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CORPORATE SPEECH IN *CITIZENS UNITED*
VS. FEDERAL ELECTION COMMISSION

Abstract

This essay identifies two arguments in the U.S. Supreme Court's 2010 ruling in Citizens United vs. Federal Election Commission, a direct argument in Justice Kennedy's opinion, and an indirect argument in Justice Scalia's concurring opinion, for applying the First Amendment to corporate speech. It argues that the direct argument's assumption that corporations are as such agents and speakers is a conceptual and logical mistake. It argues that the indirect argument, which does not rely on this assumption, nonetheless fails to take into adequate account the structure of corporate agency, by failing to distinguish the corporation's operators from its shareholders, the former being proxy agents of the latter. When these distinctions are drawn, it becomes clear that corporate expenditures on political advocacy do not ipso facto represent shareholder views, and that restrictions on corporate expenditures for political advocacy do not ipso facto restrict shareholder rights to speak as assemblies of persons.

1. Introduction

In its January 20th, 2010 decision in *Citizens United vs. Federal Election Commission*, the United States Supreme Court ruled that certain restrictions on independent expenditures by corporations for political advocacy violate the First Amendment of the Constitution, which provides that “Congress shall make no law [...] abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Justice Kennedy, writing for the 5-4 majority, held that “[b]y suppressing *the speech of manifold corporations*, both for-profit and non-profit, the Government prevents *their voices and view-points* from reaching the public and advising voters on which person or entities are hostile to *their interests*” (*Citizens United vs. Federal Election Commission* 558 U.S. 38-9 (2010); emphasis added). Much of the language of the opinion, and some of its reasoning, as this passage illustrates, presupposes that corporations are agents capable of speech, and that it is (at least in part) in the light of this that limitations on political advocacy by corporations are prohibited by the Constitution¹. While there are other strands in the argument (see note 5 in particular),

¹ Justice Kennedy writes: “We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject” (558 U.S. 12 (2010)). Again: “Citizens United has asserted a claim that the FEC has violated its First Amendment right to free speech” (558 U.S. 13 (2010)). Again: “Citizens United has preserved its First Amendment challenge to

§441b as applied to the facts of its case; and given all the circumstances, we cannot easily address the issue without assuming a premise – the permissibility of restricting corporate political speech – that is itself in doubt” (558 U.S. 14 (2010)). Kennedy cites as a form of suppression of speech “subjecting the speaker to criminal penalties” and says “[t]he law before us is an outright ban, backed by criminal sanctions” (558 U.S. 20 (2010))– a ban on speakers, he means. For “[s]ection 441b makes it a felony for all corporations – including nonprofit advocacy corporations – either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election” (loc. cit.). Thus, he subsumes corporations as such under the heading ‘speaker’ and applies the First Amendment straightforwardly to them on that assumption. This is further supported by the observation that Kennedy says that “[s]ection 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak,” because a “PAC is a separate association from the corporation” (558 U.S. 21 (2010)). Since the PAC in question can be contributed to by all the employees and managers of the corporation, and the shareholders as well, this amounts to distinguishing the corporation from the employees and the shareholders. Kennedy also claims that even if the PAC could allow the corporation to speak, it is an unreasonable burden to require corporate speech to take this form. We will return to this issue in the penultimate section of the essay. But the present point is that the main line of reasoning of the Court presupposes that the corporation as such is an entity distinct from its operators and shareholders, and that the corporation as such can speak and is therefore afforded First Amendment rights. Kennedy goes on to say, “Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process” (558 U.S. 22 (2010)). He says, “If §441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence *entities whose voices* the Government deems to be suspect” (558 U.S. 23 (2010); emphasis added). Kennedy continues: “For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’” Further: “Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. [...] Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. [...] Speech restrictions based on the identity of the speaker are all too often simply a means to control content” (558 U.S. 24 (2010)). Further: “the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice” (loc. cit.). Kennedy concludes: “We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers” (loc. cit.) and by this he means in particular corporations. The Court relies in part on the reasoning in the 1978 Court’s decision in *First National Bank of Boston vs. Bellotti* (to which all of the considerations to be taken up below apply as well): “The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster” (435 US, at 783). Kennedy concludes: “The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons’” (558 U.S. 26 (2010)). Kennedy further says, “*Bellotti*, 435 U.S. 765, reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker’s corporate identity” (558 U.S. 30 (2010)), and it is clear here that the idea is that it cannot restrict speech on the basis of the speaker’s being a corporation (*Bellotti*: “The question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection” (435 U.S. 765)). Kennedy further quotes *Bellotti* as follows: “In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue” (558 U.S. 31 (2010)).

they are interwoven with the conception of the corporation as agent and speaker, with its voice and its viewpoints. The dissenters on the court objected on precisely this point (among others). Justice Stevens wrote sarcastically in his dissent, joined by Justices Ginsburg, Breyer, and Sotomayor, that “[u]nder the majority’s view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech” (558 U.S. 33 (2010)). Justice Sotomayor suggested in oral argument that the Court’s century-old practice of treating corporations as persons rests on a conceptual mistake².

My concern in this essay is not with the question whether the restrictions violate the Constitution. There are many issues that bear on this which will be outside the scope of my discussion. My concern is with the proper conceptual framework for understanding the agency of corporations and corporate speech, and the role that conceptions of these play in the background of the majority’s reasoning. The issue is legal, but it also has philosophical, conceptual and semantic aspects. It will be the latter aspects, and their potential to shed light on legal reasoning, that are my main focus. An adequate framework requires saying what properly speaking the corporation is, how agency is expressed through the corporation, whose agency it is, centrally whether the corporation is an agent or person in its own right³, and in what sense it can be said to be capable of speech. I draw on recent work in collective action theory, particularly with respect to the semantics of collective action sentences (Ludwig 2007) and the analysis of the proxy agency in collective action (Ludwig 2014), to show (i) that corporations are neither genuine agents nor (therefore) capable of engaging in genuine speech, (ii) that consequently the First Amendment does not apply to corporations *per se*, and (iii) that a better understanding of the mechanisms of corporate agency casts doubt on more indirect arguments for extending the First Amendment to “corporate speech” as well.

The theme is explicit as well in the concurring opinions of Justice Roberts and Justice Scalia. Justice Roberts writes that “Congress may not prohibit political speech, even if the speaker is a corporation or union” (558 U.S. 5 (2010)). Justice Scalia writes, “Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate” (558 U.S. 9 (2010)). Thus, it is clear that the reasoning throughout rests on the assumption that corporations are as such speakers, and in a sense persons, even if not natural persons, and as such the First Amendment is directly applicable to them, so that the Government must show a compelling reason for restricting the speech of Corporations if such restrictions are to be constitutional. The Court concluded that there were no such compelling reasons.

² Sotomayor: “there could be an argument made that that was the Court’s error to start with, not Austin or McConnell, but the fact that the Court imbued a creature of State law with human characteristics” (Transcript of oral argument in Case 08-205, *Citizens United vs. Federal Election Commission*, Wednesday, September 9th, 2009, Alderson Reporting Company, p. 33). Strictly speaking, what Justice Sotomayor suggests the Court did can’t be done. What the Court did was sanction a certain form of speech regarding corporations to provide a compendious way of stating a body of legal doctrine to facilitate certain kinds of transactions. The mistake is to fail to recognize that the limited “legal personality” of the corporation does not sanction a blanket application of the law, as it applies to persons, to corporations, or at least to fail to recognize that extensions of its scope need to be argued for on other than syntactic grounds. See the discussion of the “legal personality” of corporations in §8, and note 23.

³ There is a tradition of treating groups, especially institutions with complex internal structure, as agents in their own right. See for example (French 1979; Copp 1979, 2006; Tollefsen 2002; List and Pettit 2011; Stoutland 1997).

2. Background and the Majority's Reasoning

In January 2008, Citizens United (CU), a non-profit corporation with an annual budget of about 12 million, released a film titled *Hillary: The Movie* (henceforth *Hillary*). Most of the funds for CU come from individuals, though they accept some funds also from for-profit corporations. CU wanted to make *Hillary* available via pay-per-view on cable television and prepared three 30-second television spots to advertise it on cable and broadcast channels. The Bipartisan Campaign Reform Act of 2002 prohibited corporations and unions from using general treasury funds to make independent expenditures for “electioneering communications” (§441b), defined as “any broadcast, cable, or satellite communication” referring to a “clearly identified candidate for Federal office,” within 30 days of a primary or 60 days of a general election (§434(f)(3)(A)). The Federal Election Commission (FEC) defines an electioneering communication further as one that is “publicly distributed,” which is defined to mean a communication that “can be received by 50,000 or more persons in a State where a primary election [...] is being held within 30 days” (§100.29(b)(3)(ii)). Citizens United wanted to make *Hillary* available within 30 days of the 2008 primary elections and, concerned that it might be found in violation of BCRA, sought “declaratory and injunctive relief against the FEC” (558 U.S. 4 (2010)). CU argued that §441b is unconstitutional as applied to *Hillary* and that BCRA’s disclaimer and disclosure requirements §§201, 311 were likewise unconstitutional as applied to *Hillary* and the three ads for the movie. The District Court denied the motion for a preliminary injunction and granted the FEC’s request for summary judgment, holding that §441b was facially constitutional under *McConnell* and as applied to *Hillary* because “it was susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office.” It likewise ruled against CU on the challenge to the disclaimer and disclosure requirements. The Supreme Court took the case on appeal. I shall be concerned solely with the first of the challenges to the constitutionality of §441b.

The majority held that CU’s case against §441b *as applied* to CU was not sustainable, but took up a facial challenge to it, that is, a challenge to the constitutionality of the law not as applied to a particular case because of its particular circumstances, but to its constitutionality always and in every case. The 5-4 majority held that §441b was facially unconstitutional, thereby overruling prior decisions in *Austin* and *McConnell* (2003) that upheld the constitutionality of the BCRA limits on independent expenditures by corporations and unions⁴.

I focus on two arguments discernable in the case for the majority ruling, in which assumptions about the nature of corporations and corporate agency can be seen to play a role, which I will call the direct and indirect arguments. The direct argument (see note 1) is drawn from Justice Kennedy’s controlling opinion⁵.

⁴ *Austin* and *McConnell* themselves traffic in the same assumption that corporations are speakers despite their corporate identity.

⁵ In *Bellotti*, the 1978 Court provides the basis for a different, if not completely disentangled argument, and one which is also at play in the reasoning in *Citizens United vs. Federal Election Commission*, namely,

The Direct Argument

- 1) Corporations (are persons that) are capable of speech (henceforth, ‘speakers’).
- 2) The First Amendment applies to all speakers in the jurisdiction of the Constitution (qualification henceforth to be understood).
- 3) While it is recognized that in some circumstances the government may have a compelling interest to place restrictions on speakers, there is no compelling interest that motivates restricting the speech of the relevant class of speakers, that is, corporations, in the circumstances specified in BCRA §441b.
- 4) Therefore, the government may not restrict independent expenditures for candidate advocacy by corporations in the way specified in §441b.

The Indirect Argument is suggested in Justice Scalia’s concurring opinion, written in rebuttal to Justice Stevens’ dissent⁶.

that (435 U.S. 776): “The First Amendment [...] serves significant societal interests. The proper question therefore is not whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether § 8 abridges expression that the First Amendment was meant to protect. We hold that it does.” The interest which the Court goes on to cite (from *Thornhill vs. Alabama* 301 U.S. 88/101-102) is “the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. [...] Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with exigencies of their period.” This still places the emphasis on corporations being capable of speech, and parties to general discussion, so it is not fully disconnected from the background assumptions I wish to raise questions about, but it suggests a line of argument that might be detached from them. It might be maintained that even if corporations are not agents, and even if “corporate speech” is not speech, expenditures by corporations on political advocacy nonetheless contributes to “free discussion of governmental affairs” (quoted in Bellotti from 384 U.S. 214), “open and informed discussion” (435 U.S. 777 n.12), and “in affording the public access to discussion, debate, and the dissemination of information and ideas” (435 U.S. 783). It might even be suggested that in focusing on the argument as I do in the text, I have mislocated the epicenter of the debate. But where the epicenter lies is a bit unclear when the assumption that corporations are speakers and agents with their own voices who speak in their own right is so intricately interwoven into the discussion, and it is clear that the dissenters at least found this to be a central point of contention. In any case, let it be granted that the debate should be focused on the contribution of “corporate speech,” whatever it comes to, to “open and informed discussion.” Still, in order to properly assess this strand of argument it must be disentangled from the strands in the reasoning which rely on the assumptions that corporations are entities with voices who speak in their own right, and a fuller understanding of the way in which agency is expressed through corporations will aid in that assessment once we have disentangled it from these other assumptions. My concern is with the light that work on collective and proxy agency sheds on the issues. While acknowledging this strand in the argument, then, I set it aside to focus on other strands on which work in the theory of collective agency sheds light, reflection on which I hope will also help here. In particular, some of the issues discussed in connection with the indirect argument below will, I think, have a bearing on the line of argument that focuses on contributions to effective public discussion, for it is plausible that relevant contributions to the discussion should be made by those who have a standing in the outcome.

⁶ I draw the Indirect Argument from the following passage. It is not, in this passage, cleanly separated from the assumption of the Direct Argument that corporations are speakers in their own right, but the underlying line of thought can be restated, as I do in the text, without assuming groups as such are speakers (558 U.S. 8 (2010)): “The dissent say that when the Framers ‘constitutionalized the right to

The Indirect Argument

- 1) Corporations are assemblies of persons.
- 2) The right to speech of individuals guaranteed by the First Amendment may be expressed in coordination with others, i.e., the First Amendment extends its protection not just to the speech of each individual taken by him or herself, but also to groups of individuals coordinating their activities to express their shared views.
- 3) While it is recognized that in some circumstances the government may have a compelling interest to place restrictions on speakers or collections of speakers coordinating the expression of their shared views, there is no compelling interest of the government to restrict such coordination when the collection is a corporation in particular in the circumstances specified in BCRA §441b.
- 4) Therefore, the government may not restrict independent expenditures for candidate advocacy by corporations in the way specified in §441b.

There were many issues in dispute between the majority and the dissenters, but I am concerned only with a subset on which some conceptual issues have a direct bearing, namely,

- (a) Are corporations persons (or agents) and speakers?
- (b) What is the nature of “corporate speech”?
- (c) What is the nature of corporate agency?
- (d) What is the relation between a corporation and its operators and shareholders?

I argue that, once we have sorted out answers to (a)-(d), we will be able to see that the direct argument is unsound and that the indirect argument’s failure to make relevant distinctions undermines its force. I argue that corporations are neither persons in their own right nor capable of speech as such, and, hence, the First Amendment does not apply to corporations on the grounds that they are speakers. This undermines the direct argument. Furthermore, while corporations are (merely) groups of people, they are not strictly speaking to be identified with their managers, employees and other executive agents, such as directors – I subsume all such individuals under the term ‘operators of the corporation’. The corporation is its shareholders. The shareholders may act through the corporate form but also independently. These two facts are relevant to the plausibility of the indirect argument. First, the distinction between the operators and shareholders raises the question to what extent the actions of the corporation as directed by its operators are intended by shareholders, and in particular under what

free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.’ Post, at 37. That is no doubt true. All the provisions of the Bill of Rights set forth in the rights of individual men and women – not, for example, of trees or polar bears. But the individual person’s right to speak includes the right to speak *in association with other individual persons*. Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of ‘an individual American.’ It is the speech of many individual Americans, who have associated in common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different – or at least it cannot be denied the right the speak on the simplistic ground that it is not “an individual American.”

circumstances the advocacy of a corporation for a candidate, at the direction of management, can be considered advocacy *by* the shareholders. This indicates that the indirect argument is not sensitive enough to when what a corporation does counts as its shareholders voicing their views. Second, the distinction between the group of shareholders and the corporate form through which they may act, directly or through their agents, raises the question to what extent restrictions on the corporation's expenditures from general funds are restrictions on the rights *of the shareholders* to advocate for candidates, even as an assembly, and so on whether restrictions on expenditures from corporate general funds for political advocacy are restrictions on the speech of its shareholders.

The rest of the essay is organized as follows. In §3, I show that *plural* action sentences are properly interpreted so as to involve only individual agents⁷. In §4, I show that action sentences involving *institutional* agents are to be interpreted on the same lines, so that their truth too involves no agents other than individual agents. In §5, I give an analysis of “institutional speech” that shows it not to be speech in the strict sense. In §6, I turn to the structure of corporate agency, the status of corporations as having a “legal personality”, and the relation of the operators to the shareholders. These strands are brought together in §7 in application to the reasoning of the Court in *Citizens United vs. Federal Election Commission* outlined above to show that the direct argument is unsound and the indirect argument overlooks a number of crucial issues that would have to be resolved before its prospects are clear. §8 is a brief summary and conclusion.

3. *Collective Action versus Collective Agents*

It is natural to assume that when a group acts, especially when it brings about something that no member of it brings about individually, we must admit in addition to the individual agents who are its members the group itself as an agent. A superficial review of the form of action sentences in the individual and collective case seems to speak in favor of this. When we contrast [1] with [2], it would appear that the only significant difference is the number of the subject term.

[1] I rowed the boat ashore.

[2] We rowed the boat ashore.

As in [1] the agent of the rowing is the referent of the subject term, so it seems, by symmetry of form, the agent of the rowing in [2] must be the referent of the subject term, that is, not any individual singly but a collection of individuals. This is a mistake, however, which is revealed when we look more closely at the logical form of the matrix of [1] (given below in [3]) and attend to the ambiguity in [2] between the distributive and collective readings of it. On the distributive reading, we understand [2] to mean each of us rowed the boat ashore. On the collective reading, we understand it to mean that we did it together.

⁷ I have argued in greater detail for the analysis of plural action sentences given here in Ludwig 2007a, 2007b and 2016.

The event analysis is by now the standard account of the logical form of [3], which I give with certain refinements, using logical notation, in [3'], though I elide treatment of tense to keep the discussion brief. I provide an ordinary language version of the analysis after the more precise formal version.

[3] \underline{x} rowed the boat ashore.

[3'] $(\exists \underline{e})(\exists \underline{f})[(\text{agent}(\underline{f}, \underline{x}) \ \& \ \text{direct}(\underline{f}, \underline{e})) \ \text{and} \ (\text{only } \underline{y} = \underline{x})(\exists \underline{f}')(\text{agent}(\underline{f}', \underline{y}) \ \& \ \text{direct}(\underline{f}', \underline{e}))] \ \& \ \text{rowing}(\underline{e}, \text{the boat ashore})$.

There are events \underline{e} and \underline{f} such that \underline{x} is an agent of \underline{f} and \underline{f} brings about \underline{e} directly and only \underline{x} is such an agent of \underline{e} and \underline{e} is a rowing of the boat ashore.

The key feature of the event analysis is that it introduces an implicit event quantifier – or two on the refined analysis. This is motivated by a variety of semantic and syntactic data, including prominently the order it brings to our understanding of adverbial modification of action sentences and event sentences more generally. The case is well documented and I will not rehearse it here⁸. In [3'], the first event quantifier introduces a *consequent event* and the second introduces an event that the agent brings about primitively, a *primitive action*. An agent brings about an event primitively if he does not bring it about by doing something else. Rowing is accomplished by grasping oars while in an aquatic vessel and moving one's arms in appropriate ways. Thus, it is accomplished by doing something else. But moving one's limbs in the way appropriate is not done by doing anything else. The relation required between the primitive action and the consequent event for an action sentence to be true may vary. In some cases, it is identity, as when I snap my fingers. In others, it may be causation (e.g., rowing by pulling) or constitution (e.g., adjourning a meeting by so announcing). In the case of causation, action verbs often require that no one else's agency mediate between one's contribution and the event. If I hire an assassin to kill a rival, I cause his death but I don't kill him myself. As above, I use 'direct(\underline{x} , \underline{y})' to express the right sort of causation without intervening agency by another. [3'] requires that there not be more than one agent of the event expressed by the action verb in the relevant way (this is the force of the '(only $\underline{y} = \underline{x}$)'-clause), which is required by our ordinary understanding of action sentences. If I built the first half of a boat and Jack built the second half, neither of us gets to say that this is the boat that he built.

Turning to the ambiguity in [2], on the distributive reading of [2], each of us rowed the boat ashore. On the distributive reading, [2] would be true if we were participating in a time trial to see who could row the boat to shore quickest, and we took turns rowing the boat to shore from a designated starting position. On the collective reading, in contrast, this situation would not be adequate to make the sentence true. We would have to be doing it together or as a group, in the same boat, at the same time, each of us making his contribution. What accounts for this ambiguity?

On the distributive reading, 'We' functions as a restricted quantifier over members of the group, as in [2d].

⁸ See Ludwig 2010 and Schein 2012 for overviews.

[2d] (Each \underline{x} of us)($\exists \underline{e}$)($\exists \underline{f}$)([(agent(\underline{f} , \underline{x}) & direct(\underline{f} , \underline{e})) and (only $\underline{y} = \underline{x}$)($\exists \underline{f}'$)(agent(\underline{f}' , \underline{y}) & direct(\underline{f}' , \underline{e})))] & rowing(\underline{e} , the boat ashore)).

Each one of us is such that there are events \underline{e} and \underline{f} such that he is an agent of \underline{f} and \underline{f} brings about \underline{e} directly and no one else is an agent of \underline{e} in that way and it's a rowing of the boat ashore.

As is well known, when there are multiple quantifiers in a natural language sentence without explicit markers for scope, we can read them with various scopes, as in 'Everyone went somewhere' ('Somewhere is such that everyone when there' vs. 'Everyone is such that he went somewhere'). When we reverse the order of the first two quantifiers in [2d] as in [2c], making appropriate adjustments to the requirement of sole agency (now we require that only members of the group contribute in the relevant way), we get the collective reading of [2]

[2c] ($\exists \underline{e}$)(Each \underline{x} of us)($\exists \underline{f}$)([(agent(\underline{f} , \underline{x}) & direct(\underline{f} , \underline{e})) and (only \underline{y} among us)($\exists \underline{f}'$)(agent(\underline{f}' , \underline{y}) & direct(\underline{f}' , \underline{e})))] & rowing(\underline{e} , the boat ashore)).

There is an event \underline{e} of which each one of us is an agent by way of some primitive action of his which contributes directly to bringing \underline{e} about and no one else is in this way an agent of \underline{e} and \underline{e} is a rowing of a boat ashore.

This is clearly just what is required intuitively for [2] to be true on the collective reading. The upshot is that collective action, understood as what is expressed by plural action sentences about groups, does not *ipso facto* commit us to collective agents, but, on the contrary, commits us to no more than individual agents all making a contribution toward some end. This is clearly compatible with the end toward which they make contributions not being brought about by any one of them individually.

Groups may act together intentionally or unintentionally. When we poison the environment, we do so unintentionally, by our various contributions, no one person's contributions being sufficient. Often, we act together intentionally, as when we elect a new president, or take a walk together, or play a game of chess. In each case, it is merely a matter of there being multiple agents of a single (perhaps complex) event. Acting together intentionally, we intend to act as a group, and we have participatory intentions characteristic of group intentional action. Following the practice in the literature, I will call these participatory intentions 'we-intentions'. We will make appeal to the notion of we-intentions below, but for present purposes no further analysis will be necessary⁹.

4. *Institutional Agents*

There is a case to be made that sentences about the actions of institutions, of the sort picked out by terms such as 'Citizens United', 'General Motors Corporation', 'The

⁹ I provide an account of we-intentions as intentions to contribute to a joint action in accordance with a shared plan in Ludwig 2007a, 2007b and 2016. For other accounts, see Bratman 1999 and 2015; Tuomela and Miller 1988; Tuomela 2005 and 2013; Searle 1990.

Supreme Court of the United States', 'the British Eighth Army', and the like, cannot be treated on the model just provided for plural action sentences. In particular:

1. Such agents are referred to in action sentences using *grammatically singular noun phrases*.
2. They appear to persist (in many cases) through changes in their membership.
3. They may (in many cases) have had different members, in some cases, perhaps entirely different members, than they in fact do.
4. They may perform actions (for example, issuing a ruling in *Citizens United vs. Federal Elections Commission*) that no *individual* could perform *in principle*.
5. They can have decision procedures that separate out research, deliberation, and decision, and which may disregard the inclinations of some of its members or perhaps in extreme cases all of them¹⁰.
6. They can have an internal organization that involves the delegation of authority to act for the whole in various matters to various subgroups, and, thus, it seems to allow for the institutional group sometimes to act though not all of its members contribute to what it does¹¹.

Thus, institutional agents can seem to take on the aspect of agents in their own right, perhaps with interests and goals which cannot be ascribed to all of their members, or perhaps any, and whose obligations and responsibilities may come apart from those of their members. While in pickup basketball games we don't want to call the teams persons in their own right, it might be thought that in the case of corporations and other similarly complex institutions it is a different game altogether.

But it is not a different game altogether: it is a more complicated game of the same basic type. Each of the features (1)-(6) listed above can be accommodated in an analysis that admits only individual agents, or shown to be misleading. I begin with a common sense argument, which I will call the argument from continuity. When a group of people decide informally to do something together, to play a game of basketball or to build a tree house, we do not want to say that the group of which they are members, which works or plays together for a term, is in any sense a person in its own right. The group does what it does by way of the agents who are its members making their individual contributions to some event that (typically) none of their individual contributions is enough to bring about, and there is nothing more to it than that. To suggest that there is suddenly another person on the scene with its own beliefs and desires and intentions is neither necessary nor sensible. It is not necessary because we can understand what is involved in playing a game of basketball or building a house entirely in terms of the contributions of the individuals who make up the group. It is not sensible because the attribution of beliefs and desires and intentions requires the attribution of a whole network of propositional attitudes. This would require a range of dispositions and the

¹⁰ For an argument for treating corporations as persons which places emphasis on these features, see French 1979.

¹¹ Tuomela 1995 (p. 142) cites the possibility of a group with an authority structure being able to delegate authority as an example in which a group may do something though not all of its members participate. The members may be divided into the operative and non-operative members, and the group counts as acting when the operative members act.

capacity for perceptual experience and consciousness that the group *per se*, as opposed to its members, fails to have. The intention to build a house, for example, presupposes possession of a wide range of concepts that implies capacities to reason and think and react, in some cases on the basis of sensory input, which the group as such clearly does not possess, though its individual members do. Consider the group choosing what color to paint the house and trim and then executing the intention, for example.

If we do not countenance the emergence of genuine group agents in these cases, there can be no reason to do so as we consider the development of more complicated institutional groups. Institutions evolve out of more informal sorts of group intentional behavior. At no point is there any development that cannot be understood in terms of the contributions of individual agents. We can see this by reflecting on the key innovation in the creation of an institution, which is the introduction of a socially constructed membership relation. The concept of a group as such is just the concept of any collection of things. Any random selection of agents constitutes a group that could do something. No special relation must hold between members of such groups, which we can call natural groups. To be a member or participant in an institutional group, however, something more is required. While every institutional group is also a natural group, not every natural group is an institutional group. Thus, the concept of membership in an institutional group is distinct from the concept of membership in a natural group. The concept is constructed, however, out of ingredients already in hand in our understanding collective intentional action by natural groups.

The formation of a club provides a simple example. The concept of a club is the concept of a group of agents each of whom agrees on an association with the others for the joint pursuit of certain common interests, and which has a formal rule for the form of association. Here, by a formal rule we mean a condition that is agreed upon by members of the group as both necessary and sufficient for being associated in the intended sense with the others. We say that the meeting of the condition then suffices for one to be appropriately associated with the others for the purposes in view, or, in other words, to be a member of the club. It may be something as simple as putting one's name on a signup sheet, or it may involve other requirements such as paying dues or coming to a certain number of meetings. Membership may then be treated by the members (those meeting it) as a condition for coordinating with and giving special status to someone in certain characteristic activities. For example, members treat each other as having a right to vote on issues that come up that concern the joint pursuit of the club's common interests, such as where and when to meet to pursue their interests.

In forming a club, we must initially decide what condition at any time is to suffice for being a member of the club. This is itself a joint activity. It comes to committing together to meeting the condition sufficing for a certain structure in the relations among all who do so. This is what brings into existence the potential for membership in the club. The form of the commitment may be given as follows:

We commit ourselves to making the following true: whoever meets condition C at a time \underline{t} is to be accorded at \underline{t} by all who meet condition C at \underline{t} as having such and such rights and obligations with respect to all who meet condition C at \underline{t} .

For example:

We commit ourselves to making the following true: whoever is at any time t such that (C) {he has paid dues of \$5 (as represented by such and such a procedure) for the year of t } is to be accorded at t by all who meet condition C (henceforth, is a member of the chess club at t) with the right to attend meetings of the club, to vote on matters pertaining to the form of its activities, and to participate in them.

Being a member of the club is socially constructed in the sense that it is a property one can have only by dint of its being collectively accepted by the members of some natural group that some condition suffices for being a member of the club. To be a member of a club, in this sense, is to have, to use John Searle's term, a status function. A status function is a function something has in virtue of the members of the group collectively accepting that it is to have that function¹². For example, that something is a twenty dollar bill is a matter of its having a certain status function. It performs its functions (as medium of exchange, unit of account, or store of value) in virtue of its being collectively accepted, in virtue of its type, for the relevant purposes. A member of a club, or Congress, or the Supreme Court has a particular sort of status function, namely, a *status role*, to which are attached, by virtue of the collective acceptance of an appropriate group (which may include a larger group in which the group in question is embedded), certain rights and responsibilities, which define how they are to act or to be treated in certain kinds of social transactions with others on the basis of their respective status roles. This is not different in principle from the designation of something of a certain shape and size as a pawn for the purposes of the play of a game of chess, except for the way that the expression of agency is folded into the function specified by a status role.

We have then two membership relations, which I will call natural membership and institutional membership. For any n things there is a natural group of which the n things are members. Some of these are groups of agents. If the agents have the concept of group intentional action and certain other concepts, then they can decide to treat certain agents in certain ways if they meet a certain condition, and thus introduce a socially constructed membership relation that individuals can bear to a group, an institutional membership relation. The institutional group in question is, at any time, a natural group, namely, that natural group each member of which meets the relevant condition at that time. I will use 'ε' to express the natural membership relation and 'ε' to express a socially constructed membership relation. In general, for different institutional groups, a different determinate membership relation is required, and so for each type of group we should use a subscript to designate the determinate form the membership relation takes. I elide this detail to keep presentation simple. Its addition would change none of our conclusions.

The type of an institutional group is typically defined by its purpose. As it is organized for collective intentional action, its organization and how it pursues its goals through collective action is determined by the status roles of its members. Meeting the condition

¹² See Searle 1995 (p. 41) and 2010 (p. 7). Collective acceptance may be expressed in an explicit agreement but it need not be. Many objects have status functions that are underwritten simply by the dispositions of relevant groups to treat them as having the relevant functions in the relevant sorts of social transactions. For our purposes, it will not be necessary to enter into further analysis of the concept of collective acceptance, but see Ludwig 2014b and 2017 for further discussion.

for institutional membership will determine a status role that is associated with every member of the group. This is compatible with membership in a group involving a sorting into more determinate status roles. Being inducted into an army, one is also assigned a more specific status role, which is expressed by an assigned rank. Integration into particular units with particular missions will then involve a further specification of a soldier's status role.

The condition for membership in an institutional group may be a condition that invokes the existence of other institutional groups, though the analysis must eventually ground out in groups that are not institutional groups. For example, to be a justice on the Supreme Court, one must be nominated by the President and approved by the Senate. Eventually, the entire system of interconnected institutions of the government is grounded in the collective acceptance of them by (enough of) its citizens.

A predicate that applies to an institutional group presupposes a membership condition that affords those who meet it the appropriate status role. When we invoke the institutional membership relation, we do so in relation to such a predicate. We say someone is a member of the chess club, or of the United States Congress, or a justice on the Supreme Court, a shareholder of General Motors Corporation, and so on, often using a term ('justice on', 'shareholder of') that indicates something about the status role of the member, and so the nature of the institution. As in these examples, we often pick out particular institutions using names for them that signal the institution type. Names for institutions are semantically marked as institution names, even when there is no predicate expressing the type incorporated into the name. Someone who did not know that 'Kuwait' was the name of a country, or that 'Crabtree and Evelyn' was the name of a company, for example, would not be counted as fully competent in their use.

This basic move for the introduction of institutional groups shows at the same time that no agents over and above individual agents are required for there to be institutional groups, and by complications of the rules involving members of such groups and their iteration, we can build very complex institutions, without there being anything unintelligible about their operation in terms of the contributions of individuals to their institution, development, and maintenance. Thus, institutional groups evolve out of informal group collective intentional behavior, and they are explicable ultimately in terms of concepts subsuming those simpler forms of collective behavior. As no more is needed to understand the simpler forms than the contributions of individual agents, the same goes for institutional agents: when they act, it is by way of their members making their contributions, and no other agents are needed to explain what is going on.

The recognition of a socially constituted membership relation turns out to be crucial for deflating some of the observations that tend to suggest that institutional actions required agents over and above their members.

First, the fact that institutions can persist through change in their institutional membership is explained by the fact that what constitutes institutional membership in the group is a time indexed condition $C(\underline{x}, \underline{t})$. At each time, there is a simple group that constitutes the institution's members at that time because they are the satisfiers of the time indexed condition. The institution itself, rather than the time slice of it, is a larger group of individual agents all of whom at one time or another met the conditions for institutional membership in it.

Second, the same thing explains how an institution could have had different members and could have existed though it had completely different members than it in fact does. A different group could have been the group whose members met the relevant membership condition. It is the same group only in the sense of being the denotation of the same description, for effectively groups which are institutional groups must be picked out by description, that is, as the group meeting the institutional membership condition – and no agent over and above the individuals in each case is required to make sense of this. Thus, to say that the Supreme Court could have had different members is no different from saying that the 44th President of the United States could have been someone else. Just as the latter does not mean there is a shadow president standing behind Barack Obama, the former does not mean that there is a super justice hovering over and above the individual justices.

With respect to the fact that institutions may do things which individuals cannot in principle do, this is just a matter of there being event types which can be brought about as a matter of the relevant concept by the contributions of more than one agent. A simple example, outside the institutional context, is two people meeting at the library. Neither of them can do it alone, not because it requires a super agent over and above the two of them, but because meeting at the library by definition involves the contributions of more than one person. The same thing goes for the Supreme Court deciding a case brought before it. The Supreme Court is by its nature a collection of individuals and a ruling by the Supreme Court is defined as the result of a decision procedure implemented by its members, and, hence, no member by him or herself could bring about an event of the relevant type. But bringing it about, by the same token, requires only each of them making his or her contribution by voting to the final result. The point generalizes.

Furthermore, it is easy to see that sentences involving institutional groups exhibit the distributive/collective ambiguity when the verb does not require that the event be brought about jointly. [4] clearly admits of both readings.

[4] The Supreme Court is out to lunch.

On one reading, it means that each member of the Supreme Court is out to lunch. On the other, it means that they are out to lunch together. The two readings are represented in [4d] and [4c].

[4d] $(\text{Each } \underline{x} \in \text{the Supreme Court at the present time } \underline{t})(\exists \underline{e})(\exists \underline{f})([(\text{agent}(\underline{f}, \underline{x}) \ \& \ \text{direct}(\underline{f}, \underline{e})) \ \text{and} \ (\text{only } \underline{y}=\underline{x}) \ (\exists \underline{f}')(\exists \underline{f}'')(\text{agent}(\underline{f}', \underline{y}) \ \& \ \text{direct}(\underline{f}'', \underline{e}))]) \ \& \ \text{lunching}(\underline{e}))$.

Each justice of the Supreme Court at the present time is such that there are events \underline{f} and \underline{e} such that he or she is an agent of \underline{f} and \underline{f} contributes to bringing about \underline{e} directly and only he or she in this way contributes to bringing about \underline{e} and \underline{e} is a lunching.

[4c] $(\exists \underline{e})(\text{Each } \underline{x} \in \text{the Supreme Court at the present time } \underline{t})(\exists \underline{f})([(\text{agent}(\underline{f}, \underline{x}) \ \& \ \text{direct}(\underline{f}, \underline{e})) \ \text{and} \ (\text{only } \underline{y} \in \text{the Supreme Court at the present time } \underline{t})(\text{agent}(\underline{f}, \underline{y}) \ \& \ \text{direct}(\underline{f}, \underline{e}))]) \ \& \ \text{lunching}(\underline{e}))$.

There is an event e such that each institutional member of the Supreme Court at the present time is such that there is an event f such that he or she is an agent of f and f contributes to bringing about e directly and only members of the Supreme court in this way contribute to bringing about e and e is a lunching.

With respect to the claim that sometimes institutions can act through the actions of a subgroup or sometimes a single member, this is an illusion, and I will aim to explain why in the next section of the essay on institutional speech and proxy agency. But even if it were not so, this would not provide any reason to suggest that we needed to countenance an agent over and above the individual agents who are members of the group which constitutes the institution.

With respect to the point that institutions may have decision procedures that result in decisions that do not accord with the interests of the individuals who are members of the institution and that the decisions may not, as in the case of *Citizens United vs. Federal Election Commission*, reflect the views of all of its members, we may make two points. First, there is nothing puzzling about someone acting in the individual case in a way that does not reflect his interests. This may be so for two reasons.

- a. Someone may act in a way that he believes to be in his interests when it is not. This can extend to the institutional context as well.
- b. Someone may act in a way that he does not believe to be in his interests (in certain important respects) because the costs of pursuing those interests are too high (and so other interests trump the ones neglected).

Similarly, in the institutional setting people often find themselves balancing their interests in one area against another, an interest in being employed, for example, against an interest in various other public and private goods. It may then be, in an extreme case, that everyone follows rules under the assumption that most others endorse them when no one does, so that as a group they act in a way that is contrary to the interests of each and of all, through a false impression about the views of most others. This doesn't require any entity to have the interests the group appears to be working toward, and any impression otherwise disappears as soon as we see the mechanism at work.

Finally, what of decision procedures, like voting, or letting some person or subgroup decide for the group as a whole, in which the result does not reflect the preference ranking of some of those who participate, so that the group does something which not all members of it want to have happen? Putting aside coercion, confusion, bad faith and the like, this is not a case in which the group does something which not all the members endorse, for in endorsing the decision procedure, they endorse conditionally the result, even if the outcome is not what they would have otherwise liked to have seen happen. If sincere in their participation in the procedure, though, they intend the group to follow the decision reached by the procedure, and to do their parts¹³.

¹³ There are certain other issues that arise with which I cannot deal within the limitations of the present context. For example, we say that the Supreme Court reversed its 1896 decision in *Plessy vs. Ferguson* that segregation is constitutional in its 1954 decision in *Brown versus Board of Education*, yet the membership on the Court in 1896 and in 1954 is disjoint. In brief, the solution is to recognize that the membership

5. *Institutional Speech and Proxy Agency*

I return to the objection that institutional groups may act by delegating to subgroups, though not all members of the group act, the resolution of which will at the same time reveal the nature of “institutional speech.” I will call this proxy agency¹⁴. Proxy agency is not restricted to group action. When I give a power of attorney to someone to act on my behalf in a commercial transaction, I act by proxy. The signal fact of proxy agency is that it requires an institutional setting, even in the case of individual action, where it requires a legal framework sustained by various forms of collective intentional behavior. This shows that an individual or a group acts as a proxy agent for another, whether an individual or a group of which it may or may not be a member, only by virtue of a suitable institutional arrangement. That arrangement itself is one to which there must be appropriate acquiescence by the relevant community, for the act to have its significance.

Take a group that delegates the task of drawing up and putting into place a constitution by electing representatives to a congress for the purpose. The representatives have a status role accorded them by the electors to carry out certain tasks, which the electors agree will result in a constitution that they will accept or not by a referendum. Thus, the electors have certain conditional we-intentions with respect to the actions that are undertaken by the congress with respect to the task delegated to it. A conditional intention is an intention to carry out some act upon a contingency, that is, it is commitment to a contingency plan¹⁵. A conditional we-intention is a we-intention to carry out (with others) some group action upon a contingency. In this case, the electors we-intend to have a referendum on any constitution settled upon by the delegates, and to act in accordance with it if it is approved. In drawing up a constitution, the delegates act in the name of the larger group by prior arrangement. They are proxy agents for them. Let us say that the delegates in turn authorize a smaller subgroup or even a single person to draw up a first draft for discussion and revision. Then that person acts as a proxy agent for the delegates, and as the delegates act as proxy agent for their electors, so the proxy agent for them is a proxy agent for the electors as well.

In delegations, we must distinguish two subtypes. The first is one in which an agent (or subgroup) is simply given a task to perform in his or her (or their) own right. For example, when a platoon makes an encampment, a squad may be delegated the task of digging a latrine. The whole platoon then does not dig the latrine, though it may be said that the platoon made an encampment a part of which involved the digging of a latrine – just as when painters paint a house they do it together but each does his part in the whole. The second case is the one of interest in the present context, and I reserve the term ‘proxy agency’ for this kind of case. This is when the subgroup is directed to do

relation is indexed to different times, and those times are 1896 and 1954, so that this sentence says in effect that the Supreme Court is such that the decision in *Plessy vs. Ferguson* reached by the justices on it in 1896 was reversed by the justices on it in 1954 in *Brown vs. Board of Education*. See Ludwig 2014a and 2017 for a detailed analysis.

¹⁴ I discuss proxy agency at greater length in Ludwig 2014b and 2017.

¹⁵ I discuss conditional intentions in Ludwig 2015 and 2016.

something that involves the imposition of a status function on something, success in which requires the acquiescence of the entire group, and also in many cases a larger group subsuming that group as well, as in the case of many legal transactions. This is possible only if the subgroup has a status role, which is defined in part by the power to impose a status function on something for a social transaction involving the whole group. For example, when I give someone a power of attorney to close on the sale of a house, he acquires a status role that enables his signing the documents of sale to have the status of my entering into a legal agreement.

In imposing a status function on something, an act is performed which is partially constitutive of its having the status function, for its having the status function is conceived of as a matter of its being done in accordance with the authorization and forms necessary for it. This is the key to understanding how a group may seem to act through a subgroup, while at the same time it is the whole group that exercises its agency in the transaction. For the action cannot come about except insofar as the relevant agent or agents are properly authorized by the group, which requires the members of the group to be prepared to accept the agents as having the relevant status roles themselves, so that their actions amount to the imposition of the status function on the relevant object or event.

There are two subcases. In the first, the agents who are to serve as the proxy agents in the transaction are given explicit instructions about what to do. For example, when a bailiff is instructed to place a defendant into custody before sentencing, the court may be said to remand the defendant, and to do so intentionally, though the remanding includes more than just the judge or judges' official decision on the matter. In the second, the agents in question are given discretion in carrying out certain tasks. For tasks that the agents undertake below the level of detail at which they are instructed, although the authorizing group (or individual) will be said to have done the thing in question when it involves the imposition of a status function for which the agent's status is a prerequisite, they will not have done it intentionally.

We turn to the case of “corporate speech,” or “institutional speech” more generally, and we start with the case of the spokesperson, which will illustrate central elements of a broader class. Strictly speaking, a *group* of people is not *an agent*, even when they act in concert with one another, and even when they act in an institutional framework. For the same reason, the group or institution does not *per se* have any beliefs, or desires, or intentions. Though the superficial form of the language we use to speak about such groups can suggest otherwise, we have seen compelling reasons to deny that these forms of speech commit us to any such thing¹⁶. It is implausible on the face of it that people

¹⁶ We say that Russia, e.g., is angry at Turkey for shooting down one of its fighters, or that Congress does not want to take up contentious legislation before an election, or that Volkswagen believes it will take years to repair its reputation with consumers. Yet, clearly we do not take these things we say to have the same significance as in the case of similar attributions to individuals. We convey (let's leave aside the question whether in virtue of meaning or pragmatics) that, e.g., many Russians, or many Russians in decision making positions in its government, are angry at Turkey, that most congressmen don't want to take up contentious legislation, or that Volkswagen's executives think it will take years to repair the company's reputation. In all of these cases, what is meant gets cashed out in terms of attitudes of individual agents. A trickier case is a “group judgment” reached by a procedure that ends

acting in concert, whether in an institutional framework or not, bring into existence an additional agent, as if the members of any institutional group were always one short the total needed for the job. Since the concept of a speech act is the concept of an act by an agent intending to represent or express something with a certain illocutionary point, a sincerity condition, and conditions of satisfaction set by the speaker's intentions, it follows that groups cannot perform speech acts in the standard sense (Searle 1969 and 1979). Therefore, at best, talk of institutions or groups performing speech acts is an extension of the vocabulary of speech acts to something that bears certain analogies to speech but is not in the core sense speech at all.

When a spokesperson for a group or an institution speaks a certain message as authorized and directed by the group for which he or she is a spokesperson, then the spokesperson has been assigned a status role and directed to act in accordance with that function for a certain purpose. Thus, in line with our earlier argument, what the spokesperson does is to execute or contribute to the performance of an act by the authorizing group. It is not that the spokesperson by herself expresses the group's agency, but that she performs a crucial part of a plan involving many others. As the message is specified in the sort of case we are imagining, the group counts as intentionally making the content available (if all goes well) to the audience when the spokesperson does her job.

We talk here of the group's having, for example, announced something (I will underline 'announce' when I use it in the extended sense so as to avoid confusion with the core sense), because the point of the arrangement is analogous to the point of an announcement by an individual, which is to make publicly available the content of a certain message, and to signal commitment to its content. This is accomplished by virtue of the group's endorsement of the spokesperson as having the role of executive agent in the act, and the group's endorsement of the message to be delivered. Absent these endorsements, the individual's speaking does not culminate in the group's announcing something. It is important that the operation can work only by way of an arrangement that includes the audience. For unless the audience understands and accepts the role intended for the spokesperson, the group cannot achieve its goal. Thus, the institutional setting for group announcement includes not just the group but also the community for which the announcement is intended¹⁷.

up not reflecting the views of any members of the group (e.g., a compromise position no one really thinks is right, or a premise-based judgment aggregation procedure which yields a conclusion no participants accept (List and Pettit 2010)). But even here, what we mean if we say the group judges such and such is merely that its members are committed to acting in accordance with the content.

¹⁷ It is not only groups who have spokespersons. An individual may employ a spokesperson. In this case too, the spokesperson must be authorized to speak for someone (the *grantor*). The message may be precisely specified, or the spokesperson may have some leeway in how to respond (as in the case of a power of attorney, which may be limited, or unlimited). When the spokesperson speaks, within his or her authorization, the grantor may be said to announce or say something. But the grantor does not literally speak. Rather, the grantor, in virtue of the collective acceptance of the grantor, spokesperson, and audience, of how the arrangement is to work, is counted by the audience as committing himself to what the spokesperson says, with the authorization of the grantor, as if he had said it himself. The grantor is an agent of the announcement, which, though it involves an utterance act by the spokesperson, is not a speech act by the spokesperson (it is not his announcement) or by the grantor

These points are general. They apply to any sort of group speech act. The point of such acts is to commit the group to the content of the speech act, which comes to each of its members intending to be committed jointly with the others to acting together appropriately with regard to the content (in whatever the relevant way is)¹⁸. Thus, group speech acts are socially constructed: they are underwritten by a group's authorization or designation of an individual to perform a certain function in an interaction with an audience that is in on the arrangement¹⁹. In the absence of all of that, there can be no such thing as a group speech act. This is in contrast to the case of an individual's performing a speech act. While speech acts are conceptualized as having roles in communicative exchanges, we can perform them without the cooperation of others and without the cooperation or awareness or potential awareness of any audience.

As in the case of proxy agency in general, a spokesperson can be given very specific instructions or only more or less general guidelines. When the message is fully specified, the group counts as announcing that content intentionally. When someone is designated to answer questions on certain matters and is given some freedom in how to handle them within general guidelines, then the group counts as intentionally conveying its policy but not in the particular words used, and perhaps not in all the particular details, depending on how the instructions go. When the spokesperson is given leave to handle a matter, the group intentionally handles it through the spokesperson but the rest of the details are below the level of the group's intentions. When the spokesperson steps outside the bounds of the authorization he has been given, then the group can no longer be said to be speaking through the spokesperson.

(he doesn't speak). One might wonder why in this case the grantor does not count as speaking: for does he not cause there to be an utterance act with a certain content and does he not have himself the right beliefs and intentions for it to count as his announcement? Why cannot we conceptualize the spokesperson as a kind of prosthetic voice, a mere mouthpiece, of the grantor? The trouble is that the spokesperson is not a device, but an autonomous agent, who is to do something intentionally at our behest. The concept of speech requires the speaker to accomplish the production of a speech act by (what I called in the text) direct causation, i.e., without the intervention of another's intentional agency. I cannot myself literally speak by causing another to speak, even if I cause him to speak words which I myself wish to endorse in the way I would if I had spoken them. I can be counted in certain circumstances as undertaking the same commitments I would have if I had spoken them, but I do not literally speak them myself, anymore than, if I cause someone to convey me on his back across a stream by walking, I walk across the stream myself. Contrast the case with dictation, in which one does speak, and a record is made by someone else.

¹⁸ There is, then, something akin to a sincerity condition on group speech acts. If a group announces something that its members do not intend to act in accordance with, then it may be said to be insincere, but the cash value of this is just that the members knowingly use the mechanism involved to represent themselves as accepting something that they are not committed to acting, as a group, in accordance with. It is they who are not sincere, where this distributes over them. This does not involve the group *per se* having any attitudes.

¹⁹ This does not mean that the audience gets a say in who is appointed spokesperson, for the arrangement they are in on leaves that up to the announcing group, and it does not mean that the audience is part of the group that performs the announcement either, for while their agency may be involved indirectly in setting up the institutional framework, they don't bear the right determinate forms of agency to the announcement to be said to be part of the group that makes it.

To summarize and conclude this section²⁰:

1. Groups, including institutions and corporations in particular, cannot perform speech acts in the standard sense.
2. They can perform acts which are analogous to speech acts in their function, especially with respect to signaling publicly the commitment of the group to act appropriately for the content and mode of some message as a group (to act as if it were true, or to be pursued, e.g.).
3. When these acts make use of a spokesperson, they make use of an individual on whom a status role has been conferred: the function of expressing to a relevant audience the content of an agreed message (in the paradigmatic case) through the use of his or her capacity to produce individual speech acts with a corresponding content.
4. Recognition of the individual as having that status role and as acting in appropriate circumstances by the intended audience is crucial for the relevant interaction between group and audience to take place, and, thus, the agreement that enables an individual to have the relevant status role includes the intended audience.
5. As the authorization of speaker and message (more or less precisely specified) is required for the group to perform the relevant act, the group as a whole participates, even if it is only the spokesperson who performs an utterance act (which has the function of officially expressing the group's view), and thus it is not a counterexample to the doctrine that when a group acts, all its members are agents of the event it brings about.
6. This goes in general for acts by proxy agents: for they serve as proxy agents only by being so authorized, and then the acts they perform that require that status are socially constructed, and so the members of the group are constitutive agents of those acts, as well as some of them being agents of what they do in other ways.

6. Corporations as shareholders and as legal persons

A corporation is paradigmatically an association of shareholders (I focus for the moment on corporations constituted by more than one person)²¹. A group of individuals

²⁰ See Ludwig 2014b and 2017 for a fuller discussion and a response to a range of objections that it would natural to raise.

²¹ Here we must not be misled by a common way of thinking and speaking about corporations. We often focus on the operators of a corporation when thinking about what the corporation does and decides because the shareholders in many large for-profit corporations have such a limited role in what the corporation does, often limited to their role, by purchasing stock, in formally authorizing in concert with other stockholders the activities of its operators for the purposes set down in its charter. The group of operators of course is a group in its own right, and we can speak about what it does. It can be natural to think and speak of that group as the corporation (especially since most people are unclear about the legal function of talk of corporations). But legally the corporation is its shareholders, and this is what is pertinent in the present context. Having the distinction between operators and the

(shareholders) incorporates, thereby creating in the eyes of the law a corporation. This is for the shareholders, in virtue of the articles of incorporation, to acquire a legal status that amounts to their having certain legal rights and responsibilities. Those rights and responsibilities detail how they may act in concert and in relation to various other entities recognized in the law. In a for-profit corporation, which will be our main focus, the shareholders pool assets for use in a business enterprise. They have ownership rights in the corporation. This is represented by their holding of stock, which is just their share of the pooled assets. The shareholders may manage the company or hire management. A frequent form of organization for larger companies is a two-tier system in which the shareholders elect a board of directors who in turn appoint and oversee management (in some jurisdictions, there can be two boards, one consisting of directors elected by shareholders, and the other answerable to it and consisting of upper management). The corporation is set up with a specific interest of the shareholders in mind – in a for-profit corporation, it is (in part at least) that of providing a return on shareholder investment.

Two features of corporations are of special interest in the present context²². The first is their status as having a “legal personality,” and the second is the limited liability of shareholders. Both of these features involve corporations being treated in the law as *legally* distinct from their owners, in certain respects. Both are connected with the business function of the corporation, which is to allow the demarcation of a pool of assets from the rest of the assets of the shareholders (their personal assets) which are to be managed separately for certain business purposes. Legal personality is the primary means of doing this, and is the expression of the particular form of business enterprise that is the corporation. It is associated with two main features, entity shielding and associated procedural rules that help implement the legal personality given to corporations to provide entity shielding.

Entity shielding is expressed in two restrictions. The first restriction consists in priority rules governing creditors. Creditors who contract with the shareholders through the corporate form have priority over creditors of the shareholders individually with respect to the corporate assets. This facilitates the business enterprise by giving assurance to those who contract with the shareholders, in connection with business conducted with the corporate assets, that their claims will not be trumped by claims on the shareholders by creditors not conducting business with them in connection with the corporate assets. The second restriction provides liquidation protection and consists in (i) prohibiting owners from withdrawing their share of the corporate assets at will (as opposed to transferring them to another), and (ii) prohibiting their creditors from foreclosing on their share of the corporate assets. This protects the value of the firm as an on-going concern, and provides assurance to both shareholders and those who contract with them through the corporate form that the business enterprise will be protected against capricious shareholders and against shareholder creditors.

Legal personality is the means by which these goals are realized. The shareholders are given, as a group, a legal personality in the sense that the firm’s legal designation is

corporation as its shareholders is crucial for determining whether restrictions of corporate expenditures for political advocacy are restrictions on the operators’ rights. I address the speech rights of the corporation’s operators below.

²² See Kraaman *et al.* 2009, pp. 5-9.

allowed to enter into legal forms otherwise reserved for individuals, *as if* it were an entity over and above its shareholders. Thus, the firm is said to enter into contracts, to own the pooled assets of the shareholders, to have the right to sell them or make them available for attachment by creditors, to be able to sue and be sued, and, indeed, to be owned by the shareholders. The shareholders are not, however, treated as if they had, just as a group of individuals, done these things. The shareholders are said to own the corporation, but the corporation is said to own, for example, the factory, and to sell its products, and to contract with others for goods and services. The corporation is, in a standard phrase, a nexus of contracts. And the mechanism in the law for realizing this is a mode of speech in which the term designating the corporation is pressed into legal forms as if it picked out an entity separate from its shareholders.

Procedural rules are required for a corporation to function in accordance with its legal personality; they specify (a) who has the authority to enter the firm into legal commitments (typically the authority rests with the board, though its role is to ratify rather than initiate business contracts) and (b) determine how contracts may be enforced on firms, i.e., how they may be sued, as firms. The precise content of the relevant discourse, in which the corporation is treated as if it were an entity separate from shareholders, is given by the legal rules that determine the responsibility ultimately of the individuals who play their various roles in the business enterprise.

The limited liability of shareholders is another respect in which the corporation is typically treated as separate from its shareholders (though the provisions for business entities with legal personality are not in every jurisdiction conjoined with limited liability for shareholders). In limited liability corporations, the shareholders share in the corporation's profits, but they are not held personally liable for the company's debts, that is, beyond the amount of their investment. This is not a matter of protecting the assets of the corporation from its owners' creditors or from the owners liquidating it, but of protecting the owners from the corporation's creditors. This facilitates investment activities because the liability of ownership is limited to the amount of the investment. In the presence of large corporate obligations, not protecting the shareholders from personal liability would discourage investment. Insulation of shareholders' personal assets from those of the firm also helps to encourage transference of shares because it makes clear what the liabilities are which come with them.

The social and commercial purpose of the corporate form is to encourage investment in business organizations and to facilitate their operation. The limitation of liability of shareholders plays a crucial role in the former. The subsumption of the corporation under a certain portion of the laws applying to individuals in business transactions plays a crucial role in the latter, especially the right to enter into contracts and to retain title to property through changes in shareholders.

Thus, corporations are treated in the law in limited respects as if they were distinct from shareholders. Because corporations are subsumed under a body of law that originally applied to persons, they are said to be "artificial persons" or "legal persons." It does not follow from this, of course, that there is a person on the scene in addition to

the shareholders and the corporation's operators – directors, managers, and employees²³. That corporations as such are persons is said to be a legal fiction, and the point is the convenience it provides in bringing to bear certain legal procedures with respect to the corporation that are already in place in another area of the law²⁴. But the extent of the carry-over is precisely defined, and the designation of a corporation as a legal person must be understood in terms of what laws are adapted from application to persons to corporations and what their function is in organizing the activities of individuals involved. The use of the term “legal person” in itself does not license the wholesale application to corporations of the body of law that applies to persons. Thus, when in the special discourse of the law a term for the corporation appears in the subject position of an action sentence involving contractual matters, it stands as proxy (for this is technical discourse) for a form of speech about individuals or groups of individuals acting in accordance with certain forms of legal organization which define their legal obligations and rights with respect to one another. Talk of a *legal person* is no more about a particular person than talk of the *average man* is about a particular man.

A corporation may, however, consist of a single person. In this case, the corporation literally is a person, in distinction from the case in which the corporation is a group. The corporation is still given a separate legal identity (as a “legal fiction”) from the person who incorporates. So the corporation (in this case, the individual) is still treated as a legal person with a legal identity separate from the person who incorporates. This is part of the legal structure that protects the personal funds of the person who incorporates from liabilities incurred by the corporation, or, more properly, by the person operating in his corporate capacity with the invested funds and earnings. No one, of course, supposes in this case that the corporation *really is a separate person or speaker*. The total number of

²³ In his dissent, Justice Stevens notes that the corporation is regarded in the law as an artificial entity. He quotes Chief Justice John Marshall, in the case of *Dartmouth College against Woodward*, 4 Wheaton, Rep. 626, which established the right of corporations to enter into contracts and to hold property while its members change: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law it possesses only those properties which the charter of its creation confers upon it [Stevens quotes the passage up to this point but it is useful to consider how the passage continues], either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyance for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use.” Justice Stevens's point, which I will take up below, is precisely that corporations are not viewed as natural persons, but rather legal persons, that talk of corporations as entities separate from their shareholders and operators is merely as an artifice which enables the law regarding certain commercial and other enterprises to function more efficiently, and that therefore the First Amendment does not automatically apply to corporations as such.

²⁴ See Fuller 1967. Of course, it is not strictly speaking a fiction at all, but rather a technical device or form of technical jargon designed to express in a compendious way something that would otherwise require considerably more effort.

persons on the scene here is just one, not two, and the total number in the case in which n people incorporate is just n , not $n + 1$.²⁵

In a corporation in which management is separate from the shareholders, the managers function as proxy agents. Let us focus on a two-tier management system involving a board of directors serving as a level of organization between shareholders and the managers of the company. In this case, the board of directors is a proxy agent for the shareholders, and, in turn, the managers that the board employs to run the company, and the employees those managers hire, are all proxy agents for the shareholders. Corporations of this sort are thus operated largely by proxy agents. So far as they have been authorized to pursue certain general aims such as providing a return on shareholder investment, what they do may be said to be something that the corporation does, i.e., the shareholders operating under the corporate form. Of course, in the case of many large businesses, many shareholders have very little idea about the operations of the corporation, and consequently they cannot be said to be engaging in those activities intentionally. Thus, very often, much of what the *corporation* does, *it* does not do intentionally. It may be said that its directors, or upper management, undertake many of its activities intentionally, often themselves through proxy agents, as when I intentionally close on a home sale through someone exercising a power of attorney on my instructions. However, the separation of the shareholders from the operators of the corporation, and the identity of the corporation with the shareholders, shows that it is not the corporation that acts intentionally in such cases.

All of these points have a bearing on the argument of the majority in *Citizens United vs. Federal Election Committee*, to which I now turn.

7. *Implications for the application of the First Amendment to corporations*

We return to the direct argument from section 2, repeated here.

- 1) Corporations are persons that are capable of speech.
- 2) The First Amendment applies to all speakers in the jurisdiction of the Constitution.
- 3) While it is recognized that in some circumstances the government may have a compelling interest to place restrictions on speakers, there is no compelling interest that motivates restricting the speech of the relevant class of speakers, that is, corporations, in the circumstances specified in BCRA §441b.
- 4) Therefore, the government may not restrict independent expenditures for

²⁵ We may in the case of incorporation by a single individual, also, however, find that there is a role for corporate speech that is not speech strictly speaking. The corporation may enter into contracts, may speak as a legal entity, a fiction of the law, in, for example, court cases, where this is not counted as the person who is the shareholder entering into the contract as an individual citizen or speaking in court – in the latter case, lawyers, who are proxy agents for the corporation, may do all the actual talking. The shareholder enters into these activities of course, and is an agent of them, but the concepts under which they are subsumed, though they wear a familiar verbal form, subsume acts that, while they may involve, in their constitution, speech acts, are not themselves speech acts but more complex moves in the context of a legal system.

candidate advocacy by corporations in the way specified in §441b.

In light of our discussion, we can see that the direct argument involves a false assumption, namely, premise 1. Corporations are not agents or persons, and they are not capable of speech. To the extent to which the majority has relied on this assumption (and as we will see below the assumption has an influence on strands of the argument that may appear not to rely on it as a central assumption), its reasoning is unsound.

The impression that the corporation is an agent or speaker in its own right with its own voice and views is encouraged by a number of factors. First, there are common ways of speaking that encourage us to think of institutional entities as agents in their own right. Noun phrases designating corporations appear in the same place in action sentences as terms denoting individuals. This suggests that corporations are clearly *agents*, and, hence, that a corporation is a kind of person, and, therefore, capable of performing speech acts, and so, on the face of it, subject to the protections of the First Amendment. This impression is further encouraged by the fact that singular noun phrases, as opposed to plural noun phrases, are used to pick out corporations, which is correlated with picking out a group that appears to survive changes in their membership, and could have had different members than it does. However, the surface grammar of action sentences involving corporations is misleading, and in fact they involve no agents other than individual agents. The further features of corporations mentioned have likewise been seen not to be barriers to the denial of their personhood, for once the mechanisms by which it is brought into existence and maintained are laid bare, it is clear that only individual agents acting in coordination with each other are required. Second, there is an established body of law that treats corporations, in certain respects, as legal persons, and this may seem to suggest that they are to be treated as persons quite generally except perhaps where special provision is made, so that the default assumption is that we should apply the Bill of Rights in the most straightforward way to corporations. This may be separate from or confused with the first. But it is spurious, for it does not follow from something being a legal or artificial person that it is a person, anymore than it follows from something's being an artificial flower that it is a flower. And it does not follow from something's status as a legal person that any portions of the law can be applied to it other than those which are explicitly allowed for, for the concept of legal personhood is beholden to how the law is applied to the relevant sorts of transactions and has no independent content²⁶.

The First Amendment specification of a right to freedom of speech does not mention persons, or even speakers, but speech. This may also contribute to the thought that the First Amendment must apply to corporations, simply on the grounds that they are capable of speech. But as we have seen, this is false too. Corporations are not speakers in the ordinary sense, and could not be, anymore than any other group, and they are not *per se* capable of speech. 'Corporate speech' is a *façon de parler*, where what we have in

²⁶ Once a legal fiction has been introduced, it can be expected that there will be some tendency for what we might call judicial creep, the extension of the portions of the law that apply to the fictional entities, in virtue of the ease with which the surface forms of speech adopted can be adapted to additional portions of the law. This of course doesn't constitute a justification for an extension but identifies a pitfall to be avoided.

mind is an act by a group that is analogous to a speech act in its intention, in this case, in the intentions of (the members of) the group that authorizes the relevant making public of certain content. It is artificial, like the corporation itself, a social construct, and not the true coin of speech. Thus, if ‘speech’ is intended in the standard sense in it, the First Amendment would not apply to what we call ‘corporate speech’. One might argue that the term ‘speech’ in the First Amendment was intended more broadly, or one might argue that it falls within the legitimate scope of the court to interpret it in ways that extend its intended meaning (for example, many things fall under ‘speech’ for the purposes of the application of the First Amendment which are not so counted in ordinary parlance)²⁷. Still, the distinction between corporate speech and genuine speech shows that some additional argument would be needed to justify this.

One might argue alternatively that it is not crucial to the application of the First Amendment in this case that we construe corporations as agents *per se*, or corporate speech as genuine speech, because its application in this case can be justified on other grounds. This brings us to the indirect argument, repeated here.

- 1) Corporations are assemblies of persons.
- 2) The right to speech of individuals guaranteed by the First Amendment may be expressed in coordination with others, i.e., the First Amendment extends its protection not just to the speech of each individual taken by him or herself, but also to groups of individuals coordinating their activities to express their shared views.
- 3) While it is recognized that in some circumstances the government may have a compelling interest to place restrictions on speakers or collections of speakers coordinating the expression of their shared views, there is no compelling interest of the government to restrict such coordination when the collection is a corporation in particular in the circumstances specified in BCRA.
- 4) Therefore, the government may not restrict independent expenditure for candidate advocacy by corporations in the way specified in §441b.

²⁷ It might be said that the court can, for perfectly valid reasons, rule against reality, as in *Nix vs. Hedden*, the court’s ruling that for legal purposes, specifically for the application of the Tariff Act of March 3, 1883, c. 121, tomatoes are vegetables, notwithstanding their botanical classification as fruit. Yet, in this case, the issue was whether the ordinary meanings of ‘vegetable’, ‘fruit’ and ‘tomato’, as distinct from their technical meanings in the science of botany, dictate that tomatoes are fruits rather than vegetables, and whether the ordinary meanings were intended in the Tariff Act. The court ruled that the dictionary definitions “have no tendency to show that tomatoes are ‘fruit,’ as distinguished from ‘vegetables’ in common speech, or within the meaning of the tariff act” and “[t]here being no evidence that the words ‘fruit’ and ‘vegetables’ have acquired any special meaning in trade or commerce, they must receive their ordinary meaning” (149 US 304 (1893)). To take the reasoning in *Nix vs. Hedden* as a model for that in *Citizens United vs. Federal Election Commission* would require us to suppose the majority took ‘corporation’ and ‘speaker’ in their ordinary meanings to dictate that corporations are persons capable of speech that expressed their distinctive views. This does seem to be a current underlying Justice Kennedy’s opinion. But both in common meaning (this is the point about the analysis of the logical form of action sentences headed with grammatically singular noun phrases) and in fact it is a mistake to think corporations are genuine agents or capable of genuine speech.

While the First Amendment may not strictly entail premise (2), it is plausible the framers would not have wanted to exclude coordination of individuals to represent their shared views, as that is the sort of activity they had variously engaged in themselves, for example, in the Declaration of Independence, in the writing of the Constitution of 1788 itself, and in the argument for its ratification in *The Federalist Papers*. However, a closer look both at corporate speech, the legal function of corporations, and the distinction between shareholders and the operators of the corporation, shows that there are important issues that the argument overlooks.

The first point is that the corporation is a group of shareholders and not, at least *ipso facto*, the management or employees of the corporation. The separation of ownership and operation means that, especially in many modern corporations, the activities of the corporation *per se* are intentional only under very general descriptions. While the management may cause the corporation to produce advocacy for a candidate, this is not *ipso facto* something that the body of shareholders, i.e., the corporation proper, undertakes intentionally. As an assembly of persons cannot be said to represent themselves as adhering to a certain position if they do not intentionally represent themselves as doing so, it follows that in cases in which the corporation, because of the actions of its operators, but without the knowledge or endorsement of the shareholders, produces advocacy for a candidate, *the corporation* (when we look through the legal veil of corporate personality) is not representing itself as advocating for the candidate. This makes it clear that there are important distinctions overlooked by the Court. For even if it were determined that shareholders' constitutional rights had been violated by restricting their ability to themselves advocate for candidates within a certain term of a primary or general election through the corporate form, i.e., by directing the use of a corporation's general treasury funds for the purpose, there would be the further question whether such advocacy could be restricted when it was not, under that description, produced at their intent.

Second, shareholders act through the corporate form for certain purposes, but they can act independently of the particular form of legal organization that the corporate law allows. Once we see that the corporation is not in itself an agent or speaker, the fact that corporate speech is prohibited, given what that means, does not entail that the corporation taken as its shareholders has been prohibited from coordinating to make representations as a group. What is prohibited is at most using the corporate resources for doing it. So no strict ban even on any group's representing their shared views is implemented by a ban on corporate speech. What this calls into question is the inference from premises 1-3 to the conclusion of the indirect argument. For that conclusion to follow, it must be the case that the limitation on independent expenditures by corporations, even in the case in which shareholders direct the expenditures as a group intentionally, is *ipso facto* a limitation on their ability to advocate together for candidates. But this is not something that follows, given that there are no limitations on the group's so acting as long as it is not through the corporation form.

Third, as the assets shareholders invest in the corporation are isolated from the personal assets of the shareholders in accordance with priority rules, liquidation protection, and limited liability, in order to promote investment for business purposes and to facilitate the operation of the firm and its value as an on-going concern, the use

of funds accumulated under these terms would not count as the shared *personal resources* of the individuals who are shareholders. Those funds do not have the legal status of a shared checking account, and their use is restricted by the laws governing the corporation. There is therefore no direct argument from a group's being the shareholders in a corporation to their being able to use the corporation's general funds for independent expenditures in support of candidates for election. Investments are voluntary, and the use of invested funds may be restricted in order to promote the value of the investment. This may result in the funds not being available for other purposes, such as political advocacy. This is not automatically a violation of the free speech rights of the investors. For example, if someone voluntarily invests funds in a three-year certificate of deposit, the unavailability of the funds for political advocacy midway through the term is not a violation of the investor's First Amendment rights²⁸.

Fourth, the recognition that the corporation is its shareholders, while typically its operators are their proxy agents, shows that a group's status as a corporation in the jurisdiction of the Constitution does not automatically confer on them rights under the constitution, for there is no requirement of citizenship on being a shareholder in a corporation that does business in the United States, or whose place of incorporation is in the United States. It is only by confusing the legal personhood of a corporation with the status of citizenship, which requires thinking of the corporation as an agent in its own right over and above those individuals who constitute it, whether shareholders or operators, that one could suppose being incorporated in or doing business in the United States was *ipso facto* to have rights of citizens under the Constitution.

Are the rights of the operators of the corporation, as opposed to its shareholders, violated? The operators of a corporation (insofar as they are citizens) have a right as individuals and as an assembly of persons to advocate for candidates. However, the question is whether they have a right to use corporate general funds in order to do so. These do not represent personal funds of the operators, nor funds in which they, as operators, own a share of the value, as do stockholders. No right accrues to the operators of the corporation as its operators to use general funds for political advocacy expressing their views, anymore than they have a right to use it for personal expenses. Their use of corporate general funds is properly limited to the advancement of the corporation's purposes. For upper management, in the case of for-profit corporations, that is to increase shareholder value. They could use general funds for political advocacy only if it were designed to increase shareholder value. But the use of such funds by the operators for corporate political speech would not be their speaking in their own right, but speaking instrumentally for the shareholders. But this does not make it, if it is for the purpose specifically of increasing shareholder value, an expression of the political views

²⁸ This point extends to the case of the single person corporation. One may decide to incorporate for business purposes. This shields funds one does not put into the corporation from certain liabilities that the corporation may incur. The legal fiction that the invested funds are the corporation's is part of the legal structure that protects the shareholder. As it is a decision of the shareholder to incorporate, and the shareholder thereby acquires certain protections, placing restrictions on the use of funds designated as those of the corporation in political advocacy need not be a prohibition on speech. As noted above, one cannot be said to be prohibited from the exercise of one's right to free speech because one knowingly ties up funds in a form that makes them unavailable for certain purposes.

of the shareholders—for even if the content expressed their views, it would not be their expressing their views. Insofar as it is speech designed to advance the business purposes of the corporation, it is not the expression of anyone’s views. It would be so only insofar as the corporation is itself an agent with a viewpoint. But it is not. Therefore, speech undertaken for such purposes is not a matter to which the First Amendment could be thought to apply on the basis of the protections of speech it extends to persons and assemblies of persons.

If upper management holds stock in the company they manage, do they thereby have a constitutional right to direct the use of corporate general funds to express their political views? If they are not the sole or majority of stockholders, their expressing *their* views is not the corporation as an assembly of shareholders expressing *its* views. They have no more a right, in virtue of their roles as proxy agents for shareholders in general, to appropriate general funds to express their views than any other proper subgroup of the shareholders has a right to appropriate general funds to express theirs. In this connection, we can note that there was a provision in BCRA to allow a corporation to set up a separate Political Action Committee (PAC) to which its employees and managers may voluntarily contribute, which is not subject to the limits on expenditures that the corporation is out of its general funds. This shows sensitivity to the distinction between the form and purpose of a corporation and the interests of its operators and owners, and shows also that a group is not necessarily restricted in its ability to speak by being prohibited from using a certain institutional arrangement for which provision is made in the law for the pursuit of shared interests of a narrowly defined sort. Justice Kennedy denied that this provision provided appropriate redress for the restriction on corporate speech: “Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak,” because a “PAC is a separate association from the corporation” (558 U.S. 21 (2010)). But *unless we are supposing that an association is an agent over and above its members*, the fact that the PAC is a separate association (a separate way in which agents organize themselves) does not establish that it does not provide an acceptable avenue for the expression by the relevant group of their opinions. And associations are not, as we have seen, agents in their own right. At this point, it is clear how thoroughly the idea of the corporation as an agential entity and speaker in its own right is woven into the way the majority has reasoned the case²⁹.

²⁹ We should not be misled into thinking that there are two separate entities in view here by our interest in discussing in some contexts types of arrangements as opposed to their realizers. Let me put this in the form of an objection. “Suppose that the Monroe County Chess Club and the Monroe County Knitting Club have the same members. If we ask how many clubs there are here, the answer is clearly two and not one. Therefore, clubs cannot be identical with their members, for this gives the wrong answer to the *how many* question.” To see that something has gone wrong here, shrink the roles occupied to a single one. Suppose that the Monroe County Chess Club and the Monroe County Knitting Club each has a president, and suppose that the same person fills the role in each club. Do we not still want to say that *each club has its own president*? But how can that be if the president of the one is the president of the other? What we should say is that in one sense each club has its own president and in another sense they do not. Each club has provisions for an office of president to be filled by a member of the club after appropriate procedures have been observed. It is not the case that each club has provisions for a joint election with the other for a joint president. That is what we mean to say when we say that each club has its own president. But of course, the president of the one is literally the

In his concurring opinion, Justice Scalia suggested (558 U.S. 7 (2010)) that if it were permissible to restrict the right of corporations to speak, it would likewise be permissible to restrict the freedom of the press, insofar as the institutionalized press involves the corporate form. The same claim is made in Kennedy's opinion (558 U.S. 35-37 (2010)) and in Justice Roberts's concurring opinion (558 U.S. 1, 11 (2010)). The First Amendment, however, includes a prohibition against restricting the freedom of the press. But if corporations are not as such literally speakers, agents, or persons, and if restricting expressions of views through use of corporate general funds does not *ipso facto* restrict the speech of their shareholders or their operators, all that would follow from the First Amendment's guarantee of the freedom of the press is that corporations which operate relevant sorts of media could not have the operation of *those media* restricted. First, nothing would follow about restrictions on corporations with other purposes. Allowing *such* restrictions would not entail the legitimacy of *any* restrictions on the freedom of the *press*, even when it takes the corporate form. Suppose a rule prohibits restricting such and such activities of entities of type A (speakers) or type B (the press). Suppose that some entities of type B are of type C (corporations), but that not all entities of type C are of type B. The rule clearly does not forbid restricting the relevant activities of entities of type C that are not of type B. Second, even when corporations own media whose operation is protected by the First Amendment, all that follows is that the operation of *those media* may not be restricted. It does not follow that there may not be restrictions on use of corporate general funds for political advocacy when the corporation's activities fall outside the proper scope of the operation of the relevant media.

8. Conclusion

The Supreme Court in *Citizens United vs. Federal Election Committee* ruled that restricting independent expenditures for candidate advocacy by a certain class of corporations is unconstitutional. Interwoven into the discussion is the assumption that the corporation

president of the other. When we say the Chess Club and the Knitting Club are not the same club, we mean that the conditions for membership in the Chess Club are not *ipso facto* the conditions for membership in the Knitting Club, just as the procedures for becoming president of the one are not *ipso facto* the procedures for becoming president of the other. But nonetheless, as things stand, 'the Chess Club' and 'the Knitting Club' pick out the same group of people. If we see the members of the Chess Club at the Uptown Diner, we could say: that's the Chess Club over there. But we could equally say: that's the Knitting Club in the corner. The one is not less accurate than the other. We will give preference to one way of picking them out over another when we conceive of them as acting together as members of the one club as opposed to the other, and this will also explain in what circumstances it will seem inapt to pick them out using the other designation. But it should be said that, in any case, the crucial point is that as an assembly of persons, not being able to use one institutional form, because of its special features, to carry on some activity, clearly does not prohibit the assembly from engaging in the activity. If the bylaws of the Chess Club prohibit its members from knitting at meetings, that hardly constitutes an absolute prohibition on their knitting. More to the point, if Chess Club dues can be used only for the purchase of chess equipment, that hardly constitutes an absolute prohibition on the members as a group pooling money to spend on knitting needles.

is a speaker, and hence an agent, and a type of person, even if an artificial one. This is a mistake that obscures *how* agency is expressed through the corporate form, *whose* agency is expressed, and especially whose agency is expressed *intentionally* under various descriptions of what the corporation undertakes. Corporations are not persons, or agents, or speakers. Corporations are constituted by their shareholders. The shareholders as a group are not an agent over and above the individual shareholders in the corporation. Furthermore, when the corporation undertakes to make information available about a candidate, what it produces is not speech in the core sense. As we have seen, groups are not, as such, speakers. Consequently, the corporation, which is a particular type of group, is not as such a speaker. There is no literal application of the First Amendment to corporations on the grounds that it is a speaker and capable of speech as such. For there to be an application of the First Amendment to corporate speech, it must be on the basis of the rights of individuals to pool their resources to represent themselves as in favor of or opposed to a candidate's election and their reasons for their position. But once we have focused on this as the rationale, a number of special features of corporations immediately become relevant that would otherwise be put aside. First, for many corporations, the operation of the corporation is carried out by proxy agents for the shareholders (who are strictly speaking the corporation itself). The legal fiction that the corporation is a person does not deny that it is its shareholders but is rather a device of the law for providing them, with whom they enter into arrangements as the corporation, with protections that facilitate the enterprise and protect the value of the firm as an on-going concern. What the proxy agents decide to represent is the intentional representation of the shareholders only insofar as the shareholders are intentionally involved in the representation. If they are not, then the speech in question does not express their views. If it expresses any relevant person's or group's shared views, it expresses the views or opinions of the management of the corporation. Since general funds are not the resources of management *per se*, their use of them to represent their views and opinions would scarcely be protected under the First Amendment. Once we look past the legal personality of the corporation, and we see it literally as its shareholders, we can recognize that the issue of whether restricting corporate general funds expenditures on political advocacy is restricting shareholders' rights to joint speech is by no means clear. For there is clearly no blanket ban imposed on the shareholders as a group, who may still act together if they do share common views. They are only prevented from doing so through the corporate form. It is as if one took a prohibition on police officers advocating for candidates while on duty and wearing their badges to be an *in toto* prohibition on their campaigning for candidates. Empirical issues remain. It may be argued that the default position should be that no form of association may be prevented from being a vehicle for its current members making manifest their views through its instruments, so that a compelling interest must be shown even in the case of corporations, even granting every point in the analysis above. Nothing I have said touches on the question whether there is a compelling interest. It may be argued that even if the decision was overly broad, nonetheless the restrictions were likewise overly broad by not taking into account whether shareholders are citizens and do endorse a message funded by a corporation. Nothing I have said settles this issue. But once we have got the proper conceptual framework in place, we

can see where attention should be focused, if our concern is with protections afforded to citizens or assemblies of citizens for political speech. We can see that not all corporate speech (very little in fact) is an expression of the views of the corporation's shareholders. We can see that corporate speech *per se* is not *ipso facto* the expression of anyone's views. We can see therefore that attention must be focused on the conditions under which corporate speech can be taken to express shareholders' views. We can see that it is not obvious that an undue burden on the speech of individuals alone or in groups is imposed by the ban on independent corporate expenditures on political advocacy, since it is not a prohibition on their expressing their views as such. We can see that it is by no means obvious that the Government, in light of the organizational structure of the corporation, its functional autonomy (in many cases) from its shareholders, the massive resources the corporate form makes available for use by decision makers operating autonomously from shareholders, does not have a compelling interest in limiting corporate general treasury funds, in some circumstances, from being used for independent expenditures by corporations for political advocacy. Settling these matters, however, is beyond the scope of the present essay, which has been concerned rather with analyzing how agency is expressed through corporations and corporate speech in aid of sharpening the issues and questions raised in *Citizens United vs. Federal Election Committee*.

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