

Personhood, Democratic Debate, and Limitations on Corporate Speech Rights

A thesis presented to
the faculty of
the College of Arts and Sciences of Ohio University

In partial fulfillment
of the requirements for the degree
Master of Arts

Brendan J. Moore

June 2012

© 2012 Brendan J. Moore. All Rights Reserved.

This thesis titled
Personhood, Democratic Debate, and Limitations on Corporate Speech Rights

by
BRENDAN J. MOORE

has been approved for
the Department of Philosophy
and the College of Arts and Sciences by

Alyssa R. Bernstein
Professor of Philosophy

Howard Dewald
Interim Dean, College of Arts and Sciences

ABSTRACT

MOORE, BRENDAN J., M.A., June 2012, Philosophy

Personhood, Democratic Debate, and Limitations on Corporate Speech Rights

Director of Thesis Alyssa R. Bernstein

In *Group Agency* (2011), Christian List and Philip Pettit defend a group realist view of corporations, arguing that complex groups are entitled to certain rights and respect. They contend that individuals hold a privileged place over groups and that groups deserve a lesser range of rights. I supplement their view by arguing that corporations should not have the same speech-rights as citizens participating a democratic society. I favor a normative individualism that takes into account speakers' interests as well as listeners' interests, the character of political debate in a well-functioning democracy, and possible adverse consequences of corporate advocacy.

I expound List and Pettit's position. Next, following Former Justice John Stevens' dissent in *Citizens United*, I point out dangers posed to the quality of debate by allowing unlimited corporate spending for candidate advocacy. I go on to characterize an ideal of political discourse as involving citizens' engagement. Lastly, I address objections.

Approved: _____

Alyssa R. Bernstein

Professor of Philosophy

I dedicate this thesis to my parents, who helped me persist in spatio-temporal reality.

ACKNOWLEDGMENTS

I would like to thank Dr. Bernstein, Dr. Bender, and Dr. Lent for their advice, many hours of work, and support provided during this process.

Ohio University has been a great home for me over the past six years, and I could not have accomplished this thesis without the support of its philosophical community.

TABLE OF CONTENTS

	Page
Abstract	3
Dedication	4
Acknowledgments	5
Section I: Introduction to the Topic	7
Section II: List and Pettit's Views	13
Section III: The Quality of Democratic Debate	23
Section IV: Two Metaphors: Marketplace vs. Town-hall	38
Section V: Objections and Concerns	49
Section VI: Conclusion	56
Bibliography	58

SECTION I. INTRODUCTION TO THE TOPIC

The Supreme Court decision *Citizens United v. Federal Elections Commission* (2010) removed restrictions on certain corporate and union expenditures from the BCRA (Bipartisan Campaign Reform Act 2002), thus permitting unlimited corporate and union spending on advocacy (broadcast ads or “electioneering communications”) for election candidates. Since that decision, many critics (including Joshua Cohen, Ronald Dworkin, and Former Justice Stevens) have written about dangers posed by the Supreme Court’s ruling to democracy, including fair elections and voter participation in self-governance. Although corporations are still banned under the Tillman Act of 1907 from directly contributing to candidates, *Citizens United* “opened the door for corporations and labor unions to do something unprecedented in American politics for a century—to use dollars from corporate or union coffers for campaign advocacy” (Wert, p. 722). I will argue that corporate influence in the election process and corporate spending on candidate advocacy can pose threats to a well-functioning democracy. Taking into account pragmatic considerations relevant to the functioning of a well-working democracy, I contend that corporations ought not to be granted the same speech-rights that citizens (natural human individuals) are granted under the First Amendment of the US Constitution. Group agents (including corporations) should not have the same speech rights as natural human persons.

In so arguing, I will be supplementing Christian List and Philip Pettit’s suggestion of distinguishing different “Classes of Persons”. I support their view that complex groups that are persons (in the performative sense that will be described

shortly) do not deserve the same range of rights as natural persons. In *Group Agency* (2011), List and Pettit present a group-realist view of corporations, arguing that some groups have the complexity that warrants ascription of certain rights and respect. They also favor natural human individuals continuing to hold a privileged status in relation to groups, and argue that groups (including corporations) deserve a lesser range of rights. Before undertaking to supplement List and Pettit's stance, I will briefly explain why it is endorsable.

List and Pettit's account of "persons in the performative sense" accurately applies to complex group agents, including corporations. To be a person in the performative sense is to "have the capacity to perform as a person" (List and Pettit, p. 173). This capacity includes the ability to play a certain role in a system of conventions (a system of law for example): to be held responsible for contracting obligations, and to be accountable for fulfilling obligations (List and Pettit, p. 173). I agree with List and Pettit that corporations do not deserve the same rights as, nor a status equal to that of, natural persons. They find "normative individualism" compelling; this is the view that something can be good only if it is for the benefit of individuals. More specifically, "... something is good only if it is good for individual human[s] or, more generally, sentient beings... . Whether or not a group person exists, and whether it should function within this or that regime of obligations, ought to be settled by reference to the rights or benefits of the individuals affected, members and non-members alike" (List and Pettit, p. 182). In the last quoted sentence, the word "individuals" apparently refers to non-group agents, specifically natural human persons, but individuals can also be more generally understood as including all

sentient beings. Therefore, whether something “benefits the individuals affected” is vague. For this reason, among others, List and Pettit’s stance on corporate rights needs to be developed.

I will supplement List and Pettit’s suggestion that we should acknowledge different “Classes of Persons”. Group agents (including corporations) should not have the same range of rights as individual persons; in particular, corporations should not have the same speech-rights as natural human individuals who are citizens in a democratic society. The “Classes of Persons” approach that I favor advocates a normative individualism that takes into account speakers’ as well as listeners’ interests, the character of political debate in a well-functioning democracy, and possible adverse consequences of corporations’ candidate advocacy. The disadvantages of unrestricted corporate expenditures for candidate advocacy pertain both to citizens’ efforts to become better informed about the public’s interests, and to citizens’ engagement in political discussion and debate.

The *Citizens United* ruling may be seen as posing different dangers to democracy depending on which interpretation of the “marketplace of political ideas” metaphor is adopted and on the consequent conception of democracy. The metaphor of a marketplace encapsulates a certain description of how citizens arrive at decisions about whom to vote for. Prior to an election, citizens debate and deliberate about what ideas should be adopted in laws and policies, and whom to elect to public office. They then vote. According to a common interpretation for the metaphor of the marketplace of ideas, good ideas will “rise to the top” and get accepted, while the bad ideas will be quickly forgotten. So interpreted, the metaphor implies similarity

between the public forum of discussion and debate in a democratic society, and a traditional marketplace where popular products will be successful and unpopular products will be unsuccessful. This construal of the marketplace metaphor expresses one conception of a healthy process of democratic political debate and deliberation. It is a process that can easily get distorted if not kept “open”; a better version of the marketplace metaphor would construe “open” differently.

Having a well-functioning democratic political system is certainly beneficial for the individual persons living within that political system, so whoever endorses normative individualism should consider what is necessary for avoiding imbalances of power that distort political debate and deliberation in a way that is not in the public’s interest. I argue that democratic election-related practices get distorted through the extension of unrestricted free-speech rights to corporations, because this conflicts with a healthy process of political debate. The “open marketplace”, I argue, is not best understood as allowing completely unregulated participation by any and all agents, but instead as engaging citizens in the activities of self-governance through undistorted debate and deliberation.

The marketplace metaphor as interpreted above fails to capture the importance of citizens’ engagement in self-governance through a process of undistorted deliberation and debate: fails by construing participation in self-governance as merely choosing between options presented. I offer an alternative metaphor and conception of healthy democratic debate and deliberation, according to which citizens voice concerns in public forums, listen thoughtfully to each other, and actively engage in debate and deliberation about whom to elect. The idea of a town-hall meeting

captures these aspects of healthy democratic process better than the marketplace metaphor.

Whether regulating corporate candidate advocacy is or is not good for a democracy depends on our conception of democracy. Joshua Cohen, responding to the *Citizens United* decision, distinguishes between two conceptions of democracy: Civic Equality and Limited Government Minimalism. The *Citizens United* decision is a serious threat to democracy according to the Civic Equality view, but it is necessary according to Limited Government Minimalism. The purpose of the First Amendment and the value of equality of opportunity to influence elections are interpreted differently in each conception. On the Civic Equality conception, the power to participate in self-governance consists not merely in being able to vote, but also in being able to engage in public discourse. On the Limited Government Minimalist conception, participation is through a peaceful vote, and deliberative discussion and debate among voters need not occur. The Civic Equality conception has the advantage of taking into account citizens' engagement as equals in political discourse and debate. I endorse the Civic Equality view of democracy.

The *Citizens United* decision invalidated the corporate advocacy restrictions in the BCRA. This invalidation may well be harmful to citizens: it may impede their efforts to become informed about the public's interests, and it may foster cynicism among citizens about their ability to govern themselves. The *Citizens United* decision is consistent with the view that participation in the democratic process is reducible merely to voting. In supplementing List and Pettit's stance on "Classes of Persons", I rely on normative individualism in arguing that it is important to avoid distortion of

political debate in order to maintain a healthy democratic society. Undistorted deliberative discussion and debate among self-governing citizens during the election process is important for promoting what is best for natural human individuals. My metaphor for healthy political discussion and debate is a town hall meeting. The best “town hall meeting” requires restrictions on corporate political speech.

In order to argue that corporations deserve fewer speech rights than natural human individuals or citizens, I will further explain the following:

- a. List and Pettit’s view and why I think it needs supplementing;
- b. the relation between speakers’ interests and listeners’ interests
(specifically in the context of democratic debate prior to elections);
- c. the importance of fulfillment of these interests for well-functioning democracy;
- d. how we should understand well-conducted political debate.

Next, I will discuss List and Pettit’s conception of group personhood in the performative sense. I will also explain their view about group rights and show why it needs supplementing to include, specifically, restrictions of corporations’ speech-rights. I will then go on to contrast speakers’ and listeners’ interests, and I will critically analyze the metaphor of the “marketplace of political ideas”, considering possible distortions of public debate and their effects on democracy.

SECTION II. LIST AND PETTIT'S VIEWS

List and Pettit on Personhood

List and Pettit distinguish between two conceptions of personhood: intrinsicist and performative. They argue that certain complex group agents are persons in the performative sense. They conclude that although group persons do not deserve the exact same rights as those of natural individual persons, group persons should be given rights and respect – but only to the extent that this serves natural individual persons' interests. I agree that List and Pettit's performative conception of personhood accurately represents certain complex group agents, and that their normative individualism supports a reasonable claim that individual persons still hold a privileged position (in terms of rights and status) over group persons, which is incompatible with the idea that group persons ought to share equal rights and standing with natural individual persons and that corporate speech rights should not be restricted.

The first of the two conceptions of personhood that List and Pettit discuss is the "intrinsicist" conception of personhood. This is the view that "there is something about the 'stuff' that persons are made off [sic: of] that distinguishes them from non-persons: something that makes persons stand out" (List and Pettit, p. 171). This view can be construed as compatible with either a Kantian or a Utilitarian framework. The intrinsic 'stuff' can be understood as not the arrangement of the materials inside of

biological persons but also their morally relevant capacities, such as their ability to suffer or to have human dignity.

List and Pettit believe that an intrinsicist conception of personhood leads us to overlook or underestimate the impact groups have on our social world. The intrinsicist conception requires an error theory about corporate personification. The error theory would hold that we are mistaken in believing that groups have person-like qualities, and would deny that personification is appropriate. “If we go along with the intrinsicist conception of persons, at least on its traditional interpretations, we are more or less bound... to be fictionalists or error theorists about the personification of groups” (List and Pettit, p. 176). The reason List and Pettit find a problem with the fictionalist account of group agents is that they think it leaves us in a position where we cannot recognize the important impact group agents have in our social world. In other words, “... there really are group agents; ... to overlook their presence would be to miss out on a significant aspect of our social world” (List and Pettit, p. 4). Resisting a fictionalist stance, List and Pettit support a realist stance toward group persons and contrast the intrinsicist conception of personhood with what they call a performative conception of personhood.

For the performative conception of personhood, “what makes an agent a person is not what the agent is but what the agent does; the mark of personhood is the ability to play a certain role, to perform a certain way” (List and Pettit, p. 171). In this view, as long as a complex agent is capable of acting and operating within a space of obligations, that agent would be considered a person.

List and Pettit explain that the performative conception of personhood emerged in the writings of Hobbes and Locke. Hobbes supported the Authorization Theory of group agency, which supports group realism. The Authorization Theory holds that "...group agents exist when a collection of people each authorize an independent voice as speaking for them... committing themselves to be bound by it just as an individual is bound by what he or she affirms or promises... . A person *simpliciter*, Hobbes... maintains, is an agent who is able to claim standing in law or in any system of social obligation" (List and Pettit, p.7, p.172). According to List and Pettit, this view of obligation-entailing personhood is also fundamental to Locke's conception, even though Locke is more commonly associated with a memory account of personal identity. The memory account of personal identity is basically that "X & Y are the same person iff (if and only if) Y can remember experiencing what some earlier X experienced." (Shoemaker, p.25). List and Pettit draw out a very different reading of Locke; they argue that, while most of Locke's commentators focus on consciousness and the memory criterion for personhood, Locke's conception of personhood is in fact closely related to Hobbes' view. Locke agrees with Hobbes that obligation is foundational to personhood.

"Where-ever a Man finds, what he calls *himself*, there I think that another may say is the same *Person*. It is a Forensick Term appropriating Actions and their Merit; and so belongs only to intelligent Agents capable of a Law, and Happiness and Misery. This personality extends it *self* beyond present Existence to what is past... it becomes concerned and accountable, owns and imputes to it *self* past Actions, just upon the same ground, and for the same

reason, that it does the present” (List and Pettit, p. 173 quoting Locke’s *Essay Concerning Human Understanding*, sec. 26).

List and Pettit focus on “Agents capable of Law” when they draw the conclusion that personhood is a “Forensick” idea (related to law) that requires an agent to be able to fulfill contracts and obligations and obey law. “What makes an agent a person, then, is that he or she is capable of contracting obligations by entering into legal and other conventional arrangements with others. And what makes an agent the same person over time is that obligations and entitlements contracted earlier are inherited later” (List and Pettit, p. 173).

At first glance, one might wonder why List and Pettit seemingly ignore Locke’s mention of “Happiness and Misery” when summarizing his view about what constitutes a person. Locke, being an empiricist, probably referred to the happiness and misery that only conscious biological organisms can experience. However, there are other ways to interpret “Happiness and Misery”. Those terms do not necessarily refer to happiness and suffering in a biological sense. To be held accountable in the court of law means you can be punished for acting irresponsibly and compensated when wronged.

If a corporation were to cause pollution in a river, consequently adversely affecting individuals downstream, then it could be held responsible for compensating the victims for their medical expenses. Thus, the biological suffering of the victims would get transformed, in a sense, into the non-biological suffering of the corporation via its bank account. Even if measuring the health of individuals in monetary terms seems repugnant, it may currently be the best means of redress.

Similarly, if I were to accidentally damage several products in a grocery store, I would be expected to compensate for the damage by financially reimbursing the equivalent cost of the products. In this case, my non-biological suffering through reimbursing the company is functionally equivalent to the non-biological suffering of the corporation due to my accident.

So, defining personhood in a performative sense does not require focusing specifically on biological properties in order to identify similarities between the legal responsibilities and obligations of group agents and these of individual agents. In *Group Agency*, List and Pettit highlight similarities between human persons and corporations in so far as all can fulfill obligations and responsibilities. Adhering to normative individualism, they argue that group persons deserve a lesser range of rights than natural persons. Corporations, in this view, are persons only in the performative sense.

List and Pettit's Stance on Rights and Why it Needs Supplementing

On Rights:

List and Pettit make only general claims about what rights ought to be extended to corporations and other complex group agents. They find “normative individualism” compelling, and they explain it as the view that something can be good only if it is for the benefit of individuals or, more generally, sentient beings. On the basis of normative individualism, “... something is good only if it is good for individual human[s] or, more generally, sentient beings... . Whether or not a group

person exists, and whether it should function within this or that regime of obligations, ought to be settled by reference to the rights or benefits of the individuals affected, members and non-members alike” (List and Pettit, p. 182). What they say is plausible but vague and requires further development.

List and Pettit are right to support normative individualism and to maintain that individual persons should continue to hold a privileged place over group persons. To define what rights an agent is owed based purely on whether or not it can perform a certain action would lead to absurd conclusions. In other words, the mere fact that an action can be performed does not mean a right should protect its performance. Obvious examples include actions that harm others or that violate others’ liberty.

Falsely shouting “fire!” in a crowded theater provides a perfect example of free-speech rights being justifiably restricted due to concerns about harm to others. In this example, the reason for restriction of speech-rights is harm caused by the speech. However, other situations may also call for restrictions, even where harm is caused by an action, gesture, or something else non-vocal. An action that might warrant restriction is publicly waving a gun wildly in the air, thus creating a public disturbance. While these cases are obvious, some less obvious cases involve politics, where the damage caused by unrestricted speech-rights may not be so clear.

Many who criticize *Citizens United* call it a threat to democracy and free speech. In a democratic society, freedom of speech is valued partially in so far as it produces a healthy political discourse (possibly understood as an “open” marketplace of political ideas, as will be discussed later). During his 2010 State of the Union address, after the *Citizens United* case, President Obama described the ruling as

“disastrous for democracy” (List and Pettit, p. 176). Obama stated, "Last week, the Supreme Court reversed a century of law that I believe will open the floodgates for special interests – including foreign corporations – to spend without limit in our elections" (Silverleib, p. 1 quoting Obama, February 2010). List and Pettit say they agree with President Obama’s stance. They explicitly recognize corporate imbalance-of-power as being dangerous, and they therefore support limitations on corporate influence. “Group Persons like corporations are clearly able to dominate those who depend on them.... There has long been a concern in political theory about the actual abuses that companies, churches, and other corporate entities may perpetrate.... [But] much less attention has been given to the problems created by the enormous power of corporations, independently of actual abuses. The assumption seems to have been that when there is no actual abuse, no actual exercise of interference, then all is well. But, unfortunately, this does not follow.” (List and Pettit, p. 184). They go on to say that excessive corporate power can be dealt with in a similar way as excessive individual power.

“As polities have found legal ways of dealing with various imbalances of individual power, they should also be able to draw on legal restrictions to deal with imbalances of corporate power” (List and Pettit, p. 184).

Extremely wealthy individuals, too, ought to be limited in their ability to influence the outcome of an election through expenditures on broadcast ads for candidate advocacy. ‘Limited’ can be understood as restricted by a reasonable ceiling on the amount of money that can be spent on broadcast ads for candidate advocacy, or ‘limited’ can be understood as completely excluded from the activity. I intend

limitation to be understood as not necessarily requiring complete exclusion from influencing an election but only restriction as far as necessary so that a well-functioning democracy can be achieved.

If there were regulation of broadcast ads supporting candidates, extremely wealthy people would still be able to express themselves. Other forms of expression available to natural persons and citizens would include writing and publishing, attending rallies, engaging other individuals in debate, and influencing family, friends, and fellow citizens. Wealthy individuals, despite ceilings on their expenditures, would still be able to exert political influence; they would just be unable to wield as much influence as they otherwise could. However, with that being said, corporation's influence and expression in politics raise different considerations, as contrasted to the expression of natural persons and citizens in politics. Corporations are not citizens taking part in democratic self-governance.

Joshua Cohen, who holds the Civic Equality conception of democracy, regards the *Citizens United* decision as a threat to democracy. According to Cohen, the participation of citizens in deliberative discussion and debate about political issues is essential to a well-working democracy. I agree with Cohen about this. Therefore, I see a need to develop List and Pettit's general accounts of corporate rights.

List and Pettit regard corporations as persons in the performative sense, and their normative individualism grounds their view that corporations ought to have a lesser range of rights. Their stance is compatible with the idea that pragmatic concerns about maintaining a well-functioning democracy should be taken into

account when considering whether to limit the range of legal rights granted to corporations.

Why List and Pettit's view needs supplementing:

There are several reasons why List and Pettit's view needs to be supplemented. The first reason is due to a concern about the extent to which corporations deserve a lesser range of rights. The second is to discourage a notion that all such persons that are not citizens should be given equal speech-rights, even if they deserve a lesser range of rights in other areas.

First, we need to understand the specifics of what types of rights of corporations can be justifiably limited. Investigating the extent corporations have speech-rights pertaining to candidate advocacy in a democratic election process has become more imperative, given the United States election atmosphere. Due to the escalating costs of finance and a growing need to draw boundaries of what rights, specifically, ought to be afforded to corporations and group agents, we need to understand to what extent corporations deserve a lesser range of rights. I go beyond List and Pettit by specifying that corporations should have more limited speech-rights than natural persons.

Secondly, I deny that all performative persons should be given equal speech-rights pertaining to democratic election processes. Affording group agents the title of "persons", even strictly in the performative sense, may lead people to assume that they should have the same speech-rights and moral status as natural individual

persons. To say that corporations do not deserve equality in standing with natural persons or citizens leaves open questions about the extent to which corporations should be allowed to influence a democratic election process.

SECTION III. THE QUALITY OF DEMOCRATIC DEBATE

If corporations degrade the quality of public debate, then their speech rights should be limited relative to the speech rights of natural persons. After expanding on the discussion by Justice Stevens (a dissenting judge for *Citizens United*) of listeners' interests and speakers' interests, I will rely on Joshua Cohen's Civic Equality conception of democracy in order to support my view that corporations, which are not citizens participating in self-governance, participate in political debate on merely instrumental terms, which reduces the quality of political debate among citizens. First, I will begin by distinguishing listeners' interests and speakers' interests.

Listeners' Interests and Speakers' Interests in Public Debate:

“There are, to be sure, serious concerns with any effort to balance the First Amendment rights of speakers against the First Amendment rights of listeners” (p. 171 *Citizens United*; p. 84 Stevens' Dissent). There are many times when the rights of speakers come into conflict with the rights of listeners. In the classic example of the crowded theater, it is against the law to yell “fire!” when no fire is present because of the needless panic it will incite. In the theater situation, the right of the listener not to have needless panic forced upon them overrides the right of the speaker to free expression. Former Justice Stevens' dissent in *Citizens United v. Federal Elections Commission* (2010) describes a similar conflict between listener and speaker in relation to the citizens' interest in becoming a well-informed citizen.

Speaker-Based Arguments:

Speaker-based arguments justify speech-rights on the basis of speakers' interests in expression. For natural persons, biological harm caused by limiting their freedom of expression can be physical (caused by stress), psychological, and emotional. By "biological", I mean the commonsense notion relating to living organisms. However, no biological harm is caused when we limit a corporation's ability to spend funds on candidate advocacy prior to an election. Former Justice Stevens points out that limiting corporate candidate advocacy impinges upon no one's dignity or political equality. "Take away the ability to use general treasury funds for some of those ads, and no one's... dignity, or political equality has been impinged upon in the least" (United, p. 164; Stevens, p. 77). Corporate speech-rights are not best justified through a speaker-based argument. Recognizing the importance of natural persons' interest in expression would require trying to prevent their voices from being marginalized. However, the majority opinion of the Court in *Citizen United* seems to focus solely on listeners' interests, to the exclusion natural persons' interests in expression.

Listener-Based Arguments:

In *Citizens United*, which repealed sections 201 and 203 of the Bipartisan Campaign Reform Act (which prohibited corporations from spending from their general treasury funds on "electioneering communications" or broadcast ads for or against election of a candidate within 60 days of a general election and 30 days before

a primary election), the majority opinion of the Court relied on a listeners'-interest-based argument to justify permitting corporations to spend from their general treasury funds on candidate advocacy. Instead of focusing on a weak speakers'-interest-based argument that corporations qua speakers deserve speech-rights, the Court focused on a supposed advantage that the electorate, qua listeners, would gain in being introduced to new knowledge, information, and opinions.

In *Austin v. Michigan Chamber of Commerce* (1990), the Supreme Court recognized the weakness of a speakers'-interest-based argument for corporate speech-rights. *Austin v. Michigan Chamber of Commerce* justified the restriction of "corporate speech", i.e., using corporation's treasury general-funds to support or oppose candidates in elections. Justice Stevens, in his dissenting opinion about the *Citizens United* case, wrote, "Recognizing the weakness of a speaker-based critique of *Austin*, the Court places primary emphasis not on the corporation's right to electioneer, but rather on the listener's interest in hearing what every possible speaker may have to say" (p. 166, *Citizens United*; p. 79, Stevens' Dissent). Stevens pointed out that the Court's central argument is that laws such as §203 of the BCRA have "deprived [the electorate] of information, knowledge and opinion vital to its function," and that this, in turn, "interferes with the 'open marketplace' of ideas protected by the First Amendment" (p. 166, *Citizens United*; p. 79, Stevens' Dissent). This raises the question of what kinds of information, knowledge, and opinion, and how much, are vital to the electorate's proper functioning. Certainly, citizens' opinions and information about the public's interests are necessary for the electorate

to be well informed. However, corporate advocacy of candidates may neither express the opinions of natural persons nor provide information about the public's interest.

Former Justice Stevens notes this possibility when describing possible negative effects of granting corporations the same free-speech protections as natural persons. He states, "When corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears 'little or no correlation' to the ideas of natural persons or to any broader notion of the public good.... The opinions of real people may be marginalized." (*Citizens United*, p. 167; Stevens' Dissent, p. 80). Since there is only a limited number of broadcasting opportunities available, the electorate may not get to hear natural persons' views. Thus, some views of natural persons may be marginalized. Avoiding marginalization of natural persons' ideas does not necessarily require complete elimination of corporate influence from the election process. However, in order to determine whether corporate spending on candidate advocacy is a good idea or not, we must consider the ways in which it can affect the listeners and thus can affect the citizens' ability to govern themselves well. The assumption that all speech is vital for the electorate to be well-informed as decision makers participating in self-governance may be reasonable only in an unrealistic situation, where participants have infinite free time to deliberate. In fact what citizens need is to be informed about the public's interests and the views of other citizens.

A Realistic Approach to Listeners' Interests:

The premise of the majority opinion in *Citizens United* is that promoting a well-informed electorate requires that speech should be unregulated. Here I argue that the majority's premise may be true only if citizens have infinite free time to deliberate. "If individuals in our society had infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere; and if broadcast advertisements had no special ability to influence elections apart from the merits of their arguments... then I [Stevens] suppose the majority's premise would be sound. In the real world... corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process" (p. 170 *Citizens United*, p. 83 Stevens' Dissent). Because citizens' willingness and capacity to participate in the democratic process are vital to a well-functioning democracy, Stevens is justified in taking a pragmatic approach and looking at the consequences of deregulation of corporations' electioneering expenditures in the "real world", in particular, how listeners and speakers are affected.

Since the majority opinion in *Citizens United* focuses its justification of corporate speech-rights on how the listeners are affected, it is necessary to consider carefully how the listeners are affected. Extending to corporations the same free-speech rights as citizens can adversely affect public debate by giving the public a

perception that corporate speech should be given especially important weight in the political election process, or weight at least as important as their own participation.

Moreover, the public could perceive their government as being non-responsive to their needs simply because they do not have the same influential economic power that corporations wield.

“Corporate ‘domination’ of electioneering... can generate the impression that corporations dominate our democracy. When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy. A Government captured by corporate interests, they may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment: an increased perception that large spenders ‘call the tune’ and a reduced ‘willingness of voters to take part in democratic governance’” (p. 168 *Citizens United*; p. 81 *Stevens’ Dissent*).

A government that wishes to be democratic must be responsive to its citizens’ interests. A well-running democratic government would attempt to prevent its citizenry from becoming cynical about their ability to influence elections and govern themselves.

Corporations are different from natural persons in many ways that warrant differing treatments. Some of those important differences include a corporate form, corporate interests, and the way in which corporations participate in debate. These

differences justify limiting rights of corporations to participate in democratic debate, as I will now explain.

Corporations Participate in Debate on Instrumental Terms:

Corporations are different from natural persons in their structure. Corporations have a greater ability to accumulate wealth, beyond the capacities of an individual, due to the following properties:

- (1) a perpetual life span
- (2) resource-pooling abilities
- (3) special tax rates and tax breaks (Tucker, p. 523).

Besides the fact that their legal structure raises concerns about participation in a democratic election process, corporations can participate in debate only on instrumental terms. By instrumental, I mean using political speech as a tool. For example, money has instrumental value insofar as its worth is determined by its purchasing power and its ability to cause things. Commercial corporations participate in public debate (e.g., about whom to elect for public office) with one primary aim: making profits.

“[T]he [commercial] corporation must engage the electoral process with the aim to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities... [It] should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain” (p. 167 *Citizens United*, p. 80 Stevens’ Dissent). A

corporation's being required to uphold, unwavering, a stance that is not modifiable according to the merits of arguments will not help public discourse. But a corporation's obligation to make money for shareholders forces them to focus on maximizing wealth. According to Milton Friedman's view of corporate responsibility, a business has only the responsibility to increase profits. "There is one and only one social responsibility of business--to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud" (Friedman, p. 6). According to this analysis, corporations are strategically motivated when participating in debate.

Of course, commercial corporations are only one kind of corporation, and certainly there are non-profit corporations, non-member corporations, and special interest groups that are bound to promote one stance, but I will be specifically addressing only commercial corporations. The single interest mentioned above is shareholder primacy (to maximize wealth for shareholders). Corporations can participate in debate only in a way that promotes this corporate interest. They cannot change their stance on issues nor can they refine their stances in the way natural persons can.

Joshua Cohen is an influential political scientist and philosopher of law who highlights differences between corporations and natural persons. He argues correctly that corporations are not and cannot be citizens participating in democratic self-governance deliberatively. In so arguing, he elaborates on listeners' interests and

speakers' interests. His points reinforce my argument that corporations participate in debate on merely instrumental terms.

Cohen on Listeners' Interests and Speakers' Interests:

Cohen points out that organizations are not deliberators. "... [O]rganizations do not have interests in expressing a view on the merits of the issue: they are not deliberators, but 'engage the [political] process in instrumental terms,' and, for companies, that is a matter of fiduciary responsibility" (Cohen, p. 18). Before describing Cohen's distinction between two conceptions of democracy and highlighting different roles citizens can play in self-governance, I will discuss an argument that claims that by not allowing corporations to influence voters we somehow deny that voters have the ultimate influence over the election outcome.

Justice Kennedy, in writing the majority opinion in *Citizens United*, boldly stated, "The appearance of influence or access... will not cause the electorate to lose faith in our democracy" (*Citizens United* p. 51; opinion of the court; pg. 44). Joshua Cohen states that Justice Kennedy's line of reasoning is a non-sequitur (the conclusion does not follow from the premises). The line of reasoning goes like this: "... [T]he fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters *presupposes that the people have the ultimate influence over elected officials*. This is ... **inconsistent** with any suggestion that the electorate will refuse 'to take part in democratic governance' because of additional political speech made by a corporation or any other speaker." Cohen goes on to point out the non-

sequitur in that “what this [argument] does [is] transform a straightforwardly empirical claim—a contestable empirical hypothesis about voter responsiveness to certain appearances, on which judges have no particular insight—into a conceptual truth—on which judges are, at any rate, as good as the rest of us” (Cohen, p. 6).

Logically, there is no inconsistency between a situation where voters hold the ultimate influence through a vote and their being so discouraged or ill informed about the public’s interests that they do not use that power.

Unbiased information is distinct from opinionated advocacy. The informed exercise of political power by citizens requires that they obtain factual, non-biased information as well as that they become informed about the public’s interests. The listening citizens have interests in hearing information and natural persons opinions about the public’s interest, not corporate advocacy. The listeners’ interest relates to the roles citizens, qua listener, play in the democratic election process. Citizens may be thought to have different roles in self-governance, depending on what conception of democracy one holds. Cohen describes two conceptions of democracy. In discussing them I will indicate what roles of citizens each conception regards as essential.

Cohen’s Account of Two Competing Views of Democracy:

“One—I will call it Civic Equality—makes *Citizens United* deeply troubling for popular self-government. The other—I will call it Limited Government Minimalism—suggests that it [*Citizens United*] was required for popular self-government” (Cohen, p. 9).

The Limited Government Minimalist conception of democracy emphasizes the vote as the primary and ultimate influence voters wield in elections, and puts less emphasis on the role public debate plays in shaping public interests. The Civic Equality view emphasizes principles of equality supporting citizens having equal opportunity to be able to influence the way in which they are governed.

Limited Government Minimalism is composed of four main elements.

Limited Government Minimalism:

1. Political Realism: Political Realism accepts that competition to control power is a fact of political life. In active democracy, there is a peaceful competition of votes among members of the voting populace.
2. Controlling State Power: The purpose of elections is not welfare (protecting those least well-off in society), but controlling state power through the discipline of elections.
3. Mistrust of political power: Uncontrolled governmental power is dangerous, because it can limit speech and is dangerous for democracy.
4. Unregulated Political Speech: Informed judgment is essential for voters. The free flow of speech is so vital for voters that the regulators of speech cannot be trusted (Cohen, 52:00).

In the Limited Government Minimalist conception of democracy, political speech is viewed as a source of information for voters, rather than a way self-governing people argue about issues in a democracy. The Limited Government Minimalist focuses on unregulated political speech as being the best for democracy, because informed judgment is essential for a well-working democracy. The regulators

(the government) cannot be trusted and the foundation of the First Amendment, as described by Kennedy in the Opinion of the Court for *Citizens United*, is “based on a mistrust of governmental power” (*Citizens United*, p. 31; Opinion of the Court, p. 24). So, when confronted with questions regarding whether political speech ought to be censored, limited, or regulated, the Limited Government Minimalist will always side with deregulation.

The Civic Equality Conception of democracy does allow for government regulation, so long as the aim is consistent with principles of political equality, which require citizens to be able to engage in the political process as equals.

For the Civic Equality conception of Democracy, political speech has a collective and deliberative aspect. Citizens are assumed to normally have conceptions of justice and the common good. Citizens are regarded as free and politically autonomous, and as engaging in the political process as equals. Ultimate authority lies in the citizens acting together; it is rooted in civic equality (Cohen, 32:00).

Debate, under the Civic Equality view, has a deliberative aspect and is not just a means to find out who should win out with power. Corporations, because of their fiduciary obligations, are unable to engage in the same kinds of deliberative processes as citizens. The Civic Equality conception of democracy relies on the Principle of Political Equality (PPE).

Principle of Political equality (PPE):

1. Equal rights of participation: There is equal right to participation and political expression among members of the self-governing populace.

2. Equal weighted Votes: People act in an open community and the activity of debating has a collective and deliberative aspect. Their vote counts the same.
3. Equal Opportunity to Political Influence: Ultimate authority lies in the people, who engage in public discussion. Everyone shares equal opportunity for fair influence (meaning that no one's views are marginalized because of a failure to be economically successful) (Cohen, 32:00).

“Civic Equality prizes free deliberation among equals—citizens bringing their views of justice and the common good, as well as their interests, to bear through public discussion on law and policy” (Cohen, p. 18). When Cohen describes citizens as deliberating among equals, he is not saying that every person's ideas should be taken with equal acceptance. Instead, he is focusing on citizens having an equal opportunity to fairly influence democratic elections. Views or judgments should prevail due to the merits of the ideas.

The Civic Equality view trusts citizens to be responsible for their own judgments. “Civic Equality is anti-paternalist: individuals are responsible for finding signals in the ambient political noise, and for judging how far they wish to go in taking on the role of participant and speaker” (Cohen, p. 15). Citizens can engage as participants and speakers in other forms than monetary donation. Corporations cannot adopt the same roles as natural persons in being active participants and are in a different membership category compared to natural persons.

Membership in the Self-Governing People:

According to the Civic Equality view of democracy, corporations do not deserve the same speech rights and respect as natural persons because they are not in the category of members. “Corporations and unions are not members of the people, the supreme authority. So there is no subversion of the relationship of sovereign and subject that we have when the speech of a citizen is restricted” (Cohen, p. 18-19). When citizens are restricted from participating in self-governance, harm happens. The Majority Opinion in *Citizens United* should have considered practicalities in suggesting whether or not pure unregulated speech is actually to the benefit of citizens in becoming well-informed self-governing participants. “It would be perfectly understandable if our colleagues feared that a campaign finance regulation such as §203 may be counterproductive or self-interested, and therefore attended carefully to the choices the Legislature has made. But the majority does not bother to consider such practical matters, or even to consult a record; it simply stipulates that “enlightened self-government” can arise only in the absence of regulation” (p. 172 *United*; p. 85 Stevens’ Dissent).

Overall, whether or not corporate influence in the election process using methods such as candidate advocacy through broadcast ads, can harm listeners is dependent on empirical facts. However, arguments that rely on the listeners’ interest for securing corporate speech-rights need to consider possible adverse effects of corporate influence (through candidate advocacy) on public debate and elections. Specific considerations include the importance of the citizenry is being well-informed about the public’s interests. Another consideration is the importance of citizens being

confident, assured that their influence in public discourse and election is significant and that their government is responsive to their needs. A government that serves corporate interests over natural persons' interests is non-responsive to citizens.

One metaphor for public debate is the marketplace of ideas. I will argue that it is insufficient for fully capturing the roles citizens play when participating in self-governance in a healthy democracy. A better metaphor is that of a town-hall meeting.

SECTION IV. TWO METAPHORS: MARKETPLACE VS. TOWN-HALL MEETING

The Metaphor of the Marketplace

The “marketplace of political ideas” is a metaphor that conveys how the best ideas become adopted through public discourse. In the metaphor, everyone meets at a marketplace and voices their political opinions, and those stances that hold merit are deemed “good” ideas - becoming accepted, adopted, and supported by the public at large. The participation of persons consists of choosing between the various views presented. One surveys the “wares” up for purchase, and one chooses which to buy and which to pass up. This process is supposed to represent how democratic debate works.

In the United States’ general election, presidential candidates compete for votes (electoral votes), and the winner will supposedly reflect the views, ideas, and motivations of Americans or at least reflect public opinion better than other competing candidates.

A concern about distortion of public debate was recognized in the Supreme Court case of *Austin v. Michigan Chamber of Commerce* (1990). Corporate participation in campaign advocacy is included as a political expenditure. “Whatever *Austin* stood for, it clearly maintained that the effects of corporate political expenditures are ‘corrosive and distorting’... The funds amassed by such institutions are ‘a function of [their] success in the economic marketplace’ and do not reflect the

actual popularity of the ideas espoused” (Gedge, p. 1206). Some will want to object and say that rich persons are just as capable of supporting policies that do not reflect public opinion, so to pick out corporations as especially needing campaign finance limitations is unwarranted. An illustration of this view is provided by the event of Jack Davis running for election in 2004. Jack Davis ran for New York’s 26th congressional district in 2004. Davis spent money gained from the “economic marketplace” to participate in politics. Some view monetary inequality as the only concern in ensuring fairness in the “political marketplace”. “... Davis spent a total of \$3.4 million in his 2004 and 2006 campaigns, primarily of his own funds. The concerns raised by immense aggregations of corporate wealth in *Austin* are similarly applicable to the immense aggregations of individual wealth, such as Davis’ situation. In other words, Jack Davis's personal funds are just as much ‘a function of [his] success in the economic marketplace’ [as a corporation's treasury]” (Gedge, p. 1206-1207).

Corporations do not belong to the population that is participating in self-governance. I focus my argument on corporations, because I am responding to List and Pettit’s account of group agents. It is much harder to make the argument that a member of the population, as opposed to an entity outside of the population’s membership, will not reflect concerns of members of that population. I leave the question of undue personal influence aside.

Problems with a Market being a Metaphor for the Democratic Election Process:

One problem with construing citizens' participation in an election through a metaphor of a 'marketplace' is that it promotes an unstructured and limited vision of what power citizens bring to the election process. Corporations can influence the debate and in that sense participate in the debate; however, they are not members of the citizenry. The imagery of a marketplace may lead to a consumerist view of democratic participation.

Traditionally, a marketplace is an open space where markets are held. In a market, consumers navigate through various booths and shops and decide to spend money on what looks the most appealing. The power and influence that consumers wield is through their purchasing power. Former Justice Stevens notes that this idea, although not being used literally, nonetheless may be an inappropriate metaphor. "[W]hen we move from the realm of economics to the realm of corporate electioneering, there may be no reason to think the market ordering is intrinsically good at all..." (p. 172, *Citizens United*; p. 85, Stevens' Dissent).

The imagery of markets may lead to an overly simplistic depiction of the process of democratic debate. When citizens debate political issues, they are focused and engaged together in political discourse. A marketplace metaphor may not fully depict the role citizens play in shaping each other's views. "Austin's 'concern about corporate domination of the political process'... reflects more than a concern to protect governmental interests outside of the First Amendment. It also reflects a concern to facilitate First Amendment values by preserving some breathing room

around the electoral “marketplace” of ideas, ... the marketplace in which the actual people of this Nation determine how they will govern themselves” (p. 170-171 United; p. 83-84 Stevens’ Dissent). The “breathing room” mentioned above reflects that the electorate should not be drowned out by a flooding of corporate power in the political process. By construing participation in self-governance as merely choosing between options presented, the scope of citizens’ impact in politics is misrepresented as more limited. We do not simply buy the best idea; we also have essential input into what that idea becomes. A better metaphor for public debate is a town-hall meeting.

The Town-Hall Meeting Metaphor

The Town Hall meeting metaphor imagines an idealized situation. In my town-hall meeting metaphor, everyone is able to voice his or her individual opinion when coming to a decision on (in the case of an election) which candidate we should choose, as a group, to elect. In typical town-hall meetings, issues that arise in the community are discussed and deliberated upon. I apply the metaphor to a democratic election and imagine the populace in the town-hall meeting as coming to a consensus on who is to be elected for public office. When coming to a consensus, citizens listen to each other and engage in debate among themselves. The consensus is reached after arguments and counter-arguments have been openly discussed. The metaphor of a town-hall meeting for the democratic election process recognizes the speakers’ engagement in deliberation. To restrict a citizen’s ability to voice their stance would be to cause harm. Careful deliberation on political issues is an organic process where

citizens are actively engaged in self-governance. Contrastingly, advocating for a candidate or policy may be merely to show support for it.

Candidate advocacy is the supporting of a specific candidate. The role advocacy for a candidate by a corporation would play in our town-hall metaphor would be as disembodied communications stating, “Elect this guy”. According to group realists, new stances and positions emerge from complexly structured entities, therefore corporations have a distinct “voice” separate from the individuals comprising the group. Corporations have a “stance” that may or may not reflect the ideology of individual members. However, even if we grant that corporations have a distinct “voice”, they are not members of the populace participating in self-government. Therefore, they do not participate in my idealized town hall meeting. Even many who support the *Citizens United* ruling do not advocate that corporations be granted voting rights. Because corporations are not citizens, their advocacy would be equivalent to posters being hung up on the wall of the town-hall advocating a position or candidate, or television screens periodically showing political ads with very loud-volume sound.

If unlimited corporate advocacy were allowed, citizens might become easily distracted from deliberation with other citizens or have their discussion points already directed by what each of them had just heard through the bullhorn of unrestricted corporate candidate advocacy. I do not intend to say that corporations cannot serve any role in the democratic election process, but that role should thoughtfully limit candidate advocacy during a period just prior to an election. Corporations own news stations that present new, relevant, information. Unbiased news reporting is especially

important for having a well-informed public. Corporations can also sponsor debates, which help give individuals (who are in the populace of our town-hall metaphor) chances to publicly debate their opinions with one another. However, unlimited corporate candidate advocacy can be destructive to achieving the aims of a well-functioning democratic election process where the participation of citizens is valued and not reduced to simply voting. Instead, the town-hall metaphor recognizes something that the marketplace metaphor loses, namely that citizens' engagement in focused political discourse and self-governance are both important aspects of a well-functioning election process. The best town-hall meetings, I will argue, limit corporate influences that would distort and distract the deliberation among citizens.

An Argument against Deregulation:

Some will construe the best town-hall as merely a deregulated event, but to do so would ignore the possibility that a market can become so flooded with wealthy participation that those who cannot buy their way into the spotlight may have their views marginalized. List and Pettit recognize that financial restrictions ought to be taken into account with their imbalances-of-power concern, so they would reject the idea that the best town-hall meeting is a completely unregulated event. However, we need to see why a completely unregulated approach fails before presenting an alternative conception of the “best” town hall meeting.

Problems with the “best town-hall meeting” construed as an unregulated event:

One argument made in favor of deregulation is that it places the appropriate amount of trust in the American voter to distinguish the “good” ideas from the “bad” ideas. “The First Amendment marketplace-of-ideas concept is crucial to a functioning democracy. Deregulation places the appropriate level of trust in the American public and allows freedom of expression to mend the political sphere” (Formanek, 1751). *McConnel v. Federal Elections Commission* (2003) upheld the constitutionality of the BCRA (Bipartisan Campaign Reform Act). Justice Scalia’s dissent in *McConnell* also emphasizes the idea that regulation leads to mistrust of the American people:

“The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. If that premise is wrong, our democracy has a much greater problem to overcome than merely the influence of amassed wealth. Given the premises of democracy, there is no such thing as *too much* speech” (*McConnell v. FEC*, 540 U.S. 93, 258–59 (2003) (Scalia, J., concurring in part and dissenting in part)).

This denial that there can be *too much* speech implies not only that political speech is a core concern in the First Amendment, but also that it deserves unlimited protection, perhaps even in the face of becoming a danger to democratic integrity.

Those who believe that the town-hall meeting should be unregulated assume that the citizens always have equality due to their being able to cast a single vote and

that is the only participation that matters. However, this is an overly simple view of citizens' participation in a democratic society. Equal opportunity does not mean merely being able to vote; it also means being able to have access to make much more of a difference in self-governance. In an ideal democratic society, money would not be a major factor in whether or not ideas become accepted or candidates become elected.

Some wrongly go so far as to conflate limitations in spending with an outright ban on political speech. "Political speech lies at 'the core' of the First Amendment; therefore contributions, expenditures, and corporate advertisements deserve unlimited protection if society considers them forms of political speech... While there are, of course, ways to communicate speech without spending money, the most effective means of disseminating speech often are expensive.... [T]he right to public political speech would be hollow if institutions were able to limit such spending" (Formanek, 1752).

The conclusion that the right to political speech would be hollow if institutions were able to limit advocacy spending is a confused conclusion that does not recognize that some limitations may be necessary to have an informed public and a "best town-hall". A public vote on candidates running for public office is legitimate only if they understand, in a non-biased fashion, information about who supports what.

Rather than construing limitations of corporate spending on candidate advocacy as being at odds with the core values of the First Amendment, those concerned with political equality and the best role for public discourse can view the

First Amendment as aiming to enable the public to engage in debate. By allowing some regulation of campaign finance, the hope would be to ensure that ideas and candidates that otherwise would fail to be represented in an election have an adequate chance of being heard.

Some assume that all political equality theorists support an extreme position that any use of money in politics is corrupt.

“[T]o political-equality theorists, money in politics is exactly the problem. Those who frame the political-advertising debate as solely an issue of political equality argue that failure to regulate campaign finance and issue advertising subverts the integrity of our political system by allowing money to influence— perhaps even corrupt—the democratic-election process.” (Formanek, 1752).

But money in politics is not necessarily the problem; the problem is financial imbalances that limit citizens’ ability to participate in a political system that is founded on, and thrives on, of voter participation. If there are financial imbalances that affect citizens’ ability to participate, then we should at least look at some form of financial regulation. Those who view their participation in self-governance as a mere vote may become discouraged and cynical about their ability to participate in self-governance. Those who are opposed to having campaign finance regulations support an overly simplistic view of political participation. “Since each American ultimately has one vote, whether rich or poor, each American effectively has an equal opportunity to participate in the political process” (Formanek, 1753-1754). However, due to large financial imbalances, in the United States Americans are not equally in being able to participate in the political process, understood as including more

avenues of participation than voting. Citizens can hold rallies, write and publish, participate in public meetings, and impact politics in other ways than just through the ballot.

However, with deregulation of candidate advocacy in elections, those citizens who cannot afford to compete will be flooded and drowned out by opinions that are backed by the power of concentrated wealth and not necessarily backed by the power of their political worth.

Those who argue that complete deregulation of candidate advocacy is the only option for both preserving democratic integrity and trusting the American public are mistaken and oversimplify the role citizens play in participating in a democratic system. As mentioned before, citizens can actively shape their political system through debate. In order to preserve democratic integrity, considerations about how deregulation of candidate advocacy affects the quality of debate, and practicalities surrounding the best way to run the election process, should be taken into account when granting speech-rights.

I have discussed the metaphor of the best town-hall meeting and presented both sides of the debate for and against candidate advocacy regulation. I conclude that those who support complete deregulation and claim to “trust” the American public both are misconstruing the idea of a well-functioning democracy and have an overly simplistic view of citizens’ participation in the political process. Corporations that have amassed money in the “economic marketplace” can flood (in terms of volume of speech) the public discourse. Maintaining a healthy politics requires both public participation and citizens’ confidence in their ability to govern themselves, which are

hindered or even destroyed by cynicism. Unlimited corporate advocacy of election candidates goes against the best interests of individual persons.

I will now consider objections to this conclusion.

SECTION V. OBJECTION AND CONCERNS

I argue that corporations do not deserve the same free speech rights as natural persons, as becomes evident when we consider that allowing unlimited corporate candidate advocacy raises concerns about loss in quality of democratic debate during the election process and failure to serve individual citizens' interests, one of which is to promote a good political debating context. In the best kind of public debate, citizens are actively engaged, they feel they can influence their government, and they have an equal opportunity to influence it. I will consider and rebut three objections against this stance.

One objection is that corporate influence in the election process may not pose a significant danger to democracy, because the public is not so gullible as to accept ideas that are presented to them if they conflict with the public's interest. Citizens have the vote and are the ultimate deciders in elections. We should trust them to sift through all ideas, including those that may not serve the public's interest, and select which ones are worth accepting. It is not necessary to impose regulations on corporate speech.

A second objection is that corporate interests may coincide with the interests of citizens: corporations' input may help citizens to judge what would serve the public good, and advancing corporate interests may advance citizens' interests.

A third objection is that corporations have distinct interests and voices. If corporations' ability to influence which candidates are elected is limited, then they will be unable to advance their interests.

I will go through each of these objections and provide a response.

A. The public is not gullible

This is the argument made in the previous section: “Problems with the ‘best town-hall meeting’ construed as an unregulated event”. One argument made in favor of deregulation of all speech is that it places the appropriate amount of trust in voters to distinguish the “good” ideas from the “bad” ideas. To remind you of Justice Scalia’s position:

“The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. If that premise is wrong, our democracy has a much greater problem to overcome than merely the influence of amassed wealth. Given the premises of democracy, there is no such thing as *too much* speech” (McConnell v. FEC, 540 U.S. 93, 258–59 (2003) (Scalia, J., concurring in part and dissenting in part)).

Justice Scalia rejects the possibility of there being *too much* speech. Not only is political speech a core concern in the First Amendment but also it deserves unlimited protection, perhaps even in the face of becoming a danger to democratic integrity.

Other theorists argue that, since the most effective way of disseminating speech is by means of money, any form of limitation of spending would automatically

undermine the right of free political speech. “The right to public political speech would be hollow if institutions were able to limit such spending.” (Formanek, 1752).

Response to the claim that the public is not gullible:

I agree that we should trust a well-informed public’s vote. However, we can only trust the public’s vote only if they are informed about individuals’ interests and the various political parties. The Civic Equality view trusts citizens to be responsible for their own judgments. However, when corporate advocacy can have a detrimental effect on fostering an electorate who are well informed about the public’s interest and are confident in their ability to influence their government, we may still have a reason for granting the corporations different corporate speech-rights from those afforded to citizens through the First Amendment.

Instead of construing limitations of corporate spending on elections as being at odds with the core value of the First Amendment, those who support the “best town-hall” concept view the First Amendment as wishing the public to engage in debate. By allowing regulation (to what extent, I will leave as a question for empirical investigation by political scientists) of corporate advocacy and corporate influence, the hope is to ensure that ideas that would otherwise fail to be represented have an adequate chance of being heard.

Again, *too much* speech would be impossible if we had an ideal situation where time limitations and other practicalities need not be taken into consideration. Those who regard citizen participation in democracy as consisting merely of voting

have an overly simplistic view and need to adopt a more realistic conception of well-functioning political discourse.

B. Individuals' identities as members of a corporation

If a manager of a corporation has an interest in his or her corporation's being able to advance its interests, then to contend that corporate candidate advocacy should be restricted would be to favor restricting the manager's interest as well as the corporation's candidate advocacy.

Response to individual's identities as members of a corporation:

One could ask whether managers, who are acting under the constraints of a role and a legal responsibility to benefit their corporation, would hold the same opinion outside of their role as managers.

Ronald Dworkin notes that the interests that corporations are required to promote may differ from the public's interest. "It [a corporation] purports to offer opinions about the public interest, but in fact managers are legally required to spend corporate funds only to promote their corporation's own financial interests, which may very well be different" (Dworkin, p. 8). Because of corporations' fiduciary obligations, their interests may be completely different from those of the general public. Moreover, even if a corporation's interest were the same as the interests of its

individual members, under the Civic Equality view of democracy, regulating corporations' political speech still would not pose a problem because the individual members who make up the corporation could still actively pursue their interests, because of the principle of political equality. To use a corporation to advance an individual's interest would seemingly be to give unequal weight to that individual's interest. The economic power of the advocacy may not reflect the merits of the idea advocated.

There will be some situations where an individual working as a member of a corporation must advocate ideas and advance interests that they would not otherwise have supported, due to their role and duties within the corporation. There will also be other situations where the corporation's interest may be aligned with that individual's interest. However, neither of these cases poses a problem for limiting corporate speech-rights. As regards the first case, the corporate interest being advanced is alien to the interests of the individual working for a corporation, which is not the kind of interests a well-informed public needs to be participators in self-governance. As regards the second case, while it may be true that corporations' interests can coincide with individuals' interests, to give corporations (who are not members of the sovereign, self-governing population of citizens) the same speech-rights as citizens would be to give unequal (i.e. greater) power to a subgroup and to promote their economic interests. This would violate Civic Equality's principle of political equality. When individuals engage as equals, they do not use the corporate legal structure to gain an advantage in debate.

C. Corporations with distinct interests and “voices”

Because corporations can have distinct voices, i.e., can have interests separate from their members, to restrict their candidate advocacy and election influence prevents them from advancing their interests in any way.

Response to corporations with distinct interests and “voices”:

Restricting corporations’ candidate advocacy is not the same as prohibiting it. According to my account, a complete ban of corporate candidate advocacy may not be necessary, depending on the empirical facts about the quality of debate, the dangers posed to democracy, and voters’ perception of their ability to govern themselves. If there were a \$100,000 limit imposed, democratic integrity were intact, and the public’s perception were that corporate influence does not hinder their self-governance, then it would not be necessary to impose a complete ban on corporate candidate advocacy.

To move on from the point that limiting may not amount to an absolute ban, if corporations were limited in their ability to advocate for election candidates or exercise political influence, this would not entail that their interests could not be promoted. If the ideas that advanced a corporation’s flourishing were in the public’s best interest, then the public could still, without the corporation’s influence, come to that conclusion.

Also, corporations have other ways of influencing policies besides candidate advocacy, and they have other ways to promote their interests besides gaining special access and using quid pro quo tactics with policy makers. One way would be to persuade individuals, perhaps customers, genuinely to see a need for the corporation's interest to be advanced. We see examples of this when people prefer small, local, or family companies and pull together as a community to prevent a particular company from going out of business or going bankrupt. Another way might be to genuinely impress customers and lawmakers with the merit of a particular view. This can be done without candidate advocacy, when there is to be a vote on a policy question, not a person running for office.

SECTION VI. CONCLUSION

As we have now seen, practical considerations should be taken into account when justifying speech-rights. In order to protect the listeners' and speakers' (citizens') interests, some form of speech-regulation (not necessarily a ban) may be needed. As in the crowded theater example, there is reason to restrict some forms of expression, such as shouting "fire!" when no fire is present. In order to maintain a healthy democratic society, informed political discussion between citizens is necessary. If listeners' interests purportedly justify corporate candidate advocacy, then we should pay attention to how corporate candidate advocacy actually affects citizens. It is justifiable to limit the distorting effects of disproportionate wealth by limiting corporate candidate advocacy that may not coincide with the public's interest. The case for such restriction views political debate through the lens of the town-hall meeting metaphor rather than the marketplace of ideas metaphor. With these considerations in mind, I argue that List and Pettit's view that group agents (including corporations) deserve a lesser range of rights than do natural human persons should be supplemented with the view that corporations deserve speech-rights more limited than those of natural persons and citizens.

List and Pettit do not explicitly comment on how normative individualism informs their conception of corporate speech-rights. However, normative individualism can be interpreted as being consistent with the view that corporations' candidate advocacy ought to be limited and that, more generally, corporations should have speech-rights different from those of natural persons and citizens. I argue that

not only do corporations and other group agents deserve a lesser range of rights, but also in particular, corporations deserve a lesser range of speech-rights, especially speech rights relevant to influencing democratic election processes.

The extent to which corporations' participation in a democratic election process should be limited is a matter that depends on empirical facts about the quality of debate among citizens, citizens' perception of their own ability to influence their government, and whether or not ideas, perspectives, or interests are being marginalized in ways that violate the principle of political equality. I will leave the task of determining these facts to political scientists. The scope of this discussion has been limited to the analysis of political speech-rights in a democracy, listeners' and speakers' (citizens') interests in the quality of democratic debate, and what is necessary for a well-functioning democracy.

BIBLIOGRAPHY

1. Breyer, Stephen, *Making Our Democracy Work: A Judge's View* (New York: Alfred A. Knopf, 2010).
2. Cohen, Joshua, "Citizens United vs. Democracy?", Chicago University, Dewey Lecture draft, April 9, 2011.
and on video: <http://www.law.uchicago.edu/video/cohen042011>
3. Dunne, Stephen. "Corporate social responsibility and the value of corporate moral pragmatism", *Culture and Organization*. Vol. 14, No. 2, 135–149, June 2008.
4. Dworkin, Ronald, "The Decision That Threatens Democracy", May 13, 2010.
5. Friedman, Milton, "The Social Responsibility of Business is to Increase its Profits", *The New York Times Magazine*, September 13, 1970.
6. Formanek, Kristen M. "There's "No Such Thing as Too Much Speech": How Advertising Deregulation and the Marketplace of Ideas Can Protect Democracy in America" 94 *Iowa Law review* [2009].

7. Gedge, Samuel, "Wholly Foreign to the First Amendment: The Demise of Campaign Finance's Equalizing Rationale in *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008)" *Harvard Journal of Law & Public Policy* [Vol. 32], 1197-1209, June, 2009.

8. Geis, Gilbert, "Special Perspectives: Adversarial Forum Fox on Corporate Personhood, Limited Liability, and Community Control: A Critique" *Behavioral Sciences and the Law*, 16, 265-272 (1998).

9. Griffen, James, *On Human Rights*, Oxford University Press, 2008.

10. Lane, Brain, "The Abuses of Corporate Personhood". *USA Today*, May Issue, p. 24-26., 2004.

11. Lipton, Daniel. "Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the turn of the Twentieth Century". *Virginia Law Review*. Vol. 96:1911, 2011.

12. List, C. and Pettit, P. *Group Agency: The Possibility, Design, and Status of Corporate Agents*, Oxford University Press, 2011.

13. Mackey, John. "Rethinking the Social Responsibility of Business", from *Reason*, October issue, 2005.

14. Marmor, Andrei, "The Nature of Law", *The Stanford Encyclopedia of Philosophy* (Winter 2011 Edition), Edward N. Zalta (ed.).

<http://plato.stanford.edu/archives/win2011/entries/lawphil-nature/>

15. Millon, David, "The Ambiguous Significance of Corporate Personhood"

Washington & Lee Public Law and Legal Theory Research Paper Series.

Working Paper No. 01-6 January 2001.

16. Mintz, Adam S., "Do Corporate Rights Trump Individual Rights? Preserving an Individual Rights Model in a Pluralist Society", *Columbia Journal of Law and Social Problems* Vol. 44, pp. 267-310, 2011.

17. Murphy, C. M., *Philosophy of Law*. Blackwell Publishing Ltd., 2007.

18. O'Neill, Terry A., "Gender and Corporate Personhood: A Feminist Response to David Millon" Volume 2, Issue 1.

19. Rachels, James *The Elements of Moral Philosophy* 6th edition edited by Stuart Rachels (McGraw Hill, 2010).

20. Ripken, Susanna K., "Corporations are People too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle", *Fordham Journal of Corporate & Financial Law*, Vol. 15, p. 97, 2009.
21. Scalia, Antonin, *A Matter of Interpretation: Federal Courts and the Law*, Princeton: Princeton University Press, 1997.
22. Shoemaker, David, *Personal Identity and Ethics: A Brief Introduction*, Broadview Press; 1st edition (October 7, 2008).
23. Silverleib, Alan. CNN (January 28, 2010). "Gloves come off after Obama rips Supreme Court Ruling". CNN. Archived from the original on February 13, 2010. Retrieved February 22, 2010.
http://articles.cnn.com/2010-01-28/politics/alito.obama.sotu_1_supreme-court-court-s-conservative-majority-high-court?_s=PM:POLITICS
24. Supreme Court of the United States, *CITIZENS UNITED v. FEDERAL ELECTION COMMISSION*, pp. 1-83., October Term, 2009.
<http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>

25. Teachout, Zephyr, "The Historical Roots of Citizens United v. FEC: How Anarchists and Academics Accidentally Created Corporate Speech Rights" *Harvard Law & Policy Review*, Vol. 5, pp. 163-187, 2011.
26. Tucker, Anne, "Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United", *Case Western Reserve Law Review*, Vol. 61:2, 2011.
27. Wert, J. Justin; Gaddie, K Ronald; and Bullock, III, S. Charles." OF BENEDICK AND BEATRICE: *CITIZENS UNITED* AND THE REIGN OF THE LAGGARD COURT", *Cornell Journal of Law and Public Policy* [Vol.20: 719, 2011], pp. 719-737.
28. Zuhairah Ariff Abd Ghadas, "Real or artificial? Jurisprudential theories on corporate personality", *US-China Law Review*, Volume 4, No.5 (Serial No.30), May, 2007.



OHIO
UNIVERSITY

Thesis and Dissertation Services