

A Corporate Constitutional Right to Privacy: A Critical Analysis

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Lower courts have divided on whether corporations may claim a limited constitutional right to privacy. Although few courts have addressed the issue to date, those that have split between either rejecting the claim with scant or flawed reasoning, or recognizing a limited constitutional right to privacy, primarily rooted in the Fourth Amendment but not clearly anchored to a particular constitutional provision. The Supreme Court has not squarely addressed the issue.

This Article provides a critical analysis of whether corporations have a constitutional right to privacy. Specifically, the Article demonstrates the limited utility of the doctrine of corporate personhood and the person metaphor in determining corporate rights such as privacy. Further, the Article proposes and applies a pragmatic approach, arguing that publicly held corporations likely do not have a constitutional privacy right, but that other kinds of corporations may have a stronger claim. The analysis looks to whether a corporate right to privacy would derivatively protect the interests of shareholders, directors, officers, or other stakeholders involved in the corporation, and serve the purpose of the privacy right.

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Introduction

If you were to examine which constitutional rights corporations enjoy, which have been clearly denied to corporations, and which have thus far been largely unexplored, you would find privacy in this last category.

The Supreme Court has never squarely addressed the question. Although a 1950 case, *Morton Salt v. FTC*, has been occasionally cited for the proposition that corporations have no constitutional right to privacy, that was not the holding of the case.¹ And in the recent *AT&T v. FCC* case in which AT&T claimed a “personal privacy” exemption under the Freedom of Information Act to shield its documents from public disclosure, the Court decided the case with straightforward statutory interpretation, specifically noting that the corporation had made no claims of constitutional privacy.²

Other federal and state courts are in disarray on the issue of a corporate constitutional right to privacy – some courts have rejected claims with scant or flawed reasoning, and some have recognized a limited corporate right to privacy under the federal constitution in contexts like discovery and contract interpretation.³ This case law is limited in both quantity and quality of analysis, however, suggesting that legal scholarship in this novel and growing area would be useful.

Yet, strikingly little scholarship to date exists on the topic of a corporate constitutional right to privacy as such. Scholars have addressed other topics such as whether corporations should have privacy rights at common law,⁴ whether trade secret law resembles common law privacy torts,⁵ whether corporations should have Fourth Amendment protections,⁶ and an economic analysis of privacy.⁷ And scholars have

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¹ See *infra* text accompanying notes __.

² *FCC v. AT&T*, 562 U.S. __, 131 S. Ct. 1177 (2011). The case turned on the word “personal” for purposes of FOIA’s exemption for “personal privacy.”

³ See *infra* text accompanying notes __.

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

⁵ KIM LANE SCHEPPELE, LEGAL SECRETS 231, 253-57 (1988) (comparing trade secrecy to a common law privacy tort and arguing that corporate actions in trade secrecy look very much like personal actions in privacy for public disclosure of private facts” and cover the same ground).

⁶ See, e.g., William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, 76-80 (2002) (arguing that *Katz v. United States* “should have occasioned a judicial reappraisal of possible beneficiaries of the Fourth Amendment” because references to privacy in the context of corporate concealment is inappropriate).

⁷ E.g., Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978); RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 231-47 (1981); Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381 (1996) (responding to economic analysis of privacy, identifying economic benefits to privacy and examining privacy in voluntary transactions); see also Peter P. Swire, *Efficient Confidentiality for Privacy, Security, and Confidential Business*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=383180 (situating economic efficiency analysis in debates about privacy protection, particularly financial services and privacy). While the following article

examined corporate privacy concerns, constitutional and otherwise, in various specific contexts such as litigation discovery,⁸ subpoenas,⁹ bank secrecy,¹⁰ and FOIA exemptions.¹¹ But exceedingly little literature examines a corporate constitutional right to privacy as such, and what little exists is over 20 years old and does not treat the issue in depth.¹²

has the term “corporate privacy” in its title and would seem another example for this list of literature addressing corporate privacy concerns in a specific context, it does not examine a corporate right to privacy or privacy interests as such: Kenneth E. Scott, *Insider Trading: Rule 10b-5, Disclosure, and Corporate Privacy*, 9 J. LEGAL STUD. 801 (1980).

⁸ Elizabeth A. Rowe, *Trade Secret Litigation and Free Speech: Is It Time to Restrain the Plaintiffs?*, 50 B.C. L. REV. 1425, 1426 (2009) (arguing that trade secret litigation does not inappropriately impinge speech rights because trade secret rights are rooted in “proprietary and corporate privacy interests” and existing litigation safeguards minimize the risk of free speech incursions); Jordana Cooper, *Beyond Judicial Discretion: Toward a Rights-Based Theory of Civil Discovery and Protective Orders*, 36 RUTGERS L.J. 775 (2005) (arguing that limitations on civil discovery are a matter of constitutional dimension in certain types of discovery disputes and that protective orders are sometimes mandatory); see also Ronald J. Allen & Cynthia M. Hazelwood, *Preserving the Confidentiality of Internal Corporate Investigations*, 12 J. CORP. L. 355 (1987) (discussing incentives created by a lack of a generalized right of corporate privacy and an emerging privilege for corporate self-investigation).

⁹ See, e.g., Christopher Slogobin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 809 (2005) (examining the history and rationale of investigative document subpoenas and their “deregulation” and arguing that “distinguishing between impersonal and personal records is important”); Abraham Tabaie, Note, *Protecting Privacy Expectations and Personal Documents in SEC Investigations*, 81 S. CAL. L. REV. 781, 815 (2008) (arguing a higher standard than “merely relevant” should apply to protect an individual’s personal documents subpoenaed by the SEC, and assuming that corporations “are creatures of the state and deserve no privacy protection”).

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

¹¹ Scott A. Hartman, Comment, *Privacy, Personhood, and the Courts: FOIA Exemption 7(c) in Context*, 120 YALE L.J. 379 (2010) (addressing recent FOIA case, *AT&T v. FCC*, and arguing that the term “privacy” excludes corporations from using the FOIA “personal privacy” exemption); Kathleen Vermazen Radez, *The Freedom of Information Act Exemption 4: Protecting Corporate Reputation in the Post-Crash Regulatory Environment*, 2010 COLUM. BUS. L. REV. 632 (2010) (examining reputational harm and FOIA jurisprudence in the financial crisis and arguing that reputational harm should be accounted for in FOIA litigation). Commentators on the recent *AT&T* case concerning the FOIA “personal privacy” exemption were quick to assert with little explanation that corporations have no, and ought to have no, right to privacy, despite the lack of constitutional claims in the case. E.g., <http://www.slate.com/id/2270956/>; <http://blog.thecorporatelibrary.com/blog/2010/11/supreme-court-to-consider-corporate-privacy-rights.html>; <http://www.politico.com/news/stories/1210/46901.html>.

¹² The existing literature on a constitutional corporate right to privacy includes a student comment from 1985 arguing that corporations should have a constitutional right to informational privacy under *Whalen v. Roe* because it would be consistent with the Supreme Court’s Fourth and Fifth Amendment treatment of corporations and arguing that would warrant using a broader definition of confidentiality for FOIA’s trade secret exemption, William C. Lindsay, Comment, *When Uncle Sam Calls Does Ma Bell Have to Answer: Recognizing a Constitutional Right to Corporate Informational Privacy*, 18 J. MARSHALL L. REV. 915 (1985); a subsection of a chapter on group privacy in Edward Bloustein’s book, discussed *infra*, EDWARD J. BLOUSTEIN, INDIVIDUAL & GROUP PRIVACY 140-46 (1978); and a book from 1980 on corporations and information, which includes two chapters discussing the “urge for corporate secrecy” and areas where corporations may have particular interest in preserving the security of information, RUSSELL B. STEVENSON, JR., CORPORATIONS AND INFORMATION: SECRECY, ACCESS, AND DISCLOSURE (1980). Not specifying whether referring to a constitutional privacy right or privacy under common law or a statute, Stevenson briefly argues that a corporate right to privacy is “on its face an absurdity” because privacy

The question of whether corporations have or should have a constitutional right to privacy merits more consideration. This Article is the first to identify this gap in the literature and to examine the issue in depth with an eye toward developing a principled approach.

This proves a particularly difficult endeavor because the right to privacy is one of the least established and least defined rights in jurisprudence.¹³ The Constitution includes no express reference to privacy and courts have found roots for it in a variety of provisions and their “penumbras.”¹⁴ Defining privacy has been “notoriously controversial” and it would not be unfair to characterize the area as a “conceptual morass.”¹⁵ Privacy scholars have debated whether privacy refers to control of information, to autonomy over certain decisions, intimacy, or other concepts.¹⁶ The wide range of areas that privacy has been invoked in has led some scholars to question whether it is helpful to refer to a general right to privacy at all.¹⁷

This Article thus recognizes the deeply problematic indeterminacy of privacy – its meaning under the law and its legal scope – and does not attempt to define it or provide a lengthy account of it. The indeterminacy of privacy does, however, add to the challenge of what can already be a difficult project – determining whether a corporation should hold a certain right and on what basis. The indeterminacy of the right also adds to the range of possible cases in which a claim might arise. Courts have already considered privacy claims from large business corporations as well as from some unusual corporations, such as the Church of Scientology and a social club challenging a city ordinance prohibiting the operation of live sex act businesses. One could imagine that AT&T might have considered additionally making a constitutional claim in its recent FOIA case, or that other business corporations might seek to shield sensitive information with a privacy right if one were available. Might Apple Corporation have a potential privacy claim if the government required it to disclose health information about its CEO, Steve Jobs?¹⁸

involves human values that a corporation cannot claim. *Id.* at 6, 69 (“Corporations can no more be injured by an invasion of their ‘privacy’ than they can swear, scratch, make love, or engage in any of the other flesh-and-blood activities that the walls of privacy serve to protect from unwanted observation.”).

¹³ RICHARD CLAYTON & HUGH TOMLINSON, *PRIVACY AND FREEDOM OF EXPRESSION* 1 (2010). Privacy law is a patchwork of legal sources: the federal Constitution, state constitutions, federal and state statutes, and common law. Depending on the circumstances, different legal doctrines may govern the resolution of a claimed privacy right. This Article concerns a privacy right under the federal Constitution.

¹⁴ *Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965); see generally LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2000).

¹⁵ HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, PRIVACY, AND THE INTEGRITY OF SOCIAL LIFE* 2 (2010).

¹⁶ *Id.*

¹⁷ Raymond Wacks, *The Poverty of “Privacy”*, 96 LQR 73 (1980); RAYMOND WACKS, *LAW, MORALITY, AND THE PRIVATE DOMAIN* 222 (2000) (“‘Privacy’ has become as nebulous a concept as ‘happiness’ or ‘security.’ Except as a general abstraction of an underlying value, it should not be used as a means to describe a legal right or cause of action.”).

¹⁸ For an argument that the SEC should impose a rule requiring disclosure of medical information about a “luminary” that is material to the corporation, see Allan Horwich, *When the Corporate Luminary Becomes*

Thus, despite the conceptual difficulties involved in the task, this Article aims to provide a critical analysis of whether corporations have a constitutional right to privacy. In doing so, it fills the noted gap in the literature and makes two contributions to the areas of corporate rights and group privacy. The first contribution concerns the analytical approach: the Article demonstrates the limited utility of the doctrine of corporate personhood and the person metaphor in determining corporate rights such as privacy.¹⁹ The second contribution is an understanding of why publicly held corporations likely do not have a constitutional privacy right, but why other kinds of corporations may have a stronger claim.

This Article proceeds in three Parts. Part I examines existing case law that provides relevant background to conclude that it remains an open question whether corporations have a constitutional right to privacy. Part I also surveys the growing body of conflicting law on this unresolved issue. In addition, the section briefly examines the relevance of so-called “commercial privacy” cases and cases concerning associational privacy.

Against this backdrop of existing case law, Part II explores the approach that courts should use when analyzing whether corporations have a constitutional right to privacy. It first rejects the doctrine of corporate personhood as a source of the answer and straightens out the flawed use of the corporate person metaphor. It then turns to a pragmatic approach to determining corporate rights.

Part III applies this pragmatic approach, first seeking an understanding of the purpose of the right to privacy and then examining whether granting that right would serve its purpose, in light of the people behind a corporation. The analysis looks to whether a corporate right to privacy would derivatively protect the interests of shareholders, directors, officers, or other stakeholders such as employees. The Article concludes that courts are not likely to find a privacy right for publicly held corporations, but other corporate entities may present a stronger claim.

Seriously Ill: When is a Corporation Obligated to Disclose that Illness and Should the Securities and Exchange Commission Adopt a Rule Requiring Disclosure?, 5 N.Y.U. J. L. & BUS. 827 (2009).

¹⁹ Elizabeth Pollman, *Reconceiving Corporate Personhood*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1732910 (forthcoming UTAH L. REV. 2011), provides a foundational analysis of corporate personhood which this Article applies in the context of privacy.