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RETHINK "PERSONAL": *AT&T* AND THE GRAMMAR CLAMOR AT THE COURT

*Justin Dickerson**

Are corporations people, too? Several recent U.S. Supreme Court decisions have considered whether constitutional protections that are typically reserved for individuals also extend to corporations. While corporations are considered "persons" in a legal sense, a unanimous Court decided in FCC v. AT&T *that this legal fiction does not entitle corporations to "personal" privacy rights under the Freedom of Information Act (FOIA). Without delving into more controversial constitutional questions, Chief Justice Roberts reached this conclusion largely by analyzing the ordinary and legal usages of the words "person" and "personal." This Comment examines the Court's ruling and argues that while the Court answered a specific question regarding a corporation's privacy rights in the context of FOIA, it missed a valuable opportunity to further clarify how constitutional rights apply to corporations. Indeed, despite the Court's holding in* FCC v. AT&T*, more challenges to the idea of corporate personhood will likely follow.*

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I. INTRODUCTION

The Freedom of Information Act (FOIA or the "Act") requires federal agencies to make records and documents publicly available upon request, unless the documents fall within one of several statutory exemptions.[1] One of these exemptions, § 552(b)(7)(C) ("Exemption 7(C)"), covers law-enforcement records, the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of *personal privacy*."[2] In *FCC v. AT&T Inc.*,[3] AT&T argued that corporations such as itself have "personal privacy" rights under this FOIA exemption based on the common legal usage of the word "person" to describe corporations.[4]

Chief Justice Roberts, writing for a unanimous U.S. Supreme Court, held that corporations do *not* have a right to personal privacy for purposes of Exemption 7(C).[5] Much of the support for the Court's holding came from standard English dictionary definitions and grammar.[6] AT&T's primary argument claimed that "[b]y expressly defining the noun 'person' to include corporations, Congress *necessarily* defined the adjective form of that noun—'personal'—also to include corporations."[7] Beyond the word's standard usage in the English language, the Court also looked to the use of the word "personal" as it is used in the statutory context of Exemption 7(C),[8] § 552(b)(6) ("Exemption 6"),[9] and § 552(b)(4) ("Exemption 4"),[10] as well as in the legislative history describing Congress's intentions in drafting Exemption 7(C).[11] In addition, the Court compared the language of Exemption 7(C) to the language that is used in other FOIA exemptions, and, more specifically, considered

1. *See* 5 U.S.C. § 552 (2006).
2. *Id.* § 552(b)(7)(C) (emphasis added).
3. 131 S. Ct. 1177 (2011).
4. *Id.* at 1180–81.
5. *Id.* at 1179, 1185.
6. *See id.* at 1181–84.
7. *Id.* (quoting Brief for Respondent AT&T Inc. at 14, *AT&T*, 131 S. Ct. 1177 (No. 09-1279)).
8. *Id.* at 1182.
9. *Id.* at 1184–85; *see* 5 U.S.C. § 552(b)(6) (2006).
10. *AT&T*, 131 S. Ct. at 1185; *see* 5 U.S.C. § 552(b)(4).
11. *AT&T*, 131 S. Ct. at 1184.

whether the language of those other exemptions would apply to corporations.[12]

This case is significant given the controversy that surrounded the Court's decision during the previous term in *Citizens United v. FEC*,[13] where the Court recognized that profit-making corporations have a broad constitutional right of free speech.[14] As it did in *Citizens United*,[15] the Court once again, in *FCC v. AT&T*, considered the fiction of corporate "personhood."[16] In addition, *FCC v. AT&T* is notable for what it did *not* decide; namely, it avoided any discussion of whether another core "personal" right found in the Constitution could also extend to corporations.

This Comment argues that the Court missed an important opportunity to clarify how "personal" rights apply to corporations. Part II details the facts that led to the Court's holding. Part III then examines AT&T's contention that "personal" is merely the adjectival form of "person." It also discusses the Court's response, which explored the ordinary language and legal usages of these words and provided a statutory interpretation. Part IV goes on to analyze how the Court sidestepped a constitutional discussion by focusing on grammar and word definitions to reach its conclusion. This Part contrasts Exemption 7(C) with other exemptions within FOIA, and it also discusses other landmark cases that deal with the idea of corporate "personhood." Finally, Part V concludes that Chief Justice Roberts intentionally limited his analysis to avoid dealing with larger constitutional questions, and that more challenges from corporate "persons" are likely to follow.

II. STATEMENT OF THE CASE

AT&T participated in an FCC-administered program called the Education-Rate program that the FCC created to enhance schools' and libraries' access to advanced telecommunications and information services.[17] In August 2004, "AT&T voluntarily reported

12. *Id.* at 1184–85.
13. 130 S. Ct. 876 (2010).
14. *See id.* at 883.
15. *Id.* at 972.
16. *AT&T*, 131 S. Ct. at 1181–84.
17. *Id.* at 1180.

to the FCC that it might have overcharged the U.S. government for services it provided to them as part of the program."[18] In response, the FCC's Enforcement Bureau (the "Bureau") launched an investigation of AT&T.[19] As part of the Bureau's investigation, "AT&T provided the Bureau with various documents, including [its] responses to interrogatories, invoices, e-mails with pricing and billing information, names and job descriptions of employees involved, and AT&T's assessment of whether those employees had violated the company's code of conduct."[20] The Bureau completed its investigation, and the FCC and AT&T resolved the matter in December 2004 through a consent decree in which AT&T, without conceding liability, agreed to pay the U.S. government $500,000 and institute a plan to ensure that AT&T would comply with the program in the future.[21]

Several months after the parties entered the consent decree, CompTel, a "trade association representing some of AT&T's competitors," submitted a FOIA request for "[a]ll pleadings and correspondence" in the Bureau's file on its investigation of AT&T.[22] AT&T opposed CompTel's request, and the Bureau responded to CompTel's request with a letter ruling.[23] The Bureau concluded in its ruling that some of the information that AT&T had provided as part of the investigation (including cost and pricing data; billing-related information; and information that identified staff, contractors, and customer representatives) should be protected from disclosure under Exemption 4, which protects "trade secrets and commercial or financial information" from disclosure.[24] The Bureau also decided to withhold other information that CompTel requested on the basis of Exemption 7(C), which precludes the disclosure of "records of information compiled for law enforcement purposes" where such disclosure "could reasonably be expected to constitute an unwarranted invasion of *personal privacy*."[25] Applying the terms of

18. *Id.*
19. *Id.*
20. *Id.* (citing AT&T Inc. v. FCC, 582 F.3d 490, 492–93 (3d Cir. 2009), *rev'd*, 131 S. Ct. 1177 (2011)).
21. *Id.*
22. *Id.* (citation omitted) (internal quotation marks omitted).
23. *Id.*
24. *Id.* (quoting 5 U.S.C. § 552(b)(4) (2006)) (internal quotation marks omitted).
25. *Id.* (emphasis added) (quoting 5 U.S.C. § 552(b)(7)(C)) (internal quotation marks omitted).

Exemption 7(C), the Bureau concluded that the individuals who were identified in AT&T's submissions had "privacy rights" that warranted protection under Exemption 7(C).[26] While the Bureau extended Exemption 7(C) protection to the *individuals* who were identified in AT&T's records, the Bureau did not extend that exemption to the corporation itself. It reasoned that "businesses do not possess 'personal privacy' interests by the exemption."[27]

The FCC reviewed and agreed with the Bureau's findings.[28] The FCC disagreed with AT&T's argument that it was a "private corporate citizen" with personal privacy rights that needed to be protected because disclosure would have "embarrass[ed]" the corporation.[29] The FCC found AT&T's position to be at odds with established FCC and judicial precedent.[30] The FCC thus concluded that Exemption 7(C)'s protection of records that it compiled for law enforcement purposes—the disclosure of which could reasonably constitute an unwarranted invasion of *personal privacy*—does not apply to corporations such as AT&T.[31]

As the statute that governs review of final FCC decisions permits,[32] AT&T sought a review of the FCC's decision in the U.S. Court of Appeals for the Third Circuit.[33] The appellate court rejected the FCC's reasoning, concluding that Exemption 7(C)'s protection of personal privacy rights does extend to corporations.[34] While it noted that Congress defined the word "person" to include corporations as well as individuals, the Third Circuit emphasized that the full text of the Administrative Procedure Act, which governs how federal administrative agencies may propose and establish regulations, states that the term "person" includes "an individual, partnership, corporation, association, or public or private organization other than an agency."[35] The Third Circuit found that FOIA's text

26. *Id.*
27. *Id.* at 1180–81.
28. *Id.* at 1181.
29. *Id.*
30. *Id.* (quoting *In re* SBC Commc'ns Inc., 23 FCC Rcd. 13704, 13707 (2008)).
31. *Id.*
32. 28 U.S.C. § 2342(1) (2006).
33. *AT&T*, 131 S. Ct. at 1181.
34. *Id.*
35. *Id.* (quoting 5 U.S.C. § 551(2)).

"unambiguously" indicates that a corporation may have a personal privacy interest under Exemption 7(C).[36]

The FCC then petitioned the Supreme Court for review of the Third Circuit's decision.[37] CompTel filed as a respondent supporting the FCC.[38] The Court granted certiorari and then reversed the Third Circuit's decision on March 1, 2011.[39]

III. REASONING OF THE COURT

In its appeal to the Court, AT&T reiterated the Third Circuit's finding that the word "personal," as Exemption 7(C) uses it in the sense of "personal privacy," is merely the adjectival form of "person."[40] The Court responded to this argument with a grammar lesson.[41] The Court said that "adjectives typically reflect the meaning of corresponding nouns, but not always."[42]

Therefore, the Court was not persuaded by AT&T's reasoning and offered several examples in support of its conclusion that AT&T's asserted "grammatical imperative" does not always mean that Congress intended for the adjectival form of a noun to have the same meaning as the noun.[43] Chief Justice Roberts took a particularly strong stance regarding this "grammatical imperative" during oral argument. "I tried to sit down and come up with other examples where the adjective was very different from the root noun," the Chief Justice said. "And it turns out it's not hard at all."[44] To the amusement of the audience, Chief Justice Roberts used the words "craft" and "crafty" and then "squirrel and "squirrely."[45] In its ruling, the Court also provided several examples of this grammatical rule:

36. AT&T Inc. v. FCC, 582 F.3d 490, 498 (3d Cir. 2009), *rev'd*, 131 S. Ct. 1177 (2011).
37. *AT&T*, 131 S. Ct. at 1181.
38. *Id.*
39. *Id.* at 1177, 1181.
40. *Id.* at 1181.
41. *See id.*
42. *Id.*
43. *See id.* Loyola Marymount University English professor Kevin Peters agreed. "That tells me how vacant the cupboard was for better arguments," he said. E-mail from Kevin J. Peters, Professor of English, Loyola Marymount University, to Author (Aug. 15, 2011, 17:17 PST) (on file with Author). Professor Peters said that it is a stretch to suggest that because a corporation is a person it therefore has "personal" belongings. *Id.*
44. Transcript of Oral Argument at 35, *AT&T*, 131 S. Ct. 1177 (No. 09-1279), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx.
45. *Id.*

for instance, the Court pointed out that the noun "crab" refers to a crustacean and a type of apple, while the related adjective "crabbed" can refer to handwriting that is difficult to read.[46] The Court intended for its numerous examples to show that, even where there may be a link between the noun and its adjective, the words will often have different ordinary meanings.[47] Accordingly, the Court found that the word "personal" does not derive from the English word "person" and that this finding highlighted the shortcomings of AT&T's proposed rule.[48]

The Court then discussed the ordinary meaning of the word "personal."[49] The Court did this because it said that when a statute does not define a term such as "personal,"[50] the Court will give the phrase its ordinary meaning.[51] The Court noted that, as a matter of ordinary English usage, the term "personal" usually refers to individuals.[52] "We do not usually speak of personal characteristics, personal effects, personal correspondence, personal influence, or personal tragedy as referring to corporations or other artificial entities," the Court wrote.[53] This is despite the fact that we do speak of corporations as "persons," at least in the legal sense.[54] While corporations do engage in "correspondence," exert "influence," and suffer "tragedies," the Court observed that the term "personal" is not generally used to describe these characteristics.[55] The Court held that, in ordinary usage, the term "personal" often means the *opposite* of something that is related to business, and the Court drew out the

46. *AT&T*, 131 S. Ct. at 1181.

47. *Id.* at 1181–82. Another example is the adjective "cranky," meaning a person with a "wayward" or "capricious" temper, in comparison to the noun "crank," which describes a distorted or crooked angular shape. *Id.* at 1182.

48. *Id.* at 1182.

49. *Id.*

50. The word "personal" is not in the Administrative Procedure Act. *See* 5 U.S.C. § 551(2) (2006).

51. *AT&T*, 131 S. Ct. at 1182 (internal quotation marks omitted) (citing Johnson v. United States, 130 S. Ct. 1265, 1267 (2010)).

52. *Id.*

53. *Id.*

54. *See* Gary Gutting, *Corporations, People, and Truth*, N.Y. TIMES OPINIONATOR BLOG (Oct. 12, 2011, 2:19 PM), http://opinionator.blogs.nytimes.com/2011/10/12/corporations-people-and-truth/ (discussing presidential hopeful Mitt Romney's statement that "[c]orporations are people" and affirming that corporations are "persons" in "some technical legal sense").

55. *AT&T*, 131 S. Ct. at 1182.

differences between work and personal life, work and personal expenses, and a company's official view and a personal opinion.[56]

To emphasize this point, the Court proposed a hypothetical: suppose that a "chief executive officer of a corporation approached the chief financial officer and said, 'I have something personal to tell you.'"[57] Most would not assume that the CEO was about to discuss *company* business.[58] In further support, the Court then looked to Webster's dictionary for help in showing that the common meaning of the word "personal" does not apply to corporations.[59] The Court noted that the dictionary defines "personal" as "'[o]f [or] pertaining to . . . the individual person or self,' and 'individual; private; one's own,' . . . '[o]f or pertaining to one's person, body, or figure.'"[60] The Court held that this could not mean corporations.[61]

AT&T also argued that "person" in common *legal* usage was understood to include a corporation.[62] "Personal," AT&T argued, therefore can and should have the same scope when it is applied to corporations.[63] Setting aside ordinary usage, the Court said that there is little support for the notion that "personal" denotes corporations in the legal context.[64] Although AT&T had noted that corporations are protected by the doctrine of "personal" jurisdiction, the Court held that the phrase instead refers to jurisdiction *in personam* (as opposed to *in rem*) not to the jurisdiction "of a person."[65]

AT&T also cited an 1896 case that referred to the "personal privilege" of a corporation.[66] But the Court found that this one case fell very short of establishing that "personal" has a legal meaning that is separate from its ordinary meaning, even if "person" has a legal meaning.[67]

56. *Id.*
57. *Id.*
58. *Id.* Another example that the Court gave was where a corporation is responding to a request for information. *Id.* The Court said that an individual might respond, "That's personal." *Id.* By contrast, a company spokesman, when asked for information about a company, would not classify confidential information as "personal." *Id.*
59. *Id.*
60. *Id.* (citing 7 OXFORD ENGLISH DICTIONARY 726 (1933)).
61. *Id.* at 1183.
62. *Id.* at 1182.
63. *Id.*
64. *Id.* at 1183.
65. *Id.* (citing Brief for Respondent AT&T Inc., *supra* note 7, at 19–20).
66. *Id.* (citing Mercantile Bank v. Tenn. *ex. rel.* Memphis, 161 U.S. 161, 171 (1896)).
67. *Id.*

The Court then addressed AT&T's argument that the term "personal privacy" simply means the privacy of a "person" as the statute defines it, an assertion that placed significance on the meaning of the term "person" as Exemption 7(C) uses it.[68] Once again, the Court had a number of examples to show that "two words together may assume a more particular meaning than those words in isolation."[69] As such, the phrase "personal privacy" conveys more than just the privacy "of a person," the Court said.[70] Instead, the Court found that "personal privacy" refers to a type of privacy that is related to *human* concerns and therefore not a kind of privacy that is usually associated with a corporation like AT&T.[71] The Court noted that, although AT&T repeatedly made the argument that "personal privacy" applies to corporations, AT&T could not support that assertion with a single instance in which a statute, the Supreme Court, or any other court[72] expressly referred to a corporation's "personal privacy."[73] The Court cited a number of treatises that state the opposite—that corporations do not have personal privacy rights.[74]

Finally, the Court concluded by establishing that its analytical approach was consistent with a longstanding approach to statutory interpretation and that the various government agencies that apply FOIA had long interpreted Exemption 7(C)'s personal privacy protections to not cover corporations.[75] The Court said that shortly after Congress enacted the 1974 amendments that created Exemption 7(C), the attorney general issued a memorandum to executive departments and agencies in which he explained what "personal privacy" meant as that term was used in the context of the

68. *Id.*

69. *Id.* For example, the Court said that it understands that a "golden cup" is a cup made of or resembling gold, but a "'golden boy,' on the other hand, is one who is charming, lucky, and talented. A 'golden opportunity' is one not to be missed." *Id.*

70. *Id.*

71. *Id.*

72. This did not include the Third Circuit's holding in this case. *See supra* notes 33–36 and accompanying text.

73. *AT&T*, 131 S. Ct. at 1183.

74. *Id.* at 1183–84 (citing RESTATEMENT (SECOND) OF TORTS § 652I cmt. c (1976); WILLIAM L. PROSSER, THE LAW OF TORTS § 97, at 641–42 (2d ed. 1955)).

75. *Id.* at 1185.

new exemption.[76] The attorney general explained that personal privacy "pertains to the privacy interests of individuals."[77] Accordingly, the attorney general noted that the new exemption "does not seem applicable to corporations or other entities."[78] The Court said that it had previously relied on the attorney general's memorandum as a "reliable guide in interpreting [the language of] FOIA" and that it agreed with the memorandum's interpretation of the language of Exemption 7(C).[79] The Court reversed the Third Circuit's judgment that Exemption 7(C)'s "personal privacy" protection extends to corporations.[80]

IV. ANALYSIS

FCC v. AT&T continues the debate over the nature and extent of a corporation's "personhood." However, the Court's opinion sheds little light on the fundamental question of just how much of a "person" a corporation is. In addition, this decision is hard to reconcile with *Citizens United*; the *Citizens United* Court was willing to give a corporation the rights of a "person" in the context of the First Amendment, but this Court was unwilling to recognize that a corporation as a "person" has "personal privacy" rights.[81]

Unfortunately, after the decision in *FCC v. AT&T*, a corporation as a "person" becomes an even more muddled legal construct. This is because Chief Justice Roberts's opinion in *FCC v. AT&T* studiously avoided tackling the larger issue of corporate "personhood" and its constitutional implications: "[T]his case does not call [for the Court] to pass on the scope of a corporation's 'privacy' interests as a matter of constitutional or common law."[82] But that is not necessarily the case. Aside from the fact that the Court could have provided more guidance if it had tackled these issues, the case actually raises more questions about what, if any, "personal" protections a corporation

76. *Id.* (citing U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE 1974 AMENDMENTS TO THE FREEDOM OF INFORMATION ACT 9 (1975), *available at* http://www.justice.gov/oip/74agmemo.htm).

77. *Id.* (internal quotation marks omitted).

78. *Id.* (internal quotation marks omitted).

79. *Id.*

80. *Id.* at 1185–86.

81. *See* Lyle Denniston, *Argument Preview: Corporate "Personhood"—Again*, SCOTUSBLOG (Jan. 18, 2011, 11:02 PM), http://www.scotusblog.com/?p=112301.

82. *AT&T*, 131 S. Ct. at 1184.

deserves. The Court only chose to answer a specific question regarding a corporation's privacy rights in the context of FOIA, and missed a valuable opportunity to further clarify how constitutional rights apply to corporations.

To avoid discussing these issues, Chief Justice Roberts focused on the grammatical structure of Exemption 7(C)'s language as the basis for his construing of the statute's use of the term "personal privacy" and his application of it to corporations. This analytical approach is not surprising given both the Justices' fundamental disagreement about the proper method of interpreting statutory language[83] and Chief Justice Roberts's fondness for "dictionaries, derivations, grammatical parsing, and fine points of usage."[84]

A. Ordinary and Legal Usages of "Person" and "Personal"

Consequently, Chief Justice Roberts seemed to grapple mostly with whether the ordinary and legal usages of the words "person" and "personal" would justify extending Exemption 7(C)'s "personal privacy" protection to corporations, rather than the constitutional implications of doing so. During oral argument, the government argued that the word "personal," standing alone, refers exclusively to human beings.[85] Dictionaries, on the other hand, define "personal" more broadly, using slight variations of the following: "of, pertaining to, or coming as from a particular person."[86]

Despite Congress's definition of the term "person" to include a corporation, AT&T was unable to persuade the Court that the term "personal" has its own *legal* meaning that is separate from its *ordinary* meaning. Moreover, AT&T provided no other support for its "grammatical imperative" beyond the 1896 *Mercantile* case,

83. Denniston, *supra* note 81.

84. Garrett Epps, *Chief Justice John Roberts: Word Nerd*, THE ATLANTIC (Mar. 1, 2011, 5:46 PM), http://www.theatlantic.com/national/archive/2011/03/chief-justice-john-roberts-word-nerd/71902/. Roberts "incessantly picked at the prose diction" of other officials and those who wrote to the president when he worked in the Reagan White House. *Id.* He once critiqued a letter from three District of Columbia officials as "reading as if it were an awkward translation from Bulgarian." *Id.*

85. Transcript of Oral Argument, *supra* note 44, at 3.

86. *See* NEW OXFORD AMERICAN DICTIONARY 1307 (2010); THE AMERICAN HERITAGE DICTIONARY 1311 (4th ed. 2006); THE CONCISE OXFORD DICTIONARY 765 (7th ed. 1982); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1686 (1986).

which referred to a corporation's "personal privilege."[87] *Mercantile*, however, was not dispositive because it did not define what it means for a corporation to have a "personal privilege" and because it only applied the term "personal privilege" narrowly in the context of an exemption to a federal tax statute.[88]

B. "Personal Privacy" as Applied to Corporations

To prevail, AT&T had to persuade the Court that it could apply the larger idea of "personal privacy" as a whole to corporations. But AT&T again was unable to present any convincing evidence in support of this assertion; rather, it argued that nothing in the statute's language shows that Exemption 7(C) was intended to *exclude* corporations.[89] This was not an effective approach, according to legal analysts: "As the reader of the [FCC v. AT&T] opinion works through it, the document turns into a somewhat repetitive recitation of the theme that the notion of 'personal privacy' just does not seem to fit a corporation."[90]

This idea came up during the oral argument as well. The government argued that a corporation's privacy is more often referred to as "confidentiality" or "secrecy."[91] Chief Justice Roberts attempted to rebut this argument by suggesting that a corporation does not have "confidential" or "secret" property, but rather "private property."[92] The government argued that Chief Justice Roberts's examples were not situations that involved "privacy" that would fit into the statutory language of Exemption 7(C) or within the intent that Congress had when it adopted Exemption 7(C).[93]

Once again, AT&T could not identify any instances in which a court or a statute has referred to a corporation's personal privacy. This was likely because the idea that "personal privacy" rights do not apply to corporations was explicitly established even before Congress drafted Exemption 7(C). The Court noted that William

87. *See* Mercantile Bank v. Tenn. *ex rel.* Memphis, 161 U.S. 161, 171 (1896).
88. *Id.*
89. Transcript of Oral Argument, *supra* note 44, at 34.
90. Lyle Denniston, *Analysis: A Word Game over "Privacy,"* SCOTUSBLOG (Mar. 1, 2011, 12:35 PM), http://www.scotusblog.com/?p=114729.
91. Transcript of Oral Argument, *supra* note 44, at 10.
92. *Id.*
93. *Id.*

Prosser wrote in his 1955 treatise that "[a] corporation . . . can have no *personal privacy* . . . ."[94] The Court also pointed out that Prosser wrote in his later 1964 treatise that "it seems generally agreed that the right of privacy is one pertaining only to individuals, and that a corporation . . . cannot claim it as such."[95] In addition, the Court noted that the Restatement (Second) of Torts—though it was written after Exemption 7(C) was drafted—stated that "[a] corporation . . . has no personal right of privacy."[96] Thus, the Court was unable to find any basis for AT&T's argument that the "personal privacy" clause of Exemption 7(C) applies to corporations. While individuals' privacy rights have generally increased since the publication of Prosser's torts treatises, the Court found no proposition to suggest that a corporation's "personal" rights have also expanded.

C. Exemption 7(C) Contrasted with Exemptions 4 and 6

The Court's unwillingness to justify "personal privacy" rights for corporations based on case law or Exemption 7(C) becomes even more clear when one contrasts Exemption 7(C) with FOIA's other sections—in particular, Exemption 4 and Exemption 6. Exemption 6 allows the withholding of "personnel and medical files," the disclosure of which would constitute an invasion of "personal privacy."[97] Exemption 4 pertains to "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[98]

While the Court has not yet decided whether corporations are entitled to "personal privacy" rights under the Constitution, it could have inferred in this case that Exemption 6's personal privacy protections apply only to individuals and only to protect an individual human's right of privacy.[99] Moreover, Congress did not use language in Exemption 7(C) that was similar to the language that it used in Exemption 4. This suggests that Exemption 4 specifically

94. FCC v. AT&T Inc., 131 S. Ct. 1177, 1184 (2011) (emphasis added) (citing PROSSER, *supra* note 74, § 97, at 641–42).

95. *Id.* (citing WILLIAM L. PROSSER, LAW OF TORTS § 112, at 843–44 (3d ed. 1964)).

96. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652I cmt. c (1976)).

97. 5 U.S.C. § 552(b)(6) (2006).

98. *Id.* § 552(b)(4).

99. *See* Dep't of State v. Ray, 502 U.S. 164, 175 (1991) (quoting Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976)); Dep't of State v. Wash. Post Co., 456 U.S. 595, 599 (1982).

addresses a corporation's "personal privacy" concerns—which are related to its trade secrets and privileged or confidential information—while Congress enacted Exemption 7(C) to protect a human's "personal privacy."

If it had compared Exemption 7(C) to Exemption 4, the Court also should have found that corporations do have "privileged or confidential" kinds of information rather than "personally private" information. Thus, at the time that Congress enacted Exemption 7(C), FOIA already contained an exemption in Exemption 4 that would have prevented the disclosure of a corporation's proprietary commercial and financial information. The existence of Exemption 4 also shows that Congress most likely enacted Exemption 7(C) to protect natural persons and that the use of the term "person" cannot extend to corporations for the purposes of Exemption 7(C).

Nonetheless, AT&T claimed in its oral argument that Exemption 4 may not be a sufficient shield to protect a corporation's privileged information.[100] For example, AT&T argued that Exemption 4 would not adequately safeguard negative e-mails between officers of a corporation about a would-be regulator or about an important customer[101]: Exemption 4 would allow the release of the damaging e-mails with the names of the parties redacted.[102] AT&T maintained that this would be an instance where the communicating parties had an expectation of privacy that their e-mails would not become public and harm their corporation.[103] AT&T argued that corporations should benefit from Exemption 7(C)'s "personal privacy" protections in situations such as one in which they hope to prevent the release of their internal e-mails.[104] Justice Scalia seemed unconvinced based on his questions at oral argument,[105] and AT&T's argument is especially hard to justify in today's world, where electronic communications—even ones where

100. Transcript of Oral Argument, *supra* note 44, at 30–31; see also *supra* text accompanying note 24 (discussing Exemption 4, which protects "trade secrets and commercial or financial information" from disclosure).

101. Transcript of Oral Argument, *supra* note 44, at 24–25.

102. *Id.* at 24.

103. *Id.* at 24–25.

104. *Id.* at 25.

105. *Id.* at 24 (questioning how the risk of possible embarrassment to a corporation relates to a corporation's "privacy" interests).

there is an expectation of privacy—are becoming increasingly public.

D. Larger Constitutional Questions and Legislative History

Still, even after it heard these arguments in favor of personal privacy protections for corporations, the Court had some discretion to consider broader constitutional questions about the rights of corporations. But it avoided tackling any of the points that might show how a corporation is like a person in the privacy sense. The Justices cited *Citizens United* and the Third Circuit decision in this case, which held that corporations, like human beings, are capable of being publicly embarrassed, harassed, or stigmatized.[106] The Court also did not look to FOIA's general aims or consider how FOIA's personal privacy protections *could* cover a corporation. FOIA's overall goal is to provide disclosure except when an agency that seeks to withhold records can prove that nondisclosure would fall within the specific exemptions that Congress wrote into the law.[107] The Court could have at least considered whether disclosure was appropriate within the larger context of FOIA's purpose.

AT&T asserted that corporations have had privacy rights for decades, even rights *similar* to those that are typically reserved for natural persons.[108] The Court even acknowledged that corporations can be like individuals in a way. Near the end of his opinion, Chief Justice Roberts reflected that he "trusts" that AT&T will not take the holding "personally."[109] In doing so, Chief Justice Roberts seemed to be suggesting, in direct contravention of his holding, that corporations do have "feelings" that can be hurt.

Beyond this, other than considering the attorney general's 1975 memorandum[110] regarding the newly enacted FOIA exemptions, the Court did not delve further into the legislative history of the Act. Justice Scalia noted during oral argument that the exceptions to FOIA should be narrowly construed, but the Court otherwise refused

106. Denniston, *supra* note 81.
107. *See id.*
108. *See id.*
109. FCC v. AT&T Inc., 131 S. Ct. 1177, 1185 (2011).
110. U.S. DEP'T OF JUSTICE, *supra* note 76.

to acknowledge either side's argument about what the Act plainly means.[111]

On the other hand, this oversight was likely because FOIA does not define "personal privacy," so the Court's best resource for its interpretation of the Act was the attorney general's memorandum. In addition, as the attorney general prepared the memorandum for the purpose of explaining the new exemptions to executive departments and agencies,[112] and because the memorandum so clearly stated that "personal privacy" pertains to individuals,[113] the Court probably did not need to go any further into the legislative history.

Furthermore, there is a "debate within the Court as to whether it is proper for the Justices to examine the drafting and legislative history of a statute it is interpreting," which may also explain its decision to use the memorandum as the sole basis of its analysis of the legislative history.[114]

In general, Chief Justice Roberts avoided the larger questions of policy or jurisprudence and did not even hint that he knew what—or who—the statute was meant to protect.[115] If he had done any more analysis on this point, the Chief Justice may have opened the floodgates to many other issues that he did not want or need to address. After all, some Justices, such as Scalia, insist that the Court find the meaning of a federal statute in the law's actual language, while others, like Breyer, think that evidence of Congress's intent from debates and committee reports lends meaning to statutes.[116]

E. Citizens United *and Other Ramifications*

Chief Justice Roberts also went out of his way to make clear that this statutory decision does not provide any guidance on how far the Court is willing to carry the *Citizens United* principle that corporations have free speech rights that are as extensive as those of individuals.[117] He likely made this point because of the widespread negative reaction to the *Citizens United* decision, which included a

111. Transcript of Oral Argument, *supra* note 44, at 11.
112. U.S. DEP'T OF JUSTICE, *supra* note 76.
113. *Id.*
114. *See* Denniston, *supra* note 81.
115. Epps, *supra* note 84.
116. Denniston, *supra* note 81.
117. Epps, *supra* note 84.

public chastisement from President Obama.[118] Then again, the Court often repeats its command that it should not decide constitutional issues unless it has no other alternative.[119] However, there were plenty of language-based routes that the Court could have taken to reach its desired holding without having to tackle larger constitutional implications.[120]

The Court also may have avoided the larger issue of corporate personhood because, even in *Citizens United*, the majority and dissent had different ideas about what a corporation is.[121] The majority viewed the corporation as an "association of citizens," while the dissent viewed corporations as more of a "creature of the state."[122] This disagreement does not provide a helpful basis for an analysis of whether the notion of personal privacy covers corporations.

Despite rendering a thorough decision on the points that related to grammar and FOIA's exemptions, the Court failed to consider some points that could have ramifications for FOIA's future. The Court could have noted that "[c]orporations with a privacy interest under Exemption 7(C) could be more willing to participate in government investigations."[123] It also failed to note the possibility that the Third Circuit's decision could hinder journalists' ability to obtain information from the government.[124] Furthermore, because this case was limited to Exemption 7(C) and did not state that corporations constitutionally do not have a personal privacy interest

118. Robert Barnes, *In the Court of Public Opinion, No Clear Ruling*, WASH. POST, Jan. 29, 2010, at A01; Denniston, *supra* note 81. Near the end of his January 2010 State of the Union address, President Obama said, "With all due deference to separation of powers, last week the Supreme Court reversed a century of law that, I believe, will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections." President Barack Obama, Remarks by the President in State of the Union Address (Jan. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address.

119. *See* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. Rev. 1003, 1004 (1994). The "last resort rule" mandates that a federal court abstain from ruling on a constitutional issue if the case can be resolved through a nonconstitutional basis. *Id.*

120. Denniston, *supra* note 81.

121. Stefan J. Padfield, *Does the Freedom of Information Act's Protection for "Personal Privacy" Protect the Privacy of Corporate Entities?*, 38 PREVIEW U.S. SUP. CT. CAS. 156, 158 (2011).

122. *Id.*

123. Maeve E. Huggins, Comment, *Don't Take It Personally: Supreme Court Finds Corporations Lack Personal Privacy Under FOIA Exemptions*, 19 COMMLAW CONSPECTUS 481, 508 (2011).

124. *Id.*

under another FOIA exemption, corporations are likely to find other ways to assert rights to personal privacy.[125] This will remain a difficult area for the Court because the law on the one hand treats corporations as "persons" in a legal sense, but on the other hand recognizes that privacy remains a concept that makes the most sense in the context of individuals' rights.[126] Thus, even if the Court expands the "personhood" of corporations, it is likely to remain unwilling to recognize the same level of privacy protections for corporations as it recognizes for individuals.[127]

V. CONCLUSION

By apparently limiting its holding in *FCC v. AT&T* to FOIA Exemption 7(C), the Court did not provide further clarification on the "personhood" of corporations or what constitutional rights corporations should enjoy. *FCC v. AT&T* provided only a thorough grammatical and statutory analysis of FOIA's Exemption 7(C). And Chief Justice Roberts intentionally limited his opinion to the conclusion that corporations, though they are "persons" in a legal sense, do not have "personal privacy" rights based on the ordinary usage of that term. As a result, other cases that test the full extent of a corporation's "personhood" are likely to follow.

125. *Id.* at 513.
126. *Id.* at 514.
127. *See id.*