

# When Harry Met Sallie Mae: Marriage, Corporate Personhood, and Hyperbole in an Evolving Landscape

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## Introduction

ON MAY 9, 2012, Robin Hansen stood at the altar.<sup>1</sup> The groom, Bank of America, was nowhere to be found, presumably not from cold feet but rather suffering from certain ineluctable corporeal difficulties.<sup>2</sup> Somehow, on July 26, 2012, Angela Marie Vogel's spouse, the ambiguously named "Corporate Person," suffered from no such physical limitations.<sup>3</sup> The betrothed were married, even in spite of Corporate Person's obvious existential precariousness.<sup>4</sup> Their marriage was short-lived, however, as King County (Seattle, Washington) reversed course and invalidated their marriage certificate.<sup>5</sup> This was much to the dismay of the supporters of "Initiative 103," who, in 2012, attempted to eliminate corporate constitutional rights and corporate

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1. Stacie Chan, *Photos: Woman Tries to Marry Corporation*, PATCH (May 9, 2012, 9:38 PM), <http://redwoodcity-woodside.patch.com/groups/politics-and-elections/p/photos-woman-tries-to-marry-corporation>.

2. *Id.*

3. Jake Ellison, Evan Hoover & Mallory Kaniss, *Why King County Nixed Woman's Marriage to a Corporation in Seattle*, KPLU (July 18, 2012, 1:06 PM), <http://kplu.org/post/why-king-county-nixed-woman-s-marriage-corporation-seattle>. In her ceremony, Ms. Vogel used a statue as a stand in for the "corporate person" she was marrying. *Id.*

4. *Id.*

5. Cameron Satterfield, a spokesperson for King County, stated that [W]hen either party to a marriage is incapable of consent then its void, no longer valid, or not valid period. So that's the basis in which we went ahead and voided the application. We went ahead and did that ourselves within our office because by the time it would've gone to the state, they would've voided it anyways. So we just avoided that altogether and voided it here.

*Id.*

personhood in the city of Seattle.<sup>6</sup> Babylonia Aivaz, another Seattle native, followed in Robin and Angela Marie's footsteps in her attempted betrothal to a 107-year-old warehouse.<sup>7</sup> Not to be outdone, she publicly declared, "Yes, I'm in love with a 107 year old building! Yes, IT'S A GAY MARRIAGE!"<sup>8</sup> The warehouse was not available for comment.

In attempting to exploit the ever-expanding definition of corporate personhood, these three quixotic women from the Pacific Northwest offer an interesting jurisprudential dilemma. In recent years, the U.S. Supreme Court has provided the necessary legal foundation to legitimize their attempts. In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that corporations were "persons" entitled to the free exercise of religion under the Religious Freedom Restoration Act (RFRA).<sup>9</sup> In *Citizens United v. Federal Election Commission*, the Supreme Court held that, at least for purposes of the First Amendment, corporations are treated as "persons" entitled to political speech.<sup>10</sup> Concomitantly, the nation's views on same-sex marriage have evolved along with the expansion of corporate personhood under law. These views have, in effect, transformed many marriage statutes from defining marriage as between a "man and a woman" to between a "person and a person"<sup>11</sup> or some semantic equivalent. The central question presented in this paper is: If a corporation is a person, and a person can now marry another person regardless of gender, can a corporate person marry a natural person?

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6. *Seattle Initiative 103: Limiting Corporate Rights and Elevating Peoples' Rights*, NETWORK-CENTRIC ADVOCACY (May 14, 2012, 9:16 PM), <http://www.network-centricadvocacy.net/2012/05/seattle-initiative-103-limiting-corporate-rights-and-elevating-peoples-rights.html>.

7. *Woman Set to Marry Building Undeterred by Demolition Work*, KOMONEWS.COM (Jan. 26, 2012, 3:48 PM), <http://www.komonews.com/news/local/138158504.html>.

8. *Id.*

9. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

10. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010) (rejecting 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).

11. See CONN. GEN. STAT. ANN. § 46b-28b (West 2009) ("A marriage between two persons entered into in this state and recognized as valid in this state may be recognized as a marriage . . ."); ME. REV. STAT. tit. 19-A, § 650-A (2012) ("Marriage is the legally recognized union of 2 people."); N.H. REV. STAT. ANN. § 457:1-a (2010) ("Marriage is the legally recognized union of 2 people."); R.I. GEN. LAWS ANN. § 15-1-7 (West 2014) ("Marriage is the legally recognized union of two (2) people."); VT. STAT. ANN. tit. 15, § 8 (West 2014) ("Marriage is the legally recognized union of two people."); WASH. REV. CODE ANN. § 26.04.010 (West 2014) ("Marriage is a civil contract between two persons who have each attained the age of eighteen years, and who are otherwise capable.").

In this parable we assume that Harry, a young, idealistic, and most importantly, *natural* person, seeks to wed Sallie Mae, the attractive corporate entity.<sup>12</sup> The question of whether a corporation can marry a person spawns several difficult legal questions, such as: How does the corporation consent? Can it? If so, is this an action appropriate for officers or the board, or does it require a shareholder vote?

This Article attempts to shed light on the Supreme Court's surprisingly lengthy history in establishing corporate personhood under the Constitution. The fatuous, but not totally preposterous hypothetical offers an important examination of a disturbing trend.<sup>13</sup> In *Hobby Lobby* and *Citizens United* the Supreme Court has insisted on affording constitutional protections traditionally reserved for human citizens to corporate entities. This trend is troubling to say the least. The analysis will begin with legal theory engineered at our nation's founding and continuing through to the turn of the twentieth century. Three competing views of corporate personhood will be discussed. Next, the Article will discuss the various provisions or legal doctrines under which the Supreme Court has found corporate rights to exist or, in some cases, not exist.

Additionally, the Article will discuss the sorts of marriage statutes that might permit Harry and Sallie Mae to wed. Only those states that have amended their respective marriage statutes to exclude references to gender will be considered. The fundamental right to marry—if such a right even exists—will also be discussed, as will the doctrines of due process and equal protection, specifically for their ability to provide support for the requisite legal footing.

As the premise of the Article is to examine the admittedly fanciful idea that a corporation could successfully marry a human being, basic corporate law and the corporate decision-making structure will also be

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12. Sallie Mae, or SLM Corporation, is a publicly-traded U.S. corporation whose operations are originating, servicing, and collecting on student loans. The use of the identical name is merely an allusion to the movie referenced in the title, and is not intended to indicate an association with or sponsorship by SLM, nor is it intended to disparage their fine assortment of federally-guaranteed student loans.

13. For example, Jonathan Frieman of San Rafael, California, attempted to flaunt a "carpool lane" regulation—"[c]arpool is two or more persons per vehicle"—by carrying the corporate charter to his charity foundation in the front seat. The Marin County Superior Court judge was not swayed. Gregory Andersen, *Driver Fights Carpool Lane Ticket, Claims Corporation was Passenger*, MARINSCOPE COMMUNITY NEWSPAPERS (Jan. 9, 2013, 11:35 AM), [http://www.marinscope.com/news\\_pointer/news/article\\_a9168c46-5a93-11e2-abaf-0019b2963f4.html](http://www.marinscope.com/news_pointer/news/article_a9168c46-5a93-11e2-abaf-0019b2963f4.html); Justin Berton, *Corporation Not Person in Carpool Lanes*, SFGATE (Jan. 8, 2013, 10:38 AM), <http://www.sfgate.com/bayarea/article/Corporation-not-person-in-carpool-lanes-4173366.php>.

introduced. Specific attention will be paid to what types of scenarios require corporate consent, who may consent on behalf of the corporation, and which scenarios are so fundamentally vital so as to necessitate a shareholder vote. A portion of the analysis will determine exactly what *sort* of corporate transaction a marriage would be and what sorts of consequences on corporate form and shareholder power it would have.

Eventually this Article will argue that, although an entertaining exercise in legal hyperbole, the lack of corporate constitutional footing, so to speak, as well as incongruities under the corporate merger doctrine and state registry, will continue to preclude similarly ambitious women (or men) from the Pacific Northwest from marrying the incorporated entity of their dreams.

## I. The Corporate Person

According to the U.S. Census Bureau, as of 2007 there were approximately thirty million businesses in the United States.<sup>14</sup> In 1800, only 335 business corporations were chartered, most of which were organized in just the last few years of the eighteenth century.<sup>15</sup> The small number of charters was partially due to our nascence as a country, and partially because of the prevailing corporate distrust at the time the nation was founded.<sup>16</sup> Indeed, under the influence of European political philosophy, U.S. citizens saw corporations as “a way for privileged elites to profit at the expense of the general public.”<sup>17</sup>

As such, in the minds of our forefathers, who were charged with constructing a legal system, the very first corporations engendered national skepticism.<sup>18</sup> The word “corporations” cannot be found within the text of the Constitution, whereas the words “nations,”<sup>19</sup> “states,”<sup>20</sup> and “tribes”<sup>21</sup> all can be. Nevertheless, as the United States expanded, corporate growth was inevitable. Accordingly, new legal doctrines

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14. *Statistics about Business Size (including Small Business) from the U.S. Census Bureau*, U.S. CENSUS BUREAU, <http://www.census.gov/econ/smallbus.html> (last visited Oct. 20, 2014).

15. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 426 n.53 (2010).

16. Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 525–26 (2010).

17. *Id.* at 525 (citing TED NACE, *GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY* 39 (2003)).

18. *See id.* at 530–32.

19. U.S. CONST. art. I, § 8.

20. U.S. CONST. art. I, §§ 2, 3, 8, 9; U.S. CONST. art. II, § 2; U.S. CONST. art. III, § 2.

21. U.S. CONST. art. I, § 8.

emerged to account for the multitude of burgeoning corporate entities. Over time, three such major legal theories arose, all of which deal with the inevitably difficult legal questions that inhere the rights and responsibilities associated with starting an artificial entity.

### A. The Corporation as an Artificial Person

Harry's quest to marry a corporation raises many questions. Would he be marrying that single corporate entity, or would he marry all of its shareholders as well? Has the Supreme Court always treated corporate personality as it did in *Citizens United* and *Hobby Lobby*? Is a corporation a singular, living breathing entity, on par with those humans who control it, or is it a collection of those associated breathing individuals, acting as one? What if corporations are just completely artificial constructs of the State?

This Article begins with the last idea, that a corporation is an imagined being, subject to the regulatory whim of the State. This was the prevailing view of the early colonial and newly liberated United States.<sup>22</sup> The original corporate charters were drafted under the directives of their respective states, which oversaw corporate expansion with a paternalistic eye.<sup>23</sup> Corporations were artificial beings and, essentially, the property of the state in which they were chartered.<sup>24</sup> Indeed, this is the precept from which the *ultra vires* doctrine sprang.<sup>25</sup> The corporation was treated solely as a legal construct to facilitate commerce—its personhood was incidental, such that a corporation could have the right to hold property, enter into contracts, and sue and be sued.<sup>26</sup> The corporation was controlled and made by the people. This policy was reflective of the era, when the fog of the nation's corporate distrust was still dissipating.<sup>27</sup>

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22. Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility*, 35 SEATTLE U. L. REV. 1135, 1147 (2012).

23. Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 108 (2009).

24. *Id.*

25. The *ultra vires* doctrine states that a corporation cannot engage in any activity not specified in its state conferred charter. The doctrine is the bulwark of the notion that the corporation is a creature of the state—that it is an artificial entity that owes its existence to the state and an acknowledgement that whatever powers it possesses have been conferred upon it by the state. See Rubin, *supra* note 16, at 539 n.97 (citing MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 71, 186 (1992)).

26. *Id.*

27. See Rubin, *supra* note 16, at 534–35.

In 1811, New York passed the first general law of incorporation.<sup>28</sup> Thereafter, corporate law was fraught with hyper-regulation: States restricted operational activities, demarcated corporate life spans, and precluded corporations from owning stocks in other corporations.<sup>29</sup> Indeed, “[s]tate attorneys general could actually revoke the charter of corporations thereby forcing such corporations to dissolve.”<sup>30</sup> Early in the nineteenth century corporate law was devised to regulate in the public, rather than private, interest.<sup>31</sup> Corporations could be formed to advance private interests but, unlike natural persons, they possessed only those traits conferred by law, whether they served public or private interests.<sup>32</sup>

The State corporate marionette act was accurately depicted in the Supreme Court decision, *Trustees of Dartmouth College v. Woodward*.<sup>33</sup> There, the Court espoused, “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.”<sup>34</sup> The Court was quick to highlight the legally constructed and “unnatural” character of a corporation, further affirming the prevailing American sentiment at the time.<sup>35</sup> The Court did not go so far as to assert that corporations do not have constitutional rights, however—the Court held that the corporation was entitled to protection under the Contracts Clause.<sup>36</sup>

However, as the United States, its people, and its commerce expanded through the nineteenth century, so did the desire for deregulation.<sup>37</sup> For example, the New Jersey legislature decided to abolish the maximum limits on capitalism<sup>38</sup> and, for the first time, allowed corporations to purchase stock in other corporations.<sup>39</sup> Deregulation

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28. NACE, *supra* note 17, at 72.

29. Rubin, *supra* note 16, at 537.

30. *Id.* at 532 (internal quotation omitted).

31. Ripken, *supra* note 23, at 108–09.

32. Johnson, *supra* note 22, at 1144–45.

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

34. *Id.* at 636.

35. *Id.*

36. *Id.* at 706; U.S. CONST. art. I, §10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”).

37. See Rubin, *supra* note 16, at 538. New Jersey’s decision to loosen the restrictions on corporate regulation ushered in a domino effect across the mid-Atlantic states. *Id.*

38. *Id.* at 537–38 (“Charters sometimes even limited the profit corporations could make, requiring them to buy back stock with excess profits ‘so that eventually all stockholders would be eliminated and the company would in effect become a public entity under the supervision of the state legislature.’”) (quoting NACE, *supra* note 17, at 51).

39. See Rubin, *supra* note 16, at 538.

ran rampant; states, not wishing to lose business to New Jersey, quickly followed suit.<sup>40</sup> The idea that “the corporation actually owed its existence to the individuals who formed the corporation to conduct their business,” eventually replaced the view of the corporation as an artificial entity belonging to the State, thereby marking the beginnings of the aggregate theory of corporate personhood.<sup>41</sup>

### B. The Corporation as an Aggregate Person

Unlike the artificial entity theory, the aggregate theory supported a hands-off, anti-regulatory approach to corporate law.<sup>42</sup> By the later half of the nineteenth century the anti-monopolistic sentiments evoked during the Revolutionary Era were long gone.<sup>43</sup> Naturally, this coincided with the “spectacular rise of the business corporation” during that same period.<sup>44</sup> The corporation was no longer seen as a distinctly state-owned entity, but rather “more [of] a collection, or aggregate, of individuals who contracted with each other to utilize the corporation for their mutual benefit.”<sup>45</sup> Accordingly, “‘the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being.’”<sup>46</sup>

In the last half of the nineteenth century, the predominant view of the corporate existential dilemma focused less on that of the entity and its filial duty to its “creator,” the State, and more on individual will.<sup>47</sup> As a result, corporate law evolved such that that the “corporate person” had no existence or identity separate and apart from the natural persons in the corporation.<sup>48</sup> Indeed, it also served to boldly assert “the primacy of the individual over the group as the key analytical focus in corporate theory and activity.”<sup>49</sup>

Eventually, the rest of the legal system recognized this as well. In *Marshall v. Baltimore and Ohio Railroad Company*, the Supreme Court

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40. *Id.*

41. Ripken, *supra* note 23, at 109.

42. See William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1484 (1989).

43. See Rubin, *supra* note 16, at 531.

44. *Id.* at 539.

45. Ripken, *supra* note 23, at 110.

46. *Id.* (quoting 1 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS 3 (2d ed. Boston, Little, Brown & Co., 1886)).

47. *Id.* at 109–10.

48. *Id.* at 110 (“In fact, no corporate acts would ever occur without the human persons who made up the corporate entity.”).

49. Johnson, *supra* note 22, at 1159.

recognized corporations as citizens in order to establish jurisdiction.<sup>50</sup> In the same year, the Court went on to dismiss a writ of error brought by “anything but a human being, or an aggregation of human beings, called a corporation or association.”<sup>51</sup> The adoption of the aggregate theory continued in the Supreme Court’s decision in *Santa Clara County v. Southern Pacific Railroad*, in which the Court held that, at least for purposes of the Fourteenth Amendment, a corporation was a person.<sup>52</sup> There, the Court held that a corporation’s property could not be taxed differently from that of an independent, natural individual.<sup>53</sup> In the *Railroad Tax Cases*, Fourteenth Amendment rights were articulated to belong to the “aggregations of individuals united for some legitimate business.”<sup>54</sup> Indeed, the court averred, “[T]he courts will always look beyond the name of the artificial being to the individuals whom it represents.”<sup>55</sup>

This type of corporate theory found repose in an environment where closely-held corporations, entities owned by just a few shareholders, abounded. Those few individuals who controlled all the corporate shares would act collectively as if the corporation *really was* an aggregate of their collective selves. However, the onset of the twentieth century saw marked corporate growth, in both the number and size of corporations.<sup>56</sup> Accordingly, the number of shareholders grew, ownership rights were dispersed amongst them, and the quantity of individual holdings decreased.<sup>57</sup> As a result, a rapidly growing disconnect emerged between the ontological identities of the corporation and its shareholders, both in economic and practical terms.<sup>58</sup> Consequently, the real entity theory of corporations emerged.

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50. *Marshall v. Balt. & O. R.R. Co.*, 57 U.S. 314, 328 (1853). Justice Campbell, however, was disturbed by the majority’s decision, wondering “when the mischief would end.” *Id.* at 353 (Campbell, J., dissenting).

51. *Steamboat Burns*, 76 U.S. 237, 238 (1869).

52. *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (“The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.”).

53. *Id.*

54. *Cnty. of San Mateo v. S. Pac. R. Co.*, 13 F. 722, 743 (C.C.D. Cal. 1882).

55. *Id.* at 744.

56. Donald J. Smythe, *The Rise of the Corporation, the Birth of Public Relations, and the Foundations of Modern Political Economy*, 50 WASHBURN L.J. 635, 636–37 (2011).

57. See generally ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 119–25 (1932) (explaining that as corporations grew the models of ownership changed dramatically).

58. For instance, in a company with widely-held stock, it would be unfair to hold shareholders with fractional interest individually liable for the corporation’s debts or



### C. The Corporation as a Real and Independent Person: The Twentieth Century

The turn of the twentieth century saw a continued corporate boom; the increase of widely held corporations—both in number of shareholders per corporation and numbers of corporations themselves—portended a doctrinal transformation.<sup>59</sup> Corporations “were understood as conceptually and legally distinct from investors, managers, and other participants.”<sup>60</sup> Accordingly, the “regulation of business became the paramount domestic issue in American politics.”<sup>61</sup>

Since corporations were no longer emblems of those few investors who created them, the idea developed that the corporation was itself an entity; soon thereafter, the real entity theory became the normative legal milieu. The real entity theory diverged from doctrines of corporate personhood discussed in the two previous sections. The real entity theory does not suggest that the corporation is a manufactured state construct, as the artificial entity theory does; nor does it view a corporation as the sum of its individual parts, as in the aggregate theory.<sup>62</sup> Rather, the corporation is viewed as a “full-fledged, living reality that exists as an objective fact and has a real personality in society.”<sup>63</sup> Indeed, the corporate entity is “entitled to the same rights as persons.”<sup>64</sup> The corporation is said to have “a ‘collective consciousness’ or ‘collective will’ that results from discussion and compromise among the individual members, and may not reflect the particular preferences of anyone person.”<sup>65</sup>

Long gone were the days of the colonial-era paternalistic State—substituted was a lasting era of free incorporation.<sup>66</sup> Just as the “state

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stocks. The development of the corporation as having its own personality was a necessary anthropomorphism to assume accountability for such legal responsibilities. Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 924 (2011).

59. See Rubin, *supra* note 16, at 539–40; *Lochner v. New York*, 198 U.S. 45, 53 (1905) (allowing corporations to receive the benefits of the deregulation that took place during that period of the Court’s jurisprudence).

60. Johnson, *supra* note 22, at 1154.

61. Alfred D. Chandler, Jr., *Government Versus Business: An American Phenomenon*, in *THE ESSENTIAL ALFRED CHANDLER: ESSAYS TOWARD A HISTORICAL THEORY OF BIG BUSINESS* 428 (Thomas K. McGraw ed., 1988).

62. Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 297 (1990).

63. See Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 584 (1999).

64. Rubin, *supra* note 16, at 539.

65. Ripken, *supra* note 23, at 114.

66. See Rubin, *supra* note 16, at 537.

may record the birth of every baby, or the sale of every land parcel," under the real entity doctrine, the State recorded the formation of every corporation.<sup>67</sup> Corporations were no longer defined by the aggregate behavior of their constituents, but rather were judged by courts to be responsible for the consequences of their own actions.<sup>68</sup>

With this recognition came both responsibilities and entitlements. Corporations, as individualized entities, had to personally answer for their debts and torts.<sup>69</sup> Corporations, in a sense, could be "personally" culpable for criminal activity.<sup>70</sup> Corporations were said to "act" for themselves.<sup>71</sup> This is reflected semantically: "We say, for example, that Nike denied that it *knew* about the wrongdoing, Exxon *believes* it *treats* its employees fairly, AOL *signed* a merger agreement with Time-Warner, and the Disney Channel *loves* young audiences."<sup>72</sup>

Under federal precedent, corporations saw their legal rights and responsibilities increase as well.<sup>73</sup> Of course, no one could predict just *how far* the law would go in treating corporations as "people":

In treating an incorporated group of persons as a separate person, the law is taking the rules about ordinary persons and extending by analogy to apply to groups of persons who have complied with certain legal formalities . . . . How far they can be held criminally and civilly liable and how far they are capable of enjoying certain rights and privileges will depend on how far the analogy is taken; and this in turn should depend on how far we think it desirable in the public interest of them to have such rights and liabilities. And while there is no logical compulsion to make the analogy complete, there is no particular point at which by any rule of logic the analogy must cease to hold.<sup>74</sup>

67. Ripken, *supra* note 23, at 112–13.

68. The corporation, as an individual, could reap profits. Conversely, as an individual, the corporation could also have criminal intent, and be held culpable. *Id.* at 114–15.

69. See Miller, *supra* note 58, at 923.

70. See Ripken, *supra* note 23, at 115 (explaining that this era ushered in an ideological shift).

71. *Id.*; see United States v. Dotterweich, 320 U.S. 277, 284 (1943) ("[A] corporation may commit an offense . . .").

72. See Ripken, *supra* note 23, at 115; see also Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 595 (1987) (explaining the linguistic basis for treating the corporation as a person by showing that it is part of ordinary language to speak about institutions as though they are persons, and that this way of speaking is independent of the law).

73. In the nineteenth century, corporations themselves were not always held responsible for their actions; the agents of the corporations, and not the corporations themselves were held liable. See Rubin, *supra* note 16, at 540–41. As corporate law began to proliferate, the jurisprudence changed: corporations could be held accountable for their torts, but they could also benefit from constitutional protections as well. See *infra* Part II.

74. Mark M. Hager, *Bodies Politic: The Progressive History of Organizational 'Real Entity' Theory*, 50 U. PITT. L. REV. 575, 599 (1989) (internal quotation omitted).

The law has not gone so far so as to expressly allow corporations to marry. However, in examining whether it *would* be possible, an explanation of the existing constitutional corporate landscape is necessary.

## II. Corporate Constitutional Rights

### A. A Survey of Corporate Rights

What rights do corporations possess under the Constitution? If they have to answer for their debts and torts, what protections do they receive? If they have fundamental First Amendment protections just as people do, what about marriage rights? What of other rights?

In two recent cases, the Supreme Court has affirmed the breadth of the corporate personhood doctrine. First, the Court, in *Citizens United v. Federal Election Commission*—a five to four decision—held that limits on a corporation’s right to engage in electioneering communications violated the First Amendment.<sup>75</sup> In doing so, the Court overruled its decision in *Austin v. Michigan Chamber of Commerce*, which held that political speech may be regulated based on the speaker’s corporate identity.<sup>76</sup> The decision has been described as “a near-complete vindication of the belief that the Constitution protects a corporation’s political speech just as much as it protects the political speech of individuals.”<sup>77</sup>

Central to the majority’s decision in *Citizens United* was the explicit issue of whether a corporation, by virtue of being an artificial

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75. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 356 (2010).

76. See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1989), *overruled by Citizens United*, 558 U.S. 310. The history predating *Austin* is lengthy. In *Buckley v. Valeo*, the Court addressed amendments to the Federal Election Campaign Act of 1971, whose 1974 amendments included an independent expenditure ban that applied to corporations and labor unions, as well as individuals. 424 U.S. 1, 6–7 (1976). Following *Buckley*, the Supreme Court decided *First National Bank of Boston v. Bellotti*. 435 U.S. 765 (1978). There, the Supreme Court faced the critical issue of whether corporations have the same rights as natural persons for purposes of the First Amendment. *Id.* at 776–77. First National Bank sought to spend money to influence a ballot initiative, however, a Massachusetts law prohibited corporations from making expenditures that would affect elections. *Id.* at 767–70. The Court noted, “[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech.” *Id.* at 777. In holding that corporate First Amendment speech was protected, the majority referenced the Courts previous recognition that the major purpose of the Amendment was to protect the free discussion of governmental affairs. *Id.* at 776–77 (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). This stood until *Austin*, where, for the first time, the Court upheld “a direct restriction on the independent expenditure of funds.” *Austin*, 494 U.S. at 695 (Kennedy, J., dissenting).

77. Miller, *supra* note 58, at 893.

entity rather than an organic one, was a sufficient basis to impede the speech rights guaranteed by the First Amendment.<sup>78</sup> Relying on *First National Bank of Boston v. Bellotti*,<sup>79</sup> the Court 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.’”<sup>80</sup> In explaining why this is so, Justice Scalia offered an insightful comment: “The [First] Amendment is written in terms of ‘speech,’ not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals . . . .”<sup>81</sup> Justice Scalia’s First Amendment analysis is an example of the Court’s tendency to concentrate on the scope of the *constitutional right*, rather than who invokes that right.<sup>82</sup> Moreover, with respect to the issue of corporate marriage, it is important to note that the majority described a corporation as an “association of individuals,”<sup>83</sup> suggesting that a corporation is best understood as a collection of natural persons. From this we may draw two inferences about *Citizens United*: (1) The Court invoked the aggregate theory of corporate personhood; and (2) an aggregation of citizens maintains full speech protection under the First Amendment.

The Court reexamined corporate rights of freedom of expression in *Burwell v. Hobby Lobby Stores, Inc.*<sup>84</sup> *Hobby Lobby* is a freedom of religious expression case in which the Court weighed whether corporations were exempt from a statutory mandate which forced the corporations to provide various types of health insurance coverage, including certain forms of contraceptives.<sup>85</sup> The Court held that a corporation *does not* have to provide such health care coverage if the corporation holds sincere religious objections to the contraceptive mandate.<sup>86</sup> The Court’s opinion is essentially divided into three parts.

First, the Court relied on the Dictionary Act, which the Court “must consult ‘[i]n determining the meaning of any Act of Congress,

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78. *Citizens United*, 558 U.S. at 343.

79. *Bellotti*, 435 U.S. 765.

80. *Citizens United*, 558 U.S. at 343.

81. *Id.* at 392.

82. *E.g.*, Miller, *supra* note 58, at 927.

83. *Citizens United*, 558 U.S. at 392.

84. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

85. *See id.* at 2759.

86. *Id.* at 2775.

unless the context indicates otherwise.’”<sup>87</sup> Under the Dictionary Act, “the word[ ] ‘person’ . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”<sup>88</sup> So, when reviewing any act of Congress, a court’s assessment of to whom the act applies will always possess the potential for a corporate personhood debate.

Second, the Court engaged in a discussion of the “very broad protection for religious liberty” at stake.<sup>89</sup> The Court held that by “enacting RFRA, Congress went far beyond what this Court has held is constitutionally required.”<sup>90</sup> Specifically, “Congress mandated that this concept ‘be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.’”<sup>91</sup> The breadth of the discussion surrounding the right to free religious exercise reinforces the Court’s “modern tendency . . . to concentrate on the scope of the *constitutional right*, rather than corporate personality.”<sup>92</sup>

Third, and perhaps the most telling portion of the opinion, the Court’s reintroduced the aggregate theory. The Court asserted, “[I]t is important to keep in mind that the purpose of [treating corporations as persons] is to provide protection for human beings.”<sup>93</sup> The Court continued:

A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.<sup>94</sup>

It is important to note the narrowness of *Hobby Lobby’s* holding. As discussed earlier,<sup>95</sup> with corporate ownership dispersed across multiple shareholders, the aggregate theory starts to unravel; one corporate person cannot be hundreds of underlying people. The Court acknowledged this by limiting its holding to closely held corporations. The Court observed that “the idea that unrelated shareholders—in-

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87. *Id.* at 2769 (quoting 1 U.S.C. § 1 (2012)).

88. 1 U.S.C. § 1 (2012).

89. *Hobby Lobby*, 134 S. Ct. at 2760.

90. *Id.* at 2767.

91. *Id.* at 2762 (quoting 42 U.S.C. § 2000cc-3(g) (2000)).

92. Miller, *supra* note 58, at 927.

93. *Hobby Lobby*, 134 S. Ct. at 2751.

94. *Id.* at 2766.

95. *See* Miller, *supra* note 58, at 931.

cluding institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.”<sup>96</sup> Thus, the Court’s holding that furthering corporate religious freedom furthers “individual religious freedom,” is applicable to corporations with a small audience of shareholders.<sup>97</sup>

The duet of *Citizens United* and *Hobby Lobby* ensure that going forward the Supreme Court will decide cases involving the rights of corporations by focusing on the depth of the constitutional right asserted, rather than looking to the rights of a corporation’s shareholders. The Court’s invocation of the Dictionary Act ensures that discussions of corporate personhood will always lurk in the shadows of any congressional debate. In rapid succession, the Court approved corporate political speech<sup>98</sup> and corporate religious expression,<sup>99</sup> affirming that the First Amendment sphere applies to corporations. But just how far do the First Amendment rights of corporations extend? And rights under different amendments?

### 1. Corporate First Amendment Rights

While corporations can *influence* the electoral process, they themselves cannot vote.<sup>100</sup> Promoters of corporate rights argue that because corporations are “people” under the Fourteenth Amendment, corporations are entitled to the “same liberties of expression that individuals enjoy, including protection for their religious expression.”<sup>101</sup> Because the Fourteenth Amendment ensures the right to be free from unlawful deprivations of liberty by the State, and because free speech is an enumerated liberty under the First Amendment, Julie Marie Baworowsky proposed that corporate religious speech was and continues to be protected by the Constitution.<sup>102</sup> *Hobby Lobby* affirmed her prognostication.

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96. *Hobby Lobby*, 134 S. Ct. at 2774.

97. *Id.* at 2794.

98. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 356 (2010).

99. See *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (plurality opinion); Julie Marie Baworowsky, *From Public Square to Market Square: Theoretical Foundations of First and Fourteenth Amendment Protection of Corporate Religious Speech*, 83 NOTRE DAME L. REV. 1713, 1714 (2008).

100. See generally *Citizens United*, 558 U.S. 310 (explaining that corporations may influence voters via traditional channel, but do not have the right to vote, which citizens possess under the Fourteenth, Fifteenth, Nineteenth, and Twenty-Fourth Amendments).

101. Baworowsky, *supra* note 99, at 1748.

102. *Id.*

## 2. Corporate Second Amendment Rights

Along these same lines, Darrell A.H. Miller suggested that corporations could potentially have Second Amendment rights as well.<sup>103</sup> The Supreme Court recently reaffirmed the right of a “natural person” to keep and bear arms in *McDonald v. City of Chicago*<sup>104</sup> and in *District of Columbia v. Heller*.<sup>105</sup> In both cases, the Justices focused on the *personal* right to self-defense and to band together for self-defense.<sup>106</sup> Miller reminds us of the anti-tyrannical aim of the Second Amendment, concluding that “[a]ssociations, no less than natural persons, have an interest in banding together for self-protection.”<sup>107</sup> He argues that “[j]ust as individuals can better exercise their First Amendment rights by associating together, individuals can better exercise their Second Amendment rights by association.”<sup>108</sup> Although both Washington and Arizona have specifically denied corporations the right to bear arms,<sup>109</sup> Miller nevertheless claims that corporations could very well possess the right to bear arms under four circumstances:<sup>110</sup> (1) private security or the right to personally defend the company;<sup>111</sup> (2) ideological associations, such as the Black Panthers;<sup>112</sup> (3) guns-to-work laws, or allowing company employees to store firearms on their property;<sup>113</sup> and (4) the commercial firearm trade, whereby “a firearms manufacturer, distributor, or other corporate entity [would] claim a right to be free from government restriction.”<sup>114</sup>

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103. See Miller, *supra* note 58, at 889. At least one other social commentator has made the same observations. See Steven Clifford, *High Court Rules Corporations Have Right To Bear Arms*, HUFFINGTON POST (Jan. 25, 2010, 1:06 PM), [http://www.huffingtonpost.com/steven-clifford/high-court-rules-corporat\\_b\\_435619.html](http://www.huffingtonpost.com/steven-clifford/high-court-rules-corporat_b_435619.html).

104. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (holding that the Second Amendment right to keep and bear arms restricts state and local governments to the exact same degree it restricts the federal government).

105. *District of Columbia v. Heller*, 554 U.S. 570, 600 (2008) (holding the Second Amendment right to keep and bear arms is a personal right, and laws preventing a person from keeping and transporting an operable handgun in the home are unconstitutional).

106. See *id.*; *McDonald*, 130 S. Ct. at 3026.

107. Miller, *supra* note 58, at 890. However, Miller goes on observing that “many states have anti-militia laws that restrict the ability of private groups to train together with private arms or to form private self-defense forces.” *Id.*

108. *Id.* at 938.

109. *Id.* at 905.

110. *Id.*

111. *Id.*

112. *Id.* at 906.

113. *Id.* at 907.

114. *Id.*

### 3. Corporate Third Amendments Rights

Although there is no case law on the subject, the rarely invoked<sup>115</sup> Third Amendment protections against quartering soldiers during peacetime could apply to corporate property.<sup>116</sup> This is especially so because the Constitution recognizes corporate property rights against takings pursuant to the Fifth Amendment.<sup>117</sup> The argument for corporate protections under the Third Amendment follows because the Third Amendment and the Takings Clause are viewed as a guarantee of private property rights,<sup>118</sup> the two may be read together<sup>119</sup> to afford corporations a synergistic right against compelled quartering of soldiers.

### 4. The Remainder of the Bill of Rights

Fourth Amendment rights are afforded to corporations based on more established legal footing. Although corporations do not enjoy a right to privacy equivalent to individuals under the Fourth Amendment,<sup>120</sup> they are still protected against unreasonable searches.<sup>121</sup> Corporate books and records, however, carry no right to personal privacy.<sup>122</sup> Corporations likewise have the Fifth Amendment right against double jeopardy,<sup>123</sup> but do not have the Fifth Amendment right against self-incrimination.<sup>124</sup> The Sixth Amendment right to a trial by jury has also been applied to corporations,<sup>125</sup> as well as the

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115. Only one court has ever defined the amendment: *Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982) (“The absence of any case law directly construing [the amendment] presents a serious interpretive problem . . . .”); *see also* William Sutton Fields, *The Third Amendment: Constitutional Protection from the Involuntary Quartering of Soldiers*, 124 MIL. L. REV. 195, 210 (1989).

116. U.S. CONST. amend. III.

117. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931); U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

118. *See* Fields, *supra* note 115, at 210.

119. *See* Thomas G. Sprankling, *Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment’s Protection of Houses*, 112 COLUM. L. REV. 112, 123 (2012).

120. *See* *United States v. Morton Salt Co.*, 338 U.S. 632, 650–52 (1950); *Fleck & Assocs. v. City of Phoenix*, 471 F.3d 1100, 1104 (9th Cir. 2006).

121. *See* *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 311 (1978) (“The Warrant Clause of the Fourth Amendment protects commercial property as well as private homes.”).

122. *United States v. White*, 322 U.S. 694, 700 (1944).

123. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575 (1977).

124. *Wilson v. United States*, 221 U.S. 361, 384 (1911) (“While an individual may lawfully refuse to answer incriminating questions . . . it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.”).

125. *United States v. Greenpeace, Inc.*, 314 F. Supp. 2d 1252, 1261 (S.D. Fla. 2004).



right to counsel,<sup>126</sup> just not the right to a public defender.<sup>127</sup> It is unclear whether corporations possess Eighth Amendment rights against cruel and unusual punishment,<sup>128</sup> or against excessive fines.<sup>129</sup>

## 5. The Fourteenth Amendment

It is well-settled that corporations are “persons” for purposes of the Fourteenth Amendment.<sup>130</sup> Corporations possess the right to equal protection under law<sup>131</sup> and the right to procedural due process.<sup>132</sup> Interestingly, the First Circuit Court of Appeals even granted third-party standing to corporations that allege race discrimination.<sup>133</sup> Semantically, corporate rights under the Fourteenth Amendment faced an uphill battle in that the provisions of the amendment apply to “[a]ll persons born or naturalized in the United States.”<sup>134</sup> This Article has explored many reasons for deeming corporations “persons,” however, the fact that a corporation cannot be “born” or “naturalized” would appear to strike a fatal blow to the proliferation of the

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126. *United States v. Rad-O-Lite of Phila., Inc.*, 612 F.2d 740, 743 (3d Cir. 1979).

127. *United States v. Unimex, Inc.*, 991 F.2d 546, 550 (9th Cir. 1993) (“Being incorporeal, corporations cannot be imprisoned, so they have no constitutional right to appointed counsel.”).

128. *Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989) (“We shall not decide whether the Eighth Amendment’s prohibition on excessive fines applies to the several States through the Fourteenth Amendment, nor shall we decide whether the Eighth Amendment protects corporations as well as individuals.”).

129. *See id.* at 285 (O’Connor, J., concurring in part and dissenting in part).

130. *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888) (“Under the designation of a ‘person’ there is no doubt that a private corporation is included.”).

131. *See Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985); *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

132. *Covington & Lexington Turnpike Rd. Co. v. Sandford*, 164 U.S. 578, 592 (1896) (“It is now settled that corporations are persons within the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the law.”).

133. *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 13–14 (1st Cir. 1979); *see also* Robert N. Strassfeld, *Corporate Standing to Allege Race Discrimination in Civil Rights Actions*, 69 VA. L. REV. 1153, 1153–54 (1983). This is not to say that corporations can be victims of race discrimination. *Id.* at 1159 (“[T]he [Supreme] Court, in a single sentence of dictum, rejected the notion that a corporation could be the direct target of race discrimination. It did not decide whether a corporation had standing to assert the rights of third persons in a race discrimination suit.”). Furthermore, third-party standing as a cure to corporate standing issues in race discrimination cases is problematic for two reasons: courts retain discretion on the issue; and it is premised on third-party rights of corporate shareholders that might not exist. *Id.* at 1156.

134. U.S. CONST. amend. XIV.

idea of corporate personhood under law.<sup>135</sup> Accordingly, in 1870, Justice Woods wrote that “[o]nly 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 Fourteenth Amendment.<sup>136</sup>

Despite Justice Woods’ sentiments, the right to corporate equal protection under law was formally entrenched in *Santa Clara County v. Southern Pacific Railroad*, which held that a corporation’s property could not be taxed differently from that of a natural individual.<sup>137</sup> *Santa Clara* was the product of the liberal application of the Equal Protection Clause at that time—indeed, in *County of San Mateo v. Southern Pacific Railroad Company* the court observed that the clause was “protective and remedial, not punitive in character, and should, therefore, be *liberally*, not *strictly*, construed.”<sup>138</sup> The court 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 injuriously affecting it, the benefits of the provision extend to corporations.”<sup>139</sup>

From *Santa Clara* onward, corporate protection under the Equal Protection Clause continued.<sup>140</sup> Interestingly, since the *Santa Clara* decision in 1886, 307 Fourteenth Amendment cases have come before the Supreme Court. Despite the recent emancipation of freed slaves—and their ensuing battle for equal protection in the face of Jim Crow—only nineteen decisions dealt with the rights of African-Americans;<sup>141</sup> the rest dealt with corporate constitutional rights.<sup>142</sup>

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135. Note that corporations might be “persons,” under the Equal Protection or Due Process Clauses, but they are not “citizens” for purposes of the Privileges or Immunities Clause. *Ulmer v. First Nat. Bank*, 55 So. 405, 466–67 (Fla. 1911).

136. *Ins. Co. v. New Orleans*, 13 F. Cas. 67, 68 (D. La. 1870) (No. 7,052).

137. *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 398 (1886).

138. *Cnty. of San Mateo v. S. Pac. R. Co.*, 13 F. 722, 759 (C.C.D. Cal. 1882).

139. *Id.* at 744.

140. See *Smyth v. Ames*, 171 U.S. 361, 365 (1898); *Charlotte, Columbia, and Augusta R.R. Co. v. Gibbes*, 142 U.S. 386, 389 (1892); *Missouri Pac. R.R. Co. v. Mackey*, 127 U.S. 205, 209 (1888).

141. Rubin, *supra* note 16, at 567; see also *Dred Scott v. Sandford*, 60 U.S. 393, 403–04 (1857) (holding that people of African descent imported into the United States and held as slaves, or their descendants, whether or not they were slaves, were not protected by the Constitution and could never be citizens of the United States).

142. Rubin, *supra* note 16, at 567.

## B. Corporate Marriage Rights

With this constitutional background in mind, this Article reaches the issue of how a court would rule on a corporate-human marriage in a state where marriage is not defined as between a man and a woman, but rather between a person and a person.<sup>143</sup> This portion of the Article will track the doctrinal analysis followed by the majority in *Citizens United*. Thus, the issue is as such: If the “[g]overnment may not suppress *political speech* on the basis of the speaker’s corporate identity,”<sup>144</sup> may the government suppress *marriage rights* on the basis of the betrothed’s corporate identity?

*Citizens United* affirmed a corporation’s right to exercise the right to free speech, in order to prevent “destroying the [fundamental] liberty” enjoyed by people and corporations alike.<sup>145</sup> On *Citizens United*’s heels, *Hobby Lobby* emphasized the right to protect religious expression, even if the one asserting the right is an artificial entity.<sup>146</sup> This aligns with the Court’s modern tendency, as discussed above, to focus on the scope of the constitutional right, rather than on the identity of the person or entity invoking that right.<sup>147</sup> So long as a constitutional right is asserted, the Court will take pains to protect it, irrespective of the corporeality of the “person” seeking constitutional protection.

### 1. The Fundamental Right to Marry

Does Sallie Mae have a *right to marry* Harry? The Due Process Clauses of the Fifth and Fourteenth Amendments protect persons from a deprivation of life, liberty, or property by a government entity<sup>148</sup> without sufficient justification.<sup>149</sup> Because marriage-filing requirements are state-based,<sup>150</sup> the focus shifts to the Due Process

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143. Cf. *supra* note 11 (comparing the language of marriage statutes from several states).

144. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010) (emphasis added).

145. *Id.* at 354–55 (quoting THE FEDERALIST NO. 10, at 130 (James Madison) (B. Wright ed., 1961)).

146. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

147. See *Miller*, *supra* note 58, at 927.

148. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

149. *Davidson v. Cannon*, 474 U.S. 344, 353 (1986).

150. See Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1378 n.7 (2010) (“In most states, to enter a civil marriage, a couple must apply for a state marriage license, generally by completing a form that demonstrates that they meet the marriage requirements as defined under state law, and they must solemnize their marriage in a civil proceeding or religious ceremony after which the (religious or secular) officiant files the marriage license with the state.”).

Clause contained in the Fourteenth Amendment.<sup>151</sup> A deprivation of the right to life, liberty, or property without such justification violates the doctrine of substantive due process.<sup>152</sup> Courts have not only used substantive due process to protect those rights enumerated in the Constitution, but have held that there are certain unenumerated rights that merit protection as well.<sup>153</sup> Despite not appearing in the text of the Constitution, these rights, such as the right to custody of one's children,<sup>154</sup> or the right to contraception,<sup>155</sup> fall under the "liberties" protected by the Fourteenth Amendment.<sup>156</sup>

In establishing the substantive due process doctrine, the Supreme Court has consistently held that some rights are so fundamental to the basic liberties that the Constitution aims to protect that they must be held nearly inviolable, even without reliance on an explicit constitutional provision.<sup>157</sup> Thus, although some fundamental rights, including free speech<sup>158</sup> and the right to exercise one's religion,<sup>159</sup> are explicit, the Court makes clear that it may articulate and expand other implicit rights.

The right to marry has been deemed one such fundamental liberty. In the seminal case *Loving v. Virginia*, which invalidated the iniquitous Virginia anti-miscegenation law, the Supreme Court observed that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."<sup>160</sup> In finding that the law violated the Due Process Clause, the Court, presciently focusing on the constitutional *right*,<sup>161</sup> found marriage to be "'one of the basic civil rights of man,' fundamental to our very existence and survival."<sup>162</sup> The fundamental right to marriage

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151. U.S. CONST. amend. XIV ("Nor shall any *State* deprive any person of life, liberty, or property, without due process of law . . . .") (emphasis added).

152. See generally *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (recognizing a fundamental right to privacy in the Fourteenth Amendment's protections against the deprivation of a person's life, liberty or property).

153. See, e.g., *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 853–55 (1998); *Washington v. Glucksberg*, 521 U.S. 702, 722–23 (1997).

154. *Stanley v. Illinois*, 405 U.S. 645, 657–58 (1972).

155. *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

156. *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992).

157. See *id.* at 847–49.

158. U.S. CONST. amend. I.

159. *Id.*

160. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

161. See *Miller*, *supra* note 58, at 927 (explaining the Court's modern tendency is to concentrate on the scope of the constitutional right, rather than on that entity seeking to enforce that right).

162. *Loving*, 388 U.S. at 12 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

was later affirmed in *Turner v. Safely*, a case applying the right to marry to prisoners, despite the fact that they possess reduced constitutional liberty interests.<sup>163</sup>

More recently, the landmark case *United States v. Windsor* invalidated the Defense of Marriage Act (DOMA), finding unconstitutional DOMA's restrictions on same-sex marriage benefits.<sup>164</sup> The Court recognized DOMA's framework as a deprivation of due process, holding that it injured the very class it was designed to protect.<sup>165</sup> The decision frequently, although obliquely, referred to the "right to marry" and the rights that a government entity must imbue—without regard to the gender composition of the marriage.<sup>166</sup> In doing so, it recognized that, although "Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the *liberty* protected by the Due Process Clause."<sup>167</sup> It is exactly this liberty interest that must be further examined.

## 2. The Corporate Right to Substantive Due Process?

At this point Harry and Sallie Mae face an unusual inquiry: not as to which *rights* are protected under the substantive due process umbrella, but rather which *persons* may invoke the doctrine. The Supreme Court addressed the issue in *BMW of North America v. Gore*, a case in which a jury awarded \$4 million in punitive damages against a BMW distributor for failing to disclose to dealers and customers that it had repainted the "new" cars because of acid rain damage.<sup>168</sup> In affirming the remittur of \$2 million, the Court identified a substantive due process right against a grossly excessive damages award.<sup>169</sup> Importantly, the Court imbued the right to BMW of North America, a corporation.

Nevertheless, the scope must be drawn more narrowly than merely substantive due process. The text of the Fourteenth Amendment references life and *property*, as well as the liberty interest about which this Article is concerned. Just three years before the *BMW* decision, the Supreme Court in *TXO Production Corp. v. Alliance Resources Corp.*, held that a "grossly excessive" punitive award amounted to an

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163. *Turner v. Safely*, 482 U.S. 78, 94 (1987).

164. *United States v. Windsor*, 133 S. Ct. 2675, 2675 (2013).

165. *Id.* at 2693 (examining a federal issue, as opposed to a state issue, the Court chose the Fifth Amendment as the aperture through which to find the constitutional infirmity).

166. *See generally id.* (discussing the purpose and practical effect of DOMA).

167. *Id.* at 2695 (emphasis added).

168. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 564 (1996).

169. *Id.* at 574–75.

“arbitrary deprivation of property without due process of law.”<sup>170</sup> Likewise, the Fifth Circuit in *Conroe Creosoting Co. v. Montgomery Cnty., Tex.*, held that where a state official deprives a corporation of its *property* in a manner that “shocks the conscience,” substantive due process may be violated.<sup>171</sup> Together those decisions establish that corporations *do* have substantive due process rights, but only insofar as the right to property is concerned.

However, the relevant inquiry is whether corporations have *liberty* rights under substantive due process. In a decision from 1906, the Supreme Court stated the “liberty” protected by the Fourteenth Amendment is the “liberty of natural, not artificial, persons.”<sup>172</sup> More recently, the Seventh Circuit similarly held that corporations may not claim substantive due process protection because corporations have no “fundamental” rights.<sup>173</sup> Indeed, Judge Frank Easterbrook perhaps put it best: “Corporations do not have fundamental rights; they do not have liberty interests, period.”<sup>174</sup>

This accords with the purely human nature of the unenumerated fundamental rights. The Supreme Court waxed poetic about these rights, describing them as necessary:

[T]o engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.<sup>175</sup>

None of these seem to naturally belong to the corporation. Thus, along with the right to contraception,<sup>176</sup> the right to raise one’s child,<sup>177</sup> and many other quintessentially *personal* liberties, the “corporate fundamental right” appears to be an oxymoronic solecism. Even though the *Citizens United* and *Hobby Lobby* opinions devote a great deal of attention to the scope of the constitutional right being asserted,<sup>178</sup> it appears that there is no eluding a corporation’s status as

170. See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453–54 (1993).

171. *Conroe Creosoting Co. v. Montgomery Cnty.*, 249 F.3d 337, 341 (5th Cir. 2001).

172. *Northwestern Nat’l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906).

173. *Pro-Eco, Inc. v. Board of Comm’rs*, 57 F.3d 505, 514 (7th Cir. 1995) (citing *Mid-American Waste Sys., Inc. v. City of Gary*, 49 F.3d 286, 291 (7th Cir. 1995)).

174. *Nat’l Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124, 1129 (7th Cir. 1995).

175. *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (internal quotations and citations omitted).

176. See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

177. *Stanley v. Illinois*, 405 U.S. 645, 657–58 (1972).

178. See *Miller*, *supra* note 58, at 927.

an entity, rather than a human in society. Unfortunately for Harry and Sallie Mae the fundamental right to marry will not help them in their quest to wed.

### 3. Corporate Equal Protection: The Hail Mary

Harry and Sallie Mae still possess one remaining constitutional argument: that denying a person the right to marry a corporation, solely on the basis of its status as a non-human entity, denies the corporation the equal protection of laws as guaranteed by the Fourteenth Amendment. The Equal Protection Clause of the Fourteenth Amendment is “essentially a direction that all persons similarly situated should be treated alike.”<sup>179</sup> Legislation is generally valid “if the classification drawn by the statute is rationally related to a legitimate state interest . . . [and w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude.”<sup>180</sup>

The primary issue is doctrinal: With much of the case law analyzing marriage rights under due process,<sup>181</sup> courts would undoubtedly hesitate to apply the equal protection framework in Harry and Sallie Mae’s case. Nevertheless, a glimmer of hope remains. Despite the Court’s insistence that the fundamental right to marry is a due process issue, according to Patricia Cain, the opacity of legal doctrine applied in certain cases leads her to the conclusion that “[o]ne cannot even tell under current Supreme Court jurisprudence whether marriage is a ‘fundamental right’ for purposes of substantive due process . . . or whether it is only a fundamental right whose allocation must adhere to notions of equal protection.”<sup>182</sup> Safe to say, this doctrinal approach is precarious, at best.

The doctrinal bases for many decisions dealing with the right to marry are difficult to discern—some decisions are decided on equal protection grounds, while others invoke due process. In *Loving*, for example, although the Court found a due process violation, the reasoning employed by the Court was emblematic of an equal protection analysis.<sup>183</sup> The Court reasoned: “To deny this fundamental freedom

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179. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

180. *Id.* at 440 (internal citations omitted).

181. *See, e.g.*, *In re Marriage Cases*, 183 P.3d 384, 419–22 (Cal. 2008); *Goodridge v. Dep’t of Pub. Health*, 798 N.E. 2d 941, 960–61 (Mass. 2003); *see also* Jennifer L. Heeb, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 SETON HALL L. REV. 347, 380–84 (1993) (arguing that due process is the best avenue for litigants to invoke marriage rights).

182. Patricia A. Cain, *Imagine There’s No Marriage*, 16 QLR 27, 32–33 (1996).

183. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

on so unsupportable a basis as the *racial classifications* embodied in these statutes, *classifications so directly subversive of the principle of equality* at the heart of the Fourteenth Amendment.”<sup>184</sup> This italicized language is a clear indicator that the Court viewed the anti-miscegenation statute as discriminating on the basis of a racial classification, a quintessential equal protection violation. The line became even more blurred in the 1978 decision, *Zablocki v. Redhail*.<sup>185</sup> In *Zablocki*, Justice Marshall, writing for the majority, focused on marriage as a right of “fundamental importance.”<sup>186</sup> The statute at issue, in that case, prevented a subgroup of persons, those who did not pay child support, from marrying.<sup>187</sup> This classification is ripe for an equal protection argument—as such, Joseph A. Pull explained that *Zablocki* is “structured like a classic equal protection opinion.”<sup>188</sup> Even in *Windsor*,<sup>189</sup> Justice Scalia was unsure whether the majority had applied a due process or equal protection analysis in striking down DOMA. Justice Scalia’s dissent reflected the confusion: “Moreover, if this is meant to be an equal-protection opinion, it is a confusing one.”<sup>190</sup>

The next question that needs to be answered before Harry and Sallie Mae tie the knot is under what circumstances may a State preclude two persons from marrying. There have been recent debates, in many states as to whether two same-sex individuals can marry.<sup>191</sup> In all of these debates, same-sex marriage supporters argue that the State may not discriminate on the basis of sexual orientation under the Equal Protection Clause.<sup>192</sup> Recent state decisions reflect that equal protection may be the most fecund route, of challenging a State’s

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184. *Id.* (emphasis added).

185. 434 U.S. 374 (1978).

186. *Id.* at 383.

187. *Id.* at 377.

188. Joseph A. Pull, *Questioning the Fundamental Right to Marry*, 90 MARQ. L. REV. 21, 29 (2006).

189. *See* *United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting).

190. *Id.*

191. *See, e.g.*, *Kitchen v. Herbert*, 755 F.3d 1193, 1198–99 (10th Cir. 2014); *Baskin v. Bogan*, 983 F. Supp. 2d 1021, 1026 (S.D. Ind. 2014); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 995 (N.D. Cal. 2010), *rev’d sub nom.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Varnum v. Brien*, 763 N.W.2d 862, 878 (Iowa 2009); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 411 (Conn. 2008); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006); *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).

192. *See, e.g.*, *Lewis*, 908 A.2d at 200; *In re Marriage Cases*, 183 P.3d 384, 404 (Cal. 2008) (analyzing California’s definition of domestic partner under the California Constitution); *Kerrigan*, 957 A.2d at 418; *Goodridge*, 798 N.E.2d at 953; *Hernandez v. Robles*, 855 N.E.2d 1, 6 (N.Y. 2006).



same-sex marriage ban.<sup>193</sup> For example, California's former anti-same-sex marriage legislation stated, "[o]nly marriage between a man and a woman is valid or recognized in California."<sup>194</sup> California's anti same-sex marriage law, juxtaposed one subgroup of people, heterosexuals, against another, homosexuals. This rift opened the door to equal protection challenges.

The instinctive reaction to the Harry and Sallie Mae hypothetical may run something like this: "Of course a person cannot marry a corporation, corporations cannot marry people!" The reaction accurately reflects the most sensible legal conclusion—that a court would invalidate a marriage between a person and a corporation because of the corporation's *classification* as an entity, and not a person. This follows because "[t]he Equal Protection Clause is aimed at classifications."<sup>195</sup> This being said, however, precluding a subgroup of persons, whether they are labeled homosexual, Latino, or *artificial*, is a classification that, should the State wish to exclude them from marriage rights, must be justified in the face of the Equal Protection Clause. Thus, Sallie Mae could possibly find repose in an equal protection claim, even in light of the extensive case law indicating that marriage is a fundamental right and a liberty interest under the Fourteenth Amendment.

### III. Corporate Governance: When Harry Meets Sallie Mae, Does She Say Yes? Can She?

Even if Sallie Mae made it to a fact-finding stage, a lawsuit attempting to enforce a corporation's right to marry Harry on an equal protection theory would almost certainly be denied under rational basis review.<sup>196</sup> Nevertheless, several interesting corporate law issues re-

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193. See generally Justin Reinheimer, *Same-Sex Marriage Through the Equal Protection Clause: A Gender-Conscious Analysis*, 21 BERKELEY J. GENDER L. & JUST. 213, 227 (2006).

194. CAL. FAM. CODE § 308.5 (West 2004).

195. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1166 (1988).

196. A classification, such as this one, which does not involve suspect criteria or interfere with the exercise of a fundamental right, is valid and will be upheld under the test, if it is rationally related to a legitimate governmental interest or purpose. *Regan v. Taxation With Representation*, 461 U.S. 540, 547 (1983). It is highly unlikely that the Supreme Court would affiliate a corporation with a suspect class. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748–50 (2011). A party challenging a statute or regulation must negate *any reasonably plausible justification* to prove that the classification is wholly irrational. See *Gusewelle v. City of Wood River*, 374 F.3d 569, 578 (7th Cir. 2004). The state could dream up any number of reasons why a corporation would not be allowed to marry a person, not the least of which would be the repercussions of an unseen economic calamity.

main. Part III begins with the somewhat ludicrous proposition that a corporation would *want* to marry a person. What type of corporation would find it beneficial to latch itself onto Harry? It is imaginable that a corporation might want to marry a natural person for several reasons. First, a corporation might want to marry a person to make a point—e.g., a left-leaning corporation wishes to shed a negative light onto the Supreme Court’s corporate personhood stance. Second, a corporation might want to marry for publicity—imagine a little-known entity wants its name in the media. Lastly, a mischievous or obtuse sole-proprietor might wish to test the bounds of corporate tax law by blurring the person/corporation line. Financial gain—whether from new clientele, more fervent financial backers, or perfidious tax filings—could be the result of all three.

Of course, in order for any marriage to be valid, there must be bilateral consent.<sup>197</sup> But who can consent? Syntactically, we say that the corporation acts—“that Nike denied that it knew about the wrongdoing”<sup>198</sup>—but who says yes? For the purpose of the hypothetical, this Article assumes the corporation, Sallie Mae, is a loosely held entity with 100 shareholders and seven directors, a chief executive officer (CEO), a chief operating officer (COO), and a president. Generally, under relevant corporate law there are three ways by which a corporation may take a course of action: (1) the officers, such as the CEO or president, are in control of the day-to-day affairs of the corporation, and may manage the business as they see fit, subject to certain limitations; (2) the directors, who are “the supreme authority in matters of the corporation’s regular business management,” may act as the final arbiter in certain affairs; and (3) the shareholders may vote to approve or disapprove of a transaction that fundamentally alters the corporate form, such as a merger or consolidation.<sup>199</sup>

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The Supreme Court has noted the “extremes to which the Court has gone in dreaming up rational bases for state regulation.” *Dandridge v. Williams*, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting).

197. *United States v. Lutwak*, 195 F.2d 748, 753 (7th Cir. 1952), *aff’d*, 344 U.S. 604 (1953).

198. See Ripken, *supra* note 23, at 115.

199. 2 JAMES D. COX & THOMAS LEE HAZEN, *TREATISE ON THE LAW OF CORPORATIONS* § 9:5 (3d ed. 2013).

### A. The Officers

Because the corporation is an artificial entity, it can only act through its agents.<sup>200</sup> These agents include the CEO, president, vice president, treasurer, and secretary.<sup>201</sup> As will be discussed in greater detail below, because the board of directors is the supreme decision-maker with respect to the business of the corporation the “board of directors confer[s] on the [agent] the authority to act.”<sup>202</sup>

Suppose that Harry goes to the president of Sallie Mae to propose.<sup>203</sup> The president, as an agent of the corporation, is constrained by the principles of agency—“[t]he president’s implied, apparent, or inherent authority is limited to carrying on the corporation’s ordinary business and does not extend to extraordinary transactions.”<sup>204</sup> Under the doctrine of inherent authority, the president may bind the corporation by contract without any express approval by the board of directors, but only if the transaction is in the usual course of business.<sup>205</sup> Is marriage one such transaction?

The role of the non-director corporate officer has increased. Wielding considerable power and influence over a corporation’s business and affairs, officers have replaced directors as the leaders in corporate decision-making. In this central role, officers owe a fiduciary duty to the corporation and its shareholders.<sup>206</sup> Nevertheless, the executive officer, in this scenario, faces two challenges: (1) the marriage must fall within the ordinary course of business, which it might not, and (2) the decision to marry must not fall within the province of board action. Since the directors must act within the ordinary course of business, assume for the purpose of the hypothetical, that the president takes the idea to the Sallie Mae’s board of directors.

### B. The Board of Directors

The board’s potential role in orchestrating this affair is less clear. In the corporate arena, boards of directors more often operate as an *ex post facto* oversight committee rather than proactive “idea men” (and women). As one court stated, “Directorial management does not

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200. 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 8:1 (3d ed. 2013).

201. *Id.* § 8:2.

202. *Id.* § 8:1.

203. All puns intended.

204. 1 COX & HAZEN, *supra* note 200, § 8.6.

205. *Id.*

206. Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

require a detailed inspection of day-to-day activities, but rather a general monitoring of corporate affairs and policies.”<sup>207</sup> Among the topics that require oversight are major corporate plans and action. Although it is true that the board retains the power to “[i]nitiate and adopt corporate plans, commitments, and actions,” these duties relate to long-term evaluations and broad objectives and strategies.<sup>208</sup> Furthermore, major corporate plans and actions depend in large part on knowledge of the inner-workings of the business of the corporation, which is more likely to be possessed by the senior executives of a company than by the board of directors.<sup>209</sup> Accordingly, after Harry went to the President of Sallie Mae with his proposal, it would be up to the board of directors to review it as a “major corporate plan.”<sup>210</sup> The board should carefully review and, when deemed appropriate, approve the relevant major business directives.<sup>211</sup> Marrying a human being—with all of the attendant financial consequences—is probably one such action.

Directors are not agents of a corporation, and have no power individually to bind it by any contract or otherwise.<sup>212</sup> Directors must act collectively as a *board*.<sup>213</sup> They must do so at a legal, duly assembled meeting.<sup>214</sup> Adhering to these procedural requirements is important because “[w]hat the directors decide as a board, the corporation does in turn, so long as their actions are within the scope of the goals and purposes of the corporation.”<sup>215</sup> Additionally, the board may also ratify the acts of its officers<sup>216</sup>—thus, if the president of Sallie Mae accepted Harry’s proposal, the board could choose to approve or disapprove of the idea.

How fond must the directors be of Harry? How hard must he court Sallie Mae? Surely, Sallie Mae cannot be betrothed on a whim or

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207. *Francis v. United Jersey Bank*, 432 A.2d 814, 822 (N.J. 1981).

208. AMERICAN LAW INSTITUTE, *PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS & RECOMMENDATIONS* § 3.02 (1994).

209. *Id.*

210. *Id.* (“[A]s a functional matter these judgments will normally be made, at least in the first instance, by the principal senior executives, and more particularly the chief executive officer, because in most cases the executives shape the board’s agenda.”).

211. *Id.*

212. *See* 1 COX & HAZEN, *supra* note 200, § 8:6.

213. *See id.*

214. 2 COX & HAZEN, *supra* note 199, § 9:5.

215. *Id.*

216. 1 COX & HAZEN, *supra* note 200, § 8:14 (“[A]n unauthorized act of a corporate officer or agent can be ratified for the corporation by its board of directors, its shareholders, or one or more of its officers, depending on which of these has the power to authorize the kind of act in question.”).

caprice; the directors must evaluate what is in Sallie Mae's best interests, pecuniary or otherwise. It is this precept that steers the evaluation as to how directors would have to justify the proposal as a defensible transaction.

Typically, directors owe a three-fold duty to the corporation: they must be obedient, diligent, and loyal.<sup>217</sup> Only the latter two considerations are of concern to Harry and Sallie Mae.<sup>218</sup> The duty to exercise reasonable care and prudence affords wide latitude in transactional decision-making.<sup>219</sup> Directors are protected by the "Business Judgment Rule," which shields directors from losses sustained from imprudent but good-faith decision-making or honest errors of judgment.<sup>220</sup> Realistically, so long as the board is acting with the corporation's best interests in mind, its decision will be vindicated.<sup>221</sup> Indeed, as long as "their errors [are not] so gross as to show their unfitness to manage corporate affairs," the board escapes liability.<sup>222</sup> Thus, even though "a better result may appear, especially with hindsight[,] . . . that conclusion does not necessarily mean a director's decision was wrong when made."<sup>223</sup> As one court puts it, "[i]rrationality is the outer limit of the business judgment rule."<sup>224</sup>

Assuming the board acts reasonably in accordance with the business judgment rule, the board must also exercise loyalty to the corporation.<sup>225</sup> The line between these two duties is often blurred.<sup>226</sup> The

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217. See 2 COX & HAZEN, *supra* note 199, § 10:1.

218. See Alan R. Palmiter, *Duty of Obedience: The Forgotten Duty*, 55 N.Y.L. SCH. L. REV. 457, 458 (2011). Were a court to revive the duty of obedience, the marriage would violate that, too because "[t]he duty of obedience requires a director to avoid committing ultra vires acts, i.e., acts beyond the scope of the [authority] of the corporation as defined by its [articles of incorporation] or the laws of the state of incorporation." *Id.* at 460 (quoting *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 719–20 (5th Cir. 1984)). Although "[n]o modern for-profit corporation case has turned explicitly on the duty of obedience," a transaction as unusual and precarious as a marriage between a person and a corporation would almost certainly be so beyond the scope of the articles of incorporation, especially in light of the potentially drastic economic ramifications, that a court would have to find a violation. *Id.*

219. See AMERICAN LAW INSTITUTE, *supra* note 208, § 3.02.

220. See 2 COX & HAZEN, *supra* note 199, § 10:2.

221. *Id.*

222. *Id.*

223. R. Franklin Balotti & James J. Hanks, Jr., *Rejudging the Business Judgment Rule*, 48 BUS. LAW. 1337, 1342 (1992–1993) (quoting James J. Hanks, Jr., *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 BUS. LAW. 1207, 1232 (1988)).

224. *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000).

225. See 2 COX & HAZEN, *supra* note 199, 10:11.

226. *Id.*

duty of care generally concerns the adequacy of the decision-making process and the directors' obligations to be prudent and thorough.<sup>227</sup> The duty of loyalty, on the other hand, concerns the motives, purposes, good-faith basis, and goals of the corporate actor—the justifications that serve as the basis for the transaction.<sup>228</sup> For instance, self-dealing contracts and other personally advantageous transactions in which the director's allegiance to the corporation could reasonably be questioned are forbidden.<sup>229</sup> A prime example of a breach of the duty of loyalty is where an "officer or director has usurped a corporate opportunity."<sup>230</sup> Put simply, unless a corporate executive steals for himself an idea that would result in pecuniary gains for his company, the executive is likely insulated from liability under the duty of loyalty.<sup>231</sup>

Presupposing that the marriage between a corporation and a person is both an idea rooted in the desire for advertising-induced revenue and a serious attempt to enter into a "social contract," two questions remain for Harry and Sallie Mae: (1) Is this action within the scope of permissible board action; and (2) is the board legally insulated from such conduct? In regards to the first question, the simplest assessment is also the most helpful. The board of directors is charged with making "business decisions."<sup>232</sup> They are responsible for overseeing "contracts, which the corporation could legitimately make."<sup>233</sup> An unusual transaction, though not purely financial, is still a *contract*.<sup>234</sup> Much like a corporation's articles of incorporation may limit the personal liability of shareholders, officers, or directors,<sup>235</sup> a couple entering into marriage may limit future liability through a prenuptial agreement.<sup>236</sup> Sallie Mae would undoubtedly draft a prenup-

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227. *Id.*

228. Clark W. Furlow, *Good Faith, Fiduciary Duties, and the Business Judgment Rule in Delaware*, 2009 UTAH L. REV. 1061, 1069–70 (2009).

229. *See id.* at 1070 ("The duty of loyalty, then, demands that directors' decisions be based on a good-faith belief that chosen course of action is the best one for the corporation.").

230. 18B AM. JUR. 2D *Corporations* § 1544 (2014).

231. This Article assumes that, Sallie Mae's executives do not have their own individual romantic interest in Harry, and thus there is no concern that the directors might usurp a corporate opportunity in this hypothetical.

232. *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (quotation omitted).

233. *Beveridge v. New York El. R. Co.*, 19 N.E. 489, 494 (N.Y. 1889).

234. 55 C.J.S. *Marriage* § 2 (2014) ("Marriage is generally considered a civil contract differing in notable respects from ordinary contracts . . .").

235. REV. MODEL BUS. CORP. ACT § 2.02 (2002).

236. *Carr v. Hancock*, 607 S.E.2d 803, 806 (W. Va. 2004) (holding prenuptial agreements that establish property settlements and support obligations at the time of divorce are presumptively valid).

tial agreement, carefully protecting against the potential financial repercussions of this social experiment.<sup>237</sup> Sallie Mae's economic rights would assuredly be invoked.

Sallie Mae's social statement might fall outside the scope of permissible actions for officers and directors by virtue of its sheer irregularity—the action of marrying Harry could conceivably constitute a capricious and cavalier business directive.<sup>238</sup> If this decision is primarily left to the directors, would this publicity stunt subject them to civil liability? It would be ludicrous to consider that the directors, whose primary purpose was to raise publicity and profit for the corporation, usurped a corporate opportunity violating the duty of loyalty, unless any of them were retaining a secret interest in the transaction. If the board of directors allowed Harry and Sallie Mae to marry, could it be said that they failed to act “on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company?”<sup>239</sup>

The business judgment rule only requires that the directors or officers “‘of a corporation act[ ] on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.’”<sup>240</sup> A failure to satisfy the business judgment rule would subject the architects of the plan to personal civil liability. Thus, the question is whether this is a case of “improvidence, of reckless, unreasonable extravagance”<sup>241</sup> Is it really “*irrational*”?<sup>242</sup> Is there “a showing of fraud, illegality or conflict of interest”?<sup>243</sup> The answer is plainly no. Even in light of the tenuous constitutional footing, the precarious post-marriage ramifications, and the bold social statement being made, the board of Sallie Mae's decision to marry Harry would be upheld so long as it was made in good faith. Indeed, in examining the

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237. Prenuptials are increasingly popular. According to one author, “everyone contemplating marriage should consider drawing up a prenuptial agreement.” Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 892 (1997). This would apply to someone with everything to lose (Sallie Mae), and someone with everything to gain (Harry). Though it would be an interesting discussion, this Article will not address the potentially limitless analysis of what could happen if a marriage between a human and a corporation dissolved without a prenuptial agreement. The possibilities of bankruptcy, divorce, corporate restructuring, and Harry's death disrupting Harry and Sallie Mae's potential union are beyond the scope of this Article.

238. See 1 COX & HAZEN, *supra* note 200, § 8:3.

239. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).

240. Stephen M. Bainbridge, *The Business Judgment Rule As Abstention Doctrine*, 57 VAND. L. REV. 83, 89 (2004).

241. *Hun v. Cary*, 82 N.Y. 65, 71, 79 (1880).

242. *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000).

243. *Shlensky v. Wrigley*, 237 N.E.2d 776, 778 (Ill. App. Ct. 1968).

*processes* by which the board based their decision, the board could easily legitimize this idea by asserting that they were primarily motivated by financial gain that would surely benefit Sallie Mae's stockholders.<sup>244</sup> Accordingly, the board could certainly find safe-haven in spacious contours of the business judgment rule.

### C. Shareholders<sup>245</sup>

Harry and Sallie Mae's marriage involves the combination of separate entities that would generate a new singular entity. Generally, corporate combinations of this sort—those that envision significant structural changes—are deemed “fundamental.”<sup>246</sup> Fundamental corporate transactions are those “characterized by their extraordinary nature as well as by the unusual changes they bring either to the corporate business or to the rights of its shareholders.”<sup>247</sup> Because fundamental transactions directly invoke the financial rights, risks, and returns of the shareholders, the shareholder's input is almost always required.<sup>248</sup>

Essentially, the shareholders have ultimate ratification power. “It is because of their effects on the business and the shareholders that the authority to undertake such transactions is not commended solely to the discretion of the board of directors, but must be authorized by

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244. The business judgment rule is generally concerned with ensuring that the officers and directors are making an informed decision. It regulates the process much more than the results. *See* *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985) (explaining that directors who fail “to act in an informed and deliberate manner” may not assert the business judgment rule as a defense to care claims). Where the contested action concerns profits and pecuniary advantage, the courts will not interfere. *See* *Kamin v. Am. Express Co.*, 383 N.Y.S.2d 807, 809 (N.Y. Sup. Ct. 1976), *aff'd*, 387 N.Y.S.2d 993 (N.Y. App. Div. 1976) (“The directors’ room rather than the courtroom is the appropriate forum for thrashing out purely business questions which will have an impact of on profits, market prices, competitive situations, or tax advantages.”).

245. This section assumes that the engagement is a board or officer-initiated idea. Interestingly, ideas founded in the socially-progressive/conscious arena are often initiated by shareholders. These initiatives are referred to as shareholder proposals, which carve out an exception for shareholders to urge the corporation to take a course of action by including the initiative in the corporation's proxy materials. *See* 17 C.F.R. § 240.14a-8(j)(1)-(2) (2011); *see also* *Apache Corp. v. N.Y.C. Emps.’ Ret. Sys.*, 621 F. Supp. 2d 444, 450 (S.D. Tex. 2008). A primary issue is whether a proposal involves issues of “ordinary business problems,” which are traditionally left to the board of directors, or whether the proposal introduces significant social policy issues such that it would necessitate a shareholder vote for approval. *Id.*

246. *Parson v. Roper Whitney, Inc.*, 586 F. Supp. 1447, 1449 (W.D. Wis. 1984); 4 JAMES D. COX & THOMAS LEE HAZEN, *TREATISE ON THE LAW OF CORPORATIONS* § 22:12 (3d ed. 2013).

247. 4 COX & HAZEN, *supra* note 246, § 25:1.

248. *See id.*



some specified vote or written consent of the shareholders.”<sup>249</sup> The board has power to recommend ideas to shareholders. These ideas may include for example, “corporate actions that require shareholder approval, such as the election of directors or a significant merger; corporate actions that are susceptible of shareholder approval.”<sup>250</sup> But is marriage *really* a fundamental change to corporate structure requiring shareholder approval? And if so, which type?

There are three basic types of corporate combination: merger, consolidation, and a sale-purchase of assets. Since this hypothetical does not involve an antiquated dowry system,<sup>251</sup> nor does the marriage contemplate buying all of anyone’s assets, we focus on merger and consolidation. Merger and consolidation are separate forms of combination.<sup>252</sup> In both cases, a favorable shareholder vote is required at a meeting, duly called on proper notice, at which a quorum is present.<sup>253</sup>

Consolidation is a “uniting or amalgamation of two or more existing corporations to form a new corporation.”<sup>254</sup> This appears to be a decent, but not perfect fit for Harry and Sallie Mae’s marriage. It is true that the newlywed couple forms a new union—“Mr. & Mrs. Sallie Mae”—but in a *real* marriage both entities maintain a separate legal existence—people do not cease to exist merely because they get hitched. When two natural people get married, they keep their own identities, their own names, titles, and property.<sup>255</sup> Thus, although a marriage brings two “people” together to form a “union,” it is not the same scenario as in a consolidation in which “the existence of all the . . . entities *terminates* and a new [entity] is created.”<sup>256</sup> Perhaps Harry and Sallie Mae’s union is better described as a merger.

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249. *Id.*

250. AMERICAN LAW INSTITUTE, *supra* note 208, § 3.02.

251. Tara S. Kaushik, *The Essential Nexus Between Transformative Laws and Culture: The Ineffectiveness of Dowry Prohibition Laws of India*, 1 SANTA CLARA J. INT’L L. 74, 77 (2003) (quoting Anshu Nangia, *The Tragedy of Bride Burning in India: How Should the Law Address It?*, 22 BROOK. J. INT’L L. 637, 639 (1996–1997) (“[M]ovable or immovable property that a bride’s father or guardian gives to the bridegroom, his parents, or his relatives as a condition to the marriage, and under duress, coercion or pressure’ or ‘cash, consumer goods, and jewelry that a wife brought with her to her husband’s household.’”).

252. 4 COX & HAZEN, *supra* note 246, § 22:2.

253. *See id.*

254. *Id.*

255. *See, e.g.*, TEX. CONST. art. XVI, § 15 (holding any property as separate if it was owned before the marriage or it was acquired after the marriage by way of gift, devise, or descent).

256. *Akwell Corp. v. Eiger*, 141 F. Supp. 19, 21 (S.D.N.Y. 1956) (emphasis added).

In a merger, one existing entity is absorbed by the other, which survives and continues the combined business and existence.<sup>257</sup> However, the Supreme Court, in *Trammel v. United States*, rejected the idea that the wife “merged into” her husband, thereby losing her distinct existence, while his existence continued.<sup>258</sup> In that case, the Court rejected the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was the surviving entity contemplated in a merger.<sup>259</sup>

In actuality, a marriage is not a corporate business merger, as Sallie Mae and Harry would not unify into some new business entity. Further, the scenario would not work semantically under state law. According to Delaware’s incorporation statute, “[a]ny 2 or more corporations existing under the laws of this State may merge into a single corporation.”<sup>260</sup> Harry is not a corporation, so he cannot be one of the two corporations necessary to merge. Likewise, New York’s merger statute is available only to domestic or foreign corporations or some sort of “other business entity.”<sup>261</sup> But Harry is not a business entity either. Unfortunately for Harry, “[o]ther business entity means any person other than a natural person.”<sup>262</sup> Accordingly, it is exceedingly difficult to see how under state corporate law this “merger” would happen.

#### D. Partnership

Perhaps the most obvious combination is also the most applicable to Harry and Sallie Mae’s situation: partnership. Under Delaware law, a partnership is formed through “the association of 2 or more persons . . . to carry on as co-owners a business for profit.”<sup>263</sup> As discussed above, corporations are treated as persons both semantically and for purposes of constitutional interpretation.<sup>264</sup> The laws of partnership are no different: under the Revised Uniform Partnership Act a “person” who may associate in a partnership means an “individual, corpora-

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257. 4 COX & HAZEN, *supra* note 246, § 22:10.

258. See *Trammel v. United States*, 445 U.S. 40, 44 (1980); see also Louis W. Hensler III, *The Trammel Court’s Hasty Rejection of Jerry Maguire’s View of Marriage*, 23 GA. ST. U. L. REV. 325, 358 (2006).

259. *Trammel*, 445 U.S. at 45–46.

260. DEL. CODE ANN. tit. 8, § 251 (West 2014).

261. N.Y. BUS. CORP. LAW § 904-a (McKinney 2008).

262. N.Y. BUS. CORP. LAW § 901 (McKinney 1999).

263. DEL. CODE ANN. tit. 6, § 15-202(a) (West 2010).

264. See *supra* Part II.

tion, business trust, estate, [etc.].”<sup>265</sup> Corporations maintain the ability to participate in partnership business, just as natural persons do. A corporation has the power “to purchase, receive, subscribe for, or otherwise acquire; own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of; and deal in and with shares or other interests in, or obligations of, any other entity.”<sup>266</sup>

There are several parallels between forming a partnership and getting married. Perhaps Justice Cardozo said it best when he stated for each partner “the venture had its phases of fair weather and of foul. The two were in it jointly, for better or worse.”<sup>267</sup> Indeed, the language used to describe partnerships sounds just like marriage: “[A]n association of two . . . adult persons to form a single economically and emotionally supportive family.”<sup>268</sup>

What protocols would Sallie Mae need to follow in order to enter into a partnership with Harry? Creating corporate partnerships is within the province of the board of directors, who are charged with “adopt[ing] corporate plans, commitments, and actions.”<sup>269</sup> Indeed, a “corporation executes its business affairs by way of the decisions of its board of directors to which they are bound.”<sup>270</sup> Entering into a partnership is quintessentially a business affair.<sup>271</sup> And what of their respective property? Unless otherwise stated, “property acquired by a partnership is property of the partnership and not of the partners individually.”<sup>272</sup> The property that predates the partnership belongs to the individual, not the partnership.<sup>273</sup> This is precisely the same rule

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265. UNIFORM PARTNERSHIP ACT, § 101 (10) (1997) (emphasis added).

266. REV. MODEL BUS. CORP. ACT § 3.02(6) (2002).

267. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. Ct. App. 1928). The quote is an intentional allusion to traditional marriage vows: “To have and to hold from this day forward, for better for worse, for richer for poorer, in sickness and in health, to love and to cherish, till death us do part, according to God’s holy ordinance; and thereto I plight thee my troth.” See *Bridgeman v. Bridgeman*, 391 S.E.2d 367, 370 (W. Va. 1990) (quoting *Solemnization of Matrimony*, THE BOOK OF COMMON PRAYER 301 (1928)).

268. Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349, 402 (2007); see also Martha M. Ertman, *Marriage As A Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 83 (2001) (“Yet the business models discussed in this Article (business partnerships, corporations, and limited liability companies) are similar to intimate relationships in that they have significant status elements that complement their contractual character.”).

269. AMERICAN LAW INSTITUTE, *supra* note 208, at § 3.02.

270. *Tomlin v. Ceres Corp.*, 507 F.2d 642, 648 (5th Cir. 1975).

271. See DEL. CODE ANN. tit. 6, § 15-202(a) (West 2010). A corporate partnership involves “[c]arry[ing] on as co-owners a business for profit.” *Id.* (emphasis added).

272. DEL. CODE ANN. tit. 6, § 15-203 (West 2009); UNIFORM PARTNERSHIP ACT § 203 (1997).

273. See *supra* Part II.A.

in marriage.<sup>274</sup> It is unlikely that forging a partnership between Harry and Sallie Mae would require a shareholder vote. Shareholder votes are reserved for extraordinary transactions,<sup>275</sup> as opposed to business transactions that do not affect existing stock.<sup>276</sup> Indeed, although a shareholder vote is required where the corporation conveys, transfers, or leases all or substantially all of its property,<sup>277</sup> individual entities keep their own property. Thus, structurally speaking, Harry and Sallie Mae may configure as a united entity under state partnership law.

### Conclusion

Even supposing that Harry and Sallie Mae proceeded with their joint venture, they still would not be *married*. Suppose that Sallie Mae, by virtue of its status as a *person* and entitled to rights under the Constitution, demands its rights just like natural persons. How would Sallie Mae and Harry go through with the actual marriage filing?

In New York, a couple who intends to be married in New York State must apply to any town or city clerk in the state in person for a marriage license.<sup>278</sup> This license must be signed by both applicants in the presence of the town or city clerk.<sup>279</sup> Because the corporation may only act through its agents,<sup>280</sup> either “the chief executive officer, president, vice president, treasurer, [or] secretary,” would have to accompany Harry to the city clerk.<sup>281</sup> Moreover, in New York, a person wishing to get married is required to establish proof of age and identity by submitting to the issuing clerk both an age-related<sup>282</sup> and identity verification document.<sup>283</sup> To prove its age, Sallie Mae would likely have to hand over a copy of its certificate of incorporation, which would prove its identity and its date of incorporation.

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274. See William A. Snyder, Jr. & James D. Walsh, *Uniform Marital Property Act Affects Spouses' Rights at Death and Divorce*, 18 Est. Plan. 28, 29 (1991).

275. Carlton Herzog, *Ramparts and Palisades: Archetypical Structures in Hostile Battles for Corporate Control*, 42 RUTGERS L. REV. 817, 817 n.9 (1990).

276. 4 COX & HAZEN, *supra* note 246, § 25:1.

277. *Id.*

278. *Information on Getting Married in New York State*, N.Y. DEP'T OF HEALTH, <http://www.health.ny.gov/publications/4210/> (last visited Oct. 25, 2014).

279. *Id.*

280. See 1 COX & HAZEN, *supra* note 200, § 8:1.

281. *Id.* § 8:2.

282. *Id.* (explaining the acceptable age documents include: birth certificates, baptismal records, naturalization records, and census records).

283. *Id.* (explaining the acceptable identity documents include: driver's licenses, passports, employment picture IDs, and immigration records).

Technically, no restrictions exist about what sorts of persons—natural or artificial—may get married. Would a city clerk *really* accept this? It is unlikely, though anything is possible considering Angela Marie Vogel and “Corporate Person” were errantly approved by administrators in Seattle, Washington.<sup>284</sup> Realistically, however, Sallie Mae should not hold its corporate breath.

Although courts have long since established corporate rights under the Constitution, marriage does not seem to be one of them. Nor should it. The extent to which corporate rights are being protected under the Constitution are in stark contrast to the purpose of the Bill of Rights and the Reconstruction Amendments. Perhaps there is no better example of misuse of these constitutional protections than the application of the Fourteenth Amendment, which was originally intended to apply to freed slaves.<sup>285</sup> Instead, it has served the interests of corporations seeking to broaden their rights as “persons.”<sup>286</sup> The extent of corporate personhood should remain limited, lest the courts wish to address other chimerical legal arguments such as the one presented in this Article.

Nevertheless, even with *Citizens United*’s focus on the scope of the constitutional right asserted—irrespective of the person or entity asserting that right—it is not clear that the established right to marriage is a right that is open to corporations. That “right,” established under the protections of liberty afforded by due process, is not available for artificial entities. Nor does the equal protection doctrine appear to be the grimoire for advancing social corporate liberty. Surely a State could recite any number of reasons for why a corporation should not marry a person sufficient to dismiss a suit pursuant to rational basis review.

Likewise, *Hobby Lobby*’s reinvigoration of an aggregate theory of corporate personhood will likely also doom this experiment. The Supreme Court’s holding that corporate rights are derivative of the rights of the small group of shareholders beneath the corporate form unravels the analogy.<sup>287</sup> For instance, “[f]urthering their religious

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284. See *supra* note 3.

285. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296 (1976) (“[T]he 39th Congress [that enacted the Fourteenth Amendment] was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves.”); Angelo Guisado, *Reversal of Fortune: The Inapposite Standards Applied to Remedial Race-, Gender-, and Orientation-Based Classifications*, 92 NEB. L. REV. 1, 9–12 (2013).

286. See Rubin, *supra* note 16, at 567.

287. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

freedom also ‘furthers individual religious freedom.’”<sup>288</sup> *Hobby Lobby* allows corporations to assert RFRA claims to protect the religious liberty of the underlying closely held group of shareholders.<sup>289</sup> The hypothetical marriage between Sallie Mae and Harry does not further the individual freedom to marry for the underlying Sallie Mae shareholders. Really, Harry wishes to further the religious rights of *the corporation itself*, as a “real entity.”<sup>290</sup> The equal protection argument hinges on the corporation’s right to distinguish itself as a quasi-protected class against which it is being discriminated. The aggregate theory is fatal to that argument. So, unfortunately for our cunning protagonist, Harry will have to find repose in a formal corporate partnership, which doubtlessly carries not nearly the same romanticism, for better or for worse.

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288. *Id.* at 2769.

289. *Id.*

290. *See supra* Part I.C.