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A STEP TOO FAR: RECENT TRENDS IN CORPORATE PERSONHOOD AND THE OVEREXPANSION OF CORPORATE RIGHTS

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I. THE CURRENT STATE OF CORPORATE PERSONHOOD

"Corporations are people, my friend."[1] Governor Mitt Romney's infamous statement at the 2011 Iowa State Fair sounded ridiculous at the time. Over the past few years, as the Supreme Court continues to expand the constitutional rights of corporations, countless politicians have weighed in on the issue. In response to Romney's quip, Senator Elizabeth Warren fired, "Corporations are not people. People have hearts . . . they live, they love and they die and that matters."[2]

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1. Governor Mitt Romney, Address at the Iowa State Fair (Aug. 11, 2011).

2. Senator Elizabeth Warren, Address at the Democratic National Convention (Sept. 5, 2012).

Although the Supreme Court historically granted corporations a number of constitutional rights, the status of corporations and their relationship to the Constitution is far from settled.[3] In particular, the First Amendment poses a number of difficulties for corporate rights. The Supreme Court did not consider corporate free speech for the first time until 1978.[4] Only after reconsidering the issue and overturning previous decisions did the Court in 2010 announce that free speech applies to corporations in the same manner as it applies to natural persons.[5] In 2014, the Court broadened corporate rights by extending religious exemptions to for-profit corporations from laws that substantially interfere with a corporation's religious beliefs.[6] Unsurprisingly, controversies arose over the seemingly incomprehensible notion that corporations can think, speak, and believe.

The Court's recent interpretive trend immensely expanded corporate rights to a point unprecedented in the history of American jurisprudence. Over the past four years, the Court reversed almost 200 years of legal precedent while establishing a fundamentally flawed concept of corporate personhood. Unreasonably expanding corporate rights is the result of an imprudent conceptual shift in understanding the nature of a corporation. The Court no longer views corporations as entities created primarily for economic purposes.[7] Corporations are now

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3. Christopher S. Ross, *Shall Businesses Profit If Their Owners Lose Their Souls? Examining Whether Closely Held Corporations May Seek Exemptions from the Contraceptive Mandate*, 82 FORDHAM L. REV. 1951, 1997 (2014).

4. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (confronting the issue of corporate free speech under the First Amendment through funding ballot initiatives for the first time).

5. *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) (reversing the case precedent established in *Bellotti*); s*ee also* McConnell v. Fed. Election Com'n, 540 U.S. 93 (2003) (overturning *Austin*); *see McConnell*, 540 U.S. 93 (overturning Buckley v. Valeo, 424 U.S. 1 (1976)); s*ee also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (overturning *McConnell* and *Austin*); *see* Citizens United 558 U.S. at 365 (holding that the government cannot restrict direct contributions to political candidates merely because of the donor's corporate identity).

6. *See* Bellotti, 435 U.S. at 821-22 (upholding corporate spending on ballot initiatives as political speech under the First Amendment); *see also* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (holding that for-profit corporations are exempt from the Affordable Healthcare Act based on sincere religious objections to the contraceptive mandate).

7. Brendan (Bo) F. Pons, Article, *The Law and Philosophy of Personhood: Where Should South Dakota Abortion Law Go from Here?*, 58 S.D. L. REV. 119, 140 (2013) (explaining that an aggregate theory interpretation of corporate personhood is contingent upon the corporation being recognized as a group of individuals); *see also* Darian M. Ibrahim, *Solving the Everyday Problem of Client Identity in the Context of Closely Held Businesses,* 56 ALA. L. REV. 181, 194 (2013) (arguing that economics and efficiency cannot justify the

perceived as collections of individuals.[8] Accordingly, the Court expands corporate rights because it believes it is protecting the rights of the individuals who operate and maintain the corporation.[9]

This Comment examines the transformation of corporate personhood in American law. It challenges the logic currently used to interpret and support corporate personhood, logic that permits and even demands continued corporate right expansions. To achieve this goal, Part II of this Comment divides Supreme Court case law concerning corporate personhood into three eras: the Early Era, the Intermediate Era and the Current Era. Next, Part III of this Comment illustrates the rationale supported during each era, the historical legacy of these laws, and their relation to a continuously transforming concept of corporate personhood. Finally, Part IV of this Comment challenges the current conceptual understanding of corporate personhood under an aggregate theory of corporations. It proposes returning to a natural entity theory for interpreting corporate personhood by limiting new expansions to issues directly related to economic efficiency, rather than religious or political rights. Natural entity theory is superior to aggregate entity theory because it supports a clear and strong division between a corporation and its owners and is conducive to corporate limited liability.

II. HISTORICAL DEVELOPMENT OF CORPORATE PERSONHOOD

A. An Overview of the Eras

The Early Era of corporate personhood began in 1886 and continued until 1978.[10] This Era is easily recognizable because the Court established a direct relationship between corporations and persons under the language of the Fourteenth Amendment.[11]

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application of aggregate theory to personhood concepts because it does not adequately address irreconcilable conflicts of interests).

8. Pons, *supra* note 7 at 140.

9. Nancy Kubasek, M. Neil Browne & Julie Harris, *The Social Obligation of Corporate Counsel: A Communitarian Justification for Allowing In-House Counsel to Sue for Retaliatory Discharge*, 11 GEO. J. LEGAL ETHICS 665, 667 n.96 (1998) (asserting that supporters of the aggregate theory sought an anti-regulatory approach that protected shareholders' interests).

10. Santa Clara Cty v. S. P.R. Co., 118 U.S. 394 (1886) (recognizing corporations "persons" under the Fourteenth Amendment for the first in history); *see Bellotti*, 435 U.S. at 765 (shifting focus to the First Amendment and exchanging its previous economic concerns for political issues while expanding the boundaries of corporate personhood).

11. *See Santa Clara,* 118 U.S. at 394 (stating "[t]he court does not wish to hear arguments on the question whether the provision in the Fourteenth

However, this Era was not exclusively limited to Fourteenth Amendment analysis and application. The Court considered the Fourth, Fifth and Seventh Amendments as well.[12] Generally, the expansion of corporate rights during the Early Era was smooth, precise, and purposeful.[13] The Court afforded corporations greater power to conduct their business freely and effectively.[14] It is not coincidental that this Era coincides with the United States' greatest economic achievements of the nineteenth and twentieth centuries.[15]

The Intermediate Era, 1978 – 2009, marks a notable shift in the Court's focus from the Fourteenth Amendment to expanding First Amendment rights for corporations. However, the Court did not operate as smoothly as it previously had in the Early Era. The Court seemed uncertain, inconsistent, and unpredictable during the Intermediate Era. Additionally, the Court abandoned its reliance on the economic functions of corporations and instead adopted a noticeably more political view of corporations.

The transition into the Current Era, in 2010, inverts nearly 200 years of the corporate personhood doctrine with a massive upheaval of the Intermediate Era decisions. The Court continues a more political focus on the issue of corporate personhood.[16] Altering its view of corporations, the Court expands the scope of

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Amendment to the Constitution, which forbids a State to deny any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does"). This language is originally included in a headnote to the Santa Clara case. *Id.* It essentially created the link between corporations and persons – corporate personhood – and continues to resonate even today. *See* Jennifer Jorczak, Note, *"Not Like You and Me": Hobby Lobby, the Fourteenth Amendment, and What the Further Expansion of Corporate Personhood Means for Individual Rights*, 80 BROOK. L. REV. 285, 294 (2014) (recognizing the importance of the "mistaken Santa Clara headnote" and the continual issues it still causes today).

12. *See generally* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (affording corporations protection from unreasonable search and seizures); *see generally* United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (enlarging the scope of corporate rights to include the Double Jeopardy Clause of the Fourteenth Amendment); *see generally* Ross v. Bernhard, 396 U.S. 531 (1970) (granting corporations the right to a jury trial under the Seventh Amendment).

13. *Infra*, IIIB (explaining the conceptual underpinning upon which Early Era cases were established).

14. *Id*.

15. *See generally* J. Bradford DeLong, *The Shape of Twentieth Century Economic History* (Nat'l Bureau of Econ. Research, Working Paper No. 7569, 2000) www.nber.org/papers/w7569.pdf (proposing that the defining characteristic of the twentieth century is an "overwhelmingly economic history").

16. *Citizens United*, 558 U.S. at 310 (overturning both *Austin* and *McConnell*, the Court affords corporations seemingly unrestricted rights to Free Speech under the First Amendment identical to those of natural persons). This allows corporations the free speech right to donate money from their general treasury directly to political campaigns. *Id.*

corporate First Amendment rights under the Free Speech Clause and Free Exercise Clause to levels unprecedented in the history of American jurisprudence.[17]

B. The Early Era – Corporate Personhood is Born

Most legal historians cite 1819 as the first appearance of corporate personhood as a concept in American law.[18] In *Trustees of Dartmouth College v. Woodward* the Court recognized the legitimacy of Dartmouth's corporate charter, granted by the British Crown before the United States won its independence.[19] According to the Court, the charter permitted the college to purchase property and enter into contracts without requiring natural persons to intervene.[20] Here, corporate personification was indirect and merely served as an analogy to preserve property and contract interests.[21] The first, direct appearance of corporate personhood did not occur until more than half a century later.[22]

In 1886, *Santa Clara County v. Southern Pacific Railroad Co.* included a headnote documenting the Court's unanimous stipulation that corporations are persons within the purview of the Fourteenth Amendment.[23] Historically, this headnote marks the first direct connection between corporations and persons and gave rise to over two centuries of legal precedent.[24]

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17. *Id.*; *Hobby Lobby*, 134 S. Ct. 2751 (recognizing a for-profit corporation's right to religious exemption for federal law under the Religious Freedom Restoration Act, in essence recognizing a corporation's right to free exercise of religion under the First Amendment).

18. Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1635 (2011) (explaining that in Dartmouth "the Court developed its personification of the corporation"); *see also* Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819) (holding that a charter between Dartmouth and the British Crown was not dissolved after the American Revolution). The charter still constituted a contract within the meaning of Article I §10 of the United States Constitution. U.S. CONST. art. I § 10; *see also Dartmouth*, 17 U.S. at 628 (noting that Article I § 10 of the Constitution prohibits States from passing laws which impair contractual obligations).

19. *Dartmouth*, 17 U.S. at 518.

20. *Id.* at 667-68 (noting that a corporation can sue and be sued as well as enter into contracts) (Story, J., concurring).

21. Pollman, *supra* note 18, at 1635 (stating, "[Dartmouth] illustrates how the concession theory animated the Supreme Court's early view of the corporation and its early jurisprudence using the person metaphor to protect property and contract interests").

22. *Santa Clara*, 118 U.S. at 369 (alluding to a direct relationship between corporations and persons for the first time in the history of American law).

23. *Id.*

24. Adam J. Sulkowski, *Ultra Vires Statutes: Alive, Kicking, and A Means of Circumventing the Scalia Standing Gauntlet in Environmental Litigation*, 24 J. ENVTL. L. & LITIG. 75, 98 n.122 (2009).

The Supreme Court issued a number of subsequent decisions relying on the *Santa Clara* headnote.[25] Each decision helped shape the status of corporate personhood under the Fourteenth Amendment. In *Lochner v. New York*, the Court protected a corporation's right to freely contract labor.[26] It did so by striking down a New York law that restricted bakery employees from working more than sixty hours in one week or ten hours in one day.[27] According to the Court, the New York law unconstitutionally deprived corporations of their liberty to freely create contracts.[28] The Court viewed this statute as a violation of the Due Process Clause because it imposed undue restrictions on employee labor hours.[29] Although restrictions on labor hours seem entirely reasonable by modern standards, in 1905 the Court did not agree.[30] Thus, the Court's stance on autonomous business practices in the early 20th century helped solidify corporations' Fourteenth Amendment rights.[31]

Nearly thirty years after *Lochner*, the Court reaffirmed corporate personhood under the Fourteenth Amendment. In *Louis K. Liggett Co. v. Lee*, the Court held that taxing a corporation at higher rates because the corporation owns multiple store chains was unconstitutional.[32] The effect of this law was twofold. First, it

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25. *See, e.g.*, *Citizens United*, 558 U.S. at 428-29 (stating "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it") (quoting, Marshall, C.J.) (*Dartmouth,* 17 U.S. at 667).

26. Lochner v. New York, 198 U.S. 45, 57 (1905) (invalidating a New York State law that prevented bakery employees from working more than 60 hours in one week or 10 hours in one day based on procedural due process under the Fourteenth Amendment).

27. *Id.* at 53 (recognizing that the statute interferes with the right of a corporation – here personified by the bakery owner – to freely contract concerning the number of hours an employee may work).

28. *Id.* at 64 (stating that the right of the "master and employee to contract" cannot be interfered with by the State without violating the Fourteenth Amendment).

29. *See supra* note 26 (explaining *Lochner*).

30. *See Lochner*, 198 U.S. at 62 (stating that respondent's argument that labor hour restrictions are valid and permissible is insufficient to justify such an interference).

31. Although the decision of *Lochner* was later overturned on other grounds, Due Process protection for corporations still stands. *See Ferguson v. Skrupa*, 372 U.S. 726 (1963) (overturning the prohibition against state legislatures from restricting absolute autonomy in business practices). The *Lochner* precedent lead to a number of unintended consequences, such as striking down minimum wages for women and setting a standard weight for a loaf of bread. *See* Adkins v. Children's Hosp., 261 U.S. 525 (1923) (striking down setting minimum wages for women); s*ee also,* Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924) (striking down legislation that attempted to set a standard weight for a loaf of bread).

32. *See generally* Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933) (ruling

increased taxes for local companies which owned and operated store chains in other counties.[33] Second, it simultaneously lowered the tax rate of companies that were located in other counties but conducted business locally.[34] The Court found no rational basis for a classificatory distinction between locally owned businesses that operated locally and non-regional businesses that operated locally.[35] This decision strengthened the conceptual link between corporations and natural persons by advancing the notion that corporations are entitled to those protections afforded to natural persons under the Fourteenth Amendment.[36]

Expanding corporate personhood under the Fourteenth Amendment raised unique issues concerning corporate challenges to state law. Notably, in the United States, individual states and not the federal government create corporations.[37] This complicates corporate challenges to state-based corporate regulations because the provisions of the United States Constitution must be applied to state law.[38] Through the incorporation doctrine and the concept of corporate personhood, corporations gain a number of additional constitutional rights beyond Fourteenth Amendment Equal Protection and Due Process.[39]

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that a state statute violated the Equal Protection clause of the Fourteenth Amendment by increasing taxes on corporations that owned multiple store chains).

33. *Id.* at 534 (indicating the logical inconsistency of taxing business at higher rates based on the location of their principle place of business when both companies operate internationally).

34. *Id.*

35. *Id.* at 533 (stating that there exists no rational basis for the distinction made in the legislative enactment).

36. *Id.* at 536 ("Corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons"); *see also* S. R. Co. v. Greene, 216 U.S. 400, 417 (1910) (concluding that the plaintiff [a corporation] is within the meaning of a person under the Fourteenth Amendment and therefore entitled to equal protection).

37. Ann M. Scarlett, Comment, *Imitation or Improvement? The Evolution of Shareholder Derivative Litigation in the United States, United Kingdom, Canada and Australia*, 28 ARIZ. J. INT'L & COMP. L. 569, 572 (2011) (noting that in the United States, as opposed to other countries, corporations are created by state governments, not the federal government).

38. Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privilege or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 44-48 (2007) (noting the general history of selective incorporation as advocated by Justice Black).

39. *See* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (affording corporations Fourth Amendment protection from unreasonable search and seizures); *see Martin Linen Supply Co.*, 430 U.S. at 564 (enlarging the scope of corporate rights to include the Double Jeopardy Clause of the Fifth Amendment); *see Bernhard*, 396 U.S. 531 (granting corporations the right to a jury trial under the Seventh Amendment).

Originally, the Court only applied the Bill of Rights to the federal government.[40] However, as early as 1897, the Court began to recognize the importance of allowing corporations protection against state and local governments under the Bill of Rights.[41] Since then, the Court continually expanded corporate protection under most provisions of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment.[42] The Court allows corporations to invoke some Fifth Amendment rights in criminal trials.[43] Additionally, the Court recognizes corporations' rights to a jury trial under the Seventh Amendment.[44] Finally, the Court guarantees corporations Fourth Amendment protection in their commercial properties from unwarranted searches.[45]

To summarize, during the Early Era, the Court focused on apolitical corporate expansion. The Court did so through the Fourth, Fifth, Seventh and Fourteenth Amendments.[46] Their aim was to support corporate economic efficiency by conveniently extending personhood to corporations.[47] The pragmatic effect was

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40. *See, e.g.*, Barron v. City of Baltimore, 32 U.S. 243, 247-49 (1883) (dismissing petitioner's claims because the Fifth Amendment, and Bill of Rights in general, only applies to federal government); *see also* Scarlett, *supra* note 37, at 536.

41. *See* Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 258 (1897) (holding [7-1] that Chicago could not escape its duty to provide just compensation for a physical taking merely because it was not the federal government). Thus, the Court legitimized the application of the Fifth Amendment's Just Compensation Clause through the Procedural Due Process of the Fourteenth Amendment. *Id.*

42. *See* David S. Cohen, Comment, *McDonald's Paradoxical Legacy: State Restrictions of Non-Citizens' Gun Rights,* 71 MD. L. REV. 1219, 1223 (2012) (noting that the Supreme Court precedent uses the Due Process Clause of the Fourteenth Amendment to apply most of the rights protected under the Bill of Rights, even though the Bill of Rights applies only to the federal government); *see e.g.*, McDonald v. Chicago, 561 U.S. 742 (2012) (incorporating the right to bear arms under the Second Amendment).

43. *See generally Martin Linen Supply Co.*, 430 U.S. at 564 (holding that the Fifth Amendment Double Jeopardy Clause applied to corporation charged with criminal contempt, where the trial ended with a deadlocked jury).

44. *See generally Bernhard*, 396 U.S. at 531 (denying a corporation's shareholders Seventh Amendment rights to a jury trial and noting that corporations generally retain Seventh Amendment rights to jury trial); U.S. CONST. amend. VII; *see also* Fed. R. Civ. P. 23.1 (establishing the procedural grounds for a shareholder derivative action).

45. *See generally Marshall*, 436 U.S. at 311 (holding that the Warrant Clause of the Fourth Amendment provides identical protections to corporate in their commercial buildings as individual citizens in their private residences).

46. *See Marshall*, 436 U.S. at 307 (affording corporations Fourth Amendment protection from unreasonable search and seizures); *see Martin Linen Supply Co*., 430 U.S. at 564 (enlarging the scope of corporate rights to include the Double Jeopardy Clause of the Fifth Amendment); *see Bernhard*, 396 U.S. at 531 (granting corporations the right to a jury trial under the Seventh Amendment).

47. *Infra*, IIIB.

that corporations were now strengthened in their contract and property claims.

C. The Intermediate Era – Corporate Personhood's Chaotic Childhood

Two features distinguish the Intermediate Era of corporate personhood from the Early Era. First, the Court's constitutional focus during the Intermediate Era shifted towards First Amendment rights for corporations.[48] Second, the Court's inconsistent decisions during the Intermediate Era created confusion surrounding the extent to which the First Amendment ought to protect corporations' free speech.[49]

Although not directly related to corporate rights, *Buckley v. Valeo* is important to note as a prelude to the Intermediate Era because it establishes the rationale advanced in subsequent decisions.[50] In *Buckley*, the Court found that the government had a compelling interest in preventing *quid pro quo* corruption.[51] To further this interest, the Court upheld a limitation on the amount that an individual can contribute to a political candidate.[52] The Court felt that upholding this contribution limitation would mitigate the appearance of political corruption.[53] In fact, the Court felt so strongly about this solution that it found the limitation created a constitutionally sufficient justification in and of itself.[54]

The Court directly broadened corporate free speech for the first time in *First National Bank v. Bellotti*.[55] In 1978, a bank

48. *See, e.g.*, *Bellotti*, 435 U.S. at 765; *see also Austin* 494 U.S. at 652. These are two of the most significant cases in the Intermediate Era and the focus exclusively on corporate free speech under the First Amendment and the potential effects of political corruption. *Id.*

49. *See* Richard Briffault, *Corporations, Corruption and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 643, 652 (2011) (indicating the palpable tension present between *Bellotti* and *Austin*).

50. *Buckley*, 424 U.S. at 1; *see* Brian L. Porto, Esq., *Where Do We Go from Here? Vermont Campaign Finance After Randall V Sorrell*, 32 VT. B.J. 30 (2007) (affirming limitations on political contributions in *Buckley* because (1) contributing to a political campaign does not constitute speech, and (2) preventing corruption is sufficient to justify limitations on campaign contributions).

51. *Buckley*, 424 U.S. at 26-27 (*quid pro quo* contributions to current and potential office holders, undermines the integrity of representative democracy).

52. *See id.* at 143 (upholding the individual contribution limits).

53. *Id.* at 26-27 (noting the remedial effects of the campaign contribution limitation on the appearance of *quid pro quo* corruption in the electoral process).

54. *Id.* at 26 (claiming that it is unnecessary to analyze beyond the contribution limit because it is a "constitutionally sufficient justification").

55. *Bellotti*, 435 U.S. at 765.

challenged a Massachusetts criminal statute prohibiting corporations from spending money in political campaigns.[56] The bank, a corporation, wanted to spend money on ballot initiatives in order to publicize its political opposition to a proposed amendment to the Massachusetts Constitution.[57]

The Court wanted to preserve the integrity of the electoral process.[58] It recognized that preventing political corruption is undoubtedly a compelling state interest.[59] However, the Court regarded the statutory means as inadequate to achieve that purpose.[60] The Court struck down the statute for two reasons. First, the Court viewed the statute as underinclusive because it only prohibited corporations from expending funds on referendum issues and not all political issues.[61] Second, the Court found the statute overinclusive since it would prevent unanimous shareholder decisions in support of ballot initiatives.[62] Thus, on the narrow issue of funding ballot initiatives, the Court afforded corporations First Amendment protection.[63]

Twelve years later, in *Austin v. Michigan State Chamber of Commerce*, the Court based its decision on the same compelling interest from *Bellotti*: preventing political corruption.[64] However, unlike in *Bellotti*, the Court in *Austin* upheld a statute, which

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56. *See* MASS. GEN. LAWS ANN. ch. 55, § 8 (1986) (stating that, "[n]o corporation carrying the business of a bank...shall directly or indirectly give any money for the purpose of aiding, political activity").

57. *Bellotti*, 435 U.S. at 794-95 (recognizing a compelling state interest in preventing corruption via direct corporate donations to political candidates but found the statues means insufficient to adequately further that interest). Thus, the Court protected corporations' rights to fund ballot initiatives under First Amendment free speech. *Id.*

58. *Bellotti*, 435 U.S. at 788-89 ("Preserving the integrity of the electoral process, preventing corruption, and 'sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance") (quoting Buckley v. Valeo, 519 F.2d 821, 835 (D.C. Cir. 1975).

59. *Id.*

60. *Id.* at 795 (Burger, C.J., concurring).

61. *Id.* (finding the statute underinclusive because it does not prohibit corporations from lobbying or voicing political concerns). Rather, it prevents corporations from funding ballot initiatives concerning referendums only. *Id.* Thus, the statute appears to silence corporate speech based on content. *Id.*

62. *Id.* at 794-95 (realizing that despite a unanimous consensus among the shareholders of a corporation on a given political issue, the statute would prevent that corporation from financially backing that cause) (Burger, C.J., concurring).

63. *Id.* at 795 (invalidating the portion of § 8 challenged by appellants which prohibits speech) (Burger, C.J., concurring).

64. *Austin,* 494 U.S. at 652 ("[T]hey [Michigan] are justified by a compelling state interest: preventing corruption or the appearance of corruption in the political arena by reducing the threat that huge corporate treasuries, which are amassed with the aid of favorable state laws and have little or no correlation to the public's support for the corporation's political ideas, will be used to influence unfairly election outcomes").

prohibited corporations from directly donating to political candidates.[65] This was the first time in the history of American jurisprudence that the Court upheld direct restrictions on corporate independent expenditures.[66]

The Court distinguished the challenged statute in *Austin* from *Bellotti*.[67] It reasoned that individual citizens and unincorporated unions receive far fewer state-derived benefits.[68] This fact distinguished individuals (and unions) from corporations because it lessened the risk of political corruption.[69] The Court recognized the dangerous relationship between corporations and politicians created by direct donations.[70] To combat this issue, the Michigan statute narrowly tailored restrictions on direct corporate expenditures.[71]

Several years later, *McConnell v. Federal Election Commission* furthered the precedent set forth in *Austin*.[72] There, the Court sustained sections of the Bipartisan Campaign Reform Act ("BCRA") that restricted corporations and unions from expending their general treasury funds to pay for campaign advertisements.[73] Contrary to its decision in *Buckley*, the Court in *McConnell* favored the voices of one group over another – citizens over corporations.[74] As a result, the Court's analysis of BCRA in *McConnell* led them to supersede the precedent established in *Buckley*.[75]

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65. *See id.* (upholding a prohibition on corporate spending in the electoral process and finding that the state had a compelling interest in preventing political corruption and the statute's means effectively promoted that interest).

66. *Citizens United*, 558 U.S. at 347 (stating that *Austin* marks the first time in history that the Supreme Court upheld a direct restriction on the independent expenditure of funds for political speech).

67. *Id.* at 665 (finding that even though the statute did not include unincorporated labor unions within the purview of this prohibition, the statute was not underinclusive).

68. *Id.*

69. *Id.*

70. *Id.* at 668 (noting that the Michigan statute illustrates the significant possibility that political expenditures by corporations will endanger the integrity of the political process).

71. *Id.* (stating that the statute "implemented a narrowly tailored solution to that problem" requiring independent corporate expenditures from separate funds significantly decreases the risk of injury to the political process).

72. *McConnell*, 540 U.S. at 93.

73. *See id.* at 94 (prohibiting corporations and unions from "using general treasury funds for communications that are intended to, or have the effect of, influencing federal election outcomes" the Court upheld this provision of BCRA).

74. *See id.* at 94 (allowing the federal statute to supersede their prior holding in *Buckley* by upholding specific provisions of BCRF).

75. Lillian R. BeVier, *Mcconnell v. FEC: Not Senator Buckley's First Amendment*, 3 ELECTION L.J. 127, 140 (2004) (in sustaining the BCRA's restrictions on issue ads *McConnell* "permits the legislature to restrict the

Comparing the frequency of cases concerning corporate personhood between the Early Era and Intermediate Era illuminates the indecisive and tumultuous nature of the Intermediate Era. The Early Era spanned 92 years (from 1886-1978) and contained seven pivotal cases, which significantly shaped the current concept of corporate personhood.[76] During the Early Era cases emerged on an average of one every thirteen years. In contrast, the Intermediate Era covered only thirty years (from 1978-2009) and contained three cases, which altered the concept of corporate personhood. The Intermediate Era saw a significant increase in the frequency of litigation surrounding the concept of corporate personhood with an average of one case every four years. Additionally, the nature of the litigation was notably different. The Court initially recognized the right to corporate free speech followed by sharply curtailing that right in order to protect individuals and prevent political corruption.

D. The Current Era – Corporate Personhood's Rebellious Adolescence

The Current Era began in 2010 with *Citizens United v. Federal Election Commission*, which marked a pivotal shift in the Court's understanding of corporations and their constitutional rights.[77] A nonprofit corporation, Citizens United, challenged the constitutionality of a federal statute, which suppressed electioneering communications.[78] The Court found the federal

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speech of some elements of our society in order to enhance the relevant voices of others," which is contrary to *Buckley's* First Amendment analysis) (quoting *Buckley,* 424 U.S. at 48-49).

76. *Dartmouth*, 17 U.S. at 518 (personifying corporations for the first time in American jurisprudence); *Santa Clara,* 118 U.S. at 394 (directly equating corporations and natural persons for the first time in American law); *Lochner*, 198 U.S. at 45 (recognizing corporations as persons under the purview of the Fourteenth Amendment); *Lee*, 288 U.S. at 517 (strengthening the conceptual connection between corporations and natural persons under the Fourteenth Amendment); *Martin*, 430 U.S. at 564 (applying the Fifth Amendment's Double Jeopardy Clause to corporations as natural persons); *Ross*, 396 U.S. at 531 (affording corporations Seventh Amendment rights to a trial by jury); *Marshall*, 436 U.S. at 765 (providing identical protections to corporations and natural persons under the Fourth Amendment's prohibition against warrantless searches).

77. Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 719-20 (2011) (noting that Citizens United marks a significant change in the Court's interpretation of personhood). This significant conceptual shift in understanding corporate personhood justifies a completely new division in the historical boundaries of corporate personhood. *Id.*; *see also* Ellis, *Citizens United*, 44 JOHN MARSHALL L. REV. 717, 719-720 (2011) (noting that Citizens United marks a significant shift in the Court's interpretation of personhood).

78. *See Citizens United,* 558 U.S. at 321 (defining electioneering communication); *see also* 2 U.S.C.A. § 434(f)(3)(A) (electioneering

statute's prohibition on corporate expenditures created an unconstitutional ban on political speech.[79] It recognized that political speech is an essential factor in any successful democratic society.[80] Since corporations are associations of individuals, the Court adopted the view that corporations should not be treated differently from natural persons under the First Amendment for the first time in the history of corporate personhood.[81] Thus, the Court expressly overruled *Austin* and *McConnell*, holding that governmental attempts to suppress political speech based on the speaker's corporate identity violates the First Amendment.[82]

The Court heavily relied on the corporate First Amendment precedents of *Buckley*, *Bellotti*, and *Austin*.[83] First, *Buckley* explained the danger of expenditures in the political process as *quid pro quo* corruption.[84] Since these corporate expenditures were

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communication is a telecommunication broadcast which clearly identifies a candidate for Federal Office made within 30 days of a primary or 60 days of a general election); *see generally* 2 U.S.C.A. § 441b (relevant federal statute prohibiting electioneering communication).

79. *Citizens United,* 558 U.S. at 339.

80. *Id.* at 339-40 ("[t]he 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[]political speech must prevail against laws that would suppress it"); s*ee also* EU v. San Francisco Cty Democratic Cent. Comm'n., 489 U.S. 214, 233 (1989) ([the First Amendment] "has its fullest and most urgent application to speech uttered during a campaign for political office").

81. *Citizens United*, 558 U.S. at 446 (declaring that the public must have faith in its representatives to sustain a well functioning democracy); *Id.* at 343 (Rehnquist, J., dissenting) (*quoting, Bellotti,* 435 U.S. at 783) (rejecting the argument that corporations should be treated differently under the First Amendment because they are not "natural persons").

82. *Id.* at 365 ("Due consideration leads to this conclusion: *Austin* [] should be and now is overruled") (citation omitted); *id.* at 311-13 (stating that Government may not suppress political speech on the basis of the speaker's corporate identity) (overruling *Austin*).

83. *See Citizens United*, 558 U.S. at 312-13 (explaining the effects of Buckley on the Court's analysis); *see also id.* at 345 (explaining the effects of Bellotti, contrasted with Buckley); *see also id.* (noting the effects of Austin on corporate free speech).

84. *Id.* at 345 (relying on *quid pro quo* definition as defined in *Buckley,* to distinguish direct contributions from independent expenditures); *see also* Elizabeth Garrett, *Campaign Finance in the Hybrid Realm of Recall Elections*, 97 MINN. L. REV. 1654, 1686 (2013) (explaining that the Court had difficulty after *Buckley* defining the nature of *quid pro quo* corruption and identifying what is wrong with persons or entities expending substantial amount of political contributions to a given candidate); s*ee also* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1466 (2014) (stating *quid pro quo* corruption means, "a direct exchange of an official act for money") (citation omitted). *Quid pro quo* corruption literally means "something in exchange for something" corruption. BLACK'S LAW DICTIONARY 619 (4th ed. 1996).

not direct favor-for-favor contributions, the Court did not view the corporation's speech as facilitating political corruption.[85]

Next, *Bellotti* did not consider the constitutionality of the Massachusetts criminal statute prohibiting corporations from directly donating to political candidates.[86] However, the Court assumed that the statute would be unconstitutional if it underwent the analysis in *Bellotti*.[87] Finally, the Court interpreted *Austin* as an attempt to bypass the prior case law of *Buckley and Bellotti* by identifying a new government interest.[88]

On that basis, and with the above-mentioned rationale, the *Citizens United* Court overturned *Austin* and *McConnell*.[89] As a result, the Court expanded corporate First Amendment rights by allowing corporations to expend funds directly from their general treasury to a particular political candidate.[90]

Citizens United marked the end of corporate free speech jurisprudence and served as the springboard for a new corporate right: the right to free religious expression.[91] In *Burwell v. Hobby Lobby Stores, Inc.*, the Court ruled the Affordable Healthcare Act ("ACA") contraception mandate violates the Religious Freedom Restoration Act of 1993 ("RFRA").[92] *Hobby Lobby* is the first case

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85. *Citizens United*, 558 U.S. at 314 (noting their departure from the concerns of political corruption first voiced in *Buckley* because political corruptness does not necessarily follow the potential influence a contributor may have over a candidate after donating).

86. *Id.* at 348 ("*Bellotti* does not address the constitutionality of the State ban on corporate independent expenditures to support candidates").

87. *Id*. (reasoning that the *First Amendment* prohibits political speech restrictions based on a speaker's corporate identity).

88. *Id*. at 348 (stating that the *Austin* Court identified a new governmental interest to bypass *Buckley* and *Bellotti* and suppress political speech; that interest, prevents the negative effects of large amounts of wealth accumulated by corporations that no connection to the public's support for the corporation's political ideas).

89. *Id*. at 365-66 (overruling *Austin* and *McConnell* stating that restrictions on corporate independent expenditures are invalid).

90. Anne Tucker, Comment, *The Citizen Shareholder: Modernizing the Agency Paradigm to Reflect How and Why a Majority of Americans Invest in the Market*, 35 SEATTLE U.L. REV. 1299, 1346 n.211 (2012) (noting that the Court in *Citizens United* ceased the opportunity to expand corporate speech rights by overturning *Austin's* and *McConnell's* limits on corporate political spending) (quotation omitted); *see also* Daniel E. Chand, *Nonprofit Electioneering Post-Citizens United: How Organizations Have Become More Complex*, 13 ELECTION L.J. 243, 244 (2014) (stating that *Citizens United* now allows corporations to spend money in federal and state elections).

91. *See Hobby Lobby,* 134 S. Ct. 2751 (noting that *Hobby Lobby* marks the first time in history the Court extended religious exemptions to for-profit corporations).

92. *Id.; see generally* Religious Freedom Restoration Act of 1993, 42 U.S.C.A. § 2000bb; *see also* Patient Protection and Affordable Healthcare Act, 42 U.S.C.A. § 300gg-13 (requiring employers to provide contraception coverage); *see also Hobby Lobby*, 134 S. Ct. at 2751 (holding that the contraceptives mandate is substantially burdensome on the religious freedom

in the history of American jurisprudence to extend the right of free exercise to for-profit corporations.[93]

Hobby Lobby arose from two separate federal lawsuits.[94] Two families, the Greens and the Hahns, are the respective owners of Hobby Lobby and Conestoga Wood (one of Hobby Lobby's major suppliers).[95] Both families hold deep and sincere religious convictions that life begins at conception, and certain kinds of contraceptives, which prevent the fertilization or maturation of a fertilized egg, are tantamount to abortion.[96] Through their corporations, both families sued to protect themselves from the religious burdens of providing their employee's birth control ACA's contraception mandate.[97]

The Court granted relief, holding that Hobby Lobby and Conestoga Wood's religious beliefs were impermissibly burdened.[98] Beginning its analysis of corporate personhood by examining whether RFRA applied to corporations as well as natural persons, the Court found that under the language of RFRA corporations are people.[99] Even though RFRA does not expressly define a person, the Court relied on the Dictionary Act to logically link corporations to people.[100] The Dictionary Act explains legislative terms

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of closely held for-profit corporations).

93. *Hobby Lobby,* 134 S. Ct. at 2795 ("[U]ntil today, religious exemptions had never been extended to any entity operating in "the commercial, profit making world"") (Ginsburg, J., dissenting) (quoting Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 342 (1987)).

94. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (holding that corporations are persons under the RFRA and they are protected under the Free Exercise Clause); *see also* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Serv., 724 F.3d 377 (3rd Cir. 2013) (holding that for-profit corporations could not bring a claim under the Free Exercise Clause or assert a RFRA claim).

95. *See Hobby Lobby,* 134 S. Ct. at 2765 (explaining the background of the Green and Hahn families).

96. *Id.* at 2759 (articulating *Hobby Lobby's* religious belief that four specific contraceptive methods included under ACA cause abortions); *id.* at 2764 (expressing that the Hahns family believes that human life begins at conception) (citation omitted); *id.* at 2766 (noting also that the Greens believe life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs).

97. *See generally Hobby Lobby*, 134 S. Ct. at 2751 (providing the background information upon which Hobby Lobby based its case).

98. *Id.* at 2785 (holding the contraceptive mandate of the Affordable Care Act violates the Religious Freedom Restoration Act).

99. *Id.* at 2768 (beginning an analysis of whether corporations are persons under the purview of RFRA); *see also, id.* at 2768-69 (interpreting the use of "person" under the RFRA includes corporations, regardless of whether the corporation is for-profit or nonprofit).

100. 1 U.S.C.A. § 1 (West 2012) ("In determining the meaning of any Act of Congress, unless the context indicates otherwise…the words person and 'whoever' include corporations"); *Hobby Lobby,* 134 S. Ct. at 2768 (noting that

commonly used by Congress and includes corporations in the definition of people.[101] Thus, the Court concluded that corporations are people within the language of RFRA.[102]

The RFRA prohibits government from enacting legislation that substantially burdens a person's exercise of religion under the First Amendment.[103] However, the federal government may burden a person's religious exercise if it can show: (1) the burden is in furtherance of a compelling interest; and (2) the burden is the least restrictive means of furthering that interest.[104] The Court found that the contraceptive mandate of the ACA substantially burdened Hobby Lobby's and Conestoga Wood's sincerely held religious beliefs under the scope of RFRA.[105] According to the Court, an analysis of whether a religious belief is actually *plausible* is not required to determine whether that belief is *sincerely held*.[106]

With Hobby Lobby's personhood decided and RFRA's substantial burden requirement satisfied, the Court turned to the least restrictive means test.[107] The Court found that the Department of Human Health Services ("HHS") did not use the least restrictive means because the government could have incurred the costs of providing contraceptives to women whose employers objected on religious grounds.[108] Thus, the substantial burden to Hobby Lobby's sincerely held religious belief (that life

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the RFRA does not define "person"); *id.* (specifying that the Dictionary Act, includes corporations, companies, associations, etc. in its definition of "person").

101. *See id.* at 2768 (defining corporations as included within Congress's meaning of person).

102. *See Hobby Lobby,* 134 S. Ct. at 2768 (holding that the language of the Dictionary Act supports a conclusion that Congress intended RFRA to apply to both for-profit and non-profit corporations in the same way it applies to natural persons).

103. Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb-1(a) (2012) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability").

104. *Id.* at § 2000bb-1(b) ("the application of the burden to the person – (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest").

105. *See Hobby Lobby*, 134 S. Ct. at 2775 (reasoning that the HHS mandate requires the Greens to engage in conduct that violates their religious belief that life begins at conception or incur penalties up to $26 million for Hobby Lobby); *see id.* at 2776 (clarifying Hobby Lobby has a religious objective in providing healthcare to its employees because their religious beliefs heavily influences their relationships to their employees).

106. *Id.* at 2778 (rejecting that a religious belief has to be plausible to qualify as a "sincerely held belief") (quoting *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)).

107. *Id.* at 2780 (turning from the definition of corporations under the Dictionary Act to the RFRA's least restrictive means test).

108 *Id.* (holding that the government has failed to show it lacks other means of achieving its goal without imposing a substantial burden on the exercise of religion).

begins at conception) violated the RFRA because the government could have paid for the contraceptives that Hobby Lobby found deplorable.[109]

The inherently political and controversial nature of *Hobby Lobby* sparked heated debate between the majority and dissent.[110] The dissent attacked four points of the majority's opinion.[111] First, the dissent disagreed with the Court's interpretation of the RFRA.[112] The dissent noted that the Dictionary Act only applies when Congress does not include an express definition in the statute and the broader context of the statute does not indicate an intended meaning.[113] Here, the dissent asserts that the context indicated otherwise and that corporations are distinguishable from natural persons because corporations lack the independent cognitive faculties to believe.[114]

Second, the dissent drew a distinction between nonprofit corporations, which have traditionally been afforded religious exemptions, and for-profit corporations, which have never been extended religious exemptions.[115] Nonprofits are allowed exemptions from laws to accommodate religious objections because the primary function of their corporation is religious and faith based and they "exist to foster interests of people subscribing to the same religious faith."[116] Conversely, for-profit corporations' main function is generating capital.[117]

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109. *Id.* at 2785 (holding that requiring contraceptive coverage, as applied to closely held corporations, violates the RFRA).

110. *See id.* at 2787 (Ginsburg, Sotomayor, Breyer, & Kagan, JJ., dissenting).

111. *See id.* at 2787-804 (attacking the majority's opinion that: (1) the Dictionary Act controls the language of RFRA; (2) for-profit and nonprofit corporations are similar enough under these circumstances; (3) the government's failure to incurs the costs of disputed contraceptives constitutes a substantial burden; and (4) the means were not the least restrictive in furthering a compelling governmental interest).

112. *See id.* at 2793 (disagreeing with the majority's use of the Dictionary Act).

113. *See id.* (Ginsburg, J., dissenting) (emphasis added) (quoting 1 U.S.C. § 1 (West 2012)) (observing that the Dictionary Act's definition of "person" only controls when the "*context does not indicate otherwise*").

114. *Id.* at 2794 (Ginsburg, J., dissenting) (quoting Marshall C.J., in *Dartmouth*, 17 U.S. at 634) (reasoning that the Court has previously refused to provide religious exemptions to for-profit corporations because corporations only exit in "the contemplation of the law" and religious beliefs are characteristic of "natural persons"); *id.* (Ginsburg, J., dissenting) (quoting *Citizens United,* 558 U.S. at 466) (restating that corporations lack consciousness, beliefs, feelings and thoughts).

115. *See Amos*, 483 U.S. at 344-46 (expounding on the difference between nonprofit corporations and for-profit corporations with regards to the free exercise of religion).

116. *Hobby Lobby*, 134 S. Ct. at 2795 (noting that religious organizations [non-profits] are clearly distinguishable from for-profit corporations).

117. *Id.* (contrasting the differences between for-profit and non-profit

Third, the dissent disagreed with the majority's interpretation of substantial burden under the RFRA. Under the ACA, the requirement that corporations provide contraceptives is contingent on whether employees request coverage.[118] It is possible that a corporation will not be required to provide contraceptive coverage because the employees and owners share similar religious oppositions to contraceptives.[119] Additionally, the dissent notes that there are circumstances in which contraceptives provide legitimate medical benefits to patients beyond preventing conception.[120]

Finally, the minority opined that even if ACA's contraceptive coverage imposes a substantial burden, the means in furtherance of a compelling governmental interest - providing for the health of its citizens - were the least restrictive.[121] The minority also reasoned that requiring the government to fund contraceptive coverage in order to not offend for-profit employers who oppose contraceptives is not a viable alternative.[122] Requiring the

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corporations). For-profit corporations are allowed exemptions for some federal laws because they are expected to spend the money they generate on community improvement within their particular faith group. *Id*. Non-profit corporations do not share this characteristic. *Id*.

118. *Id*. at 2799 (Ginsburg, J., dissenting) ("The requirement [contraceptive mandate] carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable"); *see id*. (Ginsburg, J., dissenting) ("[T]he decision whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents").

119. *Id*. (noting that the ACA doesn't force employers to actually provide contraceptives, but rather provide the option for employees to obtain them. Therefore, it is possible [if the employees of the company held the same deeply rooted and sincere religious beliefs as the owners] that the corporation would not have to provide any contraceptives).

120. *Id*. (Ginsburg, J., dissenting) ("[T]he government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well being"); *see also id*. (Ginsburg, J., dissenting) (noting that contraceptive coverage (1) "enables women to avoid the health problems [of] unintended pregnancies" (2) "helps safeguard the health of women for whom pregnancy may be hazardous, even life-threatening" and (3) "secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders and pelvic pain").

121. *See id*. at 2801 (arguing that the government has shown there is no mean which would be less restrictive on Hobby Lobby and achieve (1) "satisfy the challenger's objections" and (2) "carry out the objectives of the ACA's contraceptive coverage requirement") (Ginsburg, J., dissenting); *see also id*. at 2802 (claiming that the least restrictive means under RFRA cannot "require employees to relinquish benefits accorded to them by federal law in order to ensure their commercial employers can adhere unreservedly to their religious tenets").

122. *Hobby Lobby,* 134 S. Ct. at 2802 (Ginsburg, J., dissenting) ("The most straight forward alternative the Court asserts would be for Government to assume the cost of providing…contraceptives…to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections").

government to pay for employers' objections would not only be financially infeasible but it would essentially defeat the purpose of RFRA's least restrictive means requirement.[123] In effect, the government could never burden an individual's religious beliefs because there is always a least restrictive means; the government could foot the bill for the alleged burden.[124] However, Least restrictive does not, and should not, mean entirely unrestrictive.[125]

The Intermediate and Current Eras are strikingly similar because both focus primarily on political issues under the First Amendment.[126] Unlike the Intermediate Era, the Current Era Court expands corporate rights rather than restrict them.[127] The conflict of the Current Era is not found between cases, but rather between majorities and dissents. Heated debates are sparked within the Court, fueled by the inherently political focus of the Current Era.[128]

Additionally, the Court subtly shifts its view of corporations from legal entities separate from the individuals who constitute them to associations of individuals whose rights need to be protected.[129] The Court's opinions in *Citizens United* and *Burwell v. Hobby Lobby Stores, Inc.* are antithetical to the expressed concerns of political corruption and the natural theory of corporations prevalent in the Intermediate Era.[130]

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123. *See id.* at 2801-02 (arguing that the least restrictive means has not been satisfied by offering the alternative that the government pays for the coverage).

124. *See id.* (noting that the government footing the bill for the alleged burden will always be available as a least restrictive means).

125. *Id.* (arguing that the RFRA's least restrictive means requirement cannot cause employee's to forfeit their federally mandated healthcare coverage so as not to offend their employer's religious convictions and remain *least restrictive*).

126. *See e.g.*, *Citizens United* (concerning corporations' free speech rights under the First Amendment); s*ee also Hobby Lobby* (concerning corporations' free exercise rights under the First Amendment).

127. *See, e.g., Citizens United* (expanding corporate free speech under the First Amendment to allow corporations to donate money from their general treasury to political candidates); *see also Hobby Lobby* (expanding corporate free exercise under the First Amendment to provide corporations religious exemptions from federal law when that law substantially burdens the sincerely held religious beliefs of the corporation's owners).

128. *See* Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1499-1502 (discussing the debates between majority and dissenting justices in *Citizens United* over case precedent and *stare decisis*).

129. *See Citizens United*, 558 U.S. at 356 ("*associations of citizens* – those that have taken on the *corporate form* – are penalized for engaging in the same political speech") (emphasis added); *see also Hobby Lobby,* 134 S. Ct. at 2768 ("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 [associated with the corporation]").

130. *See* Charles D. Watts, Jr., *Corporate Legal Theory Under the First*

E. Are Corporations Really People, My Friend?

The Early Era of corporate personhood firmly supported a functional economic view of corporations. It granted corporations rights to facilitate production and economic growth. The tension of the Intermediate Era arose out of the Court's attempt to change that view. The Court wrestled with attempting to justify the established model of economic efficiency with the seemingly incompatible imposition of corporate free speech. In contrast, the Current Era Court takes the notion of "personhood" quite literally, attempting to expand the rights of corporations to equal that of natural persons. Current Era decisions stand in opposition to their predecessors because they posit the idea that corporations can believe.[131] Is corporate belief even a logically sound concept considered in light of the historical rise of corporate personhood? Or is it a recent development inconsistent with the purpose and development of the modern corporation? To answer these questions, this section investigates the legal theories that support corporate entities and analyzes the relationship between specific constitutional amendments and those theories.

F. The Artificial Nature of Corporations

Unlike people, corporations do not exist naturally in the world; instead corporations are created by law.[132] Legally, a corporation is an entity, which has the power to act above and beyond the capacity of its shareholders.[133] Economically, corporations produce goods and services.[134] The legal and economic natures of corporations are virtually inseparable from one another.[135] The prospect of economic growth entices the state to

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Amendment: Bellotti and Austin, 46 U. MIAMI L. REV. 317, 357 (1991) (stating that the Court in *Austin* and *Bellotti* adopts a natural theory of corporations).

131. Corporations "believe", insofar as they assert the religious beliefs of their owners.

132. *Dartmouth*, 17 U.S. at 636 (stating that corporations are "artificial beings existing only through the law").

133. BLACK'S LAW DICTIONARY 168 (Bryan A. Garnered et al. eds., 4th ed. 2011) ("[C]orporation: An entity having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exists indefinitely"); *see also id.* ("[C]orporate veil: The legal assumption that the acts of a corporation are not the actions of its shareholders, so that the shareholders are exempt from liability for the corporation's actions").

134. Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE WESTERN RES. L. REV. 1043, 1044 (2008) (discussing the nature of shareholder investments as a belief that corporations provide a convenient way to produce goods and services which can in turn be sold for profit).

135. *Bellotti*, 435 U.S. at 826 (Rehinquist, J., dissenting) (noting that state laws create corporations, grant them limited liability and deny other rights unrelated to those purposes).

legitimize a corporation's existence.[136] At the same time, a corporation's legal existence is necessary for significant economic growth.[137] Thus, these inseparable concepts create a legal-economic dichotomy.

Corporate transformation in the United States from the nineteenth to the twentieth century shifted the understanding of a corporation from a purely legal entity to an economic entity concerned with profit.[138] This gave rise to three distinct corporate features – a corporate anatomy: shareholder stock, board of directors, and limited liability. First, corporations became property by developing advanced banking and stock trading techniques.[139] One's ownership stake in a corporation, known as "stock," entails all of the rights and obligations of everyday tangible property.[140]

Second, collective corporate stock ownership created the modern board of directors by turning a corporation into property.[141] Typically, a corporate board of directors owns the majority of stock and performs various functions within a corporation, including: selecting officers, managing public and labor relations, determining what products or services the company will provide for sale, etc.[142] In essence, the board of directors is a collection of elected officials who both own and make decisions for the corporation.[143]

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136. *See* Phillips L. McWilliams, *Magnolia North v. Heritage Communities: The South Carolina Court of Appeals' End Run Around the Necessity of Equitable Justifications when Disregarding the Corporate Form*, 64 S.C. L. REV. 825, 830 (2013) (stating that limited liability – a legal creation of the state – was developed to promote economic growth and generally incorporate).

137. *See* Brier K. Miron, *Federal Common Law Versus State Law: Can A Federal Common Law Veil-Piercing Standard for Indirect Cercla Liability of a Parent Corporation Satisfy the Kimbell Foods Test?*, 39 SOUTHWESTERN L. REV. 513, 538 (2010) (noting that corporations promote economic growth by offering limited liability which protects investors and encourages them to take risks).

138. Donald J. Smythe, Note, *Shareholder Democracy and the Economic Purpose of the Corporation*, 63 WASH. & LEE. L. REV. 1407, 1408 (2006) (arguing that the transformation of the purpose and function of corporations in the United State had a profound effect on the conceptual understanding of corporations).

139. WILLIAM G. ROY, SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA 148-54 (1997) (tracing the historical development of inter-corporate stock ownership).

140. *See* Daniel S. Kleinberger, *The Closely Held Business Through the Entity-Aggregate Prism,* 40 WAKE FOREST L. REV. 827, 867 (2005) (noting that generally restraints on alienation of corporate stock is against public policy).

141. ROY, *supra* note 139 at 154-58 (discussing the powers a corporation's board of directors and its evolution through the 19th century).

142. *See* Arthur A. Ballantine, *Directors and their Functions*, 59 HARV. L. REV. 151, 152 (describing the various functions typically carried out by a corporation's board of directors).

143. *See* Arthur R. Pinto, *Corporate Governance: Monitoring the Board of Directors in American Corporations*, 46 AM. J. COMP. L. 317 (placing the board

Finally, and most importantly, a board of directors receives limited liability protection.[144] Limited liability is the idea that the corporation itself is responsible and liable for the actions of the corporation and its employees/agents and individual members are excluded from personal liability, barring criminal action by individual members.[145]

Shareholder stock, the board of directors, and limited liability are common features of modern corporations in America.[146] They constitute the internal anatomy, which allows corporations to function efficiently in today's marketplace.[147] The legal doctrine of corporate personhood is an external attribute of corporations. If properly applied, it enables a corporation to accomplish the economic purposes for which the state originally sanctioned its incorporation.[148] Together, the internal anatomy and external legal doctrine create a metaphorical habitat for corporate existence and growth. Each time the Court alters its interpretation or application of corporate personhood, it creates new external space in which corporations can operate.[149]

G. Initially the Supreme Court Promoted Economic Efficiency by Expanding Corporate Personhood

The Court was increasingly concerned with the Fourteenth Amendment during the Early Era of corporate personhood.[150] The Fourteenth Amendment is the most beneficial constitutional provision for corporations because it protects them from unfair

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of directors in a position of control and decision making in the traditional American corporate structure).

144. *Id.* at 158-64 (commenting on the rise of corporate limited liability in the 19th century as one of the most beneficial aspects of a corporation).

145. *See* David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1310 (2007) (discussing the equitable doctrine of "piercing the corporate veil" when the protections of limited liability ought to be denied).

146. *See supra* notes 139-141 (expounding the elements of a corporate anatomy: limited liability and shareholders stocks).

147. *See* David A. Skeel, Jr., *Corporate Anatomy Lessons*, 113 YALE L.J. 1519, 1525 (2004) (noting the significance of the board of directors within the anatomy of a corporation); *id.* at 1524 (stating that the common structure [anatomy] of corporations are: personhood, limited liability, transferability of shares, board of directors, investor ownership).

148. *See* Steven Cherensky, *A Penny For Their Thoughts: Employee-Inventors, Preinvention Assignment Agreements, Property and Personhood*, 81 CALIF. L. REV. 597, 659 (1993) (linking the concept of corporate personhood with the promotion of economic efficiency).

149. Take for example *Bellotti*, the Court granted corporations the limited right to finance ballot initiatives. This allowed the space for corporate external growth insofar as corporations were permitted to venture into previously uncharted territory and fund ballot initiates in their political favor.

150. *See supra* Part II.A (explaining the Fourteenth Amendment's prevalence in the Early Era).

state regulation and allows them to operate at a higher level of efficiency.[151] State governments not only create corporations through corporate charters, but they regulate nearly everything they do.[152] The Fourteenth Amendment provides corporations a means of relief from overly burdensome state regulations.[153] Further, by recognizing corporations as "persons," the Fourteenth Amendment makes corporate action possible.[154]

While the Fourteenth Amendment recognizes corporations as persons under the law, the Court's Fourth Amendment interpretation also secures corporate property.[155] In addition, the Early Era afforded corporations both Fifth Amendment and Seventh Amendment rights.[156] The Fifth and Seventh Amendments functionally work together and solidify a corporation's potential legal actions in court.[157] Nevertheless, the impact of the Fourteenth Amendment on corporate personhood cannot be understated. Comparatively, it is used as a corporate shield far more frequently than the Bill of Rights is used as a corporate weapon.[158]

During the Early Era the Court followed a uniform understanding of corporations supported by a single purpose when it extended Fourth, Fifth, Seventh and Fourteenth Amendments to

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151. *See* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 579 (1990) (noting that the Fourteenth Amendment acted as a shield, protecting corporations from state regulations throughout the nineteenth and twentieth centuries and today it aids corporations in fighting similar issues).

152. *See* Scarlett, *supra* note 37, at 572; *see also* Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 253-54 (arguing that state amendments at the end of the 19th century which prohibited special corporate charters recognizes the inherent and traditional ability of the state governments to grant corporate charters and create corporations).

153. *See* Dale E. Ho, *Dodging a Bullet: McDonald v. City of Chicago and the Limits of Progressive Originalism*, 19 WM. & MARY BILL RTS. J. 369, 378 (2010) (noting that the enforcement powers of the Fourteenth Amendment require Congressional legislation to counteract and afford relief against State regulation).

154. *See Santa Clara,* 118 U.S. at 394 (recognizing corporations as "persons" under the purview of the Fourteenth Amendment).

155. *Marshall*, 436 U.S. at 307 (recognizing corporations' right to protection from unwarranted searches and seizures).

156. *Louis K. Liggett Co.*, 288 U.S. at 517 (extending the Double Jeopardy Clause to corporations); *see also Ross*, 396 U.S. at 531 (affording corporations Seventh Amendment rights to jury trial).

157. *See generally* Annual Review of Criminal Procedure, 37 GEO. L.J. ANN. REV. CRIM. PROC. 605 (2008) (discussing the general application of the Fifth Amendment at trial); *see also Ross*, 369 U.S. at 531.

158. Mayer, *supra* note 151, at 593 (noting that although the Supreme Court recognizes Fourth Amendment protections for corporations, it is infrequently utilized).

corporations.[159] Namely, the Court followed a natural entity theory of corporate law and aimed at promoting the economic efficiency of corporations.[160] The natural entity theory holds that a relationship between shareholders and a corporation creates the corporation, but the corporation exists separate and distinct from the shareholders themselves.[161] The Court promoted corporate economic efficiency because recognizing the independent existence of corporations from both state law and shareholder motives allows corporations to act.[162]

H. The Supreme Court's Current Expansion of Corporate Personhood Does Not Promote Economic Efficiency

In contrast, the Court's expansion of First Amendment rights to corporations does not promote economic efficiency.[163] This is because First Amendment expansion is based on a different view of corporations.[164] Rather than looking at corporations as entities created by a relationship between shareholders, which exist separate and independent of that relationship, the Court adopts an aggregate theory of corporations.[165] That is, the Court views corporations as nothing more than the sum of the individuals who own it.[166] This rationale allows the Court to afford First

159. *See Marshall*, 436 U.S. at 317 (extending Fourth Amendment rights to corporations and recognizing the importance of efficiency); *see also Martian*, 430 U.S. at 564; *see also Bernhard*, 369 U.S. at 531.

160. *See* Charles D. Watts, *Corporate Legal Theory Under the First Amendment: Bellotti and Austin*, 46 U. MIAMI L. REV. 317, 326-28 (1991) (discussing the role of natural entity theory and the expansion of corporate rights).

161. J. William Callison, *Federalism, Regulatory Competition, and the Limited Liability Movement: The Coyote Howled and the Herd Stampeded*, 26 J. CORP. L. 951, 972 (2001) (comparing natural entity theory and artificial entity theory and noting that while natural entity theory retained the corporation's separate existence it added that corporations are created by the shareholders, not the state).

162. *See* Julie Marie Baworowsky, *From Public Square to Market Square: Theoretical Foundations of First and Fourteenth Amendment Protection of Corporate Religious Speech*, 83 NOTRE DAME L. REV. 1713, 1738 (2008) (discussing how a natural entity theory allows corporations to act independent of investor management and remain unchanged despite alterations among shareholder contracts).

163. Teneille R. Brown, *In-Corp-O-Real: A Psychological Critique of Corporate Personhood and Citizens United*, 12 FL. ST. U. BUS. REV. 1, 47 (2013) (claiming that First Amendment expansion, based on aggregate theory, cannot be adequately relied on).

164. *Id*.

165. *See* Watts, *supra* note 160, at 329-30 (explaining the aggregate theory of corporations and how it came to be recognized).

166. Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1062 (1994) (defining the aggregate

Amendment protections to corporations because they are protecting the owner's rights, not the corporation's.[167]

III. FREE SPEECH AND CITIZENS UNITED

The Court's 2010 decision in *Citizens United*, which afforded corporations free speech under the First Amendment, relied on an aggregate theory of corporations.[168] The majority specifically states, "[t]he association of individuals in a business corporation is no different [from individuals speaking in association through the Republican or Democratic party]."[169] This opinion clearly indicates that the Court adopts an aggregate theory of modern corporations. It relies on the premise that corporations exist and act through a relationship among shareholders.[170]

However, as the dissent observed, the majority failed to address the effects of this rationale on shareholder investment protection.[171] That is, the corporation's free speech exercise may undermine the shareholders' political convictions.[172] If corporations are permitted to donate to political campaigns, some shareholders will find their investments effectively working against them.[173] For example, when shareholders do not politically

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theory as the idea that "a corporation is the sum of human constituents and nothing more").

167. *See Citizens United*, 558 U.S. at 356 (equating corporations to "associations of citizens" who have taken on "corporate form"); *see also Hobby Lobby*, 134 S. Ct. at 2768 (stating that the *purpose* of affording corporations rights is to protect the people who are associated with the corporation).

168. *See* Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 341 (2014) (noting the "triumphant ascendance" of the aggregate theory of corporations in *Citizens United* after it began to take a foothold in the 1970's in *Buckley*); *see also* Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE WESTERN RES. L. REV. 497, 519 (2010) (arguing that the Court's reasoning in *Citizens United* is a return to the aggregate theory of corporations).

169. *Citizens United*, 558 U.S. at 392 (responding the dissent's opinion that corporations are not individual Americans).

170. *Id.* at 343 (rejecting the argument that corporations should be treated differently under the First Amendment because they are not natural persons). This implies that the Court's view of corporations no longer consists of an entity derived theory, but rather a theory which views shareholders as an association constituting the corporation. *Id.*; *see also* Watts, *supra* note 130, at 329-30 (explaining the principles of the aggregate theory of corporate personhood).

171. *Citizens United*, 558 U.S. at 475 (Stevens, J., dissenting) (noting the majority's failure to adequately address the issue of shareholder investment protection).

172. *Id.* ("[S]hareholders who disagree with the corporation's electoral message may find their financial investments being used to undermine their political convictions").

173. *Id.* (asserting that an effect of allowing corporations to donate to

endorse the same candidate as the corporation, they may find their financial investments opposing their political beliefs.

The counterargument to this political dissonance supposes that the democratic microcosm of the corporation will redress the issue.[174] In other words, investors can bring suit for breach of fiduciary duty to remedy political abuse committed with their investments.[175] However, these derivative suits are essentially meaningless and ineffective.[176]

Further, it fails by overlooking the issue for union members who are required to pay dues, whereas shareholders choose to invest.[177] Thus, members feel the effects of their union's free speech political donations more intensely. To illustrate, imagine being required to pay dues to a union. The trade offs seem reasonable, but dues are required and there is no option not to contribute. Then envision that those required fees are donated to a political campaign fundamentally irreconcilable with your political ideologies. Where the investor can actively choose to sell their share or avoid investing in corporations who donate to an objectionable political cause, the union member's options are exceedingly limited: pay the dues and ignore the reprehensible use of your money, or quit. Although this may seem like stretching an example to its logical extreme, since *Citizens United* it has quickly become a shocking reality.

The debate between the majority and dissent in *Citizens United* brings corporate personhood out of an economic background and onto the political stage. The Court is not only concerned with protecting the corporation as if it were a person; it also seems determined to make the corporation a "political animal" as well.[178] This new focus indicates a conceptual shift in how the

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political candidates from their general treasury is the adverse effect it would have on shareholders who invest money in the corporation but do not share the political beliefs of the corporation).

174. *Id.* at 370 (acknowledging that the corporate democracy will sufficiently address potential shareholder objections raised as a result of inconsistent political opinions between shareholders and the corporation).

175. *Id.* at 361 (speculating that abuse of shareholder investments may be remedied "through the procedures of corporate democracy").

176. *Id.* at 477 (Stevens, J., dissenting) (noting that the rights of shareholders to bring derivative suits for breach of fiduciary duty against corporations are so limited they are almost nonexistent); *see also* Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133, 165-66, 199-200 (1998) (noting that within a corporate structure in which corporations were allowed to donate to political campaigns, management and not shareholders would make decisions on who to endorse. The dissenting shareholders who did not agree with management's endorsement would have virtually non-existent protection under the current corporate democratic structure).

177. *Citizens United*, 558 U.S. at 476-77 (Stevens, J., dissenting) (responding to corporate democracy as a proposed solution to political abuse of shareholder investments).

178. *See* Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457, 464-465 (commenting on how *Citizens United* further embodies the

Court understands the nature of corporations. The Court's view of corporations is no longer aimed at promoting economic efficiency as before. The conceptual movement away from economic efficiency and corporate natural theory to political power and aggregate theory is further developed in *Hobby Lobby*.

A. Free Exercise and Hobby Lobby

The majority's rationale behind *Hobby Lobby* is identical to the opinion of the Court in *Citizens United*.[179] The Court states that the purpose of affording corporations protection, whether statutory or constitutional, is to protect the rights of people associated with the corporation.[180] This rationale is the foundation of the aggregate theory.[181] It posits that corporations are created through a relationship of associated human beings and this relationship extends constitutional rights to corporations.[182] By choosing to operate in an association, individuals do not sacrifice their constitutional rights; they can exercise them through the

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corporation in terms of corporate personhood); *see also* Aristotle, *Politics,* bk I, at 1235a (this is my own translation) ("man is by nature a *political animal*" - *ζῶον πολιτικόν* [Zoion Politikon] derived from *πόλις* [polis] meaning "city" implying that part of man's unique "political" nature resides in the communicative capacity of speech).

179. *See* Martin Petrin, *Reconceptualizing the Theory of the Firm – From Nature to Function,* 118 PENN. ST. L. REV. 1, 17 (Summer 2013) (pointing out that the *Citizens United* Court relied on an aggregate theory of corporate personhood in responding to the question: whether "corporate speech differed from that of individual political speech"). The *Hobby Lobby* Court conflated Hobby Lobby, as a for-profit corporate entity, with the majority shareholding family, the Greens. *See Hobby Lobby*, 134 S. Ct. at 2768; *see also* Elizabeth M. Silvestri, Note, *Free Speech, Free Press, Free Religion? The Clash Between the Affordable Care Act and the For-Profit, Secular Corporation*, 48 SUFFOLK U.L.REV. 257, 278-80 (2015) (arguing that the Supreme Court's decision in Hobby Lobby was not possible under an artificial person theory [artificial entity theory] of corporate personhood). The outcome of Hobby Lobby required the Court to presuppose an aggregate theory analysis of corporations. *Id*.

180. *Hobby Lobby*, 134 S. Ct. at 2768 (stating that corporations are organizations created by human beings to achieve desired ends, extending constitutional protection to corporations preserves the constitutional rights of those who create the corporation).

181. Tucker, *Flawed Assumptions*, 61 CASE WESTERN RES. L. REV. 497, 519 (2010) (arguing that the *Citizens United* Court returned to the aggregate theory of corporate personhood first utilized in *Buckley* and *Bellotti*).

182. *See* Malcom J. Harkins III, *The Uneasy Relationship of Hobby Lobby, Conestoga Wood, the Affordable Healthcare Act, and the Corporate Person: How a Historical Myth Continues to Bedevil the Legal System*, 7 ST. LOUIS U. J. HEALTH L. & POL'Y 201, 305 (2014) (defining aggregate theory of corporate personhood and noting that under this theory individuals are not required to surrender their constitutional rights because they associate with one another in corporate form).

corporate form.[183] If the Court refused to recognize the free exercise rights of corporations; individuals would not necessarily forfeit their constitutional rights. Namely, because individuals who constitute a corporation, under aggregate theory, are free to pursue their constitutional rights in their individual capacity as private citizens.

On the one hand, free speech grants corporations the ability to voice their political concerns.[184] In turn, this could indirectly promote economic efficiency by letting corporations have a say in how states regulate them.[185] On the other hand, corporate economic efficiency is not promoted, either directly or indirectly, by affording corporations religious rights. Hobby Lobby and Conestoga Wood avoid a significant financial burden by not incurring penalties under ACA, but this addresses Hobby Lobby's net profit and not the economic efficiency historically focused on when expanding corporate rights.[186]

Thus, in *Citizens United* and *Hobby Lobby* the Court alters its view of corporations. Originally, the Court adopted the view that corporations are merely convenient fictions created by law.[187] During the Early Era, the Court held a natural theory of corporate personhood.[188] This supported the understanding that shareholder relationships create corporations, yet corporate action occurs independent of any individual shareholder.[189] In contrast, the

183. *See Citizens United*, 558 U.S. at 392 (recognizing that the association of individuals within a corporate context is no different from any other form of association).

184. *See* David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United*, 89 N.C. L. REV. 1197, 1223 (2011) (discussing the capacity for corporations to utilize the holding of *Citizens United* to focus the shareholders into a political voice).

185. *See* Baworowsky, *supra* note 162, at 1743-44 (noting that voices of individuals who constitute the corporation are deemphasized when a corporate entity theory prioritizes state control above corporate autonomy); *see also* Yosifon, *supra* note 184 (contrasting alternative corporate entity theories which adopt complete corporate autonomy and arguably grant too powerful a political voice).

186. *See Hobby Lobby,* 134 S. Ct. at 2776 (noting that Hobby Lobby could potentially face $26 million in fines under the ACA for refusing to provide contraceptives).

187. *See Dartmouth*, 17 U.S. at 637 ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law"); *see also Citizens United*, 558 U.S. at 429 (quoting *Dartmouth*).

188. *See* Watts, *supra* note 130.

189. *See* Paula J. Dalley, *To Whom It May Concern: Fiduciary Duties and Business Associations*, Article, 26 DEL. J. CORP. L 515, 535 (2001) (defining the natural entity theory as the idea that corporations are real and they exist separate from the state and individuals which compose them); *see also* Thomas P. Byrne, *False Profits: Reviving the Corporation's Public Purpose*, 57 UCLA L. REV. DISCOURSE 25, 33 (2010) (contrasting artificial entity theory and natural entity theory on the basis that natural entity theory "posits that the corporation is not created by the state – via a charter or otherwise – but is instead a creation of its owners, the shareholders").

aggregate theory underlies the Court's current interpretation of corporate personhood.[190] The aggregate theory of corporations blurs the separation between the shareholders and the entity created by their association.[191] This leads to a blurred separation between the corporation's liability and shareholders' limited liability, which could seriously harm economic efficiency.[192]

IV. CORPORATIONS SHOULD FEAR AGGREGATE THEORY EXPANSION OF FIRST AMENDMENT RIGHTS

Contrary to the corporate victory that *Citizens United* and *Hobby Lobby* appear to create, corporations should fear the potential consequences of corporate personhood expansion under the aggregate theory.[193] The Court's application of aggregate theory to corporate personhood in *Citizens United* and *Hobby Lobby* poses a potentially fatal risk to corporate limited liability.[194] Considering that natural entity theory directly supports limited liability, further expansion of First Amendment rights under aggregate theory may remove limited liability's underlying justification.[195]

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190. *See e.g.,* Tucker, *Flawed Assumptions*, 61 CASE WESTERN RES. L. REV. 497, 513-20 (2010) (arguing that the *Citizens United* court utilized an aggregate theory of corporate personhood).

191. Brett W. King, *The Use of Supermajority Voting Rules in Corporate America: Majority Rule, Corporate Legitimacy, and Minority Shareholder Protection*, 21 DEL. J. CORP. L. 895, 904 (1996) (claiming the aggregate theory's distinguishing characteristic is its "atomized" composition, being comprised by shareholders, whereas natural entity theory recognizes the corporation as a distinct legal entity).

192. *See id.* (alluding to aggregate theory's elusive distinction between shareholders, and the corporate entity itself).

193. *See* Melissa Steffan, *Hobby Lobby Solidifies 'Major Victory' Against HHS Contraceptive Mandate*, CHRISTIANITY TODAY (July 30, 2013), www.christianitytoday.com/gleanings/2013/june/hobby-lobby-tenth-circut-hhs-contraceptive-mandate.html (discussing *Hobby Lobby* as a victory in the tenth circuit); *see also* Genelle I. Belmas & Jason M. Shepard, *Speaking from the Bench: Judicial Campaigns, Judges' Speech, and the First Amendment*, 58 DRAKE L. REV. 709, 731 (2010) (discussing the view that *Citizens United* constitutes an important victory for the First Amendment).

194. *See* Padfield, *supra* note 168, at 337 (claiming that the problem with aggregate theory for corporations is that it ignores the separation of ownership from control). In essence, the corporation is reduced down to a general partnership – allowing liability for the shareholders. *Id.*

195. Ronaldo J. Colombo, *The Corporation*, 85 TEMP. L. REV. 1, 13 (2012) ("[e]ven the hallmark corporate characteristic of limited liability received explanation and justification from natural entity theory").

A. The Positive and Negative Effects of Natural Entity Theory

A natural entity theory of corporate personhood denies corporations the right to unrestricted political donations and the right to circumvent federal law through religious exemptions.[196] This is because natural entity theory recognizes the existence of a separate and independent corporate entity.[197] The separate corporate entity creates distance and protects shareholders from liability.[198] Consequentially, it prevents shareholders from asserting their constitutional rights through the corporation because the corporation and shareholder are not identical. This difference is the aggregate theory's main contention with the natural entity theory.[199] However, despite this potentially negative feature, the natural entity theory provides more benefits to shareholders than it takes away.

Limited liability is the most positive and beneficial aspect of the corporate anatomy.[200] Under natural entity theory, limited

196. Holly P. Anderson, *How to Reach the Gridlocks Solution without Feeding the Alligators: Why Multiple-Matching Provisions is the Key to Public Campaign Financing*, 15 T.M. COOLEY J. PRAC. & CLINICAL L. 169, 177 (2014) (noting that the controversy of *Citizens United* is that it granted corporations the right to spend unrestricted amounts of money on political expenditures) (citing *Citizens United*, 558 U.S. 310); *see also* Julie Dabrowski, *The Exception that Doesn't Prove the Rule: Why Congress Should Narrow ENDA's Religious Exemptions to Protect the Rights of LGBT Employees*, 63 AM. U. L. REV. 1957, 1977-78 (2014) (commenting on the potential risks of future litigation within the scope of RFRA religious exemptions provided to for-profit corporations under *Hobby Lobby*).

197. Suzana Sawyer, *Disabling Corporate Sovereignty in a Transnational Lawsuit*, 29 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 23, 31 (2006) (explaining the effect that limited liability under natural entity theory is a further separation of shareholders, owners and corporations); Katherine Pratt, *The Debt-Equity Distinction in a Second-Best World*, 53 VAND. L. REV. 1055, 1096 (explaining the dependency of limited liability on the existence of a corporate entity remaining separate from the shareholders).

198. *See* G. Edward White, *Transforming History in the Postmodern Era*, 91 MICH. L. REV. 1315, 1333 (1993) (noting that the natural entity theory poses several superior aspects over other alternative theories; namely, protecting shareholders with limited liability for corporate action); *see also* Colombo, *supra* note 195, at 13 ("[e]ven the hallmark corporate characteristic of limited liability received explanation and justification from natural entity theory).

199. *See* Brett W. King, *Supermajority Voting*, 21 DEL. J. CORP. L. 895, 904 (1996) (articulating the difference between natural entity theory and aggregate theory).

200. Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53, 59 (1990) (explaining that the natural entity theory of corporate personhood recognizes the essential components of the corporate anatomy – particularly, limited liability); *see also* White, *supra* note 198 (discussing the view that a natural entity theory provides advantages because it recognizes the internal changes of a corporation; including, limited liability).

liability is significantly strengthened because it is logically consistent with a natural theory of corporate personhood.[201] The natural entity theory recognizes corporations as distinct legal entities that arise out of shareholder relationships.[202] In doing so, it serves as a reasonable middle ground between fictional entity theory and aggregate theory. The artificial entity theory significantly limits the rights of corporations and shareholders by only legitimizing corporations as convenient fictions under the law.[203] The aggregate theory over-expands the rights of corporate shareholders by failing to recognize the separate existence of corporations from their shareholders. This deteriorates the inherent and essential limited liability protection afforded to shareholders through incorporation. By assuming the middle position between the deficient extreme of fictional theory and the excessive extreme of aggregate theory, natural entity theory directly supports shareholder limited liability.[204] Limited liability is a massive benefit to the shareholders, managers and owners of any corporation because it protects shareholders and corporate managers from direct responsibility for the unforeseen consequences of a corporation's actions.

B. The Positive and Negative Effects of Aggregate Theory

What natural entity theory lacks in allowing shareholders to exercise their individual rights through a corporation, aggregate theory recognizes. Aggregate theory provides corporations rights most similar to those held by private citizens.[205] These rights include free exercise and free speech under the First Amendment.[206] Aggregate theory is capable of expanding corporate rights under the First Amendment because it operates off the idea

201. *Id.*; Kathrine Pratt, *The Debt-Equity Distinction in a Second-Best World*, 53 VAND. L. REV. 1055, 1096 (2000) ("natural entity theory was thought to be consistent with the special corporate characteristics of limited liability").

202. Byrne, *supra* note 189, at 33 (explaining that under a natural entity theory, the corporation is created by the shareholders, and not the state).

203. *See id.* (contrasting natural entity theory and artificial entity theory); *see also Dartmouth*, 17 U.S. at 637 ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law").

204. Colombo, *supra* note 195 at 13 ("[e]ven the hallmark corporate characteristic of limited liability received explanation and justification from natural entity theory").

205. Brown, *supra* note 163 ("[A]ggregate theory allowed corporations to enjoy some of the benefits of private citizens").

206. *See Hobby Lobby,* 134 S. Ct. at 2751 (recognizing the free exercise rights of corporations by extending religious exemptions to for-profit corporations under RFRA); *see also Citizens United*, 558 U.S. at 310 (extending free speech to corporations by allowing them to donate money to political campaigns).

that the rights and duties of a corporation are identical to the rights and duties of the natural persons who constitute that corporate entity.[207] The real benefit is not to the corporation itself, but to the shareholders whose corporation is no longer an imaginary legal fiction but an actual legal entity under the law.[208] In turn this means that the rights of shareholders are more readily recognized under the aggregate theory.[209] However, the positive ramifications of aggregate theory only apply to the shareholders, managers and owners of corporations, not to its employees.[210]

Although the aggregate theory of corporate personhood provides an arguably positive effect for corporate shareholders, the benefit received is significantly smaller than the risk. Aggregate theory weakens shareholder protection under limited liability by legitimizing corporate "individual" rights through the rights of corporate shareholders.

Under the aggregate theory, corporations do not act independent from the shareholders or separate from the owners.[211] Instead, those with authority (e.g. owners, shareholders, management, CEO, CFO etc.) act through the corporation.[212] This ideology distorts the once-clear distinction between corporate shareholders and the corporation itself.[213] It is inconsistent with

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207. *See* Brown, *supra* note 163, at 28-29 (stating that an aggregate theory of corporate personhood asserts that the rights and duties of a corporation – an association of sorts – are identical to the rights and duties of the citizens who make up the corporation); s*ee also* Susan Kim Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 221 (2011) (noting that the aggregate theory advocates the position that corporations cannot exist nor identify with anything that is separate from the natural persons in the corporation).

208. *See* Brown, *supra* note 163, at 29 (discussing how aggregate theory transforms corporations from imaginary beings to real entities).

209. *See* Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 928 (2011) (claiming that modern aggregate theory recognizes that corporations hold individual rights and act through fiduciaries) (quoting David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305 (2007)).

210. *See generally* Dabrowski, *Exception*, 63 AM. U.L. REV. 1957, 1977-78 (2014) (discussing the potential negative effects of corporate religious exemptions on homosexual, bisexual and transgender employees).

211. *See* Phillips, *supra* note 166, at 1084 (1994) (asserting that under an aggregate theory of corporate personhood, justifying limited liability becomes difficult because the theory fails to recognize the corporation as a distinct legal entity).

212. Brown, *supra* note 205, at 106 (stating that the Justices who supported Citizens United understood that "corporations can only act through humans").

213. *See* Joanna M. Meyer, *The Real Error in Citizens United*, 69 WASH. & LEE L. REV. 2171, 2183 (2012) (explaining that an aggregate theory of corporate personhood distorts the corporate form).

limited liability.[214] If corporate action is only made possible through human beings who associate to achieve a desired goal, then corporate action is the direct product of human action.[215] In this situation, the protective aspects of limited liability lose their efficacy.[216] An *individual* cannot, in good faith, deny responsibility for his or her own actions.[217] Thus, shareholders as the source of corporate action must assume full responsibility for those actions.

C. Natural Entity Theory Protects Corporations, Shareholders and Employees

To ensure that limited liability, as well as other vital aspects of the corporate anatomy, remain fully intact, corporations ought to be cautious about petitioning for further expansion under the First Amendment.[218] The Supreme Court must return to analyzing corporations through the lens of natural entity theory. Limited liability depends on the view that corporate actions are separate from shareholder actions and that both are separate entities.[219] The aggregate theory of corporate personhood is fundamentally detrimental to that view because it systematically breaks down a barrier separating shareholders from the corporation.[220] Under the

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214. *Id.*

215. *See id.* at 2184 (claiming that one of the inherent flaws of corporate-rights theory is the circular logic that underpins it. That is, corporations are often defined by merely listing the characteristic that they have in common with natural persons).

216. *See* Daniel R. Kahan, *Shareholder Liability for Corporate Torts: A Historical Perspective*, 97 GEO. L.J. 1085, 1092 (2010) (recognizing that limited liability significant shareholder protection from enormous judgments against corporations).

217. *See generally* JEAN-PAUL SARTRE, BEING AND NOTHINGNESS: A PHENOMENOLOGICAL ESSAY ON ONTOLOGY, pt. 4, Ch. 1, § III: Freedom and Responsibility 529-34 (Hazel E. Barnes, Trans., Citadel Press 2001) (1956) (discussing the existential ramifications of absolute freedom; namely, the inescapable responsibility one must accept through *choice*).

218. *See generally* Adam Winkler, *Yes, Corporations are People – and That's Why Hobby Lobby Should Lose at the Supreme Court*, SLATE (Mar. 14, 2014, 11:52 AM), www.slate.com/articles/news_and_politics/jurisprudence/2014/03/corporations_are_people_and_that_s_why_hobby_lobby_should_lose_at_the_supreme.html (noting the potential for an aggregate theory interpretation of corporate personhood to deprive corporations of limited liability protection).

219. *See* John H. Matheson & Raymond B. Eby, *The Doctrine of Piercing the Veil in an Era of Multiple Limited Liability Entities: An Opportunity to Codify the Test for Waiving Owner's Limited Liability Protection*, 75 WASH. L. REV. 147, 175 (2000) (noting that under limited liability circumstances, shareholders and corporations are legally separate beings) (quoting Labandie Coal Co. v. Blank, 672 F.2d 92, 97 (D.C. Cir 1982).

220. *See* Phillips, *supra* note 166, at 1083-84 (discussing the effects of aggregate theory on limited shareholder liability and the difficulties that arise when corporate rights and shareholder rights are identical).

current trend of corporate personhood, corporations must decide between exercising their right to use corporations as mechanisms for political and religious agendas or the continued stability of limited liability. They can have one or the other, but not both.

V. CONCLUSION

The history of corporate personhood in American jurisprudence extends back nearly 200 years.[221] Throughout that long history, the Court's decisions that expand corporate rights divide into three distinct eras: Early Era, Intermediate Era, and Current Era.[222] While the Intermediate Era serves as a transitional period marked by inconsistent decisions, the Early Era and Current Era conform to two different theories of corporate personhood.[223] During the Early Era, when expansion of corporate rights was primarily targeted at maximizing economic efficiency, the Court viewed corporations under a natural entity theory.[224] The natural entity theory recognizes corporations as legal entities that are created by a relationship among shareholders and operate independently.[225] This logic strengthens the most vital aspect of a corporation: limited liability.[226]

In the Current Era, the Court adopted the aggregate theory of corporate personhood.[227] Under an aggregate theory, decisions like

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221. *See* Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1148 (2012) (noting that the language of "artificial being" and "mere creature of law" from *Dartmouth College* [1819] – which marks the beginning of corporate personhood – still remains today); *see also* Kyle J. Weber, *Corporate Personhood and the First Amendment: A Business Perspective on an Eroding Free Exercise Clause*, 14 RUTGERS J.L. & RELIGION 217, 221 (2012) (commenting that the Supreme Court's holding in *Dartmouth College* "laid the foundation for an evolving theory of corporate personhood").

222. *See supra* Part II. A-C (explaining the backgrounds of the Early, Intermediate and Current Eras)

223. *See supra* Part II. B (discussing the transitory nature of the Intermediate Era of corporate personhood).

224. *See supra* Part III. B (noting the Supreme Court's expansion of corporate rights under the Old Era focused on promoting economic efficiency).

225. John C. Costas IV, *State Takeover Statute and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 818 (1989) (stating that the natural entity theory of corporate personhood recognizes the corporation's existence as a separate and distinct legal entity).

226. *See* Colombo, *supra* note 204, at 13 (noting that the natural entity theory supports limited liability); *see also* White, *supra* note 198, at 1333 (asserting the superiority of natural entity theory to alternative theories because it recognizes the importance of providing limited shareholder liability).

227. *See Hobby Lobby,* 134 S. Ct. 2751 (recognizing the free exercise rights of corporations by extending religious exemptions to for-profit corporations under RFRA); *see also Citizens United*, 558 U.S. at 310 (extending free speech to corporations by allowing them to donate money to political campaigns).

Citizens United and *Hobby Lobby* establish controversial precedents by expanding corporate First Amendment rights.[228] Now, because the Court views corporate rights and individual rights as identical, corporations can exercise free speech by donating money to political campaigns and gain special exemptions from laws that offend their religious beliefs.[229] The potential detriment to limited liability under aggregate theory far outweighs the immediate benefits of expanding corporate First Amendment rights.[230] In order for the aggregate theory to recognize the rights of shareholders as equivalent to the rights of the corporation, it must ignore the barrier of limited shareholder liability.

Corporations should be cautious about petitioning the Court for further expansion of their First Amendment rights. The mentality of piercing the corporate veil on narrow issues is not sustainable in this current legal age. While the immediate benefits of corporate free speech and free exercise may seem appealing, the long-term effects of aggregate theory will prove fatal to the corporate structure.

228. *See* Fredrick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraceptive Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L.L. REV. 343, 377 n.153 (2014) (noting the controversy surrounding *Hobby Lobby*); *see also* Anthony J. Gaughan, *The Futility of Contribution Limits in the Age of Super PACS*, 60 DRAKE. L. REV. 755, 792 (2012) (noting the controversial nature of Citizens United).

229. *See Citizens United*, 558 U.S. at 310 (expanding corporate rights under the Free Speech Clause of the First Amendment).

230. *See Hobby Lobby*, 134 S. Ct. at 2751 (expanding corporate rights under the Free Exercise Clause of the First Amendment).