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THE CORPORATE PRIVACY PROXY

Shaakirrah R. Sanders†

This Article contributes to the First Amendment corporate privacy debate by identifying the relevance of agriculture security legislation, or ag-gag laws. Ag-gag laws restrict methods used to gather and disseminate information about commercial food cultivation, production, and distribution—potentially creating a “right” to control or privatize nonproprietary information about animal and agribusinesses. Yet, corporate privacy rights are unrecognized as a matter of U.S. constitutional law, which implicates the sufficiency of the justification for ag-gag laws. This Article ponders whether “security” acts as a proxy for an unrecognized right to corporate privacy in the ag-gag context. Part I of this Article surveys the ag-gag landscape. Part II of this Article describes the corporate privacy debate. Part III of this Article hypothesizes how ag-gag laws arguably expand corporate privacy for animal and agribusinesses to a degree that threatens the marketplace of ideas about the industry.

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INTRODUCTION

No federal challenge against agriculture security legislation has examined the scope of the “right” that such laws seek to

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protect, namely, control over gathering and disseminating non-proprietary information that harms or counters the commercial reputation or the commercial representations of animal and agribusinesses. This Article describes agriculture security legislation as that which restricts—or “gags”—methods used to gather and disseminate information about the conditions and techniques of commercial food cultivation, production, and distribution. Food journalist Mark Bittman has used the term “ag-gag” to describe agriculture security legislation.¹ Ag-gag laws were enacted in Idaho,² Iowa,³ Kansas,⁴ Missouri,⁵ Montana,⁶ North Carolina,⁷ North Dakota,⁸ Utah,⁹ and Wyoming.¹⁰

Although this Article focuses on agriculture security legislation in Idaho, Utah, and Wyoming, Iowa was the first state to punish the use of false information to gain access or employ-

¹ Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES: OPINIONATOR (Apr. 26, 2011 9:29 PM), <http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/?r=0> [<https://perma.cc/6D3B-LZP2>]. See generally Shaakirah R. Sanders, *Ag-gag Free Nation*, 54 WAKE FOREST L. REV. 491, 493-94 (2019) (identifying states that have adopted ag-gag laws).

² IDAHO CODE § 18-7042 (2018) (prohibiting interference with agricultural production), *invalidated by* Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1212 (D. Idaho 2015), *aff'd in part and rev'd in part by* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018).

³ IOWA CODE § 717A.3A (2018) (prohibiting the use of false information to gain access or employment for purposes of committing an unauthorized act), *invalidated by* Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812 (S.D. Iowa 2019); see also Animal Legal Def. Fund v. Reynolds, 297 F. Supp. 3d 901, 928-29 (S.D. Iowa 2018) (denying motion to dismiss).

⁴ KAN. STAT. ANN. § 47-1827(c)(4) (2018) (prohibiting entry into “an animal facility to take pictures by photograph, video camera or by any other means” with the intent of causing harm to the enterprise), *invalidated by* Animal Legal Def. Fund v. Kelly, No. 18-2657-KHV, 2020 WL 362626 (D. Kan. 2020).

⁵ MO. REV. STAT. § 578.013.1 (2018) (imposing a duty to submit recordings of alleged farm animal abuse within 24 hours of recording).

⁶ MONT. CODE ANN. § 81-30-103(2)(e) (2017) (prohibiting entry into an animal facility with the intent to record images or take pictures for purposes of criminal defamation).

⁷ N.C. GEN. STAT. § 99A-2 (2018) (prohibiting unauthorized entry into non-public area of another’s premises).

⁸ N.D. CENT. CODE § 12.1-21.1-02(6) (2017) (prohibiting entry into “an animal facility and us[ing] or attempt[ing] to use a camera, video recorder, or any other video or audio recording equipment”).

⁹ UTAH CODE ANN. § 76-6-112(2)(c)(i) (West 2018) (prohibiting the use of false information on an employment application with the intent to record images at a farm), *invalidated by* Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017).

¹⁰ WYO. STAT. ANN. § 6-3-414 (2018) (prohibiting trespass to unlawfully collect “resource data”), constitutionally supported by *W. Watersheds Project v. Michael*, 196 F. Supp. 3d 1231 (D. Wyo. 2016), but undermined by *W. Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017), and *invalidated by* *W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1176, 1191 (D. Wyo. 2018).

ment at an animal or agribusiness.¹¹ Other states passed analogous or distinguishable agriculture security legislation. North Carolina, for example, broadly imposes civil liability for unauthorized entry into nonpublic areas of another's premises.¹² Kansas prohibits "enter[ing] an animal facility to take pictures by photograph, video camera or by any other means" with the intent of causing harm to the enterprise.¹³ Montana

¹¹ IOWA CODE § 717A.2 (2018) provides in part:

A person shall not, without the consent of the owner, . . . [e]nter onto or into an animal facility, or remain on or in an animal facility, if the person has notice that the facility is not open to the public, [or] if the person has an intent to . . . [d]isrupt operations conducted at the animal facility, if the operations directly relate to agricultural production, animal maintenance, educational or scientific purposes, or veterinary care.

Additionally, section 717A.2.2 provides that

[a] person suffering damages resulting from an action which is in violation of [this statute] may bring an action in the district court against the person causing the damage to recover . . . [a]n amount equaling three times all actual and consequential damages . . . [and] [c]ourt costs and reasonable attorney fees.

¹² N.C. GEN. STAT. § 99A-2(a) (2018) provides that

[a]ny person who intentionally gains access to the nonpublic areas of another's premises and engages in an act that exceeds the person's authority to enter those areas is liable to the owner or operator of the premises for any damages sustained. For the purposes of this section, 'nonpublic areas' shall mean those areas not accessible to or not intended to be accessed by the general public.

Section 99A-2(b) defines

an act that exceeds a person's authority to enter the nonpublic areas of another's premises [as] any of the following: (1) An employee who enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization captures or removes the employer's data, paper, records, or any other documents and uses the information to breach the person's duty of loyalty to the employer[;] (2) An employee who intentionally enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization records images or sound occurring within an employer's premises and uses the recording to breach the person's duty of loyalty to the employer[;] (3) Knowingly or intentionally placing on the employer's premises an unattended camera or electronic surveillance device and using that device to record images or data.

Section 99A-2(d) allows a court to:

award to a party who prevails in an action brought pursuant to this section one or more of the following remedies: (1) Equitable relief[;] (2) Compensatory damages as otherwise allowed by State or federal law[;] (3) Costs and fees, including reasonable attorneys' fees[; and] (4) Exemplary damages as otherwise allowed by State or federal law in the amount of five thousand dollars (\$5,000) for each day, or portion thereof, that a defendant has acted in violation of [section 99A-2(a)].

¹³ KAN. STAT. ANN. § 47-1827(c) (West 2018) provides in part that "[n]o person shall, without the effective consent of the owner and with the intent to damage the

prohibits entering an animal facility with the intent to record images or take pictures for purposes of criminal defamation.¹⁴ Similarly, North Dakota, prohibits entering an animal facility and using or attempting to use a camera, video recorder, or any other video or audio recording equipment.¹⁵ Missouri imposes a duty to submit recordings of alleged farm animal abuse within 24 hours.¹⁶

Corporate or organizational “security” in commercial food operations could be a justification for agriculture security legislation. However, this interest must be more than legitimate if ag-gag laws are to survive a First Amendment challenge because commercial food production operations are of public interest. Moreover, undercover investigations into the industry have long received First Amendment protection.¹⁷ Federal

enterprise conducted at the animal facility . . . enter an animal facility to take pictures by photograph, video camera or by any other means.” KAN. STAT. ANN. §—47.1828 (West 2018) provides that

[a]ny person who has been damaged by reason of a violation of K.S.A. 47-1827 . . . may bring an action in the district court against the person causing the damage to recover . . . [a]n amount equal to three times all actual and consequential damages [and] . . . court costs and reasonable attorney fees.

¹⁴ MONT. CODE ANN. § 81-30-103(2) (2017) provides in part that [a] person who does not have the effective consent of the owner and who intends to damage the enterprise conducted at an animal facility may not . . . enter an animal facility to take pictures by photograph, video camera, or other means with the intent to commit criminal defamation

MONT. CODE ANN. § 81-30-104 (2017) provides that [a] person who has been damaged by reason of a violation of 81-30-103 may bring against the person who caused the damage an action in the district court to recover . . . an amount equal to three times all actual and consequential damages . . . and . . . court costs and reasonable attorney fees.

MONT. CODE ANN. § 81-30-105 (2017) imposes criminal penalties for violations of § 81-30-103.

¹⁵ N.D. CENT. CODE § 12.1-21.1-02 (2017) provides that “[n]o person without the effective consent of the owner may . . . [e]nter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment.”

¹⁶ MO. REV. STAT. § 578.013.1 (2018) provides that [w]henever any farm animal professional videotapes or otherwise makes a digital recording of what he or she believes to depict a farm animal subjected to abuse or neglect . . . such farm animal professional shall have a duty to submit such videotape or digital recording to a law enforcement agency within twenty-four hours of the recording.

Intentional violations of this statute constitute a class A misdemeanor. *See id.* § 578.013.3.

¹⁷ *See* *Animal Legal Def. Fund v. Kelly*, No. 18-2657-KHV, 2020 WL 362626 (D. Kan. 2020); *Animal Legal Defense Fund v. Reynolds*, 353 F. Supp. 3d 812, 827 (S.D. Iowa 2019) (holding Iowa’s statute criminalizing accessing an agricultural facility under false pretenses and making false statements as an employee uncon-

court challenges against some ag-gag laws revealed legislative motives to insulate animal and agribusinesses from “the court of public opinion” by targeting those who “masquerade as employees to infiltrate farms in the hope of discovering and recording what they believe to be animal abuse.”¹⁸ Legislatures also sought to prevent the release of video recordings of suspected animal abuse¹⁹ by stopping “people who would go ‘running out to a news outlet.’”²⁰ Some legislators described animal rights investigators and activists as “hostage” takers, “marauding invaders,” “terrorists,” and “enemies” to be combated.²¹

This Article theorizes that in the context of agriculture security legislation, “security” acts as a proxy for “privacy.” *Whalen v. Roe* rejected an absolute or fundamental right to control information.²² Further, outside of the Fourth Amendment’s protection against unreasonable government searches and seizures, and state and federal laws that protect trade secrets and other proprietary information,²³ corporate privacy “rights” are limited in the United States.²⁴ The U.S. Constitution does not grant First Amendment privacy rights to corpora-

stitutional under the First Amendment); *W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1176, 1191 (D. Wyo. 2018) (holding Wyoming statutes criminalizing entering private land for the purposes of data collection unconstitutional under the First Amendment); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1211–13 (D. Utah 2017) (holding Utah’s statute criminalizing accessing an agricultural operation under false pretenses and recording an operation unconstitutional under the First Amendment); *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1200 (D. Idaho 2015), *aff’d in part and rev’d in part* by *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (holding Idaho’s law criminalizing interference with agricultural production unconstitutional under the First Amendment).

¹⁸ *Otter*, 118 F. Supp. 3d at 1200–01 (citing Declaration of Jo Ann Wall Supporting Plaintiffs’ Motion for Partial Summary Judgment, Exhibit C at 8–9, *Animal Legal Def. Fund v. Wasden*, 312 F. Supp. 3d 939 (D. Idaho 2015)).

¹⁹ *Otter*, 118 F. Supp. 3d at 1201.

²⁰ Editorial Board, *No More Exposés in North Carolina*, N.Y. TIMES (Feb. 1, 2016), <https://www.nytimes.com/2016/02/01/opinion/no-more-exposes-in-north-carolina.html> [<https://perma.cc/H56Y-HANL>].

²¹ See *Otter*, 118 F. Supp. 3d at 1200–01.

²² *Whalen v. Roe*, 429 U.S. 589, 602 (1977).

²³ See U.S. CONST. amend. IV; see also, Economic Espionage Act, 18 U.S.C. § 1831 (2018) (prohibiting use of trade secrets to benefit foreign governments, agents, or instrumentalities); Defend Trade Secrets Act, 18 U.S.C. § 1836 (2018) (authorizing civil action in federal court for misappropriation of trade secrets); IDAHO CODE ANN. § 48-801 (West 2011) (providing injunctive relief and damages for the disclosure of trade secrets); KAN. STAT. ANN. § 60-3320 (West 2018) (providing injunctive relief and damages for the disclosure of trade secrets).

²⁴ 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, 2288 (2015).

tions or other organizations.²⁵ The *Restatement (Second) of Torts* denies a “personal right of privacy” for corporations, partnerships or unincorporated associations,²⁶ except for information that is “highly intimate”²⁷ or otherwise protected by contracts or trade law.

This Article ponders whether corporate or organizational security or privacy provides sufficient justification to disrupt activity that has traditionally received First Amendment protection. Idaho attempted to argue that corporate privacy justified its agriculture security legislation.²⁸ During oral argument, the Ninth Circuit reminded Idaho of the non-existence of corporate privacy rights.²⁹ To the extent that states can create a statutory corporate “right” to privacy, the right should be no greater than that of individual privacy and the same First Amendment limitations should apply. One limitation relates to commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, which denies First Amendment protection to false or misleading commercial speech.³⁰

This Article brings agriculture security legislation into the corporate privacy debate. In *United States v. Alvarez*, the Court reflected on how the First Amendment should encourage “more speech, not . . . silence”³¹ on issues relating to the “unfettered interchange of ideas.”³² Alan Chen and Justin Marceau, the leading ag-gag scholars, discuss the false speech analysis announced in *Alvarez*.³³ Leading food law scholars do so as well,

²⁵ See generally *FCC v. AT&T*, 562 U.S. 397 (2011) (holding that corporations do not have “personal privacy” for the purposes of the Freedom of Information Act exemption under 5 U.S.C. §552(b)(7)(C)).

²⁶ RESTATEMENT (SECOND) OF TORTS § 652I, cmt. c (AM. LAW INST. 1977).

²⁷ *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 30 F. Supp. 2d 1182, 1188 (D. Ariz. 1998), *aff’d*, 306 F.3d 806 (9th Cir. 2002) (internal quotation marks and citation omitted).

²⁸ Oral Argument at 8:14, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (No. 15-35960), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000011554 [<https://perma.cc/TQ9D-645X>].

²⁹ *Id.*

³⁰ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 593 (1980).

³¹ *United States v. Alvarez*, 567 U.S. 709, 727–28 (2012) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

³² *Lane v. Franks*, 573 U.S. 228, 235–36 (2014) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

³³ See generally Alan K. Chen & Justin Marceau, *Developing a Taxonomy of Lies Under the First Amendment*, 89 U. COLO. L. REV. 655 (2018) [hereinafter *Taxonomy of Lies*] (discussing the framework and impact of *United States v. Alvarez*); Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1480–83 (2015) [hereinafter *High Value Lies*]

but many also theorize about how the marketplace of ideas helps consumers “sort out” commercial messaging.³⁴ The marketplace functions inefficiently when there is a lack of “diversity of voices speaking to how food is produced.”³⁵ Consumer interest in “where their food comes from and how it is produced” has increased.³⁶ Research confirms the demand for more transparency at every level³⁷ and consumer interest in the “free flow of commercial information” about food production is often sparked by exposés.³⁸ “Consumers likewise recognize and appreciate the vital information that journalists, whistleblowers, and activists have to share about” the industry.³⁹

Part I of this Article presents the ag-gag landscape and examines the scholarship and legal advocacy of Chen and Marceau. Part I also demonstrates how the Ninth and Tenth Circuits have thus far declined to scrutinize the scope of the corporate “right” to privacy when determining the constitutionality of ag-gag laws. Part I does not disparage the circuits’ choice, but instead looks forward to a potential challenge that will require a determination of the sufficiency of corporate privacy as a rationale.

(considering the facts and holding of *United States v. Alvarez* in the context of the First Amendment); Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317 (2015) (establishing Marceau’s authority on the topic of ag-gag issues); Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 1052–53 (2016) [hereinafter *Free Speech and Democracy*] (referring to the discussion in *United States v. Alvarez* regarding the utterance of false statements).

³⁴ Brief of Food Law and Policy Scholars as Amici Curiae in Support of Plaintiffs-Appellees Animal Legal Defense Fund, et al. at 11–12, Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018) (No. 15-35960) [hereinafter Food Law and Policy Scholars].

³⁵ *Id.*

³⁶ *Id.* at 26; see also Becky L. Jacobs, *Urban Food Corridors: Cultivating Sustainable Cities*, 91 U. DET. MERCY L. REV. 215, 229–30 (2014) (quoting Steven A. Platt, *Death by Arugula: How Soil Contamination Stunts Urban Agriculture, and What the Law Should Do About It*, 97 MINN. L. REV. 1507, 1508–14 (2013)) (discussing how “the U.S. Department of Agriculture estimated that demand for locally grown food would rise from the \$4 billion market in 2002 to a \$7 billion market in 2012” even though “only fifteen percent of the world’s food is grown in urban areas”).

³⁷ Food Law and Policy Scholars, *supra* note 34, at 5, 12 (quoting Nicole Negowetti, *Opening the Barnyard Door: Transparency and the Resurgence of Ag-Gag & Veggie Libel Laws*, 38 SEATTLE U. L. REV. 1345, 1373 (2015)); see also Peter Wendel, *Distressed Cities and Urban Farming: Are We Making a Mountain Out of a Molehill?*, 91 U. DET. MERCY L. REV. 277, 283–85 (2014) (illustrating how an increase in the demand for local food suggests an increase in demand for transparency).

³⁸ Food Law and Policy Scholars, *supra* note 34, at 13, 16 (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 765 (1976)).

³⁹ *Id.* at 18.

Part II of this Article reflects on the origin of the corporate structure and the emergence of individual privacy as a protected constitutional interest. Part II relies heavily on Anita Allen's work on the historic nature and scope of the individual right to privacy to evaluate the merits of the corporate privacy debate. Part II concludes by summarizing the discussion on corporate privacy between Elizabeth Pollman, Eric Orts, Amy Sepinwall, and Mary Fan.

Part III of this Article describes the importance of the corporate privacy debate to agriculture security legislation. Part III places corporate privacy in the context of the public nature of food production. Part III points out how ag-gag laws demonstrate the way some animal and agribusinesses can conceal nonproprietary information from the public through the political process. Part III concludes by identifying how ag-gag laws disrupt historic and normative understandings of the First Amendment and privacy on public matters.

I

AGRICULTURE SECURITY LEGISLATION

No federal court challenge against agriculture security legislation has examined the scope of the "right" that ag-gag laws create. Amy Meyer appears to be the first and only person charged with violating any state's ag-gag law.⁴⁰ Meyer pulled to the side of the public road while driving near the Dale Smith Meatpacking Company in Draper City, Utah,⁴¹ and videoed cows through a barbed-wire fence.⁴² One scene in particular made Meyer stop: a sick or injured live cow being carried away in a tractor "as though she were nothing more than rubble."⁴³ A slaughterhouse manager confronted Meyer and informed her she could not film.⁴⁴ Meyer claimed that she was on public land and resisted until law enforcement responded to a claim of trespass.⁴⁵ Meyer was charged even though the official report noted the lack of damage to any property.⁴⁶ The prosecutor

⁴⁰ Will Potter, *First "Ag-Gag" Prosecution: Utah Woman Filmed a Slaughterhouse from the Public Street*, GREEN IS THE NEW RED (Apr. 29, 2013), <http://www.greenisthenewred.com/blog/first-ag-gag-arrest-utah-amy-meyer/6948/> [<https://perma.cc/TJ26-R4NX>].

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

moved to dismiss the case against Meyer.⁴⁷ Meyer later reported the experience left a “chilling effect”⁴⁸ and—along with others in federal court—successfully argued that Utah’s ag-gag law violated the First Amendment.⁴⁹

In this Part, this Article explains why corporate “security” may be insufficient to justify agriculture security legislation. Justice Thomas, writing for the majority in *Reed v. Town of Gilbert*, recently theorized that in the First Amendment context a facially-neutral law can be subjected to strict scrutiny regardless of whether there was a benign motive, content-neutral justification, or a lack of animus towards ideas.⁵⁰ *Reed* involved a challenge by Good News Community Church against outdoor sign regulations that exempted twenty-three categories of signs.⁵¹ The Court identified distinctions between three types of signs as “particularly relevant”: ideological, political, and temporary directional signs.⁵² *Reed* identified the content-

⁴⁷ John M. Glionna, *Video of Utah Slaughterhouse Draws Attention to ‘Ag-Gag’ Laws*, L.A. TIMES (May 3, 2013, 7:00 AM), <https://www.latimes.com/nation/nationnow/la-na-nn-utah-ag-gag-law-uproar-20130502-story.html> [<https://perma.cc/X5QD-8BZL>].

⁴⁸ Marissa Lang, *Judge Won’t Toss Suit Challenging Utah’s ‘Ag-Gag’ Law*, SALT LAKE TRIBUNE (Aug. 7, 2014 9:08 PM), <http://archive.sltrib.com/story.php?ref=/sltrib/news/58267614-78/law-animal-plaintiffs-utah.html.csp> [<https://perma.cc/7DCR-8YAH>].

⁴⁹ *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1196 (D. Utah 2017).

⁵⁰ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) (citing *Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993)).

⁵¹ *Id.* at 2224. The exemptions included those for bazaar signs, flying banners, and everything in between. *Id.*

⁵² “Political Signs” were defined as “any temporary sign designed to influence the outcome of an election called by a public body.” *Id.* (internal quotation marks omitted) (citations omitted). Political signs could be up to “16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and ‘rights-of-way.’” *Id.* Additionally, political signs could be “displayed up to 60 days before a primary election and up to 15 days following a general election.” *Id.* at 2225 (citations omitted). “Temporary Directional Signs” were defined as “any [t]emporary [s]ign intended to direct pedestrians, motorists, and other passersby to a ‘qualifying event.’” *Id.* at 2225 (internal quotation marks omitted). A “qualifying event” was defined as any “assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.” *Id.* (internal quotation marks omitted) (citations omitted). Temporary directional signs could “be no larger than six square feet” and could “be placed on private property or on a public right-of-way.” *Id.* (citations omitted). “[N]o more than four [temporary directional] signs [could] be placed on a single property at any time.” *Id.* (citations omitted). Temporary directional signs could be “displayed no more than 12 hours before the ‘qualifying event’ and no more than 1 hour afterward.” *Id.* (citations omitted).

Ideological signs could be up to twenty square feet in area and could be placed in all “zoning districts.” *Id.* at 2224 (citations omitted). “Ideological Signs” were defined as “any sign communicating a message or ideas for noncommercial pur-

neutrality analysis as the first step in the First Amendment review, explaining:

[I]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment, and a party opposing the government need adduce no evidence of an improper censorial motive *In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.*⁵³

Reed clarified that “speech regulation[s] targeted at specific subject matter [are] content based even if [they do] not discriminate among viewpoints within that subject matter.”⁵⁴ According to *Reed*, a content-neutral regulation could be considered content-based under two circumstances.⁵⁵ First, where the law could not be justified without reference to its content, and second, where the law was adopted because of disagreement with the message the speech conveyed.⁵⁶

Reed makes establishing whether corporate “security” acts as a proxy for corporate “privacy” significant and important in the agriculture security debate. Discriminatory treatment under the First Amendment is suspect not only when the government intends to suppress certain ideas, but also when the government seeks to prohibit discussion of an entire topic.⁵⁷ Agriculture security legislation prevents discovery and disclosure of nonproprietary information about commercial food operations and production.⁵⁸ Ag-gag laws do so by criminalizing misrepresentations used to gain access or employment and by prohibiting filming once access or employment occurs.⁵⁹

Reed’s content-neutrality analysis could mandate a lower level of scrutiny than strict scrutiny when analyzing an ag-gag law. Even then, states must articulate protection of a more-than-legitimate interest. The “lesser scrutiny” *Reed* characterizes as applying to content-neutral laws is not rational basis

poses that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency.” *Id.* (internal quotation marks omitted) (citations omitted).

⁵³ *Id.* at 2228 (emphasis added) (internal quotation marks omitted) (citations omitted).

⁵⁴ *Id.* at 2230 (citing *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530 (1980)).

⁵⁵ *Id.* at 2227.

⁵⁶ *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)).

⁵⁷ *Id.*

⁵⁸ *Sanders*, *supra* note 1, at 524.

⁵⁹ Laurent Sacharoff, *Trespass and Deception*, 2015 BYU L. REV. 359, 370–71 (2015).

review, which only requires a legitimate interest. Content-neutral laws require an important or substantial government interest and thus only receive a lesser form of heightened scrutiny.⁶⁰

Beyond *Reed's* content-neutrality analysis, the recent Center for Medical Progress (the "Center") scandal demonstrates how the First Amendment already contemplates the scope of corporate or organizational privacy. In July 2015, the Center released secretly-recorded video of its members "posing as tissue brokers [and] discussing terms for procuring fetal tissue" with employees and representatives of Planned Parenthood.⁶¹ A national debate erupted over whether Planned Parenthood had illegally proposed to sell fetal tissue.⁶² In the following months, members of Congress attempted to cut off "more than \$500 million in federal money" to Planned Parenthood.⁶³ By late 2015, several states had already launched investigations,⁶⁴ even though "Planned Parenthood announced . . . that it would no longer accept reimbursement for the costs of providing the tissue for medical research."⁶⁵ In January 2016, a Texas investigation against Planned Parenthood revealed surprising results: an indictment against the makers of the secret recordings.⁶⁶ The charges, which were later dropped,⁶⁷ included tampering with a governmental record by faking California driver's licenses (a second-degree felony) and the purchase and sale of human organs (a class A misdemeanor).⁶⁸ Planned Parenthood subsequently brought a

⁶⁰ *Reed*, 135 S. Ct. at 2232.

⁶¹ Will Cabaniss & Joshua Gillin, *PolitiFact Sheet: 8 Things to Know About the Planned Parenthood Controversy*, POLITIFACT (Aug. 5, 2015, 11:32 AM), <http://www.politifact.com/truth-o-meter/article/2015/aug/05/politifact-sheet-8-things-know-about-plan-national/> [<https://perma.cc/Y6VS-GMYC>].

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Tamar Lewin, *Planned Parenthood Won't Accept Money for Fetal Tissue*, N.Y. TIMES (Oct. 13, 2015), <https://www.nytimes.com/2015/10/14/us/planned-parenthood-to-forgo-payment-for-fetal-tissue-programs.html> [<https://perma.cc/D3AQ-EKSX>].

⁶⁶ Sally Kohn, *The Truth Behind Planned Parenthood's Vindication*, CNN (Jan. 26, 2016, 5:34 PM), <http://www.cnn.com/2016/01/26/opinions/planned-parenthood-indictment-kohn/index.html> [<https://perma.cc/MD45-W6HU>].

⁶⁷ Manny Fernandez, *Last Charges Dropped Against Abortion Foes in Making of Planned Parenthood Video*, N.Y. TIMES (July 26, 2016), <https://www.nytimes.com/2016/07/27/us/last-charges-dropped-against-abortion-opponents-in-planned-parenthood-case.html> [<https://perma.cc/S8ZS-D2TM>].

⁶⁸ Kohn, *supra* note 66.

civil lawsuit on multiple grounds.⁶⁹ In April 2018, the U.S. Supreme Court denied certiorari that if successful would have allowed the release of allegedly-misleading videos taken at a private Planned Parenthood event.⁷⁰

It is unclear how the type of “security” or “privacy” interest that agriculture security legislation protects outweighs the First Amendment privilege to gather and disseminate truthful, nonproprietary information about the national and international marketplace of commercial food production. The global interconnectivity of food production increases the need for the cross-border flow of information about the industry.⁷¹ In this context, the First Amendment plays an important role because commercial food production is a public matter. More than innocently or incidentally, ag-gag laws hinder undercover investigations into the commercial food industry. By design, ag-gag laws discourage and prevent such investigations.

Agriculture security legislation “exploit[s] the interrelatedness between privacy and trespass and privacy and reputational harms to prevent disclosure about truthful and nonproprietary information that a business prefers to keep private.”⁷² The legislative history of most agriculture security legislation fails to demonstrate the inadequacies of existing criminal and civil remedies for violations of the rights of animal and agriculture businesses. Under most state laws, defamation does not protect against disclosure of truthful information.⁷³ Trespass does not always bar access to undercover investigators.⁷⁴ Ag-gag laws appear to borrow components of laws that protect reputation (defamation) and components of laws that protect privacy (trespass) to create a statutory right

⁶⁹ *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 214 F. Supp. 3d 808 (N.D. Cal. 2016) *aff’d and amended by* 890 F.3d 828 (9th Cir. 2018).

⁷⁰ Imani Gandy, *Supreme Court Deals Latest Blow to Architects of Planned Parenthood Smear Campaign*, REWIRE.NEWS (Apr. 2, 2018, 5:36 PM), <https://rewire.news/article/2018/04/02/supreme-court-deals-latest-blow-architects-planned-parenthood-smear-campaign/> [<https://perma.cc/NB3E-SDCY>].

⁷¹ Charlise Dewey, *Ag-gag Laws: Protecting Industrial Farms, but from What?*, GRAND RAPIDS BUS. J. (June 21, 2013), <http://www.grbj.com/articles/77165-ag-gag-laws-protecting-industrial-farms-but-from-what> [<https://perma.cc/Y3MQ-U5TB>].

⁷² Sanders, *supra* note 1, at 526 (citing Brief of Amici Curiae Professors Brooke Kroeger and Ted Conover in Support of Affirmance at 15, *Animal Legal Def. Fund v. Wasden*, (9th Cir. 2018) (No. 15-35960), 2016 WL 3537328 [hereinafter *Kroeger & Conover*]); *see also* Sacharoff, *supra* note 59, at 359 (explaining that the enactment of ag-gag laws “superseded ordinary trespass laws for far more targeted laws”).

⁷³ Sanders, *supra* note 1, at 525.

⁷⁴ *Id.*

against nongovernment intrusions into nonproprietary information that could be in the public's interest to know.

Professors Alan Chen and Justin Marceau, the leading scholars on agriculture security legislation,⁷⁵ do not question the justification for ag-gag laws in the same way as this Article. Instead, Marceau and Chen discuss ag-gag laws as a hindrance to democracy in the video age and advocate for the recognition of a constitutional right to record.⁷⁶ Marceau and Chen demonstrate how ag-gag laws keep agribusiness operations concealed and discuss the need to protect individuals from civil or criminal liability for their recordings⁷⁷ to further the principles of self-governance, the search for truth, and the promotion of public discourse.⁷⁸ Marceau and Chen identify recording as a preparatory component to expression and speech—not mere conduct—and distinguish between recording in public and private.⁷⁹ They conclude “nothing about the private setting fundamentally changes the conceptual understanding of the expressive nature of recording.”⁸⁰

Chen and Marceau also focus on the false-speech analysis from *United States v. Alvarez*, in which a plurality of the Court for the first time extended First Amendment protection to false speech.⁸¹ *Alvarez* involved a prosecution under the Stolen Valor Act, which made it a federal crime to falsely claim receipt of a military honor or declaration.⁸² During his first public meeting as a water district board member, Alvarez claimed that he formerly played for the Detroit Red Wings, that he once married a starlet from Mexico, and that he received a Congressional Medal of Honor.⁸³ Chen and Marceau explain how *Alvarez* extended First Amendment protection to false speech that

⁷⁵ *Free Speech and Democracy*, *supra* note 33, at 996.

⁷⁶ *See id.* at 1009, 1023–25; *see also* Brief of Association of American Publishers et al. as Amici Curiae in Support of Plaintiffs-Appellees, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (No. 15-35960) [hereinafter *Association of American Publishers*].

⁷⁷ *Free Speech and Democracy*, *supra* note 33, at 1026–41.

⁷⁸ *Id.* at 999–1017; *see also* Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 180 (2017) (arguing that three theories justify First Amendment protection of the right to record: the first is based on principles of democratic self-governance, the second on the search for truth, and the third on individual autonomy).

⁷⁹ *Free Speech and Democracy*, *supra* note 33, at 1017–23.

⁸⁰ *Id.* at 1023–24.

⁸¹ *United States v. Alvarez*, 567 U.S. 709, 721–22 (2012); *see also High Value Lies*, *supra* note 33, at 1451–54.

⁸² *Alvarez*, 567 U.S. at 715–17.

⁸³ *Id.* at 713–15.

caused no legally cognizable harm.⁸⁴ *Alvarez* frowned upon how the Stolen Valor Act allowed unlimited government control over one subject at any time or in any setting.⁸⁵ The Stolen Valor Act did protect a compelling interest—recognizing and expressing gratitude for acts of heroism and sacrifice—but it was insufficiently tailored. The government was unable to show that public perception of military honors and declarations had diminished or that the government was unable to counter *Alvarez*'s false speech with true speech.

Chen and Marceau argue that under *Alvarez*, “high value lies” warrant more robust First Amendment protection⁸⁶ and they identify investigative deceptions as a type of “high value lie.”⁸⁷ Chen, Marceau, and others (including local ACLU affiliates and animal rights groups) tested the *Alvarez* false speech analysis in several federal court challenges against agriculture security legislation. A federal district court in Idaho was the first to find an ag-gag law in violation of the First Amendment.⁸⁸ Section 18-7042 of the Idaho Code criminalized interference with production at an animal or agricultural facility, which included “any structure or land, whether privately or publicly owned, leased or operated, that is being used for agricultural production.”⁸⁹ Section 18-7042 defined “agricultural

⁸⁴ *High Value Lies*, *supra* note 33, at 1453.

⁸⁵ *Alvarez*, 567 U.S. at 724–30.

⁸⁶ *High Value Lies*, *supra* note 33, at 1480–91.

⁸⁷ *Id.* at 1455–1506.

⁸⁸ *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195 (D. Idaho, 2015), *aff'd in part and rev'd in part* by *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). The District of Idaho ruled, on a motion to dismiss, that section 18-7042 was a content-based restriction on speech. *Otter*, 118 F. Supp. 3d at 1202. Later, on summary judgment, Idaho argued section 18-7042 only applied to false speech amounting to actionable fraud, defamation, conversion, or trespass. *Id.* at 1203. The court found that Section 18-7042 prohibited “all lies used to gain access to property, records, or employment—regardless of whether the misrepresentations themselves cause any material harm.” *Id.* at 1203. “Even where reporting was truthful (and thus, no action for fraud or defamation would apply), section 18-7042 would still impose criminal liability.” Shaakirrah R. Sanders, *Ag-Gag Free Detroit*, 93 U. DET. MERCY L. REV. 669, 676 (2016). The court found that a report on the facility itself, rather than gaining access, was the harm more likely to flow from a violation of section 18-7042. *Otter*, 118 F. Supp. 3d at 1204. But truthful reporting is not a legally cognizable harm absent special circumstances. *Id.* The court theorized how in Idaho, *The Jungle* would have triggered criminal charges under section 18-7042 against Sinclair. *Id.* at 1201–02 (citing WILLIAM A. BLOODWORTH, JR., UPTON SINCLAIR 45–48 (1977)); *see also* UPTON SINCLAIR, *THE JUNGLE* (Doubleday, Page & Co., 1906) (detailing the results of an investigation that relied on untrue statements to gain access into a meatpacking plant). The court also noted that commercial animal and agricultural was a heavily regulated industry. *Otter*, 118 F. Supp. 3d at 1202, 1207.

⁸⁹ IDAHO CODE § 18-7042(2)(b) (2018).

production” as “activities associated with the production of agricultural products for food, fiber, fuel and other lawful uses[.]”⁹⁰ Section 18-7042 prohibited the use of misrepresentations to (1) enter a facility,⁹¹ (2) obtain records,⁹² (3) obtain employment with an intent cause economic or other injury,⁹³ or (4) enter and make an unauthorized audio or video recording.⁹⁴ Penalties included up to one year imprisonment and in some circumstances damages of up to twice the economic loss to a business.⁹⁵ When debating the measure, some members of the Idaho legislature expressed clear animus towards undercover investigations into Idaho’s animal and agricultural industry.⁹⁶

The Ninth Circuit reasoned that *Alvarez* left false speech unprotected if “made ‘for the purpose of material gain’ or ‘material advantage,’ or if such speech inflicts a ‘legally cognizable harm.’”⁹⁷ On this basis, the Ninth Circuit invalidated subsections 18-7042(1)(a) and (1)(d), which respectively prohibited misrepresentations to gain entry and nonconsensual audio and video recordings.⁹⁸ Idaho’s prohibition against lying to gain entry targeted journalistic and investigative reporters, which could chill lawful speech.⁹⁹ Subsection (1)(a) also potentially criminalized innocent behavior to a staggering degree and was not always associated with a material benefit to the speaker.¹⁰⁰ Ultimately, subsection (1)(a) was found to be so broad that it gave rise to suspicion of impermissible purpose.¹⁰¹ Subsection (1)(d)’s recording provision was deemed an obvious content-based restriction on speech that implicated the First Amendment right to film matters of public interest.¹⁰² In this respect, subsection (1)(d) was both under- and over-inclusive. “Subsection (1)(d) prohibited only audio and video recordings but said nothing about photographs.” Subsection

⁹⁰ *Id.* § 18-7042(2)(a).

⁹¹ *Id.* § 18-7042(1)(a).

⁹² *Id.* § 18-7042(1)(b).

⁹³ *Id.* § 18-7042(1)(c).

⁹⁴ *Id.* § 18-7042(1)(d).

⁹⁵ *Id.* § 18-7042(3), (4); see *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195 (D. Idaho. 2015), *aff’d in part and rev’d in part by Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018).

⁹⁶ See *Otter*, 118 F. Supp. 3d at 1200–01.

⁹⁷ *Wasden*, 878 F.3d at 1194 (quoting *United States v. Alvarez*, 567 U.S. 709, 719, 723, 734–36 (2012)).

⁹⁸ *Id.* at 1194–99, 1203–05.

⁹⁹ *Id.* at 1197–98.

¹⁰⁰ *Id.* at 1195–96.

¹⁰¹ *Id.* at 1198.

¹⁰² *Id.* at 1203–05.

(1)(d) also suppressed more speech than necessary due to the vast number of available legal remedies that did not implicate the First Amendment.¹⁰³

The Ninth Circuit also pondered the types of misrepresentations *Alvarez* left unprotected and revived subsections 18-7042(1)(b) and (c), which respectively prohibited misrepresentations to obtain records and employment with intent to cause economic or other injury.¹⁰⁴ Obtaining records by misrepresentation causes “actual and potential harm on a facility and bestows material gain on the fibber.”¹⁰⁵ Obtaining employment by misrepresentation with the intent to cause injury violates the covenant of good faith and fair dealing implicit in all of Idaho’s employment agreements.¹⁰⁶

The Tenth Circuit left unresolved whether *Alvarez* applied to Wyoming’s agriculture security legislation,¹⁰⁷ which imposed criminal punishment and civil liability for trespassing on private land for purposes of gathering “resource data.”¹⁰⁸ Resource data included all that related “to land or land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil,

¹⁰³ *Id.* at 1205.

¹⁰⁴ *Id.* at 1199–1203.

¹⁰⁵ *Id.* at 1200.

¹⁰⁶ *Id.* at 1199–1202.

¹⁰⁷ See *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir. 2017); see also WYO. STAT. ANN. § 6-3-414(a) (2017), which provides that:

A person is guilty of trespassing to unlawfully collect resource data from private land if he . . . [e]nters onto private land for the purpose of collecting resource data . . . and . . . [d]oes not have . . . [a]n ownership interest in the real property or, statutory, contractual or other legal authorization to enter the private land to collect the specified resource data . . . or . . . [w]ritten or verbal permission of the owner, lessee or agent of the owner to enter the private land to collect the specified resource data.

Punishment includes “imprisonment for not more than one (1) year, a fine of not more than one thousand dollars (\$1,000.00), or both.” *Id.* § 6-3-414(d). Punishment for repeat offenders includes “imprisonment for not less than ten (10) days nor more than one (1) year, a fine of not more than five thousand dollars (\$5,000.00), or both.” *Id.* Moreover, “[n]o resource data collected on private land in violation of this section is admissible in evidence in any civil, criminal or administrative proceeding, other than a prosecution for violation of this section or a civil action against the violator.” *Id.* § 6-3-414(f). Additionally, “[r]esource data collected on private land in violation of this section in the possession of any governmental entity . . . shall be expunged by the entity from all files and data bases, and it shall not be considered in determining any agency action.” *Id.* § 6-3-414(g); see also Carrie A. Scrufari, *A Watershed Moment Revealing What’s at Stake: How Ag-Gag Statutes Could Impair Data Collection and Citizen Participation in Agency Rulemaking*, 65 UCLA L. REV. DISC. 2, 11–13 (2017) (examining First Amendment implications of the Wyoming statute).

¹⁰⁸ WYO. STAT. ANN. § 6-3-414 (2017); WYO. STAT. ANN. § 40-27-101 (2017).

conservation, habitat, vegetation, or animal species.”¹⁰⁹ Wyoming criminalized entering private land “for the purpose of collecting resource data” and crossing private land to collect resource data from adjacent or proximate land.¹¹⁰

The Tenth Circuit examined how agriculture security legislation implicated the First Amendment even when the regulation of speech occurred on private property.¹¹¹ In short, the First Amendment applies even if only one aspect of the challenged legislation concerned private property.¹¹² Moreover, Wyoming punished speech-creation activities differently by increasing the penalties,¹¹³ even though such activities receive First Amendment protection.¹¹⁴ The First Amendment protects activities that support “the creation and dissemination of information”¹¹⁵ because the gathering of facts is “the beginning point” for conducting human affairs and is “most essential to advance human knowledge.”¹¹⁶ Wyoming could not escape First Amendment scrutiny by “simply proceeding upstream and damming the source of speech.”¹¹⁷ Collecting samples, noting legal descriptions, and recording geographical coordinates informs advocacy and other forms of protected expression.¹¹⁸

Utah abandoned its defense after the Tenth Circuit remanded Wyoming’s agriculture security legislation for a First Amendment analysis.¹¹⁹ Utah’s law¹²⁰ closely resembled a

¹⁰⁹ WYO. STAT. ANN. § 6-3-414(e)(iv) (2017); *see also* *W. Watersheds Project*, 869 F.3d at 1192; WYO. STAT. ANN. § 40-27-101(h)(iii) (2017).

¹¹⁰ WYO. STAT. ANN. §§ 6-3-414(a)-(c); 40-27-101(a)-(c).

¹¹¹ *W. Watersheds Project*, 869 F.3d at 1194. Wyoming supported the interpretation that its legislation regulated conduct on public land if “an individual first trespassed on private land.” *Id.*

¹¹² *Id.* at 1195.

¹¹³ *Id.* at 1194–95.

¹¹⁴ *Id.* at 1197–98.

¹¹⁵ *Id.* at 1195–96 (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011)).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1196 (quoting *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015)).

¹¹⁸ *Id.* at 1196–97.

¹¹⁹ Tiffany Caldwell, *Utah to Pay Animal Welfare Groups \$349,000 to Settle ‘Ag-Gag’ Lawsuit*, THE SALT LAKE TRIBUNE (Nov. 18, 2017), <https://www.grbj.com/articles/77165-ag-gag-laws-protecting-industrial-farms-but-from-what> [<https://perma.cc/Y3MQ-U5TB>]. *See also* *W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1176, 1191 (D. Wyo. 2018) (finding a First Amendment violation on remand).

¹²⁰ *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193 (D. Utah 2017); *see also* UTAH CODE ANN. § 76-6-112(2) (2017) (“[a] person is guilty of agricultural operation interference if the person[,] . . . without consent from the owner of the agricultural operation, or the owner’s agent, knowingly or intentionally records an image of, or sound from, the agricultural operation by leaving a recording device on the agricultural operation [or,] while present[,] . . . records an image of, or

similar statute in Idaho, and a coalition of plaintiffs brought a challenge after Amy Meyer's arrest. Section 76-6-112 of the Utah Code applied only to facilities that were exclusively located on private property,¹²¹ and broadly criminalized interference with an "agricultural operation."¹²² Section 76-6-112 contained one provision about lying and three provisions about recording. Utah criminalized bugging an agricultural operation,¹²³ obtaining "access to an agricultural operation under false pretenses,"¹²⁴ filming an agricultural operation after applying for a position with the intent to film,¹²⁵ and filming an agricultural operation while trespassing.¹²⁶ A federal district court ruled that the First Amendment barred enforcement of these provisions.¹²⁷

It is unclear whether Utah would have relied on the corporate privacy rationale to justify its agriculture security legislation. As a matter of First Amendment principle, Utah and other ag-gag states must protect more than a legitimate interest under both the content-based and content-neutral analysis discussed in *Reed*. Arguably, ag-gag laws establish a statutory "right" to corporate privacy that prevents disclosure of truthful and nonproprietary commercial information that that is in the public's interest to know. It is questionable whether preventing undercover investigations on public matters constitutes a more-than-legitimate interest.

Neither the Ninth nor Tenth Circuits determined whether ag-gag laws create a corporate right to privacy. The Tenth Circuit came close to the corporate privacy debate to the extent that Wyoming's regulation of speech occurred on private property. Idaho attempted to argue corporate privacy as its government interest during oral argument, but swiftly backtracked when Circuit Judge McKeown challenged the existence of cor-

sound from, the agricultural operation[.]"). Individuals who commit agricultural operation interference are guilty of a class A misdemeanor for the first offense. *Id.*

¹²¹ UTAH CODE ANN. § 76-6-112(2)(c)(i) (2017).

¹²² *Id.*

¹²³ *Id.* at 1195-96 (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011)).

¹²⁴ *Id.*

¹²⁵ *Id.* at 1196 (quoting *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015)).

¹²⁶ *Id.*

¹²⁷ *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1198 (D. Idaho 2015).

porate privacy.¹²⁸ This Article next addresses the corporate privacy debate.

II

THE CORPORATE PRIVACY DEBATE

Not all animal and agribusiness owners were in favor of agriculture security legislation. Hamdi Ulukaya urged former Governor Butch Otter to veto the Gem State's ag-gag law and publicly stated, in part:

A bill is up for approval in Idaho that, if passed, would limit transparency and make some instances of exposing the mistreatment of animals . . . punishable by imprisonment. This could cause the general public concern and conflicts with our views and values.¹²⁹

Ulukaya is the founder and Chief Executive Officer of Chobani, which opened a major yogurt plant in Idaho in 2013.

In this Part, this Article explores the scope of the "right" to corporate or commercial privacy that agriculture security legislation effectively creates. The media generally has a great deal of leeway to determine what to disseminate to the public, and claims for invasion of privacy are subject to that discretion.¹³⁰ Line drawing begins when publicity ceases to concern information to which the public is entitled.¹³¹ As a result, the media may be liable where publicity becomes "morbid" and "sensational prying" simply for its own sake—or into matters of which there is no public concern.¹³²

The intersection between the right to gather and disseminate news and *individual* privacy came into the public discourse in 2016, when a civil jury in California awarded Terry Bollea, also known as Hulk Hogan, \$140 million in compensatory and punitive damages against the website Gawker.¹³³ Bol-

¹²⁸ Oral Argument at 8:14, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (No. 15-35960), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000011554 [<https://perma.cc/7ZPE-ZVFB>].

¹²⁹ MILK Editors, *Chobani Yogurt Opposes Idaho Ag Gag Law*, AG WEB (Feb. 28, 2014, 9:31 AM), https://www.agweb.com/article/chobani_yogurt_opposes_idaho_ag_gag_law_naa_dairy_today_editors/ [<https://perma.cc/NCS3-X53A>].

¹³⁰ RESTATEMENT (SECOND) OF TORTS § 652D, cmt. g (AM. LAW INST. 1976).

¹³¹ *Id.* § 652D cmt. h.

¹³² *Id.*

¹³³ *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1329–30 (M.D. Fla. 2012); see also Amended Complaint, *Bollea v. Gawker Media, LLC*, (Fla. Cir. Ct. 2012) (No. 12012447-CI-011); see also Nick Madigan, *Jury Tacks on \$25 Million to Gawker's Bill in Hulk Hogan Case*, N.Y. TIMES (Mar. 21, 2016), <https://www.nytimes.com/2016/03/22/business/media/hulk-hogan-damages-25-million-gawker-case.html> [<https://perma.cc/GR2W-T4SL>].

lea's claim involved the unauthorized publication of privately recorded sexual activity with the wife of Bollea's closest friend.¹³⁴ Bollea did not consent to the recording or the publication, which received over 7 million online views.¹³⁵ The Bollea lawsuit devoted substantial energy to differentiating between the privacy rights afforded to private individuals and those afforded to public figures.¹³⁶ A more fundamental question also arose: what makes something newsworthy?¹³⁷ Bollea's extramarital affair with a friend's wife, and the fact that an unknown party filmed and disseminated the encounter, was of public interest because of Bollea's celebrity. However, the publication of the recording provided little, if any, additional benefit to the public. The jury's finding that the video recording lacked newsworthiness, and the amount of the verdict itself, established the public's shared role in defining the scope of privacy and what constitutes news.¹³⁸

As demonstrated in Bollea's case and established in *Curtis Publishing Company v. Butts*, "dissemination of the individual's opinions on matters of public interest is . . . an 'unalienable right[.]" but not an unlimited one.¹³⁹ In the same way that a business is not generally immune from regulation, the "publisher of a newspaper has no special immunity" that allows an invasion into the rights and liberties of others.¹⁴⁰ Yet limits on the press "must neither affect 'the impartial distribution of news' and ideas . . . nor deprive our free society of the stimulating benefit of varied ideas[.]"¹⁴¹ By extension, purveyors

¹³⁴ See Kayla Lombardo, *The Hulk Hogan vs. Gawker Legal Saga, Explained*, SPORTS ILLUSTRATED (May 03, 2016), <https://www.si.com/more-sports/hulk-hogan-gawker-sex-tape-lawsuit-racism-explained> [<https://perma.cc/D42S-9AVT>]; Julia Marsh, *Hulk Hogan Wants Every Cent of His \$140M Verdict From Gawker*, N.Y. POST (Oct. 31, 2016, 3:28 PM), <https://nypost.com/2016/10/31/hulk-hogan-wants-every-cent-of-his-140m-verdict-from-gawker/> [<https://perma.cc/HFR8-XDXV>].

¹³⁵ See Jeffrey Toobin, *Gawker's Demise and the Trump-Era Threat to the First Amendment*, NEW YORKER (Dec. 11, 2016), <https://www.newyorker.com/magazine/2016/12/19/gawkers-demise-and-the-trump-era-threat-to-the-first-amendment> [<https://perma.cc/2ANK-2XKF>].

¹³⁶ Oral Argument at 8:14, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (No. 15-35960), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000011554 [<https://perma.cc/7ZPE-ZVFB>].

¹³⁷ See Ryan McCarthy, *When a Sex Tape is Newsworthy: Privacy in the Internet Era*, N.Y. TIMES (Mar. 4, 2016), <https://www.nytimes.com/interactive/2016/03/04/us/Hulk-Hogan-sex-tape.html> [<https://perma.cc/8ZEK-XHHE>].

¹³⁸ Toobin, *supra* note 135.

¹³⁹ *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 149–50 (1967).

¹⁴⁰ *Id.* at 150 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132–33 (1937)).

¹⁴¹ *Id.* at 151 (quoting *Associated Press*, 301 U.S. at 133).

should not “fear physical or economic retribution solely because of what they choose to think and publish.”¹⁴²

No individual “right” to privacy, much less a corporate right, existed prior to the common law or the U.S. Constitution. Professor Daniel Greenwood traces the medieval roots of corporate entities to a feudal right to self-government that was unrelated to business endeavors.¹⁴³ As described by Greenwood, these rights were limited to the exercise of “power over the corporation and its dependents without outside interference.”¹⁴⁴ U.S. colonial era corporate entities no more closely resembled modern day business entities than they did their medieval counterparts.¹⁴⁵ At that time, corporations required a special legislative charter.¹⁴⁶

Few corporations were created by the U.S. Revolution.¹⁴⁷ Professor Lyman Johnson reports that by 1780, “colonial legislatures had chartered a mere seven business corporations.”¹⁴⁸ Johnson distinguishes between businesses and corporations and discusses how corporate responsibility during the U.S. colonial era was the primary driver behind corporate personhood.¹⁴⁹ In other words, U.S. colonial era corporations lacked personal gain as a primary motivator¹⁵⁰ because a distinctly public-service dimension controlled—or limited—corporate identity.¹⁵¹ The public-service dimension of colonial era corporations was not an explicit legal prerequisite, but a reflection of “a shared belief about the proper focus of corporate activity.”¹⁵²

As the U.S. economy changed in the years after the U.S. Revolution, so too did the nature of corporations.¹⁵³ Greenwood denotes the nineteenth century as the period during which U.S. corporations evolved as businesses for private gain.¹⁵⁴ During this century, businesses began to take on the

¹⁴² *Id.*

¹⁴³ Daniel J.H. Greenwood, *Neofeudalism: The Surprising Foundations of Corporate Constitutional Rights*, 2017 U. ILL. L. REV. 163, 169–71 (2017).

¹⁴⁴ *Id.* at 170.

¹⁴⁵ See Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1144–45 (2012).

¹⁴⁶ *Id.* at 1145.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See *id.* at 1144–45, 1153.

¹⁵⁰ See *id.* at 1144.

¹⁵¹ *Id.* at 1145.

¹⁵² *Id.*

¹⁵³ Greenwood, *supra* note 143, at 174–75.

¹⁵⁴ *Id.* at 171–77.

corporate form¹⁵⁵ and corporate law began to assume its modern shape.¹⁵⁶ Ultimately, concerns about the appropriate exercise of corporate power led to a wide-ranging debate about institutional responsibility as a matter of corporate duty.¹⁵⁷

In 1819, the Court held in *Trustees of Dartmouth College v. Woodward* that corporations were entitled to some rights under the federal constitution—specifically, the right to enter into contracts.¹⁵⁸ Decades later in 1886, *Santa Clara County v. Southern Pacific Railroad Co.* held that corporations were “persons within the meaning of the Fourteenth Amendment.”¹⁵⁹ The Court later backed away from this view in *United States v. Morton Salt Co.*¹⁶⁰ Regardless, Delaware famously took the lead after *Santa Clara County* and drafted new rules to govern corporations.¹⁶¹

The Court has since expanded the contractual rights of businesses and corporations by the end of the nineteenth cen-

¹⁵⁵ *Id.*; see also Johnson, *supra* note 145, at 1144–48 (discussing the evolution of corporations from public-service entities to entities used for private gain).

¹⁵⁶ See Greenwood, *supra* note 143, at 175.

¹⁵⁷ Johnson, *supra* note 145, at 1143.

¹⁵⁸ See *Tr. of Dartmouth C. v. Woodward*, 17 U.S. (4 Wheat) 518, 642–44 (1819). A lawsuit sought to compel the Trustees of Dartmouth College to produce records from the establishment of the corporation until October 7, 1816. *Id.* at 518–19. The Court found that the college obtained funds through private means and from private individuals, making it a private corporation. *Id.* at 632–34. “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.” *Id.* at 636. Because Dartmouth’s charter was a contract protected by the Constitution, any acts attempting to amend the corporation were void. *Id.* at 643–55.

¹⁵⁹ *Santa Clara Cty. v. S. Pac. R.R. Co.* 118 U.S. 394, 396 (1886). California assessed yearly taxes against the Southern Pacific Railroad Company that included both the railroad’s fences lining the tracks and outstanding mortgages in its property evaluation. *Id.* at 395–97. Southern Pacific argued the taxes fell outside the scope of California’s tax authority and that some outstanding mortgages should have been excluded from the valuation. *Id.* at 409–11. California brought an action to collect the taxes deemed owed. *Id.* at 397. The Court agreed that the entire assessment was a nullity upon the ground that California illegally included property that it did not have the authority to assess for taxation purposes. *Id.* at 414, 416.

¹⁶⁰ *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). Under section 5 of the Federal Trade Commission Act, Morton Salt Company was issued a cease and desist letter and four years later was ordered to submit additional reports in order to show continuing compliance with the decree. *Id.* at 635–36. Morton Salt Company argued that the Commission lacked authority to compel further reports. *Id.* at 638. The Court held that corporations have neither an unqualified right to conduct their affairs in secret nor equality with individuals in the enjoyment of a right to privacy. *Id.* at 652. Corporations “have a collective impact upon society, from which they derive the privilege of acting as artificial entities.” *Id.* The federal government gives them the privilege of engaging in interstate commerce, with the understanding that when they do they will be subject to regulations. *Id.*

¹⁶¹ Greenwood, *supra* note 143, at 175.

ture, but the question of privacy had yet to be raised. The Samuel Warren and Justice Louis Brandeis 1890 *Harvard Law Review* publication *The Right to Privacy*¹⁶² “took no position on whether business entities should be entitled to the privacy action.”¹⁶³ This is unsurprising, as another early twentieth-century development made corporate privacy an unlikely subject for Warren and Justice Brandeis: the recognition of a “free-standing [individual] ‘right to privacy’ tort[.]”¹⁶⁴

In the early 1900s, the Georgia Supreme Court held in *Pavesich v. New England Life Insurance Co.*¹⁶⁵ that an individual privacy claim arose from the unauthorized use of a photograph in a commercial advertisement.¹⁶⁶ Much of the *Pavesich* court’s reasoning reflects the modernity of photography at that time,¹⁶⁷ but Professor Anita Allen offers a robust assessment of *Pavesich*’s merits and discusses Justice Andrew Jackson Cobb’s “arresting analogy between privacy invasions and enslavement.”¹⁶⁸ Allen notes that *Pavesich* has yet to receive the same scholarly and juristic “anti-natural law ire” as *Griswold v. Connecticut*, which enshrined the fundamental right to individual privacy under the U.S. Constitution in 1965.¹⁶⁹ Allen concludes that *Pavesich*’s natural law theory of individual privacy illuminates the nature of invasions of the right: they are a civil injury to “freedom and self-determination.”¹⁷⁰

By 1905, individual privacy as a tort was only recognized in Georgia—weighing against the common law as the foundation for a constitutional right to corporate privacy. Allen argues that even though “‘privacy’ does not appear in the original

¹⁶² Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹⁶³ Anita L. Allen, *Rethinking the Rule Against Corporate Privacy Rights: Some Conceptual Quandries for the Common Law*, 20 J. MARSHALL L. REV. 607, 612 (1987).

¹⁶⁴ Anita L. Allen, *Natural Law, Slavery, and the Right to Privacy Tort*, 81 FORDHAM L. REV. 1187, 1188 (2012).

¹⁶⁵ 50 S.E. 68 (Ga. 1905).

¹⁶⁶ See *id.* at 81.

¹⁶⁷ See *id.* at 78.

¹⁶⁸ Allen, *supra* note 164, at 1188.

¹⁶⁹ *Id.* at 1190; see also *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965). Connecticut criminalized the use and sale of contraceptives to prevent marital infidelity. *Id.* at 498. Any who assisted the use of sale of contraceptives could be charged as a principle offender. *Id.* at 480. A medical doctor was convicted and fined \$100 for prescribing contraceptives to a married woman. *Id.* Justice Douglas held that the Bill of Rights creates a protectable zone of privacy and that marital relationships lie within that zone. *Id.* at 484–86. By extension, a married couple has the right not to procreate. See *id.* Later, the Court extended *Griswold* to unmarried persons in *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

¹⁷⁰ Allen, *supra* note 164, at 1192.

eighteenth century U.S. Constitution or in any of its . . . Amendments[,] . . . rich conceptions of privacy are implicit in any plausible renderings of the text.”¹⁷¹ Allen claims that *Pavesich*’s recognition of individual privacy derives “from natural law,” and is intuitive to “human instinct.”¹⁷² Because natural rights are “‘immutable,’ ‘absolute,’ and belong to every man,” *Pavesich* found individual privacy to be an expectation of a “just civil society”¹⁷³ and linked to “liberty and personal security.”¹⁷⁴ Allen suggests that *Pavesich*’s natural law hypothesis mirrors that which justifies incorporating the Bill of Rights against U.S. states.¹⁷⁵ Allen views U.S. constitutional jurisprudence that recognizes the right to individual privacy as ultimately culminating in two categories: 1) decisional privacy, as represented by *Griswold*, *Roe v. Wade*¹⁷⁶ and *Lawrence v. Texas*¹⁷⁷; and 2) informational privacy, as represented by *Whalen v. Roe*.¹⁷⁸

The question remains whether and which of the “rich conceptions of privacy” apply to corporations. Upton Sinclair published *The Jungle* in 1906,¹⁷⁹ one year after *Pavesich*. Sinclair’s exposé was the result of seven weeks of undercover work at Chicago meatpacking plants and was the catalyst of a federal investigation that ultimately led to the 1906 passage of

171 Anita L. Allen, *First Amendment Privacy and the Battle for Progressively Liberal Social Change*, 14 U. PA. J. CONST. L. 885, 887 (2012); see also *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) (recognizing a constitutionally protected “zone of privacy” protecting unwanted disclosure of personal matters and personal independence in making certain decisions).

172 Allen, *supra* note 164, at 1197.

173 *Id.* at 1198.

174 *Id.* at 1199.

175 See *id.* at 1198-99.

176 See 410 U.S. 113, 117-18, 152-53, 164 (1973) (overturning a Texas statute that criminalized abortions except for the purpose of saving the life of the mother); see also Allen, *supra* note 163, at 887-89, 895-96, 919 (describing how *Roe*’s decriminalization of abortion was premised on a more straightforward Fourteenth Amendment decisional privacy doctrine to embody “a jurisprudence of constitutional privacy for which *Griswold* was a crucial precedent”).

177 See 539 U.S. 558, 562, 564, 577-78 (2003) (overturning a Texas statute that criminalized sexual intercourse between persons of the same gender); see also Allen, *supra* note 163, at 896, 898, 919-20 (explaining that *Lawrence* also represented the kind of “liberty-based constitutional privacy doctrine[.]” begun by *Griswold* and *Roe* recognizing a decisional privacy right).

178 See 429 U.S. 589, 599-600 (1977) (recognizing an individual’s interest in avoiding disclosure of personal information, but upholding the constitutionality of the New York statute at issue); Allen, *supra* note 163, at 886, 889 n.20, 899, 919-20 (explaining that *Whalen* represents the right to informational privacy protected by the Fourteenth Amendment).

179 SINCLAIR, *supra* note 88.

the Meat Inspection Act and the Pure Food and Drug Act.¹⁸⁰ In the years before and after *The Jungle*, corporate privacy “rights” did little to stop robust investigation and regulation of the commercial food industry.¹⁸¹ Animal and agribusinesses were not the only targets of undercover investigations. Nellie Bly wrote about conditions in mental hospitals and institutions in the 1890s.¹⁸² Film and photographs in the 1950s, 1960s, and 1970s documented bookie parlor operations in St. Louis,¹⁸³ peaceful resistance in the Jim Crow south, and the horrific realities of the Vietnam War.¹⁸⁴ In the 1970s, William Sherman of the *New York Daily News* received a Pulitzer Prize for an exposé on Medicaid fraud.¹⁸⁵ While not always undercover, cell phone videos of recent police shootings have renewed public debate on racial profiling and the use of force by law enforcement.¹⁸⁶

Because *Whalen v. Roe* rejected an absolute individual right to control information about oneself in 1977,¹⁸⁷ corporate

¹⁸⁰ *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1201–02 (D. Idaho 2015) (citing *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455–56 (2012)).

¹⁸¹ See Roger Roots, *A Muckraker's Aftermath: The Jungle of Meat-packing Regulation after a Century*, 27 WM. MITCHELL L. REV. 2413, 2413–14, 2419–20 (2001).

¹⁸² Diane Leenheer Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 U. RICH. L. REV. 1185, 1190 (2000) (citing LOUIS FILLER, *APPOINTMENT AT ARMAGEDDON: MUCKRAKING AND PROGRESSIVISM IN THE AMERICAN TRADITION* 234 (1976)).

¹⁸³ Association of American Publishers, *supra* note 76, at 24 (citing Zimmerman, *supra* note 182, at 1190 (citing JAMES H. DYGERT, *THE INVESTIGATIVE JOURNALIST: FOLK HEROES OF A NEW ERA* 166–67 (1976))).

¹⁸⁴ Brief for Amici Curiae Abrams Institute for Freedom of Expression and Scholars of First Amendment and Information Law in Support of Appellees, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (No. 15-35960), 2016 WL 3537325, at *5–8 [hereinafter Abrams Institute et al.].

¹⁸⁵ See Zimmerman, *supra* note 182, at 1190 n.21 (citing DYGERT, *supra* note 183, at 23–25).

¹⁸⁶ See Elliott C. McLaughlin, *We're Not Seeing More Police Shootings, Just More News Coverage*, CNN (Apr. 21, 2015 7:26 AM), <http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/> [<https://perma.cc/FAW8-LC86>].

¹⁸⁷ See *Whalen v. Roe*, 429 U.S. 589, 605–06 (1977). New York created a special commission to evaluate the state's drug control laws in response to concerns of misuse. *Id.* at 591. That commission found deficiencies in existing law and that New York was unable to effectively: (1) prevent the use of stolen or revised prescriptions; (2) prevent unscrupulous pharmacists from repeatedly refilling or overprescribing prescriptions; and (3) prevent users from obtaining prescriptions from more than one doctor. *Id.* at 592. New York subsequently classified potentially harmful drugs in five schedules and enacted rules to prevent fraud by creating official forms, requiring a physician's signature, and requiring triplicate documentation of the prescribing physician, the dispensing pharmacy, the drug and dosage, and the name, address, and age of the patient. *Id.* at 592–93. The New York State Department of Health, which had certain security provisions, stored one of the copies for a period of five years after which they were

privacy remained limited to nondisclosure of proprietary information. The new millennium has seen continued exercise of the First Amendment as authority to conduct undercover investigations into commercial food production. A 2007 undercover investigation in California revealed “workers forcing sick cows, many unable to walk,” into kill boxes “by repeatedly shocking them with electric prods, jabbing them in the eye, prodding them with a forklift, and spraying water up their noses.”¹⁸⁸ Two years later in Iowa, an undercover investigation documented “hundreds of thousands of unwanted day-old male chicks being funneled by conveyor belt into a macerator to be ground up live.”¹⁸⁹ Another investigation in Iowa memorialized “hens with gaping, untreated wounds laying eggs in cramped conditions among decaying corpses.”¹⁹⁰ In Vermont, “similarly gruesome footage” exposed “days-old calves being kicked, dragged, and skinned alive.”¹⁹¹ Undercover investigations in Texas publicized “workers beating cows on the head with hammers and pickaxes and leaving them to die.”¹⁹²

Allen notes that, as of 1987, few courts of last appeal had ruled in favor of a right to corporate privacy,¹⁹³ in part because tortious invasion of privacy was a “comparatively recent phenomenon in Anglo-American law.”¹⁹⁴ Allen distinguishes privacy from publicity by describing the latter as a “heritable commercial” right that “can be freely traded in the marketplace.”¹⁹⁵ Allen identifies early jurisprudence that relies on metaphysical and teleological grounds for denying corporate privacy.¹⁹⁶ Corporations are creations of law and thus metaphysically lack the traits necessary to ascribe privacy rights. These grounds “reflect[] a theoretical conception of the funda-

destroyed. *Id.* at 593. Seventeen employees and 24 investigators could access the records, which were stored in a database located in a receiving room that was surrounded by locked wire fence and protected by an alarm system. *Id.* at 594–95. The Court found that Whalen could not show a violation of one of the two types of recognized privacy interests: preventing disclosure of personal matters and independence to make important personal decisions. *Id.* at 599–600. New York had authority to regulate the industry, its legislation was rational, and it provided adequate safeguards to protect privacy. *Id.* at 597–98, 601.

¹⁸⁸ *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1197 (D. Utah 2017).

¹⁸⁹ *Id.*; see also *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 908 (S.D. Iowa 2018) (discussing 2008 investigation at an Iowa pig farm).

¹⁹⁰ *Herbert*, 263 F. Supp. 3d at 1197.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See Allen, *supra* note 159, at 611 n.30.

¹⁹⁴ *Id.* at 612.

¹⁹⁵ *Id.* at 611.

¹⁹⁶ See *id.* at 613–17.

mental essence of corporate existence.”¹⁹⁷ As creations of law, they are also teleologically inconsistent with privacy rights,¹⁹⁸ an argument that “depends upon a view about the design or purpose of ascribing particular rights.”¹⁹⁹

A distinct body of scholarship has emerged in the decades since Allen’s call for the rethinking of the metaphysical and teleological arguments against corporate privacy rights.²⁰⁰ Professor Elizabeth Pollman describes corporate privacy as an “open question,” but hypothesizes that corporations likely enjoy some type of constitutional right to privacy.²⁰¹ Pollman categorizes privacy jurisprudence for groups or organizations as follows: (1) the right to make certain decisions without government interference; and (2) the right to avoid disclosure of personal or proprietary information.²⁰² According to Pollman, the First Amendment often identifies the public and consumers as beneficiaries of commercial speech.²⁰³ The First Amendment also proscribes more, not less, speech to counter falsity.²⁰⁴ Pollman points out how neither public, private for-profit, nor private nonprofit corporations enjoy a constitutionally protectable right to privacy.²⁰⁵ Pollman concludes that each could have some privacy interests worth protecting.²⁰⁶

Professors Eric Orts and Amy Sepinwall also express uncertainty about recognition of corporate privacy “rights.”²⁰⁷ Orts and Sepinwall identify six aspects of privacy that include: (1) the right to be let alone; (2) the right to limited access to self; (3) the right to secrecy or concealment of certain matters; (4) the right to control over personal or other information about oneself; (5) the right to personhood; and (6) the right to intimacy.²⁰⁸ Orts and Sepinwall acknowledge the link between corporate privacy rights and the individuals involved in those

¹⁹⁷ *Id.* at 613.

¹⁹⁸ *See id.* at 615.

¹⁹⁹ *Id.*

²⁰⁰ *See id.* at 638–39 (describing Allen’s call for rethinking arguments against corporate privacy rights).

²⁰¹ Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 33, 80 (2014).

²⁰² *See id.* at 62.

²⁰³ *See id.* at 75–76.

²⁰⁴ *See United States v. Alvarez*, 567 U.S. 709, 727–28 (2012) (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

²⁰⁵ *See Pollman, supra note 201*, at 64, 84.

²⁰⁶ *See id.* at 84.

²⁰⁷ Eric W. Orts & Amy Sepinwall, *Privacy and Organizational Persons*, 99 MINN. L. REV. 2275, 2278–79 (2015).

²⁰⁸ *See id.* at 2281 (quoting Pollman, *supra note 201*, at 60 (citing DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* 12–13 (2008))).

corporations.²⁰⁹ Orts and Sepinwall describe how rights that originate with the corporation are primary rights that only it can waive.²¹⁰ Orts and Sepinwall distinguish corporate rights from those that derive from the individuals who own, govern, and maintain the corporation.²¹¹ The latter are described as secondary rights, for which the individual owners exercise control. Orts and Sepinwall also examine the scope of informational²¹² and decisional corporate privacy,²¹³ finding the likelihood of strong protection for either unclear as a constitutional matter.²¹⁴

Professor Mary Fan explores corporate privacy as primarily grounded in statutory authority.²¹⁵ Fan discusses how businesses can contractually keep their secrets intact,²¹⁶ how state and federal courts commonly authorize protective orders,²¹⁷ and how, although rife with complications, trade secret laws can indefinitely shield nonpublic information.²¹⁸ Patent laws can also authorize nondisclosure for a limited amount of time. Outside of the aforementioned categories, Fan concludes that companies generally lack a right—statutory or otherwise—to control nonproprietary information on the grounds that it is distasteful or that it would have a negative effect on the business or its profits.²¹⁹

*Federal Communications Commission v. AT&T, Inc.*²²⁰ demonstrates how the totality of circumstances governs whether “[t]he law treats corporations as ‘persons’ deserving of constitutional rights[.]”²²¹ The Court reasoned that “‘personal privacy’

²⁰⁹ See *id.* at 2291–92.

²¹⁰ See *id.* at 2289.

²¹¹ See *id.* at 2287–93.

²¹² See *id.* at 2309–12.

²¹³ See *id.* at 2304–08.

²¹⁴ See *id.* at 2316–22.

²¹⁵ See Mary D. Fan, *Private Data, Public Safety: A Bounded Access Model of Disclosure*, 94 N.C. L. REV. 161, 164, 171–77 (2015).

²¹⁶ See *id.* at 174–75.

²¹⁷ See *id.* at 172–73, 176–77.

²¹⁸ See *id.* at 173.

²¹⁹ See *id.* at 163, 187. See generally Paul A. LeBel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL RTS. J. 1145 (1996); Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097 (1999); Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People’s Elusive “Right to Know”*, 72 MD. L. REV. 1, 29–30 (2012).

²²⁰ *FCC v. AT&T, Inc.*, 562 U.S. 397, 398 (2011).

²²¹ Lucy L. Holifield, *Animal Legal Defense Fund v. Otter: Industrial Food Production Simply is Not a Private Matter*, 12 J. FOOD L. & POL’Y 16, 47 (2016) (citation omitted).

. . . suggests a type of privacy evocative of human concerns—not the sort usually associated with an entity.”²²² *AT&T, Inc.* interpreted a definition of privacy under the Freedom of Information Act, but the Court made clear that privacy rights, by their very nature, were intrinsically dependent on the human or corporate nature of the holder.²²³ Ultimately, AT&T failed to persuade the Court that its case involved “the scope of a corporation’s ‘privacy’ interests as a matter of constitutional or common law.”²²⁴

An examination of modern U.S. tort and constitutional law shows little support for protection of corporate privacy over nonproprietary information as a fundamental right deserving of heightened protection—particularly when balanced against the right to gather and disseminate news about commercial activities.²²⁵ In the following section, this Article discusses the importance of the corporate privacy debate to ag-gag laws and argues that animal and agribusinesses who operate in the commercial marketplace can hardly expect to “enjoy a life of reserve outside the public gaze.”²²⁶ Moreover, commercial speech jurisprudence does not protect false or misleading communications. Ag-gag laws upset First Amendment norms by threatening the search for true commercial speech. In the context of commercial food production, ag-gag laws extend corporate privacy beyond the individual right, allowing for a degree of control over nonproprietary commercial information heretofore unprecedented.

III

THE CORPORATE PRIVACY PROXY

By 1987, Allen had “uncovered no tort cases in which a plaintiff recovered from a defendant simply because the defen-

²²² *AT&T, Inc.*, 562 U.S. at 398. AT&T, a provider of telecommunications and information services to schools and libraries as part of an FCC program, voluntarily reported overcharges under the program and paid restitution. *See id.* at 400. A competitor filed a FOIA request and AT&T claimed a privacy interest in the reports relinquished during the FCC’s investigation. *See id.* at 400–01. The Court ruled against AT&T and found that Congress did not intent to grant privacy rights to corporations. *See id.* at 405–10. The Court specifically pointed to comment c of section 652I of the Restatement (Second) of Torts and section 97 of Law of Torts, both of which deny corporate privacy rights. *See id.* at 406.

²²³ *AT&T, Inc.*, 562 U.S. at 405–10; *see also Sanders, supra* note 1, at 528 (“[P]rivacy rights, by their very nature, were intrinsically dependent on the human or corporate nature of the holder.”).

²²⁴ *AT&T, Inc.*, 562 U.S. at 407.

²²⁵ *See Sanders, supra* note 1, at 528.

²²⁶ Allen, *supra* note 164, at 1210.

dant used an offensive search or surveillance to obtain useful or commercially valuable information.”²²⁷ Whether any district court will ultimately define the scope of the “right” or “interest” in security or privacy that ag-gag laws seek to protect is unclear. As discussed in Part I, the Ninth and Tenth Circuits rendered ag-gag laws unconstitutional without discussing the legitimacy of corporate security or privacy.²²⁸ In January 2019, a federal district court ruled Iowa’s ag-gag law unconstitutional on First Amendment grounds.²²⁹ An ag-gag lawsuit in North Carolina is currently pending after the Fourth Circuit reversed a successful motion to dismiss.²³⁰ Setting aside whether the corporate privacy rationale may be justified in these cases, questions remain.

Under *Reed*,²³¹ both content-based and content-neutral restrictions receive heightened scrutiny and require more than a legitimate interest. The uncertainties of the scope of any “right” to corporate privacy implicate the necessity or importance of ag-gag legislation. These uncertainties also directly implicate whether any ag-gag state can claim a purpose sufficient to justify hindering undercover investigations into commercial food production operations.

Reed establishes the urgency of deciding in the First Amendment context whether corporate “security” acts as a proxy for corporate “privacy.” Ag-gag laws protect agribusinesses from journalists, whistleblowers, and activists who wish to gain nonproprietary information. Before ag-gag laws, agribusinesses lacked security or privacy rights except for those that protected proprietary information.²³² The Court had also recognized corporate rights in the context of the Fourth

²²⁷ Allen, *supra* note 163, at 618.

²²⁸ See Part I.

²²⁹ See *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 827 (S.D. Iowa 2019); see also IOWA CODE § 717A.3A (Iowa’s Agricultural production facility fraud statute); *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 928-29 (S.D. Iowa 2018) (partially denying motion to dismiss).

²³⁰ See *People for the Ethical Treatment of Animals v. Stein*, 737 Fed. Appx. 122, 132 (4th Cir. 2018); see also *Associated Press, Court Restores Lawsuit Against North Carolina Ag-gag Law*, STAR TRIBUNE, (June 5, 2018, 4:55pm), <http://www.startribune.com/court-restores-lawsuit-against-north-carolina-ag-gag-law/484629271/> (discussing how the 4th Circuit Court of Appeals reversed the dismissal of a lawsuit against North Carolina’s “ag-gag” law) [<https://perma.cc/SCL8-4PH4>].

²³¹ See *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

²³² See generally *Robinson*, *supra* note 24, at 2288 (discussing three premises in favor of corporate privacy: “(1) corporations are legal persons and are entitled to bear legal rights, including constitutional rights; (2) corporations have distinct privacy and property interests that are protected by a right to privacy; and (3) corporate rights relate to the rights of individuals involved in those corporations”).

Amendment's protection against unreasonable searches and seizures.²³³ But even if the recognition of criminal privacy triggered an implication of civil privacy, corporate privacy still remains a matter of state law. State law must acclimatize to the First Amendment.

Agriculture security legislation creates an incompatible interface with First Amendment commercial speech jurisprudence. *Central Hudson Gas & Electric Corp. v. Public Service Commission* extends First Amendment protection to commercial speech, but limits protection for false or misleading commercial speech.²³⁴ Professor Toni Massaro argues that the "Roberts Court has given quite robust protection to free speech."²³⁵ Yet, no ag-gag state has explained how corporate privacy is more than legitimate, especially when balanced against activity that has traditionally received First Amendment protection like undercover investigations.

Agriculture security legislation also creates an incompatible interface with *Whalen v. Roe*, which denied a fundamental individual right to control access to nonproprietary information about oneself.²³⁶ It should follow that corporations do not have the right to control the flow of nonproprietary information about business operations that are in the public's interest.²³⁷ The distinction between information with its own value and the effect that information has on the value of a business should inform whether corporate privacy or security shields undercover investigations into any industry. Prior to ag-gag laws, a number of undercover investigations led to boycotts, bankruptcies, criminal charges against employees and owners, statewide ballot initiatives to ban certain farming practices, and the

²³³ See *id.* at 2295.

²³⁴ See *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 593 (1980). The Public Service Commission of New York ordered electric utilities in the state to cease all advertising based on the finding that the state's utility systems did not have sufficient fuel stocks to meet consumer demand for the winter of 1973-74. See *id.* at 558-59. The Commission continued the ban three years beyond the shortages. See *id.* at 559. The Court reversed decades of precedent and held that the First Amendment protects commercial speech from unwarranted government regulation based on the informational function of advertising. See *id.* at 561-63. Commercial speech that is more likely to deceive than inform the public may be banned. *Id.* The Court announced that the government has the burden of proof on the following four part test for commercial speech: (1) Does speech advertise illegal or unlawful activities or is it false or deceptive?; (2) Is the law justified by a substantial interest?; (3) Does the law directly advance the interest?; and (4) Is the law no more extensive than necessary (i.e. narrowly tailored) to achieve the interest? See *id.* at 566.

²³⁵ Toni M. Massaro, *Chilling Rights*, 88 U. COLO. L. REV. 33, 93 (2017).

²³⁶ See *Whalen v. Roe*, 429 U.S. 589, 602 (1977).

²³⁷ See Sullivan, *supra* note 219, at 29-30.

largest meat recall in United States history that included two years' worth of production.²³⁸

Agriculture security legislation calls into question the scope of the government's authority to privatize nonproprietary information that is in the public's interest to know. Generally, the "the right to be let alone" defines the right to privacy.²³⁹ As discussed in Part II, privacy rights do not date back to the English common law and "[p]rior to 1890, no English or American court had ever expressly recognized the existence of the right" to privacy in tort.²⁴⁰ The *Restatement (Second) of Torts* still denies a corporate "right" to privacy.²⁴¹ As a result, businesses generally have "a reduced objective expectation of privacy in the workplace" unless that information is of a "highly intimate nature."²⁴²

Commercial food production is a matter of public interest, so any "right" to corporate security or privacy should be balanced with the public right to know. Ag-gag laws alter the common law understanding that no corporation, partnership, or unincorporated association has a right to privacy except for "a limited right to the exclusive use of its own name or identity."²⁴³ Nor do constitutional law principles ground the type of "right" to corporate security or privacy that ag-gag laws protect. This uncertainty over the scope of corporate privacy puts in doubt whether a compelling or important government interests exists. As a result, ag-gag laws may be insufficiently justified regardless of whether they are content-based or content-neutral under *Reed*.

Agriculture security legislation demonstrates how animal and agribusinesses operate in the political process even in the wake of the disclosure of damaging information.²⁴⁴ Agriproducts are the leading cause of foodborne illness.²⁴⁵ Recent trends suggest a lack of "progress in reducing foodborne

²³⁸ See *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1201-02 (D. Idaho 2015).

²³⁹ See RESTATEMENT (SECOND) OF TORTS § 652A, cmt. a (AM. LAW INST. 1976).

²⁴⁰ *Id.*

²⁴¹ See *id.* § 652I; § 652I cmt. c.

²⁴² *Med. Lab. Mgmt. Consultants v. ABC, Inc.*, 30 F. Supp. 2d 1182, 1188 (D. Ariz. 1998), *aff'd*, 306 F.3d 806 (9th Cir. 2002) (internal quotation marks and citations omitted).

²⁴³ RESTATEMENT (SECOND) OF TORTS § 652I, cmt. c (AM. LAW INST. 1976).

²⁴⁴ See Roy Peled, *Occupy Information: The Case for Freedom of Corporate Information*, 9 HASTINGS BUS. L.J. 261, 270-71 (2013) (discussing how corporations are able to involve themselves in significant political decisions).

²⁴⁵ See Brief of Amici Curiae Food & Water Watch and Center for Biological Diversity in Support of Affirmance at 2-3, *Animal Legal Def. Fund v. Wasden*, No. 15-35960, 2018 U.S. App. LEXIS 2734 (9th Cir. Feb. 2, 2018) [hereinafter *Food &*

infections,”²⁴⁶ as some strains of pathogens have become drug-resistant.²⁴⁷ Experts at the Center for Disease Control and Prevention warn that “even infrequent contamination of commercially distributed products can result in many illnesses.”²⁴⁸ Agriculture consistently “ranks among the most dangerous industries in the United States.”²⁴⁹ The fatality rate for agricultural workers is “seven times higher than the fatality rate for all other workers” and the injury rate is over 40 percent higher than for all workers.²⁵⁰ Agriculture and farm workers sometimes lack “proper training or protective equipment.”²⁵¹ According to the United Farm Workers of America, “far too often industry employers set workplace policies that unduly add to and exacerbate those inherent risks.”²⁵² The agriculture industry is also especially prone to labor trafficking and wage theft.²⁵³ “[A] 2012 survey of New Mexico farmworkers found that over two-thirds experienced wage theft in 2011, and nearly half were paid less than the minimum wage.”²⁵⁴ Wage theft is exacerbated by widespread practices like “piece-rat[ing].”²⁵⁵ Piece-rating occurs when workers are paid “a set amount for each piece of crop harvested,” which allows employers to un-

Water Watch]; see also Jacobs, *supra* note 36, at 222–23 (describing issues related to risks of soil contamination and remediation).

²⁴⁶ See Food & Water Watch, *supra* note 245, at 5 (quoting CDC, *Trends in Foodborne Illness in the United States, 2012*, (Apr. 18, 2013), <https://www.cdc.gov/features/dsfoodnet2012/index.html>).

²⁴⁷ See *id.* (citing Ellen Silbergeld et al., *Industrial Food Animal Production, Antimicrobial Resistance, and Human Health*, 29 ANN. REV. PUB. HEALTH 151, 151–69 (2008)).

²⁴⁸ Food & Water Watch, *supra* note 245, at 6 (quoting John A. Painter et al., *Attribution of Foodborne Illnesses, Hospitalizations, and Deaths to Food Commodities by Using Outbreak Data, United States, 1998–2008*, 19 EMERGING INFECTIOUS DISEASES 407, 411 (2013)).

²⁴⁹ Brief of Amici Curiae United Farm Workers of America Supporting Plaintiffs-Appellees Urging Affirmance at 12, *Animal Legal Def. Fund v. Wasden*, No. 15-35960, 2018 U.S. App. LEXIS 2734 (9th Cir. Feb. 2, 2018) [hereinafter *United Farm Workers of America*].

²⁵⁰ *Id.* at 12 (citing OSHA *Agricultural Operations*, DEP’T OF LABOR, <https://www.osha.gov/dsg/topics/agriculturaloperations/> (last visited Aug. 19, 2016) [<https://perma.cc/9325-VBS5>]).

²⁵¹ *Id.* at 13; see also FARMWORKER JUSTICE, *EXPOSED AND IGNORED: HOW PESTICIDES ARE ENDANGERING OUR NATION’S FARMWORKERS* 5–6 (2011).

²⁵² United Farm Workers of America, *supra* note 249, at 13.

²⁵³ *Id.* at 23, 26.

²⁵⁴ *Id.* at 26 (citing NEW MEXICO CENTER ON LAW AND POVERTY, *HUMAN RIGHTS ALERT: NEW MEXICO’S INVISIBLE AND DOWNTRODDEN WORKERS* (2013)).

²⁵⁵ *Id.* (citing FARMWORKER JUSTICE, U.S. DEPARTMENT OF LABOR ENFORCEMENT IN AGRICULTURE: MORE MUST BE DONE TO PROTECT FARMWORKERS DESPITE RECENT IMPROVEMENTS (2015), [https://www.farmworkerjustice.org/sites/default/files/FarmworkerJusticeDOLenforcementReport2015%20\(1\).pdf](https://www.farmworkerjustice.org/sites/default/files/FarmworkerJusticeDOLenforcementReport2015%20(1).pdf)) [<https://perma.cc/Y5YC-GUYQ>].

dermine state and federal minimum wage laws.²⁵⁶ “[A] 2009 study found that Oregon farmworkers paid on [a] ‘piece-rate’ basis earned less than the minimum wage 90 percent of the time and on average received 37 percent less than the minimum wage.”²⁵⁷

The interconnectivity of global food markets amplifies how agriculture security legislation distorts the marketplace of ideas about commercial food production.²⁵⁸ In the context of this marketplace, “the right to hear—[or] the right to receive information—is no less protected by the First Amendment than the right to speak.”²⁵⁹ Consumers want to know whether animal and agribusinesses of all types and sizes are clean, and whether facilities prevent contamination through good farm management and humane practices.²⁶⁰ The demand for consumer information increases when government agencies lack the resources to sufficiently monitor.²⁶¹ Estimates largely describe an “inadequate system” for enforcing laws related to farmworker safety and commercial food production.²⁶² According to one Occupational Safety and Health Administration estimate of capacity, “it would take . . . 115 years to inspect each workplace in the country just once.”²⁶³

Undercover investigations that counter the speech of animal and agribusinesses hold sway in the global marketplace

²⁵⁶ United Farm Workers of America, *supra* note 249, at 26–27.

²⁵⁷ *Id.* at 27.

²⁵⁸ Dewey, *supra* note 71.

²⁵⁹ Food Law and Policy Scholars, *supra* note 34, at 13 (citing *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002)).

²⁶⁰ Food & Water Watch, *supra* note 245, at 13–16; see also Jaime Bouvier, *Why Urban Agriculture Can Be Controversial: Exploring the Cultural Association of Urban Agriculture with Backwardness, Race, Gender, and Poverty*, 91 U. DET. MERCY L. REV. 205, 211 (2014) (reporting that “in 1920, approximately thirty percent of the United States population lived on a farm” as opposed to 2012 when “only 1.1 [percent] of the population live[d] on a farm.”); Jessica Owley & Tonya Lewis, *From Vacant Lots to Full Pantries: Urban Agriculture Programs and the American City*, 91 U. DET. MERCY L. REV. 233, 241–42 (2014) (discussing challenges associated with urban agriculture including groundwater pollution); Anastasia Telesetsky, *Community-Based Urban Agriculture as Affirmative Environmental Justice*, 91 U. DET. MERCY L. REV. 259, 261–62 (2014) (advocating recognition of the link between healthy food and environmental justice). See generally Jacobs, *supra* note 36, at 222–23 (discussing environmental concerns related to urban agriculture); Lynn Bartkowiak Sholander, *Green Thumbs in the City: Incentivizing Urban Agriculture on Unoccupied Detroit Public School District Land*, 91 U. DET. MERCY L. REV. 173, 177 (2014) (arguing for incentives for urban agricultural education in order to provide educational, entrepreneurial, and nutritional benefits to Detroit Public School students).

²⁶¹ See United Farm Workers of America, *supra* note 249, at 15.

²⁶² See *id.*

²⁶³ *Id.*

of ideas about the industry.²⁶⁴ Large companies dominate a large portion of the U.S. economy.²⁶⁵ While small farms grow a lot of food,²⁶⁶ industrial-scale animal factories dominate U.S. livestock production.²⁶⁷ Open Secrets reported that in 2017 over 1000 lobbyists earned or billed over \$130 million in lobbying expenses or expenditures on behalf of 440 U.S. animal and agribusinesses.²⁶⁸ Ag-gag laws thus show how a small number of businesses can lobby to potentially control much of the non-proprietary information that the public receives about an industry.

While undercover investigations rarely show commercial food production in its best light, such investigations do not “seriously aggrieve” the public when publicity is a matter of legitimate public concern.²⁶⁹ Moreover, the method of gathering and disseminating information during an undercover investigation rarely causes public outrage. If an undercover investigation causes outrage, it is usually because of the business practices or individual behaviors that are exposed.²⁷⁰ Even where the method of gathering and disseminating information causes public outrage, the Center and Bollea controversies demonstrate that First Amendment remedies currently exist.

First Amendment protection has traditionally included the means to conduct undercover investigations about potentially dangerous or undesirable food industry practices. “American journalists, including some of the most celebrated journalists in recent history, have often relied on the use of deception, misrepresentation, and other practices associated with undercover investigation to uncover or observe facts and practices

²⁶⁴ See Peled, *supra* note 244, at 271.

²⁶⁵ See *id.* at 270.

²⁶⁶ According to the 2012 Census of Agriculture, 88% “of all farms were small family farms with less than \$350,000 in gross cash farm income.” UNITED STATES DEPARTMENT OF AGRICULTURE NATIONAL AGRICULTURE STATISTICS SERVICE, 2012 CENSUS OF AGRICULTURE – SMALL FARMS 1 (2016), <https://www.nass.usda.gov/Publications/Highlights/2016/SmallFamilyFarms.pdf> [<https://perma.cc/8WDG-UXZD>]. Furthermore, “[s]mall family farms operated 48 percent of all farmland, owned 47 percent of the value of farm real estate (land and buildings), accounted for 20 percent of agriculture sales, and earned 5 percent of the country’s net farm income.” *Id.* Nine percent of farms are mid-size and large family owned and 3 percent were not family owned. *Id.*

²⁶⁷ Food & Water Watch, *supra* note 245, at 2.

²⁶⁸ OPEN SECRETS, 2017, *Annual Lobbying on Agribusiness*, OPEN SECRETS (Apr. 24, 2018), <https://www.opensecrets.org/lobby/indus.php?id=year=2017> [<https://perma.cc/WC9Q-JG8X>].

²⁶⁹ RESTATEMENT (SECOND) OF TORTS § 652D, cmt. d (AM. LAW INST. 1976).

²⁷⁰ *Free Speech and Democracy*, *supra* note 33, at 1052.

otherwise obscured from public view.”²⁷¹ Professors Brooke Kroeger and Ted Conover theorize that deceptive techniques “are critical to American journalism, and in particular to journalism involving conditions and practices in agricultural production facilities.”²⁷²

Within the marketplace of food, the consumer’s “interest in the free flow of commercial information”²⁷³ includes exposés about agricultural or animal production facilities.²⁷⁴ Leading food law scholars point to how consumers look to the marketplace to form eating habits.²⁷⁵ Eating habits dictate what farmers grow, and impact conservation practices and food networks.²⁷⁶ Modern consumers pay more for organic food products that exclude unnatural ingredients.²⁷⁷ “Preferences for fair trade and the movement against genetically modified (‘GMO’) ingredients also motivate [growing and] buying practices.”²⁷⁸

Modern consumers continue to expect transparency at every level of food production.²⁷⁹ This expectation “extends beyond food safety issues. Consumers want to know everything they can,” especially and including distasteful commercial food practices.²⁸⁰ Ag-gag laws prevent consumers from learning about—and expressing disapproval of—the business practices of animal and agribusinesses and their facilities. Ag-gag laws seek to conceal unpopular or illegal acts from public view by criminalizing the tools by which individuals seek to discover information.²⁸¹ But journalists, whistleblowers, and activists play a role in diversifying the marketplace of nonproprietary information.²⁸² Food consumers may not understand, but are aware of the limits to obtaining such information.²⁸³ Many consumers may also distinguish between information

271 Kroeger & Conover, *supra* note 72, at 5.

272 *Id.* at 10.

273 Food Law and Policy Scholars, *supra* note 34, at 13 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976)).

274 *Id.* at 15–16.

275 *Id.* at 11–12.

276 *Id.* at 11 (citing Andrew Martin, *Is a Food Revolution Now in Season?*, N.Y. TIMES (Mar. 21, 2009), <https://www.nytimes.com/2009/03/22/business/22food.html>).

277 *Id.* at 9.

278 Sanders, *supra* note 88, at 683.

279 *Id.* at 12 (quoting Negowetti, *supra* note 37, at 1373).

280 Food Law and Policy Scholars, *supra* note 34, at 5.

281 See Kroeger & Conover, *supra* note 72, at 6–10 (citing BROOKE KROEGER, UNDERCOVER REPORTING: THE TRUTH ABOUT DECEPTION (2012)).

282 Food Law and Policy Scholars, *supra* note 34, at 18.

283 *Id.* at 19–24.

with independent value and information with little independent value except that which affects a business's reputation. Ag-gag laws prevent consumers from making distinctions by limiting the available information upon which an informed choice may be based.

Agriculture security legislation envisions control over non-proprietary information about commercial food production as a one-sided proposition where the owner or operator of an animal or agribusiness holds an exclusive "right." Privacy in this context has other dimensions. Consumers have the right to know and choose what to consume as a matter of health, diet, religious belief, morality, and conscience. The public has the right to government accountability, at least from their government, because the federal Food and Drug Administration is "responsible for the safety and security" of the U.S. food supply, which includes over 35,000 farms, 300,000 restaurants, and 10,500 vending machines. Competitors have enforceable rights against unfair competition. Ag-gag laws fail to consider these factors, and more, in their protection of the security and privacy of animal and agribusinesses.

Agriculture security legislation contemplates statutory recognition of an expansive privilege to prevent discovery and disclosure of nonproprietary commercial information on public matters. Professor Barry Sullivan acknowledges that no Court has interpreted the First Amendment to contain an "explicit guarantee of access to information, whether for the general benefit of the public or for the special benefit of the press. . . ." ²⁸⁴ Sullivan discusses how the right to know depends on "society's view of citizenship and on the strength of its commitment to that view." ²⁸⁵ Sullivan's view could encompass "broader understandings of citizenship and of the citizen's proper role in a representative democracy" than that which the First Amendment establishes. ²⁸⁶ Nevertheless, Sullivan envisions a right to access that limits government regulation to prevent discovery and disclosure of information on public matters. ²⁸⁷

This Article is not the first to attempt to weave the intersections between the right to gather and disseminate news and privacy. Allen called for more explicit definitions of the "'goods'

²⁸⁴ Sullivan, *supra* note 219, at 29.

²⁸⁵ *Id.* at 6.

²⁸⁶ *Id.* at 3.

²⁸⁷ *Id.* at 10.

to be won through the extension of the privacy right”²⁸⁸ and proposed recognition of corporations as a “social participant” entitled to full compensation for “equivalent injuries.”²⁸⁹ Allen questioned whether privacy law should be expanded to compensate for injuries to a business or property as a consequence of wrongful access.²⁹⁰ Allen also distinguished between morally protected and unprotected lies and advocated lying to protect sexual privacy.²⁹¹ Chen and Marceau distinguished between high and low value lies and advocated heightened First Amendment protection for the former.²⁹² Massaro favors expanding First Amendment speech overbreadth jurisprudence to all laws that threaten to chill constitutional rights.²⁹³ Massaro describes free speech as “a rainbow right favored across the political [and ideological] spectrum[s].”²⁹⁴ So too is privacy, but as ag-gag laws demonstrate in the commercial food context, too much privacy can cause inherent defects in the marketplace of ideas.²⁹⁵

In arguing for the importance of the corporate privacy debate to agriculture security legislation, this Article advocates neither for nor against recognition of a right to corporate privacy. Instead, this Article hopes to demonstrate how the uncertainty over corporate privacy rights diminishes the interests that ag-gag states seek to protect. The diminished nature of an ag-gag state’s interests could and should fatally implicate the First Amendment analysis.

CONCLUSION

This Article identifies how agriculture security legislation implicates the corporate privacy debate and explores the scope of the corporate right to privacy in the context of ag-gag laws. Neither constitutional nor common law principles ground the “right” to corporate security or privacy that ag-gag laws protect,

²⁸⁸ Allen, *supra* note 163, at 636.

²⁸⁹ *Id.* at 638.

²⁹⁰ *Id.* at 615.

²⁹¹ Anita L. Allen, *Lying to Protect Privacy*, 44 VILL. L. REV. 161, 161 (1999).

²⁹² See generally *High Value Lies*, *supra* note 33, at 1480–91 (arguing that because investigative deception is a type of high value lie, restrictions on such practices, including ag-gag statutes, warrant strict scrutiny); *Taxonomy of Lies*, *supra* note 33, at 658 (arguing that the harms caused by—and benefits gained from—lies allows placement in a spectrum ranging from “socially routine lies” to “high value lies,” and proposing a framework for evaluating the scope of the First Amendment’s protections of each).

²⁹³ Massaro, *supra* note 235, at 33–50.

²⁹⁴ *Id.* at 47–48.

²⁹⁵ *Id.*

primarily because commercial food production is a matter of public interest. As a result, ag-gag laws may be insufficiently justified under the First Amendment regardless of whether they are content-based or content-neutral. This Article advocates for recognition of the importance of the corporate privacy debate to neutralize the threat that ag-gag laws pose to the marketplace of ideas about commercial food production and the First Amendment right to gather and disseminate news on public matters.