CLIMBING BACK INTO THE CONUNDRUM CAULDRON: REVISITING THE SMLLC PRO SE PROHIBITION

Kenya JH Smith*

* Kenya J. H. Smith is the Freddie Pitcher, Jr. Endowed Professor at Southern University Law Center and a former Deputy Mayor for the City of New Orleans. He received his B.A. in Political Science from Southern University at New Orleans and J.D. from the University of Wisconsin Law School. The endowed professorship is made available through the State of Louisiana Board of Regents Support Fund. This work was funded by a summer research stipend from Southern University Law Center, with thanks to Chancellor John K. Pierre. The author gratefully thanks all who have supported and contributed to this article, including the administration, faculty, and staff of Southern University Law Center, as well as the members of the Southeast/Southwest People of Color Legal Scholarship Conference, and the John Mercer Langston Black Male Law Faculty Writing Workshop.

I. INTRODUCTION

As the well-known Sesame Street song says, "One of these things is not like the others . . . . One of these things doesn't belong . . . Can you tell which thing is not like the other by the time I finish this [article]."[1] That might not be as easy as first appears in reading much of the federal jurisprudence on the pro se rights and privileges afforded juridical persons, especially when it comes to properly categorizing the single member limited liability company ("SMLLC").

The right to personally petition government is a critical component of the American experiment, embedded since the early beginnings of a nascent nation. This was no less so in judicial proceedings with citizens entitled to the "day in court" we fancifully still revere today. While there is relatively no controversy concerning a natural person's right to appear in court with or without a licensed attorney representative, pro se applicability to the juridical entities representing the business interests of these individuals remains subject to far greater debate. Federal courts have long distinguished corporations from sole proprietorships and individuals operating each of them respectively, determining that the latter is indistinguishable from the individual owner while the former, though artificial, possesses sufficiently independent personhood to justify requiring licensed legal representation

1. A well-known segment of Sesame Street is titled: "One of these things is not like the others." Sesame Street, *Sesame Street: One of These Things*, YOUTUBE (July 16, 2010), http://www.youtube.com/watch?v=6b0ftfKFEJg [https://perma.cc/ZC6Z-WNK3]. Being a product and part of an emerging 80's hip hop generation, a play on the aforementioned Sesame Street jingle was used to introduce the rapper Kwame as "One of these kids is doing his own thing. One of these kids is one in the same. One of these kids is doing his own thing. Now it's time to say his name. What's his name?" *Kwame – The Man We All Know and Love*, YOUTUBE (Feb. 21, 2009), https://www.youtube.com/watch?v=LS7K2mybKBw [https://perma.cc/K9H6-HUZA]. This jingle could as aptly describe the single member LLC, a subset of the larger LLC family, each "doing their own thing."

under 28 USCA §1654. Over time, partnerships, unincorporated associations and even sole shareholder corporations have been deemed more analogous to the corporation for purposes of §1654 and all distinguishable from the sole proprietorship.

In 2007 and 2008, *Lattanzio v. COMTA*[2] ("*Lattanzio*") and *U.S. v. Hagerman*[3] ("*Hagerman*") seemingly answered the question of whether a limited liability company ("LLC"), and the SMLLC in particular, would also be added to the list of juridical entities denied self-representation under §1654.[4] It's been over ten years since the *Hagerman* and *Lattanzio* decisions. In the interim, the *Citizens United v. Federal Election Commission*[5] ("*Citizens United*") and *Burwell vs. Hobby Lobby*[6] ("*Hobby Lobby*") decisions have reshaped the federal view of juridical personhood, expanding it in ways perhaps not envisioned when *Lattanzio* and *Hagerman* were decided. Given the current state of juridical personhood and the continuously growing popularity of LLCs among small business owners, this seems an opportune time to more deeply analyze the theories underlying the relative federal judicial treatment of the respective entities under §1654, and specifically whether the SMLLC is more analogous to the sole proprietorship or the traditional corporate form with which courts analogize it.

This article begins with a historical perspective on the pro se litigation right enjoyed by natural persons under American law. It explains the English heritage and early colonial conceptual entrenchment that fostered the strong attachment now embedded in our constitutional and statutory frameworks. Part III discusses the application of the pro se principles articulated in American law to the SMLLC *vis-a-vis* other juridical entities to provide comparative relief regarding how these persons are viewed through a pro se litigation lens. This part begins by exploring the corporate pro se prohibition predicate to show the longstanding antagonism towards this entity and how it set the stage for the denial of this right to all other juridical persons except the sole proprietorship. This part then critiques the similarities and differences among juridical persons as measured against generally recognized personhood characteristics under law and established legal theories. In doing so, this part discusses the aggregate theory as providing

2. Lattanzio v. COMTA, 481 F.3d 137 (2d Cir. 2007).

3. United States v. Hagerman, 545 F.3d 579 (7th Cir. 2008).

4. *Lattanzio*, 481 F.3d at 140; *Hagerman*, 545 F.3d at 581. *See also* Carter G. Bishop & Daniel S. Kleinberger, *An SMLLC Conundrum: Disregarded for Tax Purposes But Not in Federal Court*, 12 J. BUS. ENTITIES 4, 6 (2010) (discussing "whether a single-member LLC is more like a wholly owned corporation or a sole proprietorship").

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

6. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

the standard most consistent and best positioned to meet the policy objectives articulated in traditional business entity law as well as those held most sacred in parsing pro se petitions. The aggregate theory overlay reveals the stark similarities of the SMLLC and the sole proprietorship glossed over in federal judicial consideration of SMLLC pro se petitions. This part also parses the policies articulated by federal courts in support of the prohibitions maintained against, *inter alia*, SMLLC pro se petitions, showing that deeper policy considerations are warranted by the circumstances. Part IV makes recommendations for reconciling the inconsistencies identified in the application of articulated juridical person pro se standards, suggesting the aggregate theory as a model for reconciliation implementation. This article concludes that the aggregate theory, a personhood model that more consistently meets the core policy objectives of business entity and pro se litigation laws, will show the SMLLC to be far more analogous to the sole proprietorship and distinguishable from the other juridical persons with whom it has been summarily analogized.

II. HISTORICAL PERSPECTIVE ON THE PRO SE LITIGATION RIGHT

The right to appear pro se, at least for a natural person, is deeply rooted in the American legal tradition, even harkening to the British heritage that still influences our contemporary legal system. This is an unsurprising byproduct of the larger British common law system preserved in American law. This Part discusses the history and sources of pro se litigation that provide context for a discussion of the rights recognized for certain persons but denied others.

In some respects, the right to self-representation can be traced at least as far back as the medieval English Magna Carta which raised the possibility of self-representation.[7] Oxymoronically, early English common law actually denied accused criminal litigants the assistance of counsel.[8] The availability of legal counsel developed in the 16th and 17th centuries for civil and misdemeanor cases, with felony cases remaining what was still seen as a "long argument between the prisoner and the counsel for the Crown."[9] This

7. Magna Carta Art. 40 ("To no one will we sell, to no one will we refuse or delay, right or justice."). For more information on the evolution of pro se representation in Great Britain, see Tiffany Buxton, Note, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 107–08 (2002).

8. Faretta v. California, 422 U.S. 806, 823 (1975) (quoting F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 211 (2d ed. 1909) (the defendant was typically ordered to "'appear before the court in his own person and conduct his own cause in his own words'").

9. *Faretta*, 422 U.S. at 823–24 (citations omitted) (quoting JAMES FITZ STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 325–26 (1883))

is partly explained by the fact that "self-representation" under this rubric did not mean much more that an opportunity for defendants to offer a chosen defense.[10]

It was only with the passage of the Treason Act of 1695[11] that felony defendants were afforded full assistance of counsel as a right.[12] Even then, counsel was not a required component of a criminal defendant's appearance.[13] However, the defendant retained a greater right "to make what statements he liked"[14] Jurists consider this the seeds of choice between counsel and self-representation that later bloomed in American law.[15]

The colonists brought this English notion of a right to self-representation to America.[16] The notion of speaking for oneself became easily and extensively embedded in American colonialism.[17] In fact, the right to self-representation was more closely guarded in the American colonies than in England due to greater notions of "self-reliance and a

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("Not only were criminal defendants denied the assistance of counsel, but the courts also denied them the rights to notice, confrontation, and compulsory process that are required for a fair adversary proceeding. As opposed to criminal trials, the right to counsel in civil cases developed early and continued throughout the century. Criminal defendants, however, were denied the right to counsel during the entire seventeenth century.").

10. *Faretta*, 422 U.S. at 821–23. One notable exception to the self-representation model was the Star Chamber. *Id.* at 821. The Star Chamber was a judiciary arm created to try "political" offenses. *Id.* Although defendants were required to have counsel, the assistance was illusory. Aileen R. Leventon, Comment, Faretta v. California*,* 61 CORNELL L. REV. 1019, 1023 n.28 (1976). The Star Chamber used counsel to coerce confessions from the accused, placing the defendant at the mercy of the appointed counsel throughout the judicial process. The Star Chamber's refusal to accept a defendant's answer to an indictment without the consent of counsel demonstrates the severity of this rule. If counsel refused to sign the answer, the Star Chamber presumed the defendant confessed to the crime. *Faretta,* 422 U.S. at 821–22. Furthermore, counsel did not zealously defend clients because answers which were either false or offended the Crown subjected the attorney to rebuke, suspension, fine, or imprisonment. Leventon, *supra* note 10, at 1023 n.28. The Long Parliament abolished the Star Chamber in 1641. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 262 (1988) (noting a Puritan agitator's refusal to confess to a crime provided the impetus for the abolishment of the Star Chamber).

11. 7 & 8 Will. 3 c. 3, § 1.

12. The Treason Act granted defendants the right "to make . . . full Defense, by Counsel learned in the law." *Id.*; *Faretta*, 422 U.S. at 824–26.

13. *Faretta*, 422 U.S. at 825–26.

14. *Id.* at 825 (quoting W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 195 (1927)).

15. *Faretta,* 422 U.S. at 821 (implying a right to self-representation from the Sixth Amendment's roots in English history).

16. Leventon, *supra* note 10, at 1023 (noting colonial practices came from the history of the legal profession and criminal procedure in England).

17. *Faretta*, 422 U.S. at 826.

traditional distrust of lawyers."[18] This distrust for attorneys was more intense than that maintained by local English subjects because of the persecution they suffered for their opposition to the Crown.[19] Therefore, the colonists usually defended themselves at trial.[20] Attorneys endeavoring to practice in the early colonies found the environment so hostile that few stayed for long.[21] Although the colonists' antilawyer sentiment contributed greatly to their strong belief in self-representation, the natural law philosophy which prevailed during the Revolution also performed a pivotal role in shaping this belief.[22] The colonists believed God granted people basic inalienable freedoms.[23] Natural law thinkers did not believe in the established common law as the basis for recognition of these natural rights. Instead, these theorists believed that common law played a subordinated role in preserving and protecting these rights.[24] Thomas Paine, in a speech supporting the 1776 Pennsylvania Declaration of Rights, made an eloquent argument regarding the inalienable nature of the right to self-representation, stating that "either party . . . has a natural right to plead his own cause; this right is consistent

18. *Id.* This distrust stemmed from confrontations with the King's Court, where the attorneys and the solicitors twisted the law to secure convictions. *Id. See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 94 (2d ed. 1985) (discussing the colonists' distrust for lawyers). In general, the colonists viewed the art of lawyering as a vile and despicable practice. *Id.* Some colonies even banned attorneys from their courts. *Id.* Even though the colonists distrusted lawyers, they still recognized the importance of counsel in criminal cases and permitted accused felons to use counsel to assist in their defense. *Faretta*, 422 U.S. at 827. However, as stated in *Faretta,* "the basic right of self-representation was never questioned," and not once did a colonial court force counsel on a defendant. *Id.*

19. *See, e.g.*, *Faretta*, 422 U.S. at 827 (describing the colonists hatred for the Crown and its practice of twisting the law to secure the conviction of those opposing the King's prerogatives); DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 197 (1958) (stating the colonists brought with them their ancient English prejudice against attorneys, which became an institution in America); FRIEDMAN, *supra* note 18, at 95 (finding the colonists' distrust for attorneys in part came from their oppressions in England); Mary C. Garcia-Feehan, United States v. McDowell: *A Newer Standard For Waiver*, 19 U. TOL. L. REV. 383, 385 (1988) ("The colonists' distrust for lawyers stemmed from their experiences in England."). Another plausible reason for the colonial emphasis on self-representation is the severe shortage of lawyers during that period. Leventon, *supra* note 10, at 1024.

20. *See* Garcia-Feehan, *supra* note 19, at 385 (noting the historical right to self-representation is founded in precolonial times); Leventon, *supra* note 10, at 1024 (finding that "the memory of the Star Chamber practices coupled with their belief in the abilities of the individual and their scorn of lawyers resulted in the practice of self-representation").

21. *See* FRIEDMAN, *supra* note 18, at 94.

22. Natural law thinkers believe there is an ultimate divine source of the moral law and natural rights. Paul G. Kauper, *The Higher Law and the Rights of Man in a Revolutionary Society*, 18 L. QUADRANGLE NOTES 9, 9 ("The conception of natural rights was a basic ingredient in the thinking of the colonists.") (1974).

23. *Id.* at 9.

24. *Id.* at 9.

with safety, therefore it is retained."[25] This colonial history has been recognized as the predicate for the firm belief that the Sixth Amendment "necessarily implies the right of self-representation."[26] The American emphasis on the value of counsel and the desire to preserve self-representation culminated in the statutory as well as constitutional rights to both.[27]

The Judiciary Act of 1789 provided "[t]hat in all courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively."[27] Congress incorporated that right to proceed pro se into the United States Code, where it is still codified today.[28] Thus, federal civil litigants have a statutory right to pursue their claims either individually or with the assistance of counsel.[29] The Sixth Amendment of the United States Constitution, ratified contemporaneously, guarantees defendants in a federal criminal proceeding the right to assistance of counsel.[30] This constitutional-statutory dichotomy would manifest a sibling-like symbiotic tension that persists in today's jurisprudence.

Longstanding federal precedent exists recognizing that the right to assistance of counsel includes the right to self-representation during a criminal trial. However, self-representation at a criminal trial was not always considered an absolute right and was subject to judicial discretion.[31] While the right to counsel in criminal cases was becoming more explicitly

25. BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 316 (1971).

26. *Faretta*, 422 U.S. at 832.

27. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92 (1789) ("[I]n all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein."); *see also Faretta*, 422 U.S. at 812 ("In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation.").

28. *See* 28 U.S.C. § 1654 (2006) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.").

29. *Id.*

30. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); *see also Faretta*, 422 U.S. at 812–13, 32. It is significant that at the time of the Sixth Amendment and Judiciary Act, many state constitutions expressed or inferred a right to self-representation. *Faretta*, 422 U.S. at 831–32.

31. United States v. Dougherty, 473 F.2d 1113, 1123 (D.C. Cir. 1972) (holding that regardless of whether the right to self-representation is a Constitutional right, it is clearly a statutory right that must be recognized if timely asserted and accompanied by a valid waiver of counsel).

acknowledged,[32] the right to self-representation struggled in the shadows for its own recognition, often only implicitly acknowledged by the Supreme Court in dictum, and even in cases expressly favoring the right to counsel.[33] *Adams v. United States ex rel. McCann*[34] represented perhaps represented the Court's strongest foreshadowing of the forthcoming changing in constitutional perspective on the right to self-representation.[35] The Court stated:

> What were contrived as protections for the accused should not be turned into fetters. . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.[36]

However, this march towards independent recognition of constitutionally protected right to proceed pro se in criminal proceedings, with the United States Supreme Court's decision in *Faretta v. California*[37]

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32. *See, e.g.*, Price v. Johnson, 334 U.S. 266, 285 (1954) (contrasting the defendant's right to argue his appeal from the "recognized privilege of conducting his own defense at the trial"); Adams v. United States *ex rel.* McCann, 317 U.S. 264, 279 (1942) (recognizing the Sixth Amendment right to assistance of counsel implicitly embodies a right to waive counsel); Snyder v. Massachusetts, 291 U.S. 97, 106 (1921) (finding if a defendant is present at all criminal proceedings then "it will be in his power . . . to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself"); Powell v. Alabama, 287 U.S. 45, 73 (1932) (giving some indigent defendants a constitutional right to counsel when they could not afford it, but not extending that right universally. The defendants in *Powell* consisted of poorly educated black youths facing a capital offense. *Powell*, 287 U.S. at 51–52. In *Powell*, the Court left open the question whether all indigent criminal defendants should be entitled to counsel, but later clarified the universal applicability of Sixth Amendment in *Johnson v. Zerbst*, holding that all indigent criminal defendants entitled to the appointment of counsel. 304 U.S. 458, 462–63 (1938). *See also* Paul Marcus, *The Faretta Principle: Self-Representation Versus the Right to Counsel*, 30 AM. J. COMP. L. 551, 565 (1982).

33. *See, e.g.*, Moore v. Michigan, 355 U.S. 155, 161 (1957) (stating the Constitution does not force counsel on a defendant); Carter v. Illinois, 329 U.S. 173, 174–75 (1946) (finding the historic concept of Due Process does not deny a person "the right to defend himself"); Adams v. United States *ex rel* McCann, 317 U.S. 269, 285 (1942) (suggesting the right to waive counsel was an extension of the Sixth Amendment right to assistance of counsel); *Zerbst*, 304 U.S. at 464 (stating the courts indulge in every reasonable presumption against waiver). The *Zerbst* court indicated the validity of a waiver depends on the circumstances of the case and the individual making the decision. *Zerbst*, 304 U.S. at 464.

34. 317 U.S. 269 (1942).

35. Adams v. United States *ex rel* McCann, 317 U.S. 269, 285 (1942). The Court strongly suggested the right to self-representation extended from the Sixth Amendment right to counsel. Garcia-Feehan, *supra* note 19, 387.

36. *Adams,* 317 U.S. at 279–80.

37. *Faretta*, 422 U.S. at 836.

("*Faretta*"), explicitly recognizing a defendant's constitutional right to represent himself at trial.[38] *Faretta* foreclosed government use of its coercive powers against a defendant self-representation when that defendant "knowingly and intelligently" relinquished the benefits of representation by counsel.[39] Furthermore, the *Faretta* Court emphasized the personal nature of the right,[40] and the "inestimable worth of free choice" involved when the right is exercised.[41] A primary side effect of the *Faretta* Court's recognizing self-representation as a fundamental constitutional right, caused many years of confusion and controversy among lower courts straining to define the contours of this newly minted individual liberty.[42]

III. APPLYING PRO SE PRINCIPLES TO THE SMLLC (VIS-A-VIS OTHER JURIDICAL ENTITIES)

What makes a juridical person sufficiently separate from the constituent owner in a way that triggers the pro se prohibition? And what makes the limited liability company, even a single member LLC, more appropriately grouped with a corporation, partnership and association, all of whom are denied the pro se appearance opportunity in federal court, and distinguishable from the sole proprietorship which is deemed to have no separate existence? The *Lattanzio* and *Hagerman* decisions have been accepted as cementing the federal judicial view that all LLCs, including the SMLLC, are analogous to the corporation, partnership and association, and distinguishable from the sole proprietorship for purposes of pro se litigation rights.[43] These cases also demonstrate the federal courts' propensity to allow

38. *Id*. at 832 ("There is no indication that the differences in phrasing about 'counsel' reflected any differences of principle about self-representation . . . If anyone had thought that the Sixth Amendment, as drafted, failed to protect the long-respected right of self-representation, there would undoubtedly have been some debate or comment on the issue.").

39. *Id.* at 835. The court reasoned that by forcing a defendant "to accept against his will a state-appointed public defender, the . . . courts deprived [the defendant] of his constitutional right to conduct his own defense." *Id.* at 836.

40. The Court stated that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." *Id.* at 817. Additionally, the Court found it significant that the accused suffers the consequences of a failed defense. *Id.* at 820.

41. *Id.* at 834.

42. John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta*, 6 SETON HALL CONST. L.J. 483, 488–89, 492 (1996). Among practitioners, the *Faretta* decision "does not have a particularly wide fan base." Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 434 n.46 (2007).

43. *Lattanzio*, 481 F.3d at 140 (citations omitted)

the sole proprietorship to appear pro se; deeming it to have no legal existence separate from the owner of the business.[44]

Lattanzio involved the sole member of an LLC who attempted to represent the LLC in suing certain accreditation bodies, alleging that those bodies improperly refused to accredit the LLC as massage therapy school. After the United States District Court for the District of Connecticut dismissed the LLC's suit and held that the owner had no independent cause of action, the owner filed a pro se notice of appeal on behalf of the LLC. The Second Circuit Court of Appeals held that the LLC could appear in federal court only through licensed attorney, regardless of fact that the LLC had only one member and that member sought to represent it. While the *Lattanzio* claims were civil in nature, the cases upon which the Second Circuit relied in shaping its analysis included decisions made in the criminal law context, potentially implicating constitutional protections and not those statutorily based.[45]

Hagerman[46] addressed an SMLLC member's attempt to represent the LLC in a criminal trial. Both the LLC and its sole member were charged with and convicted of criminal violations of the Clean Water Act, with the LLC being ordered to pay $250,000 restitution and placed on probation for five years. The government later alleged that the LLC violated the terms of its parole and sought relief from the district court. The district court dismissed the government's petition after the LLC agreed to start paying restitution and provide information on its finances. The sole LLC member appealed the district court's petition dismissal. The Seventh Circuit Court of Appeals held that LLC was not permitted to appear pro se, even through its sole member, and was required to appear through a licensed attorney. The *Hagerman* court, acknowledging the pro se SMLLC matter before it as one

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("Because both a partnership and a corporation must appear through licensed counsel, and because a limited liability company is a hybrid of the partnership and corporate forms, a limited liability company also may appear in federal court only through a licensed attorney. Other courts that have addressed this issue have reached similar conclusions. Further, we see no reason to distinguish between limited liability companies and sole member or solely-owned limited liability companies.").

44. *Id.* (citations omitted) ("Although some courts allow sole proprietorships to proceed *pro se*, a sole proprietorship has no legal existence apart from its owner. Unlike a sole proprietorship, a sole member limited liability company is a distinct legal entity that is separate from its owner. For example, in Connecticut, a limited liability company has the power to sue or be sued in its own name.").

45. A full constitutional assessment of pro se rights in light of *Hobby Lobby* and *Citizens United* is beyond the scope of this article.

46. *Hagerman*, 545 F.3d 579.

of first impression in that circuit, turned to the Third Circuit's *Lattanzio* decision, inter alia, for guidance and support.[47]

Both the *Hagerman* and *Lattanzio* courts relied on the United States Supreme Court's decision in *Rowland v. California Men's Colony, Unit II Men's Advisory Council*[48] ("*Rowland*") in holding that the prohibition on juridical person pro se appearances in federal court applied to all entities except for the sole proprietorship. But to fully understand this juridical personhood juxtaposition and the underlying policy rationales, it might be helpful to first explore the historical development of these entity distinctions. This begins with perhaps the quintessentially separate juridical person, the corporation.

A. The Corporate Pro Se Prohibition Predicate

Of all juridical persons, corporations have endured the longest consistent and notorious history of pro se petition denials. This longtime prohibition is partly traceable to the philosophy that because the corporation does not have an identifiable tangible existence and must act through other persons who act on its behalf, the corporation necessarily lacks the ability to present its own case. Justice Marshall delivered perhaps one of the most famous declarations in American corporate legal history in *Trustees of Dartmouth College v. Woodward* by proclaiming:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.[49]

Having recognized corporations as artificial and lacking the human qualities that would enable said corporations to act without relying on agents,

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47. *Hagerman*, 545 F.3d at 581 (citations omitted)

> ("We have not had occasion to rule on whether, like a corporation, an LLC can litigate only if represented by a lawyer. We can find only one appellate decision directly on point: *Lattanzio v. COMTA,* 481 F.3d 137 (2d Cir.2007) (per curiam), held that an LLC can sue only if represented by a lawyer, even if . . . the LLC has only one member. . . A sole proprietorship may litigate pro se because it has no legal identity separate from the proprietor himself. But a partnership may not . . . and as we said, an LLC is a cross between a corporation and a partnership.").

48. Rowland v. Cal. Men's Colony, 506 U.S. 194 (1993).

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

modern federal courts continue to deem corporations disqualified from the personhood definition provided in the section of the federal code governing the rights of parties to "plead and conduct their own cases personally or by counsel . . . ."[50]

It should be noted that §1654 does not directly reference corporations, nor does it explicitly distinguish corporations from natural persons for purposes of statutory application. As recognized by the courts, that gap is generally filled by the Dictionary Act definition of person, which includes, inter alia, corporations.[51] Despite that seemingly straightforward interpretation, the U.S. Supreme Court addressed that very question in *Rowland*.[52] *Rowland* involved a §1983 civil rights action brought by an inmate association against prison officials in which the association attempted to proceed in forma pauperis. The Ninth Circuit Court of Appeals reversed the lower court's denial of the association's motion (for failure of the association to adequately prove its indigency). The United States Supreme Court overturned the Ninth Circuit's determination, holding that the association could not proceed in forma pauperis as such authorization is limited to natural persons.

While the *Rowland* decision directly addressed a different section of the federal code (28 USCA §1915), the Court referenced §1654 and cited a string of lower court rulings in upholding the longstanding tradition of denying a corporation's petition to proceed in federal judicial proceedings without licensed counsel.[53] Interestingly, none of the cases cited in *Rowland*

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50. *See* Eagle Associates v. Bank of Montreal, 926 F.2d 1305, 1308 (1991) (citations omitted) (citing 28 U.S.C.A. §1654) ("Courts which have refused to allow corporations to appear *pro se* have recognized that '[a] corporation is an artificial entity which can act only through agents.' Accordingly, we long have required corporations to appear through a special agent, the licensed attorney.").

51. *See Rowland*, 506 U.S. at 199 ("The relevant portion of the Dictionary Act, 1 U.S.C. § 1, provides (as it did in 1959) that '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise—the wor[d] "person" . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.'").

52. *Id.*

53. *Id.* at 201–02 (citations omitted) ("It has been the law for the better part of two centuries, for example, that a corporation may appear in the federal courts only through licensed counsel. As the courts have recognized, the rationale for that rule applies equally to all artificial entities. Thus, save in a few aberrant cases, the lower courts have uniformly held that 28 U.S.C. § 1654, providing that 'parties may plead and conduct their own cases personally or by counsel,' does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney. Viewing § 1915(d) against the background of this tradition, its assumption that litigants proceeding *in forma pauperis* may represent themselves tells us that Congress was thinking in terms of 'persons' who could petition courts themselves and appear *pro se,* that is, of natural persons only.").

addressed the Dictionary Act's personhood definition. Two of the cited cases did not even reference §1654 in their respective holdings.[54] The *Rowland* Court distinguished corporations from natural persons using the relying on the Dictionary Act's qualifier that the preceding definition would apply "unless the context indicates otherwise."[55] The Court then proceeded to outline four contextual features of the matter before the court indicating that the term "person" did not cover, inter alia, corporations.[56]

While interpretation of §1654 was not directly before the *Rowland* Court, left undisturbed was a long line of precedent recognizing two general avenues for appearing in federal court: (1) being represented by an attorney licensed and admitted to appear before the authority considering the matter, or (2) representing oneself.[57] The aforementioned and generally accepted rationale that corporations can only act through agents continued as the basis for concluding that the option of representing itself was necessarily precluded, leaving representation by a licensed attorney as the only viable option to corporations seeking to pursue litigation in federal court.[58]

Another consistent trend in this line of case is that a corporation is a "person" under law, and analogous to natural person for the purpose of determining whether a lay person is attempting to represent someone other than themselves. The *Rowland* Court cited *Turner v. American Bar Assn.* ("*Turner*") in holding that corporations must be represented by licensed attorneys.[59] However, *Turner* also involved natural persons who sought recognition of a right to be represented by other natural persons who were not licensed to practice law.[60] The *Turner* court did not distinguish between a natural person seeking authority to maintain unlicensed representation and a corporation doing the same.[61]

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54. Taylor v. Knapp, 871 F.2d 803 (9th Cir. 1989); Richdel, Inc. v. Sunspool Corp., 699 F.2d 1366 (Fed. Cir. 1983).

55. *Rowland*, 506 U.S. at 194 (citing 1 U.S.C. § 1).

56. *Id.* at 201–06.

57. *Id.* at 202 (citing to Turner v. Am. Bar Ass'n, 407 F. Supp. 451 (N.D. Tex. 1975)).

58. *Id.*

59. *Id.*; *Turner*, 407 F. Supp. at 461.

60. *Turner*, 407 F. Supp. at 461 (involving a plaintiff Hartman who moved the Court to allow the Plaintiff Jerome Daly, a person not licensed by any Court but only licensed by the Plaintiff Hartman, to be and act as counsel and spokesman for Plaintiff Hartman in the Switzer suit). Said motion was denied without opinion by Judge John Miller on February 4, 1974. *Id.*

61. *Id.* at 475

> ("This Court has found no case which has interpreted this statute so as to allow an unlicensed layman to represent a party other than himself in a civil or criminal proceeding. Indeed, in a variety of different applications of this statute, the Courts have consistently held that unlicensed individuals may not represent other parties in Federal Court under this Statute.").

These conjoined determinations seem curiously paradoxical. On the one hand federal courts analogize the "personhood" of a corporation to that of a natural person for purposes of disqualifying a lay agent through whom the corporation would appear. These courts then interpret the exact same statute section as denying the corporation equivalent status as a "person" for the purposes of litigating its own claims.[62] Federal courts do not directly address this disconnect, instead seeming to rely on the artificial entity rational to justify denial of corporate pro se rights under §1654.[63]

Hagerman and *Lattanzio* were decided against a backdrop of developing precedential rights manifesting juridical personhood that they seemed to sidestep. Today, corporations possess most, if not all, of the First Amendment free speech rights historically considered quintessentially "human,"[64] including the more recently recognized right to free exercise of religion.[65] Corporations are also generally considered "persons" with Fourteenth Amendment rights to equal protection and procedural due process.[66] Corporations are "citizens" for purposes of Article III

62. *Id.* at 475–76 (holding that a corporation is a separate person to justify prohibition on nonlawyer representation). *But see Rowland*, 506 U.S. at 194 (finding that a corporation is not a person covered by the 1654 and the Dictionary Act).

63. *See infra* III.B.4.a (discussing the artificial entity authority while comparing and contrasting it to the real entity and aggregate entity theories of corporate personhood).

64. *See* First Nat'l Bank of Bos. v. Belotti, 435 U.S. 765, 795 (1978) (discussing the corporate right to political speech); Grosjean v. Am. Press Co., 297 U.S. 233, 244, 249–51 (1936) (holding that a press corporation is a person entitled to the protection of the First and Fourteenth Amendments); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8–9, 17 n.14 (1986) (holding that California cannot force a private, but heavily regulated, utility company to use space in its mailing envelopes to transmit potentially offensive messages from its customers); Citizens United v. FEC, 558 U.S. 876, 886 (2010) (striking down restrictions on corporate independent expenditures as a First Amendment violation).

65. *See Hobby Lobby Stores, Inc.,* 573 U.S. at 682 (holding that a "person" within meaning of RFRA's protection of religion includes for-profit corporations).

66. In *Santa Clara v. S. Pac. R.R.*, the Court held that private corporations have rights to equal protection. Chief Justice Waite declared:

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

118 U.S. 394, 396 (1886). Subsequent decisions have built upon this raw ipse dixit. *See* S. Ry. v. Greene, 216 U.S. 400, 412 (1910) (citing Santa Clara to show that corporations are entitled to equal protection under the Fourteenth Amendment); Covington & Lexington Turnpike Rd. Co. v. Sandford, 164 U.S. 578, 591 (1896). This was much to the consternation of the late Justice Douglas, among others. *See* Wheeling Steel Corp. v. Glander, 337 U.S. 562, 576–77 (1949) (Douglas, J., dissenting) (noting that "[t]here was no history, logic, or reason given [in Santa Clara] to support [the] view" that corporations are persons within the meaning of the Fourteenth Amendment); *see also* Jess M. Krannich, *The Corporate "Person": A New*

jurisdictional powers.[67]

Corporate personhood rights have not been advanced on an unimpeded trajectory. Federal courts have at times articulated their willingness to place limits on the rights recognized in these juridical entities. The Sixth Amendment has been held to assure corporations a right to trial by jury[68] and to counsel.[69] However, these rights have not been extended to appointed counsel and other rights based on the indigency or attendant consequences.[70] Corporations enjoy Fourth Amendment rights against unreasonable searches,[71] but only a limited right to privacy.[72] They are held to possess

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Analytical Approach to a Flawed Method of Constitutional Interpretation, 37 LOY. U. CHI. L.J. 61, 96 (2005) (noting this tendency to build upon older cases); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 881 n.9 (1985) (applying equal protection to a corporation based on "well established" view that corporations are persons under the Fourteenth Amendment); *Santa Clara County*, 118 U.S. at 396 (stating it is clear that corporations are entitled to equal protection); Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 413–14 (1984) (finding due process rights against the exercise of personal jurisdiction).

67. *See* Hertz Corp. v. Friend, 559 U.S. 77, 85 (2010) (citations omitted) (describing prior precedent where a corporation was deemed to be an artificial person of the state by which it had been created).

68. *See* United States v. R.L. Polk & Co., 438 F.2d 377, 378–80 (6th Cir. 1971) (holding that corporations have the same Sixth Amendment right to jury as natural persons); United States v. Greenpeace, Inc., 314 F. Supp. 2d 1252, 1261 (S.D. Fla. 2004) (same). Corporations also have a Seventh Amendment right to a jury in federal court. *See* Ross v. Bernhard, 396 U.S. 531, 536, 542 (1970) (holding that an individual can claim derivative right to civil jury under the Seventh Amendment if a corporation would have had a right to a jury).

69. *See* United States v. Rad-O-Lite of Philadelphia, Inc., 612 F.2d 740, 743 (3d Cir. 1979) ("Consequently, we hold that the guarantee of effective assistance of counsel applies to corporate defendants.").

70. *See Rowland*, 506 U.S. at 206 (citations omitted) ("It is true, of course, that because artificial entities have no use for food or the other 'necessities of life,' Congress could not have intended the courts to apply the traditional 'inability to pay' criterion to such entities. Yet no alternative standard can be discerned in the language of § 1915, and we can find no obvious analogy to the 'necessities of life' in the organizational context. Although the most promising candidate might seem to be commercial-law 'insolvency,' commercial law actually knows a number of different insolvency concepts. In any event, since it is common knowledge that corporations can often perfectly well pay court costs and retain paid legal counsel in spite of being temporarily 'insolvent' under any or all of these definitions, it is far from clear that corporate insolvency is appropriately analogous to individual indigency."). *See also* United States v. Unimex, Inc., 991 F.2d 546, 550 (9th Cir. 1993) ("Being incorporeal, corporations cannot be imprisoned, so they have no constitutional right to appointed counsel."). *But cf.* Am. Airways Charters, Inc. v. Regan, 746 F.2d 865, 873 n.14 (D.C. Cir. 1984) ("It appears beyond sensible debate that corporations . . . do indeed enjoy the right to retain counsel.").

71. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 325 (1978) (finding a corporate right against warrantless inspections by workplace safety regulators).

72. *See* Fleck & Assocs. v. City of Phoenix, 471 F.3d 1100, 1104 (9th Cir. 2006) (finding no corporate right of privacy in regard to running a sex-oriented club); *see also* United States v. Morton Salt Co., 338 U.S. 632, 650–52 (1950) (finding lesser privacy protections for

Fifth Amendment rights against double jeopardy[73] and takings[74] but no rights against self-incrimination.[75] These courts have further acknowledged that not all corporate personhood rights have been determined.[76] Corporate personhood is not without consequence. Corporations have also been held criminally responsible for the acts of agents.[77]

The *Hagerman* and *Lattanzio* decisions did not directly address the impact this context might have on the weighing of the comparative characteristics those courts addressed. Instead, these courts relied heavily on *Rowland*, a 5-4 decision occurring within the aforementioned federal jurisprudential personhood context but prior to *Citizens United* and *Hobby*

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corporations than natural persons). The Court recently held that corporations have no statutory privacy rights under the Freedom of Information Act, but declined to address any constitutional privacy issue. FCC v. AT&T, Inc., 562 U.S. 397, 397–410 (2011).

73. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 565, 575 (1977) (finding corporation had rights against double jeopardy).

74. *See* Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931) (holding that a foreign corporation has the right to claim takings violation under Fifth Amendment).

75. *See* Wilson v. United States, 221 U.S. 361, 383–84 (1911) (finding that a corporation has no power to claim the Fifth Amendment right against self-incrimination); Hale v. Henkel, 201 U.S. 43, 74–75 (1906)); First Nat'l Bank v. Bellotti, 435 U.S. 765, 778 n.14 (1978) (identifying the right against self-incrimination as purely a personal right).

76. The Supreme Court has yet to hold that corporations have Eighth Amendment rights against cruel and unusual punishment and rights against excessive fines (even if the latter were incorporated). *See* Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 276 n.22 (1989) ("We shall not decide whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment, nor shall we decide whether the Eighth Amendment protects corporations as well as individuals."). *But see id.* at 285 (O'Connor, J., concurring in part and dissenting in part) (suggesting the application of the Excessive Fines Clause to corporations); Consol. Edison Co. v. Pataki, 292 F.3d 338, 346–47 (2d Cir. 2002) (finding that corporations are protected by the Attainder Clause but noting a split in authority); *Citizens United*, 558 U.S. at 394 (Stevens, J., concurring in part and dissenting in part) (observing, sarcastically, that the majority's reasoning would require corporations to have the right to vote). *See also* Darrell A.H. Miller *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887 (discussing that if *Citizens United* is taken seriously, then corporations should be afforded Second Amendment protections).

77. *See* N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495–96 (1909)

> ("While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.").

Lobby. Likewise, *Rowland* did not directly address the myriad of other legal rights enjoyed by juridical persons that can only be exercised through agents, instead seeming to rest on an artificial entity approach to its consideration of the personhood rights manifested in the association at issue.[78]

Perhaps these cases might have been decided differently in a post *Citizens United* and *Hobby Lobby* jurisprudential environment, feeling the gravitational pull of these consequential decisions. *Citizens United* involved a challenge to the Bipartisan Campaign Reform Act of 2002 (BCRA)[79] and its regulatory jurisdiction over a streaming video on-demand about Hillary Clinton.[80] BCRA restricted, among other things, independent corporate expenditures for "electioneering communication[s]" that take place within thirty days of a primary election or within sixty days of a general election.[81] The case was also designed to test pre-BCRA restrictions in *Austin v. Michigan Chamber of Commerce*.[82] The *Austin* Court upheld a Michigan law that prohibited corporations from using their general funds for independent political advocacy. *Austin* reaffirmed that legislatures could limit independent corporate expenditures in support of, or in opposition to, a candidate. Resolution of this question largely turned on whether a corporation had constitutional speech rights analogous to a natural person. Justice Kennedy, writing for the majority, answered the latter question in the affirmative.[83]

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78. In *Rowland* the Court discusses the fact that the statutory in forma pauperis process authorizes the courts to allow litigation without the prepayment of fees, costs, or security "by a person who makes affidavit that he is unable to pay such costs or give security therefor," and requires that the affidavit also "state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress." 506 U.S. at 204. Because artificial entities cannot take oaths, they cannot make affidavits. *Id.*

79. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, 116 Stat. 81 (codified as amended in scattered U.S.C. titles).

80. *See Citizens United*, 558 U.S. at 325 ("The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President.").

81. *Id*. at 321 (citing 2 U.S.C. §§ 434(f)(3)(A), 441b(b)(2) (2006)). An "electioneering communication," according to the Court, is "'any broadcast, cable, or satellite communication' that 'refers to a clearly identified candidate for Federal office" and which is "'publicly distributed.'" *Id.*

82. 494 U.S. 652 (1990).

83. *Citizens United*, 558 U.S. at 364

> ("The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech . . . Due consideration leads to this conclusion: *Austin,* 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652, should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity . . . No sufficient governmental interest justifies limits on the political speech of

Four years later, the Court, in *Hobby Lobby*,[84] delivered another momentous decision in the area of corporate personhood. *Hobby Lobby* involved challenges made by two closely held corporations and the families owning them to the contraceptive mandate in the Patient Protection and Affordable Care Act (the "Affordable Care Act"). The key issue before the Court was whether the Affordable Care Act violated the constitutional right to free exercise of religion of the two corporations involved under the Religious Freedom Restoration Act of 1993 ("RFRA"). In holding that the Affordable Care Act's contraceptive mandate violated RFRA, the Court articulated an unprecedented recognition of the religious rights that are possessed and could be exercised by business corporations.[85]

As it did previously in *Rowland*, the Court used the Dictionary Act to define the term "persons" and determine whether the right to the free exercise of religion applied to corporations under RFRA. However, the court reached a starkly different conclusion, finding that the circumstances warranted including corporations and other juridical persons in the definition of *persons* entitled to protection under RFRA.[86]

One might argue the seemingly conflicting rationales in *Rowland* and *Hobby Lobby* are reconcilable due to their respective circumstances.[87] However, the inability of a corporation to take the actions described as sacrosanct by the *Rowland* Court does not appear physically dissimilar to a

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nonprofit or for-profit corporations.").

84. *Hobby Lobby Stores, Inc.*, 573 U.S. at 682.

85. *Id.* ("In holding that the HHS mandate is unlawful, we reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships."); *id.* at 710 ("If, as *Braunfeld* recognized, a sole proprietorship that seeks to make a profit may assert a free-exercise claim, why can't Hobby Lobby, Conestoga, and Mardel do the same?").

86. *See id.* at 707 (citations omitted)

> ("As we noted above, RFRA applies to 'a person's' exercise of religion, and RFRA itself does not define the term 'person.' We therefore look to the Dictionary Act, which we must consult '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.' Under the Dictionary Act, 'the wor[d] "person" . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.' Thus, unless there is something about the RFRA context that 'indicates otherwise,' the Dictionary Act provides a quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard. We see nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition.").

87. *See Rowland*, 506 U.S. at 199–207 (finding that circumstances indicated that juridical entities are not persons contemplated to under §1654). However, a full discussion of that distinction is beyond the scope of this article.

juridical entity speaking, transferring title to property it owns, or being held criminally culpable for the actions of its agents.[88]

B. A Critique of Comparative Juridical Personhood Characteristics

It might be reasonable to query as to whether today's Supreme Court would uphold or overrule the *Hagerman* and *Lattanzio* decisions. Nevertheless, assuming we are able to reconcile the determination that the aforementioned juridical entities are *persons* with rights justifiably subordinated to those enjoyed by natural persons, we are still left with the question of what makes the SMLLC more analogous to the corporation, partnership and association, and distinguishable from a sole proprietorship such that the SMLLC is justifiably denied the ability to appear pro se as a member of the former category. This section explores the similarities and distinctions between juridical persons as those comparisons might impact statutory and constitutional litigation rights. To that end, this part explores the defining features of personhood manifested in each juridical person, discusses the historical personhood theories that seem to underlie conclusions articulated in federal case law, and then tests whether these conclusions provide the clarity and consistency as they might first appear to provide.

As stated, juridical persons are generally considered separate persons, distinguishable from their owners and agents under law, which triggers the requirement of legal representation. But what justifies this "separateness," making the SMLLC analogous to multimember LLCs ("MMLLC"), corporations and associations but distinguishable from sole proprietorships? Is it a particular certification process? Is it purely by operation of law? Perhaps, it is the entity shield? Or does answering this question require a deeper theoretical dive to determine the interests represented by the entity and whether those can be distinguished from the agent through whom the entity is seeking to appear in court? Each of these characteristics, and its applicability to the respective entities is discussed in turn below.

1. Certification

Of the entities discussed in federal case law, there are two that require compliance with some state sanctioned certification process, the corporation

88. *See* Santa Clara v. S. Pac. R.R., 118 U.S. 394 (One should also note that the respondeat superior doctrine has been employed as a rationale to impose corporate liability for actions of its agents); N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495–96.

and the LLC. The other three, partnerships, associations and sole proprietorships, generally do not require a certification process for their existence.[89] It is true that filing articles of incorporation is a prerequisite to corporate existence. The same is true for articles of organization in the forming of an LLC, whether single or multimember.[90] These certification requirements, inter alia, are credited with granting corporations and LLCs life for a given period of time, whether perpetual or for a term.[91] However, the law is generally uniform in requiring no formal application to or certification by a governmental entity in order for a partnership to be formed.[92] In fact, it is possible for a partnership to be formed without the newly bound partners intending to create the entity in question.[93] Further, a partnership is deemed to terminate upon the death, withdrawal or incapacity of persons needed to maintain the business relationship as defined by partnership law.[94] Similar to the partnership, associations generally require no formal filing to come into existence.[95] It too can be granted a perpetual existence, unless the guiding principles dictate otherwise.[96] As with a

89. *See* Mitchell F. Crusto, *Unconscious Classism: Entity Equality for Sole Proprietors*, 11 U. PA. J. CONST. L. 215, 231 (2009) (noting that sole proprietorships are formed by merely conducting business or can result from defects in the creation of a corporation or LLC); *see also* REVISED UNIF. P'SHIP ACT § 102(11) (NAT'L CONFERENCE OF COMM'RS. ON STATE LAWS 1994) (defining a partnership as "an association of two or more persons to carry on as co-owners a business for profit formed under this [act] or that becomes subject to this [act] under [Article] 11 or Section 110").

90. *See* UNIF. LTD. LIAB. CO. ACT § 201 (NAT'L CONFERENCE OF COMM'RS. ON STATE LAWS amended 2013) (outlining the filing requirements to be satisfied in the creation of a limited liability company).

91. *See id.* § 108(c) & cmt. (c) (providing that LLC can be formed for a term or by default exist in perpetuity).

92. *See* REV. UNIF. P'SHIP ACT § 202 (listing the requirements for the creation of a partnership).

93. *See* Holmes v. Lerner, 88 Cal. Rptr. 2d 130, 132 (Ct. App. 1999) ("We affirm the judgment against Lerner, primarily because we determine that an express agreement to divide profits is not a prerequisite to prove the existence of a partnership. We also determine that the oral partnership agreement between Lerner and Holmes was sufficiently definite to allow enforcement.").

94. *See* REVISED UNIF. P'SHIP ACT § 801 (explaining the different ways a partnership could dissolve).

95. *See* REVISED UNI. UNINCORPORATED NONPROFIT ASS'N ACT § 2(11) (2008) [hereinafter RUUNAA] ("'Unincorporated nonprofit association' means an unincorporated organization consisting of [two] or more members joined under an agreement that is oral, in a record, or implied from conduct, for one or more common, nonprofit purposes.").

96. *See id.* § 5(b). Note that this applies to unincorporated associations in states that provide this statutory privilege. Many states do not have unincorporated association statutes, leaving courts to analogize this amorphous entity to partnerships in determining stakeholder rights and responsibilities. Review state cases (especially NY and Fla on unincorporated

partnership and an unincorporated association, a sole proprietorship requires no formal certification to come into existence. If this were to be taken as the primarily distinguishing criteria, then the courts would be faced with reconciling the fact that partnerships and unincorporated associations share the informal characteristics of the sole proprietorship. With the courts refusing this challenge, it is unlikely that the certification criteria provide the singular basis for distinguishing the SMLLC from the sole proprietorship and grouping it with partnerships and associations for pro se litigation purposes.

Further, federal courts distinguishing the sole proprietorship from other business entities seem to ignore or disregard other regulatory requirements imposed on the sole proprietorship which distinguishes its existence from that of an individual owning the business. Interestingly, the *Hagerman* court used the term "separate identity" to distinguish the sole proprietorship from other entities.[97] The court did not define identity, nor did it cite any statutory or jurisprudential authority that defines the term. Instead, the court sweepingly associated identity with statutory entity recognition. However, identity in the common lexicon has a much broader meaning. Identity can connote the distinguishing features of a natural and, presumably, juridical personhood. This would set the stage for a broader analytical framework under which one can compare juridical entities.

If one were to apply a "separate identity test" in a literal sense, it is doubtful that even the sole proprietorship could pass this litmus test in a manner distinguishing it from other juridical entities. For example, while the sole proprietorship is a disregarded entity for tax purposes, it is still required to secure its own tax identification number for, inter alia, the retention of employees and paying payroll taxes.[98] Similarly, it should also be noted that professional licensing authorities and processes do not distinguish between a sole proprietorship and businesses operated by other,

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associations).

97. *See Hagerman*, 545 F.3d at 581 (citations omitted) ("A sole proprietorship may litigate pro se, because it has no legal identity separate from the proprietor himself.") Note the use of the word "identity" at the *Lattanzio* court uses the term "existence."

98. *See Is my SSN my Tax ID Number if I'm a Sole Proprietor?,* GOVDOCFILING.COM, https://www.govdocfiling.com/faq/ssn-tax-id-number-im-sole-proprietor/ [https://perma.cc/4A8P-XRWG]. This EIN is required for retaining employees and paying payroll taxes, banking purposes, filing for chapter 7 or 11 bankruptcy protection, and to participate in Keogh or self-401(k) retirement plans. Although a deep dive into state law entity tax treatment is beyond the scope of this article, it should be noted that sole proprietorships are often assigned separate identification numbers under state tax law. *See, e.g.*, *Instructions for Application for Louisiana Revenue Account Number*, http://revenue.louisiana.gov/taxforms/16019i(5_08)W.pdf [https://perma.cc/P8U3-NGHW] (explaining how in Louisiana sole proprietorships are assigned identification numbers).

more formal juridical entities. While each is a means through which the business owner operates, the licenses are issued to the natural person, and not the entity. This is true in professions ranging from law and medicine to construction and insurance. Focusing on these and other similarities, some scholars have argued for contemporary entity level recognition of the sole proprietorship given today's proliferation of business interests and other available options.[99]

While the forgoing certification and licensing analysis draws a close comparison between the LLC and corporation, it is far less clear that the SMLLC should be analogized any more to a partnership or an unincorporated association than to a sole proprietorship under that framework. Federal courts acknowledge as much, citing other characteristics of the partnership as a workaround.[100] It is equally unclear that this standard provides a reliable basis for the painstaking efforts federal courts have undertaken to distinguish the sole proprietorship from its partnership and association contemporaries. In fact, under this certification and licensing standard, partnerships and associations appear more analogous to a sole proprietorship than to the corporation and LLC with which federal courts more closely analogize them. Without such clarity, exploration of other bases of juridical personhood comparison become more necessary and appropriate.

2. Operation of Law

Assuming then that the aforementioned certification process is not the key distinguishing feature, one might then trace the distinction to more general entity powers and privileges granted by operation of law. As stated above, corporations and LLCs come into being as a function of a state dictated certification processes. However, these processes are not required under state law for partnerships, unincorporated associations and sole proprietorships coming into being or to possess certain personhood capacity. The state sanctioning methods employed for the respective entities bespeak the schizophrenic symbiosis between the collectively synonymous governmental personhood recognition bestowed on certain entities and the distinctive method by which such recognition is obtained. As with the

99. *See* Crusto, *supra* note 89 (proposing that sole proprietorships be granted entity status).

100. *See Hagerman*, 545 F.3d at 582 ("From that standpoint there is no difference between a corporation and a limited liability company, or indeed between either and a partnership, which although it does not provide its owners with limited liability confers other privileges, relating primarily to ease of formation and dissolution.").

certification analysis, a deeper study of the entity distinctions manifested in the manner by which each is deemed by law to come into existence (or to be "born") further complicates the rationalizing of similarities shared by the SMLLC with the MMLLC, corporation, partnership and association, these entities being collectively distinguished them from the sole proprietorship.

Federal courts generally recognize state law as determinative of entity status.[101] Virtually all states have enacted laws governing, inter alia, the internal affairs of juridical entities as well as their relationships with third parties. It is also universally established that no specific statutory law exists governing the internal affairs of the sole proprietorship. Similarly, the sole proprietorship's interactions with third parties are generally governed by traditional common law doctrines, including contract, tort and agency.[102] It should be noted that these doctrines also underlie and govern other entity internal and external relationships, the internal affairs doctrine notwithstanding. One must then consider how these bodies of operational law drive litigation-centric comparisons of the juridical persons.

Federal courts, in analyzing juridical person pro se petitions, have utilized the juridical person's legislatively endowed rights to sue and be sued as proof of sufficient separate personhood such that denial of self-representation through entity agents, even owners.[103] As these courts note, corporations, LLCs, partnerships and unincorporated associations are all statutorily empowered to sue and be sued in their own names while sole proprietorships are not. Federal courts have also articulated legislatively granted ability as a characteristic distinguishing these entities from a sole proprietorship for purposes of pro se personhood rights.[104] However, the law is far from uniform as to whether a partnership's (and in some cases, an association's) ability to sue and be sued in its own name is determinative of its personhood.[105]

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101. *See* Last Minute Cuts, LLC v. Biddle, No. 18-2631-MSN-TMP, 2019 WL 6222280, at *2 (W.D. Tenn. Oct. 18, 2019) ("Federal Rule of Civil Procedure 17(b)(2) requires federal courts to look to state law to determine a corporate entity's capacity to sue or be sued.").

102. *See* WILLIAM K. SJOSTROM, JR., BUSINESS ASSOCIATIONS: A TRANSACTIONAL APPROACH 4 (Vicki Been et al. eds., 2013) ("[A] sole proprietorship is personally liable for the obligations of the business in the same way . . . the sole proprietorship is liable for . . . personal obligations. . . . [The sole proprietorship] will also be personally on the hook for any torts arising out of the business.").

103. *Lattanzio*, 481 F.3d at 140.

104. *Id.*; *see also Hagerman*, 545 F.3d at 582 ("[T]here is no difference between a corporation and a limited liability company, or indeed between either and a partnership, which although it does not provide its owners with limited liability confers other privileges, relating primarily to ease of formation and dissolution."); *Rowland*, 506 U.S. at 202–03 (citing to *Eagle Associates*).

105. *See Rowland*, 506 U.S. at 214 (citations omitted) (Thomas, J., dissenting)

Many states follow the modern standard articulated in the Revised Uniform Partnership Act in providing that a Partnership may sue or be sued in its own name.[106] Interestingly, several of the states providing this standard have also interpreted the allowance as solely procedural in nature and not intended to confer protections on the partners or the separateness seemingly implied by federal courts viewing this ability through the §1654 lens. Although New York law and Delaware law provide that a partnership can sue or be sued in its own name, the law is not regarded as imbuing separate personhood status on the partnership.[107]

The proposition that an entity's ability to sue or be sued connotes separate personhood proves an even more dubious proposition for unincorporated associations. Far fewer states have enacted unincorporated

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("An artificial entity has the capacity to sue or be sued in federal court as long as it has that capacity under state law (and, in some circumstances, even when it does not). *See* Fed. R. Civ. P. 17(b). An artificial entity can make an affidavit through an agent. And an artificial entity, like any other litigant, can lack the wherewithal to pay costs.").

106. *See* REVISED UNIF. P'SHIP ACT § 307(a) ("A partnership may sue and be sued in the name of the partnership.").

107. *See* United States v. Stein, 463 F. Supp. 2d 459, n.22 (S.D.N.Y. 2006) (citations omitted)

("The question whether *Teamsters* applies in a partnership case is not entirely clear and, indeed, may not admit of a general answer. For one thing, members of a general partnership are jointly and severally liable for obligations of the partnership and thus have a far greater personal stake in the representation of the entity, if in fact the partnership is an entity to begin with, than does an employee of a corporation. For another, partnerships frequently are not legal entities. In such instances, counsel to the partnership in reality represents the individual partners.");

Potter v. Pilots' Ass'n for Bay River, 1992 WL 114065 (Del. Super. Ct. 1992)

("Although an association, by law, may sue pursuant to 10 Del. C. § 3904, that statute is procedural only and does not affect the substantive law regarding associations. Thus, the association is its members, and the members are the association. Actions of the association are actions of its members, and if a dispute is with the association, then the dispute is with the individual members.").

See also Del. Code Ann. tit. 10, § 3904 (West)

("An unincorporated association of persons, including a partnership, using a common name may sue and be sued in such common name and a judgment recovered therein shall be a lien like other judgments, and may be executed upon by levy, seizure and sale of the personal and real estate of such association, and also that of the persons composing such association in the same manner with respect to them as if they had been made parties defendant by their individual names. Satisfaction thereof may also be obtained by attachment process.").

association statutes than have done so with respect to corporations, partnerships and LLCs. Accordingly, federal courts in states without an unincorporated association statute will be left without the very guidance required in determining whether the association has the requisite litigation capacity deemed determinative of personhood under §1654. This could also cause even greater confusion for associations formed and recognized in one state but not another, and finding itself litigating in the latter jurisdiction.[108] This could also add to a byzantine matrix of procedural checkpoints, with the association being deemed invisibly a citizen of the state in question through its members for purposes of diversity jurisdiction, a separate entity for purposes of pro se litigation rights, and nonentity for purposes of determining whether it can sue or be sued as well as liability purposes because it is not recognized under that state's statutory rubric.

If the tethering of LLCs, corporations and partnerships through this bond is to be accepted, then the concomitant distinction and justification seems to also aptly apply to the unincorporated association.[109] However, unincorporated associations are denied the very ability to sue or be sued in its own name in several jurisdictions most respected for their business laws. New York and Florida distinguish the unincorporated association from the partnership, expressly denying the separate personhood of the former and citing that unity of interest as the basis for denying its ability to sue and be sued.[110] Texas, on the other hand, allows lawsuits even in the assumed name

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108. *See* REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 4 cmt.

> ("Since the laws governing nonprofit associations in the enacting jurisdiction govern nonprofit associations formed in other jurisdictions that are conducting activities (except for internal affairs issues in the enacting jurisdiction), a foreign-formed nonprofit association could not conduct activities in the enacting jurisdiction that a nonprofit association formed in this jurisdiction could not conduct, even if the activity were legal in the foreign jurisdiction in which the nonprofit association was formed or has its main place of activities.").

109. *See* Church of the New Testament v. United States, 783 F.2d 771, 773–74 (9th Cir. 1986) ("[U]nincorporated associations . . . cannot be represented by laypersons.").

110. *See* L & L Assocs. Holding Corp. v. Charity United Baptist Church, 935 N.Y.S. 2d 450 (Dist. Ct. 2011) (citations omitted) ("Under New York law, an unincorporated association has 'no legal existence separate and apart from its individual members.' Unlike a partnership, an unincorporated association may not be sued 'solely in the association's name.'"); Asociacion De Perjudicados Por Inversiones Efectuadas En U.S.A. v. Citibank, F.S.B., 770 So. 2d 1267 (Fla. Dist. Ct. App. 2000)

> ("At common law, unincorporated associations were treated as partnerships."). A partnership (and therefore an unincorporated association) could sue or be sued only in the name of its members, not in the name of the partnership. The Florida legislature has since empowered partnerships to sue or be sued in their own name. § 620.8307(1), Fla. Stat. (1995). The association asserts that section 620.8307(1*)*

of the sole proprietorship.[111] With this in mind, it doesn't seem unreasonable to ask whether the sole proprietorship is truly distinguishable from partnerships, unincorporated associations and LLCs in this context.

The LLC is acknowledged by the courts as a hybrid entity, borrowing characteristics from other, previously recognized entities.[112] Unfortunately, federal courts do not seem to acknowledge the hybrid nature of the SMLLC, borrowing from both the corporation and the sole proprietorship. Instead, these courts choose to glossily categorize all LLCs as identical.[113] However,

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of the Revised Uniform Partnership Act (RUPA) should be extended to confer standing on unincorporated associations because the common law rule that unincorporated associations are to be treated like partnerships has not been abrogated by statute. We disagree. The legislature clearly intended RUPA to apply only to for-profit organizations: 'An unincorporated nonprofit organization is not a partnership under RUPA, even if it qualifies as a business, because it is not a "for profit" organization.' Uniform comment to § 620.8202(2), Fla. Stat. (1995). The association, as its title implies, is not a for-profit association, as it was organized only to recover damages for its members, not to conduct business for profit. Because there is no statutory authority conferring on the association the capacity to sue, the common law rule, that associations cannot sue or be sued in their own name, applies in this case. Accordingly, the association does not have capacity to sue. Moreover, the court properly denied leave to amend, as the association's capacity defect cannot be cured. Only the individual members or a properly certified class would have standing under these circumstances. Because the capacity issue is dispositive, we need not address the standing issue.").

111. *See* TEX. R. CIV. P. 28

("Any partnership, unincorporated association, private corporation, or individual doing business under an assumed name may sue or be sued in its partnership, assumed or common name for the purpose of enforcing for or against it a substantive right, but on a motion by any party or on the court's own motion the true name may be substituted.").

112. *See Hagerman*, 545 F.3d at 581 (citations omitted)

("Limited liability companies are a 'relatively new business structure allowed by state statute,' having some features of corporations and some features of partnerships. . . For example, 'similar to a corporation, owners have limited personal liability for the debts and actions of the LLC'. . . 'Other features of LLCs are more like a partnership, providing management flexibility', . . . and in some cases affording 'the benefit of pass-through taxation.'");

Lattanzio, 481 F.3d at 140 (citations omitted)

("Because both a partnership and a corporation must appear through licensed counsel, and because a limited liability company is a hybrid of the partnership and corporate forms, a limited liability company also may appear in federal court only through a licensed attorney. Other courts that have addressed this issue have reached similar conclusions.").

113. *Lattanzio*, 481 F.3d at 140 ("Further, we see no reason to distinguish between limited liability companies and sole member or solely-owned limited liability companies.").

the courts' very rationale used to analogize LLCs to partnerships is equally applicable to the LLC's relationship with the sole proprietorship. They each carry the ease of formation and dissolution. The partnership, unincorporated association and sole proprietorship each require no formalities or certification to come into existence or operate. While the LLC requires the filing of articles of organization to come into existence, no other governance documents are required. Each carries the flexibility of management (perhaps the sole proprietorship even more so). LLC statutes require no detailed, documented governance structure, making management more akin to the partnership and the sole proprietorship in allowing for direct management by the owners of the business. Each also carries pass-through taxation as a fundamental part of their tax characterization. These features quintessentially distinguish each of these entities from the rigidity embedded in the corporate form. The lack of level analogous and contrasting analysis regarding the SMLLC's relationship to the sole proprietorship could leave the resulting precedent vulnerable to harsher critique. Nevertheless, the SMLLC is as much a hybrid of the sole proprietorship and corporation as the MMLLC is the progeny of the partnership and the corporation. Accordingly, this flaw aids in proving the operation of law standard another singularly unreliable basis for distinguishing the sole proprietorship from the SMLLC.

3. Liability Shield

Perhaps the seemingly sturdiest distinguishing feature between the sole proprietorship and the corporation, and by extension the LLC, is the liability shield afforded corporate stakeholders and fundamentally unavailable to sole proprietors. It is arguable that this shield should be contextualized as arising by operation of law, but it is certainly available as a result of compliance with certification formalities established by statute. While this is a seeming solution to the juridical personhood debate, the liability shield afforded corporations and LLCs are generally denied to partnerships. Further, no such certification procedures are required for the entity shield to arise in the unincorporated association context.[114]

114. REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 2 cmt. (citations omitted)

> ("The 'governing principles are the equivalent of the articles of incorporation, bylaws and other documents, and established practices that govern the internal affairs of a nonprofit association, sometimes referred to as an entity's private organic rules. The 'governing principles' of a nonprofit association do not have to be in a written form.").

See also id. § 8(a). *But see id.* § 8 cmt.

It is well established and universally accepted that perhaps the primary benefit of incorporating is the liability shield afforded corporate shareholders, directors and officers.[115] There are incumbent tradeoffs required in exchange for that protection, including strict adherence to corporate formalities designed to protect centralized decision making and the double taxation consequence of the corporate existence.[116] Even a sole shareholder who desires to directly manage the affairs of a corporation must adhere to corporate formalities in electing themselves as the corporate director and then appointing themselves to hold all corporate offices required by law. Attempts to circumvent these and other formalities carry the consequential corporate veil piercing risk and the loss of the corporate liability shield.

Partnerships and sole proprietorships do not provide this entity shield. The sole proprietorship is the easiest to distinguish as the business and its individual owner are deemed inseparable for liability purposes.[117] While more analogous to the sole proprietorship in this context, the partnership model requires a more nuanced understanding of its contours. As mentioned above, partnerships are generally recognized as "persons" by state statute even when formed without adherence to particular formalities. Many state statutes provide the "exhaustion rule" requiring that a creditor's claim be satisfied first by using all available partnership assets prior to enforcing a partner's personal liability.[118] However, this does not provide the type of

("In recent years all states have enacted laws providing unpaid officers, board members, and other volunteers some protection from liability for their own negligence (but generally not for conduct that is determined to constitute gross negligence or willful or reckless misconduct). The statutes vary greatly as to who is covered, for what conduct protection is given, and the conditions imposed for the freedom from liability. Some apply only to nonprofit corporations. *State Liability Laws for Charitable Organizations and Volunteers* (Nonprofit Risk Management & Insurance Institute, 1990); *Developments, Nonprofit Corporations*, 105 Harv. L. Rev. 1578, 1685–1696 (1992). This means that members and volunteers involved with unincorporated nonprofit associations do not obtain protection under those state statutes.").

115. MODEL BUS. CORP. ACT § 6.22(b) (AM. BAR ASS'N, amended 2016).

116. The corporation is generally taxed on its income and the shareholders later taxed on dividends paid out from corporate income. *But see, e.g.*, I.R.C. § 1362(a) (2012) (opting into being an "S corporation"). *See also* IRS Form 1120S (shareholders of a corporation having made an S election directly report income and expenses).

117. While the sole proprietorship is not generally deemed to exist separate from the individual business owner, that standard is admittedly unequally applied. The relationship is severable in the sense that the natural person who owns the business does not risk death as a necessary consequence of winding up the sole proprietorship.

118. REV. UNIF. P'SHIP ACT § 307(d).

entity shield contemplated in corporate law.[119]

While the LLC provides a liability shield akin to the corporation, it does not necessitate the tradeoffs required of corporate shareholders. The members of an MMLLC can elect to manage the LLC's business affairs directly instead of appointing a manager, a management structure more akin to a partnership. In the case of an SMLLC, the owner is permitted to directly manage the LLC's business affairs, a quality making it virtually indistinguishable from the manner in which a sole proprietor conducts his or her business. LLCs also provide their owners with a choice of tax treatment options under the IRS "check the box regulations";[120] to be taxed as a corporation with all attendant benefits and consequences or choosing the pass-through taxation treatment of the partnership entity form.[121] The single member LLC owner has the option of corporate tax treatment or having the entity disregarded for tax purposes. This seems to be an important context in which the business and the owner are inseparable. The entity shield notwithstanding, the disregarded entity tax option, together with the aforementioned management flexibility and number of owners, makes the SMLLC much more parallel to the sole proprietorship than to any other entity option.

While the LLC entity shield, like the certification requirement, are admittedly more similar to that of a corporation, it is a feature also distinguishing the partnership from either the corporation or the LLC and analogizing it more closely to the sole proprietorship. Further, the tradeoffs

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119. *See id.* § 306(a) ("Except as otherwise provided in subsections (b) and (c), all partners are liable jointly and severally for all debts, obligations, and other liabilities of the partnership unless otherwise agreed by the claimant or provided by law."). *But see id.* § 306(c)

> ("A debt, obligation, or other liability of a partnership incurred while the partnership is a limited liability partnership is solely the debt, obligation, or other liability of the limited liability partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the limited liability partnership solely by reason of being or acting as a partner.").

See also UNIF. LTD. P'SHIP ACT § 303(a)

> ("A debt, obligation, or other liability of a limited partnership is not the debt, obligation, or other liability of a limited partner. A limited partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the partnership solely by reason of being or acting as a limited partner, even if the limited partner participates in the management and control of the limited partnership. This subsection applies regardless of the dissolution of the partnership.").

120. Treas. Reg. § 301.7701-3 (2014).

121. *Id.*

embedded in the corporate form are inapplicable to the LLC, releasing much of the rigidity that supports identification of the separate corporate existence. Consequently, the liability shield, like certification, both being byproducts of the operation of law, does not singularly support placement of the corporation, LLC (whether MMLLC or SMLLC), partnership and unincorporated association together in a category distinct from the sole proprietorship. In fact, this characterization matches the above discussion of governmental entity certification and calls for additional criteria on which to make more complete and reliable entity comparisons.

4. Aggregation of Interests (Aggregate Personhood Theory)

Even if the entity's independent personhood under the aforementioned certification, operation of law and liability shield rubrics each prove singularly unstable as a premise to compare the SMLLC with the corporation, partnership, association, MMLLC, and sole proprietorship, one must also consider the articulated rationale that unlicensed person seeking to appear on behalf of the entity is representing more than just their individual interests. In most of the referenced entities, that person would be representing other persons possessing an interest in the entity.[122] This section discusses the three more widely discussed entity personhood theories, the artificial entity theory, real entity theory, and aggregate entity theory. It then explores which of the theories most closely matches the manner in which federal jurisprudence attempts to treat the different entities for pro se purposes; seeking to determine whether any of these theories can help reconcile the nature of the SMLLC in relation to its entity counterparts.

(a) Aggregation as an Alternative to the Artificial and Real Entity Theories

The corporation's evolutionary history is complex and convoluted. The entity is at times seemingly selectively deemed nothing more than a legal fiction, at other times a proxy for internal stakeholders and ultimate beneficiaries of corporate activities, and still other times its own person under the law with independent rights and responsibilities. Scholars and jurists vary in opinion as to whether corporate existence is most appropriately determined according to the artificial, real, or aggregate entity theories.[123]

122. This is typically the owners, but this universe could include employees, creditors and other beneficiaries—see arguments on criminal sanctions for juridical persons.

123. *See* Miller, *supra* note 76, at 918 nn.194–96

The artificial theory has the deepest historical roots, tracing back to the sanctioning of the corporations empowered to explore and settle what would become the United States of America. However, its reign as the preeminent juridical personhood legal theory would prove unsustainable as the artificial entity theory was exposed as incapable of fully serving the evolving needs of the business sector serving a developing nation. It was likewise unable to fully explain the operational business relationships it serviced.[124]

To fill that void, the real entity theory developed in ways that still largely resonate today. Real entity theorists conceptualize the corporate form as a natural extension of organic interpersonal business associations, while also exhibiting characteristics that made the corporation, like other organizations, something greater than the sum of its parts.[125] The real entity theory also provides a salient rationale for providing corporate owners with the twin benefits of a liability shield and centralized management not usually associated with partnerships and sole proprietorships.[126] However, this

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("Stray references to artificial entity theory still litter the doctrine. But outside of a few select areas–the Fifth Amendment right against self-incrimination being the most pertinent–the Court seldom denies constitutional protection on the basis of corporate artificiality. Instead, remnants of artificial entity theory manifest as balancing tests. Today, the corporate form legitimates the level, rather than the existence, of many corporate constitutional protections.").

Id. at 918 n.196 ("Not even Justice Stevens in his Citizens United dissent depended on the artificiality of the corporation, recognizing that 'many legal scholars have long since rejected the concession theory of the corporation.'").

124. *See* Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 181 (1985) (discussing this change in attitude); Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1454 (1987) ("Free incorporation . . . suggested that the corporate form was an individual's natural tool, as useful a device for independence and growth as a farmer's plow.").

125. As Victor Morawetz explained: The conception of a number of individuals as a corporate or collective entity occurs in the earliest stages of human development, and is essential to many of the most ordinary processes of thought. Thus, the existence of tribes, village communities, families, clans, and nations implies a conception of these several bodies of individuals as entities having corporate rights and attributes. . . .So, in numberless other instances, associations which are not legally incorporated are considered as personified entities, acting as a unit and in one name; for example, political parties, societies, committees, courts. VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 1 (2d ed. 1886). *See also* Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 257–62 (1911) (arguing that corporationsl–like houses, churches, and schools–are distinct entities which are greater than the sum of their aggregate parts and that "[a]ll that the law can do is to recognize, or refuse to recognize, the existence of this entity"); Horwitz, *supra* note 124, at 220 (citing W. Jethro Brown, *The Personality of the Corporation and the State*, 21 L.Q. Rev. 365, 379 (1905) (noting the turn-of-century legal movement to treat corporations as organic beings greater than sum of parts).

126. *See generally* Horwitz, *supra* note 124, at 205 (highlighting Chief Justice Roger

conceptualization of the corporation would not simply bear the liability burdens of personhood without also benefiting from the attendant rights recognized in this characterization. The real entity theory most closely analogizes corporations to natural persons.[127]

While the real entity theory has been lauded for filling many of the theoretical gaps left by the artificial entity theory, the former also presented the novel proposition of a corporation as being endowed with a "soul to . . . damn" and a "body to . . . kick."[128] It also reminds us of complexity imbedded in intersectionality of these conundrum components.[129]

Like the LLC in comparison to its juridical peers, the aggregation theory seems to strike a balance between the logical extremes reflected in the respective artificial and real entity theories.[130] This balance dates back to early judicial attempts to reconcile the competing perspectives of those viewing corporations as mere instrumentalities and those seeing them as persons independent of constituent stakeholders. In his commonly

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Taney and corporate theorist Henry O. Taylor's concern that limited liability would vanish if corporations were not entities). *Cf.* Mark, *supra* note 124, at 1473 (noting that the right of limited liability inheres in a corporation and not in its constituents); David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STAN. AGORA: AN ONLINE J. LEGAL PERSPECTIVES 39, 40–41 (2001) (discussing the legitimate role of the corporate personality theory). One should note that today's corporate shield is not without competition from various corners of the unincorporated entity world, including numerous forms of partnership. These entities provide greater management flexibility and pass-through taxation, but usually require some governmental certification.

127. A corporation is viewed as a separate entity for purposes of the Article III citizenship clause, regardless of the residency and citizenship of its constituent shareholders. *See* Hertz Corp. v. Friend, 559 U.S. 77, 84–86 (2010) (showing the development of the doctrine that a corporation is a citizen of the state where it is incorporated and has its principal place of business for jurisdiction purposes). There is diversity of thought among scholars, however, as to whether many of the personhood rights recognized in juridical entities truly relies on the real entity theory, or the aggregate theory. *See* Charles R. O'Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After* First National Bank v. Bellotti, 67 GEO. L.J. 1347, 1348 (1979) (noting a lack of consistency in constitutional jurisprudence on the nature of the corporation and its rights); *id.* at 1356 (identifying the view that corporate rights are coextensive with the aggregate of shareholders' rights).

128. John C. Coffee, Jr., *"No Soul To Damn: No Body To Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981) (quoting a remark by Edward, First Baron Thurlow).

129. Felix Cohen's famous essay exposed the circularity of corporate personhood metaphors. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 813–14 (1935).

130. *See* Miller, *supra* note 76, at 931 ("Aggregation theory tries to reap all the benefits of the real entity theory without all of the metaphorical hocus-pocus. Corporations are not artificial; they are not real; they are a set of relationships with which government should not, or constitutionally must not, interfere.").

captioned "Railroad Tax Cases," Justice Field, riding circuit, held corporations to be entitled to equal protection and due process under the Fourteenth Amendment as a representative aggregations of natural persons whose rights required protection.[131] Acknowledging the precedent established by Chief Justice Marshall in *Dartmouth College*, Justice Field nimbly pivoted to an explanation of why the artificial nature of the corporate form was facilitative of constitutional rights exercised by its constituent owners.[132] This perspective seems to be affirmed in contemporary jurisprudence, perhaps most notably involving first amendment protections

131. Railroad Tax Cases, 13 F. 722, 743 (C.C.D. Cal. 1882)

> ("Private corporations are, it is true, artificial persons, but with the exception of a sole corporation, with which we are not concerned, they consist of aggregations of individuals united for some legitimate business. In this state they are formed under general laws, and the Civil Code provides that they 'may be formed for any purpose for which individuals may lawfully associate themselves.' Any five or more persons may by voluntary association form themselves into a corporation. And, as a matter of fact, nearly all enterprises in this state, requiring for their execution an expenditure of large capital, are undertaken by corporations. They engage in commerce; they build and sail ships; they cover our navigable streams with steamers; they construct houses; they bring the products of earth and sea to market; they light our streets and buildings; they open and work mines; they carry water into our cities; they build railroads, and cross mountains and deserts with them; they erect churches, colleges, lyceums, and theaters; they set up manufactories, and keep the spindle and shuttle in motion; they establish banks for savings; they insure against accidents on land and sea; they give policies on life; they make money exchanges with all parts of the world; they publish newspapers and books, and send news by lightning across the continent and under the ocean. Indeed, there is nothing which is lawful to be done to feed and clothe our people, to beautify and adorn their dwellings, to relieve the sick, to help the needy, and to enrich and ennoble humanity, which is not to a great extent done through the instrumentalities of corporations. There are over 500 corporations in this state; there are 30,000 in the United States, and the aggregate value of their property is several thousand millions. 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. On the contrary, we think that it is well established by numerous adjudications of the supreme court of the United States and of the several states, that 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, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents.").

132. *Id.* at 744 ("Indeed, there is nothing which is lawful to be done . . . to enrich and ennoble humanity, which is not to a great extent done through the instrumentalities of corporations.").

of speech and the exercise of religion.[133]

(b) Aggregation Application to the Corporation

There seems to be more room for consensus around the corporation, and by extension other juridical entities, as representing the beneficial interests of, *inter alia,* its owners. This view seems to most consistently underlie the denial of pro se entity petitions.[134] This application of the aggregate theory has been used to extend the longstanding practice of denying corporate pro se petitions to those brought by unincorporated multiparty organizations. For example, *U.S. v. Fox*, and other cases on which the *Lattanzio* court relied, employed a rationale that should resoundingly resonate with aggregate personhood theorists.[135] However, this reliance seemingly contradicts contemporary federal judicial focus on certification and operation of law methods as the distinctive and determinative personhood indicia.

Fox involved the enforcement of an Internal Revenue Service summons against a sole proprietor.[136] In the summons, the IRS sought certain business and tax records belonging to the taxpayer and his wife. The taxpayer refused to produce the documents or testify, invoking his Fifth Amendment privilege against self-incrimination. The district court enforced the summons, holding that "the Fifth Amendment 'directly' protects the contents of an individual's private records *only* if they are 'purely personal' and 'essentially nonbusiness' documents."[137] The United States Court of Appeals, Second Circuit, reversed the lower court, finding no distinction between the sole

133. *Citizens United*, 558 U.S. at 392 (Scalia, J., concurring)

> ("[T]the individual person's right to speak includes the right to speak *in association with other individual persons*. Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of 'an individual American.' It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different—or at least it cannot be denied the right to speak on the simplistic ground that it is not 'an individual American.'");

see also Hobby Lobby, 573 U.S. at 682.

134. *See Rowland*, 506 U.S. at 194 (addressing the unincorporated association); *see also Eagle Assocs.*, 117 F.R.D. at 531 (discussing treatment of the partnership and citing Justice Souter's discussion of the unincorporated association); *Lattanzio*, 481 F.3d at 140 (citing to Phillips v. Tobin, 548 F.2d 408, 415 (2d Cir.1976)) (discussing shareholder derivative suits).

135. *Lattanzio*, 481 F.3d at 140.

136. United States v. Fox, 721 F.2d 32, 32 (2d Cir. 1983).

137. *Id.* at 34.

proprietor and the business they operated.[138] The *Fox* Court relied on a distinction drawn between a business owner representing their individual interests and that person attempting to represent larger collective interests. In doing so, the Second Circuit aligned itself with an earlier articulation of this theory by the Third Circuit in *In re Grand Jury Empaneled* ("*Colucci*").[139] This distinguishing feature has also been recognized by the U.S. Supreme Court as applicable to nonincorporated entities in much the same manner applied in the corporate context, each being a juridical entity established under law to represent convergent as well as divergent interests.[140]

This should not be taken to mean that federal courts have ceased leaning on the intangible nature of the corporate form in denying its pro se application. As discussed above it seems quite inconsistent to purely rely on the artificial nature of a corporation to deny its personhood rights for purposes on §1654, while at the same time relying on its established personhood to distinguish it from a sole proprietorship and deem corporate agents persons speaking on behalf of a person in derogation of the same rule under which corporate personhood was denied in the first place.[141] But that

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138. *Id.* at 35–36 (citations omitted)

> ("The constitutional privilege against self-incrimination is 'essentially a personal one, applying only to natural individuals.' It cannot be invoked by a collective entity or its representatives. . . . A sole proprietor, however, stands on different constitutional grounds. Because a sole proprietorship has no legal existence apart from its owner, the compelled disclosure of a sole proprietor's private or business papers implicates his privilege against self-incrimination.").

139. *In re* Grand Jury Empanelled (Colucci), 597 F.2d 851, 859 (3d Cir. 1979) (quoting *In re Grand Jury Investigation,* 483 F.2d 961, 962 (3d Cir. 1973), *aff'd, Bellis v. United States,* 417 U.S. 85 (1974)

> ("An individual who holds records in a representative capacity for a collective entity (e. g. a corporation, union or partnership) may not assert a Fifth Amendment privilege when he is compelled to produce those records. On the other hand, a sole proprietorship has no legal existence apart from its owner, and such records May be protected from disclosure by the Fifth Amendment.").

140. *See* Bellis v. United States*,* 417 U.S. 85, 89 (1974) (citations omitted) (In affirming the lower court, the US Supreme Court cited *United States v. White,* 322 U.S. 694, 704, 64 S.Ct. 1248, 1254, 88 L. Ed. 1542 (1944) in which it was held that "an officer of an unincorporated association, a labor union, could not claim his privilege against compulsory self-incrimination to justify his refusal to produce the union's records pursuant to a grand jury subpoena. *White* announced the general rule that the privilege could not be employed by an individual to avoid production of the records of an organization, which he holds in a representative capacity as custodian on behalf of the group. Relying on *White*, we have since upheld compelled production of the records of a variety of organizations over individuals' claims of Fifth Amendment privilege.").

141. *See Eagle Assocs.*, 926 F.2d at 1308 (describing how this court "long ha[s] required

is the needle's eye federal courts apparently attempt to thread; denial of the juridical personhood that would trigger the rights universally granted natural persons, while imbuing those entities with enough personhood to trigger the policy prohibitions on representing other "people" to which even humans must adhere. The aggregate theory seems to reconcile this tension.

Assuming that one might stipulate to the notion that the aggregate theory provides the most consistent standard by which corporations, partnerships, associations and MMLLCs can be analogized to each other and distinguished from sole proprietorships and SMLLCs, implementation of that standard does not create an impenetrable panacea. While the traditional corporate form leaves little argument on this point, the sole shareholder corporation warrants deeper analysis.

The traditional corporation might seemingly be well-suited for this analytical framework as it was fundamentally designed to operate independent of its beneficial owners and to maintain rigid strictures in carrying on its business.[142] Being a part of a corporation necessitates segregation of roles and responsibilities. One of the essential characteristics of the corporate form is a firewall between the corporate shareholders as owners of the corporation and the officers and directors who are generally charged with centralized management of the corporation's affairs. The maintenance of the corporate form necessitates adherence to these distinct roles and attendant formalities. This aligns with the rationale underlying the preclusion of shareholder representation of the corporation in pro se litigation. Derivative litigation is perhaps among the most pronounced examples of rigidity maintained in the corporate form, defined by the shareholder seeking to speak for the corporation (typically) against the wishes of the directors.[143]

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corporations to appear through a special agent, the licensed attorney").

142. This could also apply to other affairs in the nonprofit context. *See* MODEL NONPROFIT CORP. ACT § 8.01(a) (AM. BAR ASS'N 2008) ("A nonprofit corporation must have a board of directors."); *id.* § 8.01(b)

> ("Except as provided in Section 8.12, all corporate powers must be exercised by or under the authority of the board of directors of the nonprofit corporation, and the activities and affairs of the corporation must be managed by or under the direction, and subject to the oversight, of its board of directors.").

143. *See* Phillips v. Tobin, 548 F.2d 408, 415 (2d Cir. 1976)

> ("We conclude that the lower court erred in permitting Phillips to prosecute this suit pro se, and accordingly, its order denying the motion to dismiss is reversed. Upon this appeal we do not purport to consider the adequacy or qualifications of Phillips as a shareholder to represent other shareholders similarly situated as required by Rule 23.1. However, if Phillips decides to proceed with this suit he may do so only if represented by a member of the bar. We believe that the

Consider the sole shareholder corporation in which the shareholder also serves as the director and officer speaking for the corporation. One might argue that the natural person is, in all practicality, speaking for themselves and no other "person." While this might be a plausible argument, it does not erase the disparate roles that must be played in maintaining the corporate form. This in turn lends itself more usefully to the rational advanced by federal courts that corporate stakeholders "[having chosen] to accept the advantages of incorporation and must [also] bear the burdens of that incorporation."[144]

Admittedly, the aggregation theory does not fully explain the prohibition on sole shareholder corporations in which one person would maintain the multiple roles of sole shareholder, single director, and any required officer.[145] This could justify a conclusion that the sole shareholder

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> protection of other shareholders similarly situated requires that such counsel be more than the alter ego or 'co-counsel' of this particular plaintiff, but be an attorney-at-law who, in accordance with the standards of *Eisen v. Carlisle & Jacquelin,* 391 F.2d 555, 562 (2d Cir. 1968), is approved by the court as 'qualified, experienced and generally able to conduct the proposed litigation.'").

144. Jones v. Niagara Frontier Transp. Auth., 722 F.2d 20, 23 (2d Cir. 1983) (quoting *Mercu–Ray Indus., Inc. v. Bristol–Myers Co.,* 392 F. Supp. 16 (S.D.N.Y.), *aff'd,* 508 F.2d 837 (2 Cir. 1974)).

145. One person holding multiple corporate officer positions are permitted by law in the MBCA and in the 5 largest states by population. *See* CAL. CORP. CODE §312(a) (West 2016)

> ("A corporation shall have (1) a chairperson of the board, who may be given the title of chair of the board, chairperson of the board, chairman of the board, or chairwoman of the board, or a president or both, (2) a secretary, (3) a chief financial officer, and (4) such other officers with such titles and duties as shall be stated in the bylaws or determined by the board and as may be necessary to enable it to sign instruments and share certificates. The president, or if there is no president the chairperson of the board, is the general manager and chief executive officer of the corporation, unless otherwise provided in the articles or bylaws. Any number of offices may be held by the same person unless the articles or bylaws provide otherwise.");

FLA. STAT. § 607.08401(4) (2020) ("The same individual may simultaneously hold more than one office in a corporation."); 805 ILL. COMP. STAT. 5/8.50 (1984)

> ("A corporation shall have such officers as shall be provided in the by-laws, each of whom shall be elected by the board of directors at such time and in such manner as may be prescribed by the by-laws. Officers and assistant officers and agents as may be deemed necessary may be elected or appointed by the board of directors or chosen in such other manner as may be prescribed by the by-laws. If the by-laws so provide, any two or more offices may be held by the same person. One officer, in this Act generally referred to as the secretary, shall have the authority to certify the by-laws, resolutions of the shareholders and board of directors and committees thereof, and other documents of the corporation as true and correct copies thereof.");

corporation more closely resembles the single member LLC and the sole proprietorship in its de facto unity of interest while complying with the technical requirements still imposed by state corporate law.[146] However, despite one person's ability to simultaneously hold the titles of sole corporate shareholder, director and officer, the fundamentals of corporate law nevertheless require adherence to corporate formalities that necessitate representation of the corporation in the role of director, and not as shareholder. As discussed, corporate law generally prohibits shareholder litigation of claims brought by or against the corporation. That responsibility is reserved for management primarily embodied in the personhood of the corporate directors. Those litigation roles, rights and responsibilities are collapsed (or are collapsible) in both sole proprietorship and the SMLLC.[147] Negotiating and managing this byzantine framework would also bespeak a level of legal sophistication sought by courts in seeking assurance of the capabilities of laypersons appearing before them.[148] Nevertheless, the sole shareholder corporation would likely present a particularly narrow and difficult single owner entity case to make.

(c) Aggregation of Partnerships and Associations

Because the corporate entity liability shield is not available via a partnership or an unincorporated association, the aggregate theory seems to provide more reliable connective tissue as an underlying rationale for federal courts analogizing partnerships and associations to corporations as involving persons who must be represented by licensed counsel. While partnerships

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TEX. BUS. ORGS. CODE ANN. §§ 3.103(c), 21.417 (West 2006) ("A person may simultaneously hold any two or more offices of an entity unless prohibited by this code or the governing documents of the entity."); *See, e.g.,* N.Y. BUS. CORP. LAW § 715(e) (McKinney 1998) ("Any two or more offices may be held by the same person. When all of the issued and outstanding stock of the corporation is owned by one person, such person may hold all or any combination of offices."); MODEL BUS. CORP. ACT § 8.03(a) (2016) (AM. BAR ASS'N, revised 2016) ("A board of directors shall consist of one or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws."); MODEL BUS. CORP. ACT § 8.40(b) (2016) ("The board of directors may elect individuals to fill one or more offices of the corporation. An officer may appoint one or more officers if authorized by the bylaws or the board of directors.").

146. *See In re* Holliday's Tax Servs., Inc., 417 F. Supp. 182, 183, 185 (E.D.N.Y. 1976) (explaining that sole shareholder can appear for a closely held corporation).

147. This is particularly true in the case of an SMLLC that is member managed. *See* REVISED UNIF. LTD. LIAB. CO. ACT § 407(c)(1) (emphasis added) ("Except as expressly provided in this [act], any matter relating to the activities and affairs of the company is *decided exclusively by the manager*, or, if there is more than one manager, by a majority of the managers.").

148. *See infra* Part III.C. (Parsing Federal Pro Se Prohibition Policy Rationales).

manifest many qualities similar to sole proprietorships, a key distinctively defining feature for each is the number of persons involved. A sole proprietorship is, by definition, one person who engages in, and owns, a business without choosing to form one of the other available entity options.[149] In contrast, a partnership is also a default entity but involves two or more persons engaged in business together for the purpose of pecuniary gain. As acknowledged above, other distinctions include the fact that partnerships have a distinct body of law whereas sole proprietorships have no such body of law and are governed by common law principles, and that partnerships are often recognized as legal entities under state law whereas sole proprietorships have no such recognition. However, these distinctions can often be viewed as more form than substance.[150] Further, these distinctions can be balanced against, if not outweighed by the lack of entity shield, tax treatment and management flexibility shared by these entities. While the entity shield and certification processes have been held to distinguish the LLC (both MMLLC and SMLLC) from the sole proprietorship, it also distinguishes them from the partnership. Meanwhile, meaningful distinctions between the partnership and sole proprietorship could also be criteria contrasting the MMLLC from the SMLLC.

The partnership/sole proprietorship distinction dictated by the aggregation theory is critical to resolution of the conundrum embedded in interpretation of §1654. While federal courts have not generally belabored this distinction in interpreting §1654, it seems to provide a more reliable rational for why the courts find partnerships and associations analogous to corporations (the sole shareholder corporation notwithstanding). A partner attempting to represent their partnership would not only be representing themselves, but also the other partners. The Second Circuit crystalized this concept in *Eagle Associates v. Bank of Montreal*[151] ("*Eagle Associates*"). *Eagle Associates* involved an appeal from a default judgment entered by the U.S. District Court for the Southern District of New York against a limited partnership for noncompliance with the district court order that it appear though a licensed attorney. On appeal, the limited partnership argued that the district court erred in in concluding that the limited partnership was not permitted to appear pro se under 28 USC §1654. The Second Circuit affirmed the district court's finding that limited partnerships, like corporations and other associations, do not have the right to appear pro se in

149. SJOSTROM, *supra* note 102, at 3.

150. *See* Crusto, *supra* note 89, at 215 (proposing that sole proprietorships be granted entity status).

151. *See Eagle Assocs.,* 926 F.2d at 1309–10 ("[W]hen one partner appears on behalf of the partnership, he is representing more than just himself.").

federal court and can be required to appear through licensed counsel.

The *Eagle Associates* decision, citing *Turner*, seemed to turn on whether the representative of the entity was representing the interests of other entity stakeholders or purely their own individual interests with the entity incident to those interests.[152] As ratified two years later by the Supreme Court in *Rowland*, the *Eagle Associates* court cited the long interpretive history of §1654 being held to preclude a corporation from appearing through a lay representative.[153] Also like *Rowland*, the *Eagle Associates* court relied on *Turner* in analogizing corporations and partnerships, finding that both are "'unable to represent themselves and the consistent interpretation of Sec. 1654 is that the only proper representative of a corporation or partnership is a licensed attorney, not an unlicensed layman regardless of how close his association with the partnership or corporation.'"[154] Interestingly, the *Eagle Associates* court specifically referred to the interest of other owners being anticipated and affected in both the corporate and partnership context regardless of the entity shield, effectively rendering that shield and the certification processes through which it typically granted both superfluous to interpretation of §1654.[155] The *Eagle Associates* court addressed *U.S. v. Reeves*[156] ("*Reeves*") in which the Ninth Circuit held that partners were permitted to represent the partnership.[157] The *Eagle Associates* court rejected *Reeves* as inconsistent

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152. *See id.* at 1308 (citations omitted)

> ("Section 1654 provides '[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.' This provision has been interpreted to allow for two types of representation: 'that by an attorney admitted to the practice of law by a governmental regulatory body and that by a person representing himself. The statute does not allow for unlicensed laymen to represent anyone else other than themselves.'").

153. *Id.* (citations omitted) ("Courts also have interpreted this section to preclude a corporation from appearing through a lay representative.").

154. *Id.* at 1309 (quoting Turner v. American Bar Ass'n, 407 F.Supp. 451, 476 (1975)).

155. *Id.* at 1309

> ("Having examined the language of 28 U.S.C. Sec. 1654 and the numerous cases decided thereunder, however, we are unable to perceive a palpable difference between the situation where a layperson is representing others having an interest in a corporation and the instant situation where a layperson wishes to represent other partners, general and limited.").

156. United States v. Reeves, 431 F.2d 1187 (9th Cir. 1970).

157. *Eagle Assocs.*, 926 F.2d at 1309 (citations omitted)

> ("In *Reeves,* the court held that, since the Alaska partnership statute provides that each partner has a specific right in partnership property, '[i]t follows that, . . . [appellant-partner], as a member of that partnership, was pleading his own case.'

with the larger body of established precedent, a position affirmed by the Supreme Court in *Rowland*.[158]

In his concurrence with the *Eagle Associates* majority, Judge Graafeiland attempted to highlight distinctions between partnerships and corporations.[159] However, in the process he incorporated the noteworthy comparative statutory analysis that federal courts follow in determining the citizenship of a partnership vis-à-vis its constituent partners and to its comparable corporate peer for diversity jurisdiction purposes.[160] The analytical framework employed by federal courts in determining diversity

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Based upon that reasoning, the court permitted the partnership to be represented by a lay partner.").

158. *Id.* at 1309 (citations omitted) ("We are not persuaded by the reasoning and conclusions advanced in *Reeves* and its holding appears to conflict with other pronouncements in that circuit.").

159. *Id.* at 1310 (Van Graafeiland, J., concurring) (citations omitted) (Judge Van Graafeiland focused on the liability shield as the key distinction between corporations and partnerships, writing,

> "I concur in my colleagues' holding that the judgment of the district court should be affirmed. However, I base my concurrence upon the failure of the three named defendants, Eagle Associates and its two general partners Howard R. Schuster and Robert R. Bolding, to comply with the district judge's orders to attend pretrial conferences. I respectfully disagree with my colleagues' holding that one of two general partners, sued with the partnership on a contract indebtedness, cannot represent the defendant partnership as well as himself in court. . . . This conclusion, I suggest, follows from the very nature of a partnership. 'When a partnership is established, the liability of the individual partners is an incident of the partnership, merely, not a separate and independent liability.' *Hartigan v. Casualty Co. of Am.,* 227 N.Y. 175, 178, 124 N.E. 789 (1919). Unlike corporate shareholders or association members, partners are jointly liable with respect to their contractual obligations; *i.e.,* 'each partner is liable for the whole amount of every debt of the partnership, not merely for a proportionate part.' Because a loan to a partnership is made to all and each of the partners, creditors 'may select any partner and collect their claims wholly from the property of that partner.' Where, as here, the liabilities of the partnership and one of its codefendant members are coterminous, the individual partners, whose personal liability is at stake, should be permitted to represent their identical interests in court.").

160. *Id.* at 1310 (Van Graafeiland, J., concurring) (citations omitted)

> ("Many years ago, in an opinion written by the eminent Learned Hand, we said that 'our law has never adopted the civil law theory of the firm as a juristic entity; the Uniform Partnership Law as little as any other.' That was the law of New York when *Rossmoore* was written. Except for a few especially prescribed statutory exceptions such as C.P.L.R. Sec. 1025, it is still the law of New York. In short, partnerships and corporations were, and continue to be, 'distinctly different organizational forms.' We have recognized this to be so in numerous cases involving diversity of citizenship.").

jurisdiction[161] might be expected to easily align with the lens through which these courts would view comparative juridical personhood under §1654.[162] However, when comparatively measured on a per-entity basis, these analytical frameworks actually appear inverted.[163]

It is generally accepted that, in determining whether diversity exists among parties to a controversy in question, a partnership is deemed a citizen of each state in which a partner resides.[164] Federal courts distinguish the corporation, with its tortured history of subjugation as a legal fiction balanced against its emerging "realness" as manifested in a cadre of personhood characteristics, from all unincorporated entities.[165] Interestingly signified in this context is a distinction drawn between the corporation and the limited partnership, seeming to also diminish the importance of the entity shield or certification process as key features upon which entity distinctions should be drawn and personhood should be determined. The citizenship distinction between corporations and all unincorporated entities was

161. 28 U.S.C. § 1332 (2011).

162. *See* Bishop & Kleinberger, *supra* note 4.

163. *See* Carden v. Arkoma Associates, 494 U.S. 185, 189 (1990) ("While the rule regarding the treatment of corporations as 'citizens' has become firmly established, we have (with an exception to be discussed presently) just as firmly resisted extending that treatment to other entities.").

164. *Id*. at 195–96 (citations omitted)

> ("In sum, we reject the contention that to determine, for diversity purposes, the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members. We adhere to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of 'all the members,' 'the several persons composing such association,' 'each of its members.'").

165. *Id.* at 187–88

> ("A corporation is the paradigmatic artificial 'person,' and the Court has considered its proper characterization under the diversity statute on more than one occasion—not always reaching the same conclusion. Initially, we held that a corporation 'is certainly not a citizen,' so that to determine the existence of diversity jurisdiction the Court must 'look to the character of the individuals who compose [it].' *Bank of United States v. Deveaux,* 5 Cranch 61, 86, 91–92, 3 L.Ed. 38 (1809). We overruled *Deveaux* 35 years later in *Louisville, C. & C.R. Co. v. Letson,* 2 How. 497, 558, 11 L. Ed. 353 (1844), which held that a corporation is 'capable of being treated as a citizen of [the State which created it], as much as a natural person.' Ten years later, we reaffirmed the result of *Letson,* though on the somewhat different theory that 'those who use the corporate name, and exercise the faculties conferred by it,' should be presumed conclusively to be citizens of the corporation's State of incorporation. *Marshall v. Baltimore & Ohio R. Co.,* 16 How. 314, 329, 14 L. Ed. 953 (1854).").

extended to the LLC by the Seventh Circuit in *Cosgrove v. Bartolotta*[166] ("*Cosgrove*"), further undermining the liability shield and certification processes as bases for drawing federal jurisprudential entity distinctions.[167] Conspicuously absent from either Cosgrove or Carden, perhaps for obvious reasons, was any mention of the sole proprietorship. The consistency of these rulings, or perhaps the lack thereof, has been noted and discussed by scholars.[168]

While one may consider such conflicting precedent an opportunity to enlarge pro se opportunities for most if not all juridical entities, the consistent thread of multiparty interest acknowledged in the aggregate theory weaves, perhaps, an impenetrable proscription against laypersons seeking to represent organizational interest that extend beyond their individual interests. Such an endeavor contradicts the core restriction universally accepted in reading §1654 and the Sixth Amendment; that as a lay person you may represent yourself, but you are not allowed to represent other persons, particularly other natural persons.

(d) Aggregation of Multimember and Single Member LLCs

Application of the aggregate theory to the MMLLC and the SMLLC, while seemingly a facile exercise based on federal jurisprudence, yields more subtle complexity to the deeper aggregate analytical lens. Federal courts analyzing LLC pro se petitions have summarily drawn a seemingly smooth line connecting the corporation to all other entity forms except the sole proprietorship. As discussed above, various levels of analysis have produced a grab-bag of results. Few of those results are as comparably consistent as reached by looking through the aggregate entity lens. However, even under this lens, one must acknowledge an undeniable divergence in entity characteristics driven by the number of persons involved in the ownership of the entity.

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166. Cosgrove v. Bartolotta, 150 F.3d 729 (7th Cir. 1998).

167. *Id.* at 731 (citations omitted)

> ("Given the resemblance between an LLC and a limited partnership, and what seems to have crystallized as a principle that members of associations are citizens for diversity purposes unless Congress provides otherwise (as it has with respect to corporations, in 28 U.S.C. § 1332(c)(1)), we conclude that the citizenship of an LLC for purposes of the diversity jurisdiction is the citizenship of its members. That does not defeat jurisdiction in this case, however, because Mary–Bart, LLC has only one member—Mr. Bartolotta, who is not a citizen of the same state as the plaintiff.").

168. Bishop & Kleinberger, *supra* note 4, at 6.

The MMLLC has been acknowledged as hybrid marrying the qualities of both a corporation and a partnership.[169] However the comparison of the MMLLC and the SMLLC under the lens of aggregate theory analysis reveals the important distinctions between these seemingly comparable entities, making the SMLLC appear more analogous to the sole proprietorship as viewed through the underlying policy objectives articulated by federal courts in interpreting §1654. The very name "single member LLC" connotes the absence of any other person owning any interest in the LLC.

This singularity is also evidenced in the distinct tax categorization of the SMLLC and the MMLLC. For example, under the IRS check-the-box regulations, an MMLLC can choose whether the entity will be taxed a corporation or as a partnership.[170] An SMLLC whose owner elects not to have the entity taxed as a corporation will be a "disregarded as an entity."[171] This is an acknowledgement that the while the MMLLC and the SMLLC will both be invisible for tax purposes, the benefits and consequences attendant to the SMLLC will flow to only one person.

This is the same person who singularly has the option to directly control the LLC's business affairs. Accordingly, and liability shield notwithstanding, a comprehensive aggregate entity analysis shows the SMLLC to be more analogous to the sole proprietorship in light of the constituent entity characteristics seemingly most important to the federal courts making the pro se determinations.

C. Parsing Federal Pro Se Prohibition Policy Rationales

As discussed above, the history and development of pro se rights, particularly as applied to natural persons, bespeak the policies undergirding the recognition of those rights. As these rights are interpreted under §1654, a few general policy considerations seem to drive ultimate disposition of these juridical person pro se petitions. The first involves protection of the principal pro se litigant's interests.[172] The second, and seemingly distinct policy concern centers on conservation of judicial resources and protection

169. *See Lattanzio*, 481 F.3d at 140 (comparing and contrasting the Corporation, Partnership and MMLLC – and the SMLLC).

170. 26 C.F.R. § 301.7701-3(b)(1)(i) (1999).

171. 26 C.F.R. § 301.7701-3(b)(1)(ii); *see also* 26 C.F.R. 301.7701-2(a) (If the entity is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner); 26 U.S.C.A. § 1361(b)(3)(A)(i).

172. *Lattanzio*, 481 F.3d at 139 (quoting Jones v. Niagara Frontier Transp. Auth., 722 F.2d 20, 22 (2d Cir. 1983)) ("The principal rationale for ordinarily requiring representation by a licensed attorney is that 'the conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents but as well for his adversaries and the court.'").

other litigant interests.[173] These considerations seem to converge at the concerns for any delays and interruptions an unsophisticated lay litigant may cause in the administration of justice.[174] The third involves concerns for attorney regulation, admittedly extending from the recognized need to protect judicial resources and the parties involved.[175] This section will discuss federal court treatment of juridical entities under these policies, testing their veracity to determine whether collective natural and juridical personhood distinctions are substantiated.

1. Burdens on the Represented Party

Federal courts denying pro se petitions brought on behalf of juridical entities seem to suggest that doing so is necessary to protect the entity as the principal litigant. This perspective appears to be derived from either the real entity or aggregate theories as application of the artificial entity theory would likely undermine this philosophical position by rendering the entity more tool or function than a separate person. The real entity theory would again present many of the application problems previously discussed regarding the partnership and the unincorporated association. The partnership again begs the question of whether the entity is appearing in its own right (and whether it possesses such capacity). It further infers an argument that the liability shield and certification processes that courts deem key indicia of corporate and LLC personhood, but are not incumbent characteristics of the partnership, are no longer as meaningful in determining whether the entity is a separate person in need of the court's protection. The aggregate theory, argued above as the most appropriate comparative platform, seems logically consistent in viewing corporate shareholders and partners through a corollary lens. This facilitates a finding of the entity to be representative of those varied interests and more in line with central policy objectives articulated even in circumstances exclusively involving natural persons. This would also analogize the SMLLC to the sole proprietorship, distinguishing both from the corporation, partnership and unincorporated association. This approach seems to be a more honest and consistent application of a legal theory to the full spectrum of comparative persons, natural and juridical.

173. *Id.*

174. *Id.* (quoting Jones v. Niagara Frontier Transp. Auth., 722 F.2d 20, 22 (2d Cir. 1983)) ("'The lay litigant frequently brings pleadings that are awkwardly drafted, motions that are inarticulately presented, proceedings that are needlessly multiplicative.'").

175. *Id.* at 139 (quoting Jones v. Niagara Frontier Transp. Auth., 722 F.2d 20, 22 (2d Cir. 1983)) ("In addition to lacking the professional skills of a lawyer, the lay litigant lacks many of the attorney's ethical responsibilities.'").

Further, the aggregate theory seems most appropriate as entity owners generally gain the benefits and bear the burdens resulting from entity operations. As with the sole proprietorship, the SMLLC conceivably, ultimately involves one natural person who gains or loses from the entity's litigation. Even if a licensed attorney is representing the entity separately from the owner, it is likely that owner who is dictating the ends of representation. It strains credulity to think of that juridical person as being "separate" in that context.

2. Burdens on the Court and Other Litigants

While the burdens linked to a lay litigant's lack of sophistication can weigh on the represented entity, federal courts seem equally if not more concerned with the impact this lack of advocate sophistication will have on other litigants and the allocation of judicial resources. Courts matriculating through the maze of intersecting pro se policies seem to presume that juridical person proxies possess the same, if not a more severe, lack of sophistication generally found among natural person pro se litigants.[176] However, it is actually somewhat counterintuitive to think of a person engaged in business as less able to handle technical rigors of pro se litigation than a layperson who is not engaged in business. To validate this argument, one would need to believe that a person who has engaged in the certification process usually required to create a corporation or an LLC, has engaged in a business partnership with the usual accompanying ancillary licensing and accounting accoutrement, or has even formed an association for some determined end other than pecuniary gain would invest the requisite time and energy necessary to comply with the legal requirements incumbent is many of those processes, but would *per se* likely lack the awareness and preparation necessary to protect their business interests at least as well as a lay person with nonbusiness related litigation interests.

This rationale also appears unsupported by case law involving the actual disposition of natural person pro se petitions by these courts. Neither the *Lattanzio* court, nor the *Jones* court on which it relied, cited any precedent involving a natural person pro se litigant in support of the allegation that the appearance of a pro se juridical litigant would somehow be at least as taxing as in the former circumstance.[177] The *Hagerman* court

176. *Id.*; *see also Eagle Assocs.*, 926 F.2d at 1308 (stating that a lay litigant may lack many of the skills and responsibilities of an attorney).

177. *Lattanzio*, 481 F.3d at 139 (citing Jones v. Niagara Frontier Transp. Auth., 722 F.2d 20, 22 (2d Cir. 1983)); *see also Eagle Assocs.*, 926 F.2d at 1308 (citing Jones v. Niagara Frontier Transp. Auth., 722 F.2d 20, 22 (2d Cir. 1983)).

didn't bother to reference this policy, instead relying on an indigency rationale similar to that employed in *Rowland*.[178] It should be further noted that the two cases to which the *Hagerman* court cited did not discuss a litigant's right to proceed pro se. *Timms v. Frank* instead focused on the notices to which that pro se litigant would be entitled in the course of the proceedings.[179] *DiAngelo v. Illinois Dept. of Public Aid* did not involve a pro se petition, but rather the comparative rights to counsel in criminal and civil cases.[180] Further still, neither the petitioner's comparative wealth nor their ability to pay retained counsel is articulated in the text of the code as a prerequisite to appearing pro se, and courts do not appear poised to read such a requirement into the statute. It would perhaps be a very interesting exercise to employ such criteria in the context of natural persons, meaning that a wealthy individual's pro se petition could be denied purely on a wealth standard, likely opening a pandora's box of distinction discussions in the world of natural persons. The fact is that longstanding federal judicial policy favors broad recognition of pro se rights for natural persons.[181]

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178. *See Hagerman*, 545 F.3d at 581 (citations omitted)

> ("An individual is permitted by 28 U.S.C. § 1654 to proceed pro se in a civil case in federal court because he might be unable to afford a lawyer, or a lawyer's fee might be too high relative to the stakes in the case to make litigation worthwhile other than on a pro se basis. There are many small corporations and corporation substitutes such as limited liability companies. But the right to conduct business in a form that confers privileges, such as the limited personal liability of the owners for tort or contract claims against the business, carries with it obligations one of which is to hire a lawyer if you want to sue or defend on behalf of the entity. Pro se litigation is a burden on the judiciary, and the burden is not to be borne when the litigant has chosen to do business in entity form. He must take the burdens with the benefits.");

see also Rowland, 506 U.S. at 203, 206 (asserting an inability of juridical entity to be poor under the indigence standard associated with the poverty - or to meet the inability to pay standard).

179. Timms v. Frank, 953 F.2d 281, 285 (7th Cir. 1992) (quoting *United States v. One Colt Python .357 Cal. Revolver,* 845 F.2d 287 (11th Cir. 1988)

> ("We have repeatedly emphasized that care must be exercised to insure proper notice to a litigant not represented by counsel. Litigants without counsel lack formal legal training and 'occupy a position significantly different from that occupied by litigants represented by counsel.' A motion for summary judgment should only be granted against a litigant without counsel if the court gives clear notice of the need to file affidavits or other responsive materials and of the consequences of default.").

The *Timms* court also found no distinction between criminal and civil litigants for these purposes.

180. DiAngelo v. Illinois Dept. of Public Aid, 891 F.2d 1260 (7th Cir. 1989).

181. Andrews v. Bechtel Power Corp., 780 F.2d 124, 137 (1st Cir. 1985) ("While there is

3. Attorney Regulation

Another intriguing rationale inexplicably unarticulated in the LLC pro se decisions, or the precedent on which they rely, is the area of attorney regulation. As Professors Bishop and Kleinberger noted, the unauthorized practice of law is at least tacitly implicated by the inference that a natural person representing an entity is in fact "practicing law without a license."[182] The text of Restatement (Third) of Law Governing Lawyers provides two prohibitions. The first is against the "unauthorized practice of law" by a person not admitted to practice law.[183] The second is a prohibition against a licensed attorney assisting an unlicensed person in such unauthorized practice.[184] Notwithstanding the seemingly broad applicability of the text, pro se litigation by a natural lay person is an acknowledged right.[185] Pro se litigation by juridical entities is also addressed, citing a general prohibition on an unlicensed agent representing the entity in court.[186] However, exceptions to this general prohibition are also acknowledged.[187] Curiously, none of the aforementioned cases prohibiting the representation of an SMLLC, or other entities to which the SMLLC has been analogized, rely on or even cite this restatement of law governing lawyers. In fact, none of those

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no constitutional right to self-representation in civil cases, *O'Reilly v. New York Times,* 692 F.2d 863, 867 (2d Cir. 1982), there is a statutory right of long standing to such self-representation, 28 U.S.C. § 1654 (1982).").

182. Bishop & Kleinberger, *supra* note 4, 6 ("Unlike jurisdictional matters, pro se representation is a matter of judicial discretion, and issues concerning the unauthorized practice of law are implicated.").

183. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS, § 4 (AM. L. INST. 2000).

184. *Id.*

185. *Id.* § 3 cmt. d. ("In federal courts, the right of appearing pro se has long been recognized by statute."). This comment also notes the distinction between the constitutional right afforded in criminal cases from the statutory allowance in civil litigation.

186. *Id.* § 4 cmt. d ("In general, however, a person appearing pro se cannot represent any other person or entity, no matter how close the degree of kinship, ownership, or other relationship.").

187. *Id.* § 4 cmt. e ("With respect to litigation, several jurisdictions except representation in certain tribunals, such as landlord-tenant and small-claims courts and in certain administrative proceedings, where incorporation (typically of a small owner-operated business) has little bearing on the prerogative of the person to provide self-representation."); *see also* Bishop & Kleinberger, *supra* note 4, at 8

> ("Oddly, the rule is different in many state courts and the U.S. Tax Court, where special rules have been adopted to permit an authorized person, but not a lawyer, to represent the entity. In those cases, the entity can rely on the authorized person to prosecute the case, and that person may do so without concern about unauthorized practice of law. One might have hoped for such a nuanced approach from the U.S. circuit courts.").

courts even use the words "unauthorized practice of law" in their analysis.[188] Perhaps this can be explained by the overarching summary treatment the courts afforded this subject. Whatever the courts' reasoning, absence of this reference, along with others mentioned earlier, belie the absolutism with which they seem to treat the subject.

4. The Forgotten *Faretta* Factor

None of the aforementioned central decisions involving LLC and other juridical personhood pro se rights discussed the criteria now generally accepted as the appropriate litmus test for determining whether a natural person should be allowed to appear pro se. In fact, none of those cases even acknowledge *Faretta*. However, the *Faretta* Court directly addressed the tension inherent in balancing the right to self-representation with the right to counsel. The *Faretta* Court recognized that "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts."[189] The Court then proceeded to outline general parameters for ensuring the safe exercise of that the right. Courts interpreting *Faretta* have expounded on the scope of these self-representation safeguards by articulating three gateway requirements to be satisfied in considering a petition.[190] First, a defendant's pro se request must be "clear and unequivocal";[191] second, the request must be "voluntary, knowing, and intelligent";[192] and third, the request must be "timely."[193]

The *Faretta* Court and its progeny did not create these policies whole cloth, largely relying on standards articulated in established precedent.[194] The Court delineated three requirements for a valid waiver: 1) defendants

188. A search of *Lattanzio*, *Hagerman*, *Rowland* and *Eagle Associates* revealed no instances of the word "unauthorized."

189. *Faretta*, 422 U.S. at 832–34. *But see* Hashimoto, *supra* note 42, at 446–54 (claiming that *Faretta* decision "does not have a particularly wide fan base").

190. United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000).

191. *Id.* (citing *Faretta*, 422 U.S. at 835); United States v. Lorick, 753 F.2d 1295, 1298 (4th Cir. 1985).

192. Godinez v. Moran, 509 U.S. 389, 393 (1993); *Singleton*, 107 F.3d at 1095–96.

193. United States v. Lawrence, 605 F.2d 1321, 1325 n.2 (4th Cir. 1979).

194. *Faretta,* 422 U.S. at 835. The Court's holding that a defendant must knowingly and intelligently waive the right to counsel derived from Johnson v. Zerbst, 304 U.S. 458 (1938). Faretta, 422 U.S. at 835. *Zerbst* held trial courts have the weighty duty of determining whether there is an intelligent and competent waiver of counsel by the accused. *Zerbst*, 304 U.S. at 465. The *Faretta* Court's basis for not requiring defendants to have the competency or skill of an attorney to waive counsel derived from Adams v. United States *ex rel* McCann, 317 U.S. 269 (1942). *Faretta*, 422 U.S. at 835. The *Adams* Court held laypersons must be allowed to assert their right to representation. *Adams*, 317 U.S. at 279–80.

must be mentally competent, 2) any waiver of counsel must be knowing and intelligent, and 3) defendants must accept the costs of conducting their own defense.[195] The *Faretta* decision does not order a specific dialogue between the court and pro se petitioner. Instead, *Faretta* simply requires that the court satisfy itself with the petitioner's awareness of the dangers and disadvantages of self-representation so the "*record* will establish that 'he knows what he is doing and his choice is made with eyes open.'"[196]

One is left to wonder why the *Faretta* test was not mentioned in discussions of the safeguards those courts deemed important considerations in balancing freedom of choice with judicial responsibility for order and justice. Perhaps the reason *Faretta* went uncited was because the test would have made no functional difference without an allowance for entity speech through agents. Perhaps it was because a discussion of the *Faretta* factors would reveal the sophistication needed for "knowing and voluntary" waiver of licensed counsel, something likely met by juridical entities at least as well as the average humans advancing purely personal interests. Whatever the reasons, it is unlikely that analysis of pro se entity petitions under this rubric would yield less favorable judicial results than those readily articulated in current precedent. Whatever the reason, its omission speaks as loudly as the previously criticized narrow comparative entity analysis.

IV. RECONCILIATION RECOMMENDATIONS

A. Usage of a Universal Standard for Juridical Personhood

The aforementioned inconsistencies might best be remedied by the courts designing a more consistent universal standard on juridical personhood built on more harmonious theoretical underpinnings. As the above analysis explains, the standards offered by federal courts to distinguish the SMLLC (among other juridical persons) from the sole proprietorship prove difficult to apply consistently across the spectrum of persons. The aggregate theory seems to provide the most consistent and reliable basis for measuring juridical personhood against primary pro se policy objectives – allowing persons to represent themselves while refraining from opening the doors to lay persons attempting to offer themselves as legal counsel to other persons. As discussed, the aggregate theory also addresses concerns that entity owners might be deemed to represent other persons because the SMLLC owner will be recognized as representing his or her individual

195. *Faretta,* 422 U.S. at 835.
196. *Id.* (quoting *Adams,* 317 U.S. at 279).

interest. Application of the aggregate theory would illuminate the distinct similarity of the SMLLC to the sole proprietorship. It would also distinguish these juridical persons from corporations, partnerships and associations, entities that generally, if not fundamentally, represent multi-owner interests.

B. Negotiation of a Nuanced Standard for Judging Pro Se Petitions

A second connected solution would be for federal courts to replace the apparent bright line test used to categorically distinguish sole proprietorship pro se petitions on the one side from all other juridical personhood petitions on the other side, with a more nuanced contextual approach. Under this more nuanced contextual framework, federal courts might find it less necessary to engage in contorted analysis to maintain rigid distinctions between sole proprietorships and other juridical persons, often in ways that contradict the personhood doctrines on which the courts should rely. Efforts to analogize the corporate and partnership forms strain credulity and undermine the credibility of the important judicial determination they purport to support. To then present the SMLLC as an indistinguishable doppelganger of the MMLLC, considering both to be fungible hybrids of the corporation and partnership, ignores legal and practical differences that carry very real benefits and consequences. As one court noted, one "must take the burdens with the benefits," even if this principle is to be applied to legal reasoning and choices made from among a variety of theories in support of determinations made. Application of the aggregate theory would allow federal courts to replace a seemingly conflicted bright line test with a more flexible facts and circumstances analysis more like that employed in judicial consideration of pro se petitions made by natural persons. One should bear in mind that not even all petitions of natural persons are granted. The considerations articulated in *Faretta* and subsequent jurisprudence provide safeguards that could be applied in the juridical personhood context. This would provide a more consistent and reliable basis for distinguishing between those petitions that are justifiably denied, regardless of the entity through which they engage in business, and those proving more meritorious under a consistently applied standard. While providing more flexibility, this approach would also offer more theoretical consistency to judicial precedent in this important and emerging area of law.

C. Clarity through Congressional Action

The third and perhaps most salient solution involves congressional amendments to the statutes governing juridical personhood for greater clarity

and guidance. One of the fundamental tenants incorporated into the American constitutional framework is the separation of powers granting Congress legislative authority.[197] Once that power has been exercised, federal courts universally acknowledge their collective role as interpreting the law according to expressed congressional intent. The *Rowland* Court acknowledged this, admitting the juridical persons were included in the definition of "person" under the Dictionary Act, but used the "unless the context indicates otherwise" exception to distinguish juridical persons from natural persons for purposes of determining pro se litigation rights. One reasonable reading would be that the Dictionary Act clearly manifests congressional intent to imbue pro se litigation protections on juridical persons as a part of a broader package of rights. However, the *Rowland* Court limited applicability of "personhood" entities by reasoning that they could not take the actions anticipated in exercising the right at issue without agents.[198] As discussed above, this rationale seems directly contradictory to the application of other constitutional and statutory rights recognized in juridical person.[199] As also noted above, an exhaustive comparative

197. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240–41 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."); *see also Hobby Lobby*, 573 U.S. at 714 (citation omitted) ("When Congress wants to link the meaning of a statutory provision to a body of this Court's case law, it knows how to do so.").

198. *Rowland*, 506 U.S. at 200–01 (emphasis added) (citation omitted)

> ("The Dictionary Act's very reference to contextual 'indication' bespeaks something more than an express contrary definition, and courts would hardly need direction where Congress had thought to include an express, specialized definition for the purpose of a particular Act; ordinary rules of statutory construction would prefer the specific definition over the Dictionary Act's general one. *Where a court needs help is in the awkward case where Congress provides no particular definition*, but the definition in 1 U.S.C. § 1 seems not to fit. *There it is that the qualification 'unless the context indicates otherwise' has a real job to do*, in excusing the court from forcing a square peg into a round hole. The point at which the indication of particular meaning becomes insistent enough to excuse the poor fit is of course a matter of judgment, but one can say that 'indicates' certainly imposes less of a burden than, say, 'requires" or 'necessitates.' One can also say that this exception from the general rule would be superfluous if the context 'indicate[d] otherwise' only when use of the general definition would be incongruous enough to invoke the common mandate of statutory construction to avoid absurd results. In fine, a contrary 'indication' may raise a specter short of inanity, and with something less than syllogistic force.").

199. *Hobby Lobby Stores, Inc.*, 573, U.S. at 691 (emphasis added) (citations omitted)

> ("[W]e reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. *The plain terms of [the law] make it perfectly clear that Congress did not discriminate in this way against*

precedential assessment is beyond the scope of this article. However, even a more abbreviated study of the Court's treatment of juridical personhood abilities in *Rowland*, and later in *Hobby Lobby,* highlights different approaches to measuring the juridical person's ability to independently exercise a disputed right. Perhaps this bespeaks a competitive interpretation tension as aged as the nation and its legal heritage. It is quite possible that the disparate impact that competing judicial interpretative philosophies have produced can be reconciled by future courts. Perhaps it is more likely that this tension will remain a part of our judicial system as long as the system resembles its current structure, with the appointment of judges as a function of this republican democracy. A more certain remedy would be a legislative solution enacted by Congress. However, that too would likely be no panacea as all statutes, like constitutional text, remain subject to judicial interpretation.[200]

V. CONCLUSION

The blanket prohibition historically employed by federal courts on juridical person pro se petitions has outlived its evolutionary applicability. While initially a suitable solution for the corporation serving colonial and early American business interests, attempted rigid application of this standard to the SMLLC reveals fundamental flaws in the philosophical policy stance that all juridical persons, save the sole proprietorship, form a fungible mass with less entitlement to a more equitable entity standard. As discussed above, federal court claims that the SMLLC is more akin to a corporation and partnership than it is to a sole proprietorship strain credulity

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men and women who wish to run their businesses as for-profit corporations.");

Id. at 707–08 (emphasis added)

("RFRA applies to 'a person's' exercise of religion, 42 U.S.C. §§ 2000bb–1(a), (b), and *RFRA itself does not define the term 'person.' We therefore look to the Dictionary Act*, which we must consult '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.' 1 U.S.C. § 1. Under the Dictionary Act, 'the wor[d] *"person" . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals*.' Thus, unless there is something about the RFRA context that 'indicates otherwise,' the Dictionary Act provides a quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard. *We see nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition*, and HHS makes little effort to argue otherwise.").

200. *Id.* at 718 ("On the contrary, the scope of RLUIPA shows that Congress was confident of the ability of the federal courts to weed out insincere claims.").

and cause rationalized reasonings regarding juridical personhood that don't seem to withstand the analytical lens of primary juridical personhood principles. This seems to derive in part from the historical tension between the artificial entity, real entity and aggregate entity approaches to viewing juridical personhood. As proposed above, application of the aggregate entity theory seems to best serve the core balance courts seek to strike in considering pro se petitions. While this is by no means the only available solution, the aggregate theory seems to respect concerns for attempted representation of other persons while recognizing the deeply rooted American right to litigate one's own legal interests, all while reconciling the individual interests embedded in the entity's very existence. Application of the aggregate theory would also reveal the primary parallel between the SMLLC and sole proprietorship, distinguishing each from the multi-party juridical persons who would still be unable to meet the primary pro se litmus test. This could ease the analytical anxiety caused by court conflation of judicial personhood concepts and provide a more reliable predicate for processing the pro se petitions of both natural and juridical persons.