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Corporations are not People

An Analysis of *Citizens United v. FEC*

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Introduction

In the past two years, the idea that for-profit business corporations are entities with First Amendment political speech rights equal to those of natural citizens has been at the center of many heated political debates. The Supreme Court made this counterintuitive proposition a reality in the 2010 decision for *Citizens United v. Federal Election Commission* (130 S. Ct. 876). In this decision, the Supreme Court granted for-profit corporations the right to spend unlimited amounts of money from their general treasuries on independent expenditures for explicit broadcast advocacy for or against candidates for federal office. The Court argued that money spent on independent expenditures is protected under the Free Speech clause of the First Amendment and that corporations are legal persons entitled to the same speech protections as individual citizens. The Court did not draw any distinctions between different types of corporate entities and instead argued that both expressive organizations¹ and utilitarian business corporations² possess full First Amendment political speech protections. The general sense of outrage over the Court's ruling that corporations have the same speech protections as individuals has led to many calls for reform of campaign finance³.

However, a systematic understanding of why for-profit corporations lack a sound basis

¹ An expressive organization is an association of individuals that engages in public or private speech activities. It may take a corporate form, but it is not essential that it do so.

² A business corporation is incorporated under American state and federal laws for the primary purpose of selling goods and services. In this paper, I will specifically be dealing with corporations that are publicly traded on the stock market and are bound by fiduciary duty to maximize profits and increase shareholders' return on investment.

³ I am specifically referring to the Occupy Wall Street demand for a new constitutional amendment that would mandate campaign finance reform and would expressly state that corporations are not people. The document may be found at <http://occupywallst.org/forum/detailed-list-of-demands-overview-of-tactics-for-d/>

for speech rights in legal theory has yet to emerge. Without this foundational work, any attempt at reform is unlikely to be successful. The Court uses three theories of corporate personhood (artificial entity theory, the aggregate entity theory and the natural entity theory) to justify the extension of speech rights to for-profit corporations, but it never fully develops a legal theory specifically for corporate speech. Such a theory would enable the Court to systematically apply a cohesive logic to the issues of corporate speech rights. Without a theory of corporate speech rights, the Court lacks a normative framework within which to situate their decisions.

This paper will attempt to untangle the theoretical assumptions of corporate personhood that the Court uses to justify corporate speech rights. It will then show that none of the three major theories of corporate personhood the Court uses can be a legitimate basis for extending speech rights to for-profit corporations. The paper will also show that corporations are artificial legal entities that lack the expressive rights underlying the right to political speech. This paper will offer a theory of corporate speech rights that allows for different degrees of protection for political speech from various types of organizations. The paper will conclude by offering alternate solutions to the legal and theoretical problems originally presented by *Citizens United v. Federal Election Commission*.

Facts of the Case

In 2008, Citizens United, a 501 (c)(3) non-profit corporation, wanted to release a film called *Hillary: The Movie* that was critical of Hillary Clinton's candidacy for the presidency. However, section 441b of the McCain-Feingold Bipartisan Campaign Finance

Reform Act (BCRA) prevented political speech by for-profit corporations in the thirty days before a general election. *Hillary: The Movie* violated Section 441b of BCRA because Citizens United accepted a small part of its funding from corporate sponsors and wanted to distribute the movie within thirty days of an election cycle. Citizens United filed for injunction to avoid the implementation of the law on the grounds that the production of the movie was primarily funded by non-corporate sources. Citizens United was denied injunction and the Federal Election Commission was granted summary judgment. Citizens United appealed to the Second District Court, but the district court ruled the McCain Feingold law was constitutional because the Supreme Court had upheld it in the 2003 case *FEC v. McConnell*. The Supreme Court overruled the applicable part of *McConnell*, as well as *Austin v. Michigan Chamber of Commerce* on the grounds that the government does not have a clear and compelling interest in limiting independent corporate expenditures in relation to federal elections. The Court argued that independent corporate expenditures cannot cause *quid pro quo* corruption or the appearance of *quid pro quo* corruption, which are the only justifiable rationales for limiting political speech because according to the Court, *quid pro quo* corruption is the only empirically provable form of corruption. As a consequence of the Citizens United decision, for-profit corporations may make unlimited independent expenditures with their general treasury funds.

This Supreme Court decision is important because the imprecise language of the decision has made it applicable to most types of corporations (including business corporations) even though the facts of the case only involved an expressive

organization. The Court drew no distinctions between for-profit corporations and nonprofit expressive organizations and extended key exceptions of the BCRA that allowed political speech by nonprofit organizations to for-profit business corporations. The idea that for-profit business corporations have the same rights to political speech as individuals lies at the heart of the contention over *Citizens United v. FEC*. The Court reached this decision by arguing that both non-profit expressive organizations and for-profit business corporations have the same claim to First Amendment speech protection. However, American corporate law makes it clear that nonprofit corporations and for-profit business corporations are very different legal entities. Even if nonprofit expressive organizations have a strong claim to political speech rights, for-profit business corporations do not have the same justifications for claiming political speech rights.

Corporations in American Law

One of the main reasons the Court's decision in *Citizens United v. FEC* was overbroad was that the Court did not acknowledge that the term "corporation" covers a large variety of organizations that have different purposes and organizational structures. They used the term "corporation" as a catchall to talk about any legal entity that has been incorporated under American law. Black's Law Dictionary defines a corporation as:

An association of shareholders (or even a single shareholder) created under law and regarded as an artificial person by courts, having a legal entity entirely separate and distinct from the individuals who compose it, with the capacity of continuous existence or succession, and having the capacity of such legal entity, of taking, holding and conveying property, suing and being sued, and exercising such other powers as may be conferred on it by law, just as a natural person may (203).

While this definition is nominally correct and clearly identifies the qualities all corporations possess, it does not acknowledge that the purposes for which a corporation is created and the type of laws under which the corporation is created can determine the legal rights of the corporation. In essence, there are many different types of corporations, some of which may have stronger claims to political speech rights than others. The most noticeable dichotomy lies between for-profit business corporations⁴ and nonprofit expressive organizations⁵. For-profit business corporations serve the limited economic purpose of increasing the return on shareholders' investments. Expressive organizations are created for a non-economic purpose that is usually ideological. American law recognizes the importance of expressive organizations and grant tax-exempt status to organizations that can demonstrate that they are formed for ideological or community-welfare-oriented purposes. In some instances, expressive organizations may be created to increase the "volume" of individual political speech through collective action. Expressive organizations serve a necessary purpose in politics because they help individuals exercise their expressive rights.

⁴ A for-profit corporation that is traded on the public market is created specifically to generate profit and is legally bound by fiduciary duty to do everything within its power to increase the return on investment for its shareholders. Fiduciary duty makes the for-profit business corporation a utilitarian organization that is simply a tool used to achieve a particular economic end. They lack a clear motivation for engaging in political speech, because influence over candidates elected to office is not necessary to achieve their legal purposes.

⁵ Although there are many different types of nonprofit organizations, this paper will focus on the organizations that are incorporated specifically for political speech-related purposes. In this case, an organization can be said to have speech rights because organizational speech rights serve to enhance the voices of the individual members within the incorporated association.

Most business corporations are incorporated under one of fifty state-specific business corporation acts. They must comply with the state's requirements for business corporations and will choose to incorporate in a state with favorable legislative practices. However, all business corporations are incorporated for the purpose of making a profit. They are bound by fiduciary duty to do everything in their power to increase their shareholder's return on investment. Any action taken that decreases the profit margin of a corporation violates the corporate charter and may lead to criminal charges (Ribstein 28). This means that all for-profit corporate speech products must be tailored to reflect the business motives of the company. They are not incorporated to promote the expressive abilities⁶ of the individuals associated with the corporation or to add to the marketplace of ideas. Corporate entities can only act because of their commercial incentive. This makes any for-profit corporate speech product utilitarian rather than expressive because it is motivated by the corporation's eternal quest for profit rather than an interest in social welfare or in promoting the individual's speech rights. This calls into question the applicability of First Amendment political speech protection for for-profit corporations. As legal entities, business corporations lack a clear source for political speech rights under the First Amendment.

Nonprofit corporations have a similar state-specific process of incorporation, but federal laws play a much larger role in the governance of non-profit corporations (Tucker 13). After incorporating under the laws of one of the fifty states, non-profits file for tax-exempt status under section 501 (c) of the IRS tax code. The purposes the

⁶ Expressive abilities can be thought of as containing the powers of thought and speech that enable individuals to participate in electoral politics.

corporation is founded for determine which subsection of 501(c) is applicable. There are twenty-nine different types of 501(c) corporations, most of which are not incorporated to promote individual speech, to educate voters or to engage in political advocacy (Levinson 18). For the corporations that are created for purposes besides political activity, political speech rights may be unnecessary. However, some 501(c) corporations are created for political activity and need political speech rights to carry out the purposes for which they were incorporated. For example, 501(c)(3) corporations are corporations that are created to further educational, religious, charitable, literary or scientific purposes. They are tax-exempt and are prohibited from engaging in political activity as a "primary purpose." However, with larger 501(c)(3) corporations, the vagueness of the threshold between "primary purposes" and other organizational activities allows them to donate millions of dollars without violating the law (Levinson 20).

The loopholes in the IRS 501 (c)(3) codes allow Citizen United to engage in some political advocacy without losing its tax-exempt status. Citizens United is a 501(c)(3) corporation that was incorporated in 1988 to educate Americans about conservative issues and to, "assert American values of limited government, freedom of enterprise, strong families, and national sovereignty and security." To fulfill this mission, Citizens United undertakes various educational projects, including television advertising and feature-length documentaries (Citizens United website). According to the IRS, there is no problem with a 501(c)(3) producing and distributing political education materials as long as they are nonpartisan (IRS website). However, the Federal Election

Commission determined that *Hillary: The Movie* was clearly express advocacy against the election of Hillary Clinton to the presidency. Even if Citizens United had not violated section 441b of the BCRA by accepting funding from for-profit corporations, the documentary may have jeopardized the organization's 501(c)(3) status. Although Citizens United is limited in the amount and types of advocacy it can undertake, it is still an expressive organization created for a particular ideological purpose. The fact that it is not commercially motivated provides it with a much stronger claim to political speech rights than a utilitarian business corporation could justify because it can justify its claims to speech rights by arguing that it promotes social welfare and individual engagement in the political process.

Other types of 501(c) organizations have an even stronger claim to political speech rights. For example, 501(c)(4) corporations, which are incorporated for the promotion of social welfare and are usually community advocacy groups⁷, are allowed to participate fully in political advocacy and lobbying (IRS website). Because these corporations are created specifically to amplify the voices of individuals within a particular community, the organization has a much stronger claim to political speech rights than even a 501(c)(3) corporation. This stronger organizational speech right is based on the fact that a 501(c)(4) is clearly an expressive organization created to facilitate the process of individual political speech and to further the development of individuals' autonomy rights. The fact that the protection of political speech rights varies

⁷ Citizens United is not a 501(c)(4) because it is a national organization interested in education regarding federal politics. In order for an organization to qualify as a 501(c)(4), it must be a local association of individuals that specifically deals with local social welfare and political issues.

between different types of nonprofit corporations makes it clear that an organization's political speech rights are closely linked to its stated goals and the role the corporation plays in promoting the autonomous expression of the individuals associated with the corporation.

In essence, this brief discussion of different types of corporations serves to demonstrate that it is not sufficient to say that all corporations are the same. The differences in structure, purpose and allowable activities demonstrate that varieties of corporate entity may have different claims to political speech rights. Even if 501(c) corporations have a claim to political speech, for-profit business corporations lack a clear right to political speech. Unlike 501(c) corporations, business corporations are not created to promote an ideological goal or social welfare. They are created to streamline selling goods and services and are motivated by fiduciary duty to always seek to increase profit margins. Because they are commercially motivated, all political activity will also be tied to the corporation's economic goals rather than an ideological goal to promote social welfare or individual expression (*Avi-Yonah* 1030). By conflating the speech of nonprofit corporations like *Citizens United* with for-profit business corporations, the Supreme Court greatly overextended First Amendment speech protections to cover organizations that do not have a clear right to political speech. The Court's inability to distinguish between different types of corporation originated in part from their reliance on a muddled use of three theories of corporate personhood. None of the theories of corporate personhood they used offer a clear way to distinguish between types of corporations with varying strengths of claims to political speech rights.

Theories of Corporate Personhood

Over time, three major theories of corporate personhood have emerged in American jurisprudence. The artificial entity theory is the best established of the three theories in that the Court has used the theory consistently since 1819. It is based on the idea that a corporation is a legal fiction created for a particular purpose that is clearly outlined in the corporation's charter. This theory is also known as the grant theory because any and all rights the corporation has are granted to the corporation by the government. The government has extended such privileges as limited liability, favorable tax treatment, perpetual life, the separation of ownership and control to corporations (Shiffrin 10). Corporate rights are essentially limited to those the government chooses to grant. Chief Justice John Marshall embraced this theory in the 1819 case *Dartmouth College v. Woodward* when he wrote, "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" (Quoted in Sepinwall 60). Artificial entity theory sees corporate rights as a completely different category of rights from individual rights because individual rights are not granted by the government and are instead a result of each individual's autonomy. Autonomy rights are the rights that individuals have simply by virtue of their humanity. Because people need to engage in dialogue and debate with others in order to develop their sense of self and conception of the good, speech is commonly understood as part of an individual's autonomy rights. Under this theory, corporate speech rights may be limited or revoked if they interfere with individuals' autonomy rights because the

strength of the protection given to autonomy rights is maximal. Entities with weaker claims to speech rights such as corporations that are granted speech rights may not interfere with or impede individual speech rights.

If artificial entity theory is applied to the idea of corporate speech, the government has the right to limit corporate political speech just as it limits a multitude of potential corporate actions. With the exception of non-profit corporations formed explicitly to engage in political advocacy, political speech is not necessary for corporations to achieve their chartered purposes. The true impact of the *Citizens United* decision was that it gave for-profit business corporations the right to political speech. For a business corporation whose express purpose is to increase revenue and to serve the economic interests of its shareholders or investors, political speech is unnecessary for it to achieve its legal purposes. In fact, the money spent on corporate speech decreases revenue and therefore decreases the amount of money shareholders will receive as a dividend from their investments (Levinson 9)⁸. When seen in this light, corporations do not have a strong claim to political speech rights under the First Amendment. In fact, political speech may prevent them from fully carrying out their chartered purposes.

Artificial entity theory was evident in *Austin v. Michigan Chamber of Commerce* (110 S. Ct. 1391) where the Court argued that the government's interests in preventing

⁸ At this point it is important to remember that I am solely talking about corporate advocacy in relation to federal elections for political office. Lobbying government officials or participating in issue advocacy are separate issues and have different legal arguments associated with them. However, in terms of corporate independent expenditures for or against a candidate for political office, I do not see a clear connection between corporate speech and the profit motive of for-profit corporations.

distortion and corruption justified limiting corporate expenditures in relation to a political election. The Court reasoned that the unique corporate legal structure allowed corporations to amass large amounts of wealth that would be an unfair advantage in the political marketplace, where large corporate expenditures could drown out individual speakers. This idea became known as the anti-distortion rationale and granted the government the power to limit the speech rights of corporations in order to allow citizens to be heard. In essence, the Court argued that because corporations are created by the state, the state could limit their activities without violating the First Amendment. *Austin* is the clearest example of artificial entity theory in recent case law, but the idea that a corporation is a legal fiction created by the government is well entrenched in American jurisprudence. The Court in *Citizens United v. FEC* rejected the *Austin* decision in its entirety.

The Court refused to accept the anti-distortion rationale in *Citizens United* because the logic of the artificial entity theory could be used to limit the speech of wealthy individuals, which would obviously be an infringement of First Amendment rights. Essentially, the artificial entity theory creates a regulatory scheme that is overbroad. The Court pointed out that wealthy individuals could also use economic resources to drown out the speech of other less wealthy individuals. The idea that the government could limit speech in order to protect the speech rights of another speaker who is entitled to the same degree of speech protection is antithetical to First Amendment jurisprudence. The artificial entity theory does not articulate a way to differentiate between corporate speech rights and individual speech rights. The *Citizens*

United Court argued that the *Austin* Court had ignored or failed to realize the implications of the anti-distortion rationale and that the rationale could not be allowed to stand. Under the logic of the anti-distortion rationale, if the government has the right to limit corporate speech because of the potential for distortion of the political marketplace, it will also have the power to limit individual speech if it threatens to distort the political speech market. This lack of differentiation between types of speakers makes the government incapable of protecting individual speech while also limiting corporate speech. Thus, the artificial entity theory is not a sound foundation for a theory of corporate rights because the arguments that it generates fail to create a framework for differentiating between speakers (individuals) that need maximal protection and speakers (for-profit corporations) that do not.

Unlike the artificial entity theory, the aggregate entity theory imagines the corporation as a collection of individuals that have come together for a shared purpose (Batchis 28). In this theoretical model, the corporate form is simply a mechanism by which the incorporated individuals can achieve their joint purpose. Aggregate entity theory places the onus of responsibility for the corporation on the people who come together to form the corporation. It rejects the idea that corporations are the creation of the state and points to the fact that modern corporate law does not require that the state or federal governments grant each corporation a unique charter (Batchis 33). This distinction is important because it recognizes that artificial entity theory has historical roots in a time period where each individual corporation was granted a charter of incorporation. In modern law, corporations do not have to petition the state legislature

for permission to incorporate. The absence of a direct grant of rights from the government to a specific corporation provides a challenge to artificial entity theory. For proponents of aggregate entity theory, corporations are independent of the laws and the government of the state and are the legal identities of the collectivities they represent. Under this theory, the corporation has rights derived from the rights of its shareholders and has a right to political speech as the collective identity of the shareholders. In the majority of case law and scholarly articles, the aggregate entity theory is reserved for small non-profit organizations that are organized for purposes that are important to the self-development of the members like community advocacy groups, charity groups or fraternal organizations. The aggregate entity theory would apply to both 501(c)(3) and 501(c)(4) corporations because 501(c)(3) corporations are recognized as charitable organizations and 501(c)(4) corporations are community advocacy groups. Before *Citizens United*, this theory was never applied to large for-profit business corporations (Batchis 34).

The majority opinion of *Citizens United v. FEC* relies heavily on the idea that for-profit business corporations are associations of individuals that have expressive rights derived from those of their members. Justice Kennedy refers to corporations as “associations of citizens” throughout the majority opinion (130 S. Ct. 876 pg. 33-38). However, for-profit business corporations are not “association of citizens.” At least in the context of publicly traded corporations, corporations are legally bound to further the economic interest of their *shareholders*. In legal contexts, the rights and interests that shareholders legally have are not the same set of rights that citizens have in a

political context. Shareholders are constrained to a limited set of economic interests related to the proper management of the corporation and increased returns on their investment (Batchis 42). Calling for-profit corporations “associations of citizens” misconstrues the legal reality of the for-profit corporate entity and conflates expressive and for-profit corporations.

Justice Kennedy’s argument is flawed because for-profit corporations are inherently different from non-profit organizations and from individual citizens. Business corporations are not “associations of individuals” in the same way that non-profit organizations are. The aggregate entity theory should not be applied to for-profit corporations because they are designed to streamline the process of making and selling goods and services, not to enhance social welfare or promote individual autonomy. If a business corporation is publicly traded or has shareholders, it is legally bound to do everything it can to increase the profits of its shareholders or investors (Tucker 11). Any action it takes beyond the scope of this charge is a breach of fiduciary duty. Also, for-profit corporations cannot derive expressive rights from their shareholders because a shareholder is also a legally defined interest separate from that of the actual individual (Tucker 13). The legal identity of a shareholder does not have the same autonomy rights that an individual citizen has because the shareholder’s only legal interest is in receiving the highest possible return on his investment. Thus, the characterization of a corporation as a group of individuals who come together to engage in speech cannot and should not be applied to for-profit corporations. The Court’s use of aggregate entity

theory to justify the extension of speech rights to for-profit corporations is a misapplication of the theory and cannot stand up to careful scrutiny.

The third theory of corporate rights is the natural entity theory. This theory argues that corporations are separate legal entities from both the government and their shareholders and that a corporation is “akin to a natural individual with inherent rights, such as freedom of speech...” (Sepinwall 45). Under this theory, corporate speech must be attributed to the corporate entity rather than the individuals in the corporation. Scholars point to the phenomenon of group decision-making as support for this theory. In many instances, the final decision a group makes will not be the preference of a single individual but will instead reflect an internal bargaining process so that the decision cannot accurately be attributed to any entity besides the group (Allison 203). In regard to speech rights, natural entity theory argues that corporate speech is also the result of a process of internal bargaining and that the final speech product must be attributed to the corporation because it is not the product of any one individual speaker and is instead only attributable to the group because in many instances the decision the group makes will not reflect the desires or preferred outcome of any single actor in the organization (Dan-Cohen, *Rights, Persons and Organizations* 54). Proponents of natural entity theory argue that limiting corporate speech destroys unique speech acts and does irreparable damage to the marketplace of ideas (Briffault 38). According to this theory, corporate speech cannot be limited because corporations possess expressive speech rights as part of their autonomy rights.

Although none of the opinions from *Citizens United v. FEC* explicitly call on natural entity theory, there are plenty of implicit uses of the theory's logic in the decision. Most notably, in the majority opinion, Justice Kennedy argues that corporations, like individual speakers, have the right to engage in political speech because they "strive to establish worth, standing and respect for the speaker's voice" (130 S. Ct. 876 pg. 24). This implies that all corporations, like individuals, engage in political speech due to an inherent autonomy right to free speech. The idea that corporations, like individuals, strive for worth, standing and respect through political speech⁹ is unique to the natural entity theory and implies that the corporation's right to speak is distinct from the rights of the incorporated individuals. According to this argument, corporations *in and of themselves* have an autonomy right to political speech protections that is not grounded in a government grant of rights or in the rights of the members of the corporations. Kennedy is arguing that corporations have taken on enough of the legal characteristics of autonomous personhood to be guaranteed First Amendment speech protection. This new category of rights-bearing entity lacks a connection to reality. Corporations could not exist without either the people who created them or the laws that allow them to exist (Ortiz 9). Unlike individuals, who have autonomy rights and can exist without either community or the legal structures of the state, corporations are entirely dependent on the incorporated individuals and the legal structures of the state. Thus, even though group decision-making processes make it

⁹ The argument that corporations strive to establish worth, standing, and respect for the corporation's voice implies that corporations enter into the political sphere as a way to develop and exercise autonomy rights. However, the legal reality of a for-profit corporate entity makes it so that its speech must be motivated by a desire to make a profit if it is not to violate its fiduciary duty.

possible to attribute speech to corporations and the Court treats corporations as rights bearing entities, corporations' lack of independence from either the legal infrastructure of the state or the groups of individuals who create them demonstrates that they are not natural entities and do not have the autonomy rights necessary to claim an active right to political speech.

The use of these three theories of corporate personhood in the *Citizens United* decision clouded the judgment of the Court and led it to conclude that both non-profit expressive organizations and for-profit corporations have a right to political speech that cannot be restricted or prohibited by regulatory schemes like the BCRA. The Court did not see a distinction between for-profit corporations and non-profit expressive organizations. They argued that all corporations are "associations of citizens" that may attempt to use political speech as a way to establish "worth, standing, and respect for the speaker's voice." The blending of aggregate entity theory and natural entity theory coupled with the decision to disregard the artificial entity theory led to the overbroad and illogical decision to grant all corporations full political speech protection under the First Amendment.

A Legal Theory of Corporate Speech Rights

In the *Citizens United* decision, all three of models of corporate personhood either fail to provide convincing bases for corporate rights or produce overbroad arguments used to limit individual speakers' political speech. Attempting to use these three models of corporate personhood to understand corporate speech rights is likely to lead to an unclear metric for corporate speech protection. The best way to determine

the level of political speech protection various corporate entities should have is to look at the rights that entitle different types of speakers to speak and the relative strength of those rights. The three models of corporate personhood fail to be useful in the context of corporate speech because the models do not acknowledge that there are different sources for speech rights and that the source of the right to speak may affect the strength of that right. In the eyes of the Court, “the First Amendment is written in terms of speech, not speakers” (130 S. Ct. 876, J. Scalia concurring, 11). Here Scalia is arguing that the First Amendment does not allow speech restrictions based on the identity of the speaker because the text of the First Amendment only expressly forbids laws impinging the freedom of speech and says nothing about the rights of speakers. In Scalia’s view, this implies that all speakers have the same right to speak and that one source of speech may not be limited to protect the speech rights of another speaker. However, this argument assumes that all speakers have an equal right to political speech.¹⁰ Common sense and legal precedent point to the idea that different types of corporate entities possess varying strengths of the right to political speech. As the earlier discussion of corporate entities revealed, the purposes of a corporation and the laws under which it is created both play major roles in determining the level of speech protection due to the entity in question. In 1991, Meir Dan-Cohen examined the theoretical underpinnings of speech by different organizational speakers in his article “Freedoms of Collective Speech: A Theory of Protected Communications by

¹⁰ To be clear, I am not trying to say that individuals can have different strengths of speech protections. In this framework, individuals have maximal speech protections as a result of their autonomy rights. The differentiation of levels of speech protection only applies to corporate entities and should not be applied to questions of individual’s speech rights.

Organizations.” He found that there are several different sources for the right to political speech and that each source of political speech rights has different strengths. Under this model, it is possible to grant speech rights to some organizational speakers without declaring that all organizations have speech rights. It is also possible to restrict organizational speech if it impedes upon the speech of a speaker with a stronger right to speak. Of all of the theoretical models of organizational speech rights available, Meir Dan-Cohen’s model is the only model to examine the source as well as the strength of political speech rights. His model provides a clear and comprehensive look at the constitutional implications of corporate political speech.

Dan-Cohen’s model begins with the idea that individuals possess an original autonomy right to political speech. He argues that political speech is part of the autonomy rights of the individual. For Dan-Cohen, an autonomy right is a right that the individual has and the government must protect in order for the individual to develop her own identity and voice. He argues that in American jurisprudence, the First Amendment was designed to protect the free speech autonomy right of individuals (Dan-Cohen 1233). It is important to understand that the autonomy rights of individuals are the strongest possible justification for free speech. An individual’s original speech right is a deontological right and cannot be limited or compromised in any way.

After setting this foundation for comparison, Dan-Cohen creates a framework for varying strengths of the right to political speech. He begins with the idea that while individual speakers have an original right to free speech, individual listeners also have a right to hear any and all available information. This right is crucial to their forming

independent and well-educated opinions. Dan-Cohen labels this right the “passive aspect of freedom of speech” (Dan-Cohen 1242). The right to unimpeded information is a right nearly as strong as the individual’s original right to free speech because access to information is crucial to the development of autonomy. The passive aspect of freedom of speech can be a strong justification for corporate speech rights if the corporate speech enriches the marketplace of ideas. Dan-Cohen continues his analysis with the idea of “derivative rights,” or rights for another individual or entity that are derived from an external source (Dan-Cohen 1248). The primary use he makes of this concept is the idea of a “passive derivative speech right” which is a speech right that allows organizations without active speech rights to engage in speech. A passive derivative speech right stems from the listener’s right to an unlimited flow of information. However, the free speech rights that are derived from the listener’s right to hear are not autonomy rights. Instead, they are utilitarian rights¹¹ and are closely linked to the value of the information produced has for the listener. The fact that speech produced by an entity with a passive derivative speech right is utilitarian means that it may be limited or restricted without interfering with First Amendment constitutional rights because utilitarian rights are weaker, government-granted rights that are not automatically protected by the First Amendment (Dan-Cohen 1249). Thus, if the speech produced by an entity with a passive derivative speech right interferes with the speech of an individual with an original right to free speech or if the speech produced by entities with

¹¹ Utilitarian rights are a weaker class of rights that are used instrumentally to achieve a particular end. These rights are not part of an individual’s autonomy rights, but are instead granted to the entity in question so that it can achieve a socially desirable end (such as selling goods and services in the economic marketplace).

a passive derivative speech right does not add value to the pool of ideas available to listeners, there may be cause to limit the political speech of entities with passive derivative speech rights.

Dan Cohen adds another layer to his model of speech rights by discussing the different types of entities created by American law and the sources of their rights to speech. Business corporations that are incorporated under the for-profit section of American tax law are utilitarian organizations designed to maximize profit for their owners and shareholders. Because business corporations are legally bound to maximize profits, their active speech rights are limited to the speech that allows corporations to achieve their commercial objectives. This provides justification for commercial speech, but it does not provide a basis for political speech¹² (Dan-Cohen 1250). For that corporate entities must rely on the passive derivative right stemming from the individual's right to hear all information. However, this right is not strong enough to prevent the government from limiting corporate speech that undermines or drowns out the political speech of individuals. Essentially, the fact that corporations are designed and incorporated for purposes other than political speech requires the corporate entity to rely only on passive derivative rights. In the calculus of rights, political speech based on passive derivative rights has less weight than speech that stems from an original right to speech. In the words of Dan-Cohen:

¹² In this context, political speech is limited to independent expenditures that advocate for or against the election of a candidate to a federal office. Issue advocacy and lobbying are not covered by the scope of *Citizens United* and are outside the scope of this paper.

A derivative right is instrumental, whereas an original autonomy right is not. Within the limits set by its scope and weight, an original autonomy right may not be compromised even for the sake of enhancing the enjoyment of a similar right in others—doing so would be an impermissible act of sacrificing one person for another. In contrast, the entire purpose of a derivative right is to safeguard or enhance the enjoyment of certain rights by others. A derivative right is therefore measured—as all instruments are—by its effectiveness. It can always be discarded in favor of better means to attain the same goals. (1246)

Because the First Amendment is primarily concerned with protecting individual autonomy, which is realized through the right to free speech, for-profit corporate speech may be limited or restricted. In *Citizens United v. Federal Election Commission*, the Court argues that limiting the speech of one speaker in order to protect the speech of another speaker is not permissible because all speech is guaranteed equal protection under the First Amendment. If Dan-Cohen's model is applied, this idea will only apply to the speech of entities protected by the same type of right. Rather than arguing that all speech must be treated equally under the First Amendment and that for-profit corporations have the same type of free speech protection as non-profit expressive organizations or individuals, for-profit corporate speech may be treated differently from individual speech because for-profit corporate speech is utilitarian in nature while individual speech comes from an inherent autonomy right to self-expression.

Although utilitarian organizations like for-profit corporations are limited to passive derivative speech rights, there are organizational entities that possess stronger rights to political speech. Dan-Cohen labels these organizations "expressive organizations" and describes them as "organizations established for the specific purpose of engaging in speech" (Dan-Cohen 1248). In American law, the clearest example of an

expressive organization that takes the corporate form is the 501(c)(4) corporation.

Unlike business corporations, these entities are created so that individuals can exercise their speech rights in a group setting and increase the “volume” of their speech by speaking as part of a larger group. Because individuals join expressive organizations in order to exercise their speech rights, the expressive organization can be said to possess a right to free speech that stems from the autonomy right of the individual to engage in free speech. Dan-Cohen calls this right “an active derivative right” and argues that, “legal protection is extended to such organizations based on a concern for the individual members’ original expressive rights and on the recognition that such organizations aid the exercise of those individual expressive rights” (Dan-Cohen 1248). This is a much stronger theoretical basis for speech because it is linked to the right of association that is implicit in the First Amendment. Individuals have a right to associate with each other and to speak as a collective. Organizations that are created to further individual speech objectives such as non-profit expressive corporations have a claim to speech rights under the aggregate entity theory. The speech of an expressive organization is protected as long as it is representative of the ideological positions or beliefs of the individuals who support the organization. This delegation relationship justifies much stronger speech protections for an expressive organization as long as there is a clear link between the organizational speech and the expressive wishes of the incorporated individuals.

The Court recognized the strength of the speech rights claims made by expressive organizations in the 1986 case *Federal Election Commission v. Massachusetts*

Citizens for Life, Inc (479 U.S. 238). In that case, the Court granted a campaign finance law exception that allowed corporations to create separate segregated funds that could only accept donations from employees and shareholders. These political action committees (PACs) were allowed to make independent expenditures in relation to electoral campaigns as long as they did not accept any corporate contributions. Because the independent expenditures of the political action committees were backed by individual contributions (and monetary contributions count as protected speech), PACs were seen as having an active derivative right to political speech. This distinction of differing rights of speech depending on the purpose of the organization shows that the Court has used a calculus of rights in the past that was more complex than that used in the *Citizens United* decision. It is not enough to declare that all speech is granted equal protection under the First Amendment. In most instances, the motivations and identity of the speaker affect the source and strength of the speaker's right to political speech. By failing to examine the different types of corporate entities, the Court conflated expressive and utilitarian corporations and drastically overextended the First Amendment by granting political speech protections to organizations without a theoretical justification for political speech.

The Court's attempt to use the artificial, aggregate and natural entity theories inevitably led to the idea that corporations are endowed with the same speech rights as individuals because those three theories are incapable of showing that corporate speech is fundamentally different from individual speech. This approach also failed because the models the Court used do not provide a framework for examining different

types of corporate identity. However, Dan-Cohen's model provides a way to examine corporate speech rights in a way that accounts for the identity of the speaker and the source of the speaker's right to speech. For-profit corporations are the least protected of all organizational speakers because they are organized for a narrow economic purpose that usually has little to do with electoral politics. For-profit corporate speech is not the same as individual speech because for-profit corporations do not have the autonomy rights that would guarantee maximal constitutional speech protections. For-profit corporations may have a right to political speech derived from the rights of the listeners, but this passive derivative right to speech is purely utilitarian and should not be extended the full scope of First Amendment speech protection. On the other hand, non-profit expressive organizations may have justifiable claims to some degree of political speech protection. If the Court had used a more nuanced approach to understand the political speech rights of for-profit corporations and non-profit expressive corporations, the massive confusion over corporate personhood could have been avoided.

Suggestions for the Future

Even though the outcome of *Citizens United v. FEC* cannot be changed and the majority opinion has already become part of the case law that defines judicial precedent, it is still useful to examine courses the Court could have taken to avoid granting for-profit corporations First Amendment political speech protections. One of the easiest ways for the Court to do this would be to use Dan-Cohen's model of organizational speech rights or a model similar to it. This approach would have allowed

the Court to preserve expressive organizations' expressive speech rights without having to conclude that all corporations have First Amendment speech rights. This would be an improvement over the Court's current identity-blind rationales because it would better allow the First Amendment to protect individual's speech rights without granting political speech rights to entities that lack autonomy rights. Incorporating a dichotomy between expressive and utilitarian organizations would have allowed the Court to create a clear-cut rule tailored to the problems of organizational political speech. This purely theoretical approach lacks a connection to the question of electoral finance that lies at the heart of the case, but if the Court had started from a sounder theoretical basis it would have been able to shape campaign finance laws to fit the normative theoretical model that best reflected the true purpose of the political speech protections embodied in the First Amendment.

There are two simple ways the Court could have tied a more nuanced theory of corporate speech rights to the realities of electoral finance and to the facts of *Citizens United v. FEC*. The first would have been to reject the idea that all corporate spending counts as a specific speech act. Over time, the Court has established that money can count as a speech act because almost all speech acts require some sort of money. However, the Court has also recognized that not all monetary expenditures qualify as protected speech acts. In *Buckley v. Valeo*, one of the seminal cases of campaign finance law, the Court ruled that corporations had the right to independent expenditures, but lacked the right to donate unlimited sums of money directly to candidates. The Court reasoned that independent expenditures were explicit speech acts, but direct

contributions to a candidate only counted as “general support for the candidate” and were not entitled to speech protections. Thus, the Court has already recognized that money spent in connection with an election cycle is not always entitled to speech protection. The Court could extend this precedent in a slightly different direction. Because Citizens United’s corporate donors donated to the organization in general rather than to specifically fund *Hillary: The Movie*, the Court could have ruled that the corporate donations to Citizens United were not speech and did not implicate the speech rights of the for-profit corporate donors. The Court could have ruled on the merit of the film as the speech product of an expressive organization. Although the film would likely have still been allowed under this standard, this reimagining of the role of money in political speech cases would have provided a precedent for further clarification of the role of money in political speech.

The Court could also have avoided extending First Amendment political speech protections to for-profit corporations by creating a *de minimis* exemption for for-profit corporate donations to 501 (c)(3) organizations. The Court could have found that the funding Citizens United received from for-profit corporate sources was minimal and did not pose a threat to the integrity of the BCRA or electoral politics in general. The loophole the Court created would be a way to avoid the constitutional questions posed by *Citizens United v. FEC* and would have greatly reduced the importance of the case. Rather than ruling that for-profit corporations have the same right to political speech under the First Amendment as individuals, the Court could have simply ruled that the particular provision of the BCRA that forbade political speech by groups that accepted

for-profit corporate donations was overly stringent. This minor adjustment to campaign finance law could have addressed the merits and the facts of the case without addressing the question of corporate political speech under the First Amendment at all.

Conclusion

Citizens United v. Federal Election Commission extended First Amendment rights that should be reserved for individual citizens to for-profit corporations on the grounds that for-profit corporations have the same rights to speak as individual citizens. This is problematic because for-profit corporations are not individual citizens with autonomy rights that can only be fulfilled through political speech. They are artificial legal entities that are granted a separate identity under the law in order to facilitate their economic goals. The fact that the law grants non-profit corporate entities some political speech rights does not provide grounds for for-profit corporations to claim that they have the same theoretical justifications for speech. The three theories of corporate personhood all make a fatal assumption that “corporate personhood” grants corporations the same type of personhood rights individuals have and that all types of corporate entities have the same claim to political speech rights. As Dan-Cohen’s model demonstrates, the right to free speech is complex and has many different sources and types of rights associated with it. Because for-profit corporations are utilitarian organizations created for an economic purpose rather than an expressive one, the autonomy rights possessed by individuals do not extend to for-profit corporations. On the other hand, non-profit expressive corporations may still have a strong claim to political speech rights. The analysis of *Citizens United* ignored the complexities of free speech and equated

individual speech with corporate speech. The use of underdeveloped and unexamined theoretical justifications for speech led to a decision that violates the common sense and warps the First Amendment. For-profit utilitarian corporations should not have the same First Amendment protections for political speech that individuals have. Until the Court recognizes that the right to political speech is more complex than the *Citizens United* decision made it seem, the First Amendment will continue to protect legal entities rather than American citizens. By using a nuanced and well-reasoned normative model of corporate speech rights, First Amendment political speech case law can be reclaimed and revitalized so as to best encourage genuine political debate amongst the American people.

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