

THE CORPORATE PERSONHOOD TWO-STEP

Carliss N. Chatman*

The corporation cannot exist without its founders complying explicitly with the requirements for incorporation provided by state statutes. The artificial entity theory acknowledges that the corporation cannot and will not exist until its founders comply explicitly with the requirements for corporate formation and incorporation imposed by the state. A corporation is also, by design, a new and distinct entity divorced from its people. The real entity theory acknowledges that once a corporation is formed, it has rights that belong only to the corporation itself, wholly separate from its founders. By merging the artificial entity and real entity theories, the Court may properly define corporate rights.

Because of the dual nature of the corporation, corporate personhood should be a question of fact, not a matter of law. Corporate personhood requires weighing the evidence and making a case-by-case determination based on the choices made at formation and how the corporation operates. To determine a corporation's rights the Court should engage in a two-step analysis that gives deference to this duality. The Court should first rely on how the corporation is defined by statute to determine whether it is required to acknowledge the existence of the right for the corporation itself, then decide whether state action infringes on that right if it exists. Problems arise in corporate personhood jurisprudence when the courts give rights to corporations that states, legislatures, and founders did not intend.

When granting corporations constitutional rights based on the rights of founders and shareholders in the aggregate, the Court is ignoring the parameters of the state law definition of the corporation, as well as the affirmative choices of corporate founders who deliberately chose the corporation over other forms of business. Citizens United and Hobby Lobby are recent examples of this disregard of corporate statutes for the sake of protecting the rights of the people who make up the corporation.¹ Engaging in a two-step analysis shows that it is impossible for a corporation to be an association of citizens, which is contrary to the commentary in those court decisions.

* Assistant Professor, Northern Illinois University College of Law (J.D., The University of Texas at Austin School of Law; B.A., Duke University). I would like to thank Ellen Podgor and Marco Jimenez for guidance on structure and comments on early drafts. I would also like to thank Carla Reyes; the participants of the 2016 Southeast Association of Law Schools Conference; the 2017 Lutie Lytle Workshop and Writing Retreat at the University of Michigan Law School; and the faculty writing group participants at Northern Illinois University for insightful feedback. Lastly, a special thanks to Alexander Howell, Lauren Harris and Laura Schrauth for research support.

¹ See *Burwell v. Hobby Lobby Stores, Inc. (Hobby Lobby)*, 134 S. Ct. 2751, 2768 (2014); *Citizens United v. FEC*, 558 U.S. 310, 319 (2010).

TABLE OF CONTENTS

INTRODUCTION	812
I. PART ONE: AN OVERVIEW OF CORPORATE THEORIES	818
A. <i>Theories of Corporate Personhood</i>	819
1. <i>Artificial Entity Theory</i>	820
2. <i>Aggregate Theory</i>	822
3. <i>Real Entity Theory</i>	823
B. <i>The Corporate Form in Citizens United</i>	825
II. PART TWO: THE CORPORATION HAS NO PEOPLE	830
A. <i>The True Nature of Shareholder Rights</i>	831
B. <i>Directors and Officers: The Corporation's People?</i>	835
III. PART THREE: MISAPPLICATION OF THE AGGREGATE THEORY	838
A. <i>Historical Use of the Aggregate Theory</i>	839
B. <i>The Aggregate Theory in Citizens United and Hobby Lobby</i>	842
IV. PART FOUR: THE HYBRID THEORY AND THE CORPORATE PERSONHOOD TWO-STEP	846
A. <i>Defining Step One: Considering the True Nature of the Corporation</i>	847
B. <i>A Hybrid Theory</i>	853
C. <i>Ruby, Inc.: A Hindu Hospitality Company</i>	856
CONCLUSION	860

INTRODUCTION

Corporations are defined by state law, and have rights incidental to that status. Corporations also have rights defined by statutes. Because corporations are not naturally occurring, corporate constitutional rights should be analyzed within the parameters of how the corporation is defined and how the corporation operates. When courts issue decisions that define corporate rights without first defining the corporate person, they may unintentionally alter what it means to be a corporation.² When the Supreme Court gives consideration to the rights of the people who make up the corporation, it lays the framework for a corporate personhood doctrine that relies on the sanctity of constitutional rights for hu-

² See *Hobby Lobby*, 134 S. Ct. at 2768 (Free exercise includes protection of the religious liberties of the humans who own and control those companies). Once the corporation is defined as equal to natural persons for one constitutional right, and once the Court discourages drawing distinctions between who is exercising the right as is suggested in *Citizens United*, the Court may be required to extend the analysis to other constitutional rights. See Carliss N. Chatman, *Judgment Without Notice: The Unconstitutionality of Constructive Notice Following Citizens United*, 105 KY. L.J. 49, 76–78 (2016) (analyzing the danger of applying *Citizens United* to Fourteenth Amendment due process requirements); ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 253 (2014).

man beings.³ This is both a conflation of the various business entities as well as a false equivalency between corporations and natural persons, which is outside of the scope of how the state defines the corporation. As a result, corporate personhood and constitutional rights derived solely from the rights of the people who make up the corporation are outside of the scope of what the corporate founders intended when choosing the corporate form.

Citizens United and *Hobby Lobby* are recent examples of how this dismissal of corporate statutes for the sake of protecting the rights of the people who make up the corporation creates a precedent that can have dangerous and unintended consequences.⁴ Courts have accepted the rights of corporations as a foregone conclusion based in part on a flawed understanding of corporate formation and governance.⁵ The courts have ignored the parameters for corporate existence laid out by the individual states, the choices made by corporate founders at formation, and the ways in which corporate operations differ from other forms of business, treating the corporation as legal equals to human beings in a variety of contexts without a satisfactory justification in the law.⁶ This article will argue that to properly determine corporate rights, courts must engage in a two-step analysis. In step one, they must properly define the corporation by reviewing how the corporation is defined by statute and how the corporation operates. This helps to determine whether the state is required to acknowledge the existence of the right for the corporation itself. Then, in step two they must decide whether an action infringes on that right.

³ See Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 505–06 (2011) (The law “deals with corporations in a cumbersome and often inconsistent way.”).

⁴ See, e.g., Stefan J. Padfield, *A New Social Contract: Corporate Personality Theory and the Death of the Firm*, 101 MINN. L. REV. HEADNOTES 363, 376–77 (2017) (“[T]his exercise matters . . . because decisions like *Hobby Lobby* and *Citizens United* . . . are essentially increasing corporate subsidies by strengthening corporate rights against state regulation. A corporate personality theory analysis can explain how the Supreme Court is justifying these decisions, while at the same time exposing serious flaws in the analysis.”); see also *Amicus Curiae* Brief of Corp. & Criminal Law Professors in Support of Petitioners at 3–8, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354 & 13-356) (Treating corporations as persons to exercising religion under RFRA contradicts basic tenets of corporate law).

⁵ See, e.g., William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1503 (1989) (The Court’s analysis of corporate rights is a “situational practice.”); Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 98 (2014) (“What theory explains why corporations have some constitutional rights and not others? The Supreme Court has not offered a general theory.”); Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 642–43 (2016) [hereinafter Pollman, *Constitutionalizing*] (Recent decisions have created a “new reliance on state corporate law that gives governance rules a quasi-constitutional dimension that was not originally part of their DNA.”); Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 32 (2014) [hereinafter Pollman, *Right to Privacy*] (arguing that “the Court has not developed a coherent method or test for” determining which rights corporations hold).

⁶ See sources cited *supra* note 5; see, e.g., Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 292 (1999).

Corporate personhood analysis cannot end at formation. To fully analyze corporate rights, courts must properly acknowledge what the corporation is after it is formed, and engage in a fact-based analysis of what the corporation is intended to be. The issue of corporate personhood cannot be resolved by simply declaring, “corporations are people” or “corporations can never be people” because both statements are true. The corporation is a legal person in various respects, but it is not equal to a human being. Corporations are uniquely positioned socially and economically. A corporation is not a human, not a manifestation of a document, and not a state actor. A new theoretical framework is required to give proper acknowledgment to the corporate form. Starting at step one provides that framework. When starting at step one, the courts will be required to acknowledge corporate duality as represented by the artificial entity and real entity theories.

Throughout this Article, I will utilize the following hypothetical to illustrate the difference between the Court’s current approach to corporate rights and an appropriate two-step analysis:

Imagine a family so committed to their faith that they apply its principles to every aspect of their lives, including the family business. The family owns and operates five boutique hotels through their company, Ruby Hospitality Partners (“Ruby Partners”). As Hindus, they are vegetarians and do not allow employees to consume any animal flesh on the premises. They also only serve vegetarian food in the hotel restaurants. Ruby Partners’ vegetarian policy and the reason behind it is displayed in the restaurants, on hotel receipts, and in promotional literature. After decades of successful business, the family is concerned with ensuring that the business can survive after they are gone. The company gains the attention of a venture capitalist, who provides the funding to make the upgrades necessary to help Ruby Hospitality transition to a corporation and go public. They incorporate under the provisions of Delaware law, and choose to incorporate for all allowable business purposes. Although the new company, Ruby Hospitality, Inc. (“Ruby, Inc.”), is publicly traded, the family members stay on as the initial board of directors and all initial officers adhere to the Hindu faith and intend to maintain the vegetarian policy. Shortly after Ruby, Inc. goes public, an employee files suit for discrimination, alleging a medical need to consume animal products. In defense, Ruby, Inc. claims that banning meat is a tenet of the corporation’s faith, and to allow meat on the premises would infringe on its exercise of religion.

The holdings of *Citizens United*⁷ and *Hobby Lobby*⁸ would allow Ruby, Inc. to assert the religious rights of the people who make up Ruby, even to the point of discrimination against employees.⁹ To reach this conclusion, the Court

⁷ *Citizens United v. FEC*, 558 U.S. 310, 310 (2010).

⁸ *Hobby Lobby*, 134 S. Ct. at 2768.

⁹ In August 2016, a federal judge in Michigan applied the *Hobby Lobby* holding to conclude that the religious beliefs of a Detroit-based funeral home allowed the company to fire a transgender employee who wished to dress as a woman without consequence. As a result, the former employee, Aimee Stephens, was not allowed to join a discrimination lawsuit initiated by the EEOC. See *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d

would view Ruby, Inc. as a person capable of religious exercise through the rights of the people who make up Ruby, Inc.¹⁰ As a result, Ruby, Inc., an entity chosen deliberately to be distinct and separate from its founders, is embodied with rights that only a human being can fully enjoy by virtue of being the creation of natural persons.

The proper approach would first look to what Ruby, Inc. is intended to be and how the new corporate entity differs from Ruby Partners. By definition Ruby, Inc. is an artificial entity that does not exist until its founders meet all requirements for corporate formation imposed by the state. Ruby, Inc. is also a real, stand-alone entity that is not linked to the existence of its people. By starting at step one and looking at how Ruby, Inc. is defined by the state, Ruby, Inc. does not have religious rights based on the people who make up Ruby, Inc. Those people have chosen to divorce themselves from the business in exchange for the many benefits of corporate existence. To allow Ruby, Inc. to have freedom to exercise religion, step one requires looking at whether Ruby, Inc. itself was created to engage in religion, has a right to engage in religion based on how it is defined by corporate statute, or if the practice of religion is incidental to its corporate existence.

The courts may also look to whether Ruby, Inc.'s activities are representative of the practice of religion or if Ruby, Inc., through representative corporate activity, is holding itself out to be engaging in such practice. If, after this review, the Court decides that the corporation is entitled to the constitutional right, it can then engage in step two—a traditional constitutional analysis of the

837, 856–57 (E.D. Mich. 2016). This recent holding contradicts the majority's belief that the holding in *Hobby Lobby* is narrowly tailored and will not result in a flood of for-profit organizations seeking exemptions. *Compare Hobby Lobby*, 134 S. Ct. at 2783–85, with Garrett, *supra* note 5, at 145 (stating that the majority opinion in *Hobby Lobby* overreaches and conflates the standing of for-profit organizations).

¹⁰ *Hobby Lobby* is based on a combination of an interpretation of the Religious Freedom Restoration Act (RFRA) and the artificial construct of the closely held corporation being distinct enough from a public corporation to command separate constitutional rights. *See, e.g.,* Steven J. Willis, *Corporations, Taxes, and Religion: The Hobby Lobby and Conestoga Contraception Cases*, 65 S.C. L. REV. 1, 32 (2013). On May 4, 2017, President Donald Trump issued the Presidential Executive Order Promoting Free Speech and Religious Liberty, which seeks to protect “the freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government.” Section 3 of the Order requires, “The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services shall consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate promulgated under section 300gg-13(a)(4) of title 42, United States Code.” Exec. Order No. 13798, 82 Fed. Reg. 21675 (May 4, 2017). In *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017), the plaintiff pushes it a step further, basing corporate First Amendment rights on the religious beliefs of a single shareholder and employee. The business seeks to be exempted from a generally applicable state law based on the religious beliefs of a single person, and makes no argument about the beliefs of the corporation itself. Brief for Petitioners at 1–4, *Masterpiece Cakeshop, Ltd.*, 137 S. Ct. 2290 (No. 16-111).

state's actions.¹¹ Step one of the analysis shows that the corporation is multifaceted: it is both a creature of the state and a stand-alone real entity.

Two-step analysis demonstrates that it is impossible to make sweeping declarations about the nature of corporate constitutional rights. The Constitution is written for human beings, not entities. To give corporations rights, a fiction must be created to imprint human characteristics onto the corporation. We can say legally that the corporation is two things—an artificial entity and a real entity—and those two things require courts to examine and weigh evidence case by case to decide rights. There are no inalienable corporate rights; therefore, a rights determination for one corporation is merely persuasive authority for a determination of rights for another.¹²

In defining the corporate person, courts must recognize the role of the state in developing corporate laws and the choices of the corporation's founders.¹³ State law determines both the weight of the evidence contemplated in step one, and which factors courts should consider in step one, because the states have determined what documents and filings define the corporation. Forming a corporation is a deliberate and purposeful exercise of the founders' rights, and should operate as an acceptance of the terms presented by the state—including any implied limitations on the corporation's exercise of purely human rights.¹⁴ When forming a corporation, what the people choose and what the state provides is an entity that is wholly separate from their individual identity.¹⁵ When

¹¹ A two-step analysis of the facts in the *Hobby Lobby* decision may reach the same conclusion as the Court. To determine whether Hobby Lobby may engage in religious exercise, the Court would first look to the formation documents to determine whether Hobby Lobby was created for the purpose of engaging in religious exercise, then to representations of the corporation itself. The Court would not look to the actions of Hobby Lobby's founders. The problem with the Court's approach is that, by allowing Hobby Lobby to obtain rights based on the people who make up Hobby Lobby, it disregards the intentions of legislatures, states, and the founders of the corporation. A two-step analysis would clearly deny exercise of religious rights held only by the shareholders in *Masterpiece Cakeshop* without any evidence of similar beliefs being held and exercised by the corporation itself.

¹² See, e.g., Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 866–67 (2007). Professor Winkler notes that “[C]orporate rights have never been equivalent to those of individuals.” He also states, “[c]orporate personhood has played a smaller role in crafting corporate constitutional rights than many believe.” Instead, Professor Winkler explains how shareholder, third party, and capital market interests are protected when the state infringes on corporate constitutional rights in a way that would be prohibited for individuals, such as restrictions on commercial speech and SEC prospectus disclosure requirements. Two-step analysis and the hybrid theory allows for corporations to have necessary constitutional protections while protecting the rights and financial interests of those who interact with the corporation.

¹³ See Pollman, *Constitutionalizing*, *supra* note 5, at 644 (discussing corporate law as state business law).

¹⁴ See DEL. CODE ANN. tit. 8, § 101 (2017).

¹⁵ Founders not only have a choice in type of entity, but also in type of corporation. Founders who desire a charitable or religious purpose may choose a non-profit 501(c)(3) corporation or a benefit corporation instead of the standard corporation for general business purposes. See DEL. CODE ANN. tit. 8, §§ 391(j), 501 (2017) (requirements for an exempt

states recognize these entities, they must balance a desire to promote business with the interests of the state and rights of third parties who interact with the artificial business entities.¹⁶ In response to this unique and man-made situation, states weigh protection of unassociated individuals who interact with the corporation with the rights embodied in the corporation's very existence.¹⁷ As illustrated by the transformation from Ruby Partners to Ruby, Inc., when analyzing the corporate person, courts often ignore the choices of the state and corporate founders, finding that the rights of the people who make up the corporation must be protected when the corporation acts.

The corporation is not simply a conglomerate of individuals; therefore, the Court should carefully scrutinize organizational rights to avoid situations when corporate actions are taken at the expense of individual rights.¹⁸ Because many corporate rights decisions fail to give weight to actions of states and the goals of the founders, they often have unpredictable and unsettling results, giving the appearance of reasoning that is not based in corporate or constitutional law.¹⁹ The Court has never explained the source of corporate constitutional rights or settled on a single theory of the nature of the corporate form.²⁰ Instead, the Court ignores the deliberate choices of corporate founders, embodied in the distinctions between Ruby Partners and Ruby, Inc., allowing a corporation to avail itself of constitutional rights in situations when the Court feels a right is so fundamental that it may not be denied in any circumstance.²¹ This approach ignores the fact that there are no individuals to protect after Ruby is incorporated. It also ignores that the individuals who incorporate Ruby retain their individual rights outside of the corporation.

corporation, Delaware's version of a nonprofit); DEL. CODE ANN. tit. 8, § 361 (2017) (benefit corporations).

¹⁶ Stefan J. Padfield, *Finding State Action When Corporations Govern*, 82 TEMP. L. REV. 703, 724 (2009) (arguing corporate theory recognizes that "the State is one of the parties to the corporate contract with interests beyond merely providing gap-filler rules to effectuate as nearly as possible the intent of the corporate managers and shareholders.").

¹⁷ See, e.g., Thierry Kirat, *The Firm Between Law and Economics*, in THE FIRM AS AN ENTITY: IMPLICATIONS FOR ECONOMICS, ACCOUNTING, AND THE LAW 131, 143 (Yuri Biondi et al. eds., 2007) (When discussing the unique positioning of the corporation, Kirat notes that the corporation "is not a stable condition of the price system but rather an actor and subject of the economic dynamic."); David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1324 (2007).

¹⁸ See Chatman, *supra* note 2, at 88–90 (discussing the dangers of equalizing corporations to natural persons in contexts not contemplated by the Court).

¹⁹ See, e.g., CHEMERINSKY, *supra* note 2, at 257 ([T]here is no evidence that the First Amendment's drafters contemplated spending money in election campaigns as a form of protected speech. Nor did they intend the First Amendment, or any of the Bill of Rights, to protect corporations."); see also sources cited *supra* note 4.

²⁰ CHEMERINSKY, *supra* note 2, at 257.

²¹ When analyzing the constitutional rights of human beings, there are certainly rights so fundamental that they may not be denied in any circumstance. It is my position that because corporations are creatures of the state given personhood status, limited circumstances or scenarios exist in which the state may deny rights to its creation.

This Article calls attention to how generations of the Court's misunderstanding about corporations have resulted in corporate rights decisions that are a hodgepodge of erroneous claims about the nature of corporations and how they function.²² Proceeding in four parts, it proposes a new paradigm for analyzing the corporation and its rights that reflects the realities of corporate formation and existence. Part I provides a brief overview of the relevant theories of the corporation and the role of those theories in Supreme Court decisions. Part I also explains how theories of corporate personhood are referenced in the *Citizens United* decision. In Part II, this Article explores the role people play in corporations to illustrate the disconnect between the aggregate theory and the way a corporation operates.

Part III expands the critique of the aggregate theory through a discussion of how Supreme Court decisions are flawed in their disregard of the realities of corporate governance realities. Part III also illustrates how the court historically starts at step two in its analysis of corporate rights—using the facts and possible outcomes to determine whether acknowledging corporate rights is required. Part IV explains two-step analysis based in the hybrid theory.²³ The hybrid theory allows the Court to acknowledge the nature of the corporation and corporate governance, granting rights that correspond with those granted by the state and the terms negotiated by the incorporators. It incorporates the dual nature of corporate existence into rights determinations. The Article concludes that the corporation is a hybrid: a combination of the artificial and real entity theories.²⁴ The corporation is a real, stand-alone entity, independent of the natural persons who form and operate it. But it is also an artificial entity with rights that are defined and limited by the choices its creators made when adopting the state's terms.

I. PART ONE: AN OVERVIEW OF CORPORATE THEORIES

Corporate personhood is not a new concept. As early as the 1800s, three distinct theories of the corporation could be found in American jurisprudence.²⁵ Chief Justice John Marshall acknowledged corporate personhood rights under the artificial entity/concession theory, aggregate theory, and real entity theory.²⁶ Even though corporate personhood is acknowledged so early in our nation's history, allowing a corporation to access rights viewed as uniquely human

²² See *infra* Section III.B.

²³ The hybrid theory acknowledges that the corporation is both a creature of the state (artificial entity/concession theory) and a stand-alone independent entity (real entity theory). See *infra* Section IV.B.

²⁴ See *infra* Part III.

²⁵ See *Bank of the U.S. v. Dandridge (Dandridge)*, 25 U.S. (12 Wheat.) 64, 91–92 (1827) (real entity theory); *Trustees of Dartmouth Coll. v. Woodward (Dartmouth)*, 17 U.S. (4 Wheat.) 518, 636 (1819) (artificial entity/concession theory); *Bank of the U.S. v. Deveaux (Deveaux)*, 9 U.S. (5 Cranch) 61, 86–88, 91 (1809) (aggregate theory).

²⁶ See discussion *infra* Section I.A.

shocks the sensibilities, as is shown by the public alarm following the *Citizens United* and *Hobby Lobby* decisions.²⁷ The idea that an entity that does not live and breathe is entitled to the same rights as a human being is difficult for most to conceptualize even though it is the natural conclusion of decades of corporate personhood jurisprudence.²⁸ This is particularly true when corporations engage in activities associated only with living breathing persons, like being allowed to influence elections or engaging in religious expression.²⁹

Much of the language on corporate personhood found in Court decisions fits within one or more of the major theories of corporate personhood first seen in American jurisprudence in Chief Justice John Marshall's opinions: the artificial entity/concession theory, aggregate theory, or real entity theory.³⁰ This is true even when the Court does not acknowledge a theory of the corporation.³¹ The evolution of Chief Justice Marshall's analysis demonstrates the fact intensive nature of determining corporate constitutional rights. The Court has altered how corporations are defined in order to give a corporation rights they the Court believes they deserve based on changing circumstance. But instead, the Court should clearly define the corporation, and then use the two-step analysis to grant corporate rights based on the circumstance.

This Part first provides an overview of the theories of corporate personhood to lay the foundation for a discussion of how to adopt or reject them so they reflect the realities of the corporation's legal existence. This Part then explains how the theories present themselves in *Citizens United*.

A. Theories of Corporate Personhood

There is no mention of the corporation in the Constitution, yet the Supreme Court has held on numerous occasions that the corporation may avail itself of constitutional rights.³² The concept is first expressed very early by the Supreme

²⁷ See, e.g., Eric L. Lewis, *Who Are 'We the People'?*, N.Y. TIMES (Oct. 4, 2014), <https://www.nytimes.com/2014/10/05/opinion/sunday/who-are-we-the-people.html> [<https://perma.cc/QX9A-GHYM>].

²⁸ See Chatman, *supra* note 2, at 76–78 (summarizing corporate personhood jurisprudence).

²⁹ For example, in his 2010 State of the Union Address, President Barack Obama objected not only to the campaign finance changes made by *Citizens United*, but also to the concept of corporate personhood generally. President Barack Obama, State of the Union Address (Jan. 27, 2010), in 156 CONG. REC. H418 (daily ed. Jan. 27, 2010) (“Last week, the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections.”).

³⁰ There are other theories of the corporation, based in law, economics, and other fields of study. However, this article focuses only on these three theories.

³¹ See, e.g., Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1016 (2010).

³² See Susanna Kim Ripken, *Citizens United, Corporate Personhood, and Corporate Power: The Tension Between Constitutional Law and Corporate Law*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 285, 288 (2012) (“[O]ver the last 125 years, the Supreme Court has held corporations are persons entitled to numerous constitutional protections, even though the word ‘corporation’ does not appear anywhere in the Constitution.”).

Court in a trilogy of decisions authored by Chief Justice John Marshall.³³ In the three cases, Chief Justice Marshall justifies corporate personhood using three theories.³⁴ In Marshall's opinion, corporate personhood is either based on concessions made by states and the corporation at the time of formation (artificial entity theory), the rights of persons who make up the corporation (aggregate theory), or the autonomy and independence of the corporation following formation (real entity theory).³⁵ The Court has either followed Marshall's lead over the years, or has proclaimed the existence of corporate personhood without any justification at all.³⁶ In *Citizens United*, the Court chose the latter, alluding to three theories of corporate personhood, while proclaiming that it is not following any one theory.³⁷ Below is a historical analysis of the three theories of corporate personhood discussed in this Article: the artificial entity theory, aggregate theory, and real entity theory.

1. Artificial Entity Theory

The Supreme Court first directly addressed the nature of the corporation in *Trustees of Dartmouth College v. Woodward*.³⁸ Expressing the artificial entity theory, Marshall states:

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, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect [*sic*] the object for which it was created.³⁹

Dartmouth shows that, at least initially, corporations were not persons and not entitled to all the rights of natural persons.⁴⁰ This theory views corporate

³³ *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (artificial entity/concession theory); *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 86–88, 91(1809); *Bank of the U.S. v. Dandridge*, 25 U.S. (12 Wheat.) 64, 91–92 (1827) (real entity theory).

³⁴ See, e.g., Gwendolyn Gordon, *Culture in Corporate Law or: A Black Corporation, a Christian Corporation, and a Maori Corporation Walk into a Bar. . .*, 39 SEATTLE U. L. REV. 353, 368 (2016) (“Throughout the last century, courts have switched cheerfully back and forth, sometimes mid-opinion, in the idea of the corporation on which their analysis rests.”); Avi-Yonah, *supra* note 31(The court references all three theories).

³⁵ *Dartmouth*, 17 U.S. (4 Wheat.) at 636 (artificial entity/concession theory); *Deveaux*, 9 U.S. (5 Cranch) at 86–88, 91 (aggregate theory); *Dandridge*, 25 U.S. (12 Wheat.) at 91–92 (real entity theory).

³⁶ See *infra* Section II.B.

³⁷ See *infra* Section II.B.

³⁸ *Dartmouth*, 17 U.S. (4 Wheat.) at 636.

³⁹ *Id.*

⁴⁰ See Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593 (1988); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990); Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987). See *S. Ry. Co. v. Greene*, 216 U.S. 400, 412–13 (1910); Morton J. Horowitz, *Santa Clara Revisited: The*

rights as merely the natural result of what is granted to the corporation during the chartering process.⁴¹ The corporation in *Dartmouth* is the subordinate of the government, which can grant the right to exist, take it away, alter it, and regulate it.⁴² Under the artificial entity theory, the corporation exists at the pleasure of the state, and the states have the authority to regulate corporations should they choose to do so.⁴³

While the artificial entity theory does not view corporations as distinctly separate persons and does not view rights as derivative of its natural persons' rights, it does acknowledge the existence of corporate rights.⁴⁴ Even in *Dartmouth*, the Court notes that corporations can own and sell property, or sue and be sued.⁴⁵ Under the artificial entity theory, these rights are merely the result of what is granted during the chartering process; the corporation does not enter the state with rights, but the state cannot deny the rights that accompany state sanctioned activities.⁴⁶ Following *Dartmouth*, states pushed to the limits of the holding by adding corporate charter provisions permitting states to amend the terms of the bargain.⁴⁷ Generally, when courts invoke the artificial entity theory, they

Development of Corporate Theory, 88 W. VA. L. REV. 173, 186 (1985) (when courts invoke concession theory, they are only concerned with protecting the rights granted by the state); see also Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 225 (2011) ("[C]orporations are subordinate to the government, as government can create and regulate them.").

⁴¹ *Dartmouth*, 17 U.S. (4 Wheat.) at 667 (Story, J., concurring) ("Among other things, it [a corporation] possesses the capacity . . . of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties."); *Hale v. Henkel*, 201 U.S. 43, 74 (1906) ("[T]he corporation is a creature of the state . . . presumed to be incorporated for the benefit of the public"). See MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY 207 (1995) ("[F]rom the beginning, . . . corporations [always] required [a] grant or charter from the state to exist."); Avi-Yonah, *supra* note 31; Bratton *supra* note 5.

⁴² See *Terre Haute & I.R. Co. v. Indiana*, 194 U.S. 579, 584 (1904); *Hancock Mut. Life Ins. Co. v. Warren*, 181 U.S. 73, 76 (1901) ("A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes."). See Winkler, *supra* note 12, at 863 ("[E]arly decades of the U.S., the states exercised considerable control over corporations. . . .").

⁴³ *Dartmouth*, 17 U.S. (4 Wheat.) at 636; Avi-Yonah, *supra* note 31, at 1007; Bratton, *supra* note 5 (the concession/artificial entity theory comes in degrees: a strong version attributes the existence of the corporation to state sponsorship; the weaker version sets up state permission as a regulatory prerequisite to doing business).

⁴⁴ *Dartmouth*, 17 U.S. (4 Wheat.) at 636 (artificial entity/concession theory); *Bank of the U.S. v. Dandridge*, 25 U.S. (12 Wheat.) 64, 91–92 (1827) (real entity theory); *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 86–88, 91(1809) (aggregate theory).

⁴⁵ *Dartmouth*, 17 U.S. (4 Wheat.) at 636; *Dandridge*, 25 U.S. (12 Wheat.) at 91–92 (1827); *Deveaux*, 9 U.S. (5 Cranch) at 91(1809).

⁴⁶ See Pollman, *Constitutionalizing*, *supra* note 5, at 647 ("Such restrictions were understood as permissible constraints within the sovereignty of the states, and not infringements of property or associational rights.") (citing *Head & Armory v. Providence Ins. Co.*, 6 U.S. (2 Cranch) 127, 167 (1804) (Marshall, J.)).

⁴⁷ See Winkler, *supra* note 12, at 864.

are only concerned with protecting the rights granted by the state.⁴⁸ Thus, the artificial entity is a theory of acknowledgment, not expansion.

2. *Aggregate Theory*

Chief Justice Marshall's view of the corporation also included the aggregate theory, which views the corporation's rights as indistinguishable from the rights of the people who make up and own the corporation—shareholders.⁴⁹ Chief Justice Marshall first proposed the aggregate theory in *Bank of United States v. Deveaux*, holding that a corporation cannot sue unless it is viewed as a company of individuals, represented by a corporate name.⁵⁰ These individuals bring rights along with them that flow through them to the corporation.⁵¹ Those rights are not lost by virtue of uniting as a corporation.⁵² Notably, *Deveaux* is used by Chief Justice Marshall in a similar way that aggregate theory supporters use it today—to extend rights to corporations when by statute the state has indicated that it intends for only human beings to have access to what the statute provides.⁵³

Supporters of the aggregate theory believe that the corporation can do nothing unless human beings act on its behalf.⁵⁴ The existence of the corporation is based in the reality of the existence of its humans.⁵⁵ The aggregate theory was also initially a theory of limitations, binding corporations to only those things its people were capable of doing. Eventually, the theory evolved into a theory of expansion, invoking a grant of purely personal human rights to corporations.⁵⁶

⁴⁸ See Horowitz, *supra* note 40, at 186; David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 212 (1990) (“[T]raditional 19th-century theory insisted that corporations lacked any powers beyond those conferred by the legislature.”).

⁴⁹ See, e.g., *Nw. Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906); *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 364 (1855) (Corporation is an artificial entity that cannot sue or be sued in the courts unless the rights of the members of the corporation can be exercised under the corporate name) (Campbell, J., dissenting). See Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1674 (2015) (courts have granted rights to corporations based on the corporation as an association of citizens since the 1800s). Blair and Pollman argue that the Court's characterization as an association of citizens made sense through the nineteenth century, but no longer fit later corporations. Many scholars challenge whether shareholders have property rights in the corporation and function as its “owners.” See also discussion *supra* Section II.A.

⁵⁰ *Deveaux*, 9 U.S. (5 Cranch) at 86–88, 91.

⁵¹ *Id.*

⁵² See, e.g., *supra* note 8 and accompanying text; Garrett, *supra* note 5, at 98; see *supra* note 49 and accompanying text.

⁵³ See *supra* notes 48–49 and accompanying text; see also discussion *infra* Part III.

⁵⁴ See, e.g., Horowitz, *supra* note 40, at 186.

⁵⁵ See Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1, 9 (2015).

⁵⁶ See discussion *infra* Part II.

3. Real Entity Theory

The third approach views the corporation as a stand-alone entity, separate and distinct from the state and its shareholders.⁵⁷ Chief Justice Marshall also spoke to the real nature of the corporation, highlighting how the corporation can embody several theories in the mind of a person at once, depending on the context.⁵⁸ He first formulated the real entity theory in the dissent of *Bank of United States v. Dandridge*.⁵⁹ Marshall argued that the corporation is “one entire impersonal entity, distinct from the individuals who compose it,” which will always distinguish its transactions from those of its members.⁶⁰ Under this theory, corporations are real persons with real rights; all the state can do is recognize or refuse to recognize a corporation’s existence, but once existence is recognized the state cannot deny constitutional protections.⁶¹ A corporation is “neither the sum of its owners nor an extension of the state, but [is] a separate entity controlled by its managers.”⁶² Corporations hold property in their own names, enter into contracts that bind only the corporation in their own names, and engage in other activities indicative of stand-alone natural persons.⁶³ Thus, under the real entity theory, after formation, the corporation is an entity unto itself, untethered from its founders, shareholders, and management. The people associated with the corporation are agents, investors, or lenders; they do not define the corporation.

Corporate governance rules require that the best interest of the corporation, not the individual shareholders, be the priority of management.⁶⁴ Under the real

⁵⁷ See Johnson & Millon, *supra* note 55, at 8–9 (“[C]orporations own property, enter into contracts, and commit torts. They can sue and be sued in their own right. They are subject to penalties if they violate applicable criminal laws. They must comply with a vast array of federal and state regulations. . . . [T]hey are subject to income tax liability on the net income generated by their commercial activities. . . . [T]he rights and obligations of corporations are not simply those of their shareholders, officers, directors, employees, or other humans who participate in or are affected by the corporation’s activities.”); see also Olivier Weinstein, *The Current State of the Economic Theory of the Firm: Contractual, Competence-based, and Beyond*, in *THE FIRM AS AN ENTITY: IMPLICATIONS FOR ECONOMICS, ACCOUNTING, AND THE LAW*, *supra* note 17, at 33 (“The firm exists in its own right, as a specific entity, beyond the changing personalities of shareholders, workers and managers.”).

⁵⁸ *Bank of the U.S. v. Dandridge*, 25 U.S. (12 Wheat.) 64, 91–92 (1827) (Marshall, C.J., dissenting).

⁵⁹ *Id.*

⁶⁰ *Id.*; see also Avi-Yonah, *supra* note 31, at 1007.

⁶¹ See Mayer, *supra* note 40, at 580–81.

⁶² See Avi-Yonah, *supra* note 31, at 1001.

⁶³ See, e.g., Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value Systems Theory for Corporate Law*, 166 U. PA. L. REV. 579, at 590–91 (2018) (“One of the hallmarks of the corporate form is that corporations are legal persons with rights, including the right to hold property in their own names. This means that, just as a natural person cannot be owned by another, a corporation cannot be owned by its shareholders. What shareholders *do* own are shares.”).

⁶⁴ Marc T. Moore & Antoine Rebérioux, *The Corporate Governance of the Firm as an Entity: Old Issues for the New Debate*, in *THE FIRM AS AN ENTITY: IMPLICATIONS FOR*

entity theory, the courts recognize the true nature of corporate property and the relationship of the corporation with its shareholders and managers.⁶⁵ Courts acknowledge that independence from individuals is required for limited liability, perpetual life, and other elements essential to the corporate form.⁶⁶ Under this theory, the corporation is a separate entity controlled by management that is embodied with its own rights and must comply with the law like any other person.⁶⁷

The theories of corporate personhood are useful for expressing the relationship of the corporation to society in each context, but no single theory adequately addresses every scenario. For this reason, Justices like Marshall alternate between the theories of the corporation when analyzing rights, applying whichever theory supports the desired outcome.⁶⁸ Over time the Court has switched among theories, sometimes within the same opinion, and eventually began expanding rights without relying on any theory of corporate personhood.⁶⁹ The Court tends to rely on the aggregate and real entity theories when granting rights and the artificial entity theory when restricting corporate rights.⁷⁰ Instead of being influenced by the realities of corporate structure and governance, the Court focuses on constitutional theory, taking a right-by-right, and in some circumstances, a case-by-case, approach.⁷¹ This approach is problematic when the Court disregards the intentions of corporate founders, states, and legislatures and grants rights to the corporation regardless.

Many aspects of the corporation, including limited liability, may be negotiated by contract.⁷² Thus, when founders choose the corporation, they are affirmatively choosing not to order their business dealings using private contracting.⁷³ When states define business entities, they do so with the intention of defining rules for formation and conditions for continued recognition.⁷⁴ The

ECONOMICS, ACCOUNTING, AND THE LAW, *supra* note 17, at 370 (“The corporate governance of the firm . . . must be based at root upon the managerialist conception of the interest of the company characteristic of most U.S. state corporate law systems. . .”).

⁶⁵ See Weinstein, *supra* note 57.

⁶⁶ See Johnson & Millon, *supra* note 55, at 8.

⁶⁷ See also Weinstein, *supra* note 57 (“The firm exists in its own right, as a specific entity, beyond the changing personalities of shareholders, workers and managers”).

⁶⁸ See Avi-Yonah, *supra* note 31, at 1032 (“As the relationship of the corporation to the state, to society and to its members or shareholders changes, all three views of the corporation emerge, submerge and then re-emerge in slightly different but fundamentally similar forms.”).

⁶⁹ See Gordon, *supra* note 34, at 368 (“Throughout the last century, courts have switched cheerfully back and forth, sometimes mid-opinion, in the idea of the corporation on which their analysis rests.”).

⁷⁰ See Chatman, *supra* note 2.

⁷¹ See Garrett, *supra* note 5, at 100.

⁷² See HENRY N. BUTLER & LARRY E. RIBSTEIN, *THE CORPORATION AND THE CONSTITUTION* 22 (1995).

⁷³ See Millon, *supra* note 17, at 1307.

⁷⁴ See BUTLER & RIBSTEIN, *supra* note 72, at 22.

current approach infringes upon the rights of the states to define business entities, and the freedom of individuals to contract for the entity with the parameters they desire. Alternatively, the Court should examine the theories and adopt a position representative of the true corporate nature.⁷⁵ The hybrid theory combines the artificial entity and real entity theories to provide a legal approach to corporate rights that accurately reflects the true nature of corporations.⁷⁶ Combining the hybrid theory with the two-step analysis properly acknowledges the corporate form and results in the appropriate level of constitutional protection.

B. *The Corporate Form in Citizens United*

Early on, the Court ignored the use of the word “persons” in the Constitution, declaring without justification that the word included corporations.⁷⁷ Although corporations are not mentioned in the Constitution, as noted by both Justices Stevens and Scalia in the *Citizens United* opinion, the Court considered the nature of the corporation rather early.⁷⁸ Justice Scalia’s concurrence in *Citizens United* conveys a belief that the founding fathers’ silence on corporations within the text of the Constitution indicates an intention to include corporations in the rights given to persons.⁷⁹ Justice Stevens’ dissent contradicts these statements by profiling the history of corporations to show that the omission is in-

⁷⁵ See discussion *infra* Part IV. Many scholars credit this approach for the current discontent with *Citizens United*, and fault the approach for opening the door for an expansion of corporate rights beyond what the state and the Constitution’s drafters intended. See, e.g., Vincent S.J. Buccola, *Corporate Rights and Organizational Neutrality*, 101 IOWA L. REV. 499, 501 (2016) (summarizing the corporate personhood debate reignited by *Citizens United*).

⁷⁶ See discussion *infra* Section IV.B.

⁷⁷ See generally *Santa Clara v. S. Pac. R. Co.*, 118 U.S. 394 (1886); see also David Ciepley, *Neither Persons nor Associations: Against Constitutional Rights for Corporations*, 1 J.L. & CTS. 222, 222 (2013) (drafters of the Fourteenth Amendment did not intend to include corporations as person granted due process); Winkler, *supra* note 12, at 865 (“When the court reporter included this statement at the beginning of the published opinion, corporate personhood was established—without argument, without justification, without explanation, and without dissent.”); Ripken, *supra* note 32, at 288.

⁷⁸ *Citizens United v. FEC*, 558 U.S. 310, 338–41, 371 (2010) (Scalia, J., concurring); see also Mayer, *supra* note 40, at 579 n.8 (citing Gerard Carl Henderson, *The Position of Foreign Corporations in American Constitutional Law*, in 2 HARVARD STUDIES IN JURISPRUDENCE 1 (1918)); JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970* (1970).

⁷⁹ See *Citizens United*, 558 U.S. at 338–41 (Scalia, J., concurring). Justice Scalia’s concurrence states, “It never shows why ‘the freedom of speech’ that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form. . . . [T]he dissent feels no necessity to provide even an isolated statement from the founding era to the effect that corporations are *not* covered.” The Court disregarded the distinction between corporations, natural persons, and citizens; instead, the *Citizens United* majority proclaimed that states must look to the underlying nature of the right, not to the party exercising the right. Scalia also accepts as reality the interpretation of the corporation as an association of citizens without regard to corporate realities. See also Ciepley, *supra* note 77, at 222.

dicative of an original intent to deny corporations constitutional rights.⁸⁰ Justice Stevens recounts all the ways a corporation is not a natural person: corporations enjoy limited shareholder liability, perpetual life; separation of ownership of property and its control; corporations also have no consciences, no beliefs, no feelings, no thoughts or desires.⁸¹ While the earliest cases agree with Stevens' retelling of corporate nature, and there is no support for Scalia's blanket assertions about the original intent of the founders, the reality of the corporate form lies somewhere in between.⁸²

Because the language of the Constitution is focused on persons and citizens, in order to extend rights to corporations the Court must define them as such through the legal fiction of corporate personhood.⁸³ To make this logical leap the Court analogizes corporate scenarios to human scenarios, even when doing so contradicts the very nature of corporate law. At the oral re-argument for the *Citizens United* case, Justice Sotomayor questioned whether the leap was ever justified:

[W]hat you are suggesting is that the courts who created corporations as persons, gave birth to corporations as persons, and there could be an argument made that that was the Court's error to start with . . . the fact that the Court imbued a creature of State law with human characteristics.⁸⁴

Sotomayor's questioning rightfully highlights the lack of support for corporate rights in the Constitution.⁸⁵ It falls in line with the artificial entity theory.

⁸⁰ See *Citizens United*, 558 U.S. at 426 (Stevens, J., dissenting). Justice Stevens's dissent states: "[T]here is not a scintilla of evidence to support the notion that anyone believed [it] would preclude regulatory distinctions based on the corporate form."

⁸¹ See *id.* at 371; see discussion *infra* Part III.

⁸² See discussion *supra* note 40 and accompanying text.

⁸³ See CHEMERINSKY, *supra* note 2, at 253 ("[T]he Court's premise that corporations should have the same speech rights as individuals is just wrong. . . . There is no evidence that the framers of the First Amendment meant to protect corporations or campaign spending, let alone bestow a right for corporations to spend unlimited sums in election campaigns. The Supreme Court has explained that the First Amendment protects speech especially because of its importance to the autonomy and dignity of each person, something that has no meaning when it comes to corporations."); see also Tucker, *supra* note 3, at 511.

⁸⁴ Transcript of Oral Argument at 33, *Citizens United*, 588 U.S. 310 (No. 08-205).

⁸⁵ For a discussion of the lack of constitutional support for corporate rights, see, for example, Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 62 (2005) ("[T]he Court has never established a test to determine what a constitutional person is or whether a corporation meets such a test The result is a foundational problem in corporate constitutional law, for the Court has granted corporations constitutional rights without engaging in the preliminary inquiry of whether a corporation is entitled to them under the Constitution."); Ciepley, *supra* note 77, at 224 ("[T]he question has never been decided but merely presumed decided. To this day, in place of argumentation, the Court either offers a flawed chain of precedent back to *Santa Clara*, which never addressed the question, or drops loose metaphors of corporations being 'persons' or 'associations of persons,' which conjure[s] up theories elaborated by others."); Winkler, *supra* note 12, at 865. See also Tucker, *supra* note 3, at 499 (discussing the five realities of corporate political speech ignored by the Court in *Citizens United*).

Although correct, Justice Sotomayor's questioning also highlights a common fallacy in corporate personhood analysis—the commitment to the corporation existing solely in one theory of corporate personhood.⁸⁶ The “creature of State law with human characteristics” derives those characteristics in part from how it operates in the world after the state creates it—a principle of the real entity theory. Corporate personhood analysis cannot end at formation. To fully analyze corporate rights, the courts must properly acknowledge what the corporation is after it is formed.

The majority in *Citizens United* holds that corporations have the same First Amendment rights as natural persons; therefore, restrictions on corporate spending in election campaigns are unconstitutional.⁸⁷ In reaching this conclusion, the majority explicitly stated that it did not adhere to any one theory of corporate personhood.⁸⁸ This puts *Citizens United* on trend with other cases that personify the corporation without acknowledging a theory of corporate personhood.⁸⁹ Professor Carl Mayer explains that for nearly sixty years the Court has avoided declaring explicitly that it subscribes to a particular corporate personhood theory.⁹⁰ Instead, the Court looks at the right itself and the purpose of the right, essentially starting at step two and presuming that the organization is entitled to the right.⁹¹ This is precisely how the majority of *Citizens United* arrived at its holding.

As with most corporate personhood opinions, in *Citizens United* one can see theories of corporate personhood within the decision, even when the Court does not acknowledge them.⁹² In holding that a corporation is entitled to free-

⁸⁶ See Belinfanti & Stout, *supra* note 63, at 45 (noting that the flaw in the Court's approach to corporate personhood is viewing the corporation through the lens of only its obligations to the shareholder, instead of viewing the corporation as a whole system of many component parts).

⁸⁷ *Citizens United*, 588 U.S. at 385. Professor Chemerinsky disagrees with the premise that spending money is speech. He believes spending money is conduct, and references Justice Steven's explanation that money is a property right subject to lesser protections than speech. See CHEMERINSKY, *supra* note 2, at 253.

⁸⁸ *Citizens United*, 588 U.S. at 310.

⁸⁹ Mayer, *supra* note 40, at 620 (“Before 1960, the Court only considered corporations' constitutional guarantees within the strictures of corporate personhood theory: a corporation was either an ‘artificial’ entity subject to expansive state regulation or a ‘natural’ entity entitled to constitutional protections against the state. After 1960, the Court abandoned theorizing about corporate personhood.”).

⁹⁰ *Id.*

⁹¹ See discussion *infra* Part IV (outlining the differences between human beings and artificial persons, and fully explaining step one analysis); see also Transcript of Oral Argument, *supra* note 84; Ciepley, *supra* note 77, at 223 (explaining that the Court never offered a sustainable argument as to why corporations have constitutional rights); Krannich, *supra* note 85, at 62; Mayer, *supra* note 40, at 629 (“Frequently the Court looked to the history of the amendment in question to justify corporate rights [and] . . . occasionally the Court examined the underlying purposes of an amendment.”).

⁹² Professor Padfield's work has extensively profiled the impact of silent corporate personhood in Supreme Court decisions. See Stefan J. Padfield, *The Silent Role of Corporate Theory in the Supreme Court's Campaign Finance Cases*, 15 J. CONST. L. 831, 834 (2013) [here-

speech rights equal to those held by an individual because it is capable of speaking, the majority hinted at the aggregate and real entity theories.⁹³ The Court equated corporations to natural persons, declaring that since the corporation is capable of speaking, either through money or through persons in the aggregate, it is entitled to constitutional free-speech rights.⁹⁴ Instead of taking constitutional silence as an indication of the non-existence of corporate rights, the Court decides that silence indicated intent to grant corporations rights based on the rights of its shareholders.

In *Citizens United*, the majority struck down a campaign finance regulation on the premise that corporations should receive the same First Amendment protections as natural persons, holding that distinctions based on who is asserting a right are improper.⁹⁵ In support of this holding, the Court cited First Amendment cases and stated that it “rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”⁹⁶ This not only ignores the distinction between entities and persons, but also the statutory differences between the various business entities. The Court held that Congress had “no basis . . . [to] impose restrictions on certain disfavored speakers.”⁹⁷ The majority also held that there was no support for the view that the Amendment’s original meaning would permit suppressing a media corporation’s political speech.⁹⁸ *Citizens United* expanded corporate rights, holding that the distinctions between corporate persons and citizens are not proper; instead, corporations should not be restricted any more than a wealthy individual.⁹⁹

inafter Padfield, *The Silent Role of Corporate Theory*] (examining the cases leading up to *Citizens United*, finding that a silent corporate theory debate is evident); Stefan J. Padfield, *Citizens United and the Nexus-of-Contracts Presumption*, 1 HARV. BUS. L. REV. ONLINE 25 (2011), http://www.hblr.org/wp-content/uploads/2011/01/Padfield_Online_Article.pdf [<https://perma.cc/G39D-KSF2>] (arguing that in *Citizens United*, “adoption of . . . competing theories of the firm was in some meaningful way dispositive”).

⁹³ See *supra* notes 84–89 and accompanying text.

⁹⁴ Gordon, *supra* note 34, at 370 (“*Citizens United* . . . indicate[s] that corporations *simply were* speakers, indistinguishable from any other speakers, for the purposes of First Amendment speech rights. . . . The bright-line approach favored by the current Court is a new development.”).

⁹⁵ *Citizens United v. FEC*, 558 U.S. 310, 349–57 (2010).

⁹⁶ *Id.* at 343, (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).

⁹⁷ *Id.* at 341.

⁹⁸ *Id.* at 353; Joan MacLeod Heminway, *Thoughts on the Corporation as a Person for Purposes of Corporate Criminal Liability*, 41 STETSON L. REV. 137, 138 (2011) (“In *Citizens United*, the Court determined that political-speech protections under the First Amendment apply to corporations as well as individuals, and it found no basis to allow the government to impose political-speech limits ‘on certain disfavored speakers.’”).

⁹⁹ *Citizens United*, 558 U.S. at 355–56. The court is also implying that distinctions between partnerships, limited liability companies (LLCs), and corporations are not appropriate for consideration when determining rights.

Justice Steven's dissent in *Citizens United* invokes the artificial entity theory.¹⁰⁰ He envisions corporations as state approved entities, which exist at the pleasure of the government, are non-corporeal, and may be subject to more extensive regulation than a natural person due to this privileged position.¹⁰¹ Scalia's concurrence criticizes Justice Steven's dissent because "[i]t never shows why 'the freedom of speech' that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form."¹⁰² According to Scalia and the majority, because the corporation is an association of individuals, the individuals do not lose their constitutional rights when they assemble.¹⁰³ Denying a corporation the opportunity to voice its opinion on elections is the equivalent of denying the free speech rights of the citizens who make up a corporation.¹⁰⁴ This standard does not change, even if the corporation itself is merely a person and not a citizen with the ability to actually vote in an election.¹⁰⁵

Justice Scalia's position ignores the distinctions between business entities and the purpose of choosing to form a corporation. It also ignores the fact that the individuals who form the corporation can still voice their opinions individually. While a corporation may rightly be viewed as an association of individuals, it is an association of individuals who affirmatively choose the corporation. It is a business structure divorced from their person for purposes of profits, liability, and management instead of the partnership, which maintains the identity of the individuals and operates more like the pure association of citizens indicated by the aggregate theory.¹⁰⁶ By availing themselves of the benefits of the corporate choice, these individuals are affirmatively choosing to give up individuality to create a new and separate corporate person.¹⁰⁷

The majority's position in *Citizens United* is not new, it is merely the first time the Court explicitly declared that corporate constitutional rights should be equal to individuals. This leap is aided by the Court's express abandonment of a theory of corporate personhood. The Court, acting without a clear definition of the corporation and constitutional restrictions of its own choosing, could expand rights by merely choosing a new standard and accepting it as law.¹⁰⁸ The Court's failure to articulate a clear corporate personhood theory or a consistent means of analyzing corporate rights presents both a challenge and an oppor-

¹⁰⁰ *Id.* at 393 (Stevens J., dissenting).

¹⁰¹ *Id.* at 385–86, 391–92 (Scalia, J., concurring).

¹⁰² *Id.* at 386.

¹⁰³ See Avi-Yonah, *supra* note 31, at 1041; Ciepley, *supra* note 77, at 224.

¹⁰⁴ See Ciepley, *supra* note 77, at 234–35.

¹⁰⁵ See *Citizens United*, 558 U.S. at 424–31 (Stevens, J., dissenting).

¹⁰⁶ BUTLER & RIBSTEIN, *supra* note 72, at 4 (“[N]o one is forced to use the corporate form of organization: there is freedom of choice in organizational form. . . . This fundamental choice constrains the ability of corporate managers to misbehave.”).

¹⁰⁷ See *infra* notes 112–19 and accompanying text.

¹⁰⁸ See, e.g., Robert Sprague & Mary Ellen Wells, *The Supreme Court as Prometheus: Breathing Life into the Corporate Supercitizen*, 49 AM. BUS. L.J. 507, 550–51 (2012).

tunity for those who view *Citizens United* as an overreach. Cases like *Citizens United* accept corporate rights and personhood status as a foregone conclusion, making it difficult to determine at any given moment what rights a corporation has and what limitations are imposed on those rights.¹⁰⁹

In *Citizens United*, the Court also disregards the role of the people it seeks to protect in corporate governance: the shareholders. The aggregate theory, which views corporations as an association of citizens, does not reflect the reality of corporate operations. Instead, courts should engage in a two-step analysis of representations of corporate personhood that both acknowledges the state's definition of a corporation and how the corporation defines itself. The next Part provides an analysis of the role people play in the corporation.

II. PART TWO: THE CORPORATION HAS NO PEOPLE

Legally, shareholders act in a limited number of ways: through voting, resolution, exercise of inspection rights, litigation, or selling their shares.¹¹⁰ The shareholders are mere financial investors, and entrust all of the decisions to the board of directors and officers of the corporation.¹¹¹ The shareholders purchase shares, receive equity, and give up control of the company in exchange for a complete shield from personal liability.¹¹² The actions shareholders may take can be limited in corporate charters, bylaws, or other contractual agreements.¹¹³

¹⁰⁹ See Ciepley, *supra* note 77, at 222–23 (Professor Ciepley believes the rights of a corporation are purely contractual, corporations have no constitutional rights); see also *Amicus Curiae* Brief of Corp. & Criminal Law Professors in Support of Petitioners, *supra* note 4, at 3–4 (discussing how application of RFRA to corporations frustrates corporate law). While I believe that corporations do have constitutional rights for reasons that are based in more than contract, I disagree with the Court's use of a case that should be founded in corporate law, like *Citizens United* or *Hobby Lobby*, to make a general point about freedom of speech or freedom of religion. The Court's analysis of those rights in both cases would be correct if it was applied to human beings.

¹¹⁰ See STEPHEN M. BAINBRIDGE, *CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS* 204–06, 208 (2012); see also BLAIR, *supra* note 41, at 69 (“[T]he number of matters that must be submitted to shareholder vote is limited. . . . [T]hese include substantive amendments to the articles of incorporation and fundamental changes that are not part of the ordinary business of the company, such as merger, dissolution, or disposition of a substantial part of corporate assets.”).

¹¹¹ See, e.g., MODEL BUS. CORP. ACT § 8.01 (AM. BAR ASS'N 2010) (business and affairs of the corporation managed under the direction of the board). Some argue that shareholders are not owners, but mere holders of equity in the corporation. Professors Blair and Stout's theory of asset lock-in notes that the shareholder's contribution cannot be unilaterally withdrawn from the corporation by shareholders, just as it cannot be withdrawn by the corporation's creditors. The corporation's assets belong to the corporation and not its investors, meaning even a shareholder's equity rights are limited. Instead of having a right to dissolve a company if necessary to retain the full value of the capital contribution, such as in a partnership, shareholders' ability to withdraw assets from a corporation is limited by the market and director approval. See Blair & Stout, *supra* note 6, at 278.

¹¹² Shareholder contributions to the new stand-alone corporate entity creates a level of stability not found in other business entities. This stability in return limits the rights of shareholders in many respects. When shareholders make their investment in a corporation, they

Although much of corporate governance has been based on the concept of shareholder primacy, many have noted that the interests of shareholders are not the driving force in corporate decisions.¹¹⁴ This Part first describes the true nature of shareholder rights, then explains the role of corporate directors and officers.

A. *The True Nature of Shareholder Rights*

As early as 1963, Adolf Berle noted the shift from ownership control of corporations, more common in closely held corporations, to management control.¹¹⁵ As the purchase of stock became a secondary market, with major influence from institutional investors such as pension funds, mutual funds, and other financial institutions, the thoughts and desires of individual human investors had a reduced impact.¹¹⁶ Berle also noted that this management group is responsible to the company first, and the individual whims of shareholders second.¹¹⁷ The structure of corporations does not allow shareholders to be in-

may only get their money back if there is a buyer willing to pay a price equal to the full value of the shareholder's investment, the corporation itself buys back the shares, or a court determines the corporation must compensate the shareholder. See Lynn A. Stout, *On the Nature of Corporations*, 2005 U. ILL. L. REV. 253, 255 (2005).

¹¹³ See LISA M. FAIRFAX, SHAREHOLDER DEMOCRACY: A PRIMER ON SHAREHOLDER ACTIVISM 12 (2011) ("Although the shareholder voting right has been described as fundamental, it is relatively limited. . . . State corporate law provides that the board exercises most of the power and control within the corporation.")

¹¹⁴ See Belinfanti & Stout, *supra* note 63, at 14 (noting the criticism of shareholder primacy).

¹¹⁵ Adolf A. Berle Jr., *The Impact of the Corporation on Classical Economic Theory*, in THE FIRM AS AN ENTITY: IMPLICATIONS FOR ECONOMICS, ACCOUNTING, AND THE LAW, *supra* note 17, at 96 (stockholders derive what influence they have from socio-political, not from entrepreneurial, factors).

¹¹⁶ *Id.* at 94. Berle notes the sentimental rather than capital raising nature of the secondary stock market. The corporation does not need the stockholder's money, as the stock on the exchange is being purchased from a current owner, not the corporation itself. As a result, "the classical justification for him as a source of capital, or as investment risk-taker, let alone as entrepreneur-manager, simply disappears." *Id.* at 102; see BLAIR, *supra* note 41, at 68–69 (shareholders may exit by selling shares, or communicate directly to management, but in practice gives shareholders little power); Stout, *supra* note 112 (Shareholders are investors with a right to sell shares, but no right to compel a cash out from the corporation. It is the secondary market that makes shares freely alienable; otherwise a purchase of shares locks in capital to the corporation like a "tar pit" that is easier to get into than to get out of. There is no recourse if shares are worth less than the shareholder put into the corporation).

¹¹⁷ Berle, *supra* note 115 at 96. In the Amicus Brief of Corporate Law Professors in Support of Respondents in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017), it is noted that the varying opinions among legal scholars on shareholder primacy does not undermine a unanimous view on corporate separateness. "Shareholder primacy is simply a description of one view of the fiduciary duties of management. It does not mean that shareholders and the corporation are identical as a matter of legal rights and obligations." Brief of *Amici Curiae* Corp. Law Professors in Support of Respondents, at 15 n.7, *Masterpiece Cakeshop, Ltd.*, 137 S. Ct. 2290 (No. 16-111).

involved in the day-to-day decision making of corporations, and even if it did, the shareholders are disincentivized to do so.¹¹⁸

The requirement for a majority vote further limits the influence of an individual shareholder.¹¹⁹ Shareholder votes are often counted in ways that allow for limits on minority influence, like super majority or non-cumulative voting.¹²⁰ Anyone with the funds can become a shareholder, but it takes considerable wealth or collective power for shareholders to have the power to make changes.¹²¹ Shareholders who own the majority of shares are typically comprised of an elite class of individuals—institutions such as mutual funds buying on behalf of investors collectively, the initial founders of the company, and other power investors.¹²² For this reason, shares are only controlled by “people” if all types of institutions—including hedge funds, banks, mutual funds—are equal to people.¹²³ Thus, even if a corporation is viewed as a representative, aggregate body, the entities they represent are not natural persons.¹²⁴ Like nesting dolls, institutions that may not have rights unless the aggregate theory is utilized, are being extended additional rights through their interests in a corporation.¹²⁵ Any individual purchasing shares on the open market has little to no ability to impact corporate operations or to have their opinion represented, at least not at the level of an investment bank or wealthy investor.

Corporations are not the only entity with limited liability, so when a corporation is formed, it is an affirmative decision to choose all the positives and negatives of the corporate form, including giving up control. LPs, LLPs, and LLCs¹²⁶ can come close to simulating many of the benefits of corporations

¹¹⁸ Berle, *supra* note 115.

¹¹⁹ Another restriction is the requirement for a unanimous vote for shareholder action without a meeting. *See* FAIRFAX, *supra* note 113, at 19.

¹²⁰ *Id.* at 15–16.

¹²¹ *Id.*

¹²² *See* BLAIR, *supra* note 41, at 72–76 (discussing the rise of institutional investors, and the myth of corporate democracy as a result of shareholder activism); FAIRFAX, *supra* note 113, at 45–61; *see also* Berle, *supra* note 115 (noting rise of institutional investors).

¹²³ *See* BLAIR, *supra* note 41, at 147–48 (Financial institutions hold more than forty percent of the total financial claims against U.S. individuals, corporations and governments; more than eighty percent of corporate bonds, and almost half of corporate equity claims. Even so, institutions have their own agenda, which may not involve getting involved in management or closely monitoring).

¹²⁴ If the owners of shares are also artificial entity, acknowledging the rights of the people who make up the firm creates a scenario of nesting dolls in which courts are protecting the rights of the people who make up the company that makes up the company. *See, e.g.*, Tucker, *supra* note 3, at 528 (noting the agency problems with granting rights based on the people who make up the corporation).

¹²⁵ *See* BAINBRIDGE, *supra* note 110; BLAIR, *supra* note 41, at 147–48; FAIRFAX, *supra* note 113, at 45–61.

¹²⁶ I do not discuss the LLC extensively because I believe it can, depending on the structure chosen by founders, operate like a partnership or a corporation. For this reason, I believe the LLC to best be described as a hybrid of the artificial entity theory and the nexus of contracts theory. The LLC does not exist without the state, but once formed whether it should be treat-

while allowing owners to maintain a higher level of control, and continuing the operation of the company as an aggregate of the people who make up the company.¹²⁷ Therefore, when corporate founders choose the corporation, they have the full menu of business entities at their disposal, and make the affirmative choice to incorporate.¹²⁸

Despite these statutory realities, the Court, in *Citizens United* and other decisions, would have us believe that corporations represent the opinions of the founders and managers the same as partnerships or sole proprietorships.¹²⁹ By statute and by contract, corporate structure differs from what the courts portray. The reality of the corporation is that management is divorced from ownership so it operates more like a monarchy (or oligarchy) than a democracy.¹³⁰ The

ed like an association of citizens or a real entity will be determined by contract. Nexus of contracts envisions the corporation as a legal fiction that serves as a nexus for a mass of bilateral contracts, which various individuals have voluntarily entered into for their mutual benefit. *See, e.g.*, Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273 (1982). As Professor Joseph Morrissey explains, “[w]hile the state entity proponents argue that whatever the state creates it can regulate, the contractarians argue that the state’s role should be limited to enforcing and policing the privately structured contracts that create and sustain the corporation.” Joseph F. Morrissey, *A Contractarian Critique of Citizens United*, 15 J. CONST. L. 765, 812 (2013). Many scholars disagree with this theory, stating that viewing the corporation as a nexus of contract or as assets/property does not adequately represent the true nature of the corporation. *See, e.g.*, David Gindis, *Some Building Blocks for a Theory of the Firm as a Real Entity*, in *THE FIRM AS AN ENTITY: IMPLICATIONS FOR ECONOMICS, ACCOUNTING, AND THE LAW*, *supra* note 17, at 277 (“Firms are not simply sets of contracts or collections of assets. . . . Firms are not aggregates or ‘mereological sums.’ The very issue of comparing the whole to the sum of its parts is problematic. . . . [T]he whole is reducible neither to its members (*e.g.* owners) nor its parts (*e.g.* assets)”); Belinfanti & Stout, *supra* note 63, at 10 (“[T]he nexus of contracts theory can be critiqued for failing to acknowledge the corporation’s legal personhood, and also failing to emphasize the crucial role played by the state in creating the corporation.”); Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of “Nexus of Contracts” Theory*, 109 MICH. L. REV. 1127, 1130 (2011) (because individuals must apply to a state for permission to form a corporation, the corporation cannot be formed by contract).

¹²⁷ *See* BUTLER & RIBSTEIN, *supra* note 72, at 4–5 (individuals choose among types of organizations by comparing costs and benefits of forms, including the costs and benefits of delegating control to agents).

¹²⁸ *See, e.g.*, *Agai v. Diontech Consulting, Inc.*, No. 102968/07, 2013 WL 4419323, at *1–2 (N.Y. Sup. Ct. Aug. 19, 2013) (Factors to be considered by a court in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use).

¹²⁹ *Id.*; *See also* Pollman, *Constitutionalizing*, *supra* note 5, at 665 (“The Court’s decisions expanding speech and religious liberty rights of business corporations rely, at least in part, on a view of corporations as associations and corporate law as establishing procedures of ‘democracy’ for shareholders. But not all business corporations have an associational dynamic and existing corporate laws do not create democratic procedures, nor is that their aim.”).

¹³⁰ *See* BLAIR, *supra* note 41, at 69 (“In principle, the law is intended to give shareholders a significant amount of control. In practice, it does not always work out that way. Technically, shareholders must regularly elect or reelect the board of directors, but shareholders cannot easily remove a director whose term has not expired, and shareholders do not, typically, participate in the nomination process for new directors.”); *see* Berle, *supra* note 115 (stockhold-

aggregate theory presumes the corporation is an expression of the business decisions of the people who make up the corporation in the same way that a partnership represents the business decisions of the partners.¹³¹ When adopting the principles of the aggregate theory, the Court assumes that shareholders have a voice that is expressed in corporate actions.¹³² The separation of management and ownership means that corporate governance is not about the voice of shareholders in the way that a partnership is the voice of the partners. Instead, directors and officers are the voices that speak for the corporation.¹³³

The statutory requirements and nature of corporate governance are not the only things that limit the volume of the shareholder's voice.¹³⁴ The traditional assumption is that shareholders are not incentivized economically to be active in corporate operations.¹³⁵ The expense of investigation, advancing shareholder initiatives, and of shareholder derivative suits all create rational ignorance in the average shareholder.¹³⁶ There is no benefit gained from spending money in order to get familiar enough with corporate operations to pursue measures that may be greater than the value of an individual's financial investment.¹³⁷ Instead, it is more rational for the average shareholder to be a passive investor and rely on the recommendations of the board.¹³⁸ This is true even for many shareholders who control a majority of shares, as those investors often hold a

ers derive what influence they have from socio-political, not from entrepreneurial, factors); *see also, e.g., Statement on Company Law: Summary: Fundamental Rules of Corporate Law*, THE MODERN CORP. (Sept. 14, 2014), <https://themoderncorporation.wordpress.com/company-law-memo/> [<https://perma.cc/LES9-ZM77>] ("Certain beliefs about corporations and corporate law are widely held and relied upon by business experts, the financial press, and economists who study the firm. Unfortunately, some of these widely-held beliefs are mistaken.").

¹³¹ In a closely held corporation, the people who make up the corporation are responsible for corporate decisions, but not in their role as shareholder. For a discussion of closely held corporations, see *infra* notes 205–11 and accompanying text.

¹³² *See, e.g.,* Belinfanti & Stout, *supra* note 63, at 13 (noting that the shareholder contract gives shareholders limited rights with almost no real influence in the context of a public corporation with dispersed share ownership).

¹³³ *See, e.g.,* Andrew A. Schwartz, *Corporate Legacy*, 5 HARV. BUS. L. REV. 237, 245–49, 254 (2015) (noting the rate at which IPOs include anti-takeover defenses, despite market forces that show including them. Schwartz theorizes that the desire for corporate legacy and perpetual life is a stronger force than shareholder desires and market forces). *See also* BLAIR, *supra* note 41, at 77 (governance and control of corporations occurs through customs, cultural norms, and institutional arrangements); Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 25 (2002) ("Put simply, the board is the nexus."); Belinfanti & Stout, *supra* note 63, at 41 (proposing that shareholder value is an illusory metric for measuring director behavior, and that systems theory is an appropriate tool for assessing performance).

¹³⁴ BLAIR, *supra* note 41, at 79; *see* Schwartz, *supra* note 133, at 254.

¹³⁵ *See* FAIRFAX, *supra* note 113, at 5; *see also* BUTLER & RIBSTEIN, *supra* note 72, at 7–8 (shareholders are rationally ignorant, but protected by the right to vote and sell shares).

¹³⁶ BUTLER & RIBSTEIN, *supra* note 72, at 8.

¹³⁷ *Id.*

¹³⁸ *Id.*

large number of shares in numerous corporations.¹³⁹ For this reason, much shareholder activism begins at the initiative of disgruntled board members or is a result of merger and acquisition activity.¹⁴⁰

The Court's perception of corporate ownership should be influenced by the realities of ownership and formation.¹⁴¹ Unfortunately, the Court bases its opinion on erroneous assumptions when it rules that corporations have speech and religion rights based on the aggregate of the people who "make up the corporation."¹⁴² Those who make up the corporation, under the Court's definition, are not those whose rights are represented by corporate actions. Those who "make up" the corporation are mostly silent investors.¹⁴³ The role of corporate shareholders is especially insignificant when compared to the actions of the investors of a partnership, who may also be engaged in management of the partnership. By apprising themselves of limited liability, shareholders agree to trust others to represent their purely financial interests and serve the corporate purpose indicated at the time of incorporation.¹⁴⁴

B. *Directors and Officers: The Corporation's People?*

Corporations act through shareholders as well as directors and officers authorized by state law to carry out corporate business.¹⁴⁵ The religious or political interests of each individual shareholder, or shareholders in the aggregate, do

¹³⁹ Butler and Ribstein note that when some owners of large blocks of shares have so much wealth tied up in a firm, they cannot afford to be ignorant about governance. This changes the role of the shareholder and the information level, but not the general operation of the corporation or its structure. *Id.* at 9.

¹⁴⁰ See, e.g., *Hoepner v. Wachovia Corp.*, No. 01CVS005106, 2001 WL 34000145, at *1 (N.C. Sup. Ct. 2001).

¹⁴¹ Gordon, *supra* note 34, at 372 ("Given the 'personal' nature of these rights, the Contingent Corporation's ability to 'have' some particular cultural, racial, or political characteristic depends, to a not-insignificant extent, upon perceptions of the nature of ownership.").

¹⁴² See discussion *supra* notes 82–89.

¹⁴³ BLAIR, *supra* note 41, at 147–48, 169 (discussing market share and power of institutional investors and tendency to serve their own interests). Those investing outside of an institution, or beyond a corporation's founders or management group, do not hold a majority or even a plurality sufficient to exercise control of the corporation through the limited ways shareholders may act. See also *supra* notes 121–23 (discussing shareholder power).

¹⁴⁴ See, e.g., Stout, *supra* note 112, at 257–58 (noting that the corporate form minimizes risks from whims of other investors through capital lock-in. The corporation protects shareholders from each other for the good of the corporation in a way that is not present in a partnership). The process of protecting shareholders from each other for the good of the corporation inherently means the corporation is a separate entity. Directors are not just focused on what is good for the majority, but what allows the corporation to continue. See, e.g., Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 768–69 (2012) (Theorizing that because corporation is perpetual by statute, corporation obligated to act with long term view on behalf of future not just current shareholders).

¹⁴⁵ Schwartz, *supra* note 144, at 767. Directors owe fiduciary duties of loyalty and care to the corporation and shareholders. See Pollman, *Constitutionalizing*, *supra* note 5, at 651 (providing an overview of the history of fiduciary duties).

not motivate the actions of the directors and officers of the corporation. Instead, the directors and officers are motivated to advance the goals of the corporation, and to act in the best interest of the corporation, without knowledge or regard to the personal opinions of shareholders.¹⁴⁶ The directors and officers are not required to seek out and adhere to the moral, legal, or business whims of the majority of the shareholders.

By design, shareholders have very little influence over the management of a corporation.¹⁴⁷ This is confirmed by the fact that despite the recent financial industry scandals and greater public scrutiny of corporate behavior, there have been mostly unsuccessful attempts at increasing shareholder influence.¹⁴⁸ Shareholders have not been aware of most of the wrongful actions of corporate directors and officers.¹⁴⁹ If they had been aware, there is little that a single shareholder can do outside of selling shares.¹⁵⁰ Even corporate actions are further limited by corporate statutes and bylaws, which allow for boards to circumvent shareholder proposals.¹⁵¹ Additionally, the procedural requirements to advance a claim in court against the directors require a heightened pleading standard, making litigation a costly option that is typically not worthwhile.¹⁵² When shareholders push for a voice in the corporation, it rarely results in corporate change.¹⁵³

In fact, to bend to the will of shareholders and take actions that are not in the best interest of the corporation may subject directors and officers to liability for breach of fiduciary duties.¹⁵⁴ By force of statute and common law, boards and corporate officers are tasked with looking out for the best interest of the corporation.¹⁵⁵ The corporate law provided by the state requires directors and officers to make sound business decisions, to avoid engaging in wasteful activity, and to remain diligent in the administration of corporate duties.¹⁵⁶ Although

¹⁴⁶ See BAINBRIDGE, *supra* note 110, at 204–06, 208.

¹⁴⁷ See Belinfanti & Stout, *supra* note 63, at 13.

¹⁴⁸ See, e.g., BUTLER & RIBSTEIN, *supra* note 72, at 10 (discussing rational ignorance); FAIRFAX, *supra* note 113, at 35 (discussing the Wall Street Rule); Belinfanti & Stout, *supra* note 63, at 17 n.76 (noting that many recent scandals may have been caused by an unhealthy management focus on immediate results instead of operation of the corporation for the long-term).

¹⁴⁹ See Belinfanti & Stout, *supra* note 63, at 17 n.76.

¹⁵⁰ See sources cited *supra* note 116 (discussing the limited ways shareholders may act).

¹⁵¹ See DEL. CODE ANN. tit. 8, § 222(a) (2009); see also Goggin v. Vermillion, Inc., No. 6465-VCN, 2011 WL 2347704, at *4 (Del. Ch. 2011).

¹⁵² See DEL. CT. CH. R. 23.1; MODEL BUS. CORP. ACT § 7.42 (AM. BAR ASS'N 2016) (discussing requirements for a shareholder derivative lawsuit).

¹⁵³ See FAIRFAX, *supra* note 113; see also BAINBRIDGE, *supra* note 110, at 242–43 (little evidence that shareholder activism mattered; investor activism remains rare).

¹⁵⁴ See, e.g., MODEL BUS. CORP. ACT §§ 8.30–.31.

¹⁵⁵ See Schwartz, *supra* note 144, at 809; see also Belinfanti & Stout, *supra* note 63, at 607 (The shareholder is only one, and not necessarily the most important, of the many different groups that should be considered when managing a corporation).

¹⁵⁶ Schwartz, *supra* note 144, at 809.

the directors and officers are agents and fiduciaries of the corporation and shareholders, once authorized, the decisions of directors and officers need not comply with shareholder interests day-to-day.

Directors are beholden to protecting the corporation and all shareholders—both current and future.¹⁵⁷ In looking out for this best interest, corporations must give deference to the law and make business decisions based on the market, but not to the desires of the shareholders.¹⁵⁸ If complying with laws of general application is contrary to the wishes of shareholders, the legal duties supersede the shareholder whims.¹⁵⁹ Should the directors choose to ignore experts and the realities of the market and instead cede to shareholder control, they could face liability if the corporation or shareholders themselves suffer a loss.¹⁶⁰

With these realities in mind, many of the Court's concerns regarding rights particular to human beings are misplaced. If a right is one which a corporation personally cannot enjoy, extending the right to the corporation as a proxy for "the people" is improper. If the fiduciary interests and the corporation's existence are protected, the danger of the state restraining exercise of religion or silencing speech is not a reality. There's no danger of restraining exercise of religion unless the purpose of the corporation itself is frustrated.¹⁶¹

Courts are allowed to question the sanctity of corporate beliefs in a way that is prohibited in analysis of human beliefs because the corporation is not a natural person.¹⁶² When the realities of corporate governance are combined with the realities of corporate existence, there is room for the state to place limits on the corporation that would not be allowed for natural persons.¹⁶³ Court decisions based on the aggregate theory that extend rights that only a corporeal natural person can enjoy are offering duplicative protection to a class of individuals protected adequately elsewhere. This is because humans do not lose

¹⁵⁷ *See id.* at 777–79.

¹⁵⁸ *Id.* at 771; *see also* Blair & Stout, *supra* note 6, at 298.

¹⁵⁹ Blair & Stout, *supra* note 6, at 288, 291. Because of the fiduciary duties of the directors, which bind them to protect the interests of the corporation, when application of the hybrid theory denies the corporation the ability to exercise a right, it is not depriving individuals of a constitutional right by mere operation of contract or agreement.

¹⁶⁰ *See supra* notes 150–56.

¹⁶¹ Under the hybrid theory, the "purpose" of the corporation would be defined both by the official formation documents (articles of incorporation, charter, bylaws) as well as other documents representing the purpose of the corporation, including board resolutions, corporate policies, and corporate public statements. Should a corporation represent its religious purpose through documents and actions, then those rights for the corporation would be protected. The hybrid theory does not, however, protect the rights of "the people" who make up the corporation because the corporation is the person.

¹⁶² *See* Winkler, *supra* note 12, at 866 (corporations have free speech rights more limited than those held by individuals, and that have never been equal).

¹⁶³ *See infra* notes 230–234 and accompanying text (describing the differences between allowable classifications of natural persons and artificial persons).

their status when they put assets into or manage a corporation.¹⁶⁴ The aggregate theory gives rights to corporations they do not deserve because they physically cannot enjoy them.¹⁶⁵

III. PART THREE: MISAPPLICATION OF THE AGGREGATE THEORY

The portions of the *Citizens United* decision that advance the idea that the corporation is a stand-alone entity does reflect the reality of corporate operations, but the premise that courts must protect the rights of shareholders acting in the aggregate is divorced from that reality.¹⁶⁶ When forming a corporation, the incorporators make a choice of whether to go with default rules for shareholder involvement, to limit shareholder rights beyond the default terms, or to allow shareholders greater power through voting measures and other changes to corporate structure.¹⁶⁷ The incorporators and initial investors have the full array of terms and conditions at their disposal, within the limits of corporate and securities law, and typically they choose to limit shareholder involvement.¹⁶⁸ These parties make a deliberate choice, and often choose to limit shareholder power as much as possible to protect the operation of the corporation from shareholder aggression.¹⁶⁹ By operation of law and contract, shareholders are divorced from the handling of their investment.¹⁷⁰

For investors who are not the initial founders or are shareholders of a for-profit, publicly-traded corporation, rights are not the result of the collective decisions of an association of citizens.¹⁷¹ Instead, their rights are defined and planned at the outset of incorporation, and they may either accept the terms and purchase a financial stake in the corporation, or reject them by refusing to pur-

¹⁶⁴ See Winkler, *supra* note 12, at 873 (“Even if the fictional entity . . . did not have constitutional rights . . . the actual persons behind the corporation—as John Marshall recognized almost 200 years ago—will continue to have them.”).

¹⁶⁵ See, e.g., Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 337 (2014) (“The problem with the aggregate theory . . . is that the primary theoretical justification for limited liability is the separation of ownership and control by way of statutorily designated overseers of corporate activity—the board of directors. If one ignores this separation and boils the corporation down to its shareholder owners, then one is essentially back to a form of general partnership. . . .”). Under the hybrid theory, a corporation like Ruby, Inc. or Hobby Lobby could “enjoy” religion if manifestations of the corporation itself show that the corporation is engaging in religious exercise. The corporations could not avail themselves of freedom of religion merely because the founders, directors, officers, and employees adhere to a given religion.

¹⁶⁶ See *supra* Section I.B.

¹⁶⁷ DEL. CODE ANN. tit. 8, §§ 109, 211 (2018) limits shareholder voting rights to election of directors, approval of charter and bylaw amendments, and matters that fundamentally change the structure of the corporation such as mergers, voluntary dissolution, or selling all of the corporation’s assets. See also BAINBRIDGE, *supra* note 110, at 204.

¹⁶⁸ See Schwartz, *supra* note 133, at 245–48.

¹⁶⁹ *Id.* at 247–48; see also *supra* note 130 and accompanying text.

¹⁷⁰ See Schwartz, *supra* note 133, at 246–48.

¹⁷¹ See *id.* at 238, 243–45.

chase the stock.¹⁷² There are no accidental corporations and there are no accidental shareholders.¹⁷³ Shareholders exercise their power when they deliberately choose to invest in the corporate form.¹⁷⁴ This affirmative choice represents an agreement to abandon control and entrust operations to directors and officers.¹⁷⁵ Typically, when shareholders are disappointed in corporate performance, they express their opinion by selling shares.¹⁷⁶ Yet, the Court, through the aggregate theory, continue to consider the rights of shareholders, assigning them the role of the people who make up the corporation, when analyzing corporate rights.¹⁷⁷

This Part analyzes the misuse of the aggregate theory, considering the true nature of the role of shareholders in the corporation. There is minimal shareholder representation in corporate action, outside of their passive acceptance of the corporation's goals and the management of the directors and officers represented by the stock purchase.¹⁷⁸ The nature of corporate governance is distorted in court decisions that seek to grant constitutional rights to corporations. For these reasons, cases like *Citizens United*, which grant corporations rights based on the rights of the individuals who make up the corporation, are based on a misconception about the nature of corporate rights.

A. *Historical Use of the Aggregate Theory*

Both scholars and the courts have expressed concern about the nature of corporate rights. There has also been concern about the ability of the corporation to force a deviation from the original purpose of a constitutional right by virtue of the mere size and impact of corporations.¹⁷⁹ Like Justice Steven's dissent in *Citizens United*, these concerns are often expressed in the dissent of major court decisions and rely on the artificial entity theory to justify limitations.¹⁸⁰ Majority opinions tend to disregard the dangers posed by corporate

¹⁷² *See id.*

¹⁷³ *Id.* at 243–44.

¹⁷⁴ *Id.* at 271.

¹⁷⁵ *Id.*

¹⁷⁶ Notably, in today's secondary market selling shares does not result in a reduction of corporate assets. *See Stout, supra* note 112, at 254.

¹⁷⁷ *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014); *Citizens United v. FEC*, 558 U.S. 310, 336–37, 386 (2010).

¹⁷⁸ *See supra* note 111.

¹⁷⁹ *See Garrett, supra* note 5, at 164 (providing a survey of corporate due process rights). Garrett states that constitutional rights may be strongest when asserted by groups and not just individuals. The cost of allowing artificial entities to assert rights at the expense of individuals without adequate representation can be too great for a constitutional democracy to permit. *See Brief of Amici Curiae Corporate Law Professors in Support of Respondents, supra* note 117, at 21–24 (noting the risks of market manipulation for competitive reasons if corporations are allowed to exempt themselves from generally applicable laws based on the sincerely held beliefs of shareholders and others who make up the corporation).

¹⁸⁰ *See, e.g., Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Black, J., dissenting).

influence, relying on the aggregate theory to advance the rights of shareholders, and disregarding the impact of the corporation itself.¹⁸¹ After nearly 150 years of expanding, arguably unjustifiably, corporate constitutional rights, the perceived overreach of *Citizens United* signals an opportunity to deviate from the centuries-old pattern of blurring the line between corporations and natural persons, and of frustrating the purpose of constitutional rights.¹⁸²

Before cases like *Citizens United* and *Hobby Lobby*, the aggregate theory was primarily used to protect the property rights of shareholders as an association of citizens under the Due Process Clause.¹⁸³ The Court was concerned with the idea of taking property from individuals simply because they unite in the corporate form.¹⁸⁴ This concern, however, was misplaced. In all scenarios, the rights of the corporation were adequately protected through operation of the artificial entity theory.¹⁸⁵ The state granted property rights to the corporation at the time of charter because property rights are incidental to the corporation's existence; thus, the state could not deny property rights after the corporation was formed.¹⁸⁶ This is similar to the holding for contractual rights in *Dartmouth*. There, Chief Justice Marshall noted that a state could not place limits on rights once granted.¹⁸⁷

Many of the due process property decisions involve the railroad industry. For example, in *Santa Clara County v. Southern Pacific Railroad Company*, the Court held that a corporation's property could not be taxed differently from that of a natural person.¹⁸⁸ In *San Mateo v. S. Pac. R.R. Co.*, a railroad case that preceded *Santa Clara*, a Federal District Court in California held, "whenever a provision of the constitution, or of a law, guaranties to persons the enjoyment of property, or affords to them means for its protection, or prohibits legislation

¹⁸¹ See Tucker, *supra* note 3, at 501–05 (discussing the evolution of the Court's treatment of corporations to recognize the rights of the people who make up the corporation).

¹⁸² See Chatman, *supra* note 2, at 60–62 (discussing the Court's history expanding corporate rights without justification). If the Court grants rights to corporations equal to the rights of human beings, there is a danger of giving a corporation rights at the expense of the human beings the constitution is designed to protect. See also Belinfanti & Stout, *supra* note 63, at 587 ("Aggregate theory captures the reality that corporations must act and make decisions through their human agents. However, the aggregate approach raises several challenging questions, such as which human agents/natural persons should we aggregate? Everyone involved in the corporate enterprise? Or perhaps only the board, executives, and shareholders? And if so, today's shareholders, or the company's original shareholders? As this last question suggests, the notion of perpetual corporate life is hard to reconcile with an aggregation theory.").

¹⁸³ Chatman, *supra* note 2, at 60; see also Hovenkamp, *supra* note 40, at 1649. ("[T]he corporate personhood doctrine of *Santa Clara* represented an efficient way for the corporation to assert the property rights of its shareholders."); Pollman, *supra* note 5, at 658–59 (noting the recognition of equal protection and due process rights based on the aggregate theory).

¹⁸⁴ See Chatman, *supra* note 2, at 60–61.

¹⁸⁵ *Id.* at 62–63.

¹⁸⁶ *Id.* at 60–61.

¹⁸⁷ *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636–37 (1819).

¹⁸⁸ *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 416 (1886).

injuriously affecting it, the benefits of the provision extend to corporations.”¹⁸⁹ While early courts viewed parts of due process for corporations as so essential that it did not need justification or explanation, early courts explicitly limited full expansion of corporate rights through the aggregate theory, excluding “purely personal” rights. The courts carefully limited expansion, carving out life or liberty, noting that those are only rights that natural persons may enjoy.¹⁹⁰ Early cases drew distinctions amongst actors in a way that may be out of line with more recent holdings.¹⁹¹

Even the earliest decisions demonstrate that the aggregate theory is not necessary to adequately protect any of the rights of the corporation, including property rights.¹⁹² Many of these cases also indicate the corporation’s property rights as operation of the artificial entity theory.¹⁹³ By referencing the rights of the corporation itself, either through artificial entity or real entity theory, these early decisions also demonstrated that protection of the property rights of the people who make up the corporation is misplaced and unnecessary. The property protected in the railroad cases is the property held by corporations, not shareholders. Further, many scholars have noted that “strict property rights” cannot be applied to the ownership rights of the modern shareholder of large corporations due to the secondary nature of share ownership.¹⁹⁴ The operation of the modern corporation confirms that granting rights in the aggregate disregards the realities of corporate governance.¹⁹⁵

¹⁸⁹ In addition to the aggregate theory, in *Santa Clara and San Mateo v. S. Pac. R.R. Co.*, 13 F. 722, 744 (C.C.D. Cal. 1882), the Court also granted corporations rights under the artificial entity theory. The corporations were granted property rights during chartering: a state may not impose unconstitutional limits on rights which it has granted. *See San Mateo*, 13 F. at 744 (“It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation. We cannot accept such a conclusion.”).

¹⁹⁰ *See Ins. Co. v. New Orleans*, 13 F. Cas. 67, 68 (D. La. 1870) (“Only natural persons can be born or naturalized; only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the provisions of the first two clauses. . . .”).

¹⁹¹ *See Chatman*, *supra* note 2, at 60–62 (discussing historical limits on corporate personhood).

¹⁹² *Id.*

¹⁹³ *See San Mateo*, 13 F. at 744.

¹⁹⁴ *See Berle*, *supra* note 115, at 101–02 (The new role of shareholders has created a new form of property. Shareholders are not motivated by entrepreneurship, but stock has more socio-political implications. Corporations do not need the shareholder’s funds to operate, taking the relationship outside the parameters of traditional economic relationships); Weinstein, *supra* note 57, at 310 (noting that by renouncing control and responsibility to management, shareholders have given up the right to have the corporation managed in their interest); Pollman, *Constitutionalizing*, *supra* note 5, at 672–73 (noting the flawed assumption that corporations are all associational in nature).

¹⁹⁵ *See discussion supra* Section II.A.; *see also Gindis*, *supra* note 126, at 274 (The corporation is not an object of property rights. Humans may own shares of a corporation, but no person possesses the corporation itself).

B. *The Aggregate Theory in Citizens United and Hobby Lobby*

In *Citizens United*, Scalia and the majority did not consider whether the speech rights under consideration could be enjoyed only by natural persons, and skipped the question of whether corporations have the First Amendment right at all.¹⁹⁶ Assuming that a corporation's First Amendment rights exist, the Court advocated for the position of focusing on the right, not on who is invoking the right.¹⁹⁷ While a corporation is not an actual citizen and cannot vote, the majority ignored these facts, holding that the corporate voice is vital to political discourse.¹⁹⁸ Because the corporation is capable of speech protected by the Constitution, the First Amendment right of a corporation could not be limited simply because the words were not spoken by a citizen or a natural person.¹⁹⁹ Thus, a corporation is capable of speech, capable of having its speech infringed upon by the state, and deserves the same level of protection as any speaker from such infringements.²⁰⁰ This premise is not found in the text of the Constitution or in precedent.²⁰¹

*Burwell v. Hobby Lobby Stores*²⁰² illustrates how *Citizens United* declarations combined with the aggregate theory continues to improperly expand rights based on incorrect beliefs regarding corporate governance.²⁰³ *Hobby Lobby* suggested corporate rights are the pass through rights of the owners.²⁰⁴ A corporation has constitutional rights as long as the persons making up the cor-

¹⁹⁶ See Transcript of Oral Argument, *supra* note 84, at 33 (statement of Sotomayor, J.).

¹⁹⁷ See *supra* notes 81–83 and accompanying text.

¹⁹⁸ *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ While courts have granted corporations free speech rights as far back as Chief Justice Marshall in *Dandridge*, those rights were linked to how the corporation itself can speak—through money, corporate writings. Those who are in support of the holding in *Citizens United* emphasize that it is an opinion about the First Amendment, not a statement about corporate law. See, e.g., Floyd Abrams, *Citizens United and Its Critics*, 120 YALE L.J. ONLINE 77 (2010), <http://yalelawjournal.org/forum/citizens-united-and-its-critics> [https://perma.cc/7BGS-FMMK]. The precedence cited by the Court in *United* does support First Amendment rights for corporations, but tends toward speech that the corporation itself can engage in. *Citizens United* takes these previous holdings, affirming free speech for corporation, and extrapolates to find that when analyzing rights, a court must ignore the nature of the speaker. By ignoring corporate personhood, the Court is able to declare these cases as rightful precedence for the outcome of *Citizens United*. This, in essence, is why personhood matters. See, e.g., CHEMERINSKY, *supra* note 2.

²⁰² *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014).

²⁰³ *Id.* at 2768–69. While *Hobby Lobby* is viewed by some to be an outlier because it applies to a closely held corporation with a religious purpose, it is informative for how the Court will analyze corporate personhood. Additionally, recent cases show the holding is expanding beyond what the court indicated. See *supra* note 4 and accompanying text.

²⁰⁴ See Garrett, *supra* note 5, at 96; see also June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963, 1017–18 (2017) (*Hobby Lobby* erodes the social status of the corporation by reducing it to an entity focused on the interests of its owners).

poration have an indirect benefit.²⁰⁵ This use of the aggregate theory ignores the realities of the corporate form, conflating for-profit companies with non-profit religious organizations, and corporations with partnerships; this allows shareholders to have it both ways.²⁰⁶ The *Hobby Lobby* Court would have us believe these distinctions are of no consequence.²⁰⁷ Justice Alito and the majority proposed that incorporators and shareholders can choose the profit maximizing, dividend generating for-profit form, and apprise themselves of limited liability, yet also protect their personal religious and speech rights indirectly through the corporation.²⁰⁸

It is not clear from the *Hobby Lobby* holding if the Court is referring specifically to a statutory close corporation, or merely a corporation that is not publicly traded.²⁰⁹ In a close corporation, the shareholders view themselves as more than just shareholders and are instead involved in the management of the business.²¹⁰ Close corporations have thirty or fewer shareholders, one or more restrictions on transfer, are not registered with the SEC, and make an explicit election to be governed by the close corporation provision of the Delaware General Corporate Law § 342.²¹¹ Shareholders expect to be actively involved in management and operation of the corporation.²¹²

Even if the Court is referring to close corporations, this should not change how corporate rights are perceived in *Hobby Lobby*.²¹³ Close corporation founders are still choosing to avail themselves of the benefit of the corporate form. Their duties are greater than shareholders in a larger corporation, but those duties, based on the agency relationship among shareholders, are still owed to other shareholders and the corporation itself, not third parties.²¹⁴ The shareholders in a close corporation are wearing many hats. They can be both investors and managers. The roles assumed by shareholders in close corpora-

²⁰⁵ *Id.* at 964 (citing *Hobby Lobby*, 134 S. Ct. at 2768).

²⁰⁶ Garrett, *supra* note 5, at 145.

²⁰⁷ *Hobby Lobby*, 132 S. Ct. at 2769.

²⁰⁸ *Id.* at 2769–70.

²⁰⁹ The Department of Labor, Department of Treasury, and Health and Human Services defined “closely held” for purposes of the Affordable Care Act following the *Hobby Lobby* decision. See Coverage of Certain Preventative Services Under the Affordable Care Act, 80 Fed. Reg. 134, 41323 (July 14, 2015).

²¹⁰ F. HODGE O’NEAL & ROBERT B. THOMPSON, 1 O’NEAL’S CLOSE CORPORATIONS § 1.07, at 29–30 (3d. ed. 2002).

²¹¹ See DEL. CODE ANN. tit. 8 §§ 350, 351, 355 (2017). Shareholders govern the business and affairs entirely. A minority of shareholders can be given the power to dissolve.

²¹² O’NEAL & THOMPSON, *supra* note 210.

²¹³ *Hobby Lobby* held that even a for-profit, non-religious corporation may have religion as a purpose. If the corporation has such purpose, the corporation also has religious rights under the First Amendment. A closely held, for-profit corporation may function as a reflection and extension of the beliefs held by an aggregate of the owners. 134 S. Ct. at 2768–69, 2774–75.

²¹⁴ See Stout, *supra* note 112, at 261 (Controlling shareholders in a close corporation have a duty not to use their control over the corporation to cause the corporation to make payments to them that the minority shareholders do not receive).

tions, however, do not change the nature of the corporation itself.²¹⁵ The distinctions between a more traditional corporation and a close corporation are reflective of the incorporators' freedom to contract, as they chose the business form most representative of their goals.

It is also a reflection of the state's right to define business entities through statutes. Even in a close corporation, the corporation is still legally separate from individuals.²¹⁶ The close corporation also maintains other characteristics of a corporation, including perpetual life.²¹⁷ Yet, the aggregate theory, as advanced by the *Hobby Lobby* majority, advocates for the opposite. The Court suggests that while the responsibilities and obligations of individuals are altered by the corporate form, the rights are not.²¹⁸ The close corporation is still a corporation—the election does not change the nature of the corporation itself. If we would not give corporate rights based on the interests of directors and officers alone in public or large corporations, we should not extend rights through the aggregate theory to shareholders of a close corporation. The only difference between close corporations and traditional corporations is the management structure, not the corporate relationship with the government or third parties.²¹⁹ Allowing the incorporators and shareholders to back track when convenient should not be permissible.

The application of the aggregate theory in more recent holdings gives directors and officers constitutional protections simply because they serve as agents and fiduciaries for the corporation. As discussed in the first Section of this Part, since the Court is not protecting shareholders with the aggregate theory, the Court is giving double protection to an elite class of persons serving as directors and officers.²²⁰ If the Court's actions offer any protection to shareholders, such protections are duplicative rights earned simply by investments

²¹⁵ See, e.g., Gindis, *supra* note 126, at 261 (Individuals assume roles on behalf of a corporation, and are even the face of the business, but that does not alter the definition of the corporation. They are assuming the roles on behalf of a real entity. The corporation is a coherent and stable whole).

²¹⁶ See, e.g., BUTLER & RIBSTEIN, *supra* note 72, at 10 (Close corporation is like a partnership choice for purpose of managing and monitoring agents. The ownership and control are not separate, so the advantage is fewer agency costs. However, the shareholders lose the benefits of being a public corporation, but not the benefits of the corporation generally); see also Garrett, *supra* note 5, at 146 (“[N]othing could be more fundamental to modern corporate law than the complete separation of the owners from the legal entity itself. . . . [L]egal separateness is the point of creating a corporation.”).

²¹⁷ See DEL. CODE ANN. tit. 8 § 343 (2017) (A close corporation is formed in accordance with general corporate laws, with the exception that the name shall state that it is a close corporation and shall include the provisions of § 343); § 102(a)(5) (A certificate of incorporation defaults to perpetual existence).

²¹⁸ See discussion *supra* notes 199–205.

²¹⁹ See, e.g., *infra* note 221.

²²⁰ See discussion *supra* Section II.A. See also Tucker, *supra* note 3, at 530 (noting the problems with applying the aggregate to corporate political speech).

and wealth.²²¹ The Court's holdings are based on the protection of rights that are impossible to exercise without a physical body and do not exist independent of the natural persons behind the corporation.²²² To continue the use of the aggregate theory found in *Hobby Lobby* and *Citizens United* is to continually over-represent shareholders and management.

Applying the aggregate theory also disregards the intentions of state legislatures when they create corporations through statutes. The corporation is a creature of the state, meaning that when courts decide the constitutional rights of the artificial entity, they are deciding the rights of something that would not exist without an exercise of state power. A corporation should only have religious or speech rights, such as that of a person, if the states have defined corporations in way that allows for such an interpretation. Looking past what states intend the corporation to be and extending rights based on the people who make up the corporation disregards the autonomy and power of the state to define its creation.²²³ It voids the agreement that went into effect between the state and corporate founders when the corporation was formed.

Citizens United's use of the aggregate theory to protect the rights of the individuals who make up the corporation and the lack of consideration given to the entity exercising the right is flawed in two respects. First, it ignores that there are legal, state defined differences between corporations, natural persons, and other business entities. Then, it applies a theory of the corporation that does not reflect the realities of corporate governance. Because *Citizens United* incorrectly defined the corporation, it also incorrectly analyzed the corporation's rights. The correct approach to corporate personhood and corporate rights incorporates the realities of corporate existence, defers to the state definitions of the entity, and honors the choices made by corporate founders. The next Part proposes a way forward that properly considers what a corporation is when determining corporate rights.

²²¹ The Court has rejected the "shareholder protection" rationale due to its over-and under-inclusiveness. See Tucker, *supra* note 3, at 514–15 (discussing the Court's rejection of shareholder protection in *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792–95, and in Justice Kennedy's opinion in *Citizens United v. FEC*, 558 U.S. 310, 361 (2010)). As discussed in *supra* Section II.A., majority shareholders tend to be corporate founders and institutional investors, or corporate management—not individuals purchasing on the open market. The corporate management and majority investor classes either have institutional backing or the wealth necessary to be a party of the class.

²²² Historically, speech rights of corporations have been acknowledged under the real entity theory when the corporation speaks in ways in which a corporation can speak—writings and official corporate statements. See, e.g., *Bank of the United States v. Dandridge*, 25 U.S. (12 Wheat.) 64, 91–92 (1827) (Marshall, C.J., dissenting); discussion *supra* Section I.A. Under the hybrid theory, speech rights would receive the same level of protection.

²²³ See, e.g., Blair & Pollman, *supra* note 49.

IV. PART FOUR: THE HYBRID THEORY AND THE CORPORATE PERSONHOOD
TWO-STEP

The silver lining of the *Citizens United* decision is that it has been a catalyst in a movement to explore what a corporation is and to find a solution that defines the corporation in a way that the people, through empowerment of the state, can support. Any displeasure with the nature of corporate rights can be remedied by allowing states to define their creation.²²⁴ The Court's precedent, as far back as Chief Justice John Marshall in *Dartmouth*, makes it clear that states can redefine its creation—the corporation.²²⁵ This is because the Court is deciding the rights of an artificial entity that would not exist without state power, but whose rights, both intentional and incidental, must be acknowledged once formed. The Court cannot divorce an analysis of corporate constitutional rights from an analysis of the legal status of corporations. The role of the Court should be to simply interpret what the state intends.

The corporation is the creature of the state; therefore, states have the power to fix the corporate personhood flaws in cases like *Citizens United*.²²⁶ States have made judgments about the nuances of the corporate form, creating the corporation, and defining the rights and responsibilities of incorporators, shareholders, directors, and officers.²²⁷ In exchange for the benefits of a corporation, the humans who choose to unite in the corporate form create an entity completely separate from themselves.²²⁸ The entity created through this collaboration of the state and the natural person creates a new legal fiction embodied with its own rights, limitations, and responsibilities.²²⁹ Determining the rights

²²⁴ For decades, many have proposed going further by amending the Constitution to clearly state that corporations are not persons. For example, in 1988 Ralph Nader authored a piece in the *New York Times* profiling the history of corporate constitutional rights and advocating for a change. See Ralph Nader & Carl J. Mayer, *Corporations Are Not Persons*, N.Y. TIMES (Apr. 9, 1988), <http://www.nytimes.com/1988/04/09/opinion/corporations-are-not-persons.html> [<https://perma.cc/manage/create?folder=13520-41141>].

²²⁵ *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

²²⁶ Scholars have agreed that *Citizens United* is an opportunity for state action. See, e.g., Pollman, *Constitutionalizing*, *supra* note 5, at 657 (*Citizens United* and *Hobby Lobby* are a paradigm shift for the Court. They represent an opportunity for state law to resolve disputes among corporate participants); Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 327–32 (2015) (Governance rules can alleviate concerns over corporate political speech). The approach of relying on the states, however, does not guarantee that efforts will be taken to protect the rights of individuals over corporations.

²²⁷ See *CTS Corp. v. Dynamics Corp. of Am.* 481 U.S. 69, 94 (1987) (Court has made numerous proclamations regarding constitutional rights over the years, it is clear that “the corporation . . . owes its existence and attributes to state law.”). See also Mayer, *supra* note 40, at 584 n.36 (citing T. McCRAW, *PROPHETS OF REGULATION* 11 (1984)); Garrett, *supra* note 5, at 105.

²²⁸ Garrett, *supra* note 5, at 108.

²²⁹ Since corporations are creatures of the state, federal courts historically have been leery of interfering with what was defined by the states under law. See Garrett, *supra* note 5, at 105; Ciepley, *supra* note 77, at 225–42 (Corporations are constituted by government. They thus have no preexisting rights to reserve. Without reserved rights, and without any express rights

associated with this special relationship requires a court to analyze the facts and give consideration to evidence of the corporation's formation and operations.

This Part proposes a way forward in corporate rights analysis by using the two-step analysis to fully recognize the hybrid nature of the corporation. First, this Part defines what is involved should the Court start at step one in its analysis of the corporate form as it exists now. Then, this Part discusses the true nature of the corporation, considering step one analysis, to highlight how states can redefine their creation as stand-alone new entities that exist at the pleasure of the state, a hybrid of artificial and real entity theory. It concludes by applying the hybrid theory to Ruby, Inc.

A. *Defining Step One: Considering the True Nature of the Corporation*

The Constitution is written for human beings, not entities. To give corporations rights, a fiction must be created to imprint human characteristics onto the corporation. Corporate rights are a fact question that will always require courts to engage in a fact-intensive analysis because of the nature of corporate personhood. Step one of the two-step analysis requires the Court to examine how the corporation is founded, and how the corporation operates. Corporate personhood and corporate rights cannot be presumed, especially rights based on beliefs such as religion. If a clear proclamation of rights is desired, outside of the two-step analysis, state and federal legislature must take similar steps regarding the definition of rights that accompany personhood.

To define the corporate person and other artificial persons, it is helpful to consider how we define natural persons. The logical definition of person includes any human being possessing a physical body, without concern for age, gender, race, or nationality.²³⁰ How to classify natural persons for legal purposes is in many ways as logical as how to define them. States categorize people by age, mental capacity, and other constitutionally acceptable legal classifications.²³¹ When states classify persons, however, they are working with entities that are not creatures of the state, but who are instead the creators of the state.²³²

granted in the constitutional context to corporate entities, it makes no sense for corporations to claim constitutional rights against the government). *See also* Garrett, *supra* note 5, at 105 n.43 (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014)) (“discussing how courts will ‘turn to’ the ‘underlying state’ corporate law when ‘resolving disputes’”).

²³⁰ *See Person*, OXFORD LIVING DICTIONARY, <https://en.oxforddictionaries.com/definition/person> [<https://perma.cc/5PMF-XZM5>] (last visited Apr. 21, 2018) (defining person as “[a] human being regarded as an individual”).

²³¹ To determine whether a classification is legally acceptable, the courts engage in a fact-intensive analysis of state action, applying one of three tests. *See, e.g.*, *Jimenez v. Weinberger*, 417 U.S. 504 (1974) (“the equal protection clause is violated by discriminatory laws relating to the status of birth where classification is justified by no legitimate state interest”).

²³² *See Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 375 (1855).

As such, the state does not have the power to eliminate a human being's existence.²³³

In contrast, states do have the power to eliminate a business organization's existence because they are creatures of the state, with rights that are not recognized until the state acknowledges the formation documents, or until they engage in actions the state has deemed to meet the threshold for recognition as a business form.²³⁴ They are governed by the terms of formation documents and the mandatory terms contained in statutes. Because of the state's role in a company's recognition and formation, all formal business entities are hybridized artificial entities.²³⁵ Once formed, every entity, from the limited partnership to the corporation, operates in the world limited by how the state has defined it.²³⁶

²³³ *Dodge*, 331 U.S. (18 How.) at 375 (“Individuals are not the creatures of the State, but constitute it. They come into society with rights, which cannot be invaded without injustice.”).

²³⁴ *Id.* There are two default entities discussed that operate as alter egos of human beings and, therefore, cannot be eliminated by the state. Individuals do business alone and in collaboration with other natural persons without the intervention of the state. Sole proprietorships and general partnerships are default entities that exist when one or more individuals do business without complying with state filing requirements. *See, e.g.*, CAL. CORP. CODE § 16202(a) (no filings required to form a general partnership and be governed by the default rules, but many file a statement of partnership); JAMES F. FOTENOS & EDWARD C. RYBKA, CALIFORNIA PRACTICE GUIDE: CORPORATIONS (2018) §§ 2:3–2:8 (“A sole proprietorship is not a legal entity” separate from its owner and does not file a formation document; the owner must file a fictitious name certificate if doing business under a name that does not include the business owner's name). States' laws governing the treatment of sole proprietorships and partnerships exist in the common law and in business codes, but the laws do not define the entities in the same way that they define entities with limited liability. Even though the state may recognize a separate business name or entity, partnerships and sole proprietorships operate like alter egos in their purest forms.

²³⁵ *See* Thierry Kirat, *The Firm Between Law and Economics: An Overview of Selected Legal-economic Scholars of the Past*, in *THE FIRM AS AN ENTITY: IMPLICATIONS FOR ECONOMICS, ACCOUNTING, AND THE LAW*, *supra* note 17, at 131–32 (“A realistic theory of the enterprise should be based on two crucial dimensions: its aspect as an entity or institution, subject to the rules of law and developing its own internal rules; and its role as the operator of the creation and distribution of revenues, and of innovation, thus the economic dynamic”). The hybrid theory takes these two factors into consideration by first acknowledging that the corporation is in fact a creature of the state, then filling in the gaps of the artificial entity/concession theory and recognizing that, once formed, the corporation is a fully functioning independent entity.

²³⁶ Other entities with limited liability, such as the limited partnership (LP), limited liability partnership (LLP), limited liability company (LLC) also cannot be formed by default. To avoid the fate of sole proprietorships and general partnerships, individuals further formalize business relationships, and avail themselves of the benefits of state-defined business forms like the corporation, by complying in full with formation requirements found in state business codes. Failure to follow statutory requirements results in the corporation being treated like a default entity. *See* UNIF. PARTNERSHIP ACT § 306(c) (1997); DEL. CODE ANN. tit. 6, § 18 (2018); DEL. CODE ANN. tit. 6, § 17 (2018); DEL. CODE ANN. tit. 6, § 15 (2018). The business trust, which may be formed by contract alone, does offer some characteristics of corporations, including limited liability, but has fallen out of favor since corporate laws have been modernized. *See* Carla L. Reyes, *Distributed Autonomous Business Organizations* 25–26 (unpublished draft) (on file with author) (citing John Morley, *The Common Law Corpora-*

After formation, to determine how to further define the entity, one must look at how it operates and relates to third parties.²³⁷ Corporate personhood jurisprudence based on the aggregate theory is based on a misunderstanding of corporate laws and governance because it fails to look at how the corporation operates after it is formed.²³⁸

Beginning with the decisions and dissents written by Chief Justice Marshall in the 1800s, courts have been starting at step two of corporate-personhood analysis, defining the corporation as an assumed person then analyzing the parameters of the right.²³⁹ The desire to adequately protect corporate interests is largely based on a flawed understanding of corporate governance and has resulted in the Court never considering whether the persons being protected are deserving of, or in need of, additional protection.²⁴⁰ Cases like *Citizens United* accept corporate rights and personhood status as a foregone conclusion, making it difficult to determine at any given moment what rights a corporation actually has and what limitations are imposed on those rights.²⁴¹

Viewing the corporation as a person is necessary for many laws and regulations to have the intended effect, and typically it is the state or federal legislatures that decide when corporate personhood is necessary. Legislators draft state and federal statutes to include the corporation in the definition of a person without regard to how such classifications may impact the constitutional definition or rights of the corporation; instead, they make a conscientious decision that a statute should not apply equally to artificial persons.²⁴² The statutes

tion: The Power of the Trust in Anglo-American Business History, 116 COL. L. REV. 2145, 2146 (2016)) (comparing the business trust to the corporation).

²³⁷ Reyes, *supra* note 236.

²³⁸ See BUTLER & RIBSTEIN, *supra* note 72, at 2 (“[V]oting rules of corporations suggest that corporations are democratic institutions. . . . [H]owever, the reality of the large corporation is far from democratic, because shareholders rarely have the incentive to exercise their legal rights.”). See also, e.g., Pollman, *Constitutionalizing*, *supra* note 5 (explaining the state role in corporate governance); CHEMERINSKY, *supra* note 2, at 253 (explaining founder’s intent regarding constitutional and corporate rights).

²³⁹ See discussion *supra* Part I. See also Winkler, *supra* note 12, at 867 (Corporate constitutional rights are not based in corporate personhood).

²⁴⁰ See discussion *supra* Part II.

²⁴¹ See Ciepley, *supra* note 77, at 222–23 (Professor Ciepley believes the rights of a corporation are purely contractual, corporations have no constitutional rights). See also *Amicus Curiae* Brief of Corp. & Criminal Law Professors in Support of Petitioners, *supra* note 4, at 28 (discussing how application of RFRA to corporations frustrates corporate law). While I believe that corporations do have constitutional rights for reasons that are based in more than contract, I disagree with the Court’s use of a case that should be founded in corporate law, like *Citizens United* or *Hobby Lobby*, to make a general point about freedom of speech or freedom of religion. The Court’s analysis of those rights in both cases would be correct if it was applied to human beings.

²⁴² See, e.g., 26 U.S.C. § 7701(a)(1) (2012) (Person: “The term ‘person’ shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.”); U.C.C. § 1-201(b)(27) (“‘Person’ means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, govern-

acknowledge that some human activity must be given equal protection, regardless of the nature of the person engaging in the activity.²⁴³ Many statutes also make a distinction between a human actor, a citizen actor, and an artificial entity actor.²⁴⁴ These distinctions, properly created by state and federal legislators, are justified by the Constitution and fit within theories of corporate personhood. But when Courts provide the corporations with these same rights as defined by statute, they are interpreting the intention of the drafters of the statute.²⁴⁵ Problems arise in corporate personhood when the courts give rights to corporations that states, legislatures, and corporate founders did not intend.

Through business codes and case law, states have clearly defined the distinctions between entities and natural persons, along with the differences between the various business entities.²⁴⁶ If the Court acknowledges how corporations function, it can develop a corporate personhood theory that grants corporate rights equal to natural persons where appropriate, yet upholds appropriate state limitations that reflect the nature of the corporation. Viewing the corporation as a real entity limited by the realities of the corporate form as defined by state law, may reconcile *Citizens United* with jurisprudence that allows the state to draw distinctions between natural persons and corporations. Recognition of the realities of how corporations are formed and managed will allow the Court to start in the right place when analyzing corporate rights, developing an accurate and binding theory of corporate personhood.

The operation of the hybrid theory enables the Court to acknowledge the duality of corporate existence. Over the years, Justices have questioned why the Court has not started at step one as contemplated by the hybrid approach: determining which constitutional protections are incidental to a corporation's very existence.²⁴⁷ The Court has simply claimed any theory of corporate personhood when convenient to grant or deny rights, or to affirm or disagree with a prior decision. By starting at step one and defining the corporation, the Court will

ment, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.”).

²⁴³ See 26 U.S.C. § 7701(a)(1); U.C.C. § 1-201(b)(27).

²⁴⁴ The clearest distinction between natural persons and artificial persons appears in the Fourteenth Amendment. *Ins. Co. v. New Orleans*, 13 F. Cas. 67, 68 (D. La. 1870) (interpreting parts of the Fourteenth Amendment to apply only to human beings: “Only natural persons can be born or naturalized; only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the provisions of the first two clauses. . . .”); see also *Nw. Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906). Corporations have also found that only natural persons may avail themselves of the privilege against self-incrimination and citizen status for purposes of privileges and immunities protection. See *Bank of Augusta v. Earle*, 38 U.S. 519, 586 (1839) (privileges and immunities).

²⁴⁵ Professor Pollman believes that *Citizens United* and *Hobby Lobby* look to state corporate law as a means for resolving corporate constitutional rights. See Pollman, *Constitutionalizing*, *supra* note 5, at 669.

²⁴⁶ See *supra* notes 236–37.

²⁴⁷ See Padfield, *The Silent Role of Corporate Theory*, *supra* note 92, at 853; see also Transcript of Oral Argument, *supra* note 84, at 33 (statement of Sotomayor, J.).

have less wiggle room and will give corporate constitutional law decisions more weight and clarity.²⁴⁸ The beauty of starting at step one is that it has the benefit of properly analyzing corporate rights while avoiding blanket proclamations that endanger the proper balance between corporations and third parties. This allows the courts to consider how the corporation was formed, how it was governed, and what the state and incorporators intended. Corporate rights are case-by-case and fact dependent, but the nature of the corporation can be resolved by recognizing the corporation's dual nature.

Step one requires that the Court give deference to the role of the state by considering both the state's role in formation and the corporation's stand-alone status. Before granting corporate rights the Court should first consider whether a right is of the type necessary to protect the corporation itself, not the people who make up the corporation.²⁴⁹ As illustrated by the ownership of Hobby Lobby and the nature of the business, Hobby Lobby is not a religious entity or non-profit whose very existence is based on the exercise of religion.²⁵⁰ Instead it is a corporation with a charitable purpose and mission in addition to other more common corporate goals.²⁵¹ Freedom of religion is not incidental to Hobby Lobby's existence, nor is the exercise of religion implicit in what is granted by Hobby Lobby's corporate charter.²⁵² Instead of considering what is inherent for the people who found and operate a corporation, the Court should consider what is inherent for the corporation itself.

Step one also requires the Court to consider what rights are incidental to the corporate charter. This is because the corporation is an artificial entity bound by the rights granted by the state and altered by the foundational corporate contracts: the corporate charter, bylaws, and resolutions.²⁵³ By operation of law, actions that are explicitly included in the corporation's business purpose

²⁴⁸ See Padfield, *The Silent Role of Corporate Theory*, *supra* note 92, at 859–60; Gordon, *supra* note 34. Professor Chemerinsky notes that it would be difficult to avoid applying the *Citizens United* holding to other contexts related to speech and non-citizens. See CHEMERINSKY, *supra* note 2. There is similar room to apply the decision in other corporate law contexts. See Chatman, *supra* note 2.

²⁴⁹ See Gindis, *supra* note 126, at 266 (“[t]he firm is not simply an aggregate or a collection. It is a real integrated entity and a dynamic causal system. . . . Firms are real entities that need to be theoretically treated as such.”).

²⁵⁰ See *America's Largest Private Companies*, FORBES.COM, <https://www.forbes.com/companies/hobby-lobby-stores/> [<https://perma.cc/6F4T-WKVF>] (last visited Apr. 21, 2018); *Top-Private Companies*, BIZJOURNALS.COM, <http://companies.bizjournals.com/profile/hobby-lobby/135823/> [<https://perma.cc/FK77-DRXL>] (last visited Apr. 21, 2018) (Hobby Lobby is one of the largest private companies, with over 600 stores that sells arts and craft supplies).

²⁵¹ In court filings, Hobby Lobby is described as “an arts-and-crafts chain,” and a closely held family business organized as a general corporation under Oklahoma law. See Brief for Respondents at 1–2, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354 & 13-356).

²⁵² *Id.*

²⁵³ See discussion *supra* Section I.A.

cannot be restricted once the charter is granted.²⁵⁴ In addition, actions that are required to conduct the business detailed in the charter cannot be restricted.²⁵⁵ This includes the ability to speak through corporate documents and spending, and the ability to contract, own property, and sue and be sued.²⁵⁶

To start at step one when determining whether a right exists for the corporation, the Court should also consider what additional responsibilities accompany rights.²⁵⁷ All rights come with responsibilities, but it is difficult to assign responsibility to a shareholder, officer, or director when a corporation exercises freedom of speech or freedom of religion based on the aggregate theory.²⁵⁸ Shareholders, directors, and officers are all protected from various levels of responsibility by the existence of the corporation and the contracts between the corporation and its agents and owners.²⁵⁹ A shareholder is only held personally liable when a controlling shareholder uses his position to oppress the minority shareholder's interests.²⁶⁰ When the founders of Ruby, Inc. abandon partnership for the corporate form, they give up the power to control the corporation through their ownership interests, but also give up the responsibilities that accompany that control. There are no shareholder duties through the rights they exercise in the aggregate, unlike the partners in a partnership.²⁶¹ As a result of the realities of the corporate form, the Court extends additional rights to shareholders, officers, and directors without any additional responsibilities.²⁶²

As is evident from the earliest corporate decisions, clearly the founders and early courts envisioned a corporation subject to some level of state control.²⁶³ Two-step analysis allows the Court to continue to advance the principal that the corporation that credits its existence to terms mandated by the state should also be subject to the control of the state, while also allowing the Court to

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Prior to *Citizens United*, the courts recognized that corporations have First Amendment rights to freedom of speech and freedom of the press, Fifth Amendment protection from unreasonable takings, Fourth Amendment protection from unreasonable search and seizure, and Fourteenth Amendment rights to equal protection. *See* *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 775–76, 778 n.14 (1978) (First Amendment); *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (Fourth Amendment); *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (Fifth and Fourteenth Amendment); *Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394, 409–10 (1886) (Fourteenth Amendment).

²⁵⁷ *See, e.g.*, Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood*, 50 *SAN DIEGO L. REV.* 125, 126–27 (2013).

²⁵⁸ *Id.* at 136–37. *See also*, Chatman, *supra* note 2, at 87.

²⁵⁹ *See* discussion, *supra* Section II.A.

²⁶⁰ *See* FAIRFAX, *supra* note 113, at 26. *See also supra* notes 205–11 and accompanying text.

²⁶¹ *See* discussion, *supra* Section II.A.

²⁶² Under aggregate theory some rights are extended to corporations through the people who make up the firm, but under ethical rules, representation and privileges belong to the corporation not the employees, officers, or directors. How can the corporation assume the right on behalf of the individuals, but not be required to protect the individuals when a violation occurs? *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.13 (AM. BAR. ASS'N 1983).

²⁶³ *See* discussion, *supra* Section I.A.

acknowledge that by granting the corporation's existence the state creates a new independent entity with rights incidental to that existence.²⁶⁴ By looking at the way corporations are formed and operate, the Court may advance a cohesive theory of corporations that grants rights to corporations when required, but does not presume, as in *Citizens United*,²⁶⁵ that corporations must be equal to natural persons in all ways. The hybrid theory, with its two-step analysis and embodiment of the dual nature of corporate existence, provides the framework necessary to properly analyze corporate rights.

B. A Hybrid Theory

The enduring scholarly debate on corporate personhood disincentivizes the Court from stating explicitly what theory it subscribes to at any given moment.²⁶⁶ Once the Court identifies a theory, the decision faces immediate scrutiny by scholars who oppose the theory referenced.²⁶⁷ Much of the personhood-based criticism and support of *Citizens United* is based on how it reinforces a chosen corporate-personhood theory. The reality is that corporations, like natural persons, are no single thing.²⁶⁸ Just as a human being can be both a child and a parent, a corporation has elements of more than one personhood theory depending on the context.²⁶⁹ This phenomenon is reinforced by the fact that corporate personhood is itself a legal fiction. To properly define the corporation's personhood in order to determine its access to constitutional rights, we must properly acknowledge the parameters used by legislators and the corporate founders to define the corporation's purpose.

Those opposed to *Citizens United* that advocate to eliminate the constitutional rights of the corporation through complete disavowal of corporate personhood are unnecessarily overcorrecting, just as efforts by those in support of *Citizens United* to recognize corporations as equal to human beings are analytically overreaching.²⁷⁰ The corporation is a real, stand-alone entity, defined by the state corporate laws and with rights that come with that position.²⁷¹ Corporations have constitutional rights incidental to their right to own property, to

²⁶⁴ *Id.*

²⁶⁵ See *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

²⁶⁶ See Padfield, *The Silent Role of Corporate Theory*, *supra* note 92, at 849 n.80.

²⁶⁷ See, e.g., Abrams, *supra* note 201.

²⁶⁸ See, e.g., Weinstein, *supra* note 57 at 33 ("The firm exists in its own right, as a specific entity, beyond the changing personalities of shareholders, workers and managers"); see also, e.g., Gordon, *supra* note 34.

²⁶⁹ *Id.*

²⁷⁰ The literature critiquing and supporting *Citizens United* and corporate personhood generally is too vast to cite adequately. See, e.g., Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978 (2011); Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have but Do Not Want*, 34 HARV. J.L. & PUB. POL'Y 639 (2011).

²⁷¹ See *supra* notes 56–66 and accompanying text.

sue and be sued, enter into contracts, and otherwise function in society.²⁷² However, extending rights to corporations based on the rights of the citizens who make up the corporation in the aggregate is a mischaracterization of the corporate form.²⁷³ This approach allows the corporation and its natural persons to have it both ways, taking advantage of all of the perks of separateness while maintaining the rights they would receive if they simply chose to unite in a partnership. The corporation functions as a hybrid of the artificial entity theory and real entity theory.

Regardless of the legal fictions created, corporations do not share all aspects of natural persons and do not need the same level of protection. Corporations are embodied with rights based solely on their form. Perpetual life, limited liability, fully alienable shares, and a transient ephemeral nature all provide corporations with greater opportunities legally.²⁷⁴ The persons who make up a corporation and who may extend their rights to the corporation through *Citizens United* and *Hobby Lobby* have not been required to assume responsibility personally for the obligations of the corporation.²⁷⁵ Many of the foundational protections of the Constitution are provided to corporations and their directors and officers based on the nature of the corporate form.²⁷⁶ Thus, extending all rights to the corporation transforms it into a super citizen with more rights and advantages than the natural person.²⁷⁷

The corporation is a stand-alone, real entity, with rights tempered by its concessions to the state at the time of formation and the physical realities of its existence.²⁷⁸ Corporations can sue and be sued, they can enter into contracts, they can own property, and, per *Citizens United*, they can speak through their spending. The corporation can do these things without reliance on the rights of its natural people—the shareholders, officers, and directors. The corporation is also a *Dartmouth* firm—defined by its agreement with the state, and limited in the exercise of some rights by the state-mandated terms of its existence. The state could, in theory, abolish corporations, or refuse to allow corporations to do business within the state’s borders or obtain rights as foreign corporations in a jurisdiction.²⁷⁹ Thus, the corporation’s mere existence is at the pleasure of the states. Yet, after states grant corporations the pleasure, the state cannot deny the

²⁷² See *supra* notes 183–87 and accompanying text.

²⁷³ See discussion, *supra* Section III.B.

²⁷⁴ See, e.g., Schwartz, *supra* note 144.

²⁷⁵ See Michalski, *supra* note 257.

²⁷⁶ See discussion, *supra* Section II.A.

²⁷⁷ See, e.g., Sprague & Wells, *supra* note 108.

²⁷⁸ See also Weinstein, *supra* note 57 at 33 (“The firm exists in its own right, as a specific entity, beyond the changing personalities of shareholders, workers and managers.”).

²⁷⁹ For a discussion of the fundamental rights of states and the limits placed on Congress by the Constitution to infringe on those rights, see Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental “States’ Rights,”* 46 WM. & MARY L. REV. 213, 255 (2004) (States have fundamental rights to order their intimate affairs, including the right to contract).

corporation rights that are inherent and incidental to its legally authorized existence and activities. This duality allows the corporation to be both an artificial entity and a real entity simultaneously, depending on the rights asserted and the context.

A corporation, however, is not a citizen, can never be a citizen per the Fourteenth Amendment, and should never be granted rights incidental to citizenship.²⁸⁰ A corporation is not born and it lacks the physical body contemplated by the Amendment. It cannot vote, it cannot physically be imprisoned, and it cannot physically exercise religion through worship or reflection. A corporation may only be punished by infringements on its rights to exist, to contract, or to do business within a jurisdiction.²⁸¹ Corporate consequences are not impositions on a physical body. When a person is held liable for corporate actions, it is based on their individual role in the activity, not those taken by the corporation itself. For this reason, rights should be limited to what the state grants and what a corporation can do independent of its human agents.

Rights that are purely personal or purely corporeal should not be extended to the corporation through the aggregate theory. There is no need to recognize the constitutional rights of shareholders or officers through the corporation. Instead, the Court should recognize the financial and fiduciary rights embodied by corporate and contract law. In other words, a corporation has no human rights—no religion, no race, no gender, no sexuality, no disability, no body to wrongfully imprison, and no right to exist at all if the state revises the agreement or the corporation fails to comply with the terms of its agreement with the state. Because the corporation lacks the physical body, it does not need the same protections as the people who make up the corporation.

The corporation is a real entity, and, like a natural person, it is not born with all rights. The corporation differs from the natural person in that it may never become a full citizen of an appropriate age to avail itself of all Constitutional rights. The corporation is limited by what the state intended to create, and the realities of how the corporation operates. Instead of viewing the corporation as a person with rights incidental to the rights of individuals, the Court should return to the original artificial-entity view which maintains states' rights to form and exercise control of the corporation, while also acknowledging any rights that naturally flow from its existence as a real recognized legal entity. States may define through statutes which rights it intends only for human beings, and which are intended for all persons, both natural and artificial.²⁸²

²⁸⁰ See Chatman *supra* note 2, at 70.

²⁸¹ *Id.*; see also Pollman, *Constitutionalizing*, *supra* note 5, at 642, 647–48.

²⁸² Some states have already made efforts to amend their RFRA's to ensure that the holding in *Hobby Lobby* will apply. See, e.g., S.B. 975, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); S. Enrolled Act 50, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015); S. Enrolled Act 101, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015).

C. *Ruby, Inc.: A Hindu Hospitality Company*

When the founders of Ruby, Inc. transition from a partnership, they create a new legal person with rights and responsibilities divorced from the rights and responsibilities of the shareholders, directors, officers, and employees of Ruby, Inc. The people involved in Ruby, Inc. are either acting on behalf of the corporation, acting in the best interest of the corporation, providing the capital necessary for Ruby, Inc. to exist, or taking their share of any returns on their investment. The human beings involved with Ruby, Inc. do not define the corporation or own the corporation.²⁸³ They are instead a part of the system that allows this new entity to exist and survive.²⁸⁴ Thus, to determine the rights of Ruby, Inc., the corporate person, Ruby, Inc., must be legally defined in a way that is distinct from its people.

Corporate law does not allow Ruby, Inc. to be an aggregate entity that is a representative of the people who make up the corporation. Unlike Ruby Partners, which was owned and controlled by the partners, Ruby, Inc. is distinct and new, with shareholders owning equity in the corporation and directors and officers managing the day-to-day operations. The managers are required to operate in a way that protects the best interests of the corporation.²⁸⁵ The directors and officers are advancing the beliefs and missions of the corporation, but not the individual beliefs of the shareholders.²⁸⁶ This new state-created creature must operate within the parameters placed upon its existence by the state, but is otherwise a separate and fully recognized entity.²⁸⁷

Citizens United disregards this basic tenet of corporate law, and would allow the founders of Ruby, Inc. to have it both ways just because the rights that the Court believes flow through the corporation to its people are in question. Under the aggregate theory, the Court would look through Ruby, Inc. to the shareholders of Ruby to determine whether the dietary restrictions are a part of those people's rights of free exercise. Application of the aggregate theory seeks to ensure that the rights of human beings are protected in every scenario, even when those individuals are not a legally recognized part of the organization's reality. Because the founders, shareholders, directors, and officers of Ruby, Inc.

²⁸³ See *Belinfanti & Stout*, *supra* note 63, at 591 (Noting that because a corporation is an artificial person, it cannot be owned just like a human being cannot be owned. What shareholders own are shares in the corporation, not the corporation itself).

²⁸⁴ *Id.*

²⁸⁵ In fact, corporate statutes focus on the independence of directors and provide a means for protecting them from proper business decisions that contradict the intentions of shareholders. See DEL. CODE ANN. tit. 8, §§ 101–398, 141(a) (2017); see also *Belinfanti & Stout*, *supra*, note 63, at 622 (explaining that most of the deference to shareholders in Supreme Court decisions is mere dicta, and the Court instead defers to management judgment under the paradigm of the business judgment rule); see also, e.g., *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006); *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (directors must protect interests of corporations and serve as trustees of stockholders).

²⁸⁶ See *supra* Section III.A.

²⁸⁷ See *supra* Section IV.B.

are practicing and promoting Hinduism, the Court would protect this alleged exercise at Ruby, Inc. This outcome would be acceptable if Ruby were still a partnership, but given the difference between a partnership and a corporation, a different approach is necessary to properly define the rights of Ruby, Inc.

For a partnership, application of the artificial entity theory and the aggregate theory is reasonable. The partnership is, quite literally, an association of citizens, or, at the least, persons. So, it would be acceptable for a court to look through Ruby Partners to the people who make the Ruby partnership. For a corporation, designed to stand alone after formation, combining the artificial entity theory with the aggregate theory is far less reasonable. Instead, courts should acknowledge the power of the state through the artificial entity theory and the separate nature of the corporation through the real entity theory.

The opening hypothetical serves to illustrate the differences between the hybrid theory and the aggregate theory.²⁸⁸ Under the hybrid theory, step one requires the court to apply the artificial entity theory to first consider how the corporation was defined by statutes to determine what was granted or implied by the state at the time Ruby, Inc. was incorporated. Then, the court would apply the real entity theory and look to Ruby, Inc., as a stand-alone real entity, to determine whether state action infringes on a right that exists for the corporation itself. Under the hybrid theory the thoughts, emotions, and beliefs held by the Ruby, Inc. directors and officers would not influence a determination of the religious exercise of Ruby, Inc. Application of the hybrid theory makes bestowing corporations with rights that only human beings can physically enjoy more difficult because it requires the corporation to engage in activities representative of their rights.²⁸⁹ The hybrid theory gives the Court less wiggle room, which results in corporate constitutional law decisions with more weight and clarity.²⁹⁰

To analyze corporate rights under the hybrid theory requires two steps: first, determine what is granted by the state at the time of incorporation, then analyze what rights are incidental to the corporation's existence. The hypothet-

²⁸⁸ In partnerships, even partnerships with limited liability protections, at least one partner is actively involved in the management of the company. A Limited Liability Partnership (LLP) is a general partnership that has filed a statement of qualification. In all states except for South Carolina and Louisiana, it provides a liability shield to partners, protecting them from personal liability for partnership obligations. It is governed by the same statutes as partnerships and taxed the same as a partnership but requires a formal filing to make the partnership more than a general partnership. See UNIFORM PARTNERSHIP ACT § 306(c).

²⁸⁹ See discussion *supra* Part IV (Outlining the differences between human beings and artificial persons, and fully explaining step one analysis).

²⁹⁰ See Gordon, *supra* note 34; Padfield, *The Silent Role of Corporate Theory*, *supra* note 92 at 859. Professor Chemerinsky notes that it would be difficult to avoid applying the *Citizens United* holding to other contexts related to speech and non-citizens. CHEMERINSKY, *supra* note 2. There is similar room to apply the decision in other corporate law contexts. See also Chatman, *supra* note 2, at 72.

ical notes that at incorporation, Ruby, Inc. is formed for only legal purposes.²⁹¹ The incorporators did not choose to spell out the advancement and promotion of Hinduism or vegetarianism in the corporate charter. Thus, under the artificial entity theory, the Hindu religion is not a protection granted by the state at the time of incorporation. Further, the need to practice and promote a religion is not incidental to what is granted by the State of Delaware when Ruby, Inc. is incorporated. Under the artificial entity theory, the founders of Ruby, Inc. will not be able to use the exercise of religion to justify its vegetarian policies.

Depending on what is documented and promoted by Ruby, Inc. in its charter, bylaws, board resolutions, corporate policies, mission statements, manuals, official board minutes, and other items that make up and represent Ruby, Inc., the corporation may be able to avail itself of religious protection through the real entity theory. The hybrid theory also requires analysis of corporate actions on the premise that Ruby, Inc. is a stand-alone entity embodied with its own distinct and separate rights. Under the real entity theory, the court would look to Ruby, Inc. itself to determine whether it is promoting and advancing Hinduism and vegetarianism. Ruby, Inc. has well-known vegetarian restaurants, explains its policy in communications with its guests, and requires compliance on the premises. Assuming this belief is also represented in corporate meeting minutes and other representations of corporate intent produced by the agents of the corporation, Ruby, Inc. may be able to avail itself of religious protection. In step two, if the Court determines that the activity of the corporation itself is worthy of constitutional protection, it would then look to see if a state action has improperly infringed upon that right.

This hypothetical illustrates that at times the hybrid theory may result in the same outcome as the aggregate theory. If Ruby is found to have a right based on the first step of the hybrid analysis, it may avail itself of rights associated with the exercise of religion. Similarly, if instead rights were granted to Hobby Lobby based on how Hobby Lobby is formed and how it operates, as opposed to the religious beliefs of the people who make up Hobby Lobby, it would be an appropriate outcome under the hybrid theory. What is significant about the hybrid theory is not the outcome, it is that it properly apportions rights to the corporation itself while giving adequate deference to state power. Instead of looking through the corporation to the people who make up the corporation, the hybrid theory looks at what is granted by the state (artificial entity theory) or what actions are taken by the corporation (real entity theory). The

²⁹¹ Corporate statutes under both the MBCA and the DGCL allow for corporations to be formed for general purposes. *See* DEL. CODE ANN., tit. 8 § 102(a)(3) (2017); MODEL BUS. CORP. ACT § 3.02 (2016). Historically, corporations were required to be more specific when defining the corporate purpose. The general purposes designation is an affirmative choice by founders, used to avoid the risk of falling prey to the ultra vires doctrine. Thus, if a corporation desired to be bound and limited by the religious convictions or other parameters of the corporate founder's choosing, there is a body of law that supports and enforces those choices. *See* ERIC A. CHIAPPINELLI, CASES AND MATERIALS ON BUSINESS ENTITIES 385–87 (3d ed. 2014) (discussing the decline of the ultra vires doctrine and rise of general purpose statutes).

hybrid theory also starts at step one instead of step two and working backwards—instead of looking at whether the right is one the corporation deserves to have first, then working backwards to find a justification, the court would instead look at what the corporation is and what it does to determine rights. Utilizing the hybrid theory ensures a proper analysis of the rights of corporations as they relate to natural persons and the states.

The two-step analysis is fact intensive because corporations are man-made entities and personhood is a legal fiction. The facts and evidence necessary to confirm how the corporation is defined at the time of formation is defined by states. In step two, the trier of fact can determine how much weight should be given to representations of the corporations. Because corporations are fictional people, a court may question aspects of a corporation's life that would be constitutionally forbidden for natural persons. The hybrid theory requires courts to do the two-step analysis to determine corporate rights because to give purely human rights to non-humans should require adequate evidence of human behavior.

Application of the hybrid theory also highlights the power of the state to correct results that are outside of what it intended for its creation. In *Trustees of Dartmouth College v. Woodward*, Chief Justice John Marshall limited the state's ability to deviate from what it agreed to at the time the corporation was founded, acting against Dartmouth individually and invalidating the operation of its corporate charter.²⁹² The state could, however, redefine the corporation in its enabling statutes.²⁹³ In many ways, *Dartmouth* took a hybrid approach. The state was bound by what it agreed to in its contract with the corporation and its founders, but because the corporation was a creature of the state, it could redefine the very nature of the corporation.²⁹⁴ When the *Dartmouth* corporation engaged in allowable activities within the scope of what the state granted, those activities had legal protection derived from the corporation itself. What was true about the corporation in 1819 is true for the nature of the relationship between states and corporations today. States may define through statutes which rights it intends only for human beings, and which it intends for all persons, both natural and artificial.²⁹⁵ Courts must analyze the facts surrounding the corporation's existence through the two-step analysis to give proper deference to state and corporate founder intentions.

²⁹² See *supra* text accompanying notes 41–45 for full discussion of *Dartmouth*.

²⁹³ *Id.*

²⁹⁴ In *Dartmouth*, Chief Justice Marshall notes that altering the statute defining corporations is an option for the state of New Hampshire. Since all states require corporations to regularly update the state and file reports to remain in existence, it is possible for states to impose some requirements retroactively. See, e.g., DEL. CODE ANN. tit. 8, §§ 502, 510–511 (2017).

²⁹⁵ Some states have already made efforts to amend their RFRA's to ensure that the holding in *Hobby Lobby* will apply. See, e.g., *supra* note 282.

CONCLUSION

A simple analysis of how corporations are formed and how they operate explains the flaws in the Court's corporate-rights analysis over the years. These erroneous decisions happen because the Court has, in part, disregarded business principles and corporate law when issuing corporate-constitutional decisions. Instead of focusing on state power and corporate structure, the Court focuses on constitutional theory, taking a right-by-right, and in some circumstances, a case-by-case approach, that is divorced from the facts surrounding the individual corporation's existence because it focuses on the human rights of the people who make up the corporation.²⁹⁶ A desire to adequately protect interests and actions of human beings that should be protected in all circumstances combined with flawed assumptions and misunderstandings about the corporate form have resulted in decisions that start at step two of the analysis when determining corporate rights.²⁹⁷ By first deciding that the corporation has the right (or is not intended to have the right), then deciding what beliefs about the corporate form must be present to validate the decision, the Court has left a trail of opinions that vacillate among theories of corporate personhoods without ever developing a clear, constitutional definition of corporate personhood.²⁹⁸ The attention given to *Citizens United* has exposed a long-standing problem, and has provided an opportunity to look at the true nature of the corporation and its relationship to shareholders, management, states, and third parties.²⁹⁹

Corporate personhood is itself a legal fiction, and the corporate personhood theories are useful for articulating the relationship of the corporation to society, but no single theory adequately addresses every scenario.³⁰⁰ The concession or artificial entity theory only defines the corporation's legal recognition and existence. It distinguishes it from other entities that are also creatures of state law. Concession theory is used to define what the corporation is because to do so acknowledges the initial terms of the agreement. But we must do more than just analyze the facts of corporate formation in order to appreciate fully how corporations operate in the world. A modern view recognizes the corporation's many facets.³⁰¹ Corporate-personhood analysis cannot end at formation.

Courts must acknowledge that corporations, like natural persons, are not one thing—the corporation is an artificial entity that exists at the pleasure of the state and stands alone with independent rights once it is formed. After the corporation is formed through concessions of the state, the corporation has rights, inherent and earned, and those rights cannot be infringed upon by the state, and

²⁹⁶ Garrett, *supra* note 5, at 100.

²⁹⁷ Transcript of Oral Argument, *supra* note 84, at 33; *see also* discussion in Section III.A.

²⁹⁸ *See* discussion *supra* Section III.B.

²⁹⁹ *See* discussion *supra* Part II (discussing the true nature of shareholder rights and the role of corporate management).

³⁰⁰ *See* discussion *supra* Section III.B; *see also* Belinfanti & Stout, *supra* note 63, at 579.

³⁰¹ *See* BUTLER & RIBSTEIN, *supra* note 72, at 42 (discussing the limits of the concession/artificial entity theory).

Spring 2018]

CORPORATE PERSONHOOD

861

are wholly separate from the interests of its founders. Notably, these corporate rights are not “human rights”—there is no right to religion, right to liberty, or any other right by default. Under the hybrid theory, a corporation may have access to certain “human rights” in two ways: (1) by including an intent to engage in activity requiring protection in a corporate charter, or (2) by a state indicating in statutes that it intends for the artificial-corporate person to have such protections.

Corporations are persons, standing alone and independent, without the rights of the people who comprise them because the corporation was formed to be separate and managed by external forces.³⁰² The people forming the corporation willfully exchanged control for the benefit of divorcing themselves from liability, gaining perpetual life, and the opportunity for easier external investments.³⁰³ This choice, represented by the contract the people entered into with the state when they made the affirmative choice of the corporate form, is governed by the corporate charter and limited by the benefits gained.³⁰⁴ The aggregate theory wrongly allows individuals to divorce themselves from business for protections, and then allows them to superimpose their rights on the corporation, reuniting with the business when desired. For this reason, the rights of the corporation should be defined by the state, and be based on considerations essential or incidental to the corporate form—not based on the rights of the corporation’s people.³⁰⁵ To expand rights beyond those clearly essential and incidental to the corporate form requires engaging in the two-step analysis.

³⁰² See *supra* Section II.A.

³⁰³ See *supra* Section II.A.

³⁰⁴ See *supra* Section III.B.

³⁰⁵ See *supra* Part II.

[PAGE INTENTIONALLY LEFT BLANK]