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Judgment Without Notice: The Unconstitutionality of Constructive Notice Following *Citizens United*

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ABSTRACT

Citizens United v. Federal Election Commission *positions a corporation as an entity entitled to constitutional rights equal to the rights of natural persons. In many situations, this holding may be the impetus for reform and reconsideration of state restrictions on corporate rights that were problematic before the decision. The operation of corporate statutes on corporations chartered in one state but doing business in another state as a foreign corporation is an area in need of this* Citizens United*-inspired review. Although most corporations operate as foreign corporations outside of their state of incorporation, neither the constitutional validity of corporate withdrawal statutes nor the impact of* Citizens United *on procedural due process have been determined. This Article is the first to examine the procedural due process implications of* Citizens United *on corporations.*

The issue presented by Citizens United *is whether the Model Business Corporation Act ("MBCA") and other corporate statutes accurately reflect the new level of equality between natural persons and corporations.* Citizens United *requires states to develop a method of service that treats natural persons, domestic corporations, and foreign corporations equally. Due process requires notice of service on all parties—both natural persons and corporations—reasonably calculated to result in actual notice of suit in all circumstances. States have, however, been permitted to impose conditions on foreign corporations that may not result in actual notice based on the operation of two assumptions: (1) foreign corporations do not exist within a state's borders until they are admitted to do business, and (2) because foreign corporations are a creation of the state, a state may condition foreign corporations' admission within the state's borders upon requirements not imposed on natural persons or domestic corporations. State statutes based on the MBCA require a corporation to indefinitely provide the Secretary of State with an address where notice of service of process may be forwarded. Currently, when a corporation fails to comply with the statute, courts will attribute failure to receive notice to the corporation, subjecting it to a taking of property that violates the corporation's Fourteenth Amendment rights. This Article*

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questions why states have been allowed to continue the practice of limiting the due process rights of foreign corporations when determining whether constructive notice is effective, and whether the continued delineation for service of process purposes between domestic and foreign corporations is constitutionally appropriate following Citizens United. *This Article concludes that such disparate treatment is unconstitutional following the holding in* Citizens United.

A complete elimination of constructive notice on the Secretary of State is the natural outcome of the application of recent precedents to the corporate statutes, but it is not the best result. Treating a corporation as anything more than an artificial legal construct results in legal inequalities that favor the corporation over the natural person. Eliminating all distinctions may protect the corporate right to due process, but it also allows corporations to use withdrawal statutes to evade legal responsibility. States have better, constitutionally valid means for service of process available elsewhere in the MBCA that properly balance the compelling state need to provide natural citizens with a means to serve a withdrawn corporation against the corporation's constitutional rights. This Article proposes that utilizing an alternative means of service on a withdrawn corporation is a reasonable reform that complies with the new regulatory regime created by Citizens United.

TABLE OF CONTENTS

INRODUCTION

Imagine the following scenario:

> You are born and raised in Delaware. Your lifelong dream of being admitted to a university in Boston, Massachusetts, comes true. Massachusetts requires all out-of-state students to register with the Secretary of State when they matriculate. As an out-of-state student, if you leave the state after graduation you must provide an address where the Secretary of State can forward service of process for any legal actions arising from activity conducted while you were a student in the state. You must also provide the state with an updated address any time you move for the rest of your life. You are excited to attend the university, so you comply with the registration requirement.
>
> During your junior year of college, your dorm throws the best party of the year. You are president of the dorm and serve as its public face on campus. A few people from off-campus attend, bringing with them synthetic drugs. Lots of partygoers take the drugs and have an adverse reaction, but all seem to be fine by Monday. You believe you are very lucky that no one was hurt permanently. You go about your remaining time in college without incident and graduate as scheduled. In compliance with the statute, you provide the Secretary of State with the address at your law school in Connecticut before moving.
>
> After law school you move to New York City, but you disregard the requirement to update your address with the Secretary of State of Massachusetts. After three years of law school, you assume the risk of legal action has passed. When you are in your tenth year of practice (fourteen years after college) you receive a notice from a collections agency. It states that you have a default judgment against you in Massachusetts for a tort action involving permanent brain injuries sustained by one of the partygoers during your junior year fifteen years ago. The brain damage could be caused by only the drugs at the dorm party, and a diagnosis cannot be made without an MRI. Therefore, the plaintiff was allowed to sue outside of the statute of limitations for tort actions because he did not discover his injuries until years later.
>
> The notice of default attaches proof of service in the form of a certificate from the Massachusetts Secretary of State stating notice was sent to your address in Connecticut by certified mail. Although forwarded to Connecticut, you never received notice because by then you had graduated law school and moved to New

> York. The certificate shows that notice was returned to the Secretary of State and unclaimed. Your contact information is easy to locate because you are required to provide New York with an address to maintain your law license, yet the plaintiff made no attempts to locate you after service failed. Your attorney advises you to pay the default judgment. Although it is unconstitutional and a violation of due process to deprive persons of property without notice and an opportunity to be heard, the courts have held that states may condition the admission of non-resident students to the state upon a consent to service on the Secretary of State without violating the Constitution.

Thankfully, the scenario above is not the reality for natural persons, as it is a clear violation of due process rights.[1] For all defendants in litigation, due process requires that the defendant be given notice and an opportunity to be heard.[2] Parties may rely on constructive notice, or "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[3] Heroic efforts are not required,[4] however, notice of suit that relies entirely upon courthouse postings, postings on property, and other methods that have minimal chance of resulting in notice are unconstitutional on their own.[5] If the plaintiff knowingly forwards service to an address known to be incorrect or to an incorrect person, notice on the natural

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[1] The Due Process Clause of the Fourteenth Amendment guarantees that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. The Due Process clause has substantive and procedural applications. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846–47 (1992). Substantive due process restricts the government's actions regardless of the procedures used and protects citizens from irrational governmental classifications and invasion of fundamental rights without a compelling governmental justification. *See, e.g.*, City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 198 (2003); Lawrence v. Texas, 539 U.S. 558, 593 (2003) (O'Connor, J., concurring); Daniels v. Williams, 474 U.S. 327, 331 (1986). Procedural due process ensures that a party in litigation is given notice and an opportunity to be heard. *See, e.g.*, Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950); Grannis v. Ordean, 234 U.S. 385, 394 (1914) (citing Louisville & Nashville R.R. Co. v. Schmidt, 177 U.S. 230, 236 (1990)) ("The fundamental requisite of due process . . . is the opportunity to be heard.").

[2] *Mullane*, 339 U.S. at 314; *Grannis*, 234 U.S. at 394.

[3] *Mullane*, 339 U.S. at 314.

[4] Dusenbery v. United States, 534 U.S. 161, 170 (2002).

[5] *See, e.g.*, Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 799 (1983); Greene v. Lindsey, 456 U.S. 444, 453 (1982); Walker v. Hutchinson, 352 U.S. 112, 116 (1956).

person fails.[6] A party with knowledge of both failure and reasonable alternative means must therefore make additional attempts to serve notice before taking property by court action.[7]

The level of effort required by a plaintiff to ensure the defendant actually receives notice is minimized if the defendant is a foreign corporation.[8] For corporations, states must still ensure that notice is reasonably calculated to reach the defendant.[9] However, states are allowed to condition a corporation's admission to do business in a state upon acceptance of terms requiring the corporation to consent to notice upon the Secretary of State. In so doing, the corporation is deemed served when the Secretary of State receives notice, not when the corporation is actually notified of a lawsuit.[10] This latitude results in scenarios in which a corporation may be deprived of property without receiving actual notice and an opportunity to be heard, as is required for natural persons under the Fourteenth Amendment's Due Process Clause.[11] Thus, foreign corporations may face the outcome described in the hypothetical above, even when they have complied with the statute for a reasonable time and when the plaintiff knows of the foreign corporation's actual address.[12]

This discrepancy is further exacerbated for an out-of-state, "foreign," corporation that does business in states that have adopted the Model Business Corporations Act (hereinafter, "MBCA") Under the MBCA withdrawal statute, a foreign corporation that has ceased doing business in a state must file a certificate of withdrawal as well as consent to service on the Secretary of State.[13] States that have adopted a version of the MBCA require a corporation to update the address

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[6] *See* Jones v. Flowers, 547 U.S. 220, 225 (2006); *Mullane*, 339 U.S. at 318. In *Flowers*, the homeowner prevailed in a suit against the county commissioner alleging taking of property without due process. *Flowers*, 547 U.S. at 239. The commission mailed notices, which were returned on two occasions unclaimed, then posted notice by publication. *Id.* at 223–24. The Court held Jones' failure to comply with statutory obligations does not result in an automatic restriction of his due process rights. *Id.* at 232–34. Instead, parties with notice of failure must take additional reasonable measures when alternatives are available. *Id.* at 234. Although *Flowers* is a case of a governmental taking, it is illustrative of the attitude of the court towards individual due process.

[7] *Flowers*, 547 U.S. at 225.

[8] *See, e.g.*, Washington *ex rel.* Bond & Goodwin & Tucker v. Superior Court of Wash., 289 U.S. 361, 365 (1933).

[9] *Id.* at 365–66.

[10] *See* MODEL BUS. CORP. ACT § 15.20(c) (2010); *see also* discussion *infra* § I.C.; *infra* notes 236–240 and accompanying text.

[11] Courts have held that because the corporation is required by statute to provide an address for forwarding service, if service fails because of the corporation's failure to comply with statutes, it remains liable for a default judgment. *See* discussion *infra* Section I.C.; *infra* notes 236–240 and accompanying text. This result contradicts the Court's holding in *Flowers*. *See infra* notes 222–228 and accompanying text.

[12] Foreign corporations are corporations incorporated or chartered out of state. *See* Note, *Foreign Corporations–State Boundaries for National Business*, 59 YALE L.J. 737, 737 (1950).

[13] MODEL BUS. CORP. ACT § 15.20(a) (2010).

on file indefinitely and face the consequences of any failure to update.[14] If a withdrawn foreign corporation fails to receive notice because the Secretary of State forwards it to the last address on file instead of that corporation's actual address, the impact of the error—a default judgment—falls completely on the defendant.[15] This is the case even when the plaintiff knows that the corporation's principal place of business or home office address differs from the address on file with the Secretary of State.[16] Such an outcome is not possible when serving process on natural persons or domestic corporations.[17]

The intent of the withdrawal statutes is to prevent a corporation from withdrawing from a state and evading liability by failing to update its address with the Secretary of State.[18] In this modern era of internet search engines, electronic filings with federal agencies, and corporate websites, however, the withdrawal statutes instead act to reward a willfully ignorant plaintiff or a plaintiff with unclean hands who knowingly relies on the Secretary of State's knowledge of the defendant corporation's address when more accurate company information is available.[19] Courts have found this disparate treatment to be constitutional based on the premise that a corporation does not exist within a state until it is granted admission to that state, and therefore, the state may condition admission upon compliance with the state's corporate statutes.[20] Modern conditions combined with recent precedent compel states and courts to rethink and reform this premise.[21]

There has been little discussion of how recent expansions of corporate constitutional rights and increased recognition of corporations as persons as a result of the *Citizens United* decision impact the relationship of corporations to individuals in the courts.[22] The holdings in *Citizens United* and *Hobby Lobby*

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[14] *Id.*; *see also infra* Section III.*A*.

[15] Tankard-Smith, Inc. Gen. Contractors v. Thursby, 663 S.W.2d 473, 476 (Tex. App. 1983) (holding the defendant responsible for the default judgment).

[16] Autodynamics, Inc. v. Vervoot, No. 14-10-00021-CV, 2011 WL 1260077, at *5–6 (Tex. App. Apr. 5, 2011) (holding that because there is no statutory requirement that the plaintiff provide the nonresident's address for service under the Code, a plaintiff is not required to serve defendant at an address other than the address registered with the Secretary of State, even if the plaintiff knows the defendant has moved).

[17] Domestic corporations are only subjected to substitute service if service on the registered agent fails. In that circumstance, service is made on the secretary of the corporation at the principal place of business. *See, e.g.*, MODEL. BUS. CORP. ACT § 5.04(b) (2010).

[18] *See* MODEL BUS. CORP. ACT. § 15.20 (2010).

[19] *See* discussion *infra* Sections III.*A*., III.*B*.

[20] *See* discussion *infra* Section II.*B*.

[21] *See* discussion *infra* Section III.*C*.

[22] Professor Michalski notes that "[c]ourts . . . have overlooked that the expansion of corporate rights entails the expansion of corporate obligations, including the obligation to submit to the jurisdiction of the right-granting forum." *See* Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood*, 50 SAN DIEGO L. REV. 125, 127 (2013) (footnote omitted). Per Professor Michalski's analysis, when considering court issues, the courts focus on justice, not corporate responsibility, and this focus is misplaced. *See id.* at 150.

require the elimination of distinctions between constitutional "persons," regardless of how corporate rights are assigned during chartering.[23] States must now view the corporation and the natural person equally when analyzing constitutional limits on state authority.[24] States must look to the nature of the right, not to the party exercising the right.[25] Since individuals may not be served without adequate notice,[26] *Citizens United* should be read to hold that a corporation cannot be required to consent to being "deemed served" as a result of service upon a government entity merely by the corporation's inaction.[27] The likelihood of such a holding is reinforced by the *Hobby Lobby* decision.[28]

Although most corporations operate as foreign corporations outside of their state of incorporation, neither the constitutional validity of withdrawal statutes nor the impact of *Citizens United* on procedural due process have been examined. The issue presented by *Citizens United* is whether the MBCA and other corporate statutes accurately reflect the new level of equality between natural persons and corporations. This Article questions whether constructive notice on foreign corporations in general is constitutional following the Court's holdings in *Citizens United* and *Hobby Lobby*.[29] This Article also questions whether state withdrawal statutes infringe upon corporate Fourteenth Amendment rights by requiring perpetual updating, which results in a corporation's failure to receive actual notice.[30] While recognizing that states still retain the right to police and govern corporations, this Article concludes that the failure of a corporation to receive notice in certain circumstances renders these statutes unconstitutional.[31] States have alternative and effective means for serving foreign corporations following withdrawal while protecting their interests; therefore, this Article recommends that states utilize service requirements found elsewhere in corporate law statutes to meet the requirements of *Citizens United*.[32]

Part I of this Article lays the foundation for exploring and rethinking these rights by canvassing the history of corporate due process rights, including how service of process obligations have been defined by the states and interpreted by the courts.[33] Part I also asserts that the intersection of states' rights and corporate personhood has resulted in the development of corporate statutes that have always

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[23] Citizens United v. FEC, 558 U.S. 310, 349–57 (2010); Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, 2768–69 (2014).

[24] *See Citizens United*, 558 U.S. at 349–57.

[25] *See Citizens United*, 558 U.S. at 349–57; *see also infra* notes 163–170 and accompanying text.

[26] *See infra* notes 222–228 and accompanying text.

[27] *See* discussion *infra* Section II.*A*.

[28] *See* discussion *infra* Section II.*B*.

[29] *See* discussion *infra* Part I.

[30] *See* discussion *infra* Part II.

[31] *See* discussion *infra* Part III.

[32] *See* discussion *infra* Section III.*C*.

[33] *See* discussion *infra* Part I.

been on the brink of being unconstitutional.[34] Courts have permitted states to draw distinctions between domestic and foreign corporations and to condition mere access to the forum upon a corporation's surrendering its rights. Going forward, a state may not be able to treat a foreign corporation as it treats a foreign nation, when that corporation is made up of individual citizens vested with constitutional rights that do not disappear when they aggregate as a corporation.[35]

Part II of this Article proposes that if the holding in *Citizens United* is followed, state statutes that require a corporation to consent to constructive notice, and that do not have a likelihood of alerting the corporation of pending suits against it, are not constitutional.[36] A question inspired by *Citizens United* is whether corporations must be given due process rights equal to that of natural persons in the form of actual notice of service.[37] Whether the withdrawal statute and updating service of process requirements violate a corporate person's due process rights turns on whether corporations are deserving of constitutional rights generally.[38] If corporations are "persons" for purposes of constitutional rights, those rights must be applied equally.[39] Part II concludes that corporations are persons; therefore, the *Citizens United* and *Hobby Lobby* personhood requirements should be expanded to encompass a corporation's Fourteenth Amendment rights to adequate notice.[40] States must apply a constructive notice statute to foreign corporations with requirements and results equal to the statutory impact on natural persons and domestic corporations.

Part III of this Article considers how the application of *Citizens United* to corporate Fourteenth Amendment rights renders substitute service on foreign corporations, as it is defined in the MBCA, unconstitutional.[41] Through an examination of MBCA withdrawal provisions, Part III explores the dynamics of the changes *Citizens United* and *Hobby Lobby* have made to corporate due process rights, proposing that the holdings require states to review and reform corporate statutes.[42] By applying the same notice standards used for service of process on

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[34] *See* discussion *infra* Section I.*C.*

[35] This expression of the theory of the firm known as the aggregate theory is found in both *Citizens United* and *Hobby Lobby*. *See infra* note 50 and accompanying text.

[36] *See* discussion *infra* Section II.*A.*

[37] *See Citizens United*, 558 U.S. at 338–41. The Court disregarded the distinction between corporations, natural persons, and citizens; instead, the *Citizens United* majority proclaimed that states must look to the underlying nature of the right, not to the party exercising the right. If rights do not change based on the nature of the party exercising the right, *Citizens United* inspires an inquiry into how other rights may be impacted by equality.

[38] *See* discussion *infra* Section I.*A.*

[39] *See infra* note 37 and accompanying text..

[40] *See* discussion *infra* Section II.*B.*

[41] *See* discussion *infra* Section III.*A.*

[42] *See* discussion *infra* Section III.*B.*

domestic corporations, states may bring the statutes into compliance with the precedents.[43]

This Article also questions why states have been allowed to continue to limit the due process rights of corporations when determining whether constructive notice is effective, and whether the continued delineation for service of process purposes between domestic and foreign corporations is constitutional following *Citizens United*.[44] Following the holdings in *Citizens United* and *Hobby Lobby* to their natural conclusions results in a finding that the withdrawal service provisions found in MBCA statutes are unconstitutional.[45] If states are required by *Citizens United* to treat corporations and natural persons equally, then the withdrawal statutes that draw distinctions between domestic corporations, foreign corporations, and natural persons infringe on corporate constitutional rights. States must now view the corporation and the natural person equally when analyzing constitutional limits on state authority.

I. HISTORICAL SERVICE OF PROCESS FOR CORPORATIONS

Citizens United is not the first case in which the Court extended corporate rights without a clear constitutional justification.[46] The expansion of Fourteenth Amendment rights to corporations is an old trend, starting with *Santa Clara v. Southern Pacific Rail Road Company* in 1886.[47] The Court has taken several approaches to expanding these corporate rights. First, by protecting the corporate rights vis-à-vis property granted in state-issued corporate charters.[48] Second, by

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[43] *See* discussion *infra* Section III.*C.*

[44] *See* discussion *infra* Section II.*A.*

[45] *See* discussion *infra* Section III.*B.*

[46] *See* David Ciepley, *Neither Persons nor Associations: Against Constitutional Rights for Corporations*, 1 J.L. & CTS. 221, 223 (2013) (explaining that in *Santa Clara*, the Court never offered a sustainable argument as to why corporations have constitutional rights); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 411 HASTINGS L.J. 577, 581–82 (1990). Prior to *Citizens United*, the courts recognized that corporations have First Amendment rights to freedom of speech and freedom of the press, Fifth Amendment protection from unreasonable takings, Fourth Amendment protection from unreasonable search and seizure, and Fourteenth Amendment rights to equal protection. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 774, 778 n.14 (1978) (First Amendment); Hale v. Henkel, 201 U.S. 43, 76 (1906) (Fourth Amendment); Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 410 (1896) (Fifth Amendment); Santa Clara v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886) (Fourteenth Amendment).

[47] *See Santa Clara*, 118 U.S. 394.

[48] This premise is known as the artificial entity or concession theory. The artificial entity theory envisions corporations as state approved entities, which exist at the pleasure of the government, are non-corporeal, and may be subject to more extensive regulation than a natural person due to this privileged position. *See* William W. Bratton Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1475 (1989) (describing that the concession/artificial entity theory comes in degrees: a strong version attributes the existence of the corporation to state sponsorship; the weaker version sets up state permission as a regulatory prerequisite to doing business). Under this theory, the corporation has rights only incidental to the corporate charter.

analogizing the corporation itself to "persons."[49] Third, by finding that the corporate person's rights are derived from the rights of the association of citizens who have united in the corporate form.[50] Those persons do not lose their rights simply because they operate through a separate entity.[51]

The Fourteenth Amendment protections prohibit a state from depriving any person of life, liberty, or property without due process of law.[52] Before property may be taken away by the government, the Due Process Clause requires that the individual be given an opportunity to protect their property interests.[53] For purposes of court proceedings, the clause has been interpreted to require that a party be given the opportunity to have its day in court before a neutral tribunal.[54] Early on, the Court ignored the use of the word "persons," declaring, without justification, that the word included corporations.[55]

The ability of corporate due process rights to enjoin state action has evolved over time; however, states have maintained the authority to treat foreign corporations differently.[56] Historically, foreign corporations were treated as artificial entities outside of the state in which they were incorporated, invisible to

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[49] *See* Lyman Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70 BUS. LAW 1, 8 (2014) ("[C]orporations own property, enter into contracts, and commit torts. They can sue and be sued in their own right. They are subject to penalties if they violate applicable criminal laws. They must comply with a vast array of federal and state regulations . . . . [T]hey are subject to income tax liability on the net income generated by their commercial activities . . . . [T]he rights and obligations of corporations are not simply those of their shareholders, officers, directors, employees, or other humans who participate in or are affected by the corporation's activities").

[50] This approach, known as the aggregate theory, envisions corporations as being made up of individuals vested with constitutional rights, whose rights do not disappear when they unite in a corporate form. *See* County of San Mateo v. S. Pac. R.R. Co., 13 F. 722, 744 (1882) ("It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation. We cannot accept such a conclusion."); *see also* Reuven S. Avi-Yonah, Citizens United *and the Corporate Form*, 2010 WIS. L. REV. 999, 1012–13 (2010) (citations omitted) (stating individuals do not lose their right to equal protection because of the association).

[51] *See* Avi-Yonah, *supra* note 50, at 1013.

[52] *See* U.S. CONST. amend. XIV § 1.

[53] *See* Jones v. Flowers, 547 U.S. 220, 232 (2006); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950); Washington *ex rel.* Bond & Goodwin & Tucker v. Superior Court of Wash., 289 U.S. 361, 365 (1933).

[54] *See* Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976) (citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951)); *Mullane*, 339 U.S. at 314.

[55] *See* Santa Clara v. S. Pac. R.R. Co., 118 U.S. 394, 394 (1886); *see also* Susanna Kim Ripken, Citizens United, *Corporate Personhood & Corporate Power: The Tension Between Constitutional Law and Corporate Law*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 285, 288 (2012) ("[O]ver the last 125 years, the Supreme Court has held corporations are persons entitled to numerous constitutional protections, even though the word 'corporation' does not appear anywhere in the Constitution."); Ciepley, *supra* note 46, at 222 (asserting that the drafters of the Fourteenth Amendment did not intend to include corporations as persons granted due process and equal protection rights).

[56] Bank of Augusta v. Earle, 38 U.S. 519, 519 (1839).

other jurisdictions until admitted to do business within such jurisdictions' borders.[57] As a result of this view of corporations as creatures created and managed by the state, federal courts historically have been leery of interfering with what was defined under state law.[58] Even today, following recent advancements in corporate rights, courts have done little to prohibit additional state regulation of foreign corporations.[59] This Part explores the history of corporate due process, analyzes the impact of state laws on corporate due process prior to *Citizens United*, and briefly discusses the development of state corporate statutes.

A. A History of Corporate Due Process Rights

As with all of the amendments to the Constitution, the text of the Fourteenth Amendment is focused on persons, not corporations.[60] The Fourteenth Amendment requires that "[n]o state shall make or enforce any law" that "deprive[s] any person of life, liberty or property without due process of law."[61] The Amendment protects "life" and "liberty"—rights that only a natural person can enjoy.[62] Initially, it was the protection of the third item, property, which enabled expansion of due process rights to corporations.[63] For purposes of court proceedings, due process has been interpreted to mean the right to be heard at a meaningful time, in a meaningful way, before suffering a loss of any kind.[64]

Due process was one of the earliest corporate constitutional rights acknowledged by the courts. And Due Process has been discussed most often with

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[57] *See* Bank of Augusta v. Earle, 38 U.S. 519, 524, 559 (1839); *see also* Note, *supra* note 12, at 739.

[58] *See* Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, 2756 (2014) (discussing that "[c]ourts will turn to that structure and the underlying state law in resolving disputes."); *see also* discussion *infra* Section I.C.

[59] *See* Stefan J. Padfield, *Finding State Action When Corporations Govern*, 82 TEMP. L. REV. 703, 722 (2009) (explicating that corporations are "creatures of the State").

[60] *See* U.S. CONST. amend. XIV § 1.

[61] *Id.*

[62] *See* Ins. Co. v. New Orleans, 13 F. Cas. 67, 68 (C.C.D. La. 1870) (No. 7,052) ("Only natural persons can be born or naturalized; only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the provisions of the first two clauses . . . .").

[63] *See* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1649 (1988) ("[T]he corporate personhood doctrine of *Santa Clara* represented an efficient way for the corporation to assert the property rights of its shareholders.").

[64] *See* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (citations omitted) ("This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest."); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) (citations omitted) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). Corporations have also been held to have liberty rights under the Fifth Amendment. *See* Old Dominion Dairy Prods., Inc. v. Sec. of Def., 631 F.2d 953, 962 (D.C. Cir. 1980).

regard to the rights of corporations, not natural persons.[65] In an often-quoted passage on corporate rights found in *Santa Clara County v. Southern Pacific Railroad Company*, the Court proclaims that it "does not wish to hear argument on the question whether the . . . Fourteenth Amendment . . . applies to these corporations. We are all of [the] opinion that it does."[66] In *Santa Clara*, the Court held that a corporation's property could not be taxed differently from that of a natural person.[67] Thus, the property was the source of the corporation's constitutional rights.[68] In *San Mateo v. S. Pac. R.R. Co.*, a railroad case that preceded *Santa Clara*, a Federal District Court in California held, "whenever a provision of the constitution, or of a law, guaranties to persons the enjoyment of property, or affords to them means for its protection, or prohibits legislation injuriously affecting it, the benefits of the provision extend to corporations . . . ."[69] In *Santa Clara* and *San Mateo,* the corporations were granted property rights during chartering: a state may not impose unconstitutional limits on rights which it has granted.[70]

Following *Santa Clara*, the Court continued the expansion of Fourteenth Amendment rights. For example, in *Southern Railway Company v. Greene*, the Court concluded that the corporation is a person under the Fourteenth Amendment due to the property rights granted when it was chartered by the state.[71] This trend persists through a series of additional railroad cases.[72] Particularly in *Covington & Lexington Tpk. Rd. Co. v. Sanford*, the Court declared: "It is now settled that corporations are persons, within the meaning of the constitutional provisions forbidding the deprivation of property without due

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[65] *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 780 n.15 (1978); Bell v. Maryland, 378 U.S. 226, 262 (1964); Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 80–81 (1938); Grosjean v. Am. Press Co., 297 U.S. 233, 244 (1936); Pierce v. Soc'y of Sisters, 268 U.S. 510, 533–34 (1925); Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U.S. 26, 28 (1889); Santa Clara v. S. Pac. R.R. Co., 118 U.S. 394, 409 (1886). As Justice Hugo Black observed, in the first fifty years after *Santa Clara*, of cases analyzing the Fourteenth Amendment "less than one-half of one per cent. invoked it in protection of the negro race, and more than fifty per cent. asked that its benefits be extended to corporations." *Conn. Gen. Life Ins. Co.*, 303 U.S. at 90.

[66] *Santa Clara*, 118 U.S. at 398; *see also* Minneapolis & St. Louis Ry. Co., 129 U.S. at 28 (extending Fourteenth Amendment procedural due process to corporations).

[67] *Santa Clara*, 118 U.S. at 416.

[68] *Id.*

[69] County of San Mateo v. S. Pac. R.R. Co., 13 F. 722, 744 (C.C.D. Cal. 1882).

[70] *See* Morton J. Horowitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 186 (1985) (opining that, generally, when courts invoke the concession theory, they are only concerned with protecting the rights granted by the state, not with expansion of rights); *see also* Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11. U.C. DAVIS BUS. L.J. 221, 225 (2011) ("[C]orporations are subordinate to the government, as the government can create and regulate them."); David Millon, *Theories of the Corporation*, 1990 DUKE. L.J. 201, 212 (1990).

[71] S. Ry. Co. v. Greene, 216 U.S. 400, 412–13 (1910).

[72] *See* Covington & Lexington Tpk. Rd. Co. v. Sanford, 164 U.S. 578, 592 (1896); Gulf of Colo. & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 154 (1897).

process of law, as well as a denial of equal protection of the laws."[73] The courts have operated as if corporations were included in the intended beneficiaries of the Fourteenth Amendment because of their property rights.

The right of corporations to the Fourteenth Amendment's procedural due process mandates has been consistently reaffirmed over the last century.[74] Often in dissents or dicta, however, judges have commented on the lack of analysis and support for these corporate due process rights. For example, in a 1949 decision, Justice Douglas remarked that as a result of the Court's repeated selective application of the personhood designation from clause to clause of the Constitution, the Court had revised the meaning of the Fourteenth Amendment.[75] In *Lassiter v. Department of Social Services*, Justice Stewart expressed a similar sentiment, stating that the Due Process Clause results in judicial activism because it "can never be precisely defined. '[U]nlike some legal rules' . . . due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.'"[76] The flexibility of due process, combined with this lack of clearly defined rules, precedent in Fourteenth Amendment cases, and the holdings of *Citizens United* and *Hobby Lobby*, makes it easy to envision a successful challenge to the MBCA withdrawal statute.[77] The Court's adoption of a stronger view of the corporation and its rights in those cases renders the current approach to corporate due process unconstitutional.

B. State Limitations on Corporate Due Process

The Court has defined due process protections to require states to guarantee that all "persons"—both natural and corporate—shall not be deprived of property without due process of law.[78] The case law clearly establishes that due process

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[73] *Covington & Lexington Tpk. Rd. Co.*, 164 U.S. at 592.

[74] *See, e.g.*, Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 113–14 (2014) (providing a survey of corporate due process rights).

[75] Wheeling Steel Corp. v. Glander, 337 U.S. 562, 579 (1949) (asserting that this selective application of personhood designation within the context of the Fourteenth Amendment "requires distortion to read 'person' as meaning one thing, then another within the same clause and from clause to clause. It means, in my opinion, a substantial revision of the Fourteenth Amendment."); *see also* Ripken, *supra* note 55, at 300.

[76] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24 (1981) (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

[77] This is particularly true for the fact-intensive holding in *Hobby Lobby*. Many view the opinion as a narrowly tailored holding that applies only to the unique condition of the closely held corporation with a religious purpose. *See* discussion *infra* Section II.*B.* Courts issue similar due process opinions perceived to apply narrowly to the factual scenario contemplated by the court, but which results in reforms to due process generally. *See, e.g.*, Jones v. Flowers, 547 U.S. 220, 232 (2006); *see also* Mathews v. Eldridge, 424 U.S. 319, 334 (1976); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[78] *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 824 (1978) (Rehnquist, J., dissenting) ("[W]hen a State creates a corporation with the power to acquire and utilize property, it necessarily and implicitly guarantees that the corporation will not be deprived of that property absent due process of law.").

protects the property rights of corporations, either as an artificial entity or as an extension of the rights of the shareholders.[79] If a corporation is given property rights, it then has the right to a day in court to protect those rights.[80] Due process requires the state to develop regulations to ensure that corporations receive notice of suit reasonably calculated so that they are allowed an opportunity to present objections.[81] Through due process, corporations are entitled to "the same protection of equal laws that natural persons . . . have a right to demand under like circumstances."[82] A defendant must be given an opportunity to either appear in court or default.[83] Any method for service must be reasonably calculated *under all circumstances* to provide notice of suit.[84] Despite these clear and undisputable proclamations by the courts, foreign corporations have long been denied full protection of due process because, prior to *Citizens United*, courts found withdrawal statutes to meet these requirements.[85]

Historically, courts have made a distinction between foreign and domestic corporations, treating domestic corporations similar to natural persons and foreign corporations like foreign nations.[86] Foreign corporations were treated as artificial entities outside of the state in which they were incorporated, invisible to other jurisdictions until admitted to do business within them.[87] Such treatment seems particularly outdated in the modern context of multi-state and multi-national corporations.[88] In addition, these distinctions may be viewed as arbitrary following *Citizens United* and *Hobby Lobby*, as both cases advocate for states to examine the

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[79] *See, e.g.*, Nw. Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906). Scholars also view *Santa Clara* as a representation of the aggregate theory of the firm. Under the aggregate theory, the corporation's rights are derived from the rights of the individuals who form the corporation. Those rights do not disappear when the individuals unite in the corporate form. For an analysis of how the aggregate theory applies to the *Santa Clara* decision, *see* Hovenkamp, *supra* note 63, at 1649 ("[T]he corporate personhood doctrine of *Santa Clara* represented an efficient way for the corporation to assert the property rights of its shareholders.").

[80] *See Mathews*, 424 U.S. at 333; *see also* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) ("[T]wo central concerns of procedural due process [are] the prevention of unjustified or mistaken depravations [of property] and the promotion of participation and dialogue by affected individuals in the decision making process.").

[81] *See* Mullane v. Cent. Bank & Tr. Co., 339 U.S. 306, 314 (1950); *see also Flowers*, 547 U.S. at 232.

[82] Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 400 (1928).

[83] *See Mullane*, 339 U.S. at 314.

[84] *See id.*

[85] *See* discussion *infra* Section III.*A*.

[86] *See* Bank of Augusta v. Earle, 38 U.S. 519, 524, 559 (1839); *see also* Note, *supra* note 12, at 739.

[87] *See Earle*, 38 U.S. at 588; *see also* Note, *supra* 12, at 739.

[88] Even in the 1950s when the Model Business Corporation Act was being developed, scholars questioned the continuation of the fiction of the foreign corporation. *See, e.g.*, Note, *supra* note 12, at 757–58.

nature of the right—not the party exercising the right—when determining if a restriction violates the Constitution.[89]

States are permitted to police the right to do business within their borders through regulations and restrictions imposed only on foreign corporations.[90] As time passed and corporations became more prevalent, states took steps to develop more stringent regulatory schemes, exposing a clear intent to distinguish between corporations and natural persons.[91] States were motivated by a desire to protect corporations and other businesses founded within the their borders, and the desire to protect their citizens from corporations that may utilize their non-corporeal form to evade liability.[92] Thus, states regulate foreign corporate entry into their borders, restricting corporate activity and imposing requirements for service and other activities.[93] States have a legitimate interest in holding foreign corporations liable for actions arising from activity within their borders.[94]

Early on, in *Bank of Augusta v. Earle*, the Supreme Court analogized foreign corporations to foreign states holding, "Every principle of law which allows foreign states to sue in the Courts of other countries, applies to corporations."[95] Under the logic first articulated in *Earle*, state regulation of foreign corporations generally does not violate due process.[96] States may exclude a foreign corporation from carrying on intrastate activities when a foreign corporation has not fulfilled the state's qualification requirements. [97] Equal protection does not prevent the exclusion of foreign corporations altogether or the imposition of conditions for

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[89] Citizens United v. FEC, 558 U.S. 310, 339–42 (2010); Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, 2768–69 (2014); *see* discussion *infra* Part II.

[90] *See, e.g.*, *Earle*, 38 U.S. at 589.

[91] *See* Mayer, *supra* note 46, at 585–88. Professor Mayer summarizes the history of state and federal corporate regulation through the progressive era. Mayer notes that while states developed regulations, corporations still preferred state regulation to federal control. *See id.* at 585 (citations omitted).

[92] Although procedural due process does not involve a balancing test, some scholars have argued that *Flowers* advances the idea that such balancing indicative of substantive due process is now appropriate for procedural due process as well. Patrick J. Borchers, Essay, Jones v. Flowers*: An Essay on a Unified Theory of Procedural Due Process*, 40 CREIGHTON L. REV. 343, 351-52 (2007). When considering whether a restriction is appropriate under substantive due process analysis, courts consider "the private interest that will be affected by the official action; . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value . . . of additional or substitute procedural safeguards; . . . and finally, the government's interest." Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

[93] *See Earle*, 38 U.S. at 527–28.

[94] *See* St. Mary's Franco-Am. Petroleum Co. v. West Virginia, 203 U.S. 183, 191 (1906).

[95] *Earle*, 38 U.S. at 525.

[96] *Id.*

[97] *See St. Mary's Franco-Am. Petroleum Co.*, 203 U.S. at 191 ("It is argued that the act of February 22, 1905, is invalid under the 14th Amendment, in that it deprives the company of liberty of contract and property without due process of law, and denies it the equal protection of the laws. But, in view of repeated decisions of this court, the contention is without merit. The state had the clear right to regulate its own creations, and *a fortiori*, foreign corporations permitted to transact business within its borders.").

entry.[98] This relies on a fiction to impose conditions on foreign corporations that would not be acceptable if imposed on natural, out-of-state persons. A state may not prevent natural persons from crossing its borders, nor may it condition entry into the state on terms that are more favorable to domestic persons.[99] For a corporation, restrictions on the opportunity to do business within a state are the equivalent of a natural person being denied the opportunity to cross state lines. As a result, under *Citizens United*, this fiction operates to create an unconstitutional distinction between natural persons and corporations.

Prior to *Citizens United*, courts allowed restrictions of the Fourteenth Amendment's procedural due process requirements as applied to foreign corporations.[100] A foreign corporation could not object to a statute based simply on the premise that it would be unconstitutional as applied to those in another or dissimilar situation, such as a natural person or domestic corporation.[101] This is because states operated under the fiction that a foreign corporation was not a "person" within the meaning of constitutional protections until it was granted permission to do business within a state's borders.[102] Before it is granted admission, a corporation is "a mere artificial being" of the state where it is created, but in another state, where "that law ceases to operate, and is no longer obligatory, the corporation can have no existence."[103] Yet, states are prohibited from pretending that natural persons are not entitled to full legal protections until they are formally admitted. Instead, merely being present within a state grants natural persons legal privileges and subjects them to that state's laws and limitations, a privilege not extended to foreign corporations.

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[98] *See* W. & S. Life Ins. Co. v. State Bd. of Equalization of Ca., 451 U.S. 648, 656–58 (1981); Phillips Petroleum Co. v. Jenkins, 297 U.S. 629, 631–32 (1936); Washington *ex rel.* Bond & Goodwin & Tucker v. Superior Court of Wash., 289 U.S. 361, 364 (1933).

[99] *See* U.S. CONST. art. IV, § 2, cl. 1.

[100] Washington *ex rel.* Bond & Goodwin & Tucker v. Superior Court of Wash., 289 U.S. 361, 365–66 (1933)

[101] *See* Bourjois, Inc. v. Chapman, 301 U.S. 183, 190 (1937); Premier-Pabst Sales Co. v. Grosscup, 298 U.S. 26, 227 (1936); *Washington* ex rel. *Bond*, 289 U.S. at 366; Ry. Express Agency, Inc. v. Virginia, 282 U.S. 440, 444 (1931).

[102] *See Earle*, 38 U.S. at 519–20; *see also* Am. Ry. Express Co. v. Royster Guano Co., 273 U.S. 274, 280 (1927); Mut. Reserve Fund Life Ass'n v. Phelps, 190 U.S. 148 (1903); St. Clair v. Cox, 106 U.S. 350, 352 (1882); Lafayette Ins. Co. v. French, 59 U.S. 404, 407 (1855).

[103] *Earle*, 38 U.S. at 520. This treatment of foreign corporations creates a negative incentive to properly register to do business in a jurisdiction. Foreign corporations cannot escape jurisdiction by failing to register. Foreign corporations can, however, avoid historically inequitable treatment and any obligations imposed by the state. The purpose of registration is to ensure foreign corporations may be held responsible for any legal action that may arise due to their conduct; the purpose is not to generate default judgments in favor of state residents. However, to the extent that the corporate statutes act to disadvantage foreign corporations and deprive them of procedural due process rights, they have the effect of making corporations fail to register and make it more difficult for residents to recover damages.

Once a corporation is admitted to do business within a state, it is entitled to due process.[104] However, courts have repeatedly held that the ability to conduct business within a state is adequate consideration for a corporation to agree to limit its procedural due process rights by agreeing to be deemed served through statutory service of process on an agent.[105] If a corporation fails to receive notice of service due to its failure to comply with statutory requirements for maintaining an agent, or providing an address, the state does not violate due process if it moves forward as if the corporation received actual notice.[106] The state is merely required to ensure that constructive notice by substitute service on the Secretary of State is executed, and that such service is reasonably calculated to provide notice and an opportunity to be heard to the foreign corporation in all circumstances.[107] But when a foreign corporation fails to update its address, the withdrawal statutes substitute service is not reasonably calculated to provide notice and an opportunity to be heard.[108]

Withdrawal statutes draw a distinction between individuals, foreign corporations, and domestic corporations.[109] States knowingly impose conditions on corporations that may result in a failure to receive actual notice and which do not equate to the constructive notice standards imposed on individuals.[110] Because the foreign corporation is non-existent before being admitted to the State, courts before *Citizens United* did not find this outcome to violate due process.[111] *Citizens United* and *Hobby Lobby*, however, may signal a change in how states can constitutionally regulate a foreign corporation.[112] If corporations are now embodied with rights equal to those of natural persons at their inception, deeming foreign corporations non-existent until they are admitted to a state will not stand under either case.

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[104] *See* Hunter v. Mut. Reserve Life Ins. Co., 218 U.S. 573, 580 (1910).

[105] *Washington* ex rel. *Bond*, 289 U.S. at 363; Bagdon v. Philadelphia & Reading Coal & Iron Co., 111 N.E. 1075, 1076 (N.Y. 1916).

[106] *Washington* ex rel. *Bond*, 289 U.S. at 364.

[107] *See* Milliken v. Meyer, 311 U.S. 457, 463 (1940); Blackmer v. United States, 284 U.S. 421, 440 (1932); Clemens v. District Court, 390 P.2d 83, 86 (Colo. 1964); Sgitcovich v. Sgitcovich, 241 S.W.2d 142, 146 (Tex. 1951).

[108] *See* discussion *infra* Section III.*A*.

[109] *See, e.g.*, MODEL BUS. CORP. ACT. § 15.20 (2010) (outlining requirements for foreign corporations following withdrawal from a jurisdiction, and requiring foreign corporations to perpetually provide the secretary of state with an address for service following withdrawal); *see* discussion *infra* Section III.*C*.

[110] *See, e.g.*, Jones v. Flowers, 547 U.S. 220, 232 (2006) (When analyzing a failure of service of process on a natural person, courts require that the constructive notice be reasonably calculated to result in notice in all circumstances, and require the party to take reasonable measures after such notice fails.); *see* discussion *infra* Section III.*A*.

[111] *See, e.g.*, Bank of Augusta v. Earle, 38 U.S. 519, 527 (1839) (Once a foreign corporation seeks permission to do business in a state, that state may, consistent with due process, provide a mechanism for its residents to serve the corporation within the State even after the corporation has ceased doing business there.); *see supra* notes 95–98 and accompanying text.

[112] *See supra* note 18 and accompanying text.

C. The Development of Corporate Statutes

While the Supreme Court has made numerous proclamations with regard to constitutional rights over the years, it is clear that "the corporation . . . owes its existence and attributes to state law."[113] States have assumed most responsibility for the regulation of corporations.[114] State laws define corporations, limit their operational purposes, and impose regulations upon them.[115] States also define the legal consequences of corporations' being recognized to do business within their borders.[116] Since corporations are creatures of the state, federal courts historically have been leery of interfering with what was defined by the states under state law.[117] Today, scholars and courts broadly recognize state law as central to the regulation of corporations.[118]

As such, courts have continued to give deference to state corporate statutes in the face of disparate outcomes. This allows states to police corporations and to favor domestic corporations over foreign corporations.[119] Service of process is an area that illustrates these outcomes. It has long been established that once a foreign corporation seeks permission to do business in a state, that state may, consistent with due process, provide a mechanism for its residents to serve the corporation within the State even after the corporation has ceased doing business there.[120] It is only when the state-chosen means of service is arbitrary or unreasonable that such service violates due process.[121] Before *Citizens United*, many courts found actual notice was not required and that failure to receive notice of suit, which was the fault of the corporation's own negligence, did not violate due process.[122]

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[113] CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 94 (1987).

[114] *See* Mayer, *supra* note 46, at 584 (citations omitted); *see also* Garrett, *supra* note 74, at 105.

[115] *See* Garrett, *supra* note 74, at 105; Reza Dibadj, *(Mis)Conceptions of the Corporation*, 29 GA. ST. L. REV. 731, 735–36 (2013).

[116] *See* Garrett, *supra* note 74, at 105; Mayer, *supra* note 46, at 584.

[117] *See* Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, 2756 (2014) (discussing that "[c]ourts will turn to that structure and the underlying state law in resolving disputes.").

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

[119] *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2775.

[120] Bank of Augusta v. Earle, 38 U.S. 519, 527–28 (1839).

[121] Sieg v. Int'l Envtl. Mgmt., Inc., 375 S.W.3d 145, 155 (Mo. Ct. App. 2012) (citing Washington *ex rel.* Bond & Goodwin & Tucker v. Superior Court of Wash., 289 U.S. 361, 364–65 (1933)).

[122] *See, e.g.*, Washington *ex rel.* Bond & Goodwin & Tucker v. Superior Court of Wash., 289 U.S. 361, 365–66 (1933) ("The power of the state altogether to exclude the corporation, and the consequent ability to condition its entrance into the state, distinguishes this case from those involving substituted service upon individuals, whose entrance into a state may render them amenable to action there, only if the statute providing for substituted service incorporates reasonable provision for giving the defendant notice of the initiation of litigation.") (internal citations omitted).

How states treat corporations chartered outside of their borders can heavily impact corporate operations. This is because corporations tend to incorporate in a jurisdiction that is the least restrictive. As a result, most corporations still choose to incorporate in Delaware, but they do business all over the country as foreign corporations.[123] The law of Delaware governs the internal affairs of these corporation, but the law of the state where an incident occurs governs procedural rules, including service of process. Therefore, while Delaware may be the most useful jurisdiction to analyze for determining matters related to corporate governance, the MBCA is more influential for laws governing the day-to-day interactions of foreign corporations.[124] The MBCA has been adopted in whole or in part by thirty-eight jurisdictions.[125] Thus, the withdrawal requirements found in the MBCA have an impact on most corporations.

Because most states do not have a legacy of comprehensive corporate case law like that found in Delaware, the text and comments accompanying the MBCA have heavily influenced how the regulations are enforced and interpreted in the courts.[126] The MBCA has adopted the position that a state may condition the right of a foreign corporation to do business within its borders on terms that do not apply to domestic corporations.[127] Scholars have long expressed concern over the inequitable treatment of foreign and domestic corporations in this paradigm where corporations that originate in the United States are treated as foreigners for purposes of interstate commerce.[128] Upon admission, each state requires that a corporation name an agent for service of process or that the corporation appoint the Secretary of State to receive service of process.[129] Each state also has requirements for a corporation that wishes to "withdraw" or cease doing business within the state.[130]

The MBCA withdrawal statute requires a foreign corporation that ceases to do business within a state to file a certificate of withdrawal, revoke the authority of its registered agent, consent to service on the Secretary of State, and provide an

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[123] *See* Note, *supra* note 12 at 737 n.4.

[124] *See* Jeffrey M. Gorris et al., *Delaware Corporate Law and the Model Business Corporation Act: A Study in Symbiosis*, L. & CONTEMP. PROBS., Winter 2011, at 107, 108.

[125] *See* Alan R. Palmiter, CORPORATIONS: EXAMPLES AND EXPLANATIONS 9 (6th ed. 2009).

[126] *See* Gorris et al., *supra* note 124, at 108.

[127] *Compare* MODEL BUS. CORP. ACT § 17.01 CMT. (2010) (providing "Section 17.01 applies the MBCA to all corporations to which that application is constitutionally permissible."), *with* MODEL BUS. CORP. ACT § 15.01(a) (2010) (providing a foreign corporation may not transact business in a state "until it obtains a certificate of

authority from the secretary of state.").

[128] *See, e.g.*, Note, *supra* note 12 at 740–41.

[129] *See, e.g.*, CAL CORP. CODE § 2117 (West 2016); DEL. CODE ANN. tit. 8, § 371 (West 2016); N.Y. BUS. CORP. LAW § 1304 (McKinney 2016); MODEL BUS. CORP. ACT § 15.03 (2010).

[130] *See, e.g.*, MODEL BUS. CORP. ACT. § 15.20 (2010).

address for the Secretary of State to forward service.[131] Such a corporation is then deemed served when service of process is received by the Secretary of State.[132] There is no case law specifically interpreting the current withdrawal provisions of the MBCA. The official comment to the MBCA, however, states, "[t]here is no time limit on the obligation to advise the Secretary of State of changes of mailing address."[133] In comparison, Delaware law requires a corporation to provide an address for service at the time of withdrawal, but is silent on how long a corporation must update the address with the Secretary of State.[134] Eight other states also take this approach.[135] Two MBCA states, Oregon and Vermont, appear to see the issue with the MBCA provision and have imposed a time requirement for reporting a forwarding address.[136]

By requiring perpetual updating, the MBCA places the burden of the plaintiff's errors on the defendant, and the MBCA may reward bad actors with a victory by default judgment.[137] The MBCA does not penalize the plaintiff who ignores current, readily available corporation information and instead purposely indicates an erroneous address on file with the Secretary of State.[138] This outcome is premised on the idea that the defendant corporation that fails to comply with the statutes does so at its own peril.[139] The statutes also are premised on the view that a

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[131] *See id.* The state's compelling reason for requiring perpetual updating for a foreign corporation no longer doing business in the state stems from the perpetual life of the corporation. As a natural person, liability is limited by mortality. No such natural end to a corporation's life exists. The ability to live indefinitely, however, does not justify the burden on the corporate defendant nor the possibility of the reward given to the bad actor plaintiff. When combining advances in technology, federal regulatory reporting requirements, and the general ease of locating correct and current information on a corporation in modern times, a new analysis of the withdrawal statutes is warranted. The holding in *Citizens United* adds weight to this premise.

[132] MODEL BUS. CORP. ACT § 15.20(c) (2010).

[133] MODEL BUS. CORP. ACT. §15.20 CMT. (2010).

[134] DEL. CODE ANN. tit. 8, § 381 (West 2016).

[135] *See* ALASKA STAT. ANN. § 10.06.780 (West 2016); HAW. REV. STAT. ANN. § 414-451 (West 2016); IOWA CODE ANN. § 490.1520 (West 2016); LA. STAT. ANN. § 12:312 (2016); MINN. STAT. ANN. § 303.16 (West 2016); OKLA. STAT. ANN. tit. 18, § 1135 (West 2016); 15 PA. STAT. AND CONS. STAT. ANN. § 415 (West 2016); 7 R.I. GEN. LAWS ANN. § 7-1.2-1412 (West 2016).

[136] Oregon and Vermont have adopted a modified version of the MBCA updating requirement, including a number of years in which the corporation must update its address. *See* OR. REV. STAT. ANN. § 60.734 (West 2016) (5 years); VT. STAT. ANN. tit. 11A, § 15.20 (West 2016) (7 years). Although not a MBCA state, Missouri has a similar provision to MBCA § 15.20, but places a five-year cap on the requirement to update. *See* MO. ANN. STAT. § 351.596 (West 2016).

[137] *See infra* notes 260–267 and accompanying text.

[138] *See* MODEL BUS. CORP. ACT. §15.20 (2010); *see also infra* notes 240–50 and accompanying text.

[139] *See, e.g.*, Campus Invs., Inc. v. Cullever, 144 S.W.3d 464, 466 (Tex. 2004). ("When substituted service on a statutory agent is allowed, the designee is not an agent for *serving* but for *receiving* process on the defendant's behalf. . . . A certificate . . . from the Secretary of State *conclusively* establishes that process was served.") (internal citations omitted); *see* discussion *infra* Section III.*A*.

corporation with perpetual life has a perpetual duty to monitor a jurisdiction.[140] These reasons are not in line with the requirements of procedural due process, particularly under the new paradigm created by *Citizens United*.[141]

The MBCA embodies the holdings of pre-*Citizens United* case law. The MBCA creates corporations, both foreign and domestic, that are given "the same powers as an individual to do all things necessary and convenient to carry out its business and affairs . . . ."[142] A foreign corporation, however, also has its rights restricted by state regulation because, "the right of a foreign corporation to enter a state to engage in business depends on the consent of the state."[143] In addition, under the MBCA, a corporation has an identity that is separate and distinct from human beings. The issue presented by *Citizens United* is whether the MBCA and other corporate statutes accurately reflect the new level of equality between natural persons and corporations.

II. *CITIZENS UNITED* AND THE EVOLUTION OF CORPORATE RIGHTS

In 2011, the *Citizens United* decision expanded corporate First Amendment rights, holding that distinctions based on who is asserting a right are improper.[144] *Citizens United* considered whether corporate free speech included political speech, even though a corporation is not a citizen capable of voting.[145] The Court disregarded this distinction between corporations, natural persons, and citizens; instead, the *Citizens United* majority proclaimed that states must look to the underlying nature of the right, not to the party exercising the right.[146] Although *Citizens United* is viewed as an overreach that transcends previous corporate jurisprudence, the idea that corporations are persons deserving of rights equal to those of natural citizens is not new.[147]

Citizens United is in line with a trend in corporate constitutional law that began as early as the 1960s, and views corporate personhood, and the rights accompanying that status, as existing based on the nature of the right itself.[148] In keeping with this paradigm, *Citizens United* envisions a corporation as equal to a natural person and extends rights to a corporation by looking to the history of the

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[140] *See* MODEL BUS. CORP. ACT. §3.02 (2010); *see* also discussion *infra* Section III.*A*.

[141] Citizens United v. FEC, 558 U.S. 310, 349–56 (2010). This outcome not only contradicts the requirements of *Citizens United*, but also *Flowers*. *See* discussion *infra* Section III.*B*.

[142] MODEL BUS. CORP. ACT § 3.02 (2010).

[143] Kaw Boiler Works v. Frymyer, 227 P. 453, 455 (Okla. 1924); *see also* Hale v. Henkel, 201 U.S. 43, 74 (1906) ("[T]he corporation is a creature of the state . . . . presumed to be incorporated for the benefit of the public.").

[144] *Citizens United*, 558 U.S. at 338–41.

[145] *Id.* at 342–55.

[146] *Id.*

[147] *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 780 n.15 (1978).

[148] *Id.* at 777–78 (holding that the proper question is whether the activity that falls within are what the Constitution meant to protect).

amendment, or to the underlying purpose of the amendment, to justify the extension of corporate rights.[149] Thus, when viewing the decision in light of precedent, *Citizens United* is no surprise; it is merely the end of more than fifty years of expanding corporate rights.[150]

This is particularly true for rights already given vast leeway, like Fourteenth Amendment due process rights.[151] The *Hobby Lobby* decision is an example of this. *Hobby Lobby* expands the religious rights of corporations, holding that if a corporation has a religious purpose, it also has religious rights derived from the natural persons who unite through the corporate form.[152] If *Hobby Lobby* is any indication of the direction of future court decisions, it shows that future challenges will encompass an analysis of the nature of the right that will focus on the degree of equality based on either the rights of the people who comprise the corporation or on the rights of the corporation as a real entity.[153] This Part of the Article will contextualize the *Citizens United* decision within the greater corporate personhood debate. It will also explore how the *Hobby Lobby* decision is the first of many constitutional challenges to come. This Part concludes that *Citizens United* requires states to review restrictions on rights by looking to the nature of the right itself and not to the fact that the actor is a corporation.

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[149] *See* Mayer, *supra* note 46, at 629 ("Frequently the Court looked to the history of the amendment in question to justify corporate rights . . . [and] occasionally . . . examined the underlying purpose of the amendment . . . ."). In *Citizens United*, the majority does not adhere to any one theory of the firm in reaching its conclusion. *See Citizens United*, 558 U.S. at 364. As Professor Mayer explains in his work on the history of corporate personhood, before 1960 the Court only viewed corporations as an artificial entity or a natural entity, yet after 1960 the Court abandoned applying any theory of the firm. Mayer, *supra* note 46, at 620. ("Before 1960, the Court only considered corporations' constitutional guarantees within the strictures of corporate personhood theory: a corporation was either an 'artificial' entity subject to expansive state regulation or a 'natural' entity entitled to constitutional protections against the state. After 1960, the Court abandoned theorizing about corporate personhood."); *see also* Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 62 (2005) ("[T]he Court has never established a test to determine what a constitutional person is or whether a corporation meets such a test . . . . The result is a foundational problem in corporate constitutional law, for the Court has granted corporations constitutional rights without engaging in the preliminary inquiry of whether a corporation is entitled to them under the Constitution.").

[150] *See* Mayer, *supra* note 46, at 588–89.

[151] *See supra* notes 75–78 and accompanying text.

[152] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

[153] *See* President, Dirs. and Co. of the Bank of the U.S. v. Dandridge et al., 25 U.S. (12 Wheat.) 64, 91–92 (1827) (Marshall, J., dissenting); *see also, e.g.*, Marcantel, *supra* note 70, at 222 n.7.

A. The Landscape of Corporate Rights Following Citizens United

The holding of *Citizens United* may be a point on a slippery slope that starts with *Bellotti*[154] and continues to slide further past *Citizens United* to *Hobby Lobby*. In *Bellotti*, the Court asserted that "[t]he proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with natural persons. . . . [Rather, the] question in this case . . . is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection."[155] This reinforces the idea that courts must look to the nature of the right and not the party exercising the right. The current endpoint, *Hobby Lobby*, proves that *Citizens United* has opened the door for corporations to launch constitutional challenges to restrictions the Court held to be constitutional in the past.[156] Constructive notice, as the MBCA withdrawal statutes define it, is one such challengeable restriction.[157]

In *Citizens United*, the majority struck down campaign finance regulation on the premise that corporations should receive the same First Amendment protections as natural persons, holding that distinctions based on who is asserting a right are improper.[158] In support of this holding, the Court cited First Amendment cases and proclaimed that it "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"[159] The Court held that Congress has "no basis . . . [to] impose restrictions on certain disfavored speakers."[160] The majority also held that there is no support for the view that the Amendment's original meaning would permit suppressing a media corporation's political speech.[161] As Professor Joan MacLeod Heminway explains, "[u]nder the Court's opinion in *Citizens United*, corporations are to be treated identically to individuals; absolute corporate personhood is a *fait accompli*, at least for political-speech challenges under the First Amendment."[162] Because

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[154] *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978). Professor Ciepley compares the status of a corporation to that of a foreign nation: "[A] foreign government can, within United States jurisdiction, be a contracting individual, but only in a few legal areas can it claim the protections of a constitutional individual." Ciepley, *supra* note 46, at 223.

[155] *Bellotti*, 435 U.S. at 776, 778. *Bellotti* also holds that the worth of speech does not depend on the source. *Id.*

[156] *See* discussion *supra* Section I.*B.*

[157] *See* discussion *infra* Section III.*B.*

[158] Citizens United v. FEC, 558 U.S. 310, 364 (2010).

[159] *Id.* at 343.

[160] *Id.* at 340.

[161] *Id.* at 365; *see also* Joan MacLeod Heminway, *Thoughts on the Corporation as a Person for Purposes of Corporate Criminal Liability*, 41 STETSON L. REV. 137, 138 (2011) ("In *Citizens United*, the Court determined that political-speech protections under the First Amendment apply to corporations as well as individuals, and it found no basis to allow the government to impose political-speech limits 'on certain disfavored speakers.'") (quoting *Citizens United*, 558 U.S. at 312).

[162] *See* Heminway, *supra* note 161, at 138 (citing *Citizens United*, 558 U.S. at 342).

corporations are equal to natural persons, the restrictions on political speech are unconstitutional.[163]

Citizens United expands on *Bellotti*, which already gave corporations free speech rights close to those of natural persons.[164] In *Bellotti*, the Court acknowledged the existence of corporate constitutional rights, including due process rights.[165] *Bellotti*, however, also implicitly held that to spend money on a federal election, one must be not just a person, but also a citizen capable of voting.[166] Before *Citizens United*, *Bellotti* was the limit on corporate campaign activity and a test for corporate constitutional rights.[167] *Bellotti* allowed distinctions based on the abilities of the corporate person derived from its nature as a non-corporeal non-citizen.

Citizens United rejects this. *Citizens United* expands corporate rights, holding that the distinctions between persons and citizens are not proper; instead, corporations should not be restricted any more than a wealthy individual.[168] While a corporation is not an actual citizen and cannot vote, the majority ignored this lack of a physical body, holding that the corporate voice is vital to political discourse.[169] Because the corporation is capable of speech protected by the Constitution, the First Amendment right of a corporation must not be limited simply because the words are not spoken by a citizen or a natural person.[170]

Citizens United can be read to apply this standard of review to all constitutional rights.[171] Just as a corporation can speak and be deserving of the protections of the First Amendment, a corporation is capable of suing and being sued, placing them with the protections of the Fourteenth Amendment.[172] In fact, under the MBCA, a corporation is required to consent to being sued in a jurisdiction when it is granted a charter or the right to do business within a state as a foreign corporation.[173] Because a corporation is a participant in the court system, it must be given rights equal to other parties.[174] Therefore, following *Citizens United*, state efforts to mandate a corporation to consent to constructive notice, which does not have a likelihood of alerting the corporation of pending suits against it, is not

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[163] *See supra* notes 158–164 and accompanying text.

[164] *See Citizens United*, 558 U.S. at 349–57.

[165] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777–83 (1978).

[166] *Id.* at 788 n.26, 790; *id.* 811–12 (White, J., dissenting) (discussing the Federal Corrupt Practices Act).

[167] *See id.*, 435 U.S. at 788 n.26, 790; *id.* 811–12 (White, J., dissenting).

[168] *Citizens United*, 558 U.S. at 350–51.

[169] *Id.* at 349.

[170] *Id.* at 343.

[171] *See, e.g.*, Ciepley, *supra* note 46 at 222–23; Heminway, *supra* note 161 at 138; Michalski, *supra* note 22 at 127.

[172] *See* discussion *infra* Section III.*B.*

[173] MODEL BUS. CORP. ACT. §15.07 (2010); *see also* discussion *infra* Sections II.*B.*

[174] *See infra* notes 290–90 and accompanying text.

constitutional. States may only apply a constructive notice statute to foreign corporations if they mandate the same requirements and constitutional protections as those guaranteed to natural persons and domestic corporations.

B. The Impact of Hobby Lobby

Hobby Lobby is the natural extension of *Citizens United.* The case gives an indication of the direction the Roberts Court may choose when faced with corporate personhood decisions. In *Hobby Lobby*, the Supreme Court held that even for-profit, non-religious corporations may have religion as a purpose.[175] If a corporation has such a purpose, the corporation also has religious rights under the First Amendment.[176] A determination of the degree to which a state may infringe upon these rights requires a level of scrutiny equal to that given an individual's religious rights.[177] For these reasons, a closely-held, for-profit corporation may be exempt from a law to which its owners religiously object.[178] The majority views the corporation as a reflection and extension of the beliefs held by an aggregate of the owners.[179] While *Hobby Lobby* applies only in a factually limited circumstance, the holding is still indicative of the Court's attitude towards corporate constitutional rights.

Some scholars believe it is possible that since the Religious Freedom Restoration Act (hereinafter, "RFRA") expands rights beyond typical First Amendment rights, *Hobby Lobby* could be seen as an outlier opinion.[180] The RFRA was written in direct response to the Supreme Court's ruling in *Employment Division, Department of Human Resources of Oregon v. Smith*,[181] which redefined the limits the federal government may impose on the exercise of religion.[182] Overruling *Sherbert v. Verner*,[183] in *Smith*, the Court held that "under

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[175] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014). The dissent of *Hobby Lobby* makes a point to note that Hobby Lobby is a for-profit corporation, yet such a distinction is not used to describe business organizations under any corporate statutes at hand in the case or in the Delaware Law or the MBCA. Professors Johnson and Millon note this distinction and instead refer to *Hobby Lobby* as a business corporation. Johnson & Millon, *supra* note 149 at 1. Johnson and Millon also believe that the distinction the court draws between for-profit, not-for-profit, and closely held corporations versus general corporations are of no consequence to the impact of the *Hobby Lobby* opinion. *Id.* at 21. They believe elements of *Hobby Lobby* may be applied to all corporations. *Id.* at 24.

[176] *Hobby Lobby*, 134 S. Ct. at 2771–72.

[177] *See id.* at 2768–69.

[178] *See id.* at 2774–75.

[179] *See id.* at 2768; *see also infra* notes 187–191 and accompanying text.

[180] *See, e.g.*, Steven J. Willis, *Corporations, Taxes, and Religion: The* Hobby Lobby *and* Conestoga *Contraceptive Cases*, 65 S.C. L. REV. 1, 32 (2013) ("Thus, what might not be protected under traditional constitutional theory may receive statutory protection under such a high standard of review. The statute broadly applies to 'government,' as opposed to Congress—as the First Amendment does facially—and imposes the high standard for all cases, regardless of which standard courts have adopted.") (internal footnotes omitted).

[181] *See* Johnson & Millon, *supra* note 49, at 3.

[182] *See generally* Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

the First Amendment, 'neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling government interest.'"[184] The RFRA reestablished the standard of *Sherbert*, stating that the United States Government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ."[185] In *Hobby Lobby*, the Court concluded that a corporation is within the definition of "persons" contemplated by the RFRA, bringing corporations within that law's protection. This conclusion was reached by analyzing the nature of a corporation.[186]

Hobby Lobby adopts the aggregate theory of the firm, which defines a corporation as being made up of individuals vested with constitutional rights that do not disappear when the individuals unite in a corporate form.[187] When reaching its conclusion, *Hobby Lobby* found that a corporation is "simply a form of organization used by human beings to achieve desired ends."[188] The Court emphasized that corporate constitutional rights protect the rights possessed and maintained by the owners, shareholders, and employees as they fulfill their duties in the corporate capacity. [189] This individual freedom of religion includes freedom to exercise religion anywhere and in any capacity as protected by the First

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[183] 374 U.S. 398 (1963).

[184] *See* Johnson & Millon, *supra* note 49, at 3 (quoting City of Boerne v. Flores, 521 U.S. 507, 514 (1997); *see also Smith*, 494 U.S. at 881–81.

[185] 42 U.S.C. § 2000bb-1(a) (2012). Under the RFRA, if the government is found to substantially burden the exercise of religion, the person is entitled to an exemption unless the government can demonstrate that the application of the burden is "(1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b). The definition of "exercise of religion" was expanded with the passage of the Religious Land Use and Institutionalized Persons Act of 2000, which states that the RFRA includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *See* Johnson & Millon, *supra* note 49, at 4 (citing 42 U.S.C. § 2000cc–5(7)(A) (2000)). Thus, the RFRA gives persons more religious rights than those contemplated by the First Amendment. The Court's decision is based in part on this expansion of the right by the legislation.

[186] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).

[187] *See id.*; *see also* Avi-Yonah, *supra* note 50, at 1001. Justice Marshall first proposed the aggregate theory in *Bank of United States v. Deveaux*, holding that a corporation cannot be a citizen or sue unless it can be viewed as a company of individuals, represented by a corporate name. Bank of U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 86–88, 91 (1809).

[188] *Hobby Lobby*, 134 S. Ct. at 2768. The Court appears to ignore that the individuals choose the corporate form to avail themselves of limited liability, perpetual life, and funding sources not available to them as individuals, and in exchange agree to comply with restrictions imposed by the incorporation statutes and federal law.

[189] *See* Johnson & Millon, *supra* note 49, at 16.

Amendment and the RFRA.[190] As a result, an individual's religion transfers to his or her businesses by association. [191]

Justice Ginsburg, dissenting from *Hobby Lobby*, proclaimed that the majority opinion is a departure from historic jurisprudence and a potentially dangerous expansion of corporate rights.[192] She reasoned that the right to exercise religion is "characteristic of natural persons, not artificial legal entities."[193] Justice Ginsburg argued religious, non-profit organizations that "exist to foster the interests of persons subscribing to the same religious faith [should be protected, but not] for-profit corporations."[194]

For Justice Ginsburg and many scholars, *Hobby Lobby* is about more than just the intersection of First Amendment rights and the RFRA. Although *Hobby Lobby* is based in part on a statute that expands the reach of First Amendment rights, its holding may be influential to the interpretation of corporate constitutional rights generally.[195] But as Professor Garrett explains, the *Hobby Lobby* Court overreached when it "concluded that protecting free exercise rights of corporations also protects 'the religious liberty of the humans who own and control those companies.'"[196] Professor Garrett believes "[t]hat reasoning conflates associational and organizational standing, and it assumes that corporations and individuals can have common 'beliefs' just as they can have common privacy or financial interests."[197] If the Court stands by this reasoning—continuing to engage in the conflation articulated by Professor Garnett—it can easily be extended to other rights. The general concept of common interest worthy of protection could well be extended to all rights that may be shared by corporations and the natural persons acting as agents and shareholders. Any state action may face scrutiny based on how it applies to the aggregation of individuals forming an entity. Professor Garrett's interpretation is within the spirit of Ginsburg's dissent, yet it is an approach that the majority feels is an exaggeration.[198] But we need only analyze the

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[190] *See id.*

[191] *See Hobby Lobby*, 134 S. Ct. at 2768; *see also* Johnson & Millon, *supra* note 49, at 16 ("Analytically, in order to preserve the separateness of the corporation as a legal person distinct in a meaningful way from the humans associated with it, while still acknowledging their desires for religious expression, the Court emphasized here, and throughout the opinion, the *corporate* capacity and *corporate* positions and roles played by these humans.").

[192] *See Hobby Lobby*, 134 S. Ct. at 2787, 2790–92 (Ginsburg, J., dissenting).

[193] *Id.* at 2794.

[194] *Id.* at 2795.

[195] *See* Garrett, *supra* note 74, at 109.

[196] *Id.* at 145 (quoting *Hobby Lobby*, 134 S. Ct. at 2768).

[197] *Id.*

[198] *Compare* Garrett, *supra* note 76, at 145 (stating the majority opinion of *Hobby Lobby* overreaches and conflates the standing of for-profit organizations), *and Hobby Lobby*, 135 S. Ct. at 2804–06 (Ginsburg, J., dissenting) (arguing that the majority opinion will lead to a wave of for-profit organization accommodation claims), *with Hobby Lobby*, 135 S. Ct. at 2783–85 (majority opinion) (reasoning that its ruling is narrow under RFRA and there is no evidence of a possible flood of for-profit organizations seeking exemptions).

trajectory of corporate rights from *Bellotti* to *Citizens United* to *Hobby Lobby* to see that Justice Ginsburg and Professor Garrett are not off target.

Although interpreted by some to be narrowly tailored to a specific type of corporation (closely held), with a specific constitutionally protected purpose (religion), a similar expansion of the Fourteenth Amendment is not farfetched. All corporations are embodied with procedural due process rights under the Fourteenth Amendment.[199] The constitutional protections of these rights are relatively well-defined for individuals, yet states have been permitted to customize how they are applied to corporations. States are required to ensure that constructive notice for all persons is designed to result in a reasonable probability of actual notice, even when it does result in a failure of receipt of notice.[200] For corporations, however, there are statutory provisions that require them to consent to being deemed served when constructive notice on the Secretary of State happens, making it impossible to challenge improperly forwarded service.[201] This form of constructive notice cannot be reasonably probable to result in actual notice. Its failure is impossible to challenge.[202]

Hobby Lobby's method of interpreting corporate rights would invalidate this form of constructive notice as a violation of due process.[203] Just as the corporation in *Hobby Lobby* were held to have the religious beliefs of the owners who were improperly restricted by the Affordable Care Act ("ACA"),[204] the shareholders or trustees of a corporation that has ceased doing business in a state may be deemed to deserve actual notice of service to avoid a violation of their due process rights. States may not be able to treat a foreign corporation as it treats a foreign nation when that corporation is made up of individual citizens vested with constitutional rights that do not terminate when they aggregate as a corporation. Additionally, other less onerous means of locating corporations and ensuring notice of suit not

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[199] Santa Clara v. S. Pac. R. R. Co., 118 U.S. 394, 398 (1886).

[200] *See* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (citations omitted) ("This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest."); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (citations omitted) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

[201] *See, e.g.*, ALASKA STAT. ANN. §10.06.780 (West 2016); DEL. CODE. ANN. tit. 8, § 381 (West 2016); HAW. REV. STAT. ANN. § 414–51 (West 2016); IOWA CODE ANN. § 490.1520 (West 2016); LA. STAT. ANN. § 12:312(a) (2016); MINN. STAT. ANN. § 303.16 (West 2016); OKLA. STAT. ANN. tit. 18, § 1135 (West 2016); 7 R.I. GEN. LAWS § 7-1.2-1412 (West 2016).

[202] *See* discussion *infra* Section III.*A*.

[203] *See* discussion *infra* Section III.*B*.

[204] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759–60, 2775, 2785 (2014).

only exist, but also are present elsewhere in corporate statutes.[205] The distinctions between domestic and foreign corporations, as well as between natural persons and corporations, may be viewed as inconsequential to the application of rights. And thus unconstitutional under *Hobby Lobby* and *Citizens United*.[206]

III. CHANGES TO CORPORATE DUE PROCESS FOLLOWING *CITIZENS UNITED*

The disparate treatment of foreign corporations found in the corporate statutes has long persisted.[207] Although the language of the Fourteenth Amendment and case law interpreting it contradict this treatment in many cases, this treatment has continued in states through reasoning that a foreign corporation is non-existent until it is admitted to do business within a state.[208] Disparate treatment is also a result of beliefs that states have the ability to condition a corporation's admission on terms that favor the state's citizens over the foreign corporation.[209] But *Citizens United* changes how states must view *all* corporations.[210] *Citizens United* requires that states look to the nature of the right being exercised, not to the party exercising the right, making unconstitutional such disparate treatment premised on a corporation's foreign nature.[211]

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[205] *See, e.g.*, MODEL BUS. CORP. ACT § 5.04 (2010) (requiring service on the domestic corporation at its principal office if service on its registered agent fails). Service is perfected on "(1) the date the corporation receives the mail; (2) the date shown on the return receipt, if signed on behalf of the corporation; or (3) five days after it deposit in the U.S. Mail, as evidenced by postmark, if mailed postpaid and correctly addressed." *Id.* § 5.04(b). The MBCA notes that it does not prescribe the only means for serving a corporation. *Id.* § 5.04(c). The process for service on a foreign corporation is the same as a domestic corporation. *Id.* § 15.10.

[206] *See* discussion *infra* Section III.*B.*

[207] *See, e.g.*, W. & S. Life Ins. Co. v. State Bd. of Equalization of Ca., 451 U.S. 648, 656–58 (1981); Phillips Petroleum Co. v. Jenkins, 297 U.S. 629, 631–32 (1936); Washington *ex rel.* Bond & Goodwin & Tucker v. Superior Court of Wash., 289 U.S. 361, 365–66 (1933) ("The power of the state altogether to exclude the corporation, and the consequent ability to condition its entrance into the state, distinguishes this case from those involving substituted service upon individuals, whose entrance into a state may render them amenable to action there, only if the statute providing for substituted service incorporates reasonable provision for giving the defendant notice of the initiation of litigation.") (internal citations omitted). *See also* discussion *supra* Section I.*C.*

[208] *See, e.g.*, *St. Mary's Franco-Am. Petroleum Co.*, 203 U.S. at 191 ("It is argued that the act of February 22, 1905, is invalid under the 14th Amendment, in that it deprives the company of liberty of contract and property without due process of law, and denies it the equal protection of the laws. But, in view of repeated decisions of this court, the contention is without merit. The state had the clear right to regulate its own creations, and *a fortiori*, foreign corporations permitted to transact business within its borders.").

[209] Bank of Augusta v. Earle, 38 U.S. 519, 519 (1839); *see also* discussion *supra* Section I.*B.*

[210] *See* discussion *supra* Section II.*A.*

[211] *See Citizens United v. FEC*, 558 U.S. 310, 349–57 (2010).

Proper service of process for an individual requires following statutory requirements for service and, in most circumstances, actual notice.[212] For a natural person, constructive notice is rare, the requirements must be followed exactly, and, in some circumstances, additional steps must be taken to increase the likelihood of actual notice.[213] Constructive notice to individuals should rarely result in a failure of the party to receive notice of suit.[214] When analyzing a failure, courts require that the constructive notice be reasonably calculated to result in notice in all circumstances, and, following the holding in *Jones v. Flowers*, require the party to take reasonable measures after such notice fails.[215] Thus, for individuals, constructive notice is a rare exception: not the rule.[216] For corporations, however, constructive notice is the norm, not the exception.[217] A plaintiff must follow the statutory requirements, but the requirements themselves impose unduly burdensome restrictions, which may reward the bad-actor plaintiff.[218]

This Part begins with an exploration of the current MBCA withdrawal statutes.[219] It explains how these statutes operate in practice, and how their operation creates scenarios that prevent foreign corporations from receiving notice of pending legal actions in violation of the Fourteenth Amendment procedural due process requirements. *Hobby Lobby* and *Citizens United* have changed how the rights of corporations are interpreted, making litigation of a successful Fourteenth Amendment challenge greater.[220] This Part proposes that the statutes are now unconstitutional under *Citizens United* and *Hobby Lobby*, which require states to reconsider and reform restrictions on foreign corporations.[221] In order to navigate the new landscape of corporate rights cultivated by *Citizens United*, states may look to other means of service on corporations already developed elsewhere in corporate statutes. These other methods of service avoid the disparate outcome currently experienced by foreign corporations while addressing the state concerns with regard to elusive foreign corporations.

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[212] Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

[213] *Id.* at 313–15.

[214] *See* Jones v. Flowers, 547 U.S. 220, 234–36 (2006) (holding "that the state should have taken additional reasonable steps to notify Jones, if practicable to do so.").

[215] *Id.*

[216] *See id.* at 238.

[217] Under the MBCA, any time a corporation fails to designate an agent for service, or any time following withdrawal, service is made by serving the Secretary of State who then forwards notice to the corporation. MODEL BUS. CORP. ACT §§ 15.20, 5.04(b) (2010).

[218] *See infra* notes 248–50 and accompanying text.

[219] *See* discussion *infra* Section III.*A*.

[220] *See* discussion *infra* Section III.*B*.

[221] *See* discussion *infra* Section III.*C*.

A. The MBCA Withdrawal Statutes in Practice

Jones v. Flowers is the most recent Supreme Court case to contemplate constructive notice.[222] In *Flowers*, the state of Arkansas sold a homeowner's property for unpaid taxes after notice was unsuccessful on two occasions.[223] The tax commissioner sent notice by certified mail to the home, which was returned unclaimed.[224] The Arkansas Commissioner argued that notice by mail was adequate because it was sent to an address the property owner was required by statute to keep up to date.[225] The Supreme Court disagreed, holding that due process requires additional follow up actions when the government is aware prior to a taking of the property that notice has failed.[226] The Court inserts an aspect of the *Mullane* decision, noting "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[227] *Flowers* reads *Mullane* to suggest that constructive notice is the exception, not the rule, in all circumstances, even in the case of substitute service.[228]

In corporate statutes, substitute service is the consequence of failure to designate an agent for service or for withdrawing from the jurisdiction.[229] The corporation is at the mercy of the Secretary of State and must rely on the Secretary of State to forward it any notice it may receive.[230] This reliance does not foreclose the corporation's constitutional rights, even though the corporation is deemed served when service is received by the Secretary of State.[231] Per *Flowers*, when a party knows of the failure of service to reach the designated target before the taking occurs, the party must take reasonable measures and exert effort to remedy the situation.[232] But failure to follow up when it is known that notice will not succeed, as required by *Mullane*, is not reasonably calculated.[233]

In the current version of the MBCA, a loophole exists that allows a crafty plaintiff's lawyer to manipulate the service of process requirements and obtain a

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[222] *See* Jones v. Flowers, 547 U.S. 220, 230–34 (2006).

[223] *Id.*

[224] *Id.* at 223.

[225] *Id.* at 226.

[226] *Id.* at 225 ("[W]hen mailed notice of tax sale is returned unclaimed, the state must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so.").

[227] *Id.* at 238 (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950)).

[228] *See id.* at 238.

[229] MODEL BUS. CORP. ACT § 5.04 (2010); MODEL BUS. CORP. ACT § 5.10 (2010).

[230] *See* discussion *supra* Section II.*A.*

[231] *See* Washington *ex rel.* Bond & Goodwin & Tucker v. Superior Court of Wash., 289 U.S. 361, 363–66 (1933).

[232] *Flowers*, 547 U.S. at 229–30 (2006).

[233] *See id.* at 230–31; *see also* MODEL BUS. CORP. ACT § 5.04 (2010); MODEL BUS. CORP. ACT § 5.10 (2010); MODEL BUS. CORP. ACT § 15.20 (2010).

default judgment in direct violation of the *Flowers* standard.[234] Section 15.20 of the MBCA requires a foreign corporation to perpetually update its address with the Secretary of State following withdrawal from a jurisdiction.[235] Under the MBCA, a plaintiff can knowingly use the address listed in the certificate of withdrawal even if it is aware that the actual business address has changed.[236] This outcome rewards the plaintiff's actions with a default judgment.[237] This outcome is directly in conflict with *Flowers*, which opines that a plaintiff who knowingly designates an address on file instead of a proper address is not taking the action of someone who actually desires for notice to occur.[238] It also creates a standard that is not imposed on natural persons or domestic corporations.[239] Therefore, the resulting default judgment—based purely on the corporation's foreign nature and prior acquiescence to state control—is impermissible post-*Citizens United*.

Updating an address with the Secretary of State is not an unreasonable requirement in most circumstances.[240] Commonly, a corporation monitors activity in states where it has done business until all statutes of limitations have expired.[241] Where there is full compliance with the applicable statute, the common corporate practice of updating and monitoring a jurisdiction through the end of the liability period for any causes of action in the jurisdiction is usually adequate protection

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[234] *See* discussion *supra* Section I.C.

[235] MODEL BUS. CORP. ACT § 15.20 (2010).

[236] *See, e.g.*, Tankard-Smith, Inc. Gen. Contractors v. Thursby, 663 S.W.2d 473, 475–76 (Tex. App. 1983) (holding the defendant responsible for the default judgment).

[237] *See id.*

[238] Jones v. Flowers, 547 U.S. 220, 229 (2006).

[239] *Compare* Autodynamics, Inc. v. Vervoot, No. 14-10-00021-CV, 2011 WL 1260077, at *5–6 (Tex. App. Apr. 5, 2011) (holding that because there is no statutory requirement that the plaintiff provide the nonresident's address for service under the Code, a plaintiff is not required to serve defendant at an address other than the address registered with the Secretary of State, even if the plaintiff knows the defendant has moved), *with* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (citations omitted) (holding in reference to natural persons that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). Domestic corporations are only subjected to substitute service if service on the registered agent fails. In that circumstance, service is made on the secretary of the corporation at the principal place of business. *See, e.g.*, MODEL. BUS. CORP. ACT § 5.04(b) (2010).

[240] Corporations are subject to personal jurisdiction for all actions occurring while they are doing business within a state. *See* Michalski, *supra* note 22, at 153. The same applies to any actions they take when not registered to do business. *See id.* at 154–62. Because of the jurisdictional requirements, corporations typically monitor a jurisdiction until the end of statutes of limitations periods. *See supra* notes 132–42 and accompanying text.

[241] *See supra* notes 132–42 and accompanying text. The MBCA and other codes impose a continuing duty upon a corporation to monitor activity within jurisdictions where they have done business. For this reasons, corporations tend to monitor litigation in a jurisdiction where they have done business until it is reasonable to believe no risk of suit exists. Typically, this is until all applicable statutes of limitations have expired.

from default judgments.[242] But for corporations engaged in activity that may result in mass tort liability, the discovery rule may require the corporation to indefinitely monitor every jurisdiction where business was conducted.[243] Unlike natural persons, corporations are capable of existing perpetually; therefore, an updating requirement with no time limit or other condition can persist perpetually.

Generally, a limitations period does not begin to run until the plaintiff has a "complete and present cause of action."[244] Thus, for some causes of action, monitoring and updating for a specific number of years is not sufficient.[245] For a plaintiff with a physical injury, for example, the injury may not be realized until pain or other symptoms arise.[246] For some actions, it may take decades for a potential plaintiff to even know that an injury has occurred.[247] For this reason, jurisdictions toll or delay the statute of limitations until an injury is discovered.[248] This practice, known as the "discovery rule," operates to delay commencement of the statute of limitations until the plaintiff knew or should have known about the wrongful act and resulting injury.[249] The operation of the discovery rule results in a scenario in which a foreign corporation that is mostly diligent may be denied its

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[242] *See* Harris v. Turchetta, 622 A.2d 487, 489 (R.I. 1993) (holding that "[t]hose who seek to insulate themselves from liability by utilizing a corporate form of business enterprise have a responsibility to see to it that reports are duly filed and that an attorney for service of process is appointed."); *supra* note 240 and accompanying text.

[243] "The discovery rule was first applied in medical malpractice cases, where the courts reasoned that the 'hidden' nature intrinsic to such cases necessitated the postponement of the statute of limitations until the plaintiff could reasonably discover the existence of the malpractice. Gradually, the discovery rule was applied to other forms of torts where the defects were not necessarily discernible at the time at which the tort was committed." Sonja Larson, Annotation, *Modern Status of the Application of "Discovery Rule" to Postpone Running of Limitations Against Actions Relating to Breach of Building and Construction Contracts*, 33 A.L.R. 5th 1 § 2 (1995).

[244] Rawlings v. Ray, 312 U.S. 96, 98 (1941) (quoting Holloway v. Morris, 34 S.W.2d 750, 752 (Ark. 1931)).

[245] *See generally* Larson, *supra* note 249 (describing that under the "discovery rule," the running of the statute of limitations only begins when a person discovered they were harmed or with due diligence should have discovered the harm).

[246] *Id.*

[247] *See* Merck & Co., Inc. v. Reynolds, 559 U.S. 633, 644–46 (2010).

[248] *Id.*; *see also* Larson, *supra* note 243§ 2[a].

[249] Although typically applied to situations involving bodily injury or disease, many jurisdictions have applied the discovery rule to oil and gas leases as well as to tort or environmental events arising out of drilling activities. *See, e.g.*, Liles v. Producers' Oil Co., 99 So. 339, 342 (La. 1924) (concerning the taking of oil and gas when land leased without co-tenant authority); Liles v. Barnhart, 93 So. 490, 493 (La. 1922) (same); Martin v. Texas Co., 90 So. 922, 923 (La. 1921) (oil lease); Findley v. Warren, 94 A. 69, 71 (Pa. 1915) (oil and gas lease); *see also* Larson, *supra* note 243, at § 2[a] ("Increasingly, the discovery rule has been extended to defective construction cases, even where the plaintiff has proceeded against the defendant builder, architect, or engineer on a breach of contract theory. Those courts which have applied the discovery rule to these cases have sometimes analogized the hidden defect in the house to the hidden nature of the tort in medical malpractice cases.").

due process rights because of a simple oversight.[250] For a corporation that previously did business in an MBCA state, the statute of limitations is not adequate for monitoring and updating in compliance with the statutes.[251]

In practice, the corporate withdrawal statutes are most problematic when a foreign corporation properly withdraws from a jurisdiction, updates its address with the Secretary of State until statutes of limitations have run in all causes of action, but then actions later arise that are subject to the discovery rule.[252] In this scenario, the corporation remains liable for damages.[253] If it does not properly answer a suit, it could receive a default judgment potentially depriving the corporation of property without notice and in violation of Fourteenth Amendment procedural due process requirements.[254] This identity-based treatment is different from the treatment of domestic corporations and individuals.

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[250] For example, if the hypothetical in the introduction was applied to a corporation and not an individual, updating the state of Massachusetts for three years and having an address easily determined by the general public would not prevent a default judgment. Partial compliance does not protect the corporation when perpetual updating is required.

[251] *See* MODEL BUS. CORP. ACT. §15.20 CMT. (2010).

[252] *See, e.g.*, Campus Invs., Inc. v. Cullever, 144 S.W.3d 464, 466 (Tex. 2004). ("When substituted service on a statutory agent is allowed, the designee is not an agent for *serving* but for *receiving* process on the defendant's behalf. . . . A certificate . . . from the Secretary of State *conclusively* establishes that process was served.") (internal citations omitted). Under the Texas version of the MBCA, when a party served pursuant to the Business Code does not receive service due to its own negligent failure to comply with updating requirements, it is deemed properly served when the Secretary of State receives and forwards the complaint to the address on file. *See id.* This holding has been interpreted to apply in any situation when a party is negligent in complying with statutory requirements to update its address. *See, e.g.*, Mabon Ltd. v. Afri-Carib Enters., 369 S.W.3d 809, 813 (Tex. 2012); Autodynamics, Inc. v. Vervoot, No. 14-10-00021-CV, 2011 WL 1260077, at *5–6 (Tex. App. Apr. 5, 2011) (holding that because there is no statutory requirement that the plaintiff provide the nonresident's address for service under the Code, a plaintiff is not required to serve defendant at an address other than the address registered with the Secretary of State, even if the plaintiff knows the defendant has moved); Glob. Serv. Inc. v. G.W. Leasing Co., No. 01-94-01234-CV, 1996 WL 608904, at *7–8 (Tex. App. Oct. 24, 1996). In Harold-Elliott Co. v. K..P./Miller Realty Growth Fund I, the court held, reluctantly, that there is no obligation to seek out the correct address from the Secretary of State. 853 S.W.2d 752, 755 (Tex. App. 1993). Although it provides a party to a lawsuit the right to ignore information it has concerning the proper address and then obtain a no-notice default judgment, the substitute service statutes are interpreted literally and other states have similar holdings to that in *Harold-Elliott. See, e.g.*, Harris v. Turchetta, 622 A.2d 487, 489 (R.I. 1993) (holding that "[t]hose who seek to insulate themselves from liability by utilizing a corporate form of business enterprise have a responsibility to see to it that reports are duly filed and that an attorney for service of process is appointed."); Bonneville Billing & Collection v. Johnston, 987 P.2d 600, 601 (Utah 1999) (holding a defendant is deemed served when a plaintiff served the defendant in accordance with requirements of applicable law regardless of whether other service options are available).

[253] *See, e.g., Cullever*, 144 S.W.3d at 466 ("When substituted service on a statutory agent is allowed, the designee is not an agent for *serving* but for *receiving* process on the defendant's behalf. . . . A certificate . . . from the Secretary of State *conclusively* establishes that process was served.") (internal citations omitted).

[254] *See id.*

Generally, lack of notice is a valid ground for vacating a default judgment.[255] But in many jurisdictions, a corporation's failure to comply with a statute regarding service will negate this principle because the burden of the outcome of the corporation's negligence falls on the corporation.[256] States perceive a failure to comply with corporate statutory requirements as a decision made by the corporation at its own peril.[257] Plaintiffs are required to strictly follow the substitute service statutes, or any default judgments obtained will be void.[258] However, courts only require compliance with the applicable statute.[259] Courts do not require a plaintiff to use the method most likely to result in actual notice.[260] Because of the terms found in withdrawal statutes, absent fraud or mistake by the plaintiff, the Secretary of State's certificate is "conclusive evidence that the Secretary of State received service of process for [the corporation] and forwarded the service as required by" statute.[261] Service in this manner is sufficient even if the defendant corporation does not receive notice of a pending action.[262]

Before *Citizens United*, the MBCA withdrawal statute was considered to have a reasonable probability of notifying a defendant of service of process because it required forwarding service to the last address on file with the Secretary of State—an address provided by the corporation.[263] Because the corporation accepted the substitute service requirements following withdrawal as a condition of admission to the state, failure to receive notice because of forwarding to an address that is no longer correct, even under the operation of the discovery rule, could not invalidate a

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[255] A default judgment occurs when a party fails to take action in response to a suit. Generally, a default judgment may be set aside if a party is not properly served as a judgment without notice violates due process. *See* Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 85–86 (1988).

[256] *See, e.g.*, Washington *ex rel.* Bond & Goodwin & Tucker v. Superior Court of Wash., 289 U.S. 361, 365–66 (1933) ("The power of the state altogether to exclude the corporation, and the consequent ability to condition its entrance into the state, distinguishes this case from those involving substituted service upon individuals, whose entrance into a state may render them amenable to action there, only if the statute providing for substituted service incorporates reasonable provision for giving the defendant notice of the initiation of litigation.") (internal citations omitted).

[257] Tankard-Smith, Inc. Gen. Contractors v. Thursby, 663 S.W.2d 473, 476 (Tex. App. 1983) (holding the defendant responsible for the default judgment).

[258] *See* Harold-Elliott Co. v. K..P./Miller Realty Growth Fund I, 853 S.W.2d 752, 755 (Tex. App. 1993) (discussing literal interpretation of the service statute).

[259] *Id.* (holding, reluctantly, that there is no obligation to seek out the correct address from the Secretary of State); Harris v. Turchetta, 622 A.2d 487, 489 (R.I. 1993) (holding that "[t]hose who seek to insulate themselves from liability by utilizing a corporate form of business enterprise have a responsibility to see to it that reports are duly filed and that an attorney for service of process is appointed."); Bonneville Billing & Collection v. Johnston, 987 P.2d 600, 601 (Utah 1999) (holding a defendant is deemed served when a plaintiff served the defendant in accordance with requirements of applicable law regardless of whether other service options are available).

[260] *See supra* note 205 and accompanying text.

[261] *See, e.g.*, G.F.S. Ventures, Inc. v. Harris, 934 S.W.2d 813, 818 (Tex. App. 1996) (citing Capitol Brick Inc. v. Fleming Mfg. Co., 722 S.W.2d 399, 401 (Tex. 1986)).

[262] *See, e.g., id.* (citing Capitol Brick Inc. v. Fleming Mfg. Co., 722 S.W.2d 399, 401 (Tex. 1986).

[263] *See* Washington *ex rel.* Bond & Goodwin & Tucker v. Superior Court of Wash., 289 U.S. 361, 363–66 (1933).

default judgment.[264] This result—that a corporation is deprived of property without notice through a loophole enabling plaintiffs to ignore the actual knowledge he or she may have about a corporation's correct address—not only contradicts the holding in *Citizens United*, but also the requirements of *Flowers*.[265]

Notably, this is not the outcome for a foreign corporation that never registers to do business in the state, nor for a domestic corporation. Under corporation statutes, the duty for serving such a corporation falls on the plaintiff, who must serve the corporation's principle place of business or home office.[266] For a domestic corporation, substitute service only comes into play if the corporation fails to designate an agent for service.[267] Even then, the plaintiff must request that the Secretary of State serve the defendant corporation at its home office, principle place of business, or other location reasonably certain to result in actual notice.[268] The corporation is still deemed served when service on the Secretary of State occurs, but the failure to designate a proper address where notice is likely to actually occur is attributed to the plaintiff.[269] But for the foreign corporation, properly registered and withdrawn, plaintiffs are not held responsible for providing an incorrect address for forwarding service.[270] In this scenario, if the plaintiff chooses an address that is not in fact a proper corporate address, the failure of the corporation to receive notice is attributed to the defendant if that error is due to the defendant's failure to provide a current address to the Secretary of State.[271]

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[264] *See* Tankard-Smith, Inc. Gen. Contractors v. Thursby, 663 S.W.2d 473, 476 (Tex. App. 1983) (holding the defendant responsible for the default judgment).

[265] *Id.*; Citizens United v. FEC, 558 U.S. 310, 349–57 (2010); Jones v. Flowers, 547 U.S. 220, 229 (2006).

[266] *See, e.g.*, MODEL BUS. CORP. ACT. § 5.04 (2010) (requiring service on the domestic corporation at its principal office if service on the registered agent fails).

[267] *See id.*

[268] *See id.* (requiring service on the domestic corporation at its principal office if service on its registered agent fails). Service is perfected on "(1) the date the corporation receives the mail; (2) the date shown on the return receipt, if signed on behalf of the corporation; or (3) five days after it deposit in the U.S. Mail, as evidenced by postmark, if mailed postpaid and correctly addressed." *Id.* § 5.04(b). The MBCA notes that it does not prescribe the only means for serving a corporation. *Id.* § 5.04(c). The process for service on a foreign corporation is the same as a domestic corporation. *Id.* § 15.10.

[269] *See, e.g.*, Campus Invs., Inc. v. Cullever, 144 S.W.3d 464, 466 (Tex. 2004). ("When substituted service on a statutory agent is allowed, the designee is not an agent for *serving* but for *receiving* process on the defendant's behalf. . . . A certificate . . . from the Secretary of State *conclusively* establishes that process was served.") (internal citations omitted). Under the Texas version of the MBCA, when a party served pursuant to the Business Code does not receive service due to its own negligent failure to comply with updating requirements, it is deemed properly served when the Secretary of State receives and forwards the complaint to the address on file, even if that address is inaccurate. *See id.*; *supra* note 252 and accompanying text.

[270] Washington *ex rel.* Bond & Goodwin & Tucker v. Superior Court of Wash., 289 U.S. 361, 365 (1933); *see also supra* note 252 and accompanying text.

[271] Tankard-Smith, Inc. Gen. Contractors v. Thursby, 663 S.W.2d 473, 476 (Tex. App. 1983) (holding the defendant responsible for the default judgment); *see also supra* note 252 and accompanying text.

*B. The Validity of Withdrawal Statutes Post-*Citizens United

Citizens United changed the parameters of what is reasonable in state regulation of corporations.[272] Prior to *Citizens United*, the likelihood of a corporation not receiving notice was balanced in part with the interest of the state and the possibility of utilizing more accurate procedures.[273] If a foreign corporation failed to receive notice due to its own failure to comply with corporate withdrawal statutes, the result would not be unconstitutional.[274] Post-*Citizens United*, at least one scenario resulting from the operation of the MBCA withdrawal statute is unconstitutional.[275] Even if one deems the service requirements to be reasonable, they result in different outcomes based solely on whether the corporation is domestic or foreign.[276] With *Citizens United* in mind, it is difficult to envision a scenario in which denying a foreign corporation due process merely because of its status would be constitutionally permissible.

Flowers strengthens the likelihood of a successful challenge to the withdrawal statutes. If a plaintiff knows that an address is incorrect before the taking of property, they are required to take additional reasonable measures.[277] A plaintiff who serves a corporation by substitute service will have knowledge whether an address for service is incorrect. When service on a corporation fails to reach that corporation, a plaintiff is made aware of the failure of substitute service when the Secretary of State receives notice that the mail containing a corporation's notice is returned unclaimed.[278] The ease of locating information on corporations means that a plaintiff will also know of an alternative and correct address for a corporation with a minimal search. Thus, it is reasonable for the plaintiff to forward service to the correct address before pursuing a default judgment. Such conduct is indicative of a party who intends to inform its opponent of a pending suit.[279]

In addition to considering *Flowers*, post-*Citizens United* courts must also review the application of the Fourteenth Amendment based on the nature of the rights it guarantees—not the nature of the citizen exercising the right.[280] Corporations have procedural due process rights that stay with them regardless of

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[272] *See* discussion *supra* Section II.*A.*

[273] *See* Bank of Augusta v. Earle, 38 U.S. 519, 519 (1839); *See* discussion *supra* Section I.*B.*

[274] *Tankard-Smith*, 663 S.W.2d at 476; *see also* discussion *supra* Sections II.*B.*, III.*A.*

[275] Jones v. Flowers, 547 U.S. 220, 229 (2006).; *see also* discussion *supra* Section III.*A.*

[276] *See supra* notes 252–271 and accompanying text.

[277] *See Flowers*, 547 U.S. at 234.

[278] *Id.* at 231, 234–35.

[279] *See Flowers*, 547 U.S. at 232.

[280] *See* discussion *supra* Section II.*A.*

jurisdictional presence and that are equal to those of natural citizens.[281] Once a foreign corporation meets the threshold requirements for entry to one United States jurisdiction, subsequent states may not arbitrarily infringe on that corporation's rights merely because of its corporate status.[282] *Citizens United* prevents a state from making a distinction between a foreign and domestic corporation when imposing requirements for substitute service.[283]

The current treatment of foreign corporations is given its force by the holding in *Earle*, which declares a foreign corporation non-existent until admitted to a jurisdiction.[284] This fiction cannot persist after *Citizens United*. Post-*Citizens United*, a corporation is, like a natural person, born with rights that must be recognized by all jurisdictions.[285] A state may not deny any person due process merely because it is "born" outside of its borders. Once a corporation is founded and chartered, it should be considered "born" with rights like a natural person that are in force regardless of the jurisdiction. The fiction of the artificial corporation that enters a state without rights until granted an authorization to do business in the state should no longer exist.

Under the aggregate theory articulated in *Hobby Lobby*, a court can also invalidate withdrawal statutes based on the procedural due process rights of the citizens who make up corporations.[286] Applying a rubric similar to the Court's in *Hobby Lobby*, the citizens who have contracted to make up a corporation may not have their rights foreclosed simply because they have united in a corporate form. A state cannot contractually deprive an individual of the right to receive notice of pending actions. Nor can a state deem non-citizens served by service on its own Secretary of State. Because a state cannot impose these conditions on the citizens that make up a corporation, a state also cannot impose these conditions on a corporation itself.

A comparison of the outcomes based on the identity of the persons making up the corporation also make it clear that the withdrawal statutes do not stand up to the tests found in *Citizens United*. A default judgment on a similarly situated

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[281] Citizens United v. FEC, 558 U.S. 310, 349–56 (2010); *see* Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896) ("It is now settled that corporations are persons, within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.") (citations omitted); Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U.S. 26, 28 (1889) (extending Fourteenth Amendment procedural due process to corporations); *see generally* Santa Clara v. S. Pac. R. R. Co., 118 U.S. 394 (1886); Garrett, *supra* note 76 (providing a survey of corporate due process rights).

[282] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771–72 (2014); *see* discussion *supra* Part II.*B*.

[283] Citizens United v. FEC, 558 U.S. 310, 342–55 (2010); *see* discussion *supra* Part II.

[284] Bank of Augusta v. Earle, 38 U.S. 519, 525 (1839); *see supra* notes 95–103 and accompanying text.

[285] *See* discussion *supra* Section II.*A*.

[286] *Hobby Lobby*, 134 S. Ct. at 2768; *see* discussion *supra* Section II.*B*.

individual would not be constitutional.[287] The courts would not uphold a default judgment based solely on service of process made on an address at which the individual no longer resides and found not through diligence on the part of the plaintiff, but instead upon reliance on what was contained in just one record with one government entity.[288] The courts would also not permit a default judgment based on substitute service on a domestic corporation at a prior place of business. A default judgment on a foreign corporation based on forwarding notice of service to an improper address is not reasonably calculated to provide that foreign corporation with notice in a world in which all corporations must be treated as equal to a natural persons.

Expanding the Fourteenth Amendment's procedural due process rights to treat a corporation like a natural person does not require logistical leaps or manipulation of precedent. The history of corporate due process rights, the standard of reviewing such rights, and the recent decision in *Citizens United* make equalizing the operation of service of process statutes a natural outcome. Due process has been confirmed repeatedly as a right that applies to corporations; it is a natural extension of recent precedent for due process rights to become more equal to those exercised by natural persons.[289] *Citizens United* held that corporations have First Amendment rights because corporations can speak.[290] *Hobby Lobby* held that corporations have religious beliefs because its owners have religious beliefs.[291] Similarly, the Court should find that a corporation has the same due process rights as an individual because they can be sued and deprived of property.

C. Proposal to Reform Corporate Service of Process Under the New Regulatory Regime of Citizens United

The right to receive notice and be heard when faced with litigation is a fundamental right all can understand. Before property may be taken away by a governmental activity, the Due Process Clause requires that individuals be given an opportunity to protect their property interests.[292] For purposes of court

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[287] *See, e.g.*, Jones v. Flowers, 547 U.S. 220, 232 (2006).

[288] *See id.* at 225 (holding that the state could not rely on the address on file with the commissioner and the plaintiff's duty under law to update the address).

[289] *See, e.g.*, Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896) ("It is now settled that corporations are persons, within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.") (citations omitted); Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U.S. 26, 28 (1889) (extending Fourteenth Amendment procedural due process to corporations). *See generally* Santa Clara v. S. Pac. R. R. Co., 118 U.S. 394 (1886).

[290] Citizens United v. FEC, 558 U.S. 310, 353 (2010). *See supra* notes 158–163 and accompanying text.

[291] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2769 (2014). *See supra* notes 175–179 and accompanying text.

[292] *See* U.S. CONST. amend. XIV § 1.

proceedings, the Due Process Clause has been interpreted to require that a party be given the opportunity to have its day in court before a neutral tribunal.[293] *Flowers* imposes additional requirements for providing adequate notice, mandating that parties take additional steps when they have additional time, additional information, and when reasonable additional measures are available.[294] For this reason, the treatment of foreign corporations that have withdrawn from doing business in a state was questionable even before *Citizens United.*

Because corporations are non-corporeal, they must always be served through either a registered agent for service or through an officer of the corporation with the authority to accept service.[295] The lack of a physical body requires states to designate where a party may serve a corporate defendant—either a principal place of business, home office, or the address indicated by the registered agent.[296] When a domestic corporation or a foreign corporation that has failed to register with the state does not designate an agent or provide information to the Secretary of State, corporate statutes allow a plaintiff to serve a corporation by serving the Secretary of State, indicating that corporation's principal place of business or home office address.[297] These conditions are reasonably calculated and necessary for providing plaintiffs with a means of recovery against a defendant that is lacking in a physical form. *Citizens United* does not invalidate these steps, which are necessary due to the nature of the corporate form; it is only concerned with inequalities based solely on a corporation's nature. States may bring themselves into compliance with *Citizens United* by eliminating perpetual updating requirements—treating withdrawn foreign corporations like all other foreign and domestic corporations.

The current MBCA withdrawal provisions are unconstitutional. This does not, however, mean the provisions cannot be structured in a way that satisfies due

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[293] *See* Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976) (citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951)).

[294] Jones v. Flowers, 547 U.S. 220, 234–35 (2006). *Flowers* may be read to impose a *Mathews*-style balancing test to notice. *See id.*; Mathews v. Eldridge, 424 U.S. 319, 332 (1976). The *Flowers* Court notes that when more is at stake, more effort should be made to perfect notice. *See Flowers*, 547 U.S. at 234–35. Professor Borchers advocates for eliminating the lines of distinction between substantive, procedural, and administrative due process. Patrick J. Borchers, Essay, Jones v. Flowers*: An Essay on a Unified Theory of Procedural Due Process*, 40 CREIGHTON L. REV. 343, 347–48 (2007) ("Currently, the Supreme Court and commentators think of these three lines of cases in isolation. The *Jones* decision, for example, cites cases that are mostly in the *Mullane* line. State-court jurisdiction cases rely almost exclusively on cases in the 'minimum contacts' line of cases. The 'reasonable procedures' cases in the *Mathews* line are essentially all lumped under the heading of 'administrative due process.' Commentary, including my own, has mostly treated the lines as distinct. But what if we began to think of these as one, rather than several issues? My contention is that doing so would promote analytical clarity.") (internal footnotes omitted).

[295] *See supra* note 129–130 and accompanying text.

[296] *See supra* note 129–130 and accompanying text

[297] *See supra* note 129–130 and accompanying text.

process.[298] Alternative means of proper substitute service on a corporation exist in other corporate statutes and even in other sections of the MBCA.[299] By equalizing the treatment of foreign corporations that have never registered to do business within a state, corporations incorporated in a state, and foreign corporations that have registered to do business in a state but have withdrawn, the MBCA can be corrected to comply with the heightened constitutional requirements of *Citizens United.*

Some may view a complete elimination of constructive notice on the Secretary of State as the natural outcome of the application of recent precedents to corporate statutes, but this is not the best result. Treating the corporation as anything more than an artificial, legal construct results in legal inequalities that favor corporations over natural persons. For instance, following *Citizens United* to this conclusion, and eliminating all distinctions between natural persons and corporations, may protect the corporate right to due process—but it also allows corporations to use withdrawal to evade legal responsibility. While the withdrawal statutes, even pre-*Citizens United*, created a scenario that allowed plaintiffs to act in bad faith when serving foreign corporations, this foul outcome does not require the elimination of states' ability to impose conditions on a foreign corporation that could not be applied to natural persons. The differences between natural persons and corporations—such as a corporation's lack of a physical body that may be served—justify states' ability to mandate different service of process requirements to accommodate those differences.

The states that employ the MBCA, requiring corporations to update an address for a set number of years, balance state concerns based on the non-corporeal nature and perpetual life of corporations against the requirements of due process.[300] By merely linking the updating requirement to the statutes of limitations for causes of action arising out of corporations' conduct in a jurisdiction, statutes with time-limited provisions do not impose an additional burden on foreign corporations. This practice provides protection to states' residents and ensures corporations receive notice of suit against them. These modified MBCAs are still at risk, however, of running afoul of the *Flowers* standard. The policy of deeming a corporation served and allowing a plaintiff to perfect service by serving the Secretary of State does not completely eliminate the risk of a bad actor plaintiff. If a specific year requirement is imposed, the holdings of *Citizens United*, *Hobby Lobby*, and *Flowers* would jointly require additional attempts at service if notice initially fails.

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[298] *See, e.g., supra* note 205 and accompanying text (discussing alternative means for service available under the Model Business Corporation Act).

[299] *See, e.g., supra* note 205 and accompanying text (discussing alternative means for service available under the MBCA).

[300] *See* OR. REV. STAT. ANN. § 60.734 (West 2016) (5 years); VT. STAT. ANN. tit. 11A, § 15.20 (West 2016) (7 years); *supra* note 136 and accompanying text.

State withdrawal statutes that require a plaintiff to serve the Secretary of State indicating a corporation's principal place of business or home office address are most effective post-*Citizens United*.[301] When a corporation that is registered to do business within the state fails to designate an agent for service, the MBCA provides for service on the corporation via the secretary of the corporation at its principle place of business.[302] This requirement applies equally to domestic and foreign corporations. Using a corporation's principle place of business is a method familiar to parties and reasonably calculated to reach the corporation. These statutes equalize all corporations, place the onus of indicating an incorrect address on the plaintiff, and ensure that the foreign corporation may not evade liability by simply withdrawing from the jurisdiction.

Due process requires that constructive notice be reasonably calculated in all circumstances to result in actual notice.[303] A combination of beliefs with regard to corporate theory—and, in particular, the nature of a foreign corporation's rights—have permitted states to impose conditions on out-of-state corporations that are different from the standards imposed on domestic corporations and natural persons. This can result in an unconstitutional failure of foreign corporations' notice of suit.[304] Currently, states are permitted to deem a foreign corporation as served when service is made upon the Secretary of State, and, if notice is forwarded to an incorrect address due to a foreign corporation's failure to maintain an updated address with the Secretary of State, the impact of such failure falls on the corporation, not the party attempting to notify the corporation.[305] This outcome not only disregards the knowledge of the party attempting to serve the corporation in violation of the Supreme Court's decision in *Jones v. Flowers*,[306] but it also imposes a method of service that differs from the requirements for domestic

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[301] California arguably has the most unique treatment of foreign corporations. After withdrawal, foreign corporations are served by any means allowable. CAL. CORP. CODE § 2114 (West 2016). This approach treats the foreign corporation that has surrendered its right to do business in the state the same as a domestic corporation or a foreign corporation that was never admitted. California also takes a more liberal approach in providing relief from default judgments. Under the California Code of Civil Procedure: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." CAL. CIV. PROC. CODE § 473(b) (West 2016).

[302] MODEL BUS. CORP. ACT § 5.04 (2010).

[303] Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950); *see* discussion *supra* Section I.*B.*

[304] *See* discussion *supra* Sections III.*B.* and III.*C.*

[305] *See* discussion *supra* Section III.*A.*

[306] *See* Jones v. Flowers, 547 U.S. 220, 232 (2006).

corporations.[307] When the *Flowers* requirements are combined with a view of the corporation as equal to a natural person, the MBCA withdrawal statutes fail to satisfy constitutional guarantees of due process under the *Citizens United* standard. A consideration of the outcome under the *Flowers* standard makes the statutory scheme constitutionally problematic. By adopting the same service of process requirements found elsewhere in corporate statutes, however, states may come in compliance with *Citizens United.*

CONCLUSION

This Article considers one application of the *Citizens United* holding, and concludes that the decision renders unconstitutional the substitute service as it is applied through the Model Business Corporation Act. The issue presented by *Citizens United* is whether the MBCA and other corporate statutes accurately reflect the new level of equality between natural persons and corporations. Following the *Citizens United,* states must look to the nature of rights, not the party exercising them, when determining the permissible level of state restriction on corporate rights. For this reason, states must reexamine the withdrawal statutes to ensure that the requirements do not produce an inequitable and unconstitutional result.

Citizens United requires states to view corporations and natural persons equally when determining the constitutional limits on state authority. The *Citizens United* and *Hobby Lobby* prohibitions of identity-based limits on constitutional rights require states to examine the nature of the right themselves, not the nature of the person exercising the rights. Somewhat controversially, this Article proposes that these holdings are an indication of the direction of the Roberts Court; thus, it is reasonable to assume that the Court will extend corporate due process rights to require an equal probability of notice. Considering the Court's recent decision on procedural due process, *Flowers,* this outcome is particularly accurate in circumstances, like those permissible under the MBCA, which benefit a plaintiff with actual knowledge of better means of service—and which not only draw distinctions between persons and corporations, but also between foreign and domestic corporations. Correcting this disparity will not impose an undue burden on the states, as alternative means of service already exists elsewhere in corporate statutes that will allow states to treat all corporations equally. States that have adopted the MBCA may remedy the disparity in two ways: (1) by requiring parties to serve foreign corporations at their principal place of business or home office, similar to service of process on domestic corporations that have failed to designate a registered agent; or (2) by only requiring the foreign corporation to provide an address for service for a more reasonable, set number of years instead of in perpetuity. Both of these methods satisfy the constitutional protections of corporate

[307] *See* MODEL BUS. CORP. ACT § 5.04 (2010); *supra* notes 203–206 and accompanying text.

rights and service of process imposed by *Citizens United* and *Flowers*, balance states' interests with the rights of foreign corporations, and do not impose impractical or unreasonable means of service.