

## Article

# Privacy and Organizational Persons

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### INTRODUCTION

In *A Corporate Right to Privacy*, Elizabeth Pollman contributes to understanding an important set of issues that emerges from two large-scale developments in law and society.<sup>1</sup> In this Article, we examine Professor Pollman's contribution in the context of these larger developments, as well as her narrower claim regarding the interpretation of constitutional law.

The first development concerns the notion of the "legal personality" of the institutions and organizations that compose the modern world, including: business firms; religious organizations; nonprofit associations; labor unions; and governments at different levels, ranging from cities to nation-states to combinations of nation-states in global bodies such as the European Union, the United Nations, and the World Trade Organization. A perennial question regarding all of these artificially created but socially real institutional "persons" concerns the appropriate scope of their legal powers and rights in different contexts.<sup>2</sup>

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

2. One of us has argued elsewhere for "squaring the circle" in the debate between the nominalists who insist on the fictional and artificial nature of legally created organizations (such as corporations) and the realists who point out the social implications and real-world everyday consequences that follow from the social construction of legal entities (such as corporations). There is no necessary conceptual contradiction dividing the two camps. One can view legally constructed organizations as fictional and artificial (and therefore changeable through legal and political decisions) and at the same time socially real and powerful (given that legal recognition carries material social conse-

Recent United States Supreme Court opinions, for example, have expanded constitutional and statutory rights for business corporations. *Citizens United* recognized a constitutional right to contribute to political debates and elections in terms of “free speech” purchased with corporate money.<sup>3</sup> *Hobby Lobby* found religiously oriented business corporations to qualify for legal exclusions from health care statutes of general application on grounds that forcing financial support of certain methods of contraception would violate a firm’s rights of “free exercise” of religion.<sup>4</sup> The fascinating question Professor Pollman asks is whether these and other precedents might extend also to recognizing a constitutional “right of privacy” for corporate firms in various circumstances.<sup>5</sup>

The second large-scale development concerns the trajectory of legal and social concerns about privacy—and an expanding (or contracting) recognition of “rights of privacy.” The rise of individualism in Western societies—which has been exported unevenly to other parts of the world over the course of the last several centuries—has brought with it the idea that powerful social institutions, such as government, religious authority, and business firms, should observe limits with respect to individual autonomy, dignity, and “personal space.”<sup>6</sup> This increasing concern for privacy has influenced constitutional law in the United

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quences). See ERIC W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* 27–32 (2013) (explaining the legal and practical status of firms as persons).

3. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

4. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

5. Pollman, *supra* note 1.

6. Theorists exploring privacy as a value and principle have recognized its conceptual connections in theories of liberal political orders in which zones of private life are legally demarcated as separate from and protected against public government. See, e.g., ANITA L. ALLEN, *UNPOPULAR PRIVACY: WHAT MUST WE HIDE?* (2011); JUDITH WAGNER DECEW, *IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY* (1997); CHARLES FRIED, *AN ANATOMY OF VALUES* (1970); JULIE C. INNESS, *PRIVACY, INTIMACY, AND ISOLATION* (1992); BEATE RÖSSLER, *THE VALUE OF PRIVACY* 2–5, 10–13 (R.D.V. Glasgow trans., 2005); Edward J. Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 423 (1980); Robert S. Gerstein, *Intimacy and Privacy*, 89 ETHICS 76 (1978); W. A. Parent, *Privacy, Morality, and the Law*, 12 PHIL. & PUB. AFF. 269 (1983); James Rachels, *Why Privacy Is Important*, 4 PHIL. & PUB. AFF. 323 (1975). For a historical overview of the beginning of the idea of private life in modern societies from different academic perspectives, see *A HISTORY OF PRIVATE LIFE* (Phillippe Ariès & Georges Duby eds., Arthur Goldhammer trans. 1987–91) (five volumes). For an engaging contemporary introduction to the general topic, see RAYMOND WACKS, *PRIVACY: A VERY SHORT INTRODUCTION* (2010).

States.<sup>7</sup> Traditional privacy rights that protect “[t]he right of the people to be secure in their persons, houses, papers, and effects,”<sup>8</sup> as recognized by the Fourth Amendment’s prohibition against unreasonable searches and seizures, have been supplemented by contemporary constitutional rights protecting personal decisions regarding sexual practices, pregnancy, reproduction, marriage, and family relationships.<sup>9</sup> In addition, rights to privacy regarding some kinds of information—such as personal medical information or internet browsing history—may be emerging in constitutional law as well as in new statutes.<sup>10</sup>

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7. Perhaps because of the legacies of fascism and communism, the European Union has sought to protect individual privacy—especially data privacy—even more aggressively than the United States. See, e.g., Jason A. Kotzker, Note, *The Great Cookie Caper: Internet Privacy and Target Marketing at Home and Abroad*, 15 ST. THOMAS L. REV. 727, 748 (2003) (“The roots of the European theory stem directly from the horrors experienced by Europeans during World War II.”). Thus the EU passed the Data Protection Directive in 1995, 1995 O.J. (L 281) 95/46/EC, while the United States has yet to offer anything more than a patchwork of discrete laws and rules, leaving much of the territory to private self-regulation. See Ariel E. Wade, Note, *A New Age of Privacy Protection: A Proposal for an International Personal Data Privacy Treaty*, 42 GEO. WASH. INT’L L. REV. 659, 663 (2010). See generally Steven R. Salbu, *The European Union Data Privacy Directive and International Relations*, 35 VAND. J. TRANSNAT’L L. 655 (2002). Even though American data privacy protection may be less comprehensive or systematic compared with that in Europe, the autonomy and liberty concerns underpinning the value of privacy are still undoubtedly strongly felt.

8. U.S. CONST. amend. IV, § 2.

9. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (“The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as [1891], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution . . . . These decisions make it clear that . . . the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.” (citations omitted)); see also *Lawrence v. Texas*, 539 U.S. 558 (2003) (right to privacy in the choice of sexual partners); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to privacy regarding marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy regarding contraception); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (right to privacy regarding family decisions about education and religion).

10. As Pollman observes, cases on these issues have been mostly based on statutory grounds, though some lower court opinions have recognized constitutional rights in the context of protecting personal information. Pollman, *supra* note 1, at 30–31. In this connection, one may interpret the important case of *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), in somewhat broader terms than does Pollman who nevertheless mentions that the Court recognized “the vital relationship between freedom to associate and privacy in one’s associations.” *Id.* at 462; see also Pollman, *supra* note 1, at 30 (discussing the *NAACP* case). For a further discussion of the importance of the case, see *infra* notes 60–64 and accompanying text.

In this Article, we recognize the enduring value of Professor Pollman's contribution to understanding an important corner of the intersection of these two larger trends, namely, the specific question of whether "corporations" may claim a constitutional "right to privacy" in a manner analogous, for example, to the assertion of a constitutional right of freedom of speech under the First Amendment affirmed in *Citizens United*. Answering this question is no easy task. As Anita Allen, one of the foremost privacy scholars, has remarked, "fully explicating the reasons for denying . . . privacy rights to corporations is an occasion for abstract jurisprudence of a sort for which few have the time or temperament."<sup>11</sup> Pollman is an admirable exception. She collects the relevant legal materials and academic literature with confidence and evident mastery. Her ambition is impressive, and her approach is remarkably comprehensive. Her article will therefore serve as an excellent resource for courts and future scholars who will inevitably grapple with many new problems of "rights of privacy" as they arise in complex organizational situations. We could devote many pages to singing the praises of Pollman's work, but instead we focus here on what we see as some of its conceptual limitations and make some recommendations for future research in this area.

Our main criticism is that we do not think the conclusion that "most corporations in most circumstances should not have a constitutional right to privacy" is justified by the normative and legal arguments presented.<sup>12</sup> We point out the range of uncertainty in previous and likely future cases regarding (1) the changing meanings of "privacy" in various contexts; (2) the different kinds of "corporations" as well as other organizational forms; and (3) the cogency of claims of corporate constitutional rights, especially privacy rights. We argue that significant variations in possible and likely future conceptual scenarios, as well as significant variations in likely factual circumstances, render any conclusion about "most corporations in most circumstances" tenuous and unsupported both normatively and empirically.<sup>13</sup> We also question the jurisprudential claim that

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11. Anita L. Allen, *Rethinking the Rules Against Corporate Privacy Rights: Some Conceptual Quandries for the Common Law*, 20 J. MARSHALL L. REV. 607, 607 (1987). Allen identifies conceptual difficulties with ascribing privacy rights to corporations but, unlike Pollman, she believes that much constitutional law supports the notion of corporate privacy rights. *See id.* at 626–28 (identifying state and federal constitutional provisions that protect corporations' privacy rights).

12. Pollman, *supra* note 1, at 32, 84.

13. *See, e.g., id.* at 32 & n.25, 47, 52 n.107, 53–54, 64, 73, 75–77.

“rights” of corporations (or other human-created institutions) are always narrowly “derivative” in the sense employed by Pollman. Throughout, we assume that privacy rights are not fully reducible to other rights.<sup>14</sup> We also assume that the distinctive interests that claims of “privacy” aim to cover are indeed worthy of protection.<sup>15</sup>

We organize our Article as follows. Part I elaborates some methodological concerns in approaching the general problem of “corporate rights of privacy.” Part II considers the conceptual relationship between corporations (and other organizational persons) and the idea of rights. We propose a framework that captures a difference between organizations asserting “primary” and “secondary” rights, which we believe will prove analytically helpful. Part III expands on the meaning of “privacy” and suggests that the broad conceptual scope, and indeed its many

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14. For a scholarly debate about whether privacy rights have distinctive content, or instead fully track rights to property, liberty and so on, compare Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295, 313 (1975) (arguing that privacy rights are derived from other rights), with Thomas Scanlon, *Thomson on Privacy*, 4 PHIL. & PUB. AFF. 315 (1975) (replying that other rights such as “ownership” and “liberty” derive from recognition of a right of privacy). Nothing in our argument here turns necessarily on a resolution of this meta-debate about the nature of the value of privacy in relation to other moral values.

15. Theorists from both the right and left have attacked the liberal commitment to privacy rights. See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 231–350 (1981) (arguing that the personal interests privacy rights protect are inefficient); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991) (decrying privacy rights because they immunize the domestic sphere, a traditional locus of female oppression, from legal intervention); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009) (arguing that, by casting the right to abortion as a “private” right, the state can legitimate its refusal to pay for abortions even for those who cannot afford to pay for a pregnancy termination themselves). Our conception of rights assumes that they function as “trumps” against efficiency considerations, RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977), and so we are not moved by Posner’s critique. For a more targeted critique of Posner’s account, see Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject As Object*, 52 STAN. L. REV. 1373 (2000). We are more sympathetic to the feminist critique of privacy but we nonetheless believe that the concerns feminists often raise go to the scope of the private sphere, and not to the issue of whether the notion of privacy itself is defensible.

For a description of a different source of ambivalence around the value of privacy, see Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1 (1991) (foregrounding the conflicting commitments in our polity between “sunlight” (i.e., the imperative to be transparent) and “shadows” (i.e., a private sphere free of government intrusion)).

different meanings, counsels caution when answering whether a corporation may assert “a right of privacy.”

Part IV discusses the wide range of meanings of “corporation” when used to refer to various types of associations and organizations—including business, nonprofit, and even government entities. We argue that nothing particularly special should attach to the corporate form with respect to whether rights regarding “privacy” should be recognized. Any organized group bestowed with the benefit of formal legal recognition should probably be included generically in the analysis of specific cases.

Part V turns to consider the problem of organizational composition. Who counts as a member of an organization, and how does organizational membership translate into the normative language of privacy? We argue that complications involving group membership in organizations may often lead to different answers concerning privacy rights claims in different circumstances. Also, different kinds of organizations are created for different purposes, and these different purposes should also matter for legal and normative analysis.<sup>16</sup>

In Part VI, we point out another important dimension that falls outside of the scope of Pollman’s analysis but bears conceptually on a proper normative framing of the problem. In addition to questions of rights of privacy that may be asserted by organizations such as business corporations, it is important to consider the fact that many of these same organizations may find themselves tempted to violate the rights of privacy of individuals (or other organizations), especially in the brave new world of the internet. We thus highlight the threat to rights of privacy in the twenty-first century posed by large private organizations that have the ability to delve broadly and deeply into the digital archives of many people’s lives. We conclude that much work remains to be done in limning the lines of privacy with respect to organizational persons.

#### I. METHODOLOGY: OF “CORPORATIONS,” “RIGHTS,” AND “PRIVACY”

As various scholars in different disciplines have recognized, the idea of a “right to privacy” has a number of different

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16. To be fair, Pollman recognizes the importance of “purpose” in conducting a legal analysis regarding privacy rights asserted by organizations. Pollman, *supra* note 1, at 32, 54–55, 64. We argue, however, that the scope of her conception of potential “purposes” of organizations, including corporations (whether for-profit or nonprofit), is unduly narrow.

meanings in different contexts—ranging from traditional privacy rights connected to freedoms of political speech, religion, and association to more recent privacy rights that have been recognized to protect individual personal dignity and autonomy regarding decisions about sexual behavior and reproduction. Scholars have struggled with defining the meaning of “privacy” and its relationship to other fundamental values such as individual “autonomy,” “liberty,” and “freedom.”<sup>17</sup>

Legal scholars have also noticed conceptual difficulties in defining the meaning of “privacy.” Daniel Solove, for example,

identifies six general types or understandings of privacy, with some overlap: (1) a right to be let alone (Samuel Warren and Louis Brandeis’s influential formulation); (2) limited access to self; (3) secrecy or concealment of certain matters; (4) control over personal information or information about oneself; (5) personhood (protection of one’s personality, individuality, dignity); and (6) intimacy.<sup>18</sup>

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17. See, e.g., DECEW, *supra* note 6, at 9–25 (examining different legal and philosophical justifications for a right of privacy); INNESS, *supra* note 6, at 74–75 (arguing that privacy essentially involves the protection of “intimacy” in relationships); RÖSSLER, *supra* note 6, at 2–10, 17–18 (providing an analytical overview of the literature and advancing her own view of “privacy” as grounded in philosophical conceptions of “autonomy” of individual people to plan and make decisions about the course of their own lives); Gavison, *supra* note 6, at 423 (arguing that privacy is a coherent value focused on reserving “our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others’ attention” the protection of which advances other values of “the promotion of liberty, autonomy, selfhood, and human relations, and furthering the existence of a free society”); cf. Cohen, *supra* note 15, at 1380 & n.17 (collecting philosophical sources identifying the difficulty of defining privacy in non-property rhetoric); Julie A. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1904 (2013) (“No single meme or formulation of privacy’s purpose has emerged around which privacy advocacy might coalesce.”); Rachels, *supra* note 6, at 323 (“Why, exactly, is privacy important to us? There is no one simple answer to this question, since people have a number of interests that may be harmed by invasions of their privacy.”).

18. Pollman, *supra* note 1, at 60 (quoting DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 12–13 (2008)); see also Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 219–20 (1890) (arguing in favor of the recognition of a privacy right in the common law). It is noteworthy that Warren and Brandeis’ seminal article was motivated by a technological invention: the Kodak-style camera and the use of these and other devices by newspapers. *Id.* at 195 (“Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”). For the story of Warren’s annoyance over newspaper coverage of the details regarding his daughter’s wedding as motivating his recruitment of his partner and Harvard Law classmate Brandeis to write the article, see William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383–84, 423 (1960). The advent of the internet and the rise of cell phones with instant imaging and video technolo-

Solove concludes that the meanings of privacy are so varied that it makes better sense to focus on particular situations rather than to build a general theory of privacy. He argues that “privacy” is “a concept in disarray,” and he joins other legal scholars who doubt whether a single theory can embrace the many meanings and values that “privacy” seems to implicate.<sup>19</sup>

Moreover, it is not just the meaning of “privacy” that is contested. There are also competing conceptions of the “corporation.”<sup>20</sup> The question of whether the corporation can bear rights in its own organizational capacity has been especially

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gies suggest that another legal revolution regarding privacy protection may be in train.

19. SOLOVE, *supra* note 18, at 1–2; *see also* ARTHUR MILLER, *THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS* 25 (1971) (noting that privacy is “difficult to define because it is exasperatingly vague and evanescent”); Robert C. Post, *Three Concepts of Privacy*, 89 *GEO. L.J.* 2087, 2087 (2001) (“Privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all.”). Solove quotes the apt description by Jonathan Franzen that “privacy proves to be the Cheshire cat of values: not much substance, but a very winning smile.” SOLOVE, *supra* note 18, at 1 (quoting JONATHAN FRANZEN, *HOW TO BE ALONE* 42 (2003)).

Solove suggests a problem-oriented approach to solving different kinds of “privacy problems” that “arise when governments, businesses, organizations, and people disrupt the activities of others.” SOLOVE, *supra* note 18, at 76. Of course, this is a very broad category! He then suggests a “taxonomy” of areas of concern that involve “the value of privacy” to include “four principal groups of activities: (1) *information collection* [such as through surveillance and interrogation techniques], (2) *information processing* [which refers to “the use, storage, and manipulation of data that has already been collected”], (3) *information dissemination* [such as breach of confidentiality, blackmail, and public exposure of embarrassing personal details], and (4) *invasion* [including problems of intrusion into private spaces such as homes and interference with personal decision-making].” *Id.* at 10–11, 78–170 (italics added). Another legal scholar conducting an historical survey of privacy law in the United States concludes that there are at least five different categories of privacy law and “seeking a simple definition of privacy is a misguided quest.” Ken Gormley, *One Hundred Years of Privacy*, 1992 *WIS. L. REV.* 1335, 1335.

20. *See, e.g.*, Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 *DEL. J. CORP. L.* 767, 770–72 (2005) (describing long-term conceptual cycling of several theories of the corporation); John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *YALE L.J.* 655, 655 (1926) (arguing that different theories of legal “person,” including references to corporations, are used to signify “what law makes it signify”); Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 *WASH. & LEE L. REV.* 1421, 1423–27 (2006) (examining historical origins of theories of corporate persons and the translation of different theories into different legal cultures).

fraught.<sup>21</sup> And the notion of rights themselves and, in particular, questions about their purpose and theoretical grounds, have also generated extensive debate.<sup>22</sup>

Beginning from conceptual foundations (including disputes about them), then, one might surmise that whether a “right of privacy” should extend to an organizational person such as a corporation or other association should depend normatively on the context: both ontologically with respect to the nature of the organization and conceptually with regard to the meaning of rights. We might ask (and might urge courts to ask): Which kind of privacy is involved in a particular case? What is the role of the organizational person in advancing the claim? Whose interests are at stake, and are those interests weighty enough to mandate protection through the recognition of a right?<sup>23</sup> Arguably, the jurisprudential analysis should include references to the normative values implicated as well as discussion of whether a particular organizational person is an appropriate vehicle to advance or protect the asserted right.<sup>24</sup>

21. Compare CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* 1–16 (2011) (arguing that corporations are moral agents but expressing skepticism about corporate rights), and Peter A. French, *The Corporation As a Moral Person*, 16 AM. PHIL. Q. 207, 207 (1979) (arguing that corporations are moral agents eligible for moral and legal rights), with Tom Donaldson, *Moral Agency and Corporations*, 10 PHIL. IN CONTEXT 54, 58–59 (1980) (arguing that corporations are moral agents but not moral persons and, as such, they can be held responsible for their acts but are not appropriate candidates for moral rights). Cf. ORTS, *supra* note 2, at 9 (“Whether and how to recognize business enterprises as organizational ‘entities’ and legal ‘persons’ that bear enforceable rights, privileges, and responsibilities has been one of the most vexing issues in the history of legal thought.”). For a new collection of different views on the long-standing question of whether business firms have moral capacity, see *THE MORAL RESPONSIBILITY OF FIRMS* (Eric W. Orts & N. Craig Smith eds., forthcoming 2015) (on file with author).

22. Compare H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 162–93 (1982), and CARL WELLMAN, *REAL RIGHTS* (1995) (articulating will theories of rights, which identify as the central feature of a right the control it affords its bearer to insist upon performance, or else release the corresponding duty-bearer), with Matthew H. Kramer, *Refining the Interest Theory of Rights*, 55 AM. J. JURIS. 31, 31–34 (2010), and J. Raz, *On the Nature of Rights*, 93 MIND 194, 195 (1984) (proposing interest theories of rights, according to which rights protect interests that are sufficiently important to impose corresponding duties upon others).

23. This paraphrases the conception of rights in Joseph Raz’s account. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 165–66 (1986); see also *supra* note 22.

24. This is the approach Anita Allen urges others to answer in concluding her analysis of corporate privacy rights. Allen, *supra* note 11, at 639 (arguing that “the question of corporate privacy rights must look for the most funda-

Professor Pollman does not ask these questions. Instead, her analysis proceeds primarily from a doctrinal review of relevant cases regarding the constitutional recognition of a “right to privacy.” She then argues that most of these cases do not support an extension to “most corporations in most circumstances.”<sup>25</sup> Yet without first knowing what exactly is meant by “privacy,” and when and why corporations should enjoy rights, this methodology is too formalistic and removed from motivating principles that should otherwise drive one’s legal analysis.<sup>26</sup> An initial criticism that we have of Pollman’s method, then, is that she begins with cases rather than principles.<sup>27</sup> Before one

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mental part of its answer in conceptual accounts of what we mean by ‘privacy’ and who or what may have moral and legal rights of their own”).

25. Pollman, *supra* note 1, at 32, 44, 84, 88.

26. It is worth noting that Pollman’s approach is especially problematic because case law often develops in light of instrumental litigation decisions, and not principled views about the way the law should be. Thus, Pollman places undue weight in her argument on the fact that litigants in federal court have not raised constitutional right to privacy claims on behalf of organizations in recent cases such as *Federal Communications Commission v. AT&T, Inc.*, 131 S. Ct. 1177 (2011), and *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013). Pollman, *supra* note 1, at 27–28, 51 n.106, 81. But there are many reasons of strategy and tactics that may lead a litigant to omit making a constitutional claim. Some judges (or Justices), for example, may be expected to be averse to a constitutional privacy claim, and if a statutory claim is deemed stronger in practical terms it may be advanced and relied upon instead. At least, it does not seem that a litigant’s decision to advance a legal argument or not should determine a normative question of what the law should be from an academic standpoint.

27. Tellingly, Pollman’s references to the philosophical and jurisprudential literature regarding the meaning of privacy do not occur until midway through her article. Pollman, *supra* note 1, at 59–62. Even once this literature is mentioned, moreover, Pollman gives it second billing: “Scholarly conceptions of privacy have added depth and context that aid in understanding the values or purpose being served in the Court’s privacy jurisprudence.” *Id.* at 59. With all due respect, this manner of proceeding gives too much credence to the Supreme Court as the ultimate arbiter of philosophical and legal principles. It is also possible—and we believe better—for scholars to inquire into first principles, especially when addressing a rapidly changing topic such as privacy in the digital age, and then consider how the Court’s precedents may square with these principles and advance our understanding of them in terms of legal precedents. We agree that one can also begin with an overview and analysis of cases, and then consider principles that they employ or seem to employ. But one should then subject these principles to a critical analysis in light of independent normative considerations, and we do not believe that Pollman sufficiently undertakes that analysis.

In this connection, the history of recognition of a “right to privacy” in the common law is revealing. No court followed the argument for such a right by Warren and Brandeis for many years, and yet William Prosser noted that by 1960 the legal world had changed. Many law review articles followed the original one, and the basic principle was adopted by legal decisions in almost all of the states. Prosser, *supra* note 18, at 384–90. Parsing the cases, Prosser

has a normative understanding of what one means by “privacy,” and an account of the proper relationship between the corporation and the individuals constituting and interacting with it, it does not make sense to proceed with an analysis of cases that invokes the principle.<sup>28</sup>

Of course, Pollman’s methodology would not cause concern if the following two facts obtained: first, the case law adopted the correct normative and conceptual views of privacy and corporate rights; and, second, Pollman distilled the right test from the case law she so comprehensively surveys. But there are

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identified four general categories of a “right to be let alone” that had become recognized in the common law:

1. Intrusion upon the plaintiff’s seclusion or solitude, or into his [or her] private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.

*Id.* at 389. The point is that this development in the case law *followed* an emerging recognition of the importance of the ideas.

An interesting additional question that lies outside the scope of Pollman’s analysis is the extent to which organizational persons may assert the variations of common law rights of privacy identified by Prosser and others. *See, e.g.*, Allen, *supra* note 11, at 638–39. We leave this topic outside the scope of this Article too, but the very question adds another reason to suspect that adopting any preconception for or against organizational persons having rights of privacy is too hasty.

28. Even following a doctrinal methodology, it appears that corporations (and other organizational persons) have often been recognized as having various constitutional rights, at least some of which implicate considerations of “privacy.” *See, e.g.*, ORTS, *supra* note 2, at 50 (“In U.S. constitutional law, the argument has been made that constitutional rights are meant to protect individual people only—not organizational persons. This argument has not been persuasive over time, however, and constitutional rights for corporations (and other business firms) have been recognized in various areas, though not universally.”); Darrell A.H. Miller, *Guns, Inc: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 910 (2011) (recounting various constitutional rights accorded to corporations). Further, at least in the Fourth Amendment context, the Court has recognized that business corporations (and other firms) may assert privacy rights protecting against unreasonable searches and seizures. *See, e.g.*, *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (“The respondents do not contend that business premises are not protected by the Fourth Amendment. Such a proposition could not be defended in light of this Court’s clear holdings to the contrary. Nor can it be claimed that corporations are without some Fourth Amendment rights.”); *see also* Pollman, *supra* note 1, at 48 (citing *Hale v. Henkel*, 201 U.S. 43 (1906)). This history suggests that Pollman’s lengthy discussion of *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), *see* Pollman, *supra* note 1, at 34–37, may be undue since that case is neither the first nor the final nor even the most forceful word on corporate constitutional privacy rights.

shortcomings along each of these dimensions. In the next Part, we identify conceptual issues with each of the notions of “corporations,” “rights,” and “privacy” in Pollman’s account.

## II. CORPORATE PERSONHOOD, RIGHTS, AND PRIVACY

We focus on two conceptual relationships: the relationship between corporations and rights in general, and the relationship between corporate rights and privacy.<sup>29</sup>

### A. CORPORATIONS AND RIGHTS

We will not rehearse the extensive literature debating whether corporations are persons.<sup>30</sup> We begin instead with Pollman’s argument that corporate personhood is, effectively, a non-starter. Pollman contends that the doctrine of corporate personhood merely stands for the proposition that the corporation can bear some rights, but the doctrine neither provides a justification for ascribing rights to the corporation nor tells us which rights these are.<sup>31</sup>

Pollman wisely cautions against an overly formalistic approach to corporate rights. On such an approach, individual rights are defined narrowly, and the corporation is then found ineligible for the right in question because it lacks the capacities that, on this analysis, ground the individual right. Thus, if rights of decisional privacy (which we discuss further below) are meant to protect only decisions around sex and procreation, we will have reason to deny that corporations, which can neither have sex nor procreate, should enjoy rights to decisional privacy.<sup>32</sup> It is, of course, true by definition that a corporation

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29. In this Part and the next, we follow Pollman in restricting our analysis to corporations. As we argue in Part V, however, we fail to see that there is something distinctive about corporations that warrants treating them apart from other organizations, both formal and informal—including social clubs, labor unions, partnerships, and so on. All of these groups raise vexing questions about whether and, if so, when and why they should enjoy and have the capacity to assert privacy rights.

30. For an examination of the concept of “legal personality” as used to describe business firms, see ORTS, *supra* note 2, at 27–51. See also *supra* note 20. For philosophical literature arguing that corporations are persons, see French, *supra* note 21, at 207, and Kendy M. Hess, *The Free Will of Corporations (and Other Collectives)*, 168 PHIL. STUD. 241, 249 (2014).

31. Pollman, *supra* note 1, at 50–51.

32. Corporations can “merge” or subdivide by “spinning off,” but this is not quite the same thing as sex or reproduction!

itself cannot hold a “purely personal” privacy right.<sup>33</sup> Just as a corporation cannot be put in jail, it cannot get pregnant. But this observation does not end the argument. Corporations and other organizations are created for particular purposes—business and otherwise—and these purposes may implicate personal privacy rights.

Pollman does not argue against corporate rights of privacy by saying simply “corporations are not people, therefore they cannot have privacy rights.” However, her approach is nevertheless formalistic in other ways. As we have already noted, she takes the received legal doctrine at face value, without engaging the critical normative question of whether the doctrine has gotten it right. Thus she contends that

corporations do not receive rights because the characteristics of the entity so closely resemble a natural human so as to merit granting the right; rather corporations receive rights because, as forms of organizing human enterprise, they have natural persons involved in them, and sometimes it is necessary to accord protection to the corporation to protect their interests.<sup>34</sup>

Here, Pollman neatly summarizes the history of judicial recognition of corporate rights. However, even if it were true that courts have never conferred original rights on a corporation to protect privacy, this would not mean that courts should not do so. Pollman therefore owes us an argument about why corporations cannot, or should not, enjoy rights originally.

Suppose, though, that Pollman is correct as a *normative* matter that the only justification for conferring rights upon

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33. We understand the term “purely personal” here in the way that Pollman does, such that a “purely personal” right is a right “that inheres only in a natural person’s individual capacity.” Pollman, *supra* note 1, at 85–86.

34. *Id.* at 52. There are possible exceptions to the rule that corporations are always composed of people that appear in corporate law. For example, the use of accounting entities or entities employed only imaginatively in mergers and acquisitions are arguably entities without actual people associated directly with them. See ORTS, *supra* note 2, at 36–40 (describing the use of entities in parent-subsidary relationships, merger transactions, and changing business forms). These examples might be described as “derivatives of derivatives,” but at some point grounding one’s analysis of what is happening in corporate law (and organizational law generally) always on individual people is too convoluted or otherwise does not make sense. See Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. (forthcoming 2015) (manuscript at 3) (on file with authors) (finding that “the Court’s characterization of corporations as associations” does not adequately address the wide variety of current corporate organizations). We suggest that it becomes too complicated and unwieldy, for example, to try to track the interests of thousands of employees, managers, shareholders, creditors, and other potentially relevant participants in large firms when answering particular kinds of questions in the law of organizations.

corporations is to protect the interests of the natural persons associated with the corporations. It still would not follow that corporations should not be accorded rights of their own in the first instance. To see this possibility, consider that there is an inherent ambiguity in the notion that corporations (or other organizations) may enjoy rights as a means of protecting the interests of individuals.

On one understanding, individual persons hold rights in the first instance. They come together for some joint endeavor, and the proper exercise of their rights requires that the corporation should also inherit or otherwise be recognized to enjoy the rights of these individual participants. This is the paradigmatic case for what Pollman refers to as a “derivative” right.<sup>35</sup> Schematically, we can understand the right in the following way:

*Respecting an individual person’s right X requires ascribing right X to the corporation or other organization of which the individual person is a member.*

The recent *Hobby Lobby* case supplies an illustration.<sup>36</sup> By the lights of the majority decision, and in the particular context of a closely held corporation founded on religious principles, to respect the corporate owners’ rights of religious freedom requires that we ascribe a right of religious freedom to the corporation itself.<sup>37</sup> Here, the right originates with the individual members of the corporation, and it is imputed to the corporation in order to give the individual right the full scope of its exercise.<sup>38</sup>

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35. Pollman, *supra* note 1, at 32, 53–54, 63–64; *see also* Blair & Pollman, *supra* note 34 (manuscript at 18–19, 21) (noting that the Court historically considered corporations to be associations with derivative rights).

36. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

37. *Id.* at 2768 (“[P]rotecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.”).

38. One of us has argued that this is the most plausible way to understand the right of religious freedom that *Hobby Lobby* recognized. Amy J. Sepinwall, *Corporate Piety and Impropriety: Hobby Lobby’s Extension of RFRA Rights to the For Profit Corporation*, 5 HARV. BUS. L. REV. (forthcoming 2015) (manuscript at 23), available at <http://ssrn.com/abstract=2511666>. For the view that *Hobby Lobby* recognized, and should have recognized, that the corporation itself can practice religion in its own right (i.e., independent of whether any of its members share the corporation’s religious convictions), see Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1, 31 (2014) (“The Supreme Court was correct to conclude that Hobby Lobby and the other corporations are ‘persons’ capable of ‘exercising religion’ for purposes of the RFRA.”).

On a different understanding of what it would mean to accord rights to the corporation as a means of protecting individuals' interests, it is the corporation that enjoys the right *in the first instance*, but it enjoys the right in order to protect some rights or interests of the relevant individuals. Here, the individuals do not graft their rights onto the corporation. Instead, the right resides with the corporation itself, and it is the corporation that wields the right—deciding when and how to enforce it, or when to waive it—for itself. To be sure, at the end of the day, it is *individual rights and interests* that ground the *corporate right*. In this respect, it is correct to say that these corporate rights are “derivative,” just as rights that originate with individuals and are then grafted on to the corporation are “derivative.” Both have as their ultimate rationale the protection or advancement of individual interests. Corporate rights on this second understanding, however, are not simply an extension of some individuals' rights—they are ontologically distinct. The corporation has these rights as its own.

Importantly, when a right resides in the first instance with the corporation or other organization, this right need not be the same as the individual right that the corporate right is designed to protect. Schematically, then, we can understand this right as follows:

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Moving from interpretation to justification, we co-authors have different views about the final result in *Hobby Lobby*. One of us sees this interest as justified in the context of a small business firm such as Hobby Lobby (and its companion plaintiff, Conestoga Wood Specialties Corporation), given that business owners are the most appropriate members or participants in the firm to ground the right. Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. CHI. L. REV. (forthcoming 2015) (manuscript at 10–11), available at <http://ssrn.com/abstract=2496218>; Sepinwall, *Corporate Piety*, *supra* (manuscript at 33–36) (arguing that the individuals whose interests should count are those whom we would think it appropriate to blame when the corporation commits a wrong or praise when the corporation succeeds, as these individuals have a special claim on having the corporation act in ways that conform to their conscience). The other takes the view that a proper construction of the nature of the firm in cases such as *Hobby Lobby* should recognize the rights of employees as well as owners and managers as important to protect. On this view, *Hobby Lobby* is wrongly decided because it sacrifices the religious and other fundamental rights and interests of the firm's employees in favor of opposing rights and interest of the managers and owners. Eric W. Orts, *Theorizing the Firm: Social Ontology in the Supreme Court*, 64 DEPAUL L. REV. (forthcoming 2015) (manuscript at 30–38); Eric Orts, *Undertheorizing the Corporation Continued: Hobby Lobby and Employees' Rights*, CONGLOMERATE (July 16, 2014), <http://www.theconglomerate.org/2014/07/undertheorizing-the-corporation-continued-hobby-lobby-and-employees-rights.html>.

*Respecting an individual person's right X (or interest in X) requires according right X or some other right Y to the corporation or other organization.*

The *Citizens United* case can be understood along these lines.<sup>39</sup> Individuals' interests in hearing corporate views for purposes of gathering information about candidates for political office grounds the corporation's right to free speech, at least according to one persuasive argument adopted by the Court.<sup>40</sup> On this view, listeners' rights are one kind of speech right.<sup>41</sup> The corporation in these situations enjoys a right of the same kind as the right of the individuals whom the corporate right protects. But the corporate right is not just an extension of the individual listeners' rights. Once the corporation enjoys the right of political speech, it can determine, according to its own internal governance structure, whether and how to exercise that right. In other words, the corporation has a right to speak in order to protect citizens' right to listen.

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39. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

40. *Id.* at 356 ("When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."); see also ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 66–76 (2014).

41. For examples of scholarly analysis focused on listeners' rights or interests in various free-speech contexts, see Michael I. Meyerson, *The Right To Speak, the Right To Hear, and the Right Not To Hear: The Technological Resolution to the Cable/Pornography Debate*, 21 U. MICH. J.L. REFORM 137 (1987–88) (arguing that government censorship is improper where cable subscribers are able to block offensive channels in a way that does not interfere with the ability of others to view the channels); Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329 (2008) (arguing that the Court has wrongly relied on protecting "the speaker's freedom of mind" as a justification for the compelled speech doctrine, and that it should base the doctrine instead on "listener interests"); Note, *Overbreadth and Listeners' Rights*, 123 HARV. L. REV. 1749 (2010) (proposing that the ability of third parties to "challenge overbroad statutes in the First Amendment context" is best explained by those parties' rights to listen rather than to speak); cf. Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1688–89 (2009) (arguing that a "speaker-based model dominates First Amendment jurisprudence," but recognizing that "the rights of listeners" are given weight in some circumstances). For an earlier argument for focusing on listeners' rights in the corporate speech context, see EDWIN P. ROME & WILLIAM H. ROBERTS, *CORPORATE AND COMMERCIAL FREE SPEECH: FIRST AMENDMENT PROTECTION OF EXPRESSION IN BUSINESS* 201–04 (1985) (discussing the impact Alexander Meiklejohn's focus on the rights of listeners has had on modern interpretation of the First Amendment).

In a different category of cases, the corporate right can differ from the individual right.<sup>42</sup> Consider, for example, that newspaper and media companies currently enjoy privacy rights, such as when a newspaper refuses to disclose the identity of a confidential source.<sup>43</sup> The right here is arguably grounded neither in the privacy interests of the confidential source nor in the free speech rights of the newspaper itself (or its reporters), but instead in the interests the general electorate has in a free press.<sup>44</sup> Here, then, the corporate right is different in kind from the individual right that the corporate right protects: again, the corporation's right is a right of privacy, and the individuals' right is a right to a free press. Further, the interests the corporation's right protects are those of citizens, but the right itself belongs to the news corporation *in the first instance*.

Moreover, there may be other cases of corporate rights that are not grounded in any rights of the individuals with whom the corporation interacts. For example, we may want our home institution of the University of Pennsylvania (Penn) to engage in fundraising because we want Penn to have certain resources from which we can benefit as professors. But we have neither a right to these resources nor control over the way Penn fundraises, and we certainly do not have a right to insist that Penn must fundraise on our behalf. Still, if one wanted to know why Penn had a right to fundraise, one would point ultimately to the interests of individuals such as professors (as well as students, alumni, and perhaps society in general) whom Penn's fundraising serves.

In short, we believe that there are two kinds of corporate rights: (1) rights that reside with the corporation in the first in-

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42. Following Pollman's focus on corporations, we refer here sometimes to "corporate rights," but as we discuss in Part IV the question involves "organizational rights" in general. In other words, we sometimes use "corporate rights" generically to mean "organizational rights."

43. See Ronnell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221 (2013) (reviewing the development of law in this area focusing on the privilege held by reporters and recommending an alternative focused on the rights of anonymous sources); Geoffrey R. Stone, *Secrecy and Self-Governance*, 56 N.Y.L. SCH. L. REV. 81 (2011–12) (examining the problem of confidential sources in terms of the rights of public employees and the rights of "the press"). A high-profile case recently involved *The New York Times* and its refusal to force its reporter, James Risen, to provide details about a confidential source regarding a clandestine intelligence operation conducted by the United States against Iran. Matt Apuzzo, *Seven Years in, Reporter Says Little to Court*, N.Y. TIMES, Jan. 6, 2015, at A1.

44. Cf. RAZ, *supra* note 23, at 253–54 (describing the special privileges of the press and asserting that the "justification of the special rights and privileges of the press are in its service to the community at large").

stance and (2) rights that originate with individuals and are then ascribed to the corporation. Note that both kinds of rights *derive* from the rights or interests of individual people insofar as each kind of right has as its rationale the protection of individual rights or interests. As such, we think the term “derivative right” is unhelpfully ambiguous. It is more perspicuous to classify corporate rights according to who holds them in the first instance. Accordingly, we will distinguish between *primary* and *secondary* corporate rights. Primary rights are those held by the corporation (or other organizational person) in the first instance—e.g., rights of political speech in *Citizens United*. Secondary rights are those the corporation inherits from the rights of some individuals—e.g., rights of religious freedom in *Hobby Lobby*.<sup>45</sup>

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45. Our distinction between primary and secondary rights tracks Meir Dan-Cohen’s distinction between original and derivative rights. See MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS 58–60 (1986) (“A may have a right because of either of two reasons. A right may be recognized in A out of concern for A himself. In such a case, A has an *original right*. A right in A may also result from a concern not for him but for B. In this case, A will be said to have a *derivative right*.”). Dan-Cohen’s conception of derivative rights does not involve the ambiguity inherent in Pollman’s use of that term. We might otherwise have used Dan-Cohen’s terminology, but it will be useful to depart from it here, in order to avoid confusion.

In the First Amendment context, Robert Post has also distinguished between original and derivative rights. See POST, *supra* note 40, at 70–74. On Post’s account, commercial for-profit corporations do not have original rights to participate in political speech because only those who can “experience the subjective good of democratic legitimation” have those rights originally, and corporations cannot “experience the subjective good of democratic legitimation.” *Id.* at 71. Corporations “instead possess the derivative First Amendment right to speak in ways that inform auditors who are strangers to the corporation.” *Id.* at 71–72. We may agree with Post that the corporation does not have the kind of interests or status that would ground its having free speech rights of its own accord. (As one of us has written elsewhere, corporations are not the kind of citizens that are expected to participate in the political or civic life of the nation-state. See Amy J. Sepinwall, *Citizens United and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575 (2012).) But Post’s notion of derivative rights seems to conflate, or at least to elide, our distinction between primary and secondary rights. In the free speech context, Post contends that the corporation’s rights are rooted only in the interests of “strangers to the corporation.” POST, *supra* note 40, at 70. This would suggest that corporate free speech rights are always secondary rights; further, the only interests grounding those rights are interests of individuals *outside* of the corporation. This seems to us to unnecessarily circumscribe the scope and kind of corporate free speech rights, because it grounds the rights exclusively in the interests of listeners. By contrast, we allow that individuals within the corporation might have an interest in having the corporation speak on their behalf, and that interest might warrant constitutional protection. This is obviously the way to think about the free speech rights of unions and advocacy groups. But commercial corporations might enjoy speaker-based free speech rights too.

With secondary rights, the corporation's right will always mirror the same right of the individuals from which the corporate right originates. For example, a secondary right to corporate privacy would flow from individuals' rights of privacy. Similarly, a secondary right to corporate religious freedom would flow from individuals' rights of religious freedom.<sup>46</sup>

By contrast, although primary rights are also intended to protect individuals' interests, and even sometimes individuals' rights, the corporate primary right need not be identical to the right of the individuals that the corporate right is designed to protect. As such, corporate primary rights are unlike Pollman's derivative rights or her instrumental rights. For example, as we argue below, corporations might enjoy rights to privacy to protect individuals' property rights, rights of freedom of association, or the corporation's own intellectual property.<sup>47</sup>

We do not seek to articulate a full-blown account of primary corporate constitutional rights here, but it is useful to sketch what such an account might look like. Primary corporate rights, as we conceive of them, embody elements of the two prominent theories of the grounds of rights: the *will* theory and

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Consider, for example, Google's speech in favor of legalizing gay marriage, which it undertakes on behalf of its employees in homosexual marriages whose mobility is limited if there are states, or countries, that will not recognize homosexual marriages and so deny the employees' partner's spousal benefits. See, e.g., Alexander C. Kaufman, *Here Are The 379 Companies Urging the Supreme Court To Support Same-Sex Marriage*, HUFFINGTON POST (Mar. 5, 2015), [http://www.huffingtonpost.com/2015/03/05/marriage-equality-amicus\\_n\\_6808260.html](http://www.huffingtonpost.com/2015/03/05/marriage-equality-amicus_n_6808260.html) (listing Google as among 379 signatories of an amicus brief in *Obergefell v. Hodges*, the pending Supreme Court case raising the issue of whether the Fourteenth Amendment compels states to recognize same-sex marriage); Chris Matyszczyk, *Google to Governments: Legalize Gay Love*, CNET (July 8, 2012), <http://www.cnet.com/news/google-to-governments-legalize-gay-love>. Google's right to speak is grounded in the interests (and perhaps also the equality rights) of its employees, not in those of "strangers" to the corporation. Further, the right is one of speech, not one of hearing. Although it is important that governments and citizens get to hear what Google has to say, it is at least as important that Google be permitted to advocate on behalf of its employees (not to mention others, such as customers). For these reasons, Google's right is properly understood as a primary right. But Post's account appears not to have the resources to accommodate a right so understood, since rights grounded in individual interests appear on his account, at least in the free speech context, to track only the interests of listeners, and not those on behalf of whom the corporation might speak. With that said, it is not clear what Post's analysis portends for other corporate constitutional rights and so we do not consider it further here.

46. See *infra* text accompanying notes 52–53 (describing the constraints on corporate religious exercise where the corporation's right of religious freedom is a secondary right).

47. See *infra* Part III.B.

the *interest* theory. According to the will theory, the defining feature of a right is the choice it gives the right-holder over its disposition.<sup>48</sup> In particular, rights, on this view, confer upon those who possess them the choice whether to enforce or waive the privileges or duties that correlate with the rights in question. Thus, the will theory primarily illuminates *what it means* for someone to have a right. The interest theory, by contrast, elucidates *why it is* that someone would have a right.<sup>49</sup> Thus, on Joseph Raz's paradigmatic statement of the view, "X has a right' *if and only if X can have rights*, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty."<sup>50</sup>

Using our nomenclature in this context, we suggest that with *primary organizational rights* a corporation or other organizational person exercises control over the assertion or waiver of the right. In accordance with a will theory of rights, the organization and its governing authority determine when and how the organization will assert its primary rights.<sup>51</sup> In

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48. See, e.g., HART, *supra* note 22; WELLMAN, *supra* note 22.

49. This perhaps overstates the distinction between what it means to have a right and why we accord rights, but we think it helpful to cast the two accounts in this way to see that they might complement each other, especially where, as here, the bearer of the right is comprised of many individual right-holders. For theorists who advance hybrid will-interest theories, see, for example, Gopal Sreenivasan, *A Hybrid Theory of Claim-Rights*, 25 OXFORD J. LEGAL STUD. 257 (2005); and Rowan Cruft, *Rights: Beyond Interest Theory and Will Theory?*, 23 LAW & PHIL. 347 (2004).

50. RAZ, *supra* note 23, at 166 (emphasis added). The interests worthy of protection are those "goods whose satisfaction is required for a recognizably human life, whatever a person's particular plans, and distinctive conceptions of the good." Sarah Hannan, *Autonomy, Well-being, and Children's Rights: A Hybrid Account* (working paper, Stanford University) (Feb. 10, 2012).

Although we borrow Raz's justification for why anyone has rights, we do not adopt his justification for corporate rights in particular, which is frustratingly brief: "There is little that needs to be said here of the capacity of corporations and other 'artificial' persons to have rights. Whatever explains and accounts for the existence of such persons," says Raz, "also accounts for their capacity to have rights." RAZ, *supra* note 23, at 176. One way to capture what is at stake for us, as well as Pollman, is an effort to get clear on just what features or considerations *do* explain the existence of organizational persons.

51. One might worry that the notion of a corporation deciding of its own accord relies on the controversial proposition that the corporation can form and act on intentions of its own—that it has its own mind, if you will. The worry might be especially keenly felt by those who think of the corporation as nothing more than a nexus of contracts, see, e.g., Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1426 (1989); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976), or who otherwise adopt a reductionist conception of the corporation and so also deny that the corporation consists of anyone other than its indi-

contrast, with *secondary organizational rights*, we refer to situations in which the individual people with whom the right originates retain greater control over the exercise of the corporate analog of the right. In these situations, we expect the exercise of organizational rights to be more closely tied to the ways in which these individuals would use the rights. For example, while Hobby Lobby enjoys a right of religious freedom (at least now according to the Supreme Court),<sup>52</sup> that right must still track the interests generating it. The company cannot now assert rights as a Muslim or Buddhist corporation, at least while its owners retain their current Christian faith. Instead, given the rationale for Hobby Lobby's right, that right should be exercised in accordance with the owners' religious convictions. By contrast, because the right of political speech under *Citizens United* is a primary right, the content of the speech in which the corporation engages need not track the interests of any particular set of listeners. The corporation enjoys organizational autonomy in determining just what it will say.<sup>53</sup>

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vidual members, *see, e.g.*, BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY 19 (1993) (quoting Friedrich Hayek as a proponent of reductionism or methodological individualism—i.e., the view that “[t]here is no other way toward an understanding of social phenomena but through our understanding of individual actions directed toward other people and guided by their expected behavior.”). *See also* Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411, 422 n.43 (2012) (collecting sources espousing a reductionist position on corporations). It is beyond the scope of this Article to elaborate a theory of corporate intentionality that would completely quiet the concern that we are operating with a metaphysically loaded conception of the corporation. We note, however, that there are accounts of shared intentions that do not require the positing of a group mind or a metaphysically “real” existence of corporations outside of society. *See, e.g.*, Michael Bratman, *Shared Intention*, 104 ETHICS 97 (1993); Margaret Gilbert, *Shared Intention and Personal Intentions*, 144 PHIL. STUD. 167 (2009). For these purposes anyway, we align ourselves with the general idea contained in these accounts. *Cf.* ORTS, *supra* note 2, at 14–19, 38 (advancing an “institutional theory” that posits a social ontology of business firms without an abstract metaphysics regarding “real entities”).

52. *See* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

53. Again, note that the idea of primary organizational rights articulated here does not turn on some mysterious metaphysical conception of the corporation or other organizational persons. Exercising rights may count as just one among the many mundane ways that corporations and other organizational persons act in the world: buying property, entering contracts, marketing products, and so on. *See, e.g.*, ORTS, *supra* note 2, at 27–105 (describing the structure of “business persons” to act in these ways); *cf.* Hess, *supra* note 30, at 249 (contending that the corporation's reliance on its “physical base” (i.e., its individual members) to carry out its actions is no different from our relying on our “physical base” (i.e., our bodies) to carry out our actions).

## B. CORPORATE RIGHTS AND PRIVACY

Our efforts to articulate a distinction between primary and secondary corporate rights, and to fault Pollman for overlooking that distinction, is not mere pedantry. The distinction reveals a flaw in the test that Pollman develops for determining whether to grant a corporation a particular constitutional right.

Pollman describes her test as an effort to “analyze[] the corporate dynamics and participants involved in the type of corporation—public, private or nonprofit—to determine whether any people likely *have a privacy interest at stake and whether the purpose of the privacy right* would be served by derivatively according it to the corporation.”<sup>54</sup> In other words, for

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54. Pollman, *supra* note 1, at 63–64 (emphasis added); *see also id.* at 33 (“[T]he analysis looks to whether a corporate right to privacy would protect the privacy interests of the people involved, such as shareholders, directors, and officers, or other participants such as employees.”). Earlier in her contribution, Pollman offers a description of the test as it would apply to corporate rights generically:

[T]his Article asserts that in determining whether to accord a right to a corporation, we must look to whether the purpose of the right is served by according it to the corporation in question—that is, whether it is necessary to protect natural persons—and if the right is of a type that inheres only in an individual in his or her individual capacity.

*Id.* at 54; *see also* Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1675 (“Courts should grant corporations a particular constitutional right only when doing so would serve the purpose of that right.”). The problem is the same, however: In seeking to determine whether the corporation should enjoy some right, we are to look only to the individual counterpart to that right. In this way, Pollman never considers the fact that other individual rights, or individual interests not backed by rights, might be served by granting the corporation the right in question.

Pollman draws this test not only from the doctrinal excavation she undertakes in *A Corporate Right to Privacy* but also from another article she wrote with Margaret Blair which offers a more general analysis of corporate constitutional rights. *See* Blair & Pollman, *supra* note 34. Notably, the test they articulate is compatible with either primary or secondary organizational rights, as we conceive of them. *See id.* (manuscript at 52) (identifying as “the correct question” an “incremental” inquiry into “whether extending a particular right to a corporation protects the rights of actual people and serves the purpose of the constitutional provision at issue”). Other theorists whom Pollman cites in support of her work seem also to allow that the corporation might enjoy rights different from those of the individuals whom the corporate rights are intended to protect. For example, she favorably quotes Meir Dan-Cohen for the proposition that “a derivative right serves ‘to safeguard or enhance the enjoyment of certain rights by others.’” Pollman, *supra* note 1, at 52 n.107 (quoting Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CALIF. L. REV. 1229, 1246 (1991)). But on Dan-Cohen’s view, unlike Pollman’s, one party might enjoy a right in order to protect the same right or other rights (or interests) held by others. *See* Dan-Cohen, *supra* at 1233 (“A right may be recognized in A out of concern for A himself. In such a case, A has what I shall

Pollman, rights of privacy are invariably personal to individuals, and corporations (and other organizational persons) can therefore meaningfully assert them, if at all, only “derivatively” on behalf of their individual members or “instrumentally” to serve the interests of individuals whom the corporation affects. To put the point in the terminology developed here, all corporate or organizational rights, for Pollman, are secondary rights.<sup>55</sup>

There are two problems with a test that limits corporate constitutional rights in this way. First, the test does not in fact track the case law from which it is supposedly distilled. Second, Pollman’s test leads to results that are not only in tension with the law but also less justifiable from a normative perspective. We elaborate on each problem in turn.

### 1. Doctrinal Departures

Pollman’s test, in both its generic form and with regard to privacy rights in particular, is narrower than what the case law mandates. Outside of the privacy context, the Supreme Court has recognized corporate constitutional rights where the corporate right is not the same as the individual right the former seeks to protect. Thus, for example, in *Pierce v. Society of Sisters*, an incorporated Catholic organization claimed that an Oregon law requiring compulsory public school education unconstitutionally interfered with its activities, which included operating religious schools.<sup>56</sup> The Court recognized that the law impermissibly abridged the Society’s substantive constitutional *rights* by undercutting their legitimate business activities and private property *guarantees*.<sup>57</sup> The Court acknowledged that businesses typically cannot complain when their revenues are

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call an *original right*. A right in *A* may also result from a concern not for him but for *B*. In this case, *A* will be said to have a *derivative right*. A guardian, for example, may be given such rights as are necessary for the effective execution of her role. She may, for instance, have a right to reimbursement for expenses incurred in carrying out her duties. However, the reason for the right to reimbursement lies in the concern for the ward’s interests, and only derivatively in the concern for protecting the guardian’s interests.”)

55. Jerry Kang appears to adopt a similar position. He writes: “A corporation *qua* corporation does not [have privacy rights]. Only the individuals that make up the corporation do. This does not mean that the corporation must lack standing to argue the privacy interests of its constituent individual members. It does mean, however, that the foundation of any such group privacy claim lies originally in the interests of individual human beings.” Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1210 (1998).

56. 268 U.S. 510 (1925).

57. *Id.* at 535–36.

reduced because of legitimate state regulation, but then argued that the regulation here was not legitimate because it interfered with parents' liberty interests in deciding on the kind of education they want for their children.<sup>58</sup> *Pierce*, then, presents a case where the corporation's constitutional rights to property are recognized as a means of protecting the distinct liberty interests of the corporation's "patrons," namely, the parents and children whom the religious and educational corporation serves.<sup>59</sup>

Further, for privacy rights in particular, the Court has not insisted that the corporate right obtains only where individuals' *privacy* interests are at stake: other individual interests or rights can suffice. Consider *NAACP v. Alabama*, a case in which the NAACP asserted a right to privacy in response to a governmental order that the NAACP furnish the names of its members.<sup>60</sup> The Court recognized the NAACP's privacy right in the form of what we would call a primary organizational right. The Court grounded the NAACP's right not only in the privacy rights of the NAACP's members (who, for fear of reprisals, had a legitimate interest in not being identified) but also in their rights of freedom of association.<sup>61</sup> Thus two sets of individual rights grounded the organizational privacy right recognized in *NAACP*: individual rights to privacy and individual rights to freedom of association.<sup>62</sup> The case demonstrates that a corporation can be accorded one right—here an organizational right to privacy—in order to protect a *different* right of the individuals involved with it—here a right to freedom of association.<sup>63</sup> And indeed while the NAACP members, in light of the reprisal threats, had compelling privacy interests at stake, other cases

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58. *Id.*

59. For an influential account of nonprofit organizations in terms of their "patrons," see Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 *YALE L.J.* 835 (1980).

60. 357 U.S. 449 (1958).

61. *Id.* at 462.

62. In the Court's words: "We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment." *Id.* at 466.

63. Again to quote the Court: "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* at 462. Pollman sees that rights of privacy can become "enmeshed" with "the freedom to associate and other rights." Pollman, *supra* note 1, at 82 (discussing *NAACP*). She does not suggest as we do, however, that an organizational right of privacy might be invoked in the service of a right of association.

demonstrate that the organization's privacy interests might be grounded *solely* in their members' associational rights, with no need to advert to the members' interests in remaining anonymous.<sup>64</sup>

In sum, Pollman maintains that the test to be distilled from the doctrine is one that seeks to determine whether some individual right should be ascribed to the corporation, but the existing doctrine is in fact more capacious, as it allows for the corporation to enjoy rights of its own, just so long as those rights ultimately serve individual rights or interests. The current doctrine as expressed in some leading precedents is more expansive in its recognition of organizational rights than the test Pollman adduces.

## 2. Unduly Narrow Framing

The constrained nature of Pollman's test gives rise to some unconvincing results. For example, in discussing whether we should recognize a right of privacy in the large, publicly traded corporation, Pollman examines the interests of the corporation's various participants. But she looks only to the *privacy* interests of these participants, not to other interests they might have. Thus, for example, she argues that the privacy rights of shareholders are not implicated in the corporation's activities because shareholders do not provide sensitive information to the corporation.<sup>65</sup> But shareholders might have other interests, and even rights, that would be sufficient to ground a right of privacy in the corporation. For example, Yahoo! might have privacy rights that protect it from needing to turn over information identifying users to the government, and these rights might be grounded not in its users' privacy rights nor in any

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64. See, e.g., *United States v. Hubbard*, 650 F.2d 293, 306 (D.C. Cir. 1980) (“[T]he nature and purposes of the corporate entity and the *nature of the interest sought to be protected* will determine the question whether under given facts the corporation *per se* has a protectable privacy interest.” (emphasis added)); *Colegio Puertorriqueno De Ninas, Liceo Ponceno, Inc. v. Pesquera De Busquets*, 464 F. Supp. 761, 766 (D.P.R. 1979) (collecting cases recognizing the right to privacy of collective entities and explaining that “[i]n each of these decisions, the right of privacy operated as a ban on the challenged actions only by reason of its being intimately connected to some [other] fundamental constitutional guarantee” held by the entity's members—for example, rights to freedom of expression or procedural due process).

65. Pollman, *supra* note 1, at 66 (“[A]s far as information flows, because shareholders are not active participants in the business, they typically do not provide or create information in their limited involvement that would implicate privacy interests.”); see also *id.* at 64–67 (arguing generally that shareholders' interests and rights will only rarely support a corporate privacy right).

rights of any other business participants. Instead, Yahoo!'s privacy rights might be justified by the interests of individual shareholders as follows: Shareholders want Yahoo! to succeed financially, Yahoo! will succeed if it is a site users want to frequent, and users will not want to frequent a site that discloses confidential information about them.<sup>66</sup> On this rationale, Yahoo! would enjoy a privacy right because it is in the shareholders' financial interests that it have this right. And Yahoo!'s right would have nothing to do with its shareholders' interest in keeping their own information private.

Pollman's narrow understanding of the test for corporate rights might also explain why she fails to find corporate decisional privacy rights. Pollman admirably surveys the scholarship on privacy, which recognizes both informational and decisional privacy, and she helpfully traces both kinds of privacy through their doctrinal development.<sup>67</sup> In applying her test, however, she contemplates only whether individuals' rights to informational privacy would justify a corporate privacy right; concerns for corporate decisional privacy fall out of the picture almost entirely.<sup>68</sup>

Presumably, the omission is deliberate. Again, Pollman believes that a corporation should have right X only if according right X is necessary for the protection of individuals' right X. So, on her account, the corporation would have a right to deci-

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66. A well-known teaching case in business ethics concerns a request from the Chinese government to Yahoo! to turn over information about users in order to proceed criminally. The freedom of speech of the user would be protected under many other national laws, putting Yahoo! in an ethical and legal bind. See SANDRA J. SUCHER & DANIEL BAER, *YAHOO! IN CHINA (A)* (Harvard Business School rev. 2011). We do not mean to suggest, by the way, that corporate privacy rights should be broadly recognized any time that it would be in the shareholders' interests. Scenarios implicating shareholders' interests, however, may often motivate a corporation to claim such rights.

With respect to understanding the economic interests and rights of participants in business corporations, we also do not believe that an analysis should be limited only to the interests and rights of shareholders. The board and managers of corporations answer to a broader constituency of interests that compose the firm. See, e.g., ORTS, *supra* note 2, at 53–108, 223–30, 254–55.

67. We describe these different kinds or meanings of privacy, including decisional and informational privacy, in Part III below.

68. Pollman considers decisional privacy rights at only one point in her analysis—in thinking about the rights of shareholders of the non-profit or private corporation. Pollman, *supra* note 1, at 78–79. She contends that “[t]he role of shareholders in private corporations is economic and not likely to implicate decisional autonomy,” *id.*, and then moves on. She never makes clear why she does not consider decisional privacy rights in the context of publicly traded corporations or for the sake of constituents other than shareholders.

sional privacy only if according it a right to decisional privacy was necessary for protecting individuals' rights to decisional privacy. But one might think that protecting decisional privacy rights would never require that these rights be grafted on to the corporation. After all, to have a decisional privacy right is to have the capacity to make certain important decisions by and for oneself. In this way, decisional privacy rights are non-delegable; we cannot graft them on to the corporation as an extension of the individual right since no such extension is conceptually possible. It would be paradoxical then to posit corporate decisional privacy rights—at least if one believes, as Pollman apparently does, that all corporate rights are secondary rights.

We do not know if the foregoing argument is in fact the one Pollman had in mind when she largely abandoned decisional privacy in her analysis, but it is consistent with her narrow understanding of the ground of corporate rights. There are, however, two problems with her understanding. First, the notion of organizational decisional privacy rights is not in fact conceptually impossible or even far-fetched. It seems instead that some paradigmatic individual decisional privacy rights can receive their full effect only with the participation of others—individuals and organizations. For example, a right to abortion would be an empty formality if doctors and organizations (e.g., hospitals or clinics) were not permitted the liberty to offer and participate in abortion procedures. It seems necessary, then, for hospitals or clinics to possess decisional privacy rights (i.e., rights to decide whether they will include pregnancy termination among their services) in order to protect a woman's right to choose. And the fact that the hospital or clinic's right is a *decisional right* is important because we think that hospitals or clinics should also be free to *refuse* to provide abortion services.<sup>69</sup> Similarly, and as we argue at greater length in the next Part, abortion and other reproductive rights might require as well the support of advocacy organizations like Planned Parenthood. These organizations also assert decisional rights to act in the world to advance the rights and interests of their beneficiaries.<sup>70</sup>

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69. See, e.g., Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501 (2012) (recognizing conscience rights that protect individuals' and organizations' rights to participate or else refuse to participate in the provision of abortion).

70. Planned Parenthood regularly brings lawsuits claiming to protect the constitutional rights of individual women under the *Roe v. Wade* line of cases. See, e.g., *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 320

More significantly, we could ground primary rights to organizational decisional privacy if we were to adopt a test broader than Pollman's—a test, for example, that allowed a corporation to assert right *X* to serve the interests or rights *Y* of some individuals. To be sure, the contexts in which the Supreme Court has explicitly recognized a right to decisional privacy have little relevance for the corporation. These cases largely concern rights around sex, medical treatment, and child rearing.<sup>71</sup> But the principled ground of the decisions in which these rights were secured has application beyond the specific acts to which the rights were applied. In particular, the relevant cases grounded decisional privacy in the values of autonomy or self-determination, and these values can be extended to organizational autonomy and self-determination as well.<sup>72</sup>

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(2006) (addressing a challenge brought by several abortion clinics seeking a declaratory injunction against a New Hampshire law requiring parental notification at least forty-eight hours prior to performing an abortion on a minor on the ground that the law did not explicitly permit physicians to perform emergency abortions when continued pregnancy threatened the minor's health); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 833 (1992) (addressing a challenge brought by five abortion clinics and one physician, on behalf of himself and other physicians providing abortion services, seeking a declaratory injunction against Pennsylvania law impeding access to abortion on demand).

71. See *supra* note 9 and accompanying text; see also *In re Quinlan*, 355 A.2d 647, 647 (N.J. 1976) (addressing the right to privacy under the U.S. and New Jersey Constitutions regarding a decision to withdraw life-sustaining treatment). In addition, the Supreme Court has recognized a right to be free of unwanted bodily invasions for purposes of evidence gathering, which sound in both decisional and informational privacy. See, e.g., *Rochin v. California*, 342 U.S. 165, 172 (1952) (“Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents . . . is bound to offend even hardened sensibilities.”); *Winston v. Lee*, 470 U.S. 753, 759 (1985) (“A compelled surgical intrusion into an individual’s body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be ‘unreasonable’ even if likely to produce evidence of a crime.”).

72. See, e.g., *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986) (“Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman’s decision . . . whether to end her pregnancy.”); Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 462 (1987) (“The exercise of privacy-promoting liberties . . . can foster traits and conditions feminists have long deemed paramount, including self-determination, participation as equals, and social contribution on a par with innate capacities.”); Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2056, 2058 (2003) (“The focus of decisional privacy is on freedom from interference when one makes certain fundamental decisions . . .”).

From a philosophical perspective, “privacy” may often serve as a placeholder for other values, such as “autonomy” or “self-determination.” See

Thus, in our view, corporations and other organizational persons should be seen to enjoy rights that protect a degree of autonomous decision-making and self-governance, which is captured by the notion of corporate decisional privacy rights.

To illustrate our argument, imagine that the executives of a business corporation decide that it would be in the corporation's financial interest to close American factories and set up factories overseas where labor is cheaper. Not wanting to lose their jobs, the American factory workers object and, moved by their objections, the government steps in to forbid the factory closures. One could argue that the government's intervention was the corporate analog of a compelled bodily restraint, a standard violation of decisional privacy rights.<sup>73</sup> The corporation's complaint would sound in decisional privacy, but would not depend on any individuals' decisional privacy rights. In forbidding the relocation, the government would not be interfering with the rights of the managers, workers, or shareholders to decide where they wanted to work or invest. It would be interfering with the corporation's decision about where it wanted to run its operations. And if we think the corporation's decision should be protected as a matter of right, then we must subscribe to the idea that corporations have rights of self-determination analogous to, but not overlapping with, individuals' rights of self-determination. That is, corporations have primary decisional privacy rights. Again, and as with all pri-

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*supra* note 17 and accompanying text; see also Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 446 (1983) ("The Court itself has used the unfortunate term 'privacy' for this foundational idea, but philosophers, reading between the lines of the leading judicial opinions, have had no difficulty identifying it as the concept we have often called personal autonomy or self-determination . . . ." (footnote omitted)). We are agnostic here about the usefulness of retaining the label of "privacy" to describe various rights and values at stake in legal decisions. What matters is the underlying substance.

73. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 535, 543 (1942) (striking down a statute mandating sterilizations for those who had two or more felony convictions); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1340 (2d ed. 1988) ("[T]he meaning of *Skinner* is that *whether one person's body shall be the source of another life must be left to that person and that person alone to decide.*").

We do not take a position regarding how background legal rules should deal with this situation of factory closings and firings. One statutory approach might require giving notice of the factory closing. Another might argue that employees should have some governance authority over these kinds of decisions. Yet a third might provide fired employees with retraining benefits. These possibilities, however, do not detract from the main point that decisional autonomy concerns may arise for organizations as well as individual persons.

many corporate rights, individual interests would ground the corporation's rights. In the factory relocation case, the relevant interests would be those of shareholders and other owners who prefer that the corporation increase profits by pursuing a business strategy designed to reduce costs. But the corporation's right to decide where and how it will operate is the corporation's in the first instance.

With that said, our aim here is not to defend particular instances of corporate decisional privacy rights. It is instead to argue that Pollman's analysis occludes even the possibility of their existence in contravention of corporate rights jurisprudence, both as it is and as it should be.

### III. THE MANY MEANINGS OF PRIVACY

At this point, we step back from critiquing Professor Pollman's proposed test and engage its substantive results. Our approach here is normative: When and why should corporations enjoy rights to privacy? To advance the inquiry, we follow other theorists in categorizing privacy along three dimensions and then suggest briefly how these different meanings of privacy affect how we think about organizations asserting legal rights to protect these different kinds of privacy. The three dimensions of privacy are (1) "decisional privacy" in one's personal life, (2) "informational privacy" about one's activities, and (3) "local privacy" protecting particular places (such as one's home or office).<sup>74</sup>

#### A. DECISIONAL PRIVACY

As we have seen, a right to "decisional privacy" involves cases in which one may respond to inquiries about certain per-

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74. See, e.g., RÖSSLER, *supra* note 6, at 9, 79–168; Schwartz, *supra* note 72, at 2058 & n.11 (identifying, in addition to informational and decisional privacy, "a third kind of privacy: physical privacy, or the ability to be undisturbed at home"); see also Anita L. Allen, *Privacy and Reproductive Liberty*, in "NAGGING" QUESTIONS: FEMINIST ETHICS IN EVERYDAY LIFE (Dana E. Bushnell ed., 1995) (identifying four tiers of privacy: decisional, informational, bodily integrity and self-determination, and privacy at home); Kang, *supra* note 55, at 1202–03 (describing decisional, informational, and physical privacy). Unlike Allen, we treat bodily integrity and self-determination as an integral part of decisional privacy, but in other respects follow the three-part schemes advanced by Allen, Rössler, and Schwartz. We also do not take a strong position on these categories. We agree with the general sense of many commentators as well as courts that "privacy" is an expansive concept that is not easily defined or neatly conceptualized. See *supra* notes 17–19 and accompanying text.

sonal issues that “it’s none of your business.”<sup>75</sup> It refers to a zone of “personal space” in which individual adult people may make decisions autonomously and free from outside interference. As one scholar defines the value underlying this kind of privacy: “Decisional privacy and its protection establishes a space for manoeuvre in social action that is necessary for individual autonomy.”<sup>76</sup> An emblematic example is reflected in the sex-and-reproduction jurisprudence in the United States Supreme Court and illustrated in cases such as *Griswold v. Connecticut*,<sup>77</sup> *Roe v. Wade*,<sup>78</sup> and *Lawrence v. Texas*.<sup>79</sup> These cases demonstrate how at least one area in modern social life is marked off as “private” from the intrusive reach of government regulation.<sup>80</sup>

On first glance, it may appear obvious that an organizational person cannot have sex or become pregnant, and therefore it would be absurd to say that an organization could assert a decisional right of privacy that would not be directly derivative of individual rights.<sup>81</sup> Planned Parenthood, for example, is an organization that regularly brings lawsuits claiming to protect the constitutional rights of individual women under the *Roe v. Wade* line of cases.<sup>82</sup> The American Civil Liberties Union is another organization that focuses on legal representation for individuals faced with alleged discrimination with respect to their decisions about sex or reproduction, as well as other privacy issues.<sup>83</sup> These organizations may well have a broader view about the appropriate scope of constitutional rights of privacy, but they are clearly acting legally on behalf of individual

75. RÖSSLER, *supra* note 6, at 81.

76. *Id.* at 80; *see also* Allen, *supra* note 72; Schwartz, *supra* note 72.

77. 381 U.S. 479, 479 (1965) (recognizing a constitutional right to privacy regarding decisions to use contraception).

78. 410 U.S. 113, 114 (1973) (recognizing a constitutional right to privacy regarding decisions to continue a pregnancy or have an abortion).

79. 539 U.S. 558, 558 (2003) (recognizing a constitutional right to privacy regarding the choice of sexual partners).

80. *See also supra* notes 9–10 and accompanying text.

81. *Cf. supra* text accompanying notes 68–70 (advancing the argument that decisional privacy rights are non-delegable).

82. *See supra* note 70.

83. *See, e.g.,* *Ashcroft v. ACLU*, 535 U.S. 564, 564–65 (2002) (rejecting a broad challenge to the Child Online Protection Act under the First Amendment right of freedom of speech). For an overview of the ACLU’s Reproductive Freedom Project, *see Reproductive Freedom*, ACLU, <https://www.aclu.org/reproductive-freedom> (last visited Mar. 2, 2015). The ACLU is also active in issues regarding “digital privacy” and “consumer privacy.” *See Protecting Liberties in the Digital Age*, ACLU, <https://www.aclu.org/protecting-civil-liberties-digital-age> (last visited Mar. 2, 2015).

people, at least in litigation. In our terms, organizations in these cases are asserting secondary rights.

Further, there is no reason to think that only nonprofit or advocacy organizations can support individuals' decisional privacy rights in this manner. We have already seen that hospitals and clinics might do so, some of which are for-profit entities.<sup>84</sup> And even less savory businesses might have a hand in advancing individual decisional privacy rights.

Pollman, in fact, suggests a good example of a situation of organizational decisional privacy when discussing the case of *Fleck & Associates, Inc. v. City of Phoenix*.<sup>85</sup> In this case, the Court of Appeals rejected a privacy claim brought by a for-profit corporation that ran "a gay men's social club."<sup>86</sup> The club, which was called Flex, charged annual, monthly, or daily "memberships" that granted access to business premises on which consensual sex acts took place.<sup>87</sup> The club contested enforcement of a municipal ordinance banning any "live sex act business" in which "one or more persons may view, or may participate in, a live sex act for a consideration."<sup>88</sup> As Pollman notes, the Court held that the club did not have "associational standing" to invoke rights of privacy on behalf of its member customers and explained its decision on rather formalistic grounds.<sup>89</sup> On the merits, the district court also expressed the view that a for-profit business may not legitimately claim a right of privacy for itself when providing "public" venues for sex.<sup>90</sup>

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84. See *supra* text accompanying notes 68–69. Although the line between "business" and "nonprofit" organizations is important, it is not always a clear line, and hospitals present a good example of a kind of organization that is sometimes "for-profit" and sometimes "nonprofit." See ORTS, *supra* note 2, at 204 (describing "hospitals and other health care organizations" as well as "educational institutions" as "borderline cases"); cf. Hansmann, *supra* note 59, at 840–41, 862–73 (introducing the apt intermediate concept of a "commercial nonprofit"). We submit that for purposes of analysis regarding organizational privacy (as well as other issues, such as application of health care laws) this distinction should not be considered essential. We argue further against leaning too heavily on a distinction between "public" and "private" organizations for purposes of privacy rights analysis in Part V below.

85. 471 F.3d 1100 (9th Cir. 2006); Pollman, *supra* note 1, at 38–39.

86. *Fleck*, 471 F.3d at 1102.

87. *Id.* at 1102–03.

88. *Id.* (citing PHOENIX, AZ CODE § 23–54(B)(3)–(C)).

89. Pollman, *supra* note 1, at 39 & n.51 (observing that the court "formalistically reasoned" that a right of privacy could not extend to corporations and nodded to *Morton Salt* for authority).

90. *Fleck*, 471 F.3d at 1103. The Supreme Court explicitly limited its holding in *Lawrence v. Texas* regarding a right of privacy of consenting adults

One does not have to think too hard, though, to come up with variations on the facts of *Fleck* that may pose a challenge to a blanket rule that organized groups could never invoke privacy rights regarding consensual sexual activity. Eliminate the “public” aspects of the case, for example, and consider a private, members-only social club involving sexual practices among consenting adults (use your imagination—we won’t supply details that are easy to conjure). Suppose that the police decide to raid the club, or harass patrons as they enter or exit. The police claim that the crackdown is aimed at curbing possible illegal activity (e.g., instances of commercialized sex), but the true motive is an effort to enforce public morality against the club’s libertine ways. The social club seeks to enjoin the harassment and files suit asserting a constitutional right of privacy. The club’s argument would be that individuals should be free to decide where and how they will have sex, and the club operates to facilitate their interests in a particular kind of sexual activity. The club itself, that is, should enjoy a right to decide what kind of sex it wants to support, and it should enjoy this right because individuals will be able to enjoy the full scope of their decisional privacy rights around sexual activity only if there are spaces—real or electronic—that allow them to connect with

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to engage in sexual practices “in the confines of their homes” and not extending to “public conduct or prostitution.” *Lawrence v. Texas*, 539 U.S. 558, 567, 578 (2003). Some commentators have questioned this limitation to locations of “private” property such as homes (i.e., residential houses and apartments). *See, e.g.*, Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUM. J. GENDER & L. 1, 4 (2008) (arguing, in support of an expansion of the right of sexual privacy to include some “public” spaces, that “what should ultimately matter in determining the right’s ambit is not *where* the sex takes place but whether the sexual actors’ expectations of privacy are reasonable”).

A separate possible ground distinguishing *Fleck* from other decisional privacy cases is that the commodification of sexual activities differs from consensual sexual practices that do not involve the exchange of money. We leave for others—or another day—discussion of these issues. There is an ongoing substantive debate, for example, about whether prostitution and other forms of sexual activities should be legalized. *See, e.g.*, Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13 (1993) (arguing against prostitution but admitting uncertainty about the appropriate legal response); Scott R. Peppet, *Prostitution 3.0?*, 98 IOWA L. REV. 1989 (2013) (exploring whether prostitution services offered over the internet might eliminate traditional concerns about trading sex for money well enough to justify the legalization of these services). It is also a different question outside the scope of our Article whether commercial practices that commodify sex should be decided by constitutional interpretation of privacy or other rights, rather than by statutory legislation.

others who share their interests.<sup>91</sup> Here too, then, the club would be asserting decisional privacy rights that originated with the club's members. The fact that the club may be a for-profit venture, moreover, would seem immaterial.

More generally, one can also imagine other kinds of demands for evidence of internal organizational decision-making that may deserve protection on grounds of decisional privacy. For example, a business corporation's right to consult legal counsel seems appropriate to protect in a manner similar to attorney-client privileges accorded to individuals. Although the scope of the attorney-client privilege for business corporations and other organizations is usually considered a matter of ordinary law, the availability of the privilege implicates "clients' Constitutional rights to counsel" under the Sixth Amendment.<sup>92</sup> In cases such as *Upjohn Co. v. United States*, the Supreme Court has recognized and given scope to this privilege for business corporations.<sup>93</sup> Similarly to individuals, organizations must often consult lawyers to determine the best course of action with respect to various activities and operations. Organizations must also make decisions internally about how to handle litigation (e.g., whether to settle a case or appeal a decision). Affording attorney-client privileges in these cases, then, protects a primary right of the organization to autonomy and, in this sense, to decisional privacy.

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91. Internet websites for "dating" and "hook ups" may often also fall into this category. See, e.g., Molly Wood, *Led By Tinder, the Mobile Dating Game Surges*, N.Y. TIMES, Feb. 5, 2015, at B8.

92. David M. Brodsky, *Updates on the Corporate Attorney-Client Privilege*, 8 SEDONA CONF. J. 89, 92 (2007) (quoting *The Decline of the Attorney-Client Privilege in the Corporate Context*, Survey Results, Presentation to the United States Congress and the United States Sentencing Commission (Mar. 2006)). As Brodsky observes, the privilege recognizes a kind of "privacy" in this context. *Id.* at 91–92; see also Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 60 (2002) ("Attorneys and clients assessing their own relationships believe the [attorney-client] privilege promotes candor, communication, and sound legal advice, and serves other important interests, such as *protecting privacy* and ensuring loyalty." (emphasis added)).

93. 449 U.S. 383 (1981). In *Upjohn*, the Court construed the Federal Rules of Evidence and principles of the common law to protect the "attorney work product" privilege of a company contesting a far-reaching discovery request in a tax case. *Id.* at 386–89, 397–402. The ability of a corporation to assert the attorney-client privilege has been recognized at least since *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 336 (1915) (cited in *Upjohn*, 449 U.S. at 390).

## B. INFORMATIONAL PRIVACY

Another important kind of privacy involves the access, availability, and distribution of various kinds of information and data about people. Information that is deemed “personal”—such as medical records, personal journals, intimate correspondence between friends and lovers, and even unclothed or compromising photos or videos—should have legal protections.<sup>94</sup> This kind of “informational privacy” involves the extent to which the law exerts or allows an individual to have “control over what other people can *know* about oneself.”<sup>95</sup> The question

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94. We implicitly rely here on an intuitive dichotomy between the public and private, hewing to the idea that what is private, or personal, should be shielded from public view. Helen Nissenbaum has developed an alternative account for capturing what is at stake in informational privacy. *E.g.*, HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* 1–11 (2010); Helen Nissenbaum, *A Contextual Approach to Privacy Online*, 140 *DAEDALUS* 32, 32 (2011) [hereinafter Nissenbaum, *A Contextual Approach*]; Helen Nissenbaum, *Privacy As Contextual Integrity*, 79 *WASH. L. REV.* 119, 119 (2004). She refers to this account as “contextual integrity,” and it looks to the norms governing different contexts to determine whether a privacy violation has occurred. *See, e.g.*, Nissenbaum, *A Contextual Approach*, *supra* at 119–25. More specifically, Nissenbaum has two kinds of norms in mind—norms of appropriateness and norms of flow. The first govern substance. For example, it is appropriate for someone to share her financial situation with her tax accountant but not necessarily with her extended family. It is also appropriate for someone to share religious practices with other members of her place of worship, but not to be forced to disclose her religion with her employer. *See id.* at 138–40. Norms of flow govern expectations around the amount of sharing, and the way the substance shared will be treated by others. Thus we expect friends to be open with us, and to treat sensitive information we share with them as presumptively confidential. We do not have similar expectations about the way strangers will treat information about us that we make known, even if we do not intend that they come to know it. For example, the passenger who has a loud conversation on his cell phone during a train ride has no reasonable expectation that others will not disseminate the content of the conversation that they have been made to hear. *See id.* at 140–43. For Nissenbaum, these two sets of norms provide the indicia for determining privacy violations. As she writes, “a normative account of privacy in terms of contextual integrity asserts that a privacy violation has occurred when either contextual norms of appropriateness or norms of flow have been breached.” *Id.* at 143. We believe that Nissenbaum’s account contributes appealing subtlety to the coarser public-private distinction. With that said, the insights into informational privacy that we offer here—and, in particular, whether corporations should enjoy informational privacy rights—are compatible with either her account or the more traditional, dichotomous one that she contests. For that reason, we do not engage her theory further in this context (so to speak).

95. RÖSSLER, *supra* note 6, at 111; *see also* Charles Fried, *Privacy*, 77 *YALE L.J.* 475, 483 (1968) (“Privacy . . . is control over knowledge about oneself.”). It is important to emphasize that informational privacy involves “not only our interest in determining *whether* personal information is revealed to another person but also our interest in determining *to whom* such information

here is whether organizations should also be able to assert claims of informational privacy rights.

Again, we believe that Pollman underestimates the circumstances in which organizations might legitimately claim both primary and secondary organizational rights in situations involving informational privacy. Consider, for example, a variant on the Yahoo!-like situation discussed above, where the Chinese government demands personal information about someone who is suspected under Chinese criminal law of violations for speaking negatively about the Chinese government or Communist Party in a manner that the company deems a protected right of freedom of speech.<sup>96</sup> And it is not only the Chinese. In the United States, the secretive National Security Agency (NSA) has been revealed to have violated privacy rights under existing laws in thousands and perhaps millions of instances.<sup>97</sup>

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is revealed.” *In re Search Warrant*, 71 A.3d 1158, 1177 (Vt. 2012); *see also* Nat’l Cable & Telecomms. Ass’n v. FCC, 555 F.3d 996, 1001 (D.C. Cir. 2009) (“It is widely accepted that privacy deals with determining for oneself when, how and to whom personal information will be disclosed to others.”); Fried, *supra*, at 482 (“It is not true, for instance, that the less that is known about us the more privacy we have. Privacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves.”).

96. *See supra* note 66 and accompanying text.

97. *See, e.g.*, Barton Gellman, *NSA Broke Privacy Rules Thousands of Times Per Year, Audit Finds*, WASH. POST (Aug. 15, 2013), [http://www.washingtonpost.com/world/national-security/nsa-broke-privacy-rules-thousands-of-times-per-year-audit-finds/2013/08/15/3310e554-05ca-11e3-a07f-49ddc7417125\\_story.html](http://www.washingtonpost.com/world/national-security/nsa-broke-privacy-rules-thousands-of-times-per-year-audit-finds/2013/08/15/3310e554-05ca-11e3-a07f-49ddc7417125_story.html); *see also* David Cole, *Must Counterterrorism Cancel Democracy?*, N.Y. REV. BOOKS (Jan. 8, 2015), *available at* <http://www.nybooks.com/articles/archives/2015/jan/08/must-counterterrorism-cancel-democracy> (noting that Edward Snowden’s disclosures revealed that the NSA and others “have been collecting billions of electronic communications—including the contents of phone calls, cell phone location data, texts, e-mails, chats, and contact lists—from wide swaths of people under no suspicion whatsoever”). For a legal discussion on privacy implications, *see, for example*, G. Alex Sinha, *NSA Surveillance Since 9/11 and the Human Right to Privacy*, 59 LOY. L. REV. 861 (2013). One commentator has argued that the digital changes wrought by the NSA are so deep and widespread that the idea of “a right to privacy” should be abandoned in favor of reconceptualization of “a right to security.” Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 104 (2008). Note that Rubenfeld’s objective is not to argue against the importance of privacy rights; it is instead to argue that we should not expect privacy rights to give us the Fourth Amendment protections we want and expect from a democratic government. Privacy, that is, is the wrong conceptual foundation for a well-functioning Fourth Amendment. *Id.* at 118. Given that we are not concerned with the Fourth Amendment per se, we do not consider Rubenfeld’s arguments further here.

Pollman recognizes that for-profit corporations engaged in digital technology might have a role to play in safeguarding the privacy interests of their users.<sup>98</sup> But she characterizes this role as merely “instrumental.”<sup>99</sup> By contrast, given the stakes involved here—and the organizational realities of the digital revolution that effectively enlists private organizations as well as government to serve as “gatekeepers”—we believe that organizations should also be allowed to invoke primary organizational rights of informational privacy against government intrusion (even, and perhaps especially, when widespread intrusions are presumptively justified by proclaimed goals of “national security”).

To illustrate this argument, consider that some internet and social media companies have adopted strong privacy policies in order to attract customers to their services.<sup>100</sup> It would seem odd to suggest that these companies could not defend the privacy interests of their users directly, exerting primary rights, rather than in a strictly secondary or “derivative” manner. For example, companies offering search engines, or email or internet service providers, might refuse to disclose to the NSA their encryption methods, and they might refuse to do so not merely to protect their users’ privacy rights but also their own work product.<sup>101</sup> In other words, over and above the desire to preserve customers’ privacy, these corporations might have an independent interest in controlling who gets access to their encryption technology and how it is used. Recognizing a corporate primary right to informational privacy would protect that interest.

If one accepts our view, a legal landscape emerges in which some organizations fight for privacy rights at the same time

98. Pollman, *supra* note 1 at 147–50.

99. *Id.* at 149.

100. Mozilla, for example, is a nonprofit search engine which makes a point of preserving the privacy of its users. See *Get Smart on Privacy*, MOZILLA, <https://www.mozilla.org/en-US/privacy/tips> (last visited Mar. 3, 2015). Other search engines such as DuckDuckGo and Ixquick market themselves as privacy-friendly. A. Michael Froomkin, “*PETs Must Be on a Leash*”: *How U.S. Law (and Industry Practice) Often Undermines and Even Forbids Valuable Privacy Enhancing Technology*, 74 OHIO ST. L.J. 965, 970 (2013). Alternatives to Facebook have arisen after it became a public company. See, e.g., Jason Gilbert, *Facebook Alternatives: 10 New Social Networks To Join if Facebook’s Too Corporate For You*, HUFFINGTON POST (May 17, 2012), [http://www.huffingtonpost.com/2012/05/16/facebook-alternatives\\_n\\_1522647.html](http://www.huffingtonpost.com/2012/05/16/facebook-alternatives_n_1522647.html).

101. New cell phones from Google and Apple, for example, have built-in encryption that the companies themselves cannot decode. Cole, *supra* note 97.

that other organizations (maybe even the same ones) are violating privacy rights. Consider large social media and internet companies for example. Google may simultaneously play two important roles. First, it protects privacy rights by asserting its own decisional authority and exerting both primary and secondary privacy rights against overintrusive government surveillance. Second, and at the same time, Google's business practices raise questions about whether its own use of consumers' information for "big data mining" and other commercial purposes violates privacy rights or expectations.<sup>102</sup> We discuss the threat that business firms pose to privacy rights further below in Part VI. Our point here is simply to observe that in the age of "big data" and the ever-increasing spread of internet, it seems out-of-step to argue that organizations should not play a role in asserting rights of informational privacy protection.<sup>103</sup> If only lone individuals may bring legal claims, concerns expressed by some commentators about the "death of privacy" may well come true.<sup>104</sup>

### C. LOCAL PRIVACY

A third kind of privacy involves the protection of particular places that are reserved for private or personal interactions. The paradigmatic example of this kind of "local privacy" is the "private home," but it extends also to "the privacy of the household, of one's flat or room, and thus the privacy of personal objects, which also form an inherent part of the privacy of these spaces."<sup>105</sup> The purpose of recognizing privacy of place includes promotion of intimate family and other personal relationships, as well as a place for solitude and reflection, "a room of one's own."<sup>106</sup>

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102. For some further examples, see Nissenbaum, *A Contextual Approach*, *supra* note 94, at 32 (collecting examples).

103. For expressions of general concerns regarding the loss of privacy in our digital age, see, for example, Dennis D. Hirsch, *Protecting The Inner Environment: What Privacy Regulation Can Learn From Environmental Law*, 41 GA. L. REV. 1 (2006); Joseph Jerome, *Big Data: Catalyst for a Privacy Conversation*, 48 IND. L. REV. 213 (2014); Grover Joseph Rees, *Slouching Toward Mordor*, 14 ENGAGE 90 (2013); Derek S. Witte, *Privacy Deleted: Is It Too Late To Protect Our Privacy Online?*, 17 J. INTERNET L. 1 (2014).

104. A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1461 (2000) ("The rapid deployment of privacy-destroying technologies by governments and businesses threatens to make informational privacy obsolete.")

105. RÖSSLER, *supra* note 6, at 142.

106. *Id.* at 142–43; *see also* VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* (Harcourt First Harvest ed. 1989) (1929).

The value of local privacy relates to the social and legal recognition of private property. Hegel connects private property to self-actualization.<sup>107</sup> One exerts one's will, according to Hegel, not just through one's acts but also through one's objects. If one's personality, as manifested through objects, is not to be fleeting, then property rights are required, so that one can control the objects one has affected, and exclude others from interfering with them.<sup>108</sup> Contemporary theorists also argue for heightened protection for property that is *personal*: objects, real estate, or intangible property that has become wrapped up with one's sense of self.<sup>109</sup> In these ways, privacy and property rights are bound up with each other. It is not necessary to elaborate on this complicated relationship here.<sup>110</sup> However, it is important to note that organizations assert private property rights—and these assertions involve at least some forms of legal privacy protection both in theory and practice. In this context, Pollman does not seem to give sufficient weight to the fact that courts have long applied some constitutional protections of privacy, specifically those under the Fourth Amendment's protection against unreasonable searches and seizures, to business firms as well as other organizational persons.<sup>111</sup>

In fact, private property requires some degree of legal protection from government intrusion even to exist. Constitutional protection against “unreasonable searches and seizures,” which

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107. GEORG HEGEL, *PHILOSOPHY OF RIGHT* ¶¶ 41–45 (T.M. Knox trans., Oxford Univ. Press First ed. 1952) (1821) (noting that an individual demonstrates ownership of property by imposing his will on it and thereby “occupying” it).

108. See Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 333 (1988) (“Property becomes expression of the will, a part of personality, and it creates the conditions for further free action.”). *But cf.* Cohen, *What Privacy Is For*, *supra* note 17, at 1905 (“The self who is the real subject of privacy law and policy is socially constructed, emerging gradually from a preexisting cultural and relational substrate.”).

109. See, e.g., Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 959–61 (1982).

110. For one treatment of the relationship between “public” and “private” in connection with privacy as a value, see RÖSSLER, *supra* note 6, at 169–92. One of us has elsewhere discussed the importance and conceptual difficulties involved in the “public-private distinction” with respect to property organized in business enterprises. ORTS, *supra* note 2, at 109–31.

111. See *supra* note 8 and accompanying text; see also Allen, *supra* note 11, at 628–30 (collecting cases). Pollman observes that corporations have been accorded rights under the Fourth Amendment, but she does not discuss the connection that this protection has with values of privacy. Pollman, *supra* note 1, at 28. Instead, she seems to categorize Fourth Amendment cases as unrelated to privacy rights. *Id.* at 80–81. At most, she sees privacy as a consideration to be “factored into” Fourth Amendment tests. *Id.* at 55.

often requires “warrants” to be issued only after an advance showing of “probable cause” for suspicion of illegal activity, constitute one significant support of private property.<sup>112</sup> Cases have extended this principle to the context of private property organized in business form, including large corporate enterprises. “Plainly,” as the Supreme Court has observed, “a business establishment or an industrial or commercial facility enjoys certain protections under the Fourth Amendment.”<sup>113</sup>

One commentator has observed that even within the Fourth Amendment context, “the reasonable expectation of privacy [test] . . . takes on different meanings in different contexts.”<sup>114</sup> We do not delve more deeply into these different meanings here. If one agrees that the Fourth Amendment protects privacy, however, and if one agrees that organizational persons, including business firms, may legitimately assert constitutional protections, then the normative and empirical assertions that privacy rights of organizations are minimal must be revised. At the very least, we should recognize that we may not

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112. U.S. CONST. amend. IV. Another important constitutional protection guarantees private property against uncompensated “takings.” U.S. CONST. amend. V (prohibiting the “tak[ing]” of “private property” for “public use” without “just compensation”).

113. *Dow Chemical Co. v. United States*, 476 U.S. 227, 235 (1986). In *Dow*, the Court recognized that business corporations may assert protection of “reasonable expectations of privacy” under the Fourth Amendment, but held that this protection did not extend to aerial outdoor photography conducted by agents of the Environmental Protection Agency. *Id.* at 235, 238–39. An accompanying opinion of four Justices lamented that this holding marked “a drastic reduction in the Fourth Amendment protections previously afforded to private commercial premises under our decisions.” *Id.* at 244 (Powell, J., concurring in part and dissenting in part). “Fourth Amendment protection of privacy interests in business premises,” the opinion noted, is based on “precedents [that] leave no doubt that proprietors of commercial premises, including corporations, have the right to conduct their business free from unreasonable official intrusion.” *Id.* at 245 (citations omitted).

114. Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 549 (2007). Kerr describes four different “models” as involving “a probabilistic model,” “a private facts model,” “a positive law model,” and “a policy model.” *Id.* at 503. All of them refer to privacy considerations.

Digital technologies and the ubiquitous spread of computers and the internet raise particularly difficult problems in the Fourth Amendment context. “Personal computers [and smart phones],” as one court has observed, “often store every aspect of a citizen’s personal life.” *In re Search Warrant*, 71 A.3d 1158, 1180 (Vt. 2012); see also Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 533 (2005) (“Computers are like containers in a physical sense, homes in a virtual sense, and vast warehouses in an informational sense.”); Raphael Winick, *Searches and Seizures of Computers and Computer Data*, 8 HARV. J.L. & TECH. 75, 78 (1994) (“[T]he massive storage capacity of modern computers creates a high risk of overbroad, wide-ranging searches and seizures.”).

be able to arrive at a determinate answer as to whether a particular form of organization should enjoy a right to privacy in general terms. Variations among kinds and purposes of organizations, as well as different meanings and rationales for protecting values of “privacy,” counsel a more cautious and deliberative approach.

#### IV. BEYOND CORPORATIONS

It is not only Professor Pollman’s conception of the meaning and circumstances justifying corporate constitutional privacy rights that is, we believe, too narrow. There is another sense in which the scope of her project might be profitably enlarged. Pollman’s focus is explicitly on “corporations” and whether corporations as presumptive “persons” have a “right to privacy.”<sup>115</sup> We agree with Pollman that at least for matters of convenience and convention, the law has created and recognized “corporations” as legal “persons” that have the ability to have “standing” and raise various substantive claims in court.<sup>116</sup> We agree also that the term “corporation” is an expansive legal conception that embraces (at least in U.S. law) both business enterprises and nonprofit organizations.<sup>117</sup> In addition, and not mentioned by Pollman, the “corporation” is also a convenient legal form used for municipalities and townships (e.g., “the corporation limit of X city” signs that one sees on highways in the United States). The idea of the “corporation,” then, is an even more flexible term than Pollman recognizes, and it is used by various kinds of collective groups of people for different purposes.<sup>118</sup>

Furthermore, Pollman’s analysis is limited by a focus on “corporations” without recognizing also that any principles regarding privacy should apply to other “non-corporate” groups as well. With respect to business enterprises, for example, there is no reason that an analysis regarding privacy should not extend to partnerships, limited liability companies, and even sole pro-

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115. Pollman, *supra* note 1, at 27.

116. See, e.g., ORTS, *supra* note 2, at 27–28, 40–50.

117. Pollman, *supra* note 1, *passim* (referring to the prevalent use of “corporations” for both businesses and nonprofit organizations); see also ORTS, *supra* note 2, at 200–15 (discussing the difference between profit and nonprofit enterprises using different legal forms).

118. For an overview of the historical conceptual development of the term, see ORTS, *supra* note 2, at 127–28. See also ALFRED F. CONARD, *CORPORATIONS IN PERSPECTIVE* 127–32 (1976).

prietorships, as well as business corporations.<sup>119</sup> The Supreme Court has agreed with this approach and insisted that, for many legal issues, the specific form of enterprise is irrelevant for purposes of constitutional analysis. For example, the constitutional protection of corporate business firm records extends to other organizational business persons, as well as labor unions.<sup>120</sup> In other words, there is nothing inherently special about using a “corporate” form that should make a major difference with respect to a constitutional analysis regarding various privacy rights claims as they apply to organized groups. Although it may be true that business firms operating on the profit motive may deserve greater regulatory scrutiny for some purposes, it does not follow that jurists or scholars should be more skeptical about privacy (or other) rights when it comes to for-profit corporations relative to other kinds of firms.

As Pollman recognizes, different outcomes may revolve around further questions, such as the size and scope of a business corporation: a very large firm traded on public stock markets versus a very small firm closely held by a more limited group of people.<sup>121</sup> One may imagine that concerns about privacy may to some extent track organizational size. One-person corporations, for example, are allowed, and it would be wrong and overly formalistic to say that simply because a single person is acting as a “corporation” would mean that all rights of privacy should be rejected.<sup>122</sup> Similarly, nothing would seem to turn in principle on whether a particular nonprofit organization was “incorporated” or organized in some other fashion. For example, whether a labor union, a political party, a church or synagogue, or any other political or social association of people adopts the legal form of an unincorporated association, part-

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119. In modern legal practice, business participants have a wide degree of choice regarding the legal form of enterprise, including all of the options listed in the text and more. For a detailed review of these options, see, for example, ORTS, *supra* note 2, at 175–222.

120. In *Bellis v. United States*, for example, the Court made clear that “any thought that the principle formulated in [its previous] decisions was limited to corporate records was put to rest in *United States v. White*, [322 U.S. 694 (1944)]. In *White*, we held that an officer of an unincorporated association, a labor union, could not claim his privilege against compulsory self-incrimination to justify his refusal to produce the union’s records pursuant to a grand jury subpoena.” 417 U.S. 85, 89 (1974); *cf. also id.* (listing other Supreme Court cases where the Court denied the privilege against self-incrimination to other kinds of unincorporated entities).

121. Pollman, *supra* note 1, at 62–84.

122. Pollman would seem to agree. *See id.* at 78. Although historically there was some reluctance to allow one-person corporations, they are now widely accepted as legitimate. *See, e.g.*, ORTS, *supra* note 2, at 155, 178–80.

nership, or trust rather than a “corporation” does not seem particularly relevant to determining how particular cases regarding rights of privacy should be decided.

In general, then, we believe that one should not make too much of whether a “corporation” is used as a form either of business or nonprofit enterprise. The relevant considerations should instead focus on the particular context of the claim and the relationship of a particular organizational person (no matter its legal form) to the claim.

In this respect we see nothing wrong with the approaches taken by courts in the District of Columbia Court of Appeals (and elsewhere) suggesting as follows: “Privacy rights accorded to artificial entities are not stagnant, but depend on the circumstances.”<sup>123</sup> In contrast to Pollman’s conclusion that courts should not usually recognize rights of privacy for corporations (and especially, in her view, large public corporations), we recommend a more neutral starting point that will better allow for an incremental legal approach that would address particular kinds of privacy rights raised by particular organizational persons over time, sensitive to the circumstances and interests motivating the privacy claims. To say, as some courts have done, that tests will “depend on the circumstances” leaves open the possibility for precedents to develop, which will in turn guide courts with respect to particular kinds of issues, without attempting to draw bright lines in advance against constitutional and statutory development.

## V. ORGANIZATIONAL COMPOSITION

We shift now from considerations of organizational form to considerations of who constitutes the organization in question. Professor Pollman’s approach does not undertake a careful analysis of the relevant “participants” or “stakeholders” in a business enterprise, or other nonprofit or social organization. If the “private rights” of an organization are “derivative” or conceptually dependent on the membership of the group (our secondary organizational rights), then it is rather important to determine *who counts* as members of the group. Similarly, if an organization’s rights are “instrumental” with respect to protecting other individual rights or if the organization enjoys what

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123. *United States v. Hubbard*, 650 F.2d 293, 411 (D.C. Cir. 1980). Other cases taking a similar approach and cited by Pollman include *Tavoulaareas v. Washington Post Co.*, 724 F.2d 1010 (D.C. Cir. 1984), *vacated on other grounds*, 737 F.2d 1170 (1984); and *Roberts v. Gulf Oil Corp.*, 195 Cal. Rptr. 393 (Ct. App. 1983). Pollman, *supra* note 1, at 40–43.

we call primary organizational rights, then we will need to know which individuals the organization may seek to benefit or protect and why the organization should be permitted to benefit or protect them.

Again, the Supreme Court's decision in *Hobby Lobby* provides an example. For purposes of the Court's analysis, it appears that the controlling owners and managers of Hobby Lobby (and similar corporations) are those whose interests primarily counted with respect to the recognition of a corporate right of religious freedom. As one of us has previously argued, however, this definition of the relevant "members" or "participants" in the firm seems to leave out the employees—and it is not clear conceptually that this result should follow.<sup>124</sup> With respect to rights to privacy, the same kind of indeterminacy occurs—and it is perhaps even more complex given the various kinds of contexts in which privacy claims arise.

One important question, then, is "who composes the corporation or other organizational entity" when a claim of privacy is advanced by a firm? Pollman gestures broadly to stakeholder theory as it has been developed in business ethics research.<sup>125</sup> But stakeholder theory is notoriously vague and contradictory concerning *who actually counts as a stakeholder* in a firm and what this actually means in practice.<sup>126</sup> It is certainly true that

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124. Orts, *supra* note 38. As mentioned above, the two co-authors do not necessarily agree on this interpretation. See *supra* note 38.

125. Pollman, *supra* note 1, at 73.

126. One large difference recognized in business ethics concerns the use of stakeholders as an "instrumental" term or as a "normative" term. An instrumental use of the term relegates various categories of "stakeholders" to components of a firm's overall strategy to advance the economic interests of owners and managers. A normative use of the term asks "who counts" as a relevant interest for the firm. For an overview of this important distinction, see Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MGMT. REV. 65 (1995). For arguments for a limitation of the normative view of stakeholders to a relatively narrow set of interests in the firm (though often including employees), see Eric W. Orts & Alan Strudler, *Putting a Stake in Stakeholder Theory*, 88 J. BUS. ETHICS 605 (2009); Eric W. Orts & Alan Strudler, *The Ethical and Environmental Limits of Stakeholder Theory*, 12 BUS. ETHICS Q. 215 (2002). As Pollman notes, a similarly narrow view was previously advocated by Max Clarkson. Pollman, *supra* note 1, at 73 n.211 (citing Max B.E. Clarkson, *A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance*, 20 ACAD. MGMT. REV. 92 (1995)).

Stakeholder theory is vague because some "broad" versions include people dealing with firms (e.g., suppliers, customers, government, and even tort victims) and other "narrow" versions include only business participants with a specified "stake" at risk in the firm (e.g., investors, managers, and em-

various participants and individuals within firms—or dealing with firms—may have privacy interests to assert as individuals. This observation, however, does not provide a basis for determining when a firm may or may not assert privacy interests “derivatively,” “instrumentally,” or “primarily.”

Here again, we believe that an incremental jurisprudential approach is recommended. Privacy issues may arise in a host of different circumstances, involving different elements of constitutional and statutory law, as we have argued above in Part III. Modern organizations, including corporate business firms, are often complex and involve many different combinations of participants. Different business firms, as well as different non-profit organizations, are also organized to pursue different objectives and advance different constellations of interests.<sup>127</sup> Given this conceptual as well as empirical complexity, it makes sense to proceed cautiously and deliberately: updating principles of privacy to include corporations and other organizations when warranted, and cutting back their application when not justified or not conducive to the advancement of the values sought to be protected.

## VI. WHEN ORGANIZATIONS VIOLATE PRIVACY RIGHTS

Although we have been focusing on corporate privacy *rights*, we might also say, in some circumstances, that corporations and other social organizations have a moral *duty* to protect privacy rights of individuals. A host of issues in the new world of the internet involves precisely this question, with the European Union taking an assertive position in requiring privacy rights to be respected.<sup>128</sup> Unpacking this problem leads then to another question that falls outside the scope of Professor Pollman’s analysis, though it would seem to offer an important complement to her work: When do corporations and other social organizations violate the rights of privacy of oth-

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ployees). See, e.g., Orts & Strudler, *Putting a Stake in Stakeholder Theory*, *supra*, at 607.

127. On the diversity of purposes of business firms, see ORTS, *supra* note 2, at 175–222.

128. See *supra* note 7. For an account of different protections of privacy rights, see Michael C. James, *A Comparative Analysis of the Right to Privacy in the United States, Canada and Europe*, 29 CONN. J. INT’L L. 257 (2013). For a general discussion of the ways in which “information privacy is governed not just by governmental law but also by corporations via private governance,” see Marcy E. Peek, *Information Privacy and Corporate Power: Towards a Re-Imagination of Information Privacy Law*, 37 SETON HALL L. REV. 127, 127 (2006).

ers?<sup>129</sup> When considering the recognition of organizations' rights of privacy, it seems appropriate to consider the fact that these organizations may also pose a threat to rights of privacy.

Again, new internet-based business ventures have been generating controversy, such as Uber's recent disclosure that it was threatening to examine its corporate travel records of a journalist who was criticizing the company.<sup>130</sup> Companies often post strong privacy protection policies, but modern threats of privacy violations would seem to follow as much from intrusions by private firms and organizations as by government.<sup>131</sup> One might even imagine situations where a large organization asserts a right of privacy or other legal privilege against disclosure as a strategy to protect itself from a challenge to practices that actually violate the rights of privacy of others (such as consumers and other "netizens" leaving electronic trails available for "mining").<sup>132</sup> And the notion that corporations might have duties to respect individuals' rights of privacy lends further support to the idea that corporations might have their own organizational rights of privacy by casting the corporation as a member of the moral community, bound with other persons in reciprocal relations of respecting rights and duties.

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129. Interestingly, even though Pollman casts doubt on a corporate right to privacy in general, she recognizes that corporations may often come forward to protect employees and customers. See Pollman, *supra* note 1, at 72–77. As we discuss in Part III above, however, limiting one's analysis to only "secondary organizational rights" rather than "primary organizational rights" significantly constrains the potential for organizations to play this role.

130. See, e.g., Farhad Manjoo, *A Start-Up Going So Fast It Could Miss a Turn*, N.Y. TIMES, Nov. 19, 2014, at A1.

131. See, e.g., Froomkin, *supra* note 104 (canvassing various digital technological threats to privacy with a focus on the ability of private firms to invade individuals' rights); Sue Halpern, *The Creepy New Wave of the Internet*, N.Y. REV. BOOKS (Nov. 14, 2014), available at <http://www.nybooks.com/articles/archives/2014/nov/20/creepy-new-wave-internet> (reviewing various new challenges to privacy created by new technologies associated with "the internet of things"). The famous failure of Google glasses, which has been called the "Silicon Valley's Edsel," however, indicates that many people retain significant expectations of privacy in everyday life. See Nick Bilton, *Broken Glass*, N.Y. TIMES, Feb. 5, 2015, at E1.

132. One example is the problem of recirculation of personal images meant to be private to websites that allow widespread distribution. Legal reforms may include holding internet media firms liable for individual privacy violations—and perhaps also, as we suggest, allowing some organizations to protect the privacy interests of customers or patrons who use their services. For an overview of this issue, though with other proposed solutions regarding copyright and criminal law, see Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025 (2014).

Our larger point is that we live in a modern world full of many kinds of organizations as well as individual people. Relevant considerations about “privacy” in the twenty-first century involve not only a bilateral potential conflict between government and individual citizens—business firms and nonprofit organizations are also an intrinsic institutional part of the social matrix. A useful reformulation of privacy rights, then, should include an expansive institutional understanding that includes a role of organizational persons as “rights bearing” as well as “duty bearing.” And future research following on foundations laid by Pollman and others will be needed for this kind of reformulation of privacy rights to occur.

### CONCLUSION

Our Article, we admit, raises many more questions than we answer. We also recognize that it is often easier to poke holes in someone else’s account than to build a coherent and viable argument oneself. In conclusion, then, we reiterate the significant value that we see Professor Pollman as providing. She is to be commended for her important contribution to an emerging and difficult topic.

Given the multivariate meanings of privacy, as well as the many different kinds of organizations, however, we do not think that broad claims about whether organizational persons can or should assert rights of privacy can be made easily. Although Pollman recognizes the considerable complexity and controversy concerning different conceptions of privacy—both within the ambit of constitutional jurisprudence and more broadly—we do not think that there is sufficient theoretical grounding to support her claim that “most corporations in most circumstances should not have a constitutional right to privacy.”<sup>133</sup> Because the manner in which various kinds of privacy concerns may be raised has many manifestations and because of the many different kinds of organizations with different structures and purposes, we conclude that it is not particularly helpful—or conceptually supported—to make this sort of broad claim. We suggest instead that tough issues are involved in many different circumstances in which organizations may assert privacy rights, and the question of whether corporations or other organized groups should be recognized as having the legal authority to assert privacy concerns as a constitutional argument should remain open, awaiting particular fact-based

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133. Pollman, *supra* note 1, at 32, 84.

contexts to inform the future direction of the law.<sup>134</sup> At some places, Pollman recognizes these limitations and refers to the need to consider “the purpose of the privacy right” as it is asserted in various circumstances.<sup>135</sup> We believe, however, that the many meanings of privacy, and the many types and species of organizational forms, will press more strongly on developing case law and scholarly commentary than Pollman allows. And in any event, the emerging breadth and complexity of problems related to private rights and organizations are too great to allow for the statement of a general rule against the recognition of corporate privacy rights.

We nevertheless agree with Pollman that courts will likely view claims of extensions of a constitutional right to privacy to organizational persons skeptically. In general, there are well-known boundary questions about judicial expansions of a right to privacy in constitutional law.<sup>136</sup> This hesitancy, though, is not necessarily connected to any conceptual line drawn by the fact that an organization such as a corporation is asserting a right rather than an individual. In the modern world—especially given the vast expansion of digital and internet technologies—the meaning of privacy for individuals is closely connected to the legal and social respect for privacy given by organizations, including business enterprises and nonprofit organizations, as well as governments.<sup>137</sup> More work has yet to be done on these questions—including foundational theoretical work on normative questions of the various jurisprudential meanings of privacy in the twenty-first century.

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134. Pollman herself refers to “the open question of corporate privacy.” *Id.* at 33.

135. *See, e.g., id.* at 62.

136. For an extensive and influential examination of “rights of privacy and personhood” in U.S. constitutional law, see TRIBE, *supra* note 73, at 1301–435. Tribe nicely describes the inherent “paradox of a right invoked by those who would enmesh themselves within society while laying claim to their own personalities; who would reach out to those around them while making intimate associations on their own terms.” *Id.* at 1435.

137. For a collection of contributions from leading legal scholars and philosophers assessing challenges posed by the internet and its increased empowerment enabling “offensive” speech and related violations of personal privacy, see THE OFFENSIVE INTERNET (Saul Levmore & Martha C. Nussbaum eds., 2010).