the federal enforcement bureaucracy's decentralized features.[251]

Thus, if the predicted shift in enforcement priorities occurs quietly enough and under the radar, it will draw little response from either the judiciary or legislative branch. It will arise out of decisions made by line and staff attorneys and their supervisors.[252] Its effect—namely, less pervasive and less successful enforcement—will be perceptible to regulated entities, their lawyers and—eventually—the general public. One might consider it the antithesis of the enforcement crackdown Professor Mila Sohoni has so evocatively described.[253] Instead of noisily ramping up its enforcement, the government will quietly dial down its subpoena practices, its enforcement proceedings, and its criminal prosecutions of regulatory and white-collar offenses. The wheels of enforcement won't grind to a halt; rather, they will move more slowly and less effectively.

Readers might question whether retreat is a bug or a feature. After all, many observers frequently complain of overcriminalization, even in regard to white-collar offenses.[254] Scholars have often argued

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249. *See* Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2093 (2009) (citing "oversight hearings, budgetary controls and agency design" as important restrictions).

250. *Id.*

251. Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds - the Center Doesn't*, 117 YALE L.J. 1374, 1399–1401 (2008) (describing historical and present-day decentralization in and between federal prosecutor's offices, Main Justice, and federal investigative agencies).

252. The retreat this Section describes is thus distinct from the ideologically-driven, top-down retrenchment that implements an administration's policy preferences. *See, e.g.*, Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 458 (2015) (describing Anne Burford Gorsuch's "efforts to disperse enforcement responsibilities across various internal agency divisions" and thereby weaken the EPA).

253. Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 33 (2017) ("This is the crackdown: an executive decision to intensify the severity of enforcement of existing regulations or laws as to a selected class of offenders or a selected set of offenses.").

254. "Overcriminalization is the term that captures the normative claim that governments create too many crimes and criminalize things that properly should not be

that Congress, in drafting broad and overlapping statutes, actually prefers less than maximal enforcement.[255] And finally, the investigative tactics described in Part II *do* produce injustices and reductions of privacy among corporate employees.[256] Given these background factors, why should we be troubled by retreat?

Two responses come to mind. First, even if overenforcement plagues federal regulatory and white-collar enforcement (and those contentions are contestable[257]), such overreach usually arises out of *particular* statutory language and *particular* prosecutorial practices. The retreat described here would, of necessity, affect a wide swath of misconduct, undistinguished by agency or statute.

Second, retreat emits signals that alter the social meaning of the conduct at issue. However weak voluntary compliance may already be in some sectors, it becomes that much weaker when the government abandons its enforcement mission.[258] Retreat can communicate negative messages to victims and bystanders, creating the impression that victims no longer matter and that the government simply does not care to protect them.[259]

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crimes." Darryl K. Brown, *Criminal Law's Unfortunate Triumph over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 657 (2011). For a recent example of the overcriminalization argument applied to white-collar crime, see Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191 (2015), which argues that overcriminalization in the white-collar context spurs additional illegality by encouraging would-be offenders to rationalize their misconduct.

255. *See* Sohoni, *supra* note 253, at 49 (citing Leandra Lederman & Ted Sichelman, *Enforcement as Substance in Tax Compliance*, 70 WASH. & LEE L. REV. 1679, 1679 (2013)).

256. *See* Griffin, *supra* note 132, at 312–14; Bruce Green & Ellen Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73, 75 (2013).

257. For arguments that overenforcement is far less of a concern in administrative settings, see Van Loo, *supra* note 20, at 1609.

258. *See* Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1524 (2008) (citing the important linkage between voluntary compliance and the public's "perception that the state is fully committed" to enforcing the law and punishing those who intentionally seek to subvert it).

On social norms generally and their effect on law-abiding behavior within groups, see Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 LAW & SOC. INQUIRY 60 (2017). On law's expressive function, see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996); and Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 390–91 (1997).

259. For an example of this dynamic, consider the literature criticizing the government's failure to prosecute individuals (and most financial firms) in the wake of the 2008 financial crisis. *See* Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), https://www.nybooks

Notwithstanding the foregoing, the strategy of retreat has several features to recommend. First, it can be reversed relatively easily. It leaves positive law intact and requires no new laws when an agency reverses its stance.[260] Second, it can be paired with additional strategies, such as encouraging private litigants, foreign states, or even journalists, to take up the government's slack.[261] Still, it seems doubtful that any of these alternatives would fill the vacuum created by such a major retreat.

### B. SUBSTITUTE OR OUTSOURCE

Instead of retreating from enforcement, agencies might cast about for viable substitutes. They could, for example, increase the number and scope of administrative programs that engage in "routine" business monitoring, and they might broaden such programs to include more unannounced audits and inspections.[262] This might be useful at first, but it is unclear how an erosion of the rules described in Part II wouldn't eventually spill over to the types of monitoring that have become routine across various industries. Perhaps the Court would be willing to carve out exceptions (or a weaker set of restraints) for certain regulators or certain industries whose activities acutely implicate the public interest.[263]

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.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions [https://perma.cc/FFY9-M9NZ].

260. If the government charged *no* cases under a criminal statute, it eventually would risk the courts' application of the desuetude doctrine. *See, e.g.*, Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 49–50 (2004) ("[L]aws that are hardly ever enforced are said, by courts, to have lapsed."). The fallback the present Section describes does not contemplate such an absolute reversal.

261. It seems more likely that private litigants and state attorneys general would be best positioned to fill the enforcement vacuum described above. "From 2006 through 2015, more than 1.25 million private federal lawsuits were filed to enforce federal statutes, spanning the waterfront of federal regulation." Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment in the Trump Era*, 87 FORDHAM L. REV. 37, 39 (2018); *see also* Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 84 (2018) ("State AGs also can, and do, enforce many aspects of *federal* law."). On the extent to which journalism and other public sources of information trigger securities fraud investigations, see Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213 (2010).

262. *See* Van Loo, *supra* note 20, at 1612–13.

263. The Court concededly permits certain types of regulatory inspections despite a lack of opportunity for pre-compliance review, but it has done so sparingly and only in regard to Fourth Amendment challenges. *See* City of Los Angeles v. Patel, 576 U.S. 409, 424 (2015) (identifying four such industries). Whereas the Fourth Amendment's reasonableness language inherently permits public interest balancing for so-called

In line with this thinking, Professor Rory Van Loo has cited numerous distinctions between the government's monitoring of businesses and its criminal investigation activities,[264] an argument government actors might find fruitful in future litigation. The line between "business monitoring" and "investigative monitoring," however, is already quite blurry in certain contexts, and it would become even blurrier were the Court to clothe corporate actors with a privilege against self-incrimination or more robust privacy rights under the Fourth Amendment.[265] If constitutional law made the service of subpoenas on corporate entities more fraught and more difficult, it seems likely that audits and other forms of monitoring would *also* become vulnerable to constitutional challenge as well. Corporate targets would certainly enjoy incentives to borrow one set of newly granted protections and apply them in new contexts.

Government agencies might therefore cede some of their investigative activity to foreign jurisdictions since those jurisdictions would be unconstrained by constitutional rules of criminal procedure.[266] Still, foreign investigators would be hampered by their own procedural limitations, which is why Professors Jennifer Arlen and Samuel Buell have persuasively warned of exporting American enforcement techniques to other jurisdictions.[267] Moreover, not all misconduct crosses sovereign borders. Foreign outsourcing might work fairly well for violations of the Foreign Corrupt Practices Act, but it would do

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special needs searches, the self-incrimination clause lacks pragmatic escape valves of this sort.

264. Professor Van Loo argues that regulatory monitors seek "business" information whereas "crime agencies" such as the FBI pursue information about individuals, thereby triggering different levels of concern regarding privacy. *See* Van Loo, *supra* note 20, at 1613.

265. For example, were corporations to enjoy Fifth Amendment rights, a corporation might argue that a monitor's routine audit or demand for information might form a "link" in the chain of evidence needed to support an eventual criminal prosecution, thereby triggering Fifth Amendment concerns. *See* Hoffman v. United States, 341 U.S. 479, 486 (1951) ("The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.").

266. I am *not* suggesting prosecutors or regulators could skirt constitutional rules by having foreign investigators conduct extraterritorial investigations and then disclose the results to domestic prosecutors. Courts would very likely reject such activity. *See* United States v. Allen, 864 F.3d 63, 68 (2d Cir. 2017) ("[T]he Fifth Amendment's prohibition on the use of compelled testimony in American criminal proceedings applies even when a foreign sovereign has compelled the testimony.").

267. Arlen & Buell, *supra* note 128, at 752.

fairly little to combat home-grown violations that stay well within the United States' borders.

More likely, government actors would seek relief in substantive criminal law. As Professor Stuntz long ago explained, when procedural rules change, enforcers can reclaim their powers by broadening substantive statutes.[268] Might this phenomenon play out here? Possibly. If subpoenas became more difficult to draft and uphold, and if "internal" corporate investigations became constitutionalized, government agencies might be inclined to lobby for broader and easier-to-prove substantive laws.

For example, for certain white-collar offenses, state-of-mind elements pose the strongest hurdles to a conviction, particularly when the crime occurs within a corporation.[269] Even with the benefit of generous subpoena powers, prosecutors can find it difficult to establish someone's "specific intent" to defraud, much less someone's "willful" violation of a complex statutory scheme.[270]

Accordingly, in a world where information became more difficult to acquire, enforcers might lobby Congress to weaken the mens rea requirements for crimes such as fraud and bribery or enact statutes that mimic the federal code's so-called strict liability crimes.[271] Where statutes are silent as to mens rea, prosecutors might be more inclined to argue for less exacting mental states, and where statutes demand knowledge or purpose, prosecutors might lobby courts to interpret those words expansively. Finally, one might not be surprised to see regulators and prosecutors make greater use of statutes punishing

268. "Constitutionalizing procedure, in a world where substantive law and funding are the province of legislatures, may tend to encourage bad substantive law and underfunding." William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 6 (1997); *see also* William J. Stuntz, *The Political Constitution of Criminal Justice*, *supra* note 244, at 848 ("[H]istory is littered with examples of constitutional change prompting political backlash.").

269. *See* Samuel W. Buell, *The Responsibility Gap in Corporate Crime*, 12 CRIM. L. & PHIL. 471, 473 (2017).

270. "To convict a corporate executive of fraud, it has always been necessary to prove actual knowledge (or close to it) that material false or misleading information was disseminated." Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 850 (2014). On the difficulty of proving cases anchored by the requirement that the defendant acted willfully (i.e., with the intent or knowledge he was violating the law), see Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1561–62, 1570 (2018).

271. "The federal code is famously full of strict-liability crimes (sometimes termed 'regulatory' or 'public welfare' offenses), many of them supplements to broader projects of the administrative state in areas such as environmental protection, product safety, and control of government ethics." Buell, *supra* note 270, at 843.

comparatively minor reporting violations. Code violations once regarded as a convenient means of disposing of a less-than-perfect case might suddenly become the prosecutor's go-to charge.

Broadly written substantive laws would thus function much like the "insincere rules" Professor Michael Gilbert has discussed elsewhere at length.[272] Congress wouldn't necessarily *desire* the prosecution of accidental wrongs or mere negligence, but it would nevertheless throw its weight behind such laws to deter more serious (but difficult to prove) behavior. For this "insincere" framework to succeed, prosecutors and enforcement agencies would have to utilize their discretion to punish more culpable offenders under statutes that facially punished far less serious misconduct.[273]

Concededly, everything this Section describes is the mirror opposite of what many commentators have advocated over the past two decades.[274] Even in the white-collar context, it seems doubtful there would be sufficient political appetite for watering down statutory mens rea requirements or broadening actus reus elements. And it seems even more doubtful that politicians would deliberately widen prosecutorial discretion by drafting broader, vaguer laws. And finally, it would be an even greater surprise if the judiciary were to stand idly by while this occurred.[275]

### C. OFFSET

Instead of substitutes, federal enforcers might instead focus on something that would offset the government's reduced ability to detect and punish misconduct.

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272. *See, e.g.*, Michael D. Gilbert, *Insincere Rules*, 101 VA. L. REV. 2185 (2015) (expounding his theory); Michael D. Gilbert & Sean P. Sullivan, *Insincere Evidence*, 105 VA. L. REV. 1115 (2019) (applying insincere rule theory to explain evidentiary standards in trials).

273. The strategy is one the Court has bluntly and periodically rejected. *See, e.g.*, Marinello v. United States, 138 S. Ct. 1101, 1108 (2018) (resisting government's entreaty to "rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language").

274. *See* Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 499–501 (2019) (describing recent efforts to reduce federal criminal liability's substantive scope by erecting universal, explicit, and fairly stringent mens rea requirements); *see also* Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM L. & CRIMINOLOGY 537, 578–89 (2002) (advocating interpretive approaches that impose more rigorous mens rea obligations on statutes that threaten disproportional punishment).

275. *See generally* Huq & Lakier, *supra* note 270, at 1556–64 (documenting the Supreme Court's efforts to narrow enforcement discretion by placing its interpretive gloss on either the mens rea or actus reus elements of federal criminal statutes).

The conventional economic deterrence model identifies two key variables: the government sanction and the probability of detection.[276] Multiplied together, the two represent the "expected punishment" an offender can expect to receive, and under the standard law and economics model, criminals are deterred when the expected punishment outweighs the expected benefits of a given crime.[277] Accordingly, policymakers can preserve deterrence by manipulating one variable (increase the published sanction) to offset changes in the other (providing fewer resources for enforcement).[278]

Over the years, scholars have refined the model, recognizing that the two variables are not equivalents. A low-probability, high-sanction regime fails to secure optimal deterrence for numerous reasons: regulated actors may be judgment-proof, low enforcement rates encourage putative offenders to underestimate the likelihood of detection, and jurors and judges may be disinclined to impose harsh sanctions on relatively modest offenses.[279] Moreover, as a behavioral matter, we know that offenders respond far more readily to changes in the probability of detection than in the published sanction.[280]

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276. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (establishing formal model); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference Shaping Policy*, 1990 DUKE L.J. 1 (extending model to show how criminal law can shape internal desires or "tastes").

277. Scholars refer to this as the "multiplier principle." If a policymaker wants the expected penalty to be $1,000 and there is a 25% likelihood of detection, the resulting sanction should be set at $4,000 ($1,000 multiplied by the reciprocal of ¼). *See generally* Talia Fischer, *Economic Analysis of Criminal Law*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW (Markus D. Dubber & Tatjana Hornle eds., 2015) (explaining multiplier tradeoff and corresponding tradeoff between severity and probability of punishment).

278. "Under the conventional approach, the optimal fine . . . equals $h/d$ . . . where $d$ is the probability of detection." Gilbert, *supra* note 272, at 2198; *see also* Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 MICH. L. REV. 2185, 2186 (1999) (explaining how low probabilities of detection can be balanced out with high sanctions and vice versa).

279. *See* Miriam H. Baer, *Evaluating the Consequences of Calibrated Sentencing: A Response to Professor Kolber*, 109 COLUM. L. REV. SIDEBAR 11, 14, 15–16 (2009) (citing authorities). High-sanction/low-probability regimes are additionally problematic because they generate high error costs and strong incentives to avoid detection. *See* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1206 (1985) (explaining why it may be better to "make proof easier but at the same time make the penalty less severe in order to reduce avoidance and error costs").

280. Daniel S. Nagin, Robert M. Solow & Cynthia Lum, *Deterrence, Criminal Opportunities, and Police*, 53 CRIMINOLOGY 74, 75 (2015) ("Support for the deterrent effect of certainty of punishment . . . pertains almost exclusively to the certainty of apprehension.").

The conventional model nevertheless is useful as it predicts an enforcer's expected reaction to more restrictive procedural rules.[281] When restrictions on evidence-gathering impose additional costs on enforcers that they are unable to meet, the probability of detection falls.[282] Policymakers intent on preserving deterrence can respond by hiring more enforcement agents, by identifying alternative methods to secure information (e.g., whistleblowing programs), or by offsetting low probabilities of detection with higher sanctions.

For companies, enhanced sanctions might translate into increased fines, more frequent imposition of non-fine penalties (e.g., outside monitors), or threatening broader imposition of collateral sanctions such as debarment from federal programs. For individuals, offsets could include increases in the length of prison sentences or the number of crimes for which prison is a probable outcome. In other words, the government would prosecute fewer people and companies, but it would seek and impose far greater punishments on those it successfully prosecuted.

As with the substitute strategy, it is difficult to imagine a strong political appetite for offsets, particularly where individual defendants are involved. A rich empirical literature demonstrates the extent to which most punishers tend to *ignore* probabilities of detection, at least at the individual case level.[283] And with mass incarceration's ills so prominently on display,[284] it is difficult to imagine an offset strategy gaining much traction.

### D. IMMUNIZE AND PAY

Finally, the government might respond to a change in its procedural powers by immunizing entities more often (since that would effectively strip entities of any Fifth Amendment claim[285]) and building out programs designed to trade "carrots" for information or for

281. *Cf.* Becker, *supra* note 276, at 174–76.

282. *Cf.* Alex Raskolnikov, *Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty*, 106 COLUM. L. REV. 569, 586 (2006) (explaining how different audit rates generate "variations in the probability of detection," which in turn affects a taxpayer's expected penalty for noncompliance). *See generally* Becker, *supra* note 276.

283. Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 881–83 (2012) (citing experimental studies showing that subjects fail to take into account low probabilities of detection when setting sanctions).

284. *See generally* JOHN F. PFAFF, LOCKED IN (2017); RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019).

285. The government can compel individuals to testify by immunizing them. Kastigar v. United States, 406 U.S. 441, 453 (1972).

"consent" to government behavior that might otherwise be precluded. For example, the government could grant preferential status to businesses that agreed in advance to broadly worded waivers of their privilege against self-incrimination.[286] It could expand and reinforce its whistleblower programs, which currently offer bounties to employees who provide original information pertaining to certain offenses.[287] And it could more aggressively employ leniency programs designed to encourage corporate offenders to voluntarily disclose their company's wrongdoing.[288]

Those who practice in this area will grumble that the government already deploys an "immunize and pay" strategy, and arguably not very well. Prosecutors already enter into cooperation agreements with individual defendants in order to secure their assistance in prosecuting other defendants.[289] Corporations enter into deferred prosecution agreements with the explicit understanding that the government's leniency will be premised on the entity's willingness to investigate its employees.[290] And a number of government-sponsored programs provide whistleblowers with generous bounties in exchange for information that leads to major recoveries of money.[291]

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286. Whether such waivers would be enforceable or potentially violate the unconstitutional conditions doctrine are concerns beyond the scope of this project. "A corporation does not have to exist, but if it does, the government cannot condition its existence on the surrender of certain constitutional rights within its web of contracts." Miller, *supra* note 239, at 929 (describing the unconstitutional conditions concept as it applies to First Amendment rights); Michael Boardman, *Constitutional Conditions: Regulating Independent Political Expenditures by Government Contractors After* Citizens United, 10 FLA. ST. U. BUS. REV. 25, 44 (2011) ("[T]he unconstitutional conditions doctrine ... applies where the government conditions a discretionary benefit with the waiver of a fundamental right.").

287. On the benefits and drawbacks of whistleblower programs, see Miriam H. Baer, *Reconceptualizing the Whistleblower's Dilemma*, 50 U.C. DAVIS L. REV. 2215 (2017).

288. Laufer, *supra* note 139, at 395 (discussing government-corporate partnerships in policing).

289. *See* Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 754–56 (2016) (explaining standard parameters of cooperation agreements used by prosecutors). *See generally* Miriam H. Baer, *Cooperation's Cost*, 88 WASH. U. L. REV. 903 (2011) (discussing the effects of cooperation agreements).

290. Brewster & Buell, *supra* note 142.

291. *See generally* Julie Rose O'Sullivan, *"Private Justice" and FCPA Enforcement: Should the SEC Whistleblower Program Include a* Qui Tam *Provision?*, 53 AM. CRIM. L. REV. 67 (2016) (arguing for adoption of *qui tam* provisions for violations of the Foreign Corrupt Practices Act); Yehonatan Givati, *A Theory of Whistleblower Rewards*, 45 J. LEGAL STUD. 43 (2016) (analyzing whistleblower programs generally); David Freeman Engstrom, *Whither Whistleblowing? Bounty Regimes, Regulatory Context, and the*

The government *already* pays quite a bit for the information it receives, and it is an open question how well that arrangement has succeeded in identifying wrongdoers or improving the business sector's compliance with law. Accordingly, it seems doubtful that this strategy would do much to address shortfalls caused by changes in corporate constitutional procedure.

As the foregoing discussion demonstrates, the government would have a number of strategies to choose from in the event its access to information narrowed. None of these strategies are perfect, and all impose intended and unintended costs on law enforcement. But they also demonstrate the fallacy of exclaiming that law enforcement would simply fall apart in the wake of some change in constitutional law. Even in a world where subpoenas could be easily challenged and in which courts were leery of the claim that private investigations were truly private, corporate enforcers would still maintain the ability to punish overt violations of law. Some information would bubble up to the surface, allowing for some successful prosecutions and enforcement proceedings. Corporate and white-collar enforcement would still exist, but its agencies would be a bit (or quite a bit) less effective than they had been before. What are we to make of this change? I answer this question in the final Part below.

## IV. HYPERBOLE OR LOCHNERISM?

Part III explored several strategies the government might adopt in response to the demise of doctrines outlined in Part II. The government could retreat, cast about for substitutes, seek offsets, or aggressively immunize and pay its targets. Collectively, it is doubtful these strategies would preserve the level of legal compliance existing today. *As a whole*, criminal and regulatory enforcement would suffer, and individual and corporate compliance would decrease.

Who would be harmed by this erosion? In a worst-case scenario, regulators and prosecutors might find themselves with less to do and they might also encounter greater difficulty demanding resources from Congress, given their falling success rate. More likely, enforcement agencies would maintain their budgets but allocate money away from certain types of enforcement. Investors and consumers would

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*Challenge of Optimal Design*, 15 THEORETICAL INQUIRIES L. 605 (2014) (analyzing design of disparate regimes, including those that permit *qui tam* suits).

almost certainly find themselves worse off, as they would become more vulnerable to complex fraud schemes and corruption.[292]

For employees, the calculus differs a bit. Workplace privacy might initially improve, since government agents would no longer be able to effortlessly enlist corporate investigators to search, seize, and question employees.[293] Then again, corporations already have their own productivity-driven reasons for tracking their employees and customers.[294] *Those* infringements on privacy would continue unabated, as would corporate infringements on consumer privacy.[295]

Another possibility is that an enforcement shortfall would trigger the emergence of a more criminogenic workplace. Companies once restrained by credible threats of enforcement would now place even stronger pressures on employees to meet performance targets, ignore vexatious regulatory obligations, and obstruct the investigations and judicial proceedings that remained. Temptations and pressures to cheat would increase, driving more honorable actors from the private sector altogether. Efforts to sustain and verify improvements in corporate culture would lag, if not disappear.

Notwithstanding this doomsday scenario, statutorily enacted laws *would remain in place.* Positive law would appear stable, even as enforcement's equilibrium shifted. Statutes prohibiting fraud, bribery, obstruction, and numerous regulatory violations would remain intact. Enforcement might become spottier, less frequent, and less proactive, *but it would still exist.* Individuals would still go to jail, and corporations would still pay fines and other penalties when misbehavior spilled into public view. Regulatory enforcement would not come to an abrupt halt. Instead, it would just sputter.

What is one to make of this forecast? Is it fair to analogize a slowdown in enforcement to one of the most controversial periods in constitutional history? This final Part addresses this question.

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292. Indeed, one of the core economic justifications for public enforcement is that it relieves victims of the obligation of having to invest resources in self-protection. *See* Posner, *supra* note 279, at 1198.

293. Employees might also become less vulnerable to the phenomenon known as "corporate scapegoating." "Corporate scapegoating is a defensive act that channels, displaces and disposes of blame to protect the organization and maintain legitimacy." WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY 145 (2006).

294. *See, e.g.*, Ajunwa et al., *supra* note 241, at 769–72.

295. *See generally* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019) (discussing corporate surveillance of consumers).

### A. A BRIEF REVIEW OF FIRST AMENDMENT LOCHNERISM

Over the past decade, scholars have increasingly voiced concerns that the Court has resurrected a potent form of Lochnerism under the First Amendment's aegis.[296] Although far from an exact fit, this First Amendment metaphor helps contextualize the interests at stake in the enforcement context.

Decided in 1905, *Lochner* invalidated a New York penal statute that restricted the number of hours bakers could legally work.[297] The decision rested on the Court's controversial determination that New York's criminal statute interfered with the defendant's constitutional freedom to enter into an employment contract.[298] Although the liberty interest was technically defeasible, the Court's test for overcoming it effectively truncated numerous state and federal regulatory programs.[299]

Three decades later, the Court took a 180-degree turn. It abandoned its restrictive approach and signaled that economic and social welfare legislation would henceforth enjoy a presumption of rationality.[300] In between these chronological poles, the Court "invalidated nearly two hundred social welfare and regulatory measures."[301] Not

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296. *See, e.g.*, Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133; Sepper, *supra* note 31; *see also* Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 959–60 (2020) (citing First Amendment Lochernism's impact on progressive government programs "designed to ameliorate disparities of wealth, income, and other primary goods").

297. The statute in question made it a misdemeanor to employ an individual for more than sixty hours a week. Lochner v. New York, 198 U.S. 45, 46–47 (1905); *see also* Adkins v. Child.'s Hosp. of D.C., 261 U.S. 525 (1923) (striking down District of Columbia's minimum wage act as violative of due process).

298. *Lochner*, 198 U.S. at 53 ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.").

299. Scholars continue to dispute *Lochner*'s actual effect on government power. *See, e.g.*, Victoria F. Nourse, *A Tale of Two* Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 753 (2009) ("The *Lochner* bias was not against regulation *simpliciter*; it was bias against labor and price regulation . . . ."); *see also* Keith E. Whittington, *Congress Before the* Lochner *Court*, 85 B.U. L. REV. 821, 823 (2005) (contending that the Court's review of federal legislation during the *Lochner* period was largely "routine, uncontroversial, and normatively unobjectionable").

300. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392–94 (1937) (holding a state can regulate minimum wage if promoting employees' welfare).

301. David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003). *But see* DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011) (questioning the claim that *Lochner* and its progeny interfered with the administrative state's growth).

long after its demise, *Lochner* entered what has been called "the anti-canon" of universally derided Supreme Court opinions.[302]

*Lochner* continues to operate as a handy metaphor. Some still cite it as an example of judicial activism gone amok.[303] Others invoke its hostility to the administrative state and its insistence on market neutrality.[304] Many critics employ the more contemporary term "Lochnerism" to symbolize the tendency of corporate actors (with an assist from jurists) to exploit constitutional rights that perpetuate economic and social inequality.[305]

Over the past decade, Lochnerism has preoccupied a growing mix of scholars.[306] Thomas Colby and Peter Smith predicted in 2015 that political conservatives would once again embrace *Lochner* "by recommitting to some form of robust judicial protection for economic rights."[307] Amanda Shanor's 2016 article *The New* Lochner tracks the ways in which corporate actors have deployed First Amendment

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302. *See* K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1329 (2016) (observing that *Lochner* has become the "touchstone of the contemporary 'anti-canon' of constitutional law"); Cloud, *supra* note 189, at 556–57 ("The very name '*Lochner*' serves as an epithet, and the phrase 'to *Lochnerize*' is used to connote some fundamental judicial error, although the precise nature of the error is not always clear." (footnotes omitted)).

303. *See, e.g.*, David M. Driesen, *Inactivity, Deregulation, and the Commerce Clause: A Thought Experiment*, 53 WAKE FOREST L. REV. 479, 503 (2018) (defining "Lochnerism" as "the tendency of late nineteenth and early twentieth century Justices to read their prejudices into law through substantive due process rulings"); *see also* Sunstein, *supra* note 35, at 874 ("The received wisdom is that *Lochner* was wrong because it involved 'judicial activism': an illegitimate intrusion by the courts into a realm properly reserved to the political branches of government.").

304. "The central problem of the *Lochner* Court had to do with its conceptions of neutrality and inaction and its choice of appropriate baseline." Sunstein, *supra* note 35, at 883; *see also* Strauss, *supra* note 301, at 382–86 (writing that the Court failed to recognize the nuances in markets and market relationships).

305. Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1962–63 (2018) (citing, as evidence of an emerging "modern-day Lochnerism," scholarly accounts of "the use of civil libertarian arguments to undermine antidiscrimination law").

306. *See, e.g.*, Mila Sohoni, *The Trump Administration and the Law of the* Lochner *Era*, 107 GEO. L.J. 1323, 1359–60 (2019) (discussing Trump policies that "hearken back to the thinking of the *Lochner*-era Court"); Kessler & Pozen, *supra* note 305.

307. Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527, 531–32 (2015) (arguing that the evolving willingness to embrace a constitutional "right to contract" has been "facilitated by important modifications to the theory of originalism").

protections to instigate "constitutional deregulation,"[308] and Elizabeth Sepper has similarly traced a rise in businesses claiming religious liberty in order to subvert regulations with which their owners take issue.[309] Outside academia, Justice Kagan's dissent in the employee-union case *Janus v. AFSCME* bluntly accuses the Court's majority of "weaponizing the First Amendment . . . to intervene in economic and regulatory policy."[310]

### B. CONCEPTUALIZING LAW ENFORCEMENT'S LOCHNERISM

How might the version of "corporate weaponizing" described in the preceding Section inform current debates on enforcement—and how might the Court's decisions on *personal* privacy and corporate personhood inadvertently further Lochnerism's expansion?

In several respects, law enforcement's *Lochner* looks quite different from its alternative manifestations. For example, as the discussion in Part II makes clear, it is doubtful it would arise out of a single Court decision. Instead, corporations would likely use the dicta and holdings in the privacy and corporate personhood cases to gradually chip away the procedural doctrines that have paved the way for regulatory and white-collar enforcement.

Nor would law enforcement's *Lochner* arise in response to a specific piece of legislation. The doctrines at issue in Part II have been in existence for decades, although digital technology has certainly altered what it means for the government to encourage a company to conduct an "internal" investigation.[311]

What does seem to be clear is that a law enforcement version of *Lochner* would be at least partially fueled by the same anti-government skepticism that underpins the *Citizens United* and *Carpenter* lines of decisions. Instead of invoking libertarianism's laissez-faire free market values, those seeking to curb the government's law enforcement powers would rely heavily on privacy themes that enjoy widespread and bipartisan support. For that reason, law enforcement's *Lochner* would likely escape widespread criticism from either the political left or right.

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308. Shanor, *supra* note 296, at 135 ("[A] largely business-led social movement has mobilized to embed libertarian-leaning understandings of the First Amendment in constitutional jurisprudence.").

309. Sepper, *supra* note 31, at 1457 (observing that the religious liberty cases rest more upon notions of "market libertarianism, rather than religious liberty").

310. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

311. *See* Ajunwa et al., *supra* note 241, at 763–72.

As Parts II and III demonstrate, however, this celebration would be short-lived. Stripped of the power to cheaply obtain information from corporate actors, the government would adopt coping mechanisms that left the general public worse off. Deterrence would fade and voluntary corporate compliance would decrease. And just like the original *Lochner*, the new rules' constitutional pedigree would render them highly difficult to dislodge.

### C. POSSIBLE RESPONSES

Law enforcement's Lochnerism concededly differs from its First Amendment analogues in important ways, but it resembles them in others, and its dampening effect on government enforcement could be just as profound. It would affect not just the government's abilities to detect bread-and-butter crimes such as fraud and bribery but also its ability to carry out its regulatory monitoring activities, which rest in large part on the ease of access the Court has effectively afforded government actors through its Fourth and Fifth Amendment opinions, as well as the knowledge that prosecutors serve as an important backstop to regulators when entities and individuals willfully thwart regulatory oversight.

Given the foregoing, how ought one respond to this challenge? Fulsome answers to this question lie beyond this Article's scope, but this final Section previews several possibilities.

First, one might undertake a full-scale resistance to any change in the status quo. This is the type of response one might expect from members of the law enforcement community and jurists who continue to embrace robust enforcement as a normatively desirable proposition. Resistance in this context would translate into a purely instrumentalist defense of the "private" search and state action doctrines, the grand jury and administrative subpoena powers, and the collective entity and required records doctrines. *All* of these doctrines find their strongest support in their instrumental value, which is that they enable the government to act quickly, proactively, and with little cost.[312] It was along these lines that Justice Rehnquist spoke when he defended the Bank Secrecy Act so enthusiastically some fifty years ago:

> While an Act conferring such broad authority over transactions such as these might well surprise or even shock those who lived in an earlier era, the latter did not live to see the time when bank accounts would join chocolate, cheese, and watches as a symbol of the Swiss economy. Nor did they live to see the

312. *See* Garrett, *supra* note 20, at 122–33 (citing the "consequentialist" reasoning that underpins many of the doctrines in this area).

> heavy utilization of our domestic banking system by the minions of organized crime as well as by millions of legitimate businessmen.[313]

It should come as no surprise that this passage appears in *California Bankers Ass'n v. Shultz*, in which Justice Rehnquist defended a law that strong-armed financial institutions into policing their own customers;[314] his defense rested on a legislative record that cited a litany of examples of private sector corruption that had burgeoned during the Nixon era. Invasive statutes were thus given a pass because the Court believed they were *needed* to overcome the externalities wrought by unchecked corruption and fraud.[315] These were the heady days of judges embracing government enforcement initiatives that conscripted private businesses to investigate their customers, employees, and clients—all in the name of the greater good.

However persuasive this consequentialist reasoning was in previous decades, it is doubtful it would perform so well in an era where suspicion of government power is at an all-time high and continues to build.[316] Even prior to Donald Trump's 2016 election, critics had voiced strong concerns with the government's surveillance policies.[317] Accordingly, amidst technology changes and growing distrust of government enforcement agencies, it is difficult to imagine a robust defense of the doctrines that have been so instrumental to corporate enforcement agencies.

One might instead imagine a reaction from the other end of the spectrum, wherein scholars enthusiastically embrace the demise of government enforcement power as the perfect opportunity to

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313. Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 30 (1974).

314. The anti-money laundering laws continue to attract attention on account of the obligations they impose on financial institutions. *See, e.g.*, Christopher J. Wilkes, Note, *A Case for Reforming the Anti-Money Laundering Regulatory Regime: How Financial Institutions' Criminal Reporting Duties Have Created an Unfunded Private Police Force*, 95 IND. L.J. 649, 650 (2020).

315. *See* Henning, *supra* note 198, at 418 (discussing the evolution of judicial decisions regarding policing powers over seemingly large-scale corrupt companies).

316. *See* A.W. Geiger, *How Americans Have Viewed Government Surveillance and Privacy Since Snowden Leaks*, PEW RSCH. CTR.: FACT TANK (June 4, 2018), https://www.pewresearch.org/fact-tank/2018/06/04/how-americans-have-viewed-government-surveillance-and-privacy-since-snowden-leaks [https://perma.cc/593R-EG9P].

For academic critiques of government surveillance and its interaction with technology, see BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 211–306 (2017); and DAVID GRAY, THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE (2017).

317. *See, e.g.*, CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT (2007) (discussing the lack of regulation and oversight governing the vast intelligence capabilities of the U.S. government); Emily Berman, *Regulating Domestic Intelligence Collection*, 71 WASH. & LEE L. REV. 3 (2014) (discussing Justice Department and FBI intelligence efforts post-9/11).

refashion the relationship between the state, society, and the private sector. Professor Amy Kapczynski alludes to such a realignment in her discussion of First Amendment Lochnerism's effect on regulatory agencies: "[D]emocratic control over our economy and society will demand new public infrastructure that displaces or routes around an increasingly ungovernable private sector."[318] If law enforcement's *Lochner* contributes to the government's inability to govern the private sector, progressive scholars might simply view that development as fodder for completely remaking the private sector, radically altering the line between public and private.[319] Instead of clinging to an enforcement framework that no longer makes sense, progressive advocates may embrace enforcement's demise as the opportunity for promulgating more far-reaching reforms.

Professor Nikolas Bowie's discussion of corporate constitutional law nicely illuminates this point. To address "the problems unleashed by *Citizens United*,"[320] Professor Bowie reasons, reformers might be best advised to embrace the corporation's statehood status rather than fight the notion that it is an association of persons:

> [Mitt] Romney was right that corporations are, literally, "groups of people": institutions whose rules govern how shareholders, workers, directors, executives, creditors, consumers, and other groups can represent and exert power over one another. Outside the corporate context, we call these sorts of representative, power-balancing institutions *governments*.[321]

Of course, if the corporation is *the* state, then its searches and interrogations cannot possibly be private. Then again, perhaps that's a tradeoff Professor Bowie is happy to accept. A bit later, he writes:

> [I]nstead of attempting to change the Supreme Court's current [corporate personhood] doctrine, opponents of corporate power might instead attempt to bring all corporations—including banks, businesses, and other so-called corporate democracies—in line with American expectations about how twenty-first-century democracies should operate.[322]

How "twenty-first-century democracies should operate" lies beyond the scope of this project. Professor Bowie's statehood metaphor nevertheless captures the imagination because it suggests a far

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318. Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 182 (2018).

319. On the emergence of a different, paradigm-shifting realignment between the public and private, see Jon D. Michaels, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465, 490–99 (2020).

320. Nikolas Bowie, *Corporate Personhood V. Corporate Statehood*, 132 HARV. L. REV. 2009, 2013 (2019) (reviewing WINKLER, *supra* note 78).

321. *Id.* (footnotes omitted).

322. *Id.* at 2028.

different reaction to the destruction of law enforcement's constitutional foundations than one might first imagine. If the state cannot easily enforce criminal and regulatory laws against private industry, the best response is to reshape the government's relationship with the private sector and not to restore some nostalgic heyday of New Deal oversight.

Between these two poles lies some middle-of-the-road pragmatic and incremental response, one that attempts to calibrate personal privacy against government enforcement needs. Such an approach would call for Congress's implementation of legislative curbs on government surveillance[323] and more nuanced and meaningful approaches to the Fourth Amendment's "reasonable" terminology.[324] Those who wish to explore this middle position will do best to concede the many fissures in the constitutional enforcement edifice but nevertheless press forward in search of a sustainable and workable middle ground.[325]

## CONCLUSION

Those who attended law school prior to the turn of the twenty-first century were likely taught that the government's power to compel information from regulated actors is strong and unyielding. That claim has already been tested and will be tested even further over the ensuing decades.[326] As the Court *expands* corporate rights and *contracts* government enforcement powers, it casts an ominous shadow over a set of doctrines whose collective reckoning is long overdue.

We should take seriously the alarms raised by Justices Kennedy and Alito in the Court's landmark *Carpenter* case,[327] but not because the Court limited the government's procurement of cell site location

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323. Van Loo, *supra* note 20, at 1624–30.

324. Tokson, *supra* note 25, at 744–45 ("[The] leading ... interpretation of the [Fourth] Amendment ... support[s] a balancing approach to the crucial question of when the government can engage in suspicionless surveillance." (footnote omitted)); Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233 (2019) (proposing an alternative framework for deciding whether a given intrusion constitutes a Fourth Amendment search).

325. Andrew Leipold recognized as much in his 1995 critique of grand jury practice. Although he preferred a system that abandoned the fiction of a "grand jury" subpoena, he nevertheless conceded the subpoena's necessity: "[F]ederal law enforcement officials must either depend on a cooperative citizenry or rely on search warrants to gather evidence. Neither of these routes has been a completely satisfactory way to investigate large, complex criminal enterprises." Leipold, *supra* note 181.

326. *See, e.g.*, Boyd v. United States, 116 U.S. 616 (1886); Carpenter v. United States, 138 S. Ct. 2206 (2018); Burdeau v. McDowell, 256 U.S. 465 (1921); Hale v. Henkel, 201 U.S. 43 (1906).

327. *Carpenter*, 138 S. Ct. at 2223–35 (Kennedy, J., dissenting).

information. The government rarely seeks such data to prove its corporate and regulatory cases. It *does* rely heavily on old-fashioned subpoenas and internal investigations to accomplish its massive enforcement mission, and those are the tools we should worry about most.[328]

"The world would fall apart without it" is an argument that often dominates this discussion, notwithstanding its exaggerated qualities. An erosion of the government's enforcement tools would cause decay, but not immediate havoc. That is part of the problem. Substantive laws would remain on the books, and some scandals would leave clues so obvious that even a hamstrung enforcement agency would successfully make its case. Accordingly, even in this new world, *some* offenders would still pay fines, *some* whistleblowers and Good Samaritans would still disclose wrongdoing, and *some* white-collar criminals would still be prosecuted and punished.

But the private sector would maintain the upper hand, and government enforcement would be substantially hobbled by information bottlenecks. To the extent corporations weaponized their constitutional rights to develop and reinforce these bottlenecks, they would be engaging in the very behavior that has long been associated with the *Lochner* tradition. The corporation would win, often at the expense of its shareholders, its employees, and its customers, all because of its ability to manipulate information flows under the powerful protection of constitutional rights.

Enforcement-style Lochnerism leaves the general public worse off. It impairs the government's ability to proactively protect those least able to protect themselves. It exacts a tax on those actors who otherwise would prefer to follow the law. And eventually, it heightens the public's disaffection with government institutions. Every criticism that commentators have recently lobbed at regulators and prosecutors—that they are too reactive, too captured, too chummy with their corporate and white-collar targets—becomes *more* pervasive when we deprive the government of its most valuable enforcement tools.[329]

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328. *Cf.* Slobogin, *supra* note 172, at 805 (observing that "the federal government alone issues thousands" of subpoenas annually (citing Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27 (1986))).

329. "[T]he global financial crisis and subsequent bailout was perceived by many to reflect an all-too-clubby set of arrangements among Wall Street, the Federal Reserve, and the Treasury Department." Michaels, *supra* note 319, at 507 (describing the public's revulsion over the cozy relationships that have developed between government officials and Wall Street bankers); *see also* JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017); BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014);

For all these reasons, law enforcement's *Lochner* is an outcome worth avoiding. But in order to do that, we first have to recognize the potential for it to arise.

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Nick Werle, Note, *Prosecuting Corporate Crime when Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review*, 128 YALE L.J. 1366 (2019).