

# Commentary on “Why Moral Rights of Free Expression for Business Corporations Cannot Be Justified”

Richard R. Eva  
Baylor University

U.S. Supreme Court Justices regularly assume philosophically controversial positions without being able to fully explain or defend their positions. The practical nature of a Justice’s role requires that they limit the breadth of their opinions by strategically supporting certain premises; at some points they must decline to wade into philosophical debate. Thankfully, we have philosophers like Ava Wright (2021), who are willing to explain and defend Justices’ philosophical positions more thoroughly. This type of paper can help us think clearly about the arguments advanced in influential legal decisions—an important endeavor.

I applaud Wright’s choice of subject matter, method of analysis, and clarity. She argues that business corporations do not have free expression rights, which supports the reasoning found in Justice Stevens’s dissenting opinion in *Citizens United*.<sup>1</sup> First, Wright analyzes two possible justifications for moral rights, interest theory and choice theory, and concludes that a corporation would not acquire a right to free expression under either. Then she addresses an alternative justification for a corporation’s right to free expression, one where corporations express views *on behalf* of their members. Wright argues that this justification is untenable given the structure and purpose of corporations. I will comment on each of these arguments.

Wright explains that an interest theory justification of moral rights is “typically consequentialist or utilitarian,” (2021, p. 189) and she uses John Stuart Mill’s justification of moral rights as an example of this theory. Mill supports moral rights in part because of the vital interest individuals have in their own personal security. An impingement on the personal security of individuals would clearly decrease utility because of the intensity of feelings associated with personal security. Corporations—as opposed to individuals—do not have a concern for personal security or the related feelings, so a moral right to free expression is not warranted (Wright, 2021, p. 190). Assuming utilitarianism is correct, I agree with Wright’s argument and perhaps I can lend further support. Utilitarian arguments require some amount of speculation, and here is, I hope, a reasonable speculation: providing corporations with rights of free expression would give corporations disproportionate political power and reduce the relative

political power of individuals resulting in an overall decrease in utility. Corporations have the resources to influence politics in ways that most individuals cannot, and this undue influence could cause the political disenfranchisement and disillusionment of millions. It might make individuals' rights to free expression negligible by comparison. If moral rights are grounded in consequentialist justifications, then the consequences of disproportionate political power are worthy of consideration.

Wright goes on to argue that a corporation does not have a right to free expression under a choice theory of moral rights. A choice theory would only justify moral rights for entities that can make choices, and Wright claims that corporations cannot make choices. This is because to make choices one must be able to "acquire the means required to achieve one's ends," (Wright, 2021, p. 191) and this acquisition requires a body. So, "to have innate freedom of choice, one must have bodily powers" (Wright, 2021, p. 191). The natural objection is that corporations *do have a body*, in a sense. Wright replies that corporations do not have a body in the required sense and supports this claim by noting that a corporation's human members could intervene and circumvent the corporation's choice (2021, p. 191). But I wonder how different this is from my own body. Members of my body may circumvent my choices, but it still seems like I still have the required freedom of choice necessary for moral rights. For example, the nerves in my legs may circumvent the directions my brain provides by not moving when I direct them to. One might reject my analogy because of this difference: members of corporations make choices *of their own*, whereas my limbs do not. But I would ask, how is this difference relevant to whether the choosing entity (my brain or a corporation) has the *means to achieve its ends*? In either case the *means* could be circumvented by an individual member, so why does it matter if that member has its own agency? If a requirement for moral rights is that one has the means to achieve one's ends, it seems that corporations could meet this requirement. Nevertheless, my intuitions likely align with Wright's on this broader point: if moral rights arise in connection with *free choice*, it does not seem like corporations would have the requisite free choice.

In the latter half of the paper, Wright objects to a more plausible justification of corporate rights to free expression: that a corporation can exercise a right to free expression on behalf of its members as an expressive association. To do so, the association must only express those opinions that individual members have (implicitly or explicitly) consented to be expressed as group opinions. However, it is difficult to determine the conditions under which a group has obtained implicit consent for particular expressions.

Wright argues that the structure of publicly-traded corporations does not permit operative members to express group opinions on behalf of non-operative members. This is because of the operative members' fiduciary duty to increase the value of its non-operative members' shares. In other words, the functional purpose of a corporation is the individualized objective of increasing share-value for shareholders. Thus, the only expressions that could be construed as a group expression that have been tacitly consented to by non-operative members would be statements that "blandly restate the group's individualized purpose" (Wright, 2021, p. 194). Only in this respect could the group derive a right to free expression from the members' rights.

Some might find this functionalist interpretation too reductive.<sup>2</sup> Investors and corporations do not all have individualized financial purposes. When investors buy shares in corporations, they do not *necessarily* consider their individual financial goals. Investors increasingly engage in impact investing and many investors divest from corporations for non-financial reasons, e.g. moral reasons. The recent GameStop stock fiasco highlights the fact that many people invest for non-financial and non-individualized reasons (*GameStop's stock surge: Reddit traders vs hedge funds*, 2021). Also, not all corporations have a singular profit-making purpose, at least if we take the recent barrage of social and environmental justice advertisements at face value. Corporations regularly claim to care about more than profit, they act like profit is merely a by-product of fulfilling their *true purposes* in the world, e.g. making lives easier, bringing people joy, etc. And sometimes the non-financial purposes of investors and corporations align. Consider the following hypothetical example:

**BLM Business:** A business sells graphic t-shirts and uses most of the profits to organize and fund events that promote social justice and racial equity. The owners want to issue an IPO for funding and marketing purposes. It is widely known that people plan to purchase shares in order to support the company's causes and not to enhance their own financial positions—in fact, the latter is frowned upon. After the IPO, BLM Business regularly voices support for the Black Lives Matter movement on public platforms.

In this case, it seems fair to characterize BLM Business as expressing views on behalf of its non-operative members because there seems to be tacit consent. Thus, BLM Business may have a derivative right to free expression, at least regarding BLM-related things.

Of course, things are not as clear with most corporations today.

Wright thinks that in the absence of explicit effort by management to alter the customary business model, corporations should not be understood to endorse any purpose *other than* individual financial ones (2021, p. 194). This is a reasonable default position. But how can we tell when management has attempted to ‘alter the customary business model’ enough such that they can be understood as endorsing some other purpose? Wright thinks we could determine this by looking at whether the corporation sells shares primarily on the understanding that shareholders will profit individually or for some other reason (2021, p. 194). But determining the ‘understanding’ upon which shares are sold is difficult. Certainly we cannot rely on the formal documentation of the sale to determine the ‘understanding.’ For example, suppose BLM Business’s sale documentation contained all the standard language about its fiduciary duty. This alone does not entail that the ‘understanding’ of the sale was to increase share value; the broader public perception of the sale is also relevant. Perhaps the right question to ask is whether a ‘reasonable investor’ would understand the purpose of the corporation to be aimed at increasing share value. With BLM Business, a reasonable investor would understand that the purpose of the corporation was to support social justice and racial equity. And for a different, standard corporation, a reasonable investor would understand that their purpose was to increase share value. A ‘reasonable investor’ standard may help delineate complex cases and thus help determine when tacit consent is given for certain group expressions.

A closely related question to the one investigated in Wright’s paper is whether a corporation can derivatively have a right to religious liberty. If the purpose of a corporation is relevant to determining whether they have such a right (as it is in the case of a right to free expression), it is worth noting that religiously-affiliated corporations would likely claim to have ‘higher purpose’ than increasing share value. Of course, other factors come into play with religious liberty because it involves actions and not merely speech. But getting clear on the questions raised by Wright’s paper could also shed light on this other important issue.

#### Notes

<sup>1</sup> See *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

<sup>2</sup> See Laborde (2017, p. 183) for an example.

#### Works Cited

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