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Citizens United and the Ineluctable Question of Corporate Citizenship

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Citizens United and the Ineluctable Question of Corporate Citizenship

AMY J. SEPINWALL

As a result of the Supreme Court's decision in Citizens United, corporations and individuals now enjoy the same rights to spend money on advertisements supporting or opposing candidates for office. Those concerned about the role of money in politics have much to decry about the decision. But the threat to democracy posed by allowing wealthy corporations to function as political speakers arises under the same regime that allows wealthy individuals to do so. If we are not prepared to limit individuals' expenditures on political speech, we will have to find a way to distinguish individuals' and corporations' free speech rights.

The prevailing strategy—marshaled in Justice Stevens' dissent and taken up by the decision's critics—argues that corporations are not persons; therefore they are not entitled to the constitutional rights that persons enjoy. Yet this strategy is bound to fail because there is no consensus over just what it takes to be a person, let alone whether corporations would qualify.

The effort to find a compelling distinction between the free speech rights of individuals and corporations needs a new foundation, which this Article seeks to provide. To that end, the Article focuses not on personhood, but instead on something far more relevant to the matter at hand—citizenship. In particular, the Article advances a novel account of citizenship, which it calls normative citizenship. Normative citizens are formal citizens who are expected to participate in the joint project of the nation-state. The Article contends that it is only normative citizens who need robust political free speech rights. Because corporations do not count as normative citizens, corporate political speech need not receive the same level of protection as the political speech of normative citizens.

While enhanced clarity on the notion of citizenship cannot itself undo the Citizens United decision, there are important reasons for pursuing this work now. First, a clearer understanding of the constitutional status of the corporation could lend support to the movement for an amendment overturning the Citizens United decision. Second, the account advanced here could serve to undermine assertions of other corporate constitutional rights. Finally, this account can forestall rhetoric about the “good corporate citizen,” which may have unwittingly helped to legitimate a conception of the corporation as a bearer of strong constitutional rights—a conception that is inaccurate and problematic, for the reasons advanced here.

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I. INTRODUCTION

A cartoon in a recent issue of the *New Yorker* depicts a lawyer borrowing a page from *The Merchant of Venice* and arguing for corporate personhood before the Supreme Court: “If you prick a corporation, does it not bleed? If you tickle it, does it not laugh? If you poison it, does it not die?” the lawyer pleads.¹ In the wake of the Court’s decision in *Citizens United v. Federal Election Commission*² granting corporations the same rights as individuals to spend money on advertisements supporting or opposing candidates for office,³ one might well think that at least five

Assistant Professor, Department of Legal Studies and Business Ethics, Wharton, University of Pennsylvania. B.A., McGill University, 1997; M.A., McGill University, 1999; J.D., Yale Law School, 2004; Ph.D., Philosophy, Georgetown University, 2010. This Article grows out of a conference on *Citizens United* co-organized by Zicklin Center for Business Ethics at the Wharton School, the Center for Political Accountability and the UCLA Law School. I am grateful to Bruce Freed, Bill Laufer, Adam Winkler, and Karl Sandstrom, for exchanges that provided the starting point for the Article, and to John Hasnas and Andy Siegel for conversations that helped to improve it. Versions of this Article were presented at the 2011 annual meetings of the Academy of Legal Studies in Business and the Society for Business Ethics, and I thank audience members there for helpful feedback. Julia Ahn provided excellent research assistance. The Zicklin Center for Business Ethics at Wharton generously provided funding for this project. All errors that remain are my own.

¹ David Sipress, *New Yorker Cartoon*, NEW YORKER, Mar. 14, 2011, at 25. Other satirical responses to the *Citizens United* decision include a web posting offering tips on dating corporations, Katie Halper, *How to Date a Corporation: Dating Rules for a Post-Citizens United World*, ALTERNET (Jan. 25, 2010, 10:55pm), <http://blogs.alternet.org/speakeasy/2010/01/25/how-to-date-a-corporation-dating-rules-for-a-post-citizens-united-world/>, and a protest stunt in which a woman held a news conference to announce the start to her search for a corporate spouse, Stephen Bainbridge, *Citizens United and the Constitutional Rights of Corporations*, PROFESSORBAINBRIDGE.COM (Jan. 18, 2011), <http://www.professorbainbridge.com/professorbainbridgecom/2011/01/citizens-united-and-the-constitutional-rights-of-corporations.html>.

² 130 S. Ct. 876 (2010).

³ *Id.* More specifically, *Citizens United* invalidated § 203 of the Bi-Partisan Campaign Reform Act of 2002, which bars corporations and unions from spending money from their general treasuries on “electioneering communication[s],” 2 U.S.C. § 441b (2006); *Citizens United*, 130 S. Ct. at 914–17. An electioneering communication is defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within thirty days of a primary or sixty days of a general election. 2 U.S.C. § 434(f)(3)(A). The Federal Election Commission’s (FEC) regulations further define an electioneering communication as a communication that is “publicly

Justices on the Court could be convinced that the corporation has the same “hands, organs, dimensions, senses, affections [and] passions” of a Shylock, or any of us for that matter.⁴ Yet, notwithstanding the widespread public backlash against a decision largely viewed as improperly recognizing corporate personhood,⁵ the majority opinion in *Citizens United* is remarkable, not least of all for eliding the issue of whether the corporation is or is not like a human being for purposes of the First Amendment.⁶

It is understandable that opponents of the decision should adopt the battle cry that “corporations are not people.”⁷ On the one hand, there is

distributed.” 11 C.F.R. § 100.29(a)(2) (2010). “In the case of a candidate for nomination for President . . . publicly distributed means” that the communication “[c]an be received by 50,000 or more persons in a State where a primary election . . . is being held within 30 days” or a general election is being held within 60 days. *Id.* § 100.29(b)(3)(ii).

Citizens United may well prompt recognition of even broader corporate political rights. A federal district court in Virginia, for example, relied upon the decision to find unconstitutional the ban on corporate campaign contributions. *United States v. Danielczyk*, 788 F. Supp. 2d 472, 493–95 (E.D. Va. 2011). In the wake of *Danielczyk*, then, corporations—at least within the jurisdiction of the Eastern District of Virginia—may, like individuals, engage in both direct (i.e., contributions) and indirect (i.e., independent expenditures) spending on political speech. *Id.* at 494 (“[I]f, in *Citizens United*’s interpretation of *Bellotti*, corporations and human beings are entitled to equal political speech rights, then corporations must also be able to contribute within FECA’s limits.”). *But see* *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 741 F. Supp. 2d 1115, 1133–34 (D. Minn. 2010) (declining to extend *Citizens United* to the ban on corporate campaign contributions).

⁴ WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 3, sc. 1.

⁵ For example, several Vermont state representatives have sponsored a resolution in the wake of *Citizens United* that would have “the General Assembly urge[] Congress to propose an amendment to the United States Constitution for the states’ consideration which provides that corporations are not persons under the laws of the United States or any of its jurisdictional subdivisions” Joint Senate Resolution 11, *JOURNAL OF THE SENATE* (Jan. 21, 2011), *available at* <http://www.leg.state.vt.us/docs/2012/journal/SJ110121.pdf#page=1>; *see also* Jamie Raskin, *Corporations Aren’t People*, NPR (Sept. 10, 2009), <http://www.npr.org/templates/story/story.php?storyId=112714052> (“A corporation is not, nor has it ever been, a constitutional person with voting rights; it is not, no[r] has it ever been, a democratic citizen”); Peter Rothberg, *The Story of “Citizens United” vs. the FEC*, *THE NATION* (Mar. 2, 2011, 5:52 PM), <http://www.thenation.com/blog/158964/story-citizens-united-vs-fec> (“Corporations are not people, they do not vote, and they should not be able to influence election outcomes.”).

⁶ Thus, Justice Stevens, in dissent, glibly remarks that “[t]he fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it.” *Citizens United*, 130 S. Ct at 971 (Stevens, J., dissenting).

⁷ This is the slogan for one of the proposed constitutional amendments seeking to overturn the *Citizens United* decision. *See, e.g.*, DEMOCRACY IS FOR PEOPLE, <http://democracyisforpeople.org/> (last visited Dec. 16, 2011). The notion that corporations are not people is also implied in the subtitle of an animated YouTube video criticizing the decision that has gone viral. Storyofstuffproject, *The Story of Citizens United v. FEC*, YOUTUBE (Feb. 25, 2011), <http://www.youtube.com/watch?v=k5kHACjrdEY> (receiving over 279,742 views in the first eight months). The film’s narrator intones: “Shouldn’t democracy be all about what the people want? I’m a person. You’re a person. Chevron? Not a person.” *Id.* at 1:20–1:26; *cf.* Molly Morgan & Jan Edwards, *Abolish Corporate Personhood*, 59 GUILD PRAC. 209, 214 (2002) (“Slavery is the legal fiction that a person is property. Corporate personhood is the legal fiction that property is a person.”).

much to bemoan about an influx of corporate dollars in the lead up to political elections. Studies demonstrate that, in states where corporations have long enjoyed the right to fund advertisements supporting or opposing candidates for state elections, corporate political expenditures favor Republican and pro-business candidates.⁸ This preference was borne out at the national level in the 2010 election cycle, as spending in support of Republican candidates by the top four independent entities outstripped spending in support of Democratic candidates by more than seven to one.⁹

On the other hand, any attempt to rail against the force of corporate wealth in electoral politics will have to contend with what might be called the “Bill Gates objection”: the threat to democracy posed by allowing corporations, with their immense aggregations of wealth, to function as political speakers under the same regime that allows individual citizens, who may also accumulate tremendous wealth, to spend as much of that wealth as they choose on political speech. If we are not prepared to limit individuals’ expenditures on political speech—and the Supreme Court’s now established campaign finance jurisprudence indicates that we are not¹⁰—we will have to find a way to distinguish between individuals’ and corporations’ free speech rights. Enter attempts to proffer accounts of personhood for which only individuals, and not corporations, qualify.¹¹

⁸ See, e.g., Raymond J. LaRaja, *Will Citizens United v. FEC Give More Political Power to Corporations?* 13–16, 23 (2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1642175 (comparing states with and without spending bans on political speech, and finding that business groups in states without bans spend more on Republican candidates).

⁹ After the national political parties, the three entities funding the most political speech spent an average of \$28.5 million each, or \$85 million total; two of these devoted 100% of their funding and the third devoted 93% to supporting Republican candidates. See PostPolitics, *Election 2010: Campaign Finance*, WASH. POST, <http://www.washingtonpost.com/wp-srv/politics/campaign/2010/spending/> (last visited Oct. 16, 2011). The entity spending the most in support of democratic candidates paid a measly \$11.8 million in comparison for its political speech. *Id.*

¹⁰ See, e.g., *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825 (2011) (invalidating an Arizona statute providing matching funds to publicly financed candidates for political office, and noting that the Supreme Court has “repeatedly rejected the argument that the government has a compelling state interest in ‘leveling the playing field’ that can justify undue burdens on political speech”); *Davis v. FEC*, 554 U.S. 724, 739 (2008) (invalidating the “Millionaire’s Amendment” of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441a–1(a) (2006), which increased the individual contribution limit threefold for opponents of a candidate to the House of Representatives who had deployed \$350,000 or more of her own funds on her campaign, on the ground that the amendment forced the candidate “to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations”); *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976) (“We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify . . . [the] ceiling on independent expenditures.”).

¹¹ See, e.g., Carol R. Goforth, *A Corporation Has No Soul—Modern Corporations, Corporate Governance, and Involvement in the Political Process*, 47 HOUS. L. REV. 617, 661 (2010) (positing that the Supreme Court’s view of the corporation as an individual in *Citizens United* is inconsistent with the Framers’ concern with “individual rights”); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 495,

Yet as well-motivated as that strategy is, it is almost surely destined to fail. As has been argued elsewhere, scholars have been debating for two millennia about the capacities necessary and sufficient for personhood, and little progress has been made.¹² In light of this history, it seems unlikely that critics of the *Citizens United* decision will succeed in arriving at a defensible conception of personhood, let alone persuade the public that the corporation lacks at least some of the capacities that personhood requires.¹³

518 (2011) (advancing the viewpoint that the Supreme Court's decision in *Citizens United* was built on flawed assumptions); Reuven S. Avi-Yonah, *To Be or Not to Be? Citizens United and the Corporate Form 2*, 34 (Univ. Mich. Empirical Legal Stud. Ctr., Working Paper No. 10-005, 2010), available at <http://www.law.umich.edu/centersandprograms/elsc/abstracts/pages/papers.aspx> (discussing various implications of the *Citizens United* decision on the view of corporations and the impact of allowing foreign corporations a voice in campaigns); Lyle Denniston, *Analysis: The Personhood of Corporations*, SCOTUS BLOG (Jan. 21, 2010, 6:45 PM), <http://www.scotusblog.com/?p=15376> (positing that *Citizens United* could have far reaching implications in developing the "personhood" of corporations).

It is not clear whether the Supreme Court's recent decision in *FCC v. AT&T, Inc.*, 131 S. Ct. 1177 (2011), reversing a Third Circuit decision finding that corporations have "personal privacy" interests, will take some of the wind out of the sails of those who are concerned with distinguishing the corporation from individuals on personhood grounds. On the one hand, the Court pointed out that the term "personal," used in the statute's language conferring protections for "personal property" was not commonly used to refer to the corporation: "We do not usually speak of personal characteristics, personal effects, personal correspondence, personal influence or personal tragedy as referring to corporations and other artificial entities." *Id.* at 1181. This might seem to suggest that the Court does not view the corporation as a person. But the Court was keen to distinguish between "person" and "personal," explaining that "[a]djectives typically reflect the meaning of corresponding nouns, but not always." *Id.* at 1182. The Court went on to provide examples of this, including—e.g., "corny" has little to do with corn. *Id.* Elsewhere the Court reasoned that "[p]ersonal' ordinarily refers to individuals. People do not generally use terms such as personal characteristics or personal correspondence to describe the characteristics or correspondence of corporations"—thus we distinguish between personal and business expenses, or personal and business communications. *Id.* at 1178. In these ways, *AT&T* likely does not stand as a counterweight to concerns about corporate personhood that the *Citizens United* decision arguably raises.

¹² See generally Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. (forthcoming 2011) (manuscript at 23–24), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865438 (recognizing the difficulties stemming from the debate over a definition for corporate personhood).

¹³ Others have argued that the corporation might not be entitled to robust First Amendment rights in its own right even if it were to satisfy the criteria for personhood, whatever those happened to be. See, e.g., Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. (forthcoming Winter 2011) (manuscript at 46–51), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1732910 (arguing that recognition of a corporation's personhood is intended only to protect the rights of the individuals behind the corporation, and not to confer rights upon the corporation over and above those enjoyed by its members); Susanna Kim Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations* 46–50 (Chapman Univ. Sch. Of Law, Working Paper No. 10-37, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1702520 (arguing that, even if one could establish that the corporation were a person, the question of its First Amendment rights would yet remain unanswered, since "[l]egal history shows that the personhood designation has been inconsistently applied in constitutional law cases, revealing that the label itself does not dictate results").

What is needed is a ground upon which to distinguish individual and corporate free speech rights that avoids the highly contested personhood debates—and that is what this Article endeavors to provide. To that end, this Article focuses not on the metaphysics of personhood but instead on the social fact of citizenship. More specifically, it advances an account of *normative citizenship*. A normative citizen, on that account, is a formal citizen who is subject to a set of obligations that sustain the nation-state's joint project. Because the corporation is not subject to these obligations, this Article concludes that it is not a normative citizen. It then argues that political speech is speech that addresses the nation-state's joint project. As such, normative citizens are specially placed to engage in political speech, and deserve the most robust political free speech protections. Correspondingly, those who are not expected to participate in the nation-state's joint project need not enjoy these robust protections. It follows that restrictions on the corporation's ability to spend unlimited amounts from its own treasury on political speech need pose no constitutional infirmity.

One might think the task of articulating an account of citizenship with an eye to justifying restrictions on corporate free speech rights more than a little belated. After all, the Supreme Court has ruled: As a result of *Citizens United*, corporations face restrictions no different from individuals when it comes to spending their own money on communications supporting or opposing candidates for office. And the *Citizens United* decision does not rest on a conception of the corporation as a citizen; instead, the majority opinion grounds corporate free speech rights largely on the right of listeners to hear speech from as many different voices as possible.¹⁴

Nonetheless, there are important reasons for gaining clarity on the standing of corporations under the Constitution. For one thing, this clarity could lend support to the movement for a constitutional amendment overturning the *Citizens United* decision.¹⁵ For another, the *Citizens United* decision has prompted assertions of other corporate constitutional rights, and an enhanced understanding of the standing of corporations before the Constitution could serve to undermine these assertions. For

¹⁴ *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2011) (“The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. . . . For these reasons, political speech must prevail against laws that would suppress it . . .”).

¹⁵ See, e.g., Lawrence Lessig, *Citizens Unite*, HUFFINGTON POST (Mar. 16, 2010, 7:32 AM), http://www.huffingtonpost.com/lawrence-lessig/citizens-united_b_500438.html (advocating a constitutional amendment that would state that “[n]othing in this Constitution shall be construed to restrict the power to limit, though not to ban, campaign expenditures of non-citizens of the United States during the last 60 days before an election”); American Constitution Society, *Group Urges Congress To Support Constitutional Amendment Overturning Citizens United v. FEC*, AM. CONST. SOC’Y BLOG (Oct. 4, 2010), <http://www.acslaw.org/node/17163> (describing a group of attorneys and public servants advocating a constitutional amendment for the purpose of invalidating *Citizens United*).

example, during the health care reform debates, health care insurance companies and HMOs lobbied the government to recognize the conscience-based rights of *corporations* to refuse to provide abortions, or refer their patients to a facility that did offer abortion services.¹⁶ They succeeded, and the Patient Protection and Affordable Care Act was accompanied by an executive order recognizing corporate conscience rights.¹⁷ Further, commentators have suggested that the *Citizens United* decision could provide grounds for the extension of other constitutional rights to the corporation—including Sixth Amendment rights to a trial by jury,¹⁸ Fifth Amendment rights against self-incrimination,¹⁹ and even Second Amendment rights allowing corporations to maintain their own militias!²⁰ None of these is yet a fixed reality—President Obama’s executive order can be rescinded at any time, and no court has yet recognized the corporate Second, Fifth, and Sixth Amendment rights that some commentators forecast. A proper understanding of the corporation’s constitutional status could forestall these attempts to drape the corporation in constitutional protections that it does not warrant.

Finally, *Citizens United* provides an opportunity to explore the dark side of the rhetoric around “good corporate citizenship.”²¹ While those

¹⁶ See, e.g., Sara Hutchinson, *In Good Conscience? Examining the Abuse of Conscience Clauses in the US*, CONSCIENCE, Sept. 22, 2010, <http://www.thefreelibrary.com/> (search “author” and “Sara Hutchinson”; then follow hyperlink for “Sara Hutchinson Conscience”) (discussing the use of refusal clauses to block the availability of abortions).

¹⁷ Exec. Order No. 13,535, 75 Fed. Reg. 59 (Mar. 24, 2010) (“Under the Act, longstanding Federal laws to protect conscience (such as the Church Amendment, 42 U.S.C. §300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8) remain intact and . . . prohibit discrimination against health care facilities . . . because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions.”).

¹⁸ Elizabeth R. Sheyn, *The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of Citizens United*, 65 U. MIAMI L. REV. 1, 26 (2010) (advancing the proposition that *Citizen United’s* recognition of the corporation’s First Amendment rights to free speech could implicate other constitutionally protected rights for corporations, particularly in the realm of criminal liability).

¹⁹ *Id.*

²⁰ See, e.g., Daniel J.H. Greenwood, *Telling Stories of Shareholder Supremacy*, 2009 MICH. ST. L. REV. 1049, 1075 (“It remains to be seen whether the Court will extend its new Second Amendment jurisprudence to grant corporations a protected right to take up arms against the citizenry, but little in the existing precedents suggests any reason to expect the Court to hesitate.”).

²¹ See, e.g., Archie B. Carroll, *The Four Faces of Corporate Citizenship*, 100 BUS. & SOC’Y REV. 1, 1–5 (1998) (“‘[G]ood corporate citizenship’ boiled down to companies exhibiting the following practices: ‘family-friendly’ policies, such as allowing family leave; good health and pension benefits; a safe workplace; training and advancement opportunities; and policies that avoid layoffs.”); Joan T. Gabel et al., *Letter vs. Spirit: The Evolution of Compliance into Ethics*, 46 AM. BUS. L.J. 453, 469 (2009) (“Corporate citizenship describes the role of the corporation in administering citizenship rights for individuals and promoting socially responsible conduct.”); Dirk Matten & Andrew Crane, *Corporate Citizenship: Towards an Extended Theoretical Conceptualization*, 30 ACAD. MGMT. REV. 166, 173 (2005) (“C[orporate] c[itizenship] describes the role of the corporation in administering citizenship rights for individuals.”); Remarks of Tim Smith, *Transcript: Corporate Social*

who employ this rhetoric have laudable goals in mind, they may have unwittingly made respectable a conception of the corporation as a legitimate bearer of constitutional rights. The *Citizens United* decision prompts us to revisit this rhetoric, and the account advanced in this Article should demonstrate that calls for corporate social responsibility are better broadcast under a banner that does not rest on the metaphor (or, worse still, purported reality) of citizenship.

The Article proceeds as follows: Part II argues that the *Citizens United* majority was wrong to elide the question of the corporation's status before the Constitution. While Justice Stevens, in his dissenting opinion, rightly addressed distinctions between individuals and corporations, Part III argues that the distinctions he advanced do not in fact secure an adequate ground upon which to justify lesser First Amendment protections for corporations. Part IV aims to offer a more compelling ground upon which to distinguish the corporation from individual citizens. To that end, it advances the promised account of normative citizenship, and applies the account to corporations. This Article concludes that corporations are not normative citizens. Part V elucidates the relationship between normative citizenship and political speech, arguing that normative citizens are those for whom the First Amendment's most stringent free speech protections are intended. Because corporations are not normative citizens, they need not enjoy First Amendment rights as robust as individuals'. Part VI addresses a concern about freedom of the press that provided significant fodder for the *Citizens United* majority opinion. Briefly, the majority argued that restricting any corporation's free speech rights would entail restricting the free speech rights of the press—an outcome it deemed anathema. In response, Part VI argues that the account advanced here would nonetheless permit enhanced protections for media corporations, relative to other corporations. Part VII concludes.

II. DOES CORPORATE CITIZENSHIP MATTER?

Is the corporation the kind of entity that should be found to enjoy the robust free speech rights that individuals enjoy? This Article argues that it is not. It will go on to argue against a conception of the corporation as a political speaker with rights equal in strength to those of individuals. But it

Responsibility: Paradigm or Paradox?, 84 CORNELL L. REV. 1282, 1302 (1999) (“We are encouraging good corporate citizenship, pressing for leadership by the business community on issues as I have just described, and . . . we are heartened to see that these calls for corporate social responsibility are coming not simply from investors, not simply from environmental groups or human rights groups, but also from the business community itself.”); see also Pierre-Yves Néron & Wayne Norman, *Citizenship Inc.: Do We Really Want Businesses To Be Good Corporate Citizens?*, 18 BUS. ETHICS Q. 1, 2–4 (2008) (surveying different dimensions of citizenship and arguing that insufficient work has been done addressing the connection between good corporate citizenship and corporate political participation).

is important to first establish that this is a question that demands attention, notwithstanding the Court's, and some commentators', refusal to engage it. To that end, this Part addresses arguments about the purported irrelevance of the corporation's constitutional standing.

A. *Claim I: An Association of Individuals Should Possess the Rights of Its Members*

Following the Court's insistence that "political speech does not lose First Amendment protection 'simply because its source is a corporation,'"²² some commentators argue that it does not matter whether the corporation is or is not a person, or is or is not a citizen, since the corporation is in any case comprised of individual persons, many, if not most, of whom are citizens. Thus, commentators advance the claim that "corporations are associations of individuals, and individuals do not lose their First Amendment rights simply because they decide to join with other individuals under a particular organizational form, whether corporate or otherwise."²³ In response, one might contend, as Daniel Greenwood does, that the corporation's members (its shareholders) are not individual human beings, but instead institutional investors, who are no more corporeal than the corporation itself.²⁴ But even assuming the quaint near-fiction of a public corporation whose shares are held exclusively by flesh-and-blood citizens, the Court's and commentators' claim is mistaken as a matter of logic. The fact that a right is enjoyed by a person in her individual capacity says nothing about whether that right should be enjoyed by the

²² *Citizens United v. FEC*, 130 S. Ct. 876, 900 (2010) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978)).

²³ Steve Simpson, *Citizens United and the Battle for Free Speech in America*, 5 OBJECTIVE STANDARD 13, 28 (2010); see also Stephen Bainbridge, *Citizens United v. FEC: The First Amendment Rights of Corporate "Persons"*, PROFESSORBAINBRIDGE.COM, Jan. 21, 2010, <http://www.professorbainbridge.com/professorbainbridge.com/2010/01/citizens-united-v-fec-the-first-amendment-rights-of-corporate-persons.html> ("[P]eople shouldn't lose their speech rights just because they exercise these rights through the corporation in which they have invested.") (quoting Larry Ribstein, *Is a Corporation a Person?*, IDEO BLOG (May 22, 2004, 8:56 AM), http://busmovie.typepad.com/ideoblog/2004/05/is_a_corporatio.html); Jack Kenny, *McCain-Feingold and Free Speech*, NEW AMERICAN (Mar. 4, 2010), <http://thenewamerican.com/usnews/constitution/3049-mccain-feingold-and-free-speech> ("[C]orporations are made up of people who have constitutionally protected rights. Nothing in the Constitution suggests that people lose their right to free speech when joined together in a corporation."); cf. Ilya Somin, *People Organized as Corporations Are People Too*, VOLOKH CONSPIRACY (Jan. 21, 2010, 5:12 PM), <http://volokh.com/2010/01/21/people-organized-as-corporations-are-people-too> ("It's true, of course, that corporations 'are not human beings.' But their owners (the stockholders) and employees are. Human beings organized as corporations shouldn't have fewer constitutional rights than those organized as sole proprietors, partnerships, and so on.").

²⁴ See Daniel H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1065-66 (1996) (exploring the characteristics of a "portfolio investor").

association that she forms along with other individuals.²⁵ To wit, individuals enjoy voting rights, but an association formed by individuals does not enjoy a right to vote in its own right. In any event, the individuals whose association is denied the right (correctly, as this Article shall go on to argue) do not “lose” that right, for they may still enjoy the right in their individual capacities.

B. Claim II: The Constitution Protects the Public’s Right to Hear Unlimited Corporate Speech

Others argue, following the language of the opinion, that it is speech, not the speaker, that warrants protection. Thus, the Court intoned, the worth of speech “does not depend upon the identity of its source, whether corporation, association, union, or individual.”²⁶ The point might be captured by advertent to the rights of listeners to hear as much speech as might be offered, or to hear the kind of speech that the corporation is purportedly uniquely well-placed to utter.²⁷

In response, one might readily agree that the quality of an individual’s deliberations—how informed and thoughtful they are—will almost surely be enhanced as she is exposed to more and different kinds of messages.²⁸ But if it really is the listener’s rights that are at issue, then one should query whether allowing corporations to engage in unlimited independent political expenditures will indeed yield more and different kinds of messages, or whether the *Citizens United* decision will instead create a hegemony of pro-business speech that overwhelms speech with other content. This is an empirical debate into which the Court did not even attempt to venture. Indeed, Justice Stevens, in his dissent, repeatedly rails against the majority for baldly asserting, without the benefit of a factual

²⁵ See JOHN SALMOND, JURISPRUDENCE: THE THEORY OF THE LAW 288 (1907) (“Ten men do not become in fact one person, because they associate themselves together for one end, any more than two horses become one animal when they draw the same cart.”); James Raskin, *The Campaign Finance Crucible: Is Laissez Fair?*, 101 MICH. L. REV. 1532, 1542 (2003) (book review) (“[T]he corporation is neither a natural-born nor naturalized democratic citizen; nor is it a membership group of citizens. It is a capital-ownership structure and legally defined entity that should enjoy no political rights under the Constitution. It has no constitutional standing outside of the independent individual rights of the people involved with it.”).

²⁶ *Citizens United*, 130 S. Ct. at 904.

²⁷ See, e.g., HENRY N. BUTLER & LARRY E. RIBSTEIN, THE CORPORATION AND THE CONSTITUTION 68–71 (1995) (arguing that restrictions on corporate political speech impose unjustifiable social costs by allowing non-corporate interest groups disproportionate influence, disadvantaging political challengers who will lack adequate funding to unseat incumbents, and depriving the public of speech that the corporation is uniquely well-placed to offer).

²⁸ Thus, the First Amendment, said Judge Learned Hand, “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.” *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

record, that restrictions will distort the speech being offered.²⁹ In any event, the restriction that *Citizens United* overturned, § 203 of the Bipartisan Campaign Reform Act (“BCRA”),³⁰ prohibited only “electioneering communication”—i.e., speech referring to a candidate for election communicated on radio or television in the lead-up to a primary or general election.³¹ Section 203 placed no restrictions on a corporation’s dissemination of its views by posting them on its own website, issuing press releases, holding press conferences, communicating with its shareholders, or establishing a separate fund to which employees or shareholders could contribute, which could be used to fund unlimited political speech.³² As such, the issue was not whether the public could constitutionally be deprived of the corporation’s views, but whether the corporation should be permitted to use its own funds—funds that frequently dwarf those any individual could amass³³—to disseminate its views in traditional media outlets. Since the majority provided no evidence that permitting the corporation to broadcast its views will not overwhelm the airwaves, so-to-speak, there is no reason to believe that the majority’s position was more protective of listeners’ rights than was the dissent’s.³⁴

²⁹ *Citizens United*, 130 S. Ct. at 933 (Stevens, J., dissenting) (“The Court operates with a sledge hammer rather than a scalpel when it strikes down one of Congress’ most significant efforts to regulate the role that corporations and unions play in electoral politics. . . . The problem goes still deeper, for the Court does all of this on the basis of pure speculation.”); *id.* (“In this case, the record is not simply incomplete or unsatisfactory; it is nonexistent. Congress crafted BCRA in response to a virtual mountain of research on the corruption that previous legislation had failed to avert. The Court now negates Congress’ efforts without a shred of evidence on how § 203 or its state-law counterparts have been affecting any entity other than *Citizens United*.”); *id.* at 939 (“[T]he Court supplements its merits case with a smattering of assertions. The Court proclaims that ‘*Austin* is undermined by experience since its announcement.’ This is a curious claim to make in a case that lacks a developed record.”) (citation omitted).

³⁰ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81 (codified at 2 U.S.C. § 441b (2006)).

³¹ For a more specific definition of an electioneering communication, see *supra* note 3.

³² *Citizens United*, 130 S. Ct. at 943–44 (Stevens, J., dissenting).

³³ See, e.g., KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS & PROGRESSIVE POSSIBILITIES* 4–5 (2006) (noting that corporations are among “the largest and most powerful institutions in the world,” wielding “the economic power of nations”); Ripken, *supra* note 13, at 5 & n.13 (discussing theorists who have argued that corporations have come to rival nation-states in their accumulations of wealth and power).

³⁴ In his now famous monograph, *Corporations and Natural Rights*, Charles Beard argues that it is precisely in light of the corporation’s immortality and consequent ability to accumulate endless wealth that it should be denied the right to participate in self-government:

[T]he corporations, as persons created by law, claimed all the rights of natural, human persons, . . . in acquiring, holding, enlarging, and transmitting property perpetually in an unbroken line of succession. In effect, this practice virtually entailed vast accumulations of property forever in the grip of deathless corporations. Under the leadership of Jefferson the last vestiges of primogeniture and entailment had been destroyed for natural persons. That was

C. *Claim III: The First Amendment States that Congress Shall Make No Law Abridging Speech, and “No Means No”*

Still others contend that what is at issue is not a right at all, but instead the appropriate scope of government restrictions. After all, these commentators argue, the First Amendment states that “Congress shall make no law . . . abridging the freedom of speech,”³⁵ not that persons—whether individual or corporate—shall enjoy rights to free speech.³⁶ But notwithstanding the First Amendment’s plain text, it is well established that Congress can and does make many laws abridging the freedom of speech.³⁷ In determining whether some speech restriction is constitutional, it is important to know the strength of the constitutional right upon which the restriction would impinge, and the strength of that right almost certainly turns upon the constitutional status of its bearer.³⁸

In short, one cannot hope to know whether the government may restrict the speech of corporations more readily than that of human beings without first determining whether the corporation can claim speech rights of a strength equal to those of individuals. This point was not lost on the *Citizens United* dissent, as shown below.

III. UNSUCCESSFUL EFFORTS TO DISTINGUISH CORPORATE AND INDIVIDUAL CITIZENS

In his vigorous dissent, Justice Stevens recognized that it was imperative to consider whether a corporation could rightfully claim free speech rights identical in strength and scope to those that individuals

done to prevent the concentration of wealth. The natural person died. . . . But the corporation . . . might live forever. . . . Surely this was an amazing situation to be endured by people who imagined themselves to be stalwart individualists, foes of collectivism, bent on preserving natural persons against government—and, presumably, against the corporate creatures of government.

Charles A. Beard, *Corporations and Natural Rights*, 12 VA. Q. REV. 337, 345 (1936).

³⁵ U.S. CONST. amend. I.

³⁶ See, e.g., Judith Romero, *Do Corporations Have Constitutional Rights?*, SLS NEWS (Mar. 8, 2010), <http://blogs.law.stanford.edu/newsfeed/2010/03/08/do-corporations-have-constitutional-rights/> (citing Kathleen Sullivan’s argument that it is a mistake to ask the “ontological question” of whether or not corporations should be promoted as having constitutional rights; the author instead states that “we should remember that constitutional rights are ‘negative restraints on government’”).

³⁷ See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010) (upholding a statutory provision (18 U.S.C. § 2339B(a)(1) (2006)) making it a criminal offense to provide material support to a foreign terrorist organization (FTO), even if the support was in the form of a donation, and even if it was provided to the humanitarian wing of the FTO).

³⁸ Thus, for example, Congress may constitutionally restrict the political speech of foreigners and the Fourth Amendment rights of minor students. See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 825 (2002) (holding that a public school board may subject high school students enrolled in extracurricular activities to mandatory drug testing); *infra* notes 116, 129–35 and accompanying text (discussing the limited rights of foreigners).

enjoy.³⁹ He then proceeded to identify a number of ways in which corporations differ from individuals, and to argue that these differences licensed lesser First Amendment protections for the corporation. In particular, Justice Stevens noted that corporations have (a) limited liability for their owners and managers;⁴⁰ (b) separation of ownership and control;⁴¹ (c) perpetual life and a concomitant capacity for “substantial aggregations of wealth amassed by the special advantages which go with the corporate form,”⁴² and (d) that the resources available to the corporation for political expenditures may greatly exceed popular support for the corporation’s ideas.⁴³ Justice Stevens also relied upon the ontological and metaphysical differences between corporations and human beings: (e) “corporations have no consciences, no beliefs, no feelings, no thoughts, no desires,”⁴⁴ and they do not have the capacity for self-realization upon which the First Amendment is, according to Stevens, predicated.⁴⁵ Finally, Stevens noted that (f) corporations may be controlled by foreigners,⁴⁶ and even if they are not, corporations “are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.”⁴⁷ The following Sections address each of these contentions in turn, and argue that none of them is up to the task of differentiating corporations’ and individuals’ free speech rights.⁴⁸

A. *Limited Liability*

If an individual is the sole proprietor of a business, or a partner in a business, and the business is subjected to a civil or criminal fine that cannot be paid fully with the business’s assets, then the government may legitimately seize the individual’s personal assets even if—as with the silent partner in a partnership—the individual did not commit, or even know about, the offense that resulted in the fine. Corporations are different insofar as they confer upon their shareholders limited liability: the most a shareholder can lose in the event of a corporate fine is the amount of the

³⁹ *Citizens United v. FEC*, 130 S. Ct. 876, 971 (2010) (Stevens, J., dissenting) (“The fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it.”).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 955 (quoting the Court’s view on the nature of a corporation in *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 257 (1986)).

⁴³ *Citizens United*, 130 S. Ct. at 971 (Stevens, J., dissenting).

⁴⁴ *Id.* at 972.

⁴⁵ *Id.*

⁴⁶ *Id.* at 971.

⁴⁷ *Id.* at 972.

⁴⁸ *Cf.* Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 990, 997 (2011) (arguing that Stevens’ dissent was “muddled” and contained “a hodge-podge of inconsistent understandings” of the decision’s animating rationale).

shareholder's investment; her personal assets will remain untouched.⁴⁹

Limited liability is a key advantage of the corporate form, but it is not clear why the *corporation* may be restricted in its speech as a result. The idea seems to be that those who enjoy limited liability may not fully internalize the costs of doing business, as the following hypothetical illustrates: Suppose that, at time X, the ABC corporation commits some wrong—for example, it decides to disregard legally mandated and costly emissions restrictions. Then, at some later time Y, ABC faces a fine as a result of its environmental injury. Between X and Y, ABC has profited from its environmental injury and it has distributed some of this profit to its shareholders in the form of dividends. If ABC cannot raise enough money to cover the fine it incurs at time Y, and if, because of the limited liability provisions, neither ABC nor the government can “clawback” money from shareholders who profited from the wrongdoing, then some part of the injury ABC has caused will go unredressed, and shareholders will have benefited at the expense of those whom the injury harmed.⁵⁰ It might well seem untoward if these shareholders were to use these ill-gotten gains to influence electoral politics. But it would not then follow that the *corporation* should have limits placed on its ability to fund political speech. Instead, the limits would appropriately be placed on the beneficiaries of limited liability—i.e., those who hold shares in the corporation.⁵¹ Since the corporation does not itself enjoy limited liability, it cannot be this feature of the corporate form that grounds restrictions on corporate political speech.

B. Separation of Ownership and Control

Like the limited liability consideration, it is difficult to see how the separation of ownership and control in the corporation supports restrictions on corporate political speech. The idea seems to be something like this: It is corporate managers (i.e., those who control the corporation) who would decide how to spend corporate funds on political speech. But the money they would be spending belongs to the corporation's shareholders, who are

⁴⁹ *Citizens United*, 130 S. Ct. at 971 (Stevens, J., dissenting).

⁵⁰ For an account advocating shareholder clawbacks in cases where dividends were issued from ill-gotten corporate gains, see Ryan Burg, *Latent Irresponsibility* (Wharton School of Business, Working Paper), available at <http://www.hse.ru/en/org.persons/34007131>.

⁵¹ While Stevens cites the limited liability of “owners and managers,” *Citizens United*, 130 S. Ct. at 971 (Stevens, J., dissenting), this Section focuses only on shareholders (i.e., owners), who include outside investors as well as managers who hold stock. Managers, in their managerial capacity, are subject to liability. Indeed, under the responsible corporate officer doctrine, managers can be prosecuted and punished for a corporate wrong on the sole basis that they could have known about some corporate wrong and could have prevented it if they had known, even if they did not in fact know of the wrong. See, e.g., *United States v. Park*, 421 U.S. 658, 670–71 (1975) (“[A]n omission or failure to act [is] deemed a sufficient basis for a responsible corporate agent’s liability.”).

arguably its owners.⁵² So, allowing corporations to spend money from their treasuries on political speech raises the traditional principal-agent concern that managers will indulge their own preferences at the expense of shareholders' interests.⁵³ There is some basis for this concern,⁵⁴ but the concern is not rooted in egalitarian considerations about allowing corporations, with their great aggregations of wealth, to play a role in influencing election outcomes. The concern is instead just a version of what the Supreme Court has termed the "shareholder protection" argument.⁵⁵ And, as the majority opinion in *Citizens United* makes clear, concerns about protecting shareholders from having their proceeds used to subsidize speech with which they might disagree are better addressed through "the procedures of corporate democracy,"⁵⁶ rather than an outright ban on corporate political expenditures.

C. *Perpetual Life and Other Favorable Tax Treatment*

Whereas individual humans die and have their estates taxed before bequest, corporations can, in principle, exist forever, and accumulate wealth over that duration without ever facing the equivalent of an estate

⁵² *But see* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 260–61, 278 (1999) (challenging the notion that shareholders "own" the corporation).

⁵³ *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 122–24 (Legal Classics Library 1993) (1932) (arguing that corporate managers may be incentivized to "serve their own pockets better by profiting at the expense of the company than by making profits for it").

⁵⁴ *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 90–92 (2010) (describing a divergence between the interests of directors and officers, on the one hand, and shareholders, on the other, and arguing that current law affords shareholders no rights to influence corporate political expenditures); Ciara Torres-Spelliscy, *Corporate Campaign Spending: Giving Shareholders a Voice* (Brennan Ctr. for Just.), 2010, at 9, available at http://brennan.3cdn.net/54a676e481f019bfb8_bvm6ivakn.pdf ("[O]ne potential risk posed by deregulation of corporate money in politics is that corporate managers who were restrained by the PAC requirement will spend much more money on politics—using the corporate treasury to support their personal political agendas."); *cf.* Larry E. Ribstein, *Corporate Political Speech*, 49 WASH. & LEE L. REV. 109, 141 (1992) (arguing that "[t]he combined effect of encouraging corporate PACs while prohibiting direct activity by corporations may be to cause corporate speech to reflect managers' interests" instead of the broader interests of shareholders or consumers).

In the wake of *Citizens United*, research has emerged demonstrating a negative correlation between corporate political expenditures and shareholder value. *See* Rajesh K. Aggarwal et al., *Corporate Political Donations: Investment or Agency?* 10, 27 tbl.4 (W. Fin. Assoc. Meeting Paper, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=972670 (finding a negative return on political donations by corporations); John C. Coates IV, *Corporate Governance and Corporate Political Activity: What Effect Will Citizens United Have on Shareholder Wealth?* 15–16, 28 tbl.8 (Harv. Ctr. For Law, Econ., & Bus., Discussion Paper No. 684, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680861 (finding a negative correlation between corporate political activity and firm value). In other words, corporations that spend more on political speech tend to perform more poorly than corporations that spend less.

⁵⁵ *Citizens United*, 130 S. Ct. at 977–79 (Stevens, J., dissenting).

⁵⁶ *Id.* at 916 (Kennedy, J.) (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 794 (1978)).

tax. This capacity for wealth accumulation should indeed give us pause. But if it provides sufficient grounds for restrictions on a corporation's political expenditures then, on the same grounds, those same restrictions should be imposed on individuals who have enjoyed favorable tax treatment. Thus, for example, individuals who inherited money in 2010, when the estate tax expired and heirs received 100% of the testator's estate tax-free,⁵⁷ should on this ground be prohibited from using their wealth to fund political speech. George Steinbrenner's children—who, in a different year might have paid up to \$500 million in estate tax on Steinbrenner's \$1.15 billion estate⁵⁸—would then be prohibited from using their funds to pay for express advocacy. Yet, if the United States is not prepared to prohibit these heirs from paying for political speech, it cannot, on the ground of a state-conferred capacity to amass wealth, prohibit corporations from doing so.

D. *Lots of Money for Potentially Unpopular Ideas*

Another concern raised in Stevens' dissent, not unrelated to the concern about the corporation's capacity to amass wealth, goes to the possibility that the corporation's power to spend money will be grossly disproportionate to the popular support behind its ideas.⁵⁹ Presumably, the thought is that corporations have a narrow range of interests, connected to conditions that would facilitate or enhance their operation, and that these interests are not likely to be shared widely by those outside of the business world. Again, however, it is not clear how this concern justifies restrictions on corporate political speech, but not restrictions on the speech of wealthy individuals with narrow or idiosyncratic interests. The very purpose of the First Amendment is to ensure speech by a diversity of voices. As the Supreme Court has stated, "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."⁶⁰ As such, it would clearly be unconstitutional to restrict an individual's ability to spend money on constitutional speech simply because the content of her speech was unpopular. Something other than, or in addition to, the (assumed)

⁵⁷ See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16, § 501, 115 Stat. 38, 69, *repealed by* Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 301, 124 Stat. 3296.

⁵⁸ Sandra Block, *Steinbrenner's Estate Tax Bill: \$0; But Tax Is Returning, and It Could Cost Ordinary Folks a Lot*, USA TODAY, July 21, 2010, at 1B.

⁵⁹ See *Citizens United*, 130 S. Ct. at 971–77 (Stevens, J., dissenting) ("It is an interesting question 'who' is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters . . .").

⁶⁰ *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978).

unpopularity of corporate ideas is needed to sustain restrictions on the corporation's political speech.

E. *Corporations Lack Consciences, Beliefs, Feelings, Thoughts, Desires, and Corporations Cannot Engage in Self-realization*

Of all of the considerations Justice Stevens raises, this is the only one that is straightforwardly ontological: Corporations cannot claim First Amendment rights because, the argument goes, they are not the kinds of entities that can claim rights in the first place, least of all rights so intimately connected with self-realization.⁶¹ This argument echoes debates about whether corporations are moral persons. These debates are likely intractable given the lack of consensus around the necessary and sufficient capacities for personhood, to say nothing of the disagreement over whether the corporation possesses whatever these capacities are.⁶² Given the manifest controversy in this area, Stevens is on shaky ground in denying that corporations lack the capacities necessary for having a conscience, beliefs, feelings, thoughts, or desires. Even if Stevens is right that the corporation cannot engage in self-realization, the notion that the First Amendment rests on a commitment to protecting and enhancing individuals' capacities for self-realization embroils him in yet another area of controversy, for the self-actualization rationale is just one among many conflicting visions of the First Amendment's purpose.⁶³ Moreover, some of these alternative understandings of the First Amendment—like the democratic self-governance rationale—might be served by allowing the corporation unfettered political speech rights even if the corporation is not capable of self-actualization.⁶⁴ As such, there might be reason to afford corporate political speech robust protection independent of the corporation's capacity for self-realization.

In short, it would be all too easy to deny Stevens' premises here—again, that the First Amendment contemplates only beings that have a capacity for belief, conscience, thought, desire, and self-realization, and

⁶¹ See *Citizens United*, 130 S. Ct. at 972 (Stevens, J. dissenting) (“It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires.”).

⁶² See *supra* note 12 and accompanying text; cf. Amy J. Sepinwall, *Defense of Others and Defenseless Others*, 17 YALE J.L. & FEMINISM 327 (2006) (engaging the debate about personhood with regard to abortion politics).

⁶³ See, e.g., Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1142–43 (1984) (identifying three strands in our understanding of free speech—an individualistic view focused on self-realization, a “process” view focused on democratic self-government, and a third view that holds that the first two are both “proper and indeed complementary”); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144–45 (2010) (articulating two visions of the right to free speech—an equality-based view intent on ensuring that all viewpoints have equal access and airtime, and a liberty-based view that treats skeptically any governmental restrictions on speech).

⁶⁴ See *infra* note 126 and accompanying text.

that the corporation lacks one or more of these capacities—and thereby avoid his conclusion that the corporation does not deserve the robust free speech rights that individuals enjoy.

Before moving on, however, it is worth considering a related argument that opponents of the *Citizens United* decision have advanced. Drawing upon Chief Justice Marshall’s famous statement in *Dartmouth College* that a corporation, as “an artificial being, invisible, intangible, and existing only in contemplation of law . . . possesses only those properties which the charter of its creation confers upon it,”⁶⁵ some commentators have argued that corporations, as creatures of the state, are legitimately subject to whatever constraints the state would like to impose on them.⁶⁶ In particular, corporations have no free speech rights independent of a legislative grant.⁶⁷ In response, it is worth noting that the fact that an entity exists just in virtue of some state act does not entail that the state may do whatever it pleases to its creation. After all, a married couple exists only as a creature of the state—without a marriage certificate (the analog of the corporate charter), two individuals are merely cohabitants, and not husband and wife (or husband and husband, or wife and wife), no matter the strength of their commitment to each other. Yet no one thinks the state may do whatever it pleases to a married couple simply because the marital unit is a state creation. It is not at all clear then that the origins of one’s legal status determine the scope or strength of one’s constitutional rights.

F. *Corporations May Be Controlled by Foreigners and, Even if They Are Not, They Are Not Members of “We the People”*

These considerations come closest to grounding the relevant distinction between corporations and individuals, though Stevens merely mentions them, without elucidating their relevance.⁶⁸ This is unfortunate because, without this elucidation, it is difficult to see how they might

⁶⁵ Trs. of *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

⁶⁶ See, e.g., *Rise of the Corporate Court: How the Supreme Court Is Putting Businesses First*, PEOPLE FOR THE AM. WAY, <https://www.pfaw.org/media-center/publications/the-business-of-justice-how-the-supreme-court-putting-corporations-first> (last visited Dec. 16, 2011) (arguing that the Roberts Court has “elevate[d] the power of business corporations . . . over the rights of the old-fashioned human beings called citizens”). In a related vein, both Justices White and Rehnquist, in their separate dissents to the Court’s decision in *Bellotti* permitting corporations to spend money supporting or opposing ballot initiatives, noted that the corporation is a creation of the state and “[t]he State need not permit its own creation to consume it.” *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 809 (1978) (White, J., dissenting); *id.* at 823–24 (Rehnquist, J., dissenting) (“A state grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity . . . [and] it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist.”).

⁶⁷ See *Rise of the Corporate Court*, *supra* note 66 (discussing the Roberts Court’s interpretation of the First Amendment to mean “that the state *must* permit its own creation to consume it”).

⁶⁸ *Citizens United v. FEC*, 130 S. Ct. 876, 947–48 (2010) (Stevens, J., dissenting).

provide the rationale for distinguishing the free speech rights of corporations and individuals.

Beginning with the concern about foreign control: the Supreme Court has not yet ruled on whether Congress may restrict foreign individuals from spending money on political speech.⁶⁹ The concern is that foreigners may be moved by issues different from those that Americans care about, and allowing them to disseminate their political views may undermine American voices. This seems an intuitively compelling concern, but it is one that pertains to foreign individuals and corporations alike. The next Part offers an account of citizenship that explains why both corporations, and foreigners—whether individual foreigners or foreign corporations—do not enjoy free speech rights as robust as American citizens do.

That account turns upon, and helps explain, the special importance of belonging to “We the People.” But nothing in Stevens’ dissent does so. In particular, Stevens never makes clear just who or what is a member of “We the People,” and on what grounds inclusion or exclusion is based. Only a sustained engagement with an account of citizenship will elucidate these matters. It is to such an account that this Article now turns.

IV. A NORMATIVE ACCOUNT OF CITIZENSHIP

This Part seeks to gain clarity on the question of whether corporations and individuals enjoy the same kind of citizenship. Citizenship, on the account this Part advances, contemplates something more rigorous than mere formal recognition of one’s membership within a sociopolitical entity. Instead, this Part seeks to delineate a class of citizens who are expected to participate in the joint project of the United States. These citizens may be referred to in the mere formal sense as *legal citizens*, and those who bear an expectation of participation as *normative citizens*.⁷⁰

This Part describes two dimensions of normative citizenship. First, Section IV.A focuses on three integral arenas of participation in the nation-state—the ballot box, the jury, and the military. Though Section IV.A does not pretend to argue in any comprehensive fashion for the centrality of these three forms of service, the considerations adduced forcefully evoke

⁶⁹ As Justice Kennedy, writing for the Court, noted, “[W]e need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.” *Id.* at 911 (Kennedy, J.).

⁷⁰ Other theorists have identified a threefold distinction in conceptions of citizenship—citizenship as legal status, citizenship as political participation, and citizenship as identity group. *E.g.* Jean L. Cohen, *Changing Paradigms of Citizenship and the Exclusiveness of the Demos*, 14 INT’L SOC. 245, 248 (1999); Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352, 353, 369 (1994). The account of normative citizenship advanced here contains elements of the second and third conceptions. Briefly, normative citizens are those who are expected to participate politically and to harbor an identity of themselves as citizens of the nation-state and a resulting loyalty to their fellows.

their importance.

A second dimension of normative citizenship contemplates the associative obligations normative citizens owe one another. Section IV.B describes these. Finally, Section IV.C employs the understanding of normative citizenship developed in the first two sections to argue that corporations are not normative citizens.

A. Normative Citizenship and Institutional Participation

Normative citizens are those citizens who are expected to participate in the joint project of the nation-state.⁷¹ The precise contents of the American joint project resist description—indeed, one of the defining features of America is that it admits of multiple, divergent, and sometimes even conflicting conceptions of just what its central objectives, commitments, and values are. The purpose here is not to clarify the nature of the joint project of the United States, but instead to describe three central institutions through which normative citizens engage in and with that project—the ballot, the jury, and the military.

The connection between the ballot and citizenship cannot be gainsaid. The importance of the right to vote is highlighted perhaps most evocatively by those who have railed against its denial. Thus, for example, Elizabeth Cady Stanton described the right to vote as the “first right as a citizen.”⁷² And Chief Justice Earl Warren, writing in *Reynolds v. Sims*,⁷³ the 1964 case enshrining the “one person, one vote” principle, declared that “[t]o the extent that a citizen’s right to vote is debased, he is that much less a

⁷¹ The notion of participation might be taken to imply a republican conception of citizenship, according to which active engagement in the polis characterizes the life of the citizen. See, e.g., ARISTOTLE, *THE POLITICS OF ARISTOTLE* 93–94 (Ernest Barker trans., 1958) (“The citizen in the strict sense is best defined by the one criterion, ‘a man who shares in the administration of justice and in the holding of office.’”); JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 55–56 (Roger D. Masters ed., Judith R. Masters trans., 1978) (arguing that the natural freedom lost through a citizen’s social contract with the sovereign state is counterbalanced by the civil freedom gained). Contemporary scholars have persuasively argued that the civic republicanism of the ancients has no place in our “grands Etats modernes.” Benjamin Constant, *The Liberty of the Ancients Compared with that of the Moderns*, in *POLITICAL WRITINGS* 309, 310 (Biancamaria Fontana ed. & trans., 1988); see also Michael Walzer, *Citizenship*, in *POLITICAL INNOVATION AND CONCEPTUAL CHANGE* 211 (Terrence Ball, James Farr & Russell L. Hanson eds., 1989) (discussing the many differences between modern citizenship and the citizenship of the ancient Greeks and Romans). Nonetheless, some of these scholars embrace a conception of the citizen who, though living much of her life in the private sphere, nonetheless turns to public engagement when the times require it. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 233–35 (1991) (discussing the individual who typically remains private and only occasionally involves himself in public activities, perhaps during times of war or during election voting); Kymlicka & Norman, *supra* note 70, at 365–68 (describing liberal virtue theory). The idea of normative citizenship is compatible with at least some contemporary understandings of liberalism, and can appeal to liberals and civic republicans alike.

⁷² SUE DAVIS, *THE POLITICAL THOUGHT OF ELIZABETH CADY STANTON* 53 (2008).

⁷³ 377 U.S. 533, 536 (1964).

citizen.”⁷⁴ The connection between voting and participation in the nation’s joint project is clear: the laws that elected officials create are laws for the electorate; these laws do (or at least should) sustain and advance a joint project that principally contemplates the electorate. Thus, Bob Moses, an African-American civil rights protestor in 1960s Mississippi, hit the nail on the head when he remarked that African Americans would be subject to mistreatment just so long as they were denied access to the ballot box. The law in Mississippi, he wrote, “is law made by white people, enforced by white people, for the benefit of white people. It will be that way until the Negroes begin to vote.”⁷⁵ More generally, in a representative democracy, voting is the closest most individuals come to writing and affirming the rules of government.

If the vote makes each individual partly responsible for governing, and elected officials responsible to their constituency, jury service makes each individual responsible to one another. More specifically, participation upon a jury places one in a community in which one is permitted to hold one’s fellows to the laws that govern all individuals. Thus, the wrong involved in excluding citizens from jury duty has traditionally been understood not merely as denying the defendant a jury of his peers but, just as importantly, as denying citizens their rightful participation in this central institution.⁷⁶ For example, in *Strauder v. West Virginia*,⁷⁷ the Supreme Court case holding the exclusion of African-Americans from jury service unconstitutional, Justice Strong, writing for the majority intoned:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to

⁷⁴ *Id.* at 567.

⁷⁵ SETH CAGIN & PHILIP DRAY, *WE ARE NOT AFRAID: THE STORY OF GOODMAN, SCHWERNER, AND CHANEY AND THE CIVIL RIGHTS CAMPAIGN FOR MISSISSIPPI* 148 (1988).

⁷⁶ Peter Spiro has argued that, at least in a community with a sizeable immigrant population, disallowing immigrants from jury service may deprive a defendant of a jury of her peers. PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* 99 (2008). Yet, Spiro misses the normative importance of jury service. Although immigrants and permanent residents might well be counted among the defendant’s peers, they may not be entitled to stand in judgment, for the laws that the jury enforces are, in an important sense, not *their* laws.

⁷⁷ 100 U.S. 303 (1879).

individuals of the race that equal justice which the law aims to secure to all others.⁷⁸

Indeed, so important a civic service is jury duty that, in some jurisdictions, sheriffs are empowered to seize individuals eligible to sit on a jury and deliver them to court⁷⁹—a process that would rightly be viewed as kidnapping in any other context.⁸⁰

Mandatory jury service bears a noteworthy relationship to conscripted military service, not least of all because both demand self-sacrifice. Paul Kahn has argued that the prospect of self-sacrifice is foundational in the American political culture, in part because the U.S. government enjoys continued authority to demand that Americans kill or be killed on behalf of the nation-state.⁸¹ Thus, Kahn notes, the naturalization oath of allegiance requires the individual seeking American citizenship to pledge that she will “bear arms on behalf of the United States when required by law [to do so],” and in doing so exemplifies, Kahn contends, the “sovereign demand on citizenship as an open-ended willingness to sacrifice.”⁸² And it is not just for immigrants-*cum*-citizens that the obligation to die for America is made salient; other theorists have noted that, among the duties that all American citizens bear, “[a]bove all others is the duty to bear arms and to face the mortal hazards of the battlefield.”⁸³ “The notion that Americans should be willing to kill and die for their country is, then, a strong piece of evidence in support of the claim that American citizenship has a normative cast.”⁸⁴

In short, participating in America’s joint project in significant part means being subject to an expectation that one will enact his or her citizenship by helping to select the nation-state’s representatives, affirm respect for its laws, and safeguard its territory and people. Those who are subject to this expectation are normative citizens, and their participation in

⁷⁸ *Id.* at 308.

⁷⁹ *E.g.*, CAL. CIV. PROC. CODE § 211 (West 2010) (“[T]he court may direct the sheriff or marshal to summon, serve, and immediately attach the person of a sufficient number of citizens having the qualifications of jurors, to complete the panel.”).

⁸⁰ See Fred E. Foldvary, *Is Jury Duty Involuntary Servitude?*, FREE LIBERAL (Oct. 7, 2009), <http://freelibrary.com/archives/003918.php> (stating that even though the accused “are entitled to a fair and speedy trial” this does not “justify governmental kidnapping”).

⁸¹ PAUL W. KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY 94–96 (2008).

⁸² *Id.* at 35.

⁸³ SPIRO, *supra* note 76, at 97; see also GEORGE KATEB, PATRIOTISM AND OTHER MISTAKES 7 (2006) (“How is patriotism most importantly shown? Let us not mince words. The answer is that it is most importantly shown in a readiness, whether reluctant or matter-of-fact, social or zealous, to die and to kill for one’s country.”).

⁸⁴ Amy Sepinwall, *Citizen Responsibility and the Reactive Attitudes: Blaming Americans for War Crimes in Iraq*, in ACCOUNTABILITY FOR COLLECTIVE WRONGDOING 231, 244 (Tracy Isaacs and Richard Vernon eds., 2011).

the nation-state's central institutions is partly constitutive of the joint project that unites them.

B. *Normative Citizenship and Associative Obligations*

It is not just an expectation of participation in the nation-state's central institutions that marks one's status as a normative citizen. Normative citizens bear a special set of responsibilities, or *associative obligations*, to one another. The concept of an associative obligation is not unique to the relationship among citizens; nor is it the case that the relationships involving associative obligations need be voluntary. Thus much of the literature around associative obligations refers to the special responsibilities members of a family owe one another. Nonetheless, the nation-state has been a much-studied context in which to argue that associative obligations do or do not arise,⁸⁵ or should or should not obtain.⁸⁶

Most commentators who consider the associative obligations of

⁸⁵ See, e.g., Talbot M. Brewer, *Two Kinds of Commitments (And Two Kinds of Social Groups)*, 66 PHIL. & PHENOMENOLOGICAL RES. 554, 569–70 (2003) (discussing the effect moral obligations have on interactions between fellow citizens). Theorists supporting associative obligations among citizens include RONALD DWORKIN, *LAW'S EMPIRE* 195–96, 206 (1986) (“Political association, like family and friendship and other forms of association more local and intimate, is in itself pregnant of obligation.”); A. JOHN SIMMONS, *JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS* 102–07 (2001) (critiquing the view of the state that undermines the political arrangements that exist in modern political societies); YAEL TAMIR, *LIBERAL NATIONALISM* 107–12 (1993) (asserting that self-interest forms and defines our associative obligations); Richard Dagger, *Membership, Fair Play, and Political Obligation*, 48 POL. STUD. 104, 104–07 (2000) (weighing the strengths and weaknesses of the argument for associational obligations); John Horton, *In Defence of Associative Political Obligations: Part Two*, 55 POL. STUD. 1, 1–9 (2007) (discussing the positive aspects of associative political obligations); John Horton, *In Defence of Associative Political Obligations: Part One*, 54 POL. STUD. 427, 428–33 (2006) (addressing flaws in various criticisms of associative political obligations).

⁸⁶ Some commentators have contested the connection between associative obligations and citizenship on the ground that the connection entails a troubling distributive preference for one's compatriots relative to those outside one's borders. Samuel Scheffler has referred to this as the “distributive objection” to the claim of special responsibilities among compatriots. Samuel Scheffler, *The Conflict Between Justice and Responsibility*, in *GLOBAL JUSTICE* 86, 91 (Ian Shapiro & Lea Brilmayer eds., 1999). These commentators object not to national associative obligations per se, but only to a possible implication of these obligations—namely, that they might be thought to justify national resource distribution, to the detriment or possible exclusion of global redistribution. See, e.g., Kok-Chor Tan, *The Boundary of Justice and the Justice of Boundaries: Defending Global Egalitarianism*, 19 CANADIAN J. L. & JURISPRUDENCE 319, 337–43 (2006) (“Citizens owe to each other certain special obligations of distributive justice”); Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, BOS. REV., Oct./Nov. 1994, at 3 (“But we should work to make all human beings part of our community of dialogue and concern, base our political deliberations on that interlocking commonality, and give the circle that defines our humanity a special attention and respect.”). But the link between associative obligations and resource distribution is contingent, not conceptual; associative obligations need not entail duties to attend to the material needs of one's compatriots before those of the global poor. In any event, the associative obligations described below do not necessarily entail this distributive preference.

citizens do so in the context of discussions of political obligation, or the duty to obey the law.⁸⁷ The associative obligations entailed by citizenship, however, involve more than mere law abidingness. Elsewhere, a more detailed account of the associative obligations of citizenship has been offered;⁸⁸ the aim of this Section is more modest. As with the preceding remarks on a citizen's participation in the nation-state's central institutions, this Section merely intends to give some flavor for what robust citizenship entails. That flavor will, hopefully, suffice to ground the claim that this Article seeks to defend in the next Section—that whatever kind of citizenship the corporation enjoys, it is not the robust normative kind described here.⁸⁹

The first obligation of citizenship requires the citizen to experience a sense of alignment with the nation-state. In the typical case, citizens will view their interests as aligned with those of the polity where a success for the polity is at least *prima facie* positive for the citizen, and a loss to the polity is at least *prima facie* negative for her. Thus, if a loss for the polity is nonetheless to the citizen's benefit, this should be *in spite* of and not *because* of the polity's fate.⁹⁰ The citizen who supports her nation-state need not share all of its core commitments, or endorse all of its purposes. Nonetheless, she should believe in the nation-state's joint project as a whole.

Closely related to the citizen's support for her nation-state's joint

⁸⁷ See, e.g., Andrew Mason, *Special Obligations to Compatriots*, 107 ETHICS 427, 427 n.1 (1997) (describing the long history of the idea that compatriots have special obligations to one another to obey the law, with its genesis in Socrates, a more explicit exposition in Thomas Hobbes, and contemporary revival in work by John Rawls). But see Avia Pasternak, *The Distributive Effect of Collective Punishment*, in ACCOUNTABILITY FOR COLLECTIVE WRONGDOING 210, 211–12 (Tracy Isaacs and Richard Vernon eds., 2011) (providing an account of collective liability grounded in the associative obligations that obtain between members of the collective).

⁸⁸ See Sepinwall, *supra* note 84, at 238–241 (describing associative obligations as citizen commitment to the state); Amy J. Sepinwall, *Responsibility for Group Transgressions* (Jan. 28, 2011) (unpublished Ph.D. dissertation, Georgetown University) (on file with author).

⁸⁹ Andrew Mason posits a set of special obligations that dovetail fairly well with those described below. Mason, *supra* note 87, at 427. Specifically, Mason states that associative obligations typically include “an obligation to give priority to each other's needs and an obligation to participate fully in public life,” with the former entailing at least a weak commitment to the notion that “charity begins at home.” *Id.* at 427–28. But Mason does not seek to elaborate upon the nature or justification for the particular associative obligations he lists; nor does he seek to argue that these obligations obtain in any particular polity. Instead, Mason's objective is to critique existing attempts to *ground* associative obligations, and to offer an alternative foundation. *Id.* at 427. The objective of this Article, by contrast, is not to inquire into the foundation for the associative obligations we happen to have, less still to seek to ground associative obligations *tout court*. It is sufficient for present purposes to establish that the American political culture does involve associative obligations, and that these hold between individuals, but not between the corporation and the individual.

⁹⁰ Cf. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108, 147–49 (1976) (arguing that courts should apply the “group-disadvantaging principle” to Equal Protection cases and highlighting the importance of group identification and interdependence).

project is an obligation to attend to the nation-state's best interests. To take a mundane example, the citizen may be expected to pay taxes to subsidize government services or programs even if she knows these programs will never benefit her, directly or indirectly. Moreover, this can be true even if there is no prospect of full or even partial reciprocity—that is, even when her contributions to programs that benefit others exceed the benefits she derives from others' contributions. The obligation to contribute in such cases arises because this is just what compatriots do—just as the obligation to help out a friend or family member in need arises because that is just what friends and family do.⁹¹ More generally, the citizen is called upon, at least at some moments, to set aside concerns for her private welfare for the sake of the welfare of the nation-state.⁹²

Finally, the citizen bears a duty to seek to reform the nation-state where it threatens to evolve in ways that deviate from its foundational commitments. In such cases, the citizen is required to seek to persuade her compatriots to desist from the offending conduct, or otherwise to attempt to restore the nation-state to its rightful path (or her conception of it).

Now, as just described, one might worry that the obligations of normative citizenship are unrealistically demanding, and uncharacteristic of the obligations Americans bear. Two qualifications should allay this worry. First, the associative obligations of citizenship are not absolute. Instead, these exist alongside, and may well frequently be outweighed by, other sources of commitment (personal or interpersonal). It is thus likely more accurate to construe the obligations of citizenship as *prima facie* claims upon the citizen, capable of being overridden by countervailing obligations. Still, normative citizenship in the United States does entail associative obligations of a non-trivial magnitude.

The second qualification allows individuals to better grasp just when a citizen's associative obligations will prevail over countervailing sources of commitment. It is undoubtedly true that citizenship in some socio-political entities might involve only a dormant or very weak commitment, in which case the obligations of membership may be defeated by just about any countervailing obligation or entitlement. Citizenship in some of the states of the Union might well be of this kind. But citizenship in most democratic nation-states comprehends a sufficiently robust normative dimension to subject at least some of the nation-state's citizens to the obligations described above. In particular, citizenship in the United States

⁹¹ For the view that the associative obligations between citizens share normative foundations similar to those grounding associative obligations between intimates, see DWORKIN, *supra* note 85, at 206–08; JOHN HORTON, *POLITICAL OBLIGATION* 150 (2d ed. 2010); Michael O. Hardimon, *Role Obligations*, 91 J. PHIL. 333, 347 n.22 (1994).

⁹² See, e.g., I ACKERMAN, *supra* note 71, at 298–99 (explaining the necessity of private citizens to examine the public good in order to be a good citizen).

comprehends this normative dimension.

One need only look to our most cherished rhetoric to see that we conceive of the American project as one that may rightfully lay claim to our hearts, minds, wallets, and in desperate times, even our bodies. Thus, the obligation to act with an eye toward the national interest—whether in times of war or peace—figures in our most memorable presidential addresses (“Ask not what your country can do for you, but what you can do for your country”⁹³) and patriotic slogans (“I only regret that I have but one life to lose for my country”⁹⁴). Americans are asked to undertake financial sacrifices for the sake of economic recovery, and bodily sacrifices for the sake of national security. Thus, Barack Obama in his presidential acceptance speech stated: “[T]he change we seek . . . cannot happen . . . without a new spirit of service, a new spirit of sacrifice.”⁹⁵ Nor does the proud tradition of speaking out against the government undercut the commitment to America that citizens are expected to undertake; instead, dissent is taken to be a paradigmatically American form of enacting one’s citizenship, insofar as dissent is aimed at returning the country to a set of values from which the dissident believes it has unduly deviated.⁹⁶

In short, the United States functions for Americans not merely as a night-watchman state,⁹⁷ nor is it simply a bureaucratic organization providing services to a geographically contained people who benefit from the organization’s economies of scale.⁹⁸ Instead, America has a mission—

⁹³ *Presidents: John F. Kennedy*, THE WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/johnfkennedy> (last visited Dec. 16, 2011).

⁹⁴ PAUL ARON, WE HOLD THESE TRUTHS . . . AND OTHER WORDS THAT MADE AMERICA 59 (2008) (quoting Nathan Hale).

⁹⁵ Barack Obama, Victory Speech Upon Winning Presidential Election (Nov. 5, 2008), available at <http://elections.nytimes.com/2008/results/president/speeches/obama-victory-speech.html>.

⁹⁶ Consider, for example, Justice Brandeis’s stirring defense of the right to dissent in his concurrence in *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring), a case challenging the defendant’s conviction for her membership in the Communist Labor Party.

Those who won our independence believed . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized . . . that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies. . . . Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.”

Id. at 375–76 (footnote omitted); cf. Mason, *supra* note 87, at 428 (“The idea that we have a special obligation to our compatriots to participate fully in public life has been thought to include or entail various specific obligations such as an obligation . . . to keep a watchful eye on government and speak out when it acts unjustly.”).

⁹⁷ See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26–28, 51–53 (1974) (providing an argument in support of the night-watchman state).

⁹⁸ See Charles Taylor, *Cross-Purposes: The Liberal Communitarian Debate*, in LIBERALISM AND THE MORAL LIFE 159, 166 (Nancy L. Rosenblum ed., 1989) (describing the bureaucratic organization

some might even say a spiritual mission⁹⁹—that unites its people, and in virtue of which they bear associative obligations to one another.

C. *Who Are America's Normative Citizens?*

There is no doubt that corporations are citizens in a formal sense: They receive their charters from a state and become citizens of their state of incorporation as a result.¹⁰⁰ But are corporations *normative* citizens? This Section argues that, in the United States, legal citizenship is a more encompassing category than normative citizenship, and that the corporation qualifies only for the former, and not the latter.

More precisely, the position this Section defends conceives of normative citizens as (i) legal citizens, (ii) who are expected by their compatriots to participate in the nation-state's central institutions and fulfill their associative obligations to their fellows.

The requirement of legal citizenship is a practical one: Only legal citizens are permitted to serve on a jury, cast a ballot on election day, or enlist in the military and so on. It is difficult to imagine that a person who is visibly foreclosed from participating in these central forms of American citizenship could nonetheless be expected by others to fulfill the obligations of membership. For that reason, normative citizens constitute a subset of the class of legal citizens.

Moreover, as stated above, normative citizens are those who are expected by their compatriots to both participate in the nation-state's joint project and bear associative obligations to their fellows. Importantly, the definition of normative citizenship rests not on the expectations the citizen sets himself, but on those his compatriots set for him. As such, the American who disavows any attachment to the nation-state's joint project may nonetheless be bound to the participatory and associative obligations of citizenship. For inherent in the character of normative citizenship is the element of obligation—more specifically, joint obligation.¹⁰¹ Given the

state theory as a mere means “to obtain benefits through common action that [we] could not secure individually”); cf. Seth Lazar, *A Liberal Defence of (Some) Duties to Compatriots*, 27 J. APPLIED PHIL. 246, 249 (2010) (“The state is not an insurance company, of which we are clients; it is our corporate agent, through which we carry out our duties to one another.”).

⁹⁹ See, e.g., Sepinwall, *supra* note 84, at 242 (describing the “quasi-spiritual understanding of the nation’s mission, and the connection to martyrdom that this understanding yields”).

¹⁰⁰ In 1958, Congress enacted a law stating that a corporation was to “be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.” Act of July 25, 1958, Pub. L. No. 85-554, § 2(c), 72 Stat. 415 (1958). In 2010, the Supreme Court interpreted “principal place of business” to mean “the place where a corporation’s officers direct, control, and coordinate the corporation’s activities. It is the place that Courts of Appeals have called the corporation’s ‘nerve center.’” *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2010).

¹⁰¹ See MARGARET GILBERT, *A THEORY OF POLITICAL OBLIGATION: MEMBERSHIP, COMMITMENT, AND THE BONDS OF SOCIETY* 152–64 (2006) (“[T]hose with a joint aim . . . are required

joint nature of the obligation, unilateral release is unavailable. Instead, the fact that the normative citizen's compatriots continue to harbor expectations of him will, all else being equal, suffice to maintain the force of the obligations to which he is bound.¹⁰²

While self-imposed dissociation or exclusion may not sever one's membership in the class of normative citizenship, exclusion imposed by one's fellows may suffice to do so. Sometimes, there is a compelling reason for the exclusion—young children, for example, have no business voting, deliberating on a jury, or fighting on behalf of the nation-state.¹⁰³ Other exclusions seem far more troubling. Currently, individuals convicted of a felony forfeit their right to vote until they enter,¹⁰⁴ or complete,¹⁰⁵ probation; in Kentucky and Virginia, convicted felons may be permanently stripped of their voting rights.¹⁰⁶ Historically, the franchise was denied to African-Americans,¹⁰⁷ women,¹⁰⁸ and the homeless.¹⁰⁹ Jury

to behave in a caring manner towards each other to the extent that this is necessary to promote their joint aim.”)

¹⁰² Philip Roth powerfully evokes the disenfranchised citizen in *Exit Ghost*. There, Roth's protagonist, Nathan Zuckerman, describes his transformation from fresh-faced activist to alienated citizen, a transformation that prompts Zuckerman to “banish[] [his] country” from his mind, by canceling newspaper subscriptions and otherwise shutting out reports of current events. PHILIP ROTH, *EXIT GHOST* 68–70 (2007). But although Zuckerman may have chosen to banish his country from his consciousness, he has not banished himself from his country, and his country does not banish him. Indeed, Zuckerman remains an iconic American citizen. In this country, the disaffected member is not only a trope but also a celebrated type, for he embodies the commitment to a diversity of ideas and freedom of expression that America holds so dear. And just so long as others continue to expect Zuckerman to participate in America's central institutions and fulfill his associative obligations, he retains his status as a normative citizen.

¹⁰³ Interestingly, the BCRA contained a provision prohibiting campaign contributions, or political party contributions, from minor children. Bipartisan Campaign Reform Act, 2 U.S.C. § 441k (Supp. 2003). The purpose of the prohibition was to prevent parents of minor children from circumventing the contribution limits by donating money to campaigns in their children's names. The provision in question was struck down in *McConnell v. FEC* on the ground that the stated purpose could be accomplished in a more tailored fashion. 540 U.S. 93, 231–32 (2003).

¹⁰⁴ These states include California, Colorado, Connecticut, New York, and South Dakota. *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUST., http://www.brennancenter.org/page/-/d/download_file_48642.pdf (last visited Dec. 16, 2011).

¹⁰⁵ There are twenty states that restore voting rights after the convict has completed her prison term, parole and probation, including Alaska, Maryland, New Jersey, Texas, Washington, and Wisconsin. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ African-Americans gained the constitutional right to vote in the Fifteenth Amendment. U.S. CONST. amend. XV, § 1.

¹⁰⁸ Women gained the constitutional right to vote in the Nineteenth Amendment. U.S. CONST. amend. XIX.

¹⁰⁹ Several states have explicitly recognized the right of homeless people to vote. See *Coal. for the Homeless v. Jensen*, 590 N.Y.S.2d 502, 503 (App. Div. 1992) (election officials had not taken reasonable, good faith steps to determine whether homeless applicants were residents before denying them the opportunity to vote). Other states have held unconstitutional voting eligibility rules that defined “residence” narrowly to exclude homeless shelters or other temporary domiciles. See *Pitts v. Black*, 608 F. Supp. 696, 710 (S.D.N.Y. 1984) (homeless applicants could not be prohibited from

service was not recognized as a constitutional right for African-Americans until the *Strauder* decision in 1879,¹¹⁰ and the Supreme Court did not recognize the right and civic duty of women to serve on a jury until 1975.¹¹¹ Today, women are subject to exclusion from combat in the military,¹¹² and, until the December 2010 repeal of “Don’t Ask Don’t Tell,” gays and lesbians were permitted to serve in the military only if they concealed their homosexuality.¹¹³

There has been much to decry about these exclusions. For those who are concerned about allowing the actual expectations of Americans—error-prone and troubling as these may be—to determine who qualifies for normative citizenship, two points may be in order. First, the aim here is to define the class of normative citizens, not to defend it. Second, it seems likely that exclusion from only some of the institutions of citizenship is insufficient to disqualify one for normative citizenship.¹¹⁴

On the other hand, and far more relevant here, is the status of the legal citizen who is excluded from all three of the central institutions of normative citizenship, and whom other Americans view as outside the bonds of associative obligation. That individual or entity does not belong to the class of normative citizens.¹¹⁵

Corporations, it goes without saying, are neither expected nor entitled to vote, perform jury duty, or serve in the military. More generally, corporations are not required to undertake the associative obligations that

registering to vote just because they did not inhabit traditional residences); *Fischer v. Stout*, 741 P.2d 217, 221 (Alaska 1987) (“A residence need only be some specific locale within the district at which habitation can be specifically fixed. Thus, a hotel, shelter for the homeless, or even a park bench will be sufficient.”); *In re Application for Voter Registration of Willie R. Jenkins* (D.C. Bd. of Elections and Ethics, June 7, 1984). More generally, homeless individuals technically have the right to vote in every state, but more than half the states require a mailing address to register to vote. See, e.g., *State-by-State Chart of Homeless People’s Voting Rights*, NAT’L COAL. FOR THE HOMELESS, <http://www.nationalhomeless.org/projects/vote/chart1.pdf> (last visited Dec. 16, 2011) (tabulating information regarding homeless people’s voting rights and voter registration requirements according to states).

¹¹⁰ *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

¹¹¹ *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975). In *Taylor*, the Court held that a criminal defendant—male or female—is entitled to a jury drawn from a fair cross-section of his peers, and that a fair cross-section must include men and women in proportions roughly equal to their respective compositions in the surrounding community. *Id.* In so holding, the Court reversed an earlier decision in which it held constitutional a Florida law that allowed women to be placed in a jury pool only if they had volunteered for jury service. *Hoyt v. Florida*, 368 U.S. 57, 68–69 (1961).

¹¹² E.g., *Schwartz v. Brodsky*, 265 F. Supp. 2d 130, 132 (D. Mass. 2003).

¹¹³ Carl Hulse, *Senate Ends Military Ban on Gays Serving Openly*, N.Y. TIMES, Dec. 19, 2010, at A1.

¹¹⁴ *But cf.* T.R.S. Allan, *Law, Justice and Integrity: The Paradox of Wicked Laws*, 29 OXFORD J. LEGAL STUD. 705, 713 (2009) (“[A] very grave injustice to any particular group of citizens would . . . [render] their associative obligations . . . counterfeit . . .”).

¹¹⁵ *Cf.* *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (Harlan, J., dissenting) (“Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry.”).

bind most adult Americans. In this way, corporations are like children or incompetent adult citizens insofar as all three are formal citizens of the United States but none of them participates in the nation-state's joint project. Importantly, the similarity is not necessarily along metaphysical lines: The rationale for excluding corporations need not rest, as it likely does with children and incompetent adults, on concerns that the corporation is not a moral agent. Indeed, the corporation could rightfully be excluded from participation in the nation-state's joint project even if it were a moral agent, just as a foreign individual is excluded notwithstanding the fact that she is a moral agent. What matters then is not the corporation's metaphysical or ontological status, but instead the plain social fact that corporations are not expected to participate in the central institutions of citizenship, just as foreigners are not expected to do so.¹¹⁶ If expectations were changed, (and some way for corporations to vote, sit on a jury, and serve in the military was developed),¹¹⁷ corporations would then count as normative citizens. But these things are not currently expected of corporations.¹¹⁸

¹¹⁶ Along these lines, consider that some other countries allow non-citizen residents to vote in local, and even national, elections. See, e.g., Rainer Bauböck, *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, 75 *FORDHAM L. REV.* 2393, 2393–94 (2007) (“Voting by noncitizen residents may be regarded as complementing electoral rights for nonresident citizens.”). Thus, the restrictions on foreign and corporate participation in the central political institutions of the United States follow not from some intrinsic characteristics of foreigners or corporations that necessarily render them unsuitable for political participation but instead from our norms and practices.

¹¹⁷ One might worry that the qualifier about finding some way to have the corporation participate in these three institutions smuggles in the metaphysical considerations that I eschewed earlier. The suspected argument would go like this: The corporation cannot, as a result of the kind of being it is, check off a box on a ballot, or occupy a seat in a jury box, or load and fire a weapon. It is because of these incapacities that we do not expect the corporation to vote, or to perform jury or military service. Our expectations then follow from, rather than proceed independently of, the corporation's ontological or metaphysical status.

In response, it is worth noting that anything a corporation “does,” it does by its human representatives. If they can speak on the corporation's behalf, so too they can—as a matter of the laws of physics though not as a matter of the laws of this country—vote, or engage in jury deliberations, or undertake military activity on its behalf as well.

The infirmity is then as described: Whatever the corporation's capacities, the fact remains that we do not impose upon it the expectations that we expect of normative citizens. As such, it does not count as a normative citizen.

¹¹⁸ It may also be useful to contrast the corporation's status within our constitutional culture with that which it enjoys in other polities. For example, in China, state-owned enterprises (SOEs) are expected to align their commercial objectives with those of the governing party, and to pursue initiatives that will help entrench Chinese culture. See, e.g., *Guidelines to the State-owned Enterprises Directly Under the Central Government on Fulfilling Corporate Social Responsibilities*, STATE-OWNED ASSETS SUPERVISION AND ADMIN. COMM'N, <http://www.sasac.gov.cn/n2963340/n2964712/4891623.html> (last visited Dec. 16, 2011) (“Fulfilling [corporate social responsibilities] is not only [part of the company's] mission and responsibilities, but also an ardent expectation and requirement from the public.”). These expectations bear similarities to the obligations of citizenship described in this Article and, to the extent that they do, it may make sense to think of SOEs as

Indeed, it is not merely that corporations are not expected to function as normative citizens, but also that they are prohibited by law from fulfilling the associative obligations to which individuals are bound. Corporate law respects shareholder primacy: the corporation is supposed to operate for the interests of its shareholders.¹¹⁹ While the business judgment rule confers wide latitude on corporate officials to exercise discretion in pursuit of the corporation's objectives,¹²⁰ it is clear that corporate managers may not pursue national welfare as an end in itself, independent of its connection to enhancing shareholder returns. This is not the place to interrogate the cogency of the shareholder primacy norm. The point is that the corporation is excused from the associative obligations not merely as a matter of informal practice, but also as a matter of well-entrenched law.¹²¹

In sum, the corporation is not a participant in the nation-state's joint project. For that reason, it need not enjoy the robust free speech of normative citizens.

V. NORMATIVE CITIZENSHIP AND POLITICAL SPEECH RIGHTS

Thus far, this Article has argued that only some American citizens—i.e., normative citizens—participate in the joint project of the nation-state, and that corporations are not normative citizens. This Part argues that only normative citizens are entitled to the robust protection that the American constitutional regime accords political speech. Others—and corporations in particular—need not enjoy political free speech rights equal in scope or strength to those of normative citizens.¹²²

occupying a citizen-like role. Thus, there may be no conceptual or metaphysical impediment to having corporations function like citizens. The point for present purposes is that, in the United States, corporations are not expected to so function.

¹¹⁹ See, e.g., AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(a) (1994) (“[A] corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.”).

¹²⁰ See, e.g., Bebchuk & Jackson, *supra* note, 54, at 83 (noting that directors and executives have near plenary authority over ordinary business decisions).

¹²¹ Justice Stevens noted in his dissent that because corporations owe fiduciary duties to shareholders, they are not permitted to function like public-minded citizens; their corporate political speech can only be aimed at enhancing shareholder value. *Citizens United v. FEC*, 130 S. Ct. 876, 974 (2010) (Stevens, J., dissenting); cf. Alexander Boer, *Continental Drift: Contextualizing Citizens United by Comparing the Divergent British and American Approaches to Political Advertising*, 34 B.C. INT'L & COMP. L. REV. 91, 102 (2011) (noting that a director's only duty in the political process is to enhance shareholder value).

¹²² This Article does not address the question of whether corporations, and others who fail to qualify for normative citizenship, may be denied the full scope of other constitutional rights. In at least some instances, it seems clear that normative citizens and others to whom the Constitution extends should enjoy constitutional rights of equal strength. Thus, for example, the Eighth Amendment's prohibition on cruel and unusual punishment should apply with equal strength to normative citizens, mere formal citizens, permanent residents and anyone else who might happen to be within the

Political speech is speech that describes, furthers, supports, opposes, or otherwise engages with the nation-state's joint project. It is speech about what our joint project is or should be about, and about who the stewards of this joint project should or should not be.¹²³ "[T]he First Amendment . . . 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"¹²⁴ It is for this reason that political speech receives the greatest protection in First Amendment jurisprudence.¹²⁵

country's criminal jurisdiction. The rationale for this form of equal protection, however, need not rest on claims about the co-equal status of all of these individuals before the Constitution. Instead, treating all individuals as equally subject to protection from cruel and unusual punishment affirms a core piece of our national identity, as a country that practices relative moderation in its imposition of punishment (the death penalty being a glaring contradiction, in this light). See *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (recognizing that anyone—citizens and non-citizens alike—may claim rights of habeas corpus to challenge their detention); cf. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 4 (2004) (promoting robust free speech protections in digital communications—apparently without regard to territorial borders—for purposes of developing individuals' capacities for engagement in a democratic culture).

With that said, the question of whether those who are not normative citizens might enjoy weaker versions of other constitutional rights remains open.

¹²³ Cf. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2816–17 (2011) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of our system of government.")

¹²⁴ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

¹²⁵ See, e.g., *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) ("The Free Speech Clause exists principally to protect discourse on public matters . . ."); *Burson v. Freeman*, 504 U.S. 191, 196 (1992) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.") (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) ("[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.") (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)); ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 62 (1975) ("[T]he First Amendment should protect and indeed encourage speech so long as it serves to make the political process work . . ."); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 3 (1960) (arguing for the relationship between free speech and self-government); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 358 (1978) ("[T]he sole legitimate first amendment principle protects only speech that participates in the process of representative democracy."); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971) (arguing that the First Amendment protects *only* explicit political speech); Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1082 (2002) ("Although the category of high-value speech is hardly exhausted by political speech, no other kind of high-value expression is so consistently placed at the 'core' of expression protected by the Speech Clause [of the First Amendment]."); Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 210–11 (1964) (interpreting the First Amendment in light of Meiklejohn's theory granting special protection to political speech); see also CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 232–42 (1993) (advancing a two-tier theory of free speech with political speech as the paradigmatic case of high-value, and hence most protected, speech); *The Supreme Court, 1989 Term: Leading Cases*, 104 HARV. L. REV. 129, 242 (1990) ("Speech is classified either as 'high value,' enjoying the 'strict scrutiny' extended to 'core' political

An understanding of the First Amendment that foregrounds its relationship with self-government supports this conception of the connection between normative citizenship and political free speech, but that understanding is not necessary to sustain the connection. It might be that the nation-state's joint project has democratic self-governance as its end. For the purposes of the understanding of the First Amendment leveraged here, however, it could just as well be that democratic self-governance functions as an important means in the pursuit of the nation-state's joint-project, whose end is something other than democratic self-government.

Either way, speech about political matters allows for collaboration and contestation around the contents of the joint project, the legal protections necessary to safeguard it, and the individuals who would best steward it. It makes sense, then, that those who are expected to participate in the nation-state's joint project should be those with the greatest claim to speak on the matters that pertain to that project. As Steven Heyman writes, the right of "political free speech . . . is a right to discourse with other individuals who have the same rights of citizenship and participation, and who share certain interests as a community."¹²⁶

Fears about foreign spending on political speech reflect the notion that those who do not participate in the nation-state's joint project should have weaker rights to speak, or perhaps even no right to speak, on matters of politics—especially electoral politics. Thus, for example, a provision of the Federal Election Campaign Act states that "[i]t shall be unlawful for a foreign national, directly or indirectly, to make . . . a contribution or donation . . . in connection with a Federal, State, or local election."¹²⁷ Such a restriction rests in part on concerns about corruption or undue influence.¹²⁸ In this respect, the restriction comports with the constitutional provision prohibiting any "Person holding any Office of Profit or Trust"

speech, or as so utterly worthless that it enjoys no first amendment protection at all and is subject to a mere 'minimum due process standard.'" (footnote omitted); cf. T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 538 (1979) ("Reflection on the *Skokie* case may also suggest that 'political speech' has a special place in our intuitive understanding of this right. It seems unlikely that expression so deeply offensive to bystanders would be deemed to be protected by freedom of expression if it did not have a political character—if, for example, its purpose had been merely to provide entertainment or to promote commerce."). Alon Harel collects many of the classic works drawing a connection between the First Amendment and political speech in *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887, 1892 n.9 (1992).

¹²⁶ Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1347–48 (1998) (footnote omitted).

¹²⁷ 2 U.S.C. § 441e(a)(1)(A) (2006).

¹²⁸ See, e.g., Note, "Foreign" Campaign Contributions and the First Amendment, 110 HARV. L. REV. 1886, 1887–88 (1997) (describing the history of the provision, and noting its connection to concerns about corruption and undue influence).

from accepting, without the consent of Congress, “any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.”¹²⁹ But the restriction on foreign campaign contributions or independent expenditures rests as well on the notion that foreigners, as Lloyd Bentsen famously said, do not “have any business in our political campaigns,”¹³⁰ even if their interests align with those of a significant segment of the American people.¹³¹ As such, the restriction is akin to the Supreme Court’s pronouncement in *Cabell v. Chavez-Salido*¹³²—a case upholding California’s exclusion of aliens from peace officer positions against a Fourteenth Amendment equal protection challenge—that “[t]he exclusion of aliens from basic governmental processes is . . . a necessary consequence of the community’s process of political self-definition.”¹³³ The government is a government by and for the people,¹³⁴ and the people—i.e., the demos—does not include foreigners, our constitutional culture makes clear.¹³⁵

Nor, for similar reasons, should “the people” include corporations. As the *Chavez-Salido* Court noted, “[s]elf-government, whether direct or through representatives, begins by defining the scope of the community of

¹²⁹ U.S. CONST. art. I, § 9, cl. 8; see also Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 393 n.245 (2009) (noting the historic distrust of foreign influence in the corporate sphere because of the perception that “foreign powers and individuals had no basic investment in the well-being of the country”).

¹³⁰ 120 CONG. REC. 8684, 8783 (1974).

¹³¹ For the view that “financial participation by foreign corporations in U.S. elections should be categorized as wholly unprotected speech under the First Amendment,” see Matt A. Vega, *The First Amendment Lost in Translation: Preventing Foreign Influence in U.S. Elections After Citizens United v. FEC*, 44 LOY. L.A. L. REV. 951 (emphasis added).

¹³² 454 U.S. 432 (1982).

¹³³ *Id.* at 434–36, 439; see also U.S. CONST. art. I, § 2, cl. 2 (prohibiting an individual from running for Congress if he or she has not been a citizen of the United States for at least seven years—a restriction that can be understood as seeking to ensure adequate participation in the nation-state’s joint project before an individual can seek to represent the people’s interests in safeguarding and furthering it).

¹³⁴ The language here is an obvious paraphrase of Abraham Lincoln’s Gettysburg Address, Gettysburg, PA (Nov. 19, 1863).

¹³⁵ Indeed, the Supreme Court has seized upon the word “people” in some amendments to exclude foreigners from the Bill of Rights. Thus, for example, it is precisely because the Fourth Amendment protects the “right of the *people* to be secure . . . against unreasonable searches and seizures,” U.S. CONST. amend. IV (emphasis added)—whereas the Fifth and Sixth Amendments do not make reference to the people—that a plurality of the Supreme Court has found that aliens outside U.S. territory do not enjoy the Fourth Amendment’s protections, even if the Fifth and Sixth Amendments extend to them. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (“[‘People’] refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”). Timothy Zick has suggested that this line of argument could ground a finding that aliens do not enjoy First Amendment rights outside U.S. territory either. Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1595 (2010). *Cf. id.* at 1544 (“Traditional First Amendment theories or justifications have generally assumed that the First Amendment is a wholly domestic concern, one generally impervious to events, laws, or persons outside U.S. borders.”).

the governed and thus of the governors as well”¹³⁶ The governed might well consist of all legal citizens and immigrants, but the governors consist only of those participating in the project of self-government. For the reasons articulated in Part IV, corporations have no place in this project.

In sum, the Supreme Court, in *Citizens United*, was clearly correct in noting that speech “is ‘indispensable to decision-making in a democracy.’”¹³⁷ Where the Court went wrong was in concluding therefrom that corporations should enjoy the same political speech rights as individuals. The interest in ensuring rights to robust political speech is an interest held by those whom we have identified as rightful political speakers—*viz*, those who are entitled and expected to participate in the joint project that political speech is about. Corporations are not participants in that joint project. As indicated in Part II, there is no reason to think that allowing them unfettered access to the airwaves will enhance the quality of the speech offered to normative citizens. More to the point, there is no reason to think that the corporation—excluded as it is from the nation-state’s joint project—deserves to have the same political speech rights as normative citizens.¹³⁸

VI. FREE SPEECH RIGHTS FOR THE PRESS

If corporations, like foreigners, have “no business” spending money on political speech then, contrary to the holding in *Citizens United*, the government may prohibit corporations from using money from their coffers to pay for political speech, just as the government imposes these prohibitions on foreigners. If the Supreme Court did get matters wrong—with potentially devastating consequence—this conceptualization should yield sufficient justification and political will to secure a constitutional amendment overturning the decision.

Yet suppose that such an amendment is passed, and we revert to the campaign finance regime that *Citizens United* invalidated. That regime is susceptible to a concern about restrictions on the press that permeates the *Citizens United* decision; as Justice Kennedy noted in the majority opinion:

[M]edia corporations accumulate wealth with the help of the corporate form, the largest media corporations have “immense aggregations of wealth,” and the views expressed by media corporations often “have little or no

¹³⁶ *Chavez-Salido*, 454 U.S. at 439.

¹³⁷ *Citizens United v. FEC*, 130 S. Ct. 876, 904 (2010) (quoting *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 (1978)).

¹³⁸ See *supra* notes 27–29 and accompanying text.

correlation to the public's support" for those views. Thus, under the Government's [and the dissent's] reasoning, wealthy media corporations could have their voices diminished to put them on par with other media entities.¹³⁹

Justice Kennedy concluded: "There is no precedent for permitting this under the First Amendment."¹⁴⁰

This Part offers some preliminary suggestions for ways in which media corporations might enjoy free speech rights stronger than those of other corporations.

Broadly speaking, three classes of strategies present themselves. The first urges recognition of the fact that the Constitution already offers distinctive protections for the press that justify conferring upon media corporations free speech rights that may be rightly denied to other corporations. The second strategy seeks to create these enhanced protections, through statutory or constitutional means. Finally, the last strategy asks the press to bite the bullet and operate within the constraints to which other corporations might be subject. Though it would be beyond the scope of this Article to offer a detailed account of how any of these strategies might work, this Part offers some general remarks about each.

A. Existing Constitutional Protections for the Press

Recently, some First Amendment scholars have advocated an institution-sensitive approach to the First Amendment, which would accord institutions that further First Amendment values greater protection than those that do not.¹⁴¹ Thus, for example, Frederick Schauer has argued that the Court does, and should, confer greater constitutional protection on the institutional press because of the important role the press plays as a "marker[] of deeper background First Amendment values."¹⁴² Similarly, Joseph Blocher has argued for enhanced protections for those institutions that lower transaction costs in the marketplace of ideas,¹⁴³ including the institutional press, which "serv[es] as a clearinghouse for information . . . [and] explain[s] and distribut[es] information about other institutions . . . [w]ithout [which] . . . it would be impossible for citizens to cast informed votes."¹⁴⁴ If these scholars are correct, then there are

¹³⁹ *Citizens United*, 130 S. Ct. at 905 (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

¹⁴⁰ *Id.*

¹⁴¹ For works especially notable on this front, see Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 828–29 (2008), and Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1274–75 (2005).

¹⁴² Schauer, *supra* note 141, at 1274.

¹⁴³ Blocher, *supra* note 141, at 857.

¹⁴⁴ *Id.*

grounds intrinsic to our constitutional culture that could justify protections for the press that other corporations do not enjoy.

While Schauer and Blocher ground their accounts in understandings of the First Amendment's objectives and underpinnings, Sonja West has recently suggested that the First Amendment's text itself contains explicit protection for the media, though that protection has largely lain dormant.¹⁴⁵ More specifically, West argues that constitutional treatment of the Free Press Clause has failed adequately to distinguish it from the Free Speech Clause, and case law and commentary have failed adequately to distinguish speakers from newsmakers. This is unfortunate, West contends, because an overly expansive understanding of the press entails less protection, rather than more.¹⁴⁶ For example, judges will be disinclined to recognize rights like an entitlement to trespass for the sake of gathering and then disseminating information if everyone can claim to be a newsmaker—as everyone can under an understanding of the press that includes the traditional hard-nosed reporter to the blogger in her pajamas.¹⁴⁷ Thus, West concludes, we could have more freedom of the press if we had a narrower definition of “press.”¹⁴⁸ West tentatively offers some possibilities for arriving at such a definition.¹⁴⁹ In the end, she embraces a functional approach that would grant heightened protections to individuals or entities that fulfilled the unique functions of the press, which she identifies as conveying newsworthy information and checking government.¹⁵⁰

The important point for present purposes is not how one should conceive of the press but instead the more general point that the Constitution seems to provide for press exceptionalism. Thus, Justice Kennedy's concern that unprotected corporate speech would lead to an unprotected press need not result if one recognizes, as West urges, that the press enjoys protection under a provision separate from the First Amendment's free speech clause.¹⁵¹

¹⁴⁵ See Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1030–31 (2011) (suggesting that the Speech Clause has “swallow[ed] up” the Press Clause).

¹⁴⁶ *Id.* at 1056.

¹⁴⁷ *Id.* at 1048 n.165. The reference to a blogger in her pajamas derives from Judge Sentelle's concurring opinion in *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1156 (D.C. Cir. 2006) (Sentelle, J., concurring), in which the D.C. Circuit refused to recognize a reporter's right to withhold the name of a confidential source. Judge Sentelle expressed defeat at the prospect of defining the press narrowly, such that the purported right would be enjoyed only by traditional reporters. *Id.*

¹⁴⁸ West, *supra* note 145, at 1068.

¹⁴⁹ *Id.* at 1069–70 (stating that the press could be defined “through the lens of its unique functions”).

¹⁵⁰ *Id.* at 1069–70.

¹⁵¹ *Id.* at 1033.

B. *Changing the Law to Protect the Press*

Even if one denies that the Constitution currently provides for enhanced protections for the press,¹⁵² it would not follow that such protections were constitutionally infirm or politically infeasible. After all, to suppose that Congress *may* regulate or restrict the speech of corporations does not entail that Congress *must* do so. In a world without *Citizens United*, Congress could limit corporate political speech in general while still affording robust protections to the political speech of media corporations. Thus, for example, Congress could enact a statutory exemption for media corporations.

To be sure, careful drafting of the statute would be required; otherwise, many non-media corporations might seek to exploit this exemption by forming media subsidiaries and funneling all of the money that they would spend on political speech to these subsidiaries. Yet the statute could address this concern by defining “media corporation” narrowly. For example, drawing upon restrictions for the Political Action Committees (PACs) of foreign-owned corporations,¹⁵³ Congress could exclude from its statutory protection media subsidiaries that had directors or employees of the parent corporation participate in the operation of the media subsidiary, serve as its officers, or participate in the selection of its officers or directors. These corporations would be subject to the same restrictions that would govern non-media corporations, while media subsidiaries that satisfied the independence requirements of the envisioned statute would enjoy enhanced protections.

As an alternative to a statutory exemption, Congress might instead promulgate the exemption through a constitutional amendment. A constitutional amendment might be more difficult to pass, given the supermajority requirements for amendments, but an amendment would entrench protection of media corporations, and thereby avoid any concern about the relative ease with which Congress can repeal one of its own statutes.

C. *Biting the Bullet*

Finally, rather than carving out an exemption for media corporations, these corporations could simply resign themselves to biting the bullet. To

¹⁵² Some commentators deny that there is a “Free Press” Clause distinct from the “Free Speech” Clause. These commentators argue that the Free Press Clause is intended to afford protection not to the institution of the press, but instead to the spoken or written word of the individuals or entities to which the Amendment extends. Adam Liptak, *In Arguments on Corporate Speech, the Press Is a Problem*, N.Y. TIMES, Feb. 8, 2011, at A12 (“There are good arguments both ways about whether corporations ought to be covered by the First Amendment. But it is harder to say that some corporations have First Amendment rights and others do not.”).

¹⁵³ See 2 U.S.C. § 441e (2006) (prohibiting foreign nationals from contributing to United States election campaigns); 11 C.F.R. § 110.20(i) (2010) (same).

see how this would work, imagine that the restrictions on corporate political speech were identical to those that *Citizens United* invalidated. Those restrictions prohibited expenditures for express advocacy—i.e., speech in support of or opposition to a political candidate—in the month before a primary, or two months before an election. But “express advocacy” had been defined narrowly. Specifically, in a 2007 opinion, the Supreme Court had held that “express advocacy” should be understood only as speech that could not reasonably be interpreted as anything other than an advertisement supporting or opposing a candidate for office.¹⁵⁴ This understanding of express advocacy clearly would not extend to typical reporting. It would arguably exclude letters to the editor supporting or opposing candidates for office, at least if these were not too heavily weighted toward one candidate and against her opponent. And it might even exclude op-eds endorsing or opposing candidates, so long as these were written by individuals who were not on the media corporation’s payroll. Further, to the extent that the restrictions required forbearance on express advocacy, they would apply only during the specified time periods. Thus, media corporations could issue political endorsements so long as these were published more than a month before a primary or sixty days before an election.¹⁵⁵ On this understanding of the stakes of a provision like the one that *Citizens United* invalidated, the prospect of an unfree press—let alone the specter of book banning that the Justices in the majority invoked¹⁵⁶—is illusory.

VII. CONCLUSION

The Supreme Court deemed restrictions on corporate political speech unconstitutional because the Court neglected to consider distinctions between the corporation and the individual citizen—distinctions that

¹⁵⁴ *FEC v. Wis. Right to Life*, 551 U.S. 449, 469–70 (2007).

¹⁵⁵ *Wisconsin Right to Life* dealt with an as-applied challenge. *Id.* at 456. The *Citizens United* majority declared § 203 facially unconstitutional because it was concerned about the chilling effect of as-applied challenges, which would require the corporate speaker to seek advance permission to engage in speech to which § 203 was not meant to extend. *Citizens United v. FEC*, 130 S. Ct. 876, 882 (2010). A similar concern might arise in the face of the proposal contained in the text accompanying this note—*viz.*, that media corporations would need to seek declaratory judgments prior to publishing anything that even mentioned a candidate for office, or else defend themselves against an onslaught of governmental suits alleging infringement of a statutory provision like § 203. The concern could easily be allayed, however, by enacting a statute that codified the understanding of express advocacy that *Wisconsin Right to Life* articulated, and exempting from congressional regulation speech by media corporations of that kind.

¹⁵⁶ *See, e.g.*, Liptak, *supra* note 152, at A12 (describing an exchange between Justice Alito and a government lawyer at the initial *Citizens United* hearing in which the Justice implied that § 203 could result in a ban on books containing express advocacy). Justices Scalia and Roberts pressed the issue of book banning at the second oral argument. Transcript of Oral Argument at 65–66, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205).

ground more robust protection for the individual American's speech than for the corporation's. Political speech is speech that is intimately connected with the nation-state's joint project. Corporations are neither expected to participate in that project, nor eligible to do so. As such, Congress may abridge their political speech—especially if doing so will yield greater protection or uptake for the political speech of normative citizens. This is not to say that some kinds of corporations—such as media corporations—may not enjoy protections greater than those afforded to other corporations, or that corporations may not be valuable speakers on matters for which they have unique competencies.¹⁵⁷ It is to say that protections for corporate political speech do not flow from their own constitutional status. Absent some special reason for protecting corporate political speech, the robust political free speech rights that individuals possess need not be conferred upon corporations.

More generally, because corporations are not normative citizens, they may well have weaker entitlements to other provisions of the Constitution related to the nation-state's joint project. Future work should consider the extent to which the corporation's constitutional status, as elucidated here, informs the strength and scope of the constitutional rights it can legitimately claim.

Finally, the account articulated in this Article should prompt those concerned about corporate social responsibility to consider retreating from a conception of the corporation as a "citizen." The "good corporate citizen" rhetoric threatens to legitimate an understanding of the corporation as equal in status to the individual citizen. For the reasons adduced here, the corporation does not enjoy that kind of equality.

¹⁵⁷ See, e.g., Jill E. Fisch, *How Do Corporations Play Politics? The Fedex Story*, 58 VAND. L. REV. 1495, 1565–68 (2005) (explaining that corporations are often more knowledgeable about the costs and benefits of regulatory changes than politicians and are therefore in a unique position to best understand proposed changes).