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## Could a Corporation Serve in Congress? Corporations and Citizenship under the Constitution

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COULD A CORPORATION SERVE IN CONGRESS?  
CORPORATIONS AND CITIZENSHIP  
UNDER THE CONSTITUTION

JOEL M. GRACZYK\*

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Abstract

*Recent Supreme Court decisions such as Citizens United v. FEC and Burwell v. Hobby Lobby Stores, Inc. have triggered an ongoing national discussion about the proper role for corporations in American political life. Popular discourse characterizes those cases as embracing the notion that “corporations are people,” a characterization that raises a novel question: Could a corporation exercise political rights by serving in Congress? This Article engages with a limited form of that question, asking whether a*

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corporation qualifies as a “citizen” under the Qualifications Clauses in Article I of the United States Constitution for purposes of serving in the United States House or Senate. Although allowing a corporation to serve in Congress would be consistent with the Supreme Court’s broad interpretation of the Qualifications Clauses, this Article argues that treating a corporation as a citizen would actually be inconsistent with the Court’s modern corporate rights cases. Historically, the Court adopted the metaphor of the corporation as a “person” when evaluating corporate rights. But more recently, the Court has examined corporate rights without explicitly describing corporations as persons. Rather, the Court’s latest decisions instead identify corporations as possessing rights only where human people seek to use the corporate form to collectively exercise the constitutional rights that they each possess as individuals. Treating a corporation as a person independently capable of exercising political rights would deviate from that associative reasoning. Despite creating the popular impression that the Court treats corporations as persons, the reasoning that animates the Court’s recent cases thus indicates that corporations are not persons for citizenship purposes.

## I. INTRODUCTION

The Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission*<sup>1</sup> has ignited an ongoing national conversation about the appropriate role for corporations in political discourse.<sup>2</sup> Unabashedly rejecting congressional limitations on independent corporate speech related to elections, the Court concluded “that First Amendment protection extends to corporations” and that “political

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1. 558 U.S. 310 (2010).

2. See, e.g., Editorial, *A Trickle-Down Effect of Citizens United*, N.Y. TIMES, Oct. 14, 2014, at A24, available at <http://www.nytimes.com/2014/10/14/opinion/a-trickle-down-effect-of-citizens-united.html> [<http://perma.cc/4KDP-XQKC>]; Matt Bai, *How Did Political Money Get This Loud?*, N.Y. TIMES MAG., July 22, 2012, at MM14, available at <http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html?pagewanted=all> [<http://perma.cc/8UJA-2P4S>] (“The oft-repeated narrative of 2012 goes like this: Citizens United unleashed a torrent of money from businesses and the multimillionaires who run them, and as a result we are now seeing the corporate takeover of American politics.”); Bradley Smith, *The Incumbent’s Bane: Citizens United and the 2010 Election*, Jan. 25, 2011, at A15, available at <http://online.wsj.com/articles/SB1001424052748703555804576101622398145818> [<http://perma.cc/FL3Y-A3R4>].

speech does not lose First Amendment protection ‘simply because its source is a corporation.’”<sup>3</sup>

In the wake of that decision, various commenters have either embraced or decried the notion that “corporations are people,”<sup>4</sup> and independent corporate spending on elections has increased substantially.<sup>5</sup> Shortly after the Court released its decision, *The Onion* went so far as to run a story about the Court recognizing a new right for corporations under the Constitution: “In a landmark decision that overturned decades of legal precedent, the U.S. Supreme Court ruled 5–4 Tuesday to remove all restrictions that had previously barred corporations from holding public office.”<sup>6</sup>

At first glance, the story in *The Onion* seems like that paper’s usual form of satire—carrying the logic underlying current events to an apparently ridiculous conclusion. But on closer reading, the story’s phrasing raises an interesting question: Under the U.S. Constitution, does anything actually preclude a corporation from holding political office? Dissenting from the Court’s opinion in *Citizens United*, Justice Stevens

3. *Citizens United*, 558 U.S. at 342 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)).

4. See, e.g., Eric L. Lewis, *Who Are “We the People”?*, N.Y. TIMES, Oct. 5,

2014, at SR1, available at <http://www.nytimes.com/2014/10/05/opinion/sunday/who-are-we-the-people.html> [<http://perma.cc/YP5H-Y6GJ>] (“This inability to make the distinction between individual corporate stakeholders and the legal fiction of the corporations is not only weird, it is bad corporate law. Whatever else corporations may be, they are not the sum of their people.”); Jack Welch & Suzy Welch, *It’s True: Corporations Are People*, WALL ST. J., July 16, 2012, at A13,

available at <http://online.wsj.com/articles/SB10001424052702303740704577524823306803692> [<http://perma.cc/H3PD-NEL2>] (“Of course corporations are people. What else would they be? Buildings don’t hire people. Buildings don’t design cars that run on electricity or discover DNA-based drug therapies that target cancer cells in ways our parents could never imagine.”); see also Philip Rucker, *In Iowa, Romney Says “Corporations Are People,”* WASH. POST, Aug. 12, 2011, at A4,

available at [http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I\\_story.html](http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html) [<http://perma.cc/NL23-4KVY>] (“‘Corporations are people, my friend,’ Romney said. . . . ‘Everything corporations earn ultimately goes to people. Where do you think it goes?’”).

5. See, e.g., *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, [https://www.opensecrets.org/outsidespending/cycle\\_tots.php](https://www.opensecrets.org/outsidespending/cycle_tots.php) [<https://perma.cc/7AXC-B5D7>] (last visited Feb. 16, 2016).

6. *Supreme Court Allows Corporations to Run for Political Office*, THE ONION (Feb. 3, 2010), <http://www.theonion.com/articles/supreme-court-allows-corporations-to-run-for-polit,7071/> [<http://perma.cc/46VE-T589>].

questioned whether the Court's logic would lead to the Court later recognizing a corporate right to vote.<sup>7</sup> Also seemingly critiquing the Court's decision, a Maryland corporation named Murray Hill, Inc. actually went so far as to declare itself a candidate for election to the House.<sup>8</sup> Its bid failed when Maryland denied its voter registration on the grounds that it was not a human being.<sup>9</sup>

An arguably more serious proposal came in 2013, when a shareholder of Goldman Sachs Group, Inc., proposed that the corporation seek political office.<sup>10</sup> In anticipation of the 2013 proxy statement, the shareholder called for including a resolution about investigating the possibility of Goldman Sachs seeking political office:

7. 558 U.S. at 424–25 (Stevens, J., dissenting) (“Under the majority’s view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.”). A corporation asserting a right to vote seems to be the factual situation most likely to give rise to a case requiring the Court to determine whether corporations are citizens. See *infra* note 93.

8. John Wagner, *Campaign Stunt Launches a Corporate “Candidate” for Congress*, WASH. POST, Mar. 13, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/12/AR2010031204127.html> [<http://perma.cc/QJR9-PA2E>]. The proponents of Murray Hill’s candidacy cited *Citizens United* as conferring on it the right to hold office. William Klein & Eric Hensal, *Next Step After ‘Citizens United’: Corporate Candidates* (Oct. 29, 2010 4:24 PM EDT), <http://www.politico.com/news/stories/1010/44388.html> [<http://perma.cc/FSS9-UPKS>] (“When the Supreme Court ruled in the *Citizens United* decision that corporations had the same rights as individuals to contribute to federal candidates, the millstone of human influence began to be lifted from U.S. Politics. For campaign contributors, the court said, life can begin equally at birth or with articles of incorporations. In other words, corporations are people, too.”)

9. *Election Board Halts Murray Hill Inc.’s Congressional Run: Is a Corporations a Citizen or Not?*, EXAMINER.COM (Mar. 19, 2010, 4:18 PM MST), <http://www.examiner.com/article/election-board-halts-murray-hill-inc-s-congressional-run-is-a-corporation-a-citizen-or-not> [<http://perma.cc/R83M-SZV4>].

10. Letter from John C. Harrington, President, Harrington Invs., Inc., to John F.W. Rogers, Sec’y to the Bd. of Dirs., The Goldman Sachs Grp., Inc. (Oct. 12, 2012) [hereinafter Harrington Letter], available at <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/johnharrington021913-14a8.pdf> [<http://perma.cc/LWV9-LSWU>]; see also Michael J. Moore, *Goldman Rejects Proposal that Firm Run for Elected Office*, BLOOMBERG.COM (Mar. 25, 2013 12:22 PM CT), <http://www.bloomberg.com/news/20130325/goldman-rejects-proposal-that-firm-run-for-elected-office.html> [<http://perma.cc/EM2T-RT7S>].

Therefore, be it resolved, [t]hat the Board of Directors undertake an analysis of the opportunities under federal and state law for Goldman Sachs, as a “person” with certain rights under the laws of the United States and individual states and territories, to run for electoral office where permissible, and to issue a report to shareholders, at reasonable cost and excluding confidential information, by December 31, 2013, on policy options regarding whether and where the corporation can seek to itself run, as a person, for electoral positions.<sup>11</sup>

The shareholder made a practical argument in favor of seeking office. He suggested that continued donations on behalf of political campaigns would be more likely to have an adverse impact on the company’s reputation than would an actual run for office.<sup>12</sup> “[W]e believe it is more appropriate for the Corporation to forthrightly participate in the political process than to do so covertly by availing itself of the opportunity for a behind-the-scenes and potentially anonymous role in politics and political advertising.”<sup>13</sup> After consulting with the SEC to obtain a no-action letter, Goldman Sachs excluded the proposal from the proxy statement.<sup>14</sup>

Although Goldman Sachs did not follow the path suggested in the shareholder proposal, this Article seeks to engage with the federal constitutional issues that the proposal raised. Specifically, this Article asks whether a corporation qualifies as a “citizen” under the Qualifications Clauses in Article I of the U.S. Constitution for purposes of serving in the United States House or Senate.<sup>15</sup>

11. Harrington Letter, *supra* note 10, at 2.

12. *Id.* at 2.

13. *Id.*

14. Letter from Ted Yu, Senior Special Counsel, Sec. & Exch. Comm’n, to Beverly L. O’Toole, The Goldman Sachs Grp., Inc. (Feb. 19, 2013), *available at* <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/johnharrington021913-14a8.pdf> [<http://perma.cc/LWV9-LSWU>] (“[W]e note your representation that Goldman Sachs ‘currently has no involvement, never has had any involvement, and has no plans to become involved in the business of running for political office.’ Accordingly, we will not recommend enforcement action to the Commission if Goldman Sachs omits the proposal from its proxy materials . . . .” (quoting Letter from Beverly L. O’Toole to Sec. & Exch. Comm’n (Dec. 12, 2012), *available at* <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/johnharrington021913-14a8.pdf> [<http://perma.cc/LWV9-LSWU>])).

15. U.S. Const. art. I, § 1, cl. 2; U.S. CONST. art. I, § 3, cl. 3. This Article focuses exclusively on the “Citizen” requirement in these two clauses, as the age

Answering that question requires synthesizing case law and scholarship surrounding the Qualifications Clauses and corporate rights with theories about the nature of citizenship and the social obligations and responsibilities that flow from the status of “citizen.” Part II begins with an examination of the meaning of citizenship under the Constitution, followed by a discussion about the Supreme Court’s historic and contemporary approaches to corporate rights. Part III then

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and residency requirements seem likely to prove less controversial. Federal statutes and case law already provide mechanisms for treating a corporation as a citizen of a state, particularly for purposes of jurisdiction. 28 U.S.C. § 1332(c)(1) (2012) (“[A] corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . . .”); 46 U.S.C. § 50501(b) (2012) (“[A] corporation is deemed to be a citizen of the United States only if . . . (1) it is incorporated under the laws of the United States or a State; (2) its chief executive officer, by whatever title, and the chairman of its board of directors are citizens of the United States; and (3) no more of its directors are noncitizens than a minority of the number necessary to constitute a quorum.”); *Hertz Corp. v. Friend*, 559 U.S. 77 (2010) (interpreting the phrase “principal place of business” in 28 U.S.C. § 1332). This body of law designates corporations as citizens of particular jurisdictions for practical purposes pertaining to efficient enforcement of the law. Although this existing law would not foreclose a different definition of corporate state of residence for Qualifications Clause purposes, it does illustrate a degree of agreement within the legal community regarding the method for determining a corporation’s state of residence.

After settling on a corporation’s state of residence, discerning its age should prove easier. A corporation will necessarily have a date of incorporation that could serve as its date of “birth.” For example, Goldman Sachs Group, Inc.’s July 21, 1998, date of incorporation in Delaware suggests that it would not yet be old enough to represent that state in Congress. *Department of State: Division of Corporations: General Information Name Search*, STATE OF DELAWARE, <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx> [<https://perma.cc/SQ3F-REQQ>] (last visited Feb. 16, 2016) (search for “Goldman Sachs Group” and follow the hyperlink “The Goldman Sachs Group, Inc.”).

An analysis of a corporation’s eligibility to run for or serve as president is also beyond the scope of this Article because of Article II’s “natural born Citizen” limitation on eligibility to serve as president. *See* U.S. CONST. art. II, § 1, cl. 5 (“No person except a *natural born Citizen*, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of the President . . . .” (emphasis added)); *see also* Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 B.Y.U. L. REV. 927; *cf.* *Schneider v. Rusk*, 377 U.S. 163, 165 (1964) (“We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive. The only difference drawn by the Constitution is that only the ‘natural born’ citizen is eligible to be President.”).

applies that law and theory to answer the question of whether a corporation is a citizen for purposes of the Qualifications Clauses. Part IV concludes.

Although the Court has interpreted the Qualifications Clauses strictly,<sup>16</sup> allowing a corporation to serve in Congress would nonetheless be inconsistent with the Court's recent cases involving corporate rights.<sup>17</sup> Opinions such as *Citizens United* and *Hobby Lobby* do not explicitly adopt the metaphor of the corporation as a person, and permitting a corporate representative in Congress would not advance the rights of individual voters;<sup>18</sup> thus, the Supreme Court likely would not hold that a corporation is a citizen for Qualifications Clause purposes.

## II. CITIZENSHIP AND CORPORATE RIGHTS

Citizenship can be an amorphous concept, and neither the Constitution nor the Supreme Court provides a precise definition for the term. Whether a corporation qualifies as a citizen under these clauses depends upon whether the Court's chosen theory of corporate entities is consistent with the definition of "citizen" under the Qualifications Clauses. Although the Fourteenth Amendment and related case law do not specifically exclude corporations from the definition of citizen, the Supreme Court has not explicitly extended the metaphor of the corporation as a person to hold that corporations are citizens under the Constitution.<sup>19</sup>

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16. See *infra* Part III.A.

17. See *infra* Part III.B.1.

18. See *infra* Part III.B.2.

19. See Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS'N LEGAL WRITING DIRECTORS 169, 182–83, 186–88 (2004); Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 99 (2014) ("Legal scholars have long found the Supreme Court's lack of a coherent approach or engagement with theoretical questions concerning the nature of the firm deeply disturbing, calling the Court's rulings 'ad hoc,' 'right-by-right,' 'arbitrary,' 'sporadic,' inconsistent, and incoherent. Scholarly objections to the Court's rulings concerning corporate constitutional rights have only increased post-*Citizens United*." (footnote omitted) (first quoting Tom Benningson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech*, 39 CONN. L. REV. 379, 399 (2006); then quoting Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 62 (2005); and then quoting Charles R. O'Kelly, Jr., *The Constitutional Rights of Corporations*

A. The Qualifications Clauses and Citizenship Under the Constitution

When engaging with the meaning of the term “citizen” as used in the Constitution, the Supreme Court and scholars interpreting its case law frequently describe citizenship in an imprecise manner. They speak of rights and responsibilities that flow from citizenship without expressing the exact conditions that a person must meet in order to attain the status of “citizen.” However, in the absence of a clear test for evaluating citizenship status, the Constitution’s text ultimately focuses any analysis on determining whether a corporation is a “person” for constitutional purposes.

1. *The Supreme Court’s Comments on the Definition of “Citizen”*

According to the Qualifications Clauses, only a person who is a “Citizen of the United States” may serve in the House or Senate.<sup>20</sup> Although the word “citizen” appears a number of times in the Constitution, the document never explicitly defines the term.<sup>21</sup> And despite the absence of a definition in the Constitution’s text, the Supreme Court in its cases interpreting the Qualifications Clauses has provided no guidance regarding the term’s meaning. Consequently, an analysis of the citizenship requirement under the Qualifications Clauses requires a more general inquiry into the Court’s definition of “citizenship,” broadly speaking.

An analysis of citizenship under the Constitution begins with the Fourteenth Amendment: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

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*Revisited: Social and Political Expression and the Corporation After First National Bank v. Bellotti*, 67 GEO. L.J. 1347 (1979)).

20. U.S. CONST. art. I, § 1, cl. 2 (“No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”); U.S. CONST. art. I, § 3, cl. 3 (“No person shall be a Senator who shall not have attained to the age of thirty Years, and have been nine years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.”).

21. David Fontana, *A Case for the Twenty-First Century Constitutional Canon: Schneiderman v. United States*, 35 CONN. L. REV. 35, 86 (2002); see *Sugarman v. Dougal*, 413 U.S. 634, 651 (Rehnquist, J., dissenting) (noting that the “distinction” between citizens and non-citizens is “constitutionally important in no less than 11 instances”); Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681, 691 (1997).

States and of the State wherein they reside.”<sup>22</sup> With an exception for children born to foreign diplomats, this section of the Fourteenth Amendment grants a broad birthright citizenship in the United States,<sup>23</sup> and no other limiting language in the document gives meaning to the term “citizen.” Although the *Slaughter-House Cases*<sup>24</sup> describe this section as providing a “clear and comprehensive definition of citizenship,” that clarity likely referred to the fact that, at the time, the amendment established that national citizenship existed at all.<sup>25</sup>

When discussed by the Court, the meaning of citizenship seems to parallel abstract characterizations of citizenship, which describe citizenship as “a particular set of political practices involving specific public rights and duties with respect to a given political community.”<sup>26</sup> Early in the Republic’s history, Justice Bushrod Washington, serving in his capacity as a Circuit Justice, articulated a broad theory of citizenship that incorporated rights and responsibilities in line with the abstract definition:

The privileges and immunities . . . which belong, of right, to the citizens of all free governments . . . [include p]rotection by the government . . . with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.<sup>27</sup>

Similarly, in *Minor v. Happersett*,<sup>28</sup> an early case interpreting the Fourteenth Amendment, the Court focused on the “association of

22. U.S. CONST. amend. XIV, § 1.

23. Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 63-64 (1997)

24. 83 U.S. (16 Wall.) 36 (1872).

25. *Id.* at 72-73; see also Smith, *supra* note 21, at 683 (“[T]echnically, the language of the first sentence of Section 1 does not provide a true ‘definition’ of the term ‘citizen,’ but rather a statement of the conditions sufficient for attaining the status of ‘citizen’ . . .”).

26. RICHARD BELLAMY, *CITIZENSHIP: A VERY SHORT INTRODUCTION* 2 (2008); see also J.G.A. Pocock, *The Ideal of Citizenship Since Classical Times*, in *THEORIZING CITIZENSHIP* 29, 47 (Ronald Beiner ed., 1995) (describing citizenship as “a practice of rights, of pursuing one’s own rights and assuming the rights of others within the legal, political, and even cultural communities that have been formed for purposes of this kind”).

27. *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230) (Washington, Circuit Justice), *quoted in* Eisgruber, *supra* note 23, at 58 n.16.

28. 88 U.S. (21 Wall.) 162 (1874).

persons” who formed the “political community” of the Republic—the citizens—to describe the nature of the citizenship relationship: “Each one of the persons associated becomes a member of the nation . . . . He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.”<sup>29</sup> More recently, then-Justice Rehnquist, writing in a dissent, emphasized the responsibilities inherent in citizenship, describing it as “a status in and relationship with society which is continuing and more basic than mere presence or residence.”<sup>30</sup> Although none of these statements set forth a clear doctrine defining who qualifies as a citizen under the constitution, they do suggest an assumption that citizens will have the ability to exercise certain rights in exchange for a degree of responsibility toward and participation in society.

In *Schneider v. Rusk*,<sup>31</sup> the Court provided additional insights about the meaning of citizenship by evaluating the relative rights of natural born citizens and naturalized citizens with regard to expatriation by Congress.<sup>32</sup> Holding that Congress could not deprive a naturalized citizen of his or her citizenship merely because the naturalized citizen lives abroad (even in his or her home country) for an extended period of time, the Court emphasized the equality of rights and protections that flowed from obtaining the status of citizen, regardless of the manner in which the person attained citizenship.<sup>33</sup> Treating corporations as citizens, then, would seem to require granting them the same rights and expecting that they assume the same responsibilities as natural persons. *Schneider*, however, does not necessarily provide insights with regard to determining which entities should qualify as citizens.

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29. *Id.* at 165–66.

30. Sugarman v. Dougal, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting) (“In constitutionally defining who is a citizen of the United States, Congress obviously thought it was doing something, and something important.”).

31. 377 U.S. 163 (1964).

32. *Id.* at 166–67.

33. *Id.* at 168–69 (“A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second class citizenship. Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons.”).

## 2. *Scholarly Commentary on the Definition of Citizenship*

Various commenters working with the Court's sparse comments have struggled to articulate a standard that could function as a test for citizenship. For those who conceive of citizenship as a balance between rights and obligations, "citizenship provides a domain where we find we can assert unashamedly our attachment to the notion of public duties, to civic virtue, to engagement in the political life of the nation largely for its own sake, not for its instrumental contribution to the advancement of private preferences."<sup>34</sup> In the same vein as others who have discussed the balancing nature of citizenship, one scholar assumed that "a resident of a polity is a citizen if and only if the resident is not subject to deportation and is entitled to vote after reaching adulthood."<sup>35</sup>

Using that balance between rights and responsibilities as a critical juncture for evaluating the citizenship status of corporations, another scholar has advanced a model of "normative citizenship" that distinguishes legal citizenship from citizenship for purposes of civic participation.<sup>36</sup> Under the model, normative citizens constitute a subgroup within the larger category of legal citizens, which includes corporations.<sup>37</sup> Normative citizens are those citizens "who are expected by their compatriots to participate in the nation-state's central institutions and fulfill their associative obligations to their fellows."<sup>38</sup> In practice, normative citizens, but not legal citizens, participate in three critical institutions: jury duty, military service, and voting.<sup>39</sup>

Yet the strongest critique of normative citizenship lies within its own definition: "If expectations were changed (and some way for

34. David A. Martin, *The Civic Republican Ideal for Citizenship*, 35 VA. J. INT'L L. 301, 306 (1994).

35. Eisgruber, *supra* note 23, at 58.

36. Amy J. Sepinwall, *Citizens United and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575, 594 (2012) (characterizing citizenship for political purposes as "contemplat[ing] something more rigorous than mere formal recognition of one's membership within a sociopolitical entity").

37. *Id.* at 602.

38. *Id.* at 597, 602 ("[P]articipating 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.").

39. *Id.* at 595, 604 ("[C]orporations 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 join project.").

corporations to vote, sit on a jury, and serve in the military was developed), corporations would then count as normative citizens. But these things are not currently expected of corporations.”<sup>40</sup> Under this conception of the corporation, a corporation could cross that line into normative citizenship—thus acquiring all of the rights and protections available to other normative citizens—simply by embracing the obligations consistent with civic participation.<sup>41</sup> However, others might

40. *Id.* at 605.

41. Historical analogues in the Anglo-American tradition suggest mechanisms by which a corporation might fulfill each of Sepinwall’s three obligations of normative citizenship (voting in elections, serving in the military, and serving on juries). In the City of London, businesses have voted in the Corporation’s elections for centuries. Tony Travers, Professor, London School of Economics, Lecture at Gresham College: The Governance and Voting System of the City of London (Jan. 17, 2013), *transcript available at* <http://www.gresham.ac.uk/lectures-and-events/the-governance-and-voting-system-of-the-city-of-london> [<http://perma.cc/4A5D-3T2N>]. The City’s electorate consists of not just “residents” and “sole traders” but also “voters from incorporated and unincorporated bodies located within the City.” *Id.* “[T]here is discretion within organisations about the appointment of voters” on their behalf, so long as the processes by which the organizations select their voters are “open and clear.” *Id.* American states or the federal government could similarly develop a method by which a corporation selects the representative who will cast the corporation’s ballot in elections. *But see* *Texfi Indus., Inc. v. City of Fayetteville*, 269 S.E.2d 142, 150 (N.C. 1980) (“The history, policy, and purposes of the right to vote all militate against plaintiff[] [corporation’s] position. The right to vote is the right to participate in the decision-making process of government. The right to vote is at the foundation of a constitutional republic. . . . Aside from being theoretically inconsistent with the basis of our republican form of government, plaintiff’s argument fails to confront the practical difficulties inherent in its argument.”).

The federal government could also allow corporate citizens to fulfill their military service obligations—particularly in the event of an activation of the selective service system—by allowing a form of substitute service similar to the system enacted in the Union during the Civil War:

[A]ny person drafted and notified to appear . . . may . . . furnish an acceptable substitute to take his place in the draft; or he may pay such person . . . such sum, not exceeding three hundred dollars, as the Secretary may determine, for the procurement of such substitute; . . . and thereupon such person so furnishing the substitute, or paying the money, shall be discharged from further liability under that draft.

Enrollment Act, ch. 75, § 13, 12 Stat. 731, 733 (1863). Congress could similarly require conscripted corporate citizens to provide a substitute or to pay a commutation fee in fulfillment of their duty to support the nation’s armed forces.

Unlike a corporation’s duties to vote and to serve in the military, the corporation’s duty to serve on juries does not have historical analogues. But in

argue that a for-profit corporation could never look beyond its own profit interests, particularly in light of its obligations to its shareholders.<sup>42</sup>

Ultimately, though, any standard for citizenship based on rights and responsibilities would seem to place too many extratextual restrictions on analysis of whether a corporation qualifies as a citizen under the Fourteenth Amendment. That amendment confers citizenship on “[a]ll persons born or naturalized in the United States.”<sup>43</sup> If a corporation is “born” on its date of incorporation and resides in its state of incorporation,<sup>44</sup> then its rights and responsibilities in society will be irrelevant to a determination of whether, for Fourteenth Amendment purposes, it is a “person,” a characterization that federal law generally,<sup>45</sup> and the Court in particular, already uses in other contexts.<sup>46</sup>

an environment in which society has accepted the possibility of a corporation selecting representatives to vote and to serve in the military on its behalf, it seems reasonable to assume that states and the federal government could also create a method for allowing corporate representatives to serve on juries.

42. See *supra* note 34 and accompanying text.

43. U.S. CONST. amend. XIV, § 1 (emphasis added).

44. See *supra* note 15.

45. 1 U.S.C. § 1 (2012) (“In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”); see *supra* note 15.

46. At first glance, the Court’s decision in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869) would seem to foreclose any inquiry into the citizenship status of corporations under the Fourteenth Amendment. In *Paul*, the Court held that, in the Fourteenth Amendment context, “[t]he term citizens . . . applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed.” *Id.* at 177. However, as the discussion in Part II.B below will show, while the reasoning underlying the Court’s conclusion was consistent with the Court’s conceptualization of corporations in 1869, the Court’s 1886 adoption of the metaphor of the person to describe corporations in *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886), indicates a subsequent change in reasoning that seems to reopen the question of corporations’ constitutional citizenship status. *Cf.* *Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 126 (2003) (citing *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 558 (1844)) (discussing Court’s similar historic change with regard to corporate citizenship for federal diversity jurisdiction purposes). *But see* Garrett, *supra* note 19, at 98 (“[T]he Court has ruled that [corporations] are not citizens under the Fourteenth Amendment.” (citing *Paul*, 75 U.S. (8 Wall.) 168)); Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 911 & n.151 (2011) (citing *Paul* for the proposition that corporations are “not ‘citizens’ for purposes of the Privileges or Immunities Clause”).

## B. The Constitutional Status of Corporations

Currently, corporations enjoy protections under a number of constitutional provisions.<sup>47</sup> Throughout the Court's history, it has inconsistently applied the metaphor of the corporation as a person when deciding whether a corporation should receive these protections.<sup>48</sup> At times, the Court has outright adopted the theory of the corporation as a person. But more recently, it has evaluated corporate rights without explicitly characterizing the corporation as a person under the particular constitutional provision.<sup>49</sup>

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47. Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 503 & n.18 ("Today, corporations enjoy the protection of the First, Fourth, Fifth, Sixth, and Fourteenth Amendments."); see also Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 664–65 (1990) (listing decisions regarding corporate rights under the Bill of Rights).

48. See Krannich, *supra* note 19, at 63 ("In essence, the Court has constructed a house of cards by relying on metaphors and theory to establish the basis of corporate constitutional rights. Rather than allowing such a legal fiction to provide the basis for corporate rights, the Court should examine the reasons a natural person is granted the right at issue and determine whether those justifications apply equally to the corporate entity. In this manner, the Court would avoid the creation of a legal fiction by ensuring at the outset that the nature of the right is such that it logically extends to corporations."); Mayer, *supra* note 47; cf. Note, *The Meaning(s) of "The People" in the Constitution*, 126 HARV. L. REV. 1078, 1095 (2013) ("It is long established that corporations are 'legal persons' for certain purposes; but it would seem to be another matter to say that they are among 'the people,' since the Supreme Court has indicated that 'persons' refers to a broader class of individuals than does 'the people.'"). But see Garrett, *supra* note 19, at 110–11 ("[F]or each constitutional right the Supreme Court has considered, the Court has adopted a consistent approach by largely avoiding questions concerning the inherent nature of different types of entities. Instead, the Court focuses on the consequences of finding that an organization has standing to assert [any given] . . . right by examining the purposes of the particular constitutional right to decide if entities have asserted a sufficient injury creating standing to litigate the right.").

49. *Compare* Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886) (relating the Chief Justice's statement before oral argument that the Justices agreed that "Corporations are persons within the meaning of the Fourteenth Amendment"), with *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (rejecting limitation on campaign advertising by corporations as limiting the aggregated speech of the people who form the corporation). See generally Mayer, *supra* note 47, at 579 ("[A]lthough the Court increasingly confers Bill of Rights safeguards on corporations, it has abandoned earlier efforts to theorize about the corporation's entitlement to constitutional protections."). More recently, Professor Brandon Garrett has argued that evaluating the Court's

When using the metaphor of the corporation as a person, the Court “treats the corporation as an autonomous and real entity, separate from its creation by the state and from the individuals who work for it.”<sup>50</sup> Also referred to as the “natural entity” theory of the corporation, the metaphor of the corporation as a person “regards the corporation not as artificial, but as real, with a separate existence and independent rights.”<sup>51</sup>

In early cases assessing the constitutional status of corporations, the Court focused on corporations’ natures as emanations of the state and thus concluded that corporate rights did not exist.<sup>52</sup> In *Bank of the United States v. Deveaux*,<sup>53</sup> the Court, in an opinion by Chief Justice John Marshall, specifically rejected the notion that a corporation could be a citizen: “That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen.”<sup>54</sup> Expanding on that rejection, in *Trustees of Dartmouth College v. Woodward*<sup>55</sup> the Court, in another opinion by Chief Justice Marshall, limited corporate rights to those conferred upon corporations by the creating state: “Being the mere creature of law, [the corporation] possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”<sup>56</sup>

Later in the century, though, the Court in *Santa Clara County v. Southern Pacific Railroad* broke from the Marshall Court’s early analysis and adopted the metaphor of the corporation as a person.<sup>57</sup> Before oral arguments began in the case, the Chief Justice stated the

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recognition of corporate constitutional rights through the lens of standing doctrine brings coherence to the topic. Garrett, *supra* note 19, at 136 (“[A]n Article III standing framework provides a useful guide to understanding whether an organization can litigate constitutional rights.”).

50. Berger, *supra* note 19, at 182.

51. Mayer, *supra* note 47, at 580.

52. See Berger, *supra* note 19, at 181.

53. 9 U.S. (5 Cranch) 61 (1809).

54. *Id.* at 86 (holding, however, that the corporations could invoke federal diversity jurisdiction).

55. 17 U.S. (4 Wheat.) 518 (1819).

56. *Id.* at 636. The Court actually considered the relationship between the corporation and political participation, rejecting the possibility of corporations contributing to political discourse: “But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power on a natural person.” *Id.*

57. 118 U.S. 394 (1886).

Court's response to an argument in the briefs that corporations functioned as persons under the Fourteenth Amendment:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to corporations. We are all of the opinion that it does.<sup>58</sup>

Although the Chief Justice's statement merely appears in a comment that precedes the Court's opinion in the *United States Reports*—rather than in the opinion itself—the case has been cited as the first time that the Court adopted the natural entity theory and explicitly characterized corporations as independent legal persons.<sup>59</sup>

Since changing its perspective on corporations with *Santa Clara County* in the late nineteenth century, the Court has significantly expanded the circumstances under which corporations can exercise constitutional rights. “Today, corporations enjoy the protection of the First, Fourth, Fifth, Sixth, and Fourteenth Amendments.”<sup>60</sup> A theme that

58. *Id.* at 396.

59. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 822 (1978) (Rehnquist, J. dissenting) (“The Court decided at an early date, with neither argument nor discussion, that a business corporation is a ‘person’ entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment.”); *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1938) (“[I]n 1886, this Court . . . decided for the first time that the word ‘person’ in the amendment did in some instances include corporations.”); *Gulf, Colo., & Santa Fé Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897) (“It is well settled that corporations are persons within the provisions of the fourteenth amendment to the constitution of the United States.”); Berger, *supra* note 19, at 182 (citing THOM HARTMANN, *UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS* 104 (2002)); Mayer, *supra* note 47, at 581; Tucker, *supra* note 47, at 504 (“In retrospect the extension of constitutional rights to corporations was a sea-change moment.”); Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1751 (1998) (“Despite the summary nature of its original assertion . . . , the Court has largely followed this principle in subsequent [property rights] cases.”).

60. Tucker, *supra* note 47, at 503 & n.18. Mayer included a comprehensive—and frequently cited—list of the cases that extended constitutional protections to corporations. Mayer, *supra* note 47, at 664–65, cited in Berger, *supra* note 19, at 182 n.94, and Miller, *supra* note 46, at 909 n.138, and Beth Stephens, *Are Corporations People? Corporate Personhood Under the Constitution and International Law*, 44 RUTGERS L.J. 1, 13 n.61 (2013), and David Graver, Comment, *Personal Bodies: A Corporeal Theory of Corporate Personhood*, 6 U. CHI. L. SCH. ROUNDTABLE 235, 235 n.1 (1999), and Note, *supra* note 59, at 1752 n.49. For a similarly thorough discussion of

emerges out of an evaluation of these constitutional provisions is the Court's interest in protecting corporate rights to property.<sup>61</sup> Early cases involved corporate rights to tangible property,<sup>62</sup> while contemporary cases have also recognized the importance of intangible and intellectual property to corporations that seek to compete in the modern economy.<sup>63</sup> Notably, though the Court has made decisions about the propriety of extending constitutional protections to corporations on a case-by-case basis—comparable to its doctrine of “selective incorporation” applying the Bill of Rights against the states<sup>64</sup>—it has not made a general rule establishing the constitutional status of corporations in all contexts.

A key reason for the Court's gradual, case-by-case evaluation of corporate rights under the Constitution is the Court's inconsistency with regard to its preferred theory of the corporation. After *Santa Clara County*, the Court predominantly used the metaphor of the person when

Court recognition for corporate constitutional rights, see also Garrett, *supra* note 19, at 110–36.

61. See Mayer, *supra* note 47, at 590–91, 601–02.

62. See *id.* at 590–92 (first citing *Noble v. Union River Logging Railroad*, 147 U.S. 165, 167 (1893) (holding that federal government's retraction of a previously approved right-of-way across federal lands amounted to a taking without due process of law under the Fifth Amendment); then citing *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (permitting corporation's refusal to comply with an overbroad subpoena because the subpoena amounted to an unreasonable search and seizure)).

63. *E.g.*, *Citizens United v. FEC*, 558 U.S. 310, 354 (2010) (“*Austin* interferes with the ‘open marketplace’ of ideas protected by the First Amendment.”); see Berger, *supra* note 19, at 180 (assessing the assumptions underlying the metaphor of the corporation as a person and the consequent implication that “because [the corporation] can do all these human things, the corporation must be treated as an equal participant in the free market of ideas”); Mayer, *supra* note 47, at 601 (“Modern Property includes . . . knowledge and information. In response to these changes, corporations invoked the Bill of Rights to protect novel forms of property and to challenge modern regulatory structures.”).

64. Garrett, *supra*, note 19, at 108 (“The selective incorporation adopted by the Court avoided questions relating to the nature of states as sovereigns and whether constitutional rights apply differently to the states. Instead, the approach focused on whether each right was so important that it deserved protection from violation by state actors. The approach toward constitutional rights of corporations has some parallels.” (footnote omitted)); see also Louis Henkin, “*Selective Incorporation*” in *the Fourteenth Amendment*, 73 *YALE L.J.* 74, 74 (1963) (“During recent Terms, four justices . . . espoused a doctrine of ‘selective incorporation’; the fourteenth amendment incorporates specific provisions of the Bill of Rights, and those that are ‘absorbed’ at all are incorporated whole and intact, providing protections against the states exactly congruent with those against the federal government.”).

evaluating corporate constitutional rights, although it periodically returned to its earlier “artificial entity” approach and subjected corporations to regulation on the grounds that they existed only as creations of the state.<sup>65</sup> However, during the second half of the twentieth century, the Court began to move away from the metaphor of the corporation as a person in the face of corporations asserting intangible rights like the right of privacy.<sup>66</sup> Rather than consistently characterize the corporation as a person for purposes of constitutional analysis, the Court began referring to “notions [of] commercial property, the free market of ideas, and the historical purpose of each amendment.”<sup>67</sup> As a result, the historical preference for treating corporations as persons can create a cognitive dissonance when a contemporary decision functionally seems to treat a corporation as a person without explicitly doing so.

### III. A CORPORATION AS A CANDIDATE

A broad reading of the phrase “Citizen of the United States” that treats corporations as citizens arguably would be consistent with the Supreme Court’s narrow interpretation of the Qualifications Clauses.<sup>68</sup>

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65. Mayer, *supra* note 47, at 620; *see also* Garrett, *supra* note 19, at 109 (“The Supreme Court has struggled with the constitutional status of corporations since the Marshall Court. Corporate personhood itself evolved in the late nineteenth and early twentieth centuries as a complex and powerful legal concept. Yet neither judges nor scholars during this period could reconcile whether corporations were simply legal creations, “persons” with real rights, aggregations that protected rights of their individual members and shareholders, or some combination of those ideas.” (first citing William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1484 (1989); then citing Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1445 (1987)).

66. *See* Mayer, *supra* note 47, at 643–44 (“It is entirely plausible that a group of people could band together to hold property jointly. It is less plausible that the same group can speak with one voice or have a singular privacy interest.”).

67. *See id.* at 643–44; Krannich, *supra* note 19, at 98–99; *see also* Pac. Gas. & Elec. Co. v. Pub. Utils. Comm’n of Cal., 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting) (“Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an ‘intellect’ or ‘mind’ for freedom of conscience purposes is to confuse metaphor with reality.”).

68. “A fundamental principle of our representative democracy is, in Hamilton’s words, ‘that the people should choose whom they please to govern them.’” Powell v. McCormack, 395 U.S. 486, 547 (1969) (quoting *The Debates in the Convention of the State of New York on the Adoption of the Federal*

However, a broad interpretation of the term citizen that encompasses corporations as persons would be inconsistent with the reasoning underpinning the Court's recent decisions with regard to corporate rights.<sup>69</sup> Furthermore, allowing corporations to serve in Congress could actually diminish the power of the individual right to vote while also undermining the citizenship requirement in the Qualifications Clauses. Consequently, the contemporary Supreme Court seems unlikely to determine that corporations qualify as citizens.

#### A. A Corporation Under the Qualifications Clauses

When considering the Qualifications Clauses, the Supreme Court has interpreted them narrowly, treating them as the only limitations that Congress and the States can place on membership in Congress.<sup>70</sup> In *Powell v. McCormack*,<sup>71</sup> the Court made clear that Congress's power to judge its members' qualifications extended only to evaluating the age, citizenship, and residency requirements that appear in the Qualifications Clauses.<sup>72</sup> When the House, by a majority vote, refused to seat a member upon his re-election as retribution for the member's misconduct during the previous session, the Court held that Congress overstepped its bounds and disenfranchised the voters in the member's district by creating conditions for membership beyond those set forth in the

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*Constitution* [hereinafter *Convention of New York*], in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (photo reprint 1974) (Jonathan Elliot ed., 2d ed. 1888) (statement of Alexander Hamilton)); see also Note, *Voter and Officeholder Qualifications*, 119 HARV. L. REV. 2230, 2238 (2006) ("The case law also reflects a conceptual acknowledgement that a restriction on candidates impinges on the choice of voters.").

69. Mayer, *supra* note 47, at 643–44.

70. *Cf.* Note, *supra* note 68, at 2235–36 ("Officeholder qualifications have remained remarkably untouched in the two centuries since they were inscribed onto constitutional parchment. . . . Over the years, courts have struck down additional state qualifications for federal candidates, including an additional residency requirement, a loyalty oath requirement, and a non-felon requirement." (footnotes omitted)).

71. 395 U.S. 486 (1969).

72. *Id.* at 548 ("[W]e have concluded that Art. I, § 5, is at most a 'textually inexpressible commitment' to Congress to judge only the qualifications expressly set forth in the Constitution."); see also U.S. CONST. art. I, § 5, cls. 1–2 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own members. . . . Each House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.")

Qualifications Clause.<sup>73</sup> More recently, the Court in *U.S. Term Limits, Inc. v. Thornton*,<sup>74</sup> this time citing the need for national uniformity in the selection of representatives in Congress, struck down as creating an unconstitutional qualification requirement an Arkansas term limits provision that barred candidates' names from the ballot after they had served a certain number of terms in the House or Senate.<sup>75</sup> Together, the cases suggest a strong preference at the Court for interpreting the Qualifications Clauses in a manner that limits their applications to the circumstances described in the text of the Constitution.

Therefore, if a corporation were to win election to the House or to the Senate, it would merely need to show that it met the citizenship, age, and residency requirements in order to comply with the Qualifications Clauses.<sup>76</sup> To require anything more of the corporation would be to contradict the principle "that the people should choose whom they please to govern them."<sup>77</sup> Consequently, the Qualifications Clauses and the cases interpreting their language would not inhibit a corporation's ability to serve in Congress if it could meet the citizenship standard.<sup>78</sup>

#### B. Extending the Corporation as Person Metaphor for Citizenship Purposes

Despite the broad nature of the clauses, it is not likely that the Supreme Court would adopt the metaphor of the corporation as a person if asked to determine the meaning of "citizen" for Qualifications Clause purposes. Although recent high-profile decisions at the Court have articulated Constitutional protections for corporate rights, those decisions focus on corporations as associations of citizens and apply reasoning that would not apply to an evaluation of corporate citizenship for the purpose

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73. *Powell*, 395 U.S. at 547–50 (“[S]ince Adam Clayton Powell, Jr., was duly elected by the voters of the 18th Congressional District of New York and was not ineligible under any provision of the Constitution, the House was without power to exclude him from its membership.”).

74. 514 U.S. 779 (1995).

75. *Id.* at 783 (“Allowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers’ vision of a uniform National Legislature representing the people of the United States. If the qualifications set forth in the text of the Constitution are to be changed, that text must be amended.”).

76. *See Powell*, 395 U.S. at 547–50.

77. *Convention of New York*, *supra* note 68, at 257 (statement of Alexander Hamilton).

78. *See supra* note 15.

of serving in Congress. Additionally, the possibility of a corporation serving in Congress raises other constitutional concerns that counsel against granting citizenship rights to corporations for the purpose of holding office.

1. *The Modern Trend Away from the Metaphor of Corporation as Person*

Despite the contemporary trend toward recognizing constitutional protections for corporate rights, a holding that a corporation can be a citizen under the Qualifications Clauses would actually be inconsistent with the Court's reasoning in recent cases. Treating a corporation as a person independently capable of exercising political rights would deviate from the reasoning of the cases that protected corporate rights solely for the purpose of protecting the rights of the individuals who form the corporation.<sup>79</sup> Unlike in the context of other rights, prohibiting a corporation from serving in Congress based on a determination that it is not a citizen would not limit the rights of its constituent individuals.

In *Citizens United* and *Burwell v. Hobby Lobby Stores, Inc.*<sup>80</sup> the Court described constitutional protections for individuals who chose to act through the corporate form, but these cases do not adopt the metaphor of the corporation as a person. For example, in *Hobby Lobby*, the Court mentioned the “fiction” of treating corporations as persons for purposes of statutory interpretation and drew a distinction between using a metaphor for interpretive purposes and actually examining the rights and protections at issue in the case.<sup>81</sup>

In each case, the Court observed comparable underlying realities: corporations can exercise constitutional rights only because citizens associated with each other and acted through the mechanism of the corporation. In *Hobby Lobby*, this meant concluding that “[a] corporation is simply a form of organization used by human beings to achieve desired ends. . . . When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.”<sup>82</sup> Similarly, the Court struck down the statute at

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79. *E.g.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) (“[P]rotecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.”).

80. 134 S. Ct. 2751 (2014).

81. *Id.* at 2768.

82. *Id.*

issue in *Citizens United* because the statute allowed “the Government to ban the political speech of millions of associations of citizens.”<sup>83</sup> Both cases illustrate the principle that the Constitution provides protections for people—regardless of whether those people choose to use the corporate form to collectively exercise the constitutional rights that they each possess as individuals.

Allowing a corporation to serve in Congress, however, would not extend protections for individual rights and would instead risk substantially harming them. Permitting a corporation to serve as an elected representative would not advance any collective interest in selecting political representatives because a mechanism already exists by which individuals can collectively choose their representatives in Congress. By voting in elections, each individual voter expresses his or her personal preferences regarding political representation, and the election results for a particular geographic region therefore represent the collective preferences of a majority of voters located in that area. Elections by their nature allow for a group of people to articulate their preferences, and enabling corporate candidates would not enhance voters’ abilities to vindicate their constitutional rights to vote.

In fact, permitting a corporation to serve in Congress would place a barrier—in the form of the corporation’s responsibility to its shareholders—between the voters and the elected representative.<sup>84</sup> Even if a corporation’s directors, officers, and shareholders agreed that they could collectively achieve their best interests by pursuing the public interest, the duties that the officers and directors owed to the shareholders would still seem to outweigh any interest owed to the voters.<sup>85</sup> Rather than advancing the collective interest of voters, a corporation serving in Congress would diminish the interest of those voters whom it represented.

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83. *Citizens United v. FEC*, 558 U.S. 310, 354 (2010).

84. *See* *Texfi Indus., Inc. v. City of Fayetteville*, 269 S.E.2d 142, 150 (N.C. 1980) (“Corporations are artificial entities which are designed for the purpose of managing economic resources. The very nature of a corporation prevents it from sharing an identity with the broader humane, economic, ideological, and political concerns of the human body politic.”); Garrett, *supra* note 19, at 164 (“[T]he cost of allowing an ‘artificial being,’ an organization, to assert rights at the expense of individuals or without adequately representing individuals can be too great for a constitutional democracy to permit.”).

85. This presumes that a corporation elected to serve as a political representative would act through its officers and directors in a manner to similar to other situations in which a corporation may act as a person (e.g., a limited liability company serving as the general partner of a limited partnership).

## 2. *The Legal and Practical Problems of Corporate Citizenship*

Although not grounded in the associative reasoning underlying the Court's recent decisions regarding corporate rights, at least two additional concerns counsel against allowing a corporation to serve in Congress. Both concerns also speak to a corporation's eligibility for citizenship under the Qualifications Clauses. Treating corporations as citizens could substantially undermine the purpose of limiting membership in the House and Senate to citizens and create a mechanism by which non-citizens could control a citizen corporation.<sup>86</sup> Assuming that a citizen corporation that is eligible to hold office would also have the right to vote, corporate citizenship would also risk undermining the "one person, one vote" policy by turning corporations into "political hydra" that could spawn an unlimited numbers of eligible voters over time.<sup>87</sup>

Authorizing corporations to serve in Congress by treating corporations as citizens could create a loophole that nullifies the citizenship language in the Qualifications Clauses and effectively allows non-citizens to hold office. Justice Stevens raised the specter of foreign influence on American politics in his *Citizens United* dissent, noting that the Court's decisions seemed to "afford the same protection to multinational corporations controlled by foreigners as to individual Americans."<sup>88</sup> A foreign controlled corporation participating in American politics could arguably "undermine American voices."<sup>89</sup> While the idea of foreign influence may raise concerns in the context of political speech, the idea of a non-citizens serving in Congress actually contradicts the Constitution.

Two issues arise if a corporate citizen could become eligible for Congress by simply incorporating itself in its "home" state a certain number of years before holding office. First, a non-citizen human could incorporate a corporation in an American state, wait until the corporation matured to the age of eligibility, and then run that corporation for office. Presumably, that citizen corporation could then shield the non-citizen from the citizenship requirement in the Qualifications Clauses, allowing

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86. See *Citizens United*, 558 U.S. at 424 (Stevens, J., dissenting).

87. *Texfi Indus.*, 269 S.E.2d 142; see *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

88. *Citizens United*, 558 U.S. at 424 (Stevens, J., dissenting).

89. Sepinwall, *supra* note 36, at 593–94 ("This seems an intuitively compelling concern, but it is one that pertains to foreign individuals and corporations alike.").

him or her to serve in Congress by acting on the citizen corporation's behalf. Second, and perhaps more concerning, a non-citizen could simply buy a majority interest in a mature corporation and immediately run for office.<sup>90</sup> Beyond just engaging in the national political discourse, a non-citizen could actually control a citizen and make laws that advance his or her own political agenda despite personally not qualifying for office under the Constitution.

Equally concerning in the context of corporate citizenship is the potential distortionary effect of corporate citizens on the pool of eligible voters.<sup>91</sup> "As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."<sup>92</sup> Because voting is both a right and responsibility of citizenship, a corporation that possessed the right to participate in politics as a representative in Congress would also likely possess the right to vote.<sup>93</sup> The Supreme Court of North Carolina specifically denied a corporation that right to vote, though, on the grounds that such a ruling would create a limitless number of artificial voters: "[C]orporations could become political hydra, which, unlike natural persons, could multiply their voting power by merely creating additional subsidiaries."<sup>94</sup>

If the Supreme Court of the United States issued a ruling allowing states to create artificial voters in this manner, the Court would actually place itself in conflict with its own decisions regarding a state's authority

90. A human citizen who does not meet the age requirement in either of the Qualifications Clauses could also arguably circumvent those requirements by acquiring a majority interest in a mature corporation.

91. *Texfi Indus.*, 269 S.E.2d at 150.

92. *Reynolds*, 377 U.S. at 562.

93. Indeed, a case requiring the Supreme Court of the United States to decide whether a corporation can be a citizen is perhaps most likely to arise in the context of a corporation challenging a state's denial of the corporation's alleged right to vote. As the Murray-Hill example shows, a corporate candidate for Congress likely would need to demonstrate its status as a citizen by registering to vote before ever having the opportunity to appear on a ballot. *See supra* notes 8–9 and accompanying text. Therefore, if a corporation went a step farther than Murray-Hill and made a serious effort to run for Congress—perhaps acting on a shareholder proposal, as suggested to Goldman Sachs, *see supra* notes 10–14 and accompanying text—a state denial of the corporation's voter registration could lead to litigation as the corporation sought to vindicate its "right" as a "citizen."

94. *Texfi Indus.*, 269 S.E.2d at 150 ("A state may not dilute the strength of a person's vote to give weight to other interests.").

to manipulate the strength of an individual vote. In rejecting a congressional districting plan that gave voters disproportionate influence depending on their geographic location within a state, the Court noted that “[i]t would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State’s voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once.”<sup>95</sup> A decision declaring that corporations are citizens under the Constitution would have that extraordinary effect, granting an additional vote to a voter in every election for each corporation that he or she controls. These impractical and unconstitutional possibilities, when combined with the Court’s trend away from specifically invoking the metaphor of the corporation as a person for constitutional purposes, suggest that the Court likely would not treat a corporation as a citizen under the Qualifications Clauses.

#### IV. CONCLUSION

Though frequently maligned for a perceived heavy-handed overemphasis on politics, George Lucas’s *Star Wars* prequel trilogy depicted a Republic in decline due in part to organizations like a “Trade Federation” not just engaging in political advocacy but literally speaking in the Galactic Senate with a voice equal to that of other sovereigns. In our society—in which people casually assume that corporations are, for all legal purposes, persons—it is not unreasonable to ask whether corporate persons are therefore citizens who might one day speak on behalf of a state in the United States Senate or House of Representatives. This Article by no means pretends to provide the definitive answer to that question. Rather, it seeks to initiate a conversation and suggest one answer based on broad themes in Supreme Court precedent.

Certainly, the metaphor of the corporation as a person has a prominent place in popular discourse regarding constitutional rights for corporations. But while a metaphor can function as a useful tool for explaining complex concepts in concrete language, a metaphor cannot replace the underlying reality of the concept that it describes. Despite historically adopting the metaphor of the corporation as a person when examining the constitutional status of corporations, the Court’s most recent decisions actually move away from that metaphor to engage with

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95. *Reynolds*, 377 U.S. at 562 (“Weighting the votes of citizens differently, by any method or means, . . . hardly seems justifiable.”).

complex questions regarding protections for individual rights when individuals choose to associate using the corporate form. Yet despite the move away from the metaphor, the Court's recent decisions ironically continue to create the popular impression that the Court has reaffirmed the metaphor with new vigor by protecting intangible corporate rights. Nevertheless, the associative reasoning underlying the move away from the metaphor ultimately suggests that—if directly asked to decide whether a corporation is a person for citizenship purposes—the Court would likely say “no.”