Why Moral Rights of Free Speech for Business Corporations Cannot Be Justified

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Abstract: In this paper, I develop two philosophically suggestive arguments that the late Justice Stevens made in *Citizens United* against the idea that business corporations have free speech rights. First, (1) while business corporations conceived as real entities are capable of a thin agency *conceptually* sufficient for moral rights, I argue that they fail to clear important *justificatory* hurdles imposed by interest or choice theories of rights. Business corporations conceived as real entities lack any interest in their personal security; moreover, they are incapable of exercising innate powers of choice. Second, (2) I argue that the structure and functionally individualized purpose of a business corporation—to increase value for its shareholders—undermines the implicit joint commitment necessary to *derive* corporate rights of free speech from non-operative shareholder-member rights. Since one cannot transfer innate moral rights such as free speech, any exercise of this right on behalf of another must be limited in scope.

In *Citizens United v. Federal Election Commission* (2010), the U.S. Supreme Court held that parts of the 2002 Bipartisan Campaign Reform Act, which restricts business corporations from making "electioneering" communications during or near an election, violated the First Amendment because business corporations are persons entitled to free speech protections. In a strenuous 86-page dissent, the late Justice Stevens made a number of telling arguments against the idea that business corporations have rights of free speech, but here I wish to develop two suggestions Stevens made that seem to me philosophically significant.[1] First, Stevens suggests that corporations are not real persons like human beings, and so should not have rights like free speech:

> [C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their 'personhood' often serves as a useful legal fiction. But they are not themselves members of 'We the People'.... (J. Stevens (dissenting), *Citizens United*, p. 466)

Second, Stevens questions whether business corporations can coherently be understood to exercise free speech rights on behalf of any real individual inside or outside the corporation:

> It is an interesting question 'who' is even speaking.... Presumably it is not the customers or employees.... It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm.... Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends. (J. Stevens (dissenting), *Citizens United*, p. 467)

In this paper, I develop Stevens' suggestions and argue that whether we conceive business corporations as in some sense *real entities* with their own rights of free speech, or whether we conceive them, alternatively, as *expressive associations* that purport to exercise the free speech rights of their members derivatively, moral rights of free speech for business corporations cannot be justified.[2]

1. Corporations Conceived as Real Entities

In this section, I develop Stevens' first suggestion and argue that business corporations conceived as real entities lack vital interests and powers required to justify ascribing them rights of free speech on either interest or choice theories of moral rights.

Phillip Pettit argues that a corporation that 1) has a purpose and 2) exhibits rational unity in its judgments over time, is an "intentional subject that is distinct from its members," a real entity with a "mind of its own" (Pettit, 2003, p. 167). Pettit does not argue that such groups have minds like natural human subjects do, with the same kinds of memory, perception, beliefs and desires, but he does argue that groups that show rational unity in pursuing their purposes have a "functional organization" sufficient to qualify them as moral subjects (Pettit, 2003, p. 182). Adina Preda similarly argues that corporations that have what she calls a "coherent collective decision-making procedure" make decisions that cannot be reduced to some aggregate of the corporation's members' decisions, and so are legitimate subjects of moral agency (Preda, 2012, p. 248).[3] Preda does distinguish the thin form of agency that corporations exercise from the "full-blown" agency that real persons exercise, but argues that this thin corporate agency is all that is required to meet "the

conceptual requirements for being a right-holder" (Preda, 2012, p. 251 [emphasis in original]).

Pettit and Preda thus establish grounds for accepting the prior conceptual claim that corporations with some significant degree of functional organization are capable of exercising rights because they are capable of exercising some form of moral agency on their own. As Preda points out, however, "this argument should not be taken to imply that any such group actually has moral rights" (Preda, 2012, p. 251).[4]

1.1 Justification of Rights of Corporate Real Entities on an Interest Theory

On an interest theory of moral rights, rights serve to protect interests deemed important enough to hold others under duties with respect to them. Interest theory thus sets a low conceptual hurdle for extending the protections of rights in the "second-" and "third-generation" to such non-traditional objects as, for example, nonhuman animals or the environment, or to groups like business corporations. If we judge the interest that business corporations have in freely expressing their opinions to be sufficiently weighty to morally justify holding others under duties with regard to them, then business corporations have moral rights of free speech on an interest theory of rights. But interest theory sets up significant justificatory hurdles to judging an interest as one morally important enough to protect by a right.[5]

The justification of moral rights on an interest theory is typically consequentialist or utilitarian in character.[6] In this subsection, I focus on John Stuart Mill's justification of moral rights and its implications for the moral rights of business corporations.[7] In the first four chapters of *Utilitarianism*, Mill makes the basic rule-utilitarian case that rules such as the moral prohibition against lying have a "transcendent expediency" that permits exceptions only in extremely rare circumstances (Mill, 1969, p. 223). Mill's aim in the last chapter (five) of *Utilitarianism* is to account for the moral intuition that justice "must have an existence in nature as something absolute, generically distinct from every variety of the expedient..." (Mill, 1969, p. 240). Mill does so by distinguishing the vital interest that human beings have in their *personal security* from other human interests.

Human beings experience violations of moral rights with an indignation that is qualitatively more intense than the sentiments that attach to violations of other kinds of moral rules, Mill argues, because

> ... there goes to the composition of the sentiment, not a rational only but also an animal element—the thirst for retaliation; and this thirst derives its intensity, as well as its moral justification, from the extraordinarily important and impressive kind of utility which is concerned. The interest involved is that of security, to everyone's feelings the most vital of all interests. (Mill, 1969, p. 250)

This vital interest in our personal security generates moral *rights* rather than ordinary moral rules, Mill continues, because

> ... the claim we have on our fellow creatures to join in making safe for us the very groundwork of our existence gathers feelings around it so much more intense than those concerned in any of the more common cases of utility that the difference in degree (as is often the case in psychology) becomes a real difference in kind. (Mill, 1969, p. 251)

Without the protections that moral rights provide, a society that maximizes human well-being for everyone would be impossible, Mill concludes. Mill concedes that moral rights may thus yield to a concern for consequences in extreme cases, but argues that such cases will be exceedingly rare.

Business corporations conceived as real entities do not feel sentiments of outrage or pain when they are dissolved or disbanded, or when their freedom to act or to speak is restricted. While corporations conceived as real entities might be understood to rationally register restrictions on their freedom in some way, they would not feel a sentiment with the "animal element" that Mill describes, the "thirst for retaliation" upon violations of their freedom. Corporations conceived as real entities, therefore, lack the special interest in personal security that Mill says is necessary to justify moral rights like freedom of speech.

1.2 Justification of Rights of Corporate Real Entities on a Choice Theory

On choice (will) theories of rights, rights protect moral agency. Hence choice theory analytically bars extending rights to entities that cannot make choices, such as nonhuman animals or the environment.[8] As we have seen, Pettit and Preda establish the prior conceptual claim that corporations with a certain structure are capable of making choices, but like interest theories, choice theories of rights establish significant justificatory requirements to determining that the ability to make choices merits ascribing moral rights.

Immanuel Kant argues that every person, by virtue of her "humanity,"

has an "innate" right of freedom of choice limited only by the equal right of freedom of every other person under a universal law (Kant, 1992, 6:237). The innate right of freedom serves as the foundation for all other "acquired" rights such as rights to property or in contract (Kant, 1992, 6:237). In general, to make choices, one must take oneself to have or be able to acquire the means needed to achieve one's ends. But whatever ends we set, we must use our bodily powers in order to act toward them. As Arthur Ripstein puts it, "every time you did something or something happened to you, your body did it, or it happened to your body" (Ripstein, 2010, p. 41). Hence to have an innate freedom of choice, one must have bodily powers. But since corporations understood as real entities do not have bodily powers with which to set and pursue their ends, corporations therefore lack the innate right of freedom of choice. While individual human members of corporations have bodies and therefore innate powers of choice, corporations understood as real entities existing independently of their members do not. Since according to Kant free speech is a constituent of the innate right of freedom, corporations therefore do not have rights of free speech (Kant, 1992, 6:238).

Perhaps one might object that a corporation could be taken to have a body in the sense that its human members are a part of the corporation and these members have bodies. But having a collective body in this sense is not relevant to the question of whether a corporation conceived as a real entity has the *innate* right of freedom. Note that a corporation's human members could always choose to intervene between the corporation's end-setting and action in pursuit of that end and so circumvent the corporation's choice. This possibility reveals that corporations lack the innate powers of choice that its members, by contrast, do have, even if corporations could be taken to have bodies in some sense. Corporations therefore lack the innate right of freedom.

Business corporations conceived as real entities, therefore, lack both 1) the interest in personal security that grounds moral rights on interest theories, and 2) the innate powers of choice that ground moral rights on choice theories. Hence corporations conceived as real entities lack moral rights of free speech. One might still argue, however, that human members of a business corporation could *transfer* their moral rights of free speech to the corporate entity.[9] I evaluate this strategy for justifying the rights of business corporations in the next main section.

2. Corporations Conceived as Expressive Associations

On an expressive association theory of corporate rights, corporations have rights to express opinions not on their own behalf as real entities but,

derivatively, on behalf of the real individuals who make up the corporation. In *Citizens United,* Justice Stevens' questioned whether the corporation's right of free speech can reasonably be understood to derive from those of its employees, managers, or shareholders. In this section, I argue that the structure and functionally individualized purpose of a business corporation fatally undermines the tacit joint commitment required to derive corporate rights of free speech from non-operative shareholder-member rights. Hence business corporations lack moral rights when conceived as expressive associations.

2.1 The Inalienability of Free Speech Rights

Rights usually include limited powers to transfer rights to others; however, innate rights such as free speech are not alienable in the way that acquired rights such as those to property or in contract are. One cannot, for example, transfer the right to one's own body to another person; it is not possible to sell oneself into slavery because one is innately free (Kant, 1992, 6:241; see also Mill, 1977, pp. 299-300).[10] Similarly, it is not possible to sell or transfer one's right to express one's opinions to another person, again because one is innately free. One may of course *consent* to allow another the use of one's body in limited ways; for example, one may consent to surgery. Or one may consent to allow another to speak on one's behalf in limited ways or contexts such as when a lawyer represents a client in court. But it is not possible to consent to the transfer of powers associated with innate rights such as one's bodily powers because these powers are constituents of the innate right freedom.[11] To be innately free simply means that it is not possible for one person to choose for another or to set ends for another (Kant, 1992, 6:381; see also 6:384-5).[12]

Individual members of expressive associations therefore cannot consent to sell or transfer powers associated with their innate rights of free speech to the association; instead, the association must be understood to be authorized to express only those opinions that individual members have (implicitly or explicitly) consented to express as group opinions. This formulation of innate rights of free speech in the aggregate arrives at a model of group speech that resembles "joint commitment" models of group features such as group belief or action.

2.2 Joint Commitment Models of Group Opinions

Margaret Gilbert (1994) sets out the structure of such "joint commitment" models: "For persons A and B and psychological attribute X, A and B form a *plural subject* of X-ing if and only if A and B are jointly committed

to X-ing as a body, or, if you like, as a single person" (Gilbert, 1994, p. 244). In the basic case, joint commitment requires that individuals "mutually express[] their willingness to be *jointly committed*, in conditions of common knowledge" (Gilbert, 1994, p. 245). While Gilbert's joint commitment model is often offered to explain how groups can hold beliefs or knowledge in ways that are "non-summative," the key feature in this context is that there is a *commitment* by members to X-ing as a body.[13] Commitment here is tantamount to consent: members of an expressive association commit to express an opinion as a body, as the association's opinion. Without such a joint commitment, there could be no consent to expressing the group opinion as a group opinion. Gilbert's model in the basic case requires that everyone in the group jointly commit to the group opinion, which can create problems in cases of larger groups like corporations that often have committees or boards that make decisions on behalf of the group. For example, suppose members of the ACLU's board of directors supports a white racist group's right to march in a parade, but no other ACLU members do.[14] One might plausibly say that the ACLU supports the group's right, despite that members of the ACLU have not "jointly committed" to do so.

In response to such examples, Raimo Tuomela modifies Gilbert's joint commitment model to require that only "operative members" (such as board directors) of a group need jointly commit to the opinion, while "non-operative members of [the group] tend tacitly to accept—or at least ought to accept—[the opinion] as members of the group" because of the joint commitment that operative members make within the context of an appropriate "authority system" (Tuomela, 1992, pp. 295-296).[15] The purpose of the authority system, Tuomela says, is to generate an implied agreement among nonoperative members that the opinion that operative members choose is the group view. Tuomela says that the authority system "involves that the nonoperative members give up their will with respect to group-goal formation and transfer that right to the operative members" (Tuomela, 1992, p. 299).

2.3 The Authority System of a Modern Business Corporation

Since an individual member of a corporation cannot consent to transfer her innate right of free speech to the corporation, the corporation exercises its members' free speech rights by a consent that is necessarily limited in scope. Authority systems that effectively generate the tacit joint agreement of non-operative members to corporate opinions that operative members jointly commit to express as group opinions, therefore, must stay within the scope of the limited consent that non-operative members grant the

corporation to express opinions as group opinions on their behalf.

In its customary or standard legal form, a modern business corporation divides responsibilities between management and ownership (i.e., shareholders). Management has exclusive responsibility for making decisions to advance the specific goals of the enterprise, while shareholders have little or no say in such matters and, instead, are expected to invest or divest their interests in the corporation in accordance with their individual financial goals (see Berle and Means, 1967). Moreover, management is under a fiduciary duty to increase the value of the corporation for its shareholders, and increasing corporate value is the functionally organizing purpose of the business corporation.[16] Hence a modern business corporation's functional purpose is *individualized*—to increase the value of its shareholder-members' shares—and shareholders' goals in relation to the corporation are correspondingly individual ones.

But groups whose functional purposes are individualized in this way and whose members' goals with respect to the group are thus individual ones lack an authority system that would permit operative members to express non-operative members' views *as group views*. In groups with such individualized purposes, non-operative members cannot be assumed to tacitly jointly agree to express *any* opinion as a group opinion simply by virtue of choosing to join the group. Such groups are unable to derive a group right of free speech from members' rights, except perhaps a free speech right to blandly restate the group's individualized purpose.

Suppose I join a gym whose purpose is to advance its members' individual fitness goals by providing them the use of exercise machines. The gym's purpose is therefore individualized and its members goals with respect to the gym are individual ones. If the gym then purported to express an opinion as a group opinion, even an opinion on some physical fitness topic—for example, "everyone should exercise at least 20 minutes three times per week"—then that opinion would be taken as either the gym management's opinion or perhaps understood summatively as an opinion to which most or all of the members would agree if polled on it. The opinion fails as the speech of a group view because the gym's individualized purpose as a corporation vitiates its authority to express opinions on behalf of gym members as group opinions.

3. Conclusion

I have argued that business corporations should not have moral rights of free speech, whether conceived as real entities that might have free speech rights of their own, or as expressive associations that might derive corporate rights of free speech from the free speech rights of their members. These

arguments stemmed from two suggestive arguments that Justice Stevens made in his dissent in *Citizens United*.

The corporation at issue in *Citizens United* was not a business corporation but instead a non-profit corporation. The court nevertheless broadly held that business corporations have free speech rights. Many of the arguments I have made here may not apply, or may not apply to the same extent, to non-profit corporations, and I hope that the arguments of this paper have cast some doubt on the philosophical basis for the court's broad holding in *Citizens United*.[17]

Notes

[1] Justice Stevens died on July 16, 2019; the court's ruling in *Citizens United* prompted his retirement (Greenhouse, 2019).

[2] My concern in this paper is with moral rather than legal rights. The idea that moral rights should entail legal rights, while not incontestable, reflects a common understanding of their relationship and is implicit in Justice Stevens' reasoning. I thus dispute the antecedent in the claim that if business corporations have moral rights of free speech, then business corporations should have legal rights of free speech. It is possible that some other relationship between moral and legal rights holds, or there may be some other basis for ascribing legal rights to business corporations.

[3] Preda does not evaluate Pettit's claim that corporations have minds, however.

[4] Preda goes on to suggest, however, that choice theorists "cannot object to rights being transferred from individuals to groups," which might open a short path to the justification of corporate moral rights (Preda, 2012, p. 251). In the second main section of this paper, I dispute this claim with respect to the transfer of "innate" rights such as the right of free speech.

[5] For some discussion of the contrasting conceptual and justificatory questions that interest and choice theories of rights raise, see Edmundson (2004, Chapter Seven, pp. 119-132).

[6] This is not surprising, as the divide between interest (or "benefit") and choice (or "will") theories of rights tracks the wider division in modern value theory between consequentialism and deontology.

[7] I focus on Mill both because of Mill's importance within the liberal moral and political tradition but also because I believe Mill sets out the best consequentialist defense of moral rights. In the next subsection, where I take up the justificatory requirements of choice theory, I focus on Immanuel Kant's deontological justification of moral rights for similar reasons. So-called "hybrid" theories of rights that combine elements of interest and choice theories do not seem to me to offer genuine alternatives at the level of justificatory grounds for rights; thus I do not explicitly consider hybrid theories here. Modern treatments of theories of rights tend to focus on description rather than justification, which is

another motivation for my focus on classic sources such as Mill and Kant.

[8] Choice theorists take pains to emphasize, however, that their conception of rights is not meant to limit the application of other moral requirements to protect those incapable of choice such as infants. Choice theorists simply object to referring to such obligations as "rights." On choice theories, rights always include powers to waive or enforce the duties that correlate with the rights held.

[9] For example, Preda says that "any Choice theorist has to allow right-holders to transfer the powers associated with their rights to someone else, in which case the new power-holder becomes the right-holder" (2012, p. 251). While this is generally correct, powers associated with innate rights like the moral right of free speech cannot be transferred in a straightforward way.

[10] Mill of course defends moral rights on utilitarian rather than deontological grounds; however, Mill's defense of the incomparable value of the individual interest in autonomy results in the same bar on its alienation that Kant identifies. It is contradictory to justify the alienation of one's freedom by reference to the value of one's interest in that very same freedom.

[11] If one doubts this, consider what an effective transfer of one's innate bodily powers, for example, would be. Suppose I transfer my right to my body with all its powers to you; how would you then exercise my power to move my body without my continuing consent to obey your commands? Or suppose I transfer my powers of free speech to you; how would you exercise them without my continuing consent to (at a minimum) remain silent as you spoke? Perhaps some partial appropriations of powers are possible, but such appropriations are difficult to imagine without injuring or changing their basic nature. For example, perhaps I could consent to give you control of my body via a neural implant; but besides the speculative nature of the example, it seems difficult to imagine how such a transfer could occur without damaging either my body or at least raising the question as to which powers are innate. Hence short of their destruction or injury, I always retain innate powers such as to move my body as I can, or to speak for myself.

[12] As Kant observes, "I can never be constrained by others to have an end: only I myself can make something my end" (Kant, 1992, 6:381). It is perhaps possible to imagine forms of duress or coercion so severe as to deform moral agency itself, but this possibility is not relevant to the argument made here.

[13] "Summative" views theorize group opinion as that of (all, the majority, or at least some) group members, whereas on "non-summative" views, a group opinion might diverge from that of any or even all members of the group.

[14] See *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).

[15] Gilbert also alters her model somewhat to handle such examples; however, Tuomela's model seems more developed in this regard.

[16] Here I avoid taking a position on the proper resolution of conflicts between management and ownership. My argument requires only the uncontroversial premises that management's fiduciary duties are directed to serve the business corporation's financial interests and that this duty in general ultimately serves

shareholders' individual financial interests. The *Hobby Lobby* decision may call this traditional view of the business corporation somewhat into some question (see *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014)). Yet even if the purpose of a business corporation is no longer legally restricted to maximizing shareholder value, this purpose is so embedded in business custom that it seems unlikely that, for example, publicly-held companies would ever abandon it. So long as that remains the case, those purchasing shares in publicly-traded business corporations should not be understood to endorse any other purpose but individual financial ones in the absence of some explicit effort by management to attempt to alter the customary business model. And even given such an effort, the question would seem to be an empirical rather than a formal one: does the business corporation offer to sell ownership shares to the public primarily on the understanding that its shareholders will individually profit, or for some other reason?

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