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Dissecting *Hobby Lobby's* Corporate Person

A PROCEDURAL PROPOSAL FOR ALIGNING CORPORATE RIGHTS AND RESPONSIBILITIES

INTRODUCTION

The contemporary gap between corporate rights and responsibilities is attributable in part to the ad hoc way in which the American corporate-person doctrine has evolved since the late nineteenth century.¹ The absence of a standard for determining corporate personhood and the arbitrary nature in which these rights were allocated have clouded the Supreme Court's vision of just what a corporation "is" in other areas of the Court's jurisprudence.² Instead, both the Supreme Court and lower courts have done backflips to arrive at results that they deem satisfactory without enunciating a standard or test to be applied in future cases. Furthermore, because courts and legislatures work independently, Congress historically has not passed reactionary statutes to map corporate responsibilities onto their ever-expanding, judicially created rights. The result is a gulf between the true nature of a corporation, its rights, and its corresponding responsibilities. Nowhere is this gulf more evident than in the Court's personal jurisdiction jurisprudence. The resulting void between corporate personhood rights and contemporary corporate personal jurisdiction doctrine is primarily due to the fact that the Supreme Court's jurisdictional jurisprudence has conceptualized the corporation as a static, theoretical being, as if plucked straight from a business organizations law school textbook. In reality, the Court itself, over the course of the late nineteenth and twentieth centuries, created a much different "thing" than what it envisioned in its seminal corporate personal jurisdiction cases.

After the adoption of the Fourteenth Amendment to the U.S. Constitution, a series of cases spawned by the burgeoning

¹ Malcom J. Harkins III, *The Uneasy Relationship of Hobby Lobby, Conestoga Wood, the Affordable Care Act, and the Corporate Person: How a Historical Myth Continues to Bedevil the Legal System*, 7 ST. LOUIS U. J. HEALTH L. & POL'Y 201, 205 (2014).

² See Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood*, 50 SAN DIEGO L. REV. 125, 126-27 (2013).

railroad industry forced the Supreme Court to decide whether corporations were persons for equal protection purposes.³ A headnote erroneously inserted⁴ by a court reporter in the 1886 case of *Santa Clara County v. Southern Pacific Railroad* breathed life into the corporate personhood doctrine:

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.⁵

While that position was not official precedent because it appeared only in a headnote, it was soon adopted in *Pembina Consolidated Silver Mining & Milling Company v. Pennsylvania* in 1888.⁶ Since then, though, the Supreme Court has utterly failed to set forth a consistent standard for when a corporation may or may not claim personhood status.⁷ Rather, the major cases shaping the corporate personhood doctrine have largely been results oriented.⁸ For example, in 2010, the Supreme Court rendered its seminal decision in *Citizens United v. FEC*.⁹ There, the Court held that the First Amendment barred the government from “suppress[ing] political speech on the basis of the speaker’s corporate identity.”¹⁰ This expansion of First Amendment political speech rights to corporations gave nonprofit corporations, for-profit corporations, and labor unions the largely unfettered right to contribute to “electioneering communications” from their general treasuries.¹¹ This ruling took an unprecedented step toward putting the corporate person on even ground with natural persons. Nonsentient, for-profit corporations can now express political beliefs and can take concerted actions in furtherance of them.¹²

Four years later, the Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*,¹³ where the Court held that for-profit corporations are “persons” under the Religious Freedom

³ Harkins III, *supra* note 1, at 214-15.

⁴ *Id.* at 247-48.

⁵ *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

⁶ *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888) (“Under the designation of person there is no doubt that a private corporation is included.”).

⁷ Harkins III, *supra* note 1, at 211.

⁸ *Id.* at 305.

⁹ *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹⁰ *Id.* at 365.

¹¹ *Id.* at 319-21 (quoting 2 U.S.C. § 441b). “[E]lectioneering communications” consist of all communications that “expressly advocate the election or defeat of a [political] candidate, through any form of media.” *Id.* at 319-20.

¹² *See id.* at 365.

¹³ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

Restoration Act (RFRA). There, the Court bifurcated the corporate person into the “classic” corporation and the closely held corporation and allowed only closely held corporations to claim religious exemption from the birth control mandate in the Patient Protection and Affordable Care Act of 2010 (Affordable Care Act).¹⁴ While *Hobby Lobby* did not deal with personal jurisdiction, the Court’s creation of a new, more “free” corporate person now presents the Court with the opportunity to forge a doctrine that would align corporate rights and responsibilities for closely held corporations much more narrowly than it has done for “classic” corporations.

This note argues that the personal jurisdiction doctrine has progressed with a constant view of corporations in the abstract without taking into account the ever-evolving nature of corporations as persons. The failure of courts to recognize the evolution of corporations when shaping personal jurisdiction doctrine was most recently exemplified in the Ninth Circuit’s decision in *Martinez v. Aero Caribbean*.¹⁵ There, the court held that tag jurisdiction (also known as “transitory” and “transient” jurisdiction) does not apply to corporations.¹⁶ Tag jurisdiction is the method of establishing general personal jurisdiction over a defendant by serving them personally while he or she is physically present in a given forum, even if only “transitor[ily]” present.¹⁷ The court’s ruling rested on the traditional theory that the corporation is a legal fiction—a personality separate and apart from its officers.¹⁸ But cases like *Citizens United* and *Hobby Lobby* cannot be justified without acknowledging a contradictory theory.¹⁹

Corporations, and closely held corporations in particular, now possess the potential to have political and religious beliefs.²⁰ Corporations, however, are not sentient beings.²¹ They cannot decide for themselves which religion or political ideology to

¹⁴ 42 U.S.C. § 300gg-13(a)(4) (2012); see also *Hobby Lobby*, 134 S. Ct. at 2759. The Affordable Care Act requires most employer-supported health plans to cover preventive care products and procedures without copayments, deductibles, or cost sharing. This includes all FDA-approved contraceptive methods and sterilization procedures prescribed for women, but not products or procedures that induce an abortion.

¹⁵ *Martinez v. Aero Caribbean*, 764 F.3d 1062 (9th Cir. 2014).

¹⁶ *Id.* at 1064. The Ninth Circuit concluded that corporations cannot be subject to tag jurisdiction without specifically delineating whether certain types of corporations could be. *Id.* at 1071.

¹⁷ *Burnham v. Superior Court of Cal., Cty. of Marin*, 495 U.S. 604, 611 (1990).

¹⁸ *Aero Caribbean*, 764 F.3d at 1069.

¹⁹ *Hobby Lobby*, 134 S. Ct. 2751; *Citizens United v. FEC*, 558 U.S. 310 (2010).

²⁰ See *Hobby Lobby*, 134 S. Ct. 2751; *Citizens United*, 558 U.S. 310.

²¹ Michael Nagler & Stephanie Van Hook, *Corporations Are Not People: We Hold These Truths to Be Self-Evident...*, COMMON DREAMS (Oct. 12, 2011), <http://www.commondreams.org/views/2011/10/12/corporations-are-not-people-we-hold-these-truths-be-self-evident> [<http://perma.cc/775V-AN5N>].

possess.²² If a corporation is to have a religious or political affiliation, it is because the owners and officers (often the same people in the closely held context) superimpose their own religious and political beliefs onto the corporate personality. This renders the notion of the corporation as a separate personality from its owners a fiction of the past with regards to closely held corporations; when a corporate officer's religious or political views are attributed to the corporation, their respective personalities merge. In this respect, the new closely held corporate person resembles a partnership much more than it resembles a corporation. In light of *Hobby Lobby* (and *Citizens United*, to a lesser degree), tag jurisdiction—which is valid over partnerships—should be conferred on closely held corporations when a corporate officer is “tagged,” regardless of the nature of his or her contacts in that forum. Conferring tag jurisdiction over closely held corporations would be an important first step towards matching corporate rights with corporate responsibilities.

Corporations are among the most powerful entities on the planet. They generate immense wealth, provide jobs to billions of people worldwide, catalyze innovation, and possess the potential to effect profound social change.²³ When operated ethically, corporations serve an invaluable function in society. Despite this immense amount of power, though, corporations are seemingly uncomfortable in their “corporate skin.” They want to be people, just like you and me, and for the last 150 years, American courts have been happy to let corporations be persons—creating personhood rights on a case-by-case basis. Furthermore, whenever the judiciary has conferred a corporate personhood right, it has not ventured to delineate all of the legal consequences that correspond with that new right. This has created a vast gulf between corporate rights and corresponding legal responsibilities.²⁴ And that gulf is widening.²⁵

Part I of this note analyzes the pivotal cases on corporate personhood and draws particular attention to the lack of a clear legal standard for determining when a corporation is a person.

²² See *id.*

²³ See J.D. Harrison, *Who Actually Creates Jobs: Start-Ups, Small Businesses or Big Corporations?*, WASH. POST (Apr. 25, 2013), http://www.washingtonpost.com/business/on-small-business/who-actually-creates-jobs-start-ups-small-businesses-or-big-corporations/2013/04/24/d373ef08-ac2b-11e2-a8b9-2a63d75b5459_story.html [http://perma.cc/HT6R-UM3Y].

²⁴ See Michalski, *supra* note 2, at 126-27 (“As ‘artificial’ persons, corporations can claim the constitutional rights of natural persons. But then they can turn around and evade the obligations that come with personhood. . . . Rights must track obligations.” (footnotes omitted)).

²⁵ See *id.*

Part II provides a cursory examination of the pivotal personal jurisdiction cases and highlights the way in which the Supreme Court's conceptualization of the corporation has grown out of touch with the corporate person it has created. Part III analyzes and compares *Aero Caribbean* and *Hobby Lobby* from a jurisdictional standpoint, illustrating that cases like *Aero Caribbean* deserve a fresh jurisdictional analysis in light of *Hobby Lobby*. Finally, Part IV argues that closely held corporations should be subject to tag jurisdiction when one of their directors or owners is personally served in a given forum.

I. THE HISTORY OF CORPORATE PERSONHOOD IN AMERICAN JURISPRUDENCE

Corporations in America span as far back as the Founding, albeit serving a much different role in society than they do today.²⁶ Prior to the nineteenth century, corporations were created via special state charters and were charged with strict public-serving purposes.²⁷ While not an official prerequisite for incorporation, the notion of the corporation as a vehicle for public service appears to have been the prevailing view at the time.²⁸ For example, "colleges, guilds, and municipalities were often organized as corporations, as were such public-serving transportation ventures as canals or turnpikes."²⁹

For-profit "business" corporations, conversely, were few and far between. By 1780, colonial legislatures had chartered a mere seven business corporations.³⁰ That number had only grown to 335 business corporations by 1800, with most of the incorporations taking place within the last few years of the century.³¹

The general incorporation statutes of modern times were nonexistent in the eighteenth century.³² Several scholars and jurists, including Justice Stevens in his *Citizens United* partial concurrence, argue that the state charter model reflected a belief that corporations needed strict oversight precisely because they

²⁶ Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1144 (2012).

²⁷ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 112 (1992); Johnson, *supra* note 26, at 1145.

²⁸ Johnson, *supra* note 26, at 1145.

²⁹ *Id.*; Ian Speir, *Corporations, the Original Understanding, and the Problem of Power*, 10 GEO. J.L. & POL'Y 115, 126 & nn.47-48 (2012).

³⁰ Johnson, *supra* note 26, at 1145.

³¹ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 189 (2d ed. 1985).

³² See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440 (2001).

were supposed to act for the public welfare.³³ The special legislative charter, therefore, fostered a more rigid regulatory paradigm than the statutes that governed noncorporate, predominantly family-run businesses at that time.³⁴

Despite the public-serving purpose of most corporations in the late eighteenth century, special legislative charters became synonymous with “perceptions of political cronyism.”³⁵ This public perception ultimately led to the demise of special legislative charters altogether.³⁶ With the procedural hurdle of obtaining corporate status out of the way, corporate status for businesses became prevalent.³⁷ Following the death of special legislative charters for incorporation, the strict public-serving vision of the corporation also faded.³⁸ Corporations became much more profit driven.³⁹ This led to serious questions regarding the nature of corporations, their purpose, and the parameters of state control. These questions were soon addressed by the U.S. Supreme Court in *Trustees of Dartmouth College v. Woodward*.⁴⁰ The Court’s ruling altered 400 years of prior corporate conceptualization and laid the groundwork for the birth of the modern doctrine of corporate personhood.

King George III of England granted Dartmouth College a charter in 1769.⁴¹ The charter defined the purpose of the school, established its structure and terms of governance, and provided land for the campus.⁴² In 1815, the New Hampshire state legislature attempted to alter Dartmouth College’s charter in order to reinstate its deposed president. It sought to do so by placing the power to appoint trustees in the hands of the state’s governor, altering the composition of the board of trustees, and creating a state board of visitors with veto power over trustee decisions.⁴³ This effectively converted the school, a private corporation, into a public corporation. The Board of Trustees brought an action of trover against William H. Woodward, secretary and treasurer of the Board of Trustees, to turn over the books, records, corporate property, and corporate seal of the school.⁴⁴

³³ *Citizens United v. FEC*, 558 U.S. 310, 427 (2010) (Roberts, C.J., concurring).

³⁴ Johnson, *supra* note 26, at 1145.

³⁵ *Id.* at 1146.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See id.*

⁴⁰ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

⁴¹ *Id.* at 518.

⁴² *Id.*

⁴³ *Id.* at 546.

⁴⁴ *Id.* at 625.

Chief Justice Marshall, writing for the majority, ruled that the actions of the New Hampshire legislature unconstitutionally interfered with Dartmouth's rights under the Contract Clause of the U.S. Constitution.⁴⁵ The majority opinion famously defined the nature of corporations:

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. . . . Among the most important are immortality. . . . It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.⁴⁶

The notion of an “immortal” corporation was groundbreaking. Corporations under the public-service doctrine existed to serve a specific purpose, and when that purpose ceased to exist, so too did the corporation. Under that view, corporations were inherently soulless.⁴⁷ The English jurist Sir Edward Coke most famously espoused this view, maintaining that corporations “cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls.”⁴⁸

This new understanding of American corporations had other profound effects. States now had to either reserve the right to alter corporate charters in the initial corporate charter itself or forfeit the ability to do so after the initial grant.⁴⁹ This made corporate regulation more difficult for state governments and granted private corporations, now free from the strictures of the sharply defined corporate charters of the eighteenth century, a great degree of fluidity in their operations. And, perhaps even more importantly, *Dartmouth College* “heralded a recognition of the force of the moral personality of the corporate entity, as a consequence of which the corporation went from being the humble servant of the state to being its virtual master.”⁵⁰ While the case was not one involving corporate personhood, the recognition of the corporate “moral personality” established the key framework from which the corporate-person doctrine would eventually grow.⁵¹ *Dartmouth College* was groundbreaking because corporations, in

⁴⁵ *Id.* at 588-91 (citing U.S. CONST. art. I, § 10).

⁴⁶ *Id.* at 636.

⁴⁷ Michalski, *supra* note 2, at 126.

⁴⁸ *Case of Sutton's Hospital* (1612) 77 Eng. Rep. 960, 973 (K.B.).

⁴⁹ Liam Séamus O'Melinn, *Neither Contract Nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 216 (2006).

⁵⁰ *Id.* at 205.

⁵¹ *Id.* at 216.

pursuit of private gain, thereafter possessed the ability to break free from the confines of special legislative charters to establish and maintain a revolutionary level of autonomy.⁵²

From the time of the Supreme Court's ruling in *Dartmouth College* to the end of the Civil War, corporate litigation did little to aggrandize or restrict previously recognized personhood rights.⁵³ The passage of the Reconstruction Amendments, namely the Fourteenth Amendment, provided the catalytic spark to ignite the "corporate person" debate.⁵⁴ That debate culminated in the infamous case of *Santa Clara County v. Southern Pacific Railroad*.⁵⁵ The case arose from a challenge by the Southern Pacific Railroad Company to taxes it allegedly owed Santa Clara County and the State of California under provisions of the California constitution.⁵⁶ Those provisions prohibited railroads from deducting the amount of their debts from the taxable value of their property.⁵⁷ The county claimed that it had the ability to tax a fence owned by the railroad, while Southern Pacific countered that the state constitution only granted California the power to tax "the franchise, roadway, road-bed, rails, and rolling-stock."⁵⁸ Southern Pacific refused to pay the taxes, and Santa Clara County sued in state court to recoup the taxes owed.⁵⁹ Southern Pacific removed the action to federal district court, which ruled that the county lacked the authority to levy the taxes.⁶⁰ Santa Clara County appealed the decision to the U.S. Supreme Court.⁶¹

The case is immortalized for statements that Chief Justice Waite made to the litigants prior to commencement of oral arguments. He stated that the Court did not wish to hear arguments on whether corporations were persons under the Fourteenth Amendment.⁶² While his exact words remain unknown,⁶³ the eventual characterization of the statement in the U.S. Reports by court reporter Bancroft Davis would have a

⁵² *Id.*

⁵³ JAN EDWARDS, TIMELINE OF PERSONHOOD RIGHTS AND POWERS (2002), <http://www.californiademocracy.org/corporations/resource/timeline.pdf> [<http://perma.cc/G9L8-YSGQ>].

⁵⁴ *Id.*

⁵⁵ *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886).

⁵⁶ *Id.* at 397.

⁵⁷ *Id.* at 404.

⁵⁸ *Id.* at 405.

⁵⁹ *Id.* at 397.

⁶⁰ *Id.* at 398.

⁶¹ *Id.* at 394.

⁶² Harkins III, *supra* note 1, at 248 ("In opening the Court stated that it did not wish to hear argument on the question whether the Fourteenth Amendment applie[d] to such corporations as [were] parties in these suits.").

⁶³ *Id.* at 248 n.149.

profound impact on American corporate law.⁶⁴ Weeks after the oral argument, Davis summarized the Chief Justice's pre-argument statements in a headnote:

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.⁶⁵

Because the statement only appeared in a headnote, and not in the opinion itself, it was not officially controlling law with the issuance of the decision.⁶⁶ But in 1888, the Court went on to officially adopt this stance in *Pembina Consolidated Silver Mining & Milling Company v. Pennsylvania*, albeit in dicta.⁶⁷

In *Pembina*, a Colorado corporation argued that certain licensing fees levied against it by the State of Pennsylvania denied it equal protection of the laws because Pennsylvania did not impose the same fees against Pennsylvania corporations.⁶⁸ While the Court found that the fee did not amount to a violation of equal protection, Justice Field, a known proponent of expansive corporate personhood at the time,⁶⁹ wrote that private corporations were “no doubt”⁷⁰ included in the designation of “person.” Justice Field quoted Justice Marshall and stated that “[t]he great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.”⁷¹ And in the same Supreme Court term, Justice Field further espoused that position in *Minneapolis & St. Louis Railway Co. v. Beckwith*.⁷²

In *Beckwith*, the plaintiff raised Fourteenth Amendment due process and equal protection challenges to an Iowa law that allowed plaintiffs to recover double damages for injuries resulting from railroads.⁷³ Justice Field again declared that corporations were persons under the Fourteenth Amendment and stated that “corporations can invoke the benefits of provisions of the

⁶⁴ See *id.* at 248.

⁶⁵ See *supra* note 7 and accompanying text.

⁶⁶ Harkins III, *supra* note 1, at 248.

⁶⁷ *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 188-89 (1888) (“Under the designation of ‘person’ there is no doubt that a private corporation is included.”).

⁶⁸ See *id.* at 181-83.

⁶⁹ Dr. Paul Kens, *Nothing to Do with Personhood: Corporate Constitutional Rights and the Principle of Confiscation*, SELECTED WORKS OF PAUL KENS DR. (Feb. 9, 2015), works.bepress.com/paul_kens/4/download/ [http://perma.cc/V4MV-H936].

⁷⁰ *Pembina*, 125 U.S. at 189.

⁷¹ *Id.* (quoting *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 562 (1830)).

⁷² *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26 (1889).

⁷³ *Id.* at 28.

Constitution and laws which guarantee to persons the enjoyment of property . . . or prohibit legislation injuriously affecting it.”⁷⁴

These decisions set off a firestorm of litigation. While an immense degree of debate at the time questioned whether the Reconstruction Amendments applied only to African-Americans or to all persons, one thing was clear: corporations were eager to utilize the Fourteenth Amendment to enhance their rights.⁷⁵ According to research conducted by Jan Edwards, Board Member for the California Center for Democracy, a staggering 288 of the Fourteenth Amendment cases brought before the Supreme Court from 1890 to 1910 dealt with corporations, whereas only “19 dealt with African Americans.”⁷⁶ Moreover, courts over the course of the next century were largely willing to accommodate corporate requests for expansions of their rights.⁷⁷

⁷⁴ *Id.*

⁷⁵ Harkins III, *supra* note 1, at 235.

⁷⁶ EDWARDS, *supra* note 53.

⁷⁷ For example, the Supreme Court granted corporations Fourth Amendment protection from unreasonable searches and seizures in *Hale v. Henkel* in 1906. *Hale v. Henkel*, 201 U.S. 43, 75-76 (1906) (“Although . . . we are of the opinion that an officer of a corporation which is charged with a violation of a statute of the State of its creation, or of an act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against unreasonable searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.” (citation omitted)). In 1967, the Supreme Court granted corporations Fourth Amendment protection from random inspection by fire departments, holding that an administrative warrant is necessary to conduct an inspection of “commercial premises.” See *v. City of Seattle*, 387 U.S. 541, 545-46 (1967) (“We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure. . . . We hold only that the basic component of a reasonable search under the Fourth Amendment—that it not be enforced without a suitable warrant procedure—is applicable in this context, as in others, to business as well as to residential premises.”). In 1922, corporations were granted Fifth Amendment “takings” protection in *Pennsylvania Coal Co. v. Mahon* when the Pennsylvania Coal Company was allowed to bring a challenge to a Pennsylvania statute on regulatory takings grounds. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922). In 1977, corporations received the right to invoke Fifth Amendment protection from double jeopardy in *United States v. Martin Linen Supply Co.*, a criminal antitrust case in which the government attempted to retry the defendant after the first trial ended in acquittal due to a hung jury. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 565-67 (1977) (“A ‘hopelessly deadlocked’ jury was discharged when unable to agree upon a verdict at the criminal contempt trial of respondent corporations The Court of Appeals reasoned that, since reversal of the acquittals would enable the United States to try respondents a second time, the bar of the Double Jeopardy Clause ‘leads inescapably to the conclusion that no appeal lies from the directed verdict ordered by the court below.’ . . . We affirm.” (quoting *Providence Bank v. Bookings*, 534 F.2d 585, 589 (1976))).

In 1978, a landmark case, *First National Bank of Boston v. Bellotti*, struck down a Massachusetts statute prohibiting banks and other business corporations from making contributions or expenditures to ballot initiative campaigns that did not directly “affect[] . . . the property, business or assets of the corporation.”⁷⁸ Invoking the First Amendment, Justice Powell, writing for the majority, stated,

We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property.⁷⁹

This case was a major victory for corporate personhood and would be relied on heavily by the majority in *Citizens United* over three decades later.

These are just a handful of the well-known cases in which corporations were placed on an even plane with individuals in terms of constitutional rights. While they all dealt with vastly different constitutional provisions, facts, and parties, one thing unites them: not one of these cases attempts to enunciate any standard, test, or rule for when corporations are appropriately deemed to be “persons” and when they are not; instead, the Court in each of these cases was results oriented and sought to further whatever its notion of “justice” was in the case before it—rather than enunciating objective criteria as a basis for future decisions.

Before arriving at the modern dilemma, a cursory examination of the evolution of corporate personal jurisdiction in the United States is necessary. This will highlight the differences between the theoretical corporation envisioned by the Court in its major decisions and the true nature of corporations as persons.

II. SETTING THE STAGE: THE EVOLUTION OF PERSONAL JURISDICTION IN AMERICA

The doctrine of personal jurisdiction in American jurisprudence has endured a protean history since its inception in *Pennoyer v. Neff* in 1877.⁸⁰ *Pennoyer* was firmly grounded in the principle that the power of any court was strictly limited to the geographical boundaries of the forum in which it sat.⁸¹ In time,

⁷⁸ *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 767-68 (1978).

⁷⁹ *Id.* at 784.

⁸⁰ *Pennoyer v. Neff*, 95 U.S. (5 Otto.) 714 (1877).

⁸¹ *Id.* at 720.

however, “that strict territorial approach yielded to a less rigid understanding.”⁸² Spurred by “changes in the technology of transportation and communication, and the tremendous growth of interstate business activity,”⁸³ courts were forced to grapple with the notion of answering complex, novel questions of extraterritorial jurisdiction within the requirements of constitutional due process. Crucially, though, throughout the doctrine’s evolution, the Court has always viewed the corporation as an invisible, intangible entity separate from its directors, officers, and shareholders⁸⁴—that is, only “present” in its state of incorporation, principal place of business, and wherever its contacts are so “systematic and continuous” that the exercise of personal jurisdiction satisfies “traditional notions of fair play and substantial justice.”⁸⁵ Yet the doctrine has wholly failed to account for the advances the Court itself has granted to corporations in expanding their rights as persons.

The extraterritorial evolution of the doctrine culminated in the Supreme Court’s canonical decision in *International Shoe Co. v. Washington*.⁸⁶ There, the International Shoe Company, a Delaware corporation with its principal place of business in St. Louis, Missouri, was engaged in the business of manufacturing and selling shoes.⁸⁷ The State of Washington required all employers that conducted business within the state to pay a tax that would contribute to the state unemployment fund.⁸⁸ International Shoe had no office in Washington and conducted very little business there.⁸⁹ International Shoe did not pay the unemployment fund tax, and Washington brought suit for the moneys owed⁹⁰ and then personally served one of International Shoe Company’s in-state salesmen with a notice of assessment, a copy of which was also sent by registered mail to the company’s office in St. Louis.⁹¹

⁸² *Burnham v. Superior Court of Cal., Cty. of Marin*, 495 U.S. 604, 617 (1990) (opinion of Scalia, J.).

⁸³ *Daimler AG v. Bauman*, 134 S. Ct. 746, 753 (2014) (quoting *Burnham*, 495 U.S. at 617).

⁸⁴ *See generally* *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819) (“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.”).

⁸⁵ *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

⁸⁶ *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁸⁷ *Id.* at 313.

⁸⁸ *Id.* at 315.

⁸⁹ *Id.* at 313.

⁹⁰ *Id.* at 312.

⁹¹ *Id.*

International Shoe made a special appearance in Washington before the office of employment⁹² to challenge the alleged tax deficiency “on the ground that the service upon appellant’s salesman was not proper service upon appellant; that appellant was not a corporation of the State of Washington and was not doing business within the state; that it had no agent within the state upon whom service could be made.”⁹³ The unemployment tribunal ruled that the State of Washington was entitled to the tax payments, and the decision was subsequently affirmed by the Supreme Court of Washington.⁹⁴ The U.S. Supreme Court granted certiorari to decide, inter alia, whether the company’s activities within the State of Washington were sufficient for the state court to exercise personal jurisdiction over it.⁹⁵ The Supreme Court, led by Chief Justice Stone, held that a state may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has “certain minimum contacts with [the State] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁹⁶ In deciding whether a plaintiff has successfully obtained personal jurisdiction over an out-of-state defendant, courts must consider both the nature of the defendant’s contacts, as well as those contacts’ relation to the cause of action in the case before the court.⁹⁷ Applying this standard, the Court held that International Shoe’s contacts with the state, including the constant flow of orders that brought International Shoe’s products into the state and the permanent display of shoe samples in shoe stores in Washington over a span of several years, rendered it amenable to suit there.⁹⁸ Accordingly, the State of Washington was entitled to the tax payments.⁹⁹

With *International Shoe*’s historic reformation of *Pennoyer*’s principle of strict territorial limitation, litigation surrounding general and specific jurisdiction¹⁰⁰ has most

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Int’l Shoe Co. v. State*, 154 P.2d 801 (Wash. 1945).

⁹⁵ *Int’l Shoe Co.*, 326 U.S. 310.

⁹⁶ *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

⁹⁷ *See id.* at 317.

⁹⁸ *Id.* at 314-15.

⁹⁹ *Id.* at 321.

¹⁰⁰ Specific jurisdiction is a contacts-based exercise of personal jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984) (“It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant’s contacts with the forum, the State is exercising ‘specific jurisdiction’ over the defendant.”). On the other hand, “[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.” *Daimler AG v.*

frequently confronted the question of when it is appropriate for a court to exercise jurisdiction over an out-of-state defendant.¹⁰¹ Courts have grappled with these cases, wary of offending “traditional notions of fair play and substantial justice.”¹⁰² Courts have set forth a range of analyses for cases involving goods in the “stream of commerce,”¹⁰³ including whether individuals or corporations have “purposefully availed” themselves of the forum¹⁰⁴ and whether a corporation is “at home”¹⁰⁵ in a given forum.

Despite its pedigree as the consummate case in twentieth-century personal jurisdiction jurisprudence, *International Shoe* left many questions unanswered. One such question was whether *International Shoe* established the proper inquiry for every evaluation of personal jurisdiction, or whether *Pennoyer’s* principle of personal service of process on a defendant in the forum state was still a valid means of obtaining personal jurisdiction over an otherwise out-of-state defendant.

In 1990, the Court tackled the question of whether in-state service upon an individual was sufficient to establish personal jurisdiction in *Burnham v. Superior Court of California, County of Marin*.¹⁰⁶ Justice Antonin Scalia, writing for a plurality, stated, “The question we must decide today is whether due process requires a similar connection between the litigation and the defendant’s contacts with the State in cases where the defendant is physically present in the State at the time process is served upon him.”¹⁰⁷ In *Burnham*, a husband and wife, residents of New Jersey, separated.¹⁰⁸ The couple agreed that Mrs. Burnham would take custody of the children and move to California, with Mr. Burnham remaining in New Jersey.¹⁰⁹ When Mr. Burnham visited California on business, Mrs. Burnham served him with a summons and complaint for divorce proceedings in California.¹¹⁰ Mr. Burnham returned to New Jersey but eventually went back

Bauman, 134 S. Ct. 746, 754 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A., v. Brown*, 564 U.S. 915, 918 (2011)). Corporations are at home in their state(s) of incorporation and the state of their principal place of business. Individuals are at home in their state of domicile.

¹⁰¹ See, e.g., *Goodyear*, 564 U.S. at 923 (quoting *Int’l Shoe Co.*, 326 U.S. 310); *Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal.*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

¹⁰² *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

¹⁰³ See *Asahi Metal Indus. Co., Ltd.*, 480 U.S. at 103-04.

¹⁰⁴ *Burger King Corp.*, 471 U.S. at 482 (quoting *Burger King Corp. v. Maschara*, 724 F.2d 1505, 1513 (11th Cir. 1984)).

¹⁰⁵ *Goodyear*, 131 S. Ct. at 2851.

¹⁰⁶ *Burnham v. Superior Court of Cal., Cty. of Marin*, 495 U.S. 604, 611 (1990).

¹⁰⁷ *Id.* at 610.

¹⁰⁸ *Id.* at 607.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 608.

to California to make a “special appearance” in order to quash service of process on the ground that the Superior Court lacked personal jurisdiction.¹¹¹ Mr. Burnham argued that he lacked the requisite minimum contacts with California to establish personal jurisdiction because he had only visited California a few times for business and to visit his children.¹¹² The Superior Court denied his motion, and the California Court of Appeals subsequently denied his request for mandamus relief.¹¹³ The U.S. Supreme Court affirmed the decision of the state high court.¹¹⁴ In so doing, Justice Scalia wrote that a state’s ability to exercise power over defendants found within its borders, regardless of how long that person is in the state, was one of the most “firmly established principles of personal jurisdiction in American tradition.”¹¹⁵

Burnham was a divorce case, and so the question of whether the Court’s holding applied to corporations was not implicated. With *Hobby Lobby*’s creation of a “new” closely held corporate person, whose full list of rights is untold and potentially expansive, the Court should confer tag jurisdiction over closely held corporations when an owner or officer is tagged in a given forum. This would better align the rights and responsibilities of the closely held corporate person than the court ever has through its conceptualization of the classic corporation.

III. A WINDOW FOR TAG JURISDICTION OVER CLOSELY HELD CORPORATIONS

A. *Hobby Lobby: The Illegitimate Birth of the Religious, Closely Held Corporate Person*

In June 2014, the U.S. Supreme Court rendered its decision in *Burwell v. Hobby Lobby Stores, Inc.*¹¹⁶ Although the case did not deal with personal jurisdiction, the Supreme Court’s holding arbitrarily¹¹⁷ bifurcated the corporate person into the “classic” corporation and the closely held corporation, affording the right to opt out of federal legislation on religious grounds to the latter. The decision opens the door for a new era of corporate

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 628.

¹¹⁵ *Id.* at 610.

¹¹⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

¹¹⁷ The selection of the undefined closely held corporation truly was arbitrary. While the majority explained why it did not extend the exemption to *all* corporations, it did not explain why the undefined closely held corporation was the proper outer bound for eligibility for the exemption.

personhood if the judiciary, especially the Supreme Court, decides to deal with the two corporate persons separately going forward. *Hobby Lobby* dealt with the consolidated challenges of three private corporations to the contraceptive mandate promulgated by the Department of Health and Human Services (HHS)¹¹⁸ in the Affordable Care Act.¹¹⁹ Under the Affordable Care Act, employers who provide health insurance coverage to their employees were required to provide “preventive care and screenings” for women without “any cost sharing requirements.”¹²⁰ The “preventive care” included 20 types of contraception, and “four of those methods . . . may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus.”¹²¹ Employers could either comply with the mandate or pay steep monetary penalties.¹²²

All of the plaintiff corporations (Hobby Lobby Stores, Inc., Conestoga Wood Specialties Corp., and Mardel Corp.) were founded and operated pursuant to Christian ideals¹²³ and are family owned and controlled.¹²⁴ Each family claimed that their religion dictated that life begins at conception and that they were all morally opposed to the use of contraception on the belief that its use is an act of abortion.¹²⁵ They argued that the penalties for failure to comply with the mandate constituted a substantial burden on the exercise of their religion.¹²⁶ The Supreme Court, led by Justice Samuel Alito, ruled that for-profit, closely held corporations are “persons” within the meaning of the Religious Freedom Restoration Act.¹²⁷ Therefore, closely held corporations with owners who object to the contraceptive mandate of the Affordable Care Act may opt out of covering contraception in their employee insurance packages.¹²⁸

The decision to limit the exemption to closely held corporations is important. First, Justice Alito, writing for the majority, did not explain why the closely held corporation was the

¹¹⁸ HHS is the U.S. government’s principal agency for protecting the health of all Americans and providing essential human services, especially for those who are least able to help themselves. HHS Secretary Sylvia Mathews Burwell was the named appellant in *Hobby Lobby*. *About HHS*, HHS, <http://www.hhs.gov/about/index.html#> [<http://perma.cc/KSV4-N6F5>] (last visited May 5, 2016).

¹¹⁹ *Hobby Lobby*, 134 S. Ct. 2751.

¹²⁰ 42 U.S.C. § 300gg-13(a)(4) (2012).

¹²¹ *Hobby Lobby*, 134 S. Ct. at 2762-63.

¹²² 26 U.S.C. § 4980D(a)-(b) (2012).

¹²³ *Hobby Lobby*, 134 S. Ct. at 2764-65.

¹²⁴ *Id.* at 2774.

¹²⁵ *Id.* at 2759.

¹²⁶ *Id.*

¹²⁷ *Id.* at 2768.

¹²⁸ *Id.* at 2783-85.

appropriate entity at which to draw the line. Secondly, the majority did not define “closely held,” which is problematic, as several potential definitions exist. The lack of a clearly enunciated definition of “closely held” forces entities seeking to take advantage of the exemption to guess as to whether they will qualify or not. Most notably, this decision simultaneously served as a “first” in the progression of, and an unprecedented limit on, corporate personhood rights. The decision is the first from the Supreme Court to allow for-profit corporations to seek exemption from a federal law of general applicability on religious grounds. On the other hand, by arbitrarily limiting its applicability to only closely held corporations, the Supreme Court bifurcated the corporate person into two different types: the “classic,” all-encompassing legal conceptualization of the corporation that had dominated the Court’s jurisprudence since the railroad cases, and the new, “religious” closely held corporate person. The creation of two different corporate persons presents the Court with the opportunity to align the rights and responsibilities of the new closely held corporate person in future jurisprudence—if the court treats the two persons as separate entities going forward. To decline to do so would mar *Hobby Lobby* as a results-oriented decision and would weaken its legitimacy.

In balking at the notion of granting the right to religious exemption to *all* corporations, the Court, led by Justice Alito, acknowledged something that it had never acknowledged before: large, for-profit, publicly traded corporations cannot realistically share a common religion among its owners (i.e., its shareholders).¹²⁹ Justice Alito reasoned:

These [consolidated] cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. For example, the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.¹³⁰

The majority’s awareness of the improbability that numerous, diffuse shareholders could agree to a unified religious core for corporate governance is well placed, albeit unprecedented. It is clear that shareholders agree on basic principles of corporate governance, such as profit maximization. But getting those same

¹²⁹ *Id.* at 2774.

¹³⁰ *Id.*

shareholders to agree on a single corporate religious belief system would likely become an insurmountable task.

One glaring problem with the *Hobby Lobby* decision is that the majority neglected to define what they meant by “closely held corporations,” and there are several possible definitions under current law. For example, the IRS defines a closely held corporation as one with at least “50% of the value of its outstanding stock” being held by five people or fewer at any time during the previous tax year.¹³¹ Under the IRS definition, personal-service corporations (e.g., law firms, medical offices, accounting firms) cannot be closely held corporations.¹³² It is estimated that the IRS definition encapsulates 90% of the companies in the United States,¹³³ including corporations like agricultural behemoth Cargill, which “employs 140,000 people and had \$136.7 billion in revenue in fiscal 2013.”¹³⁴ It can be inferred, though, that the definition contemplated by the *Hobby Lobby* majority expands at least as far as S corporations, since *Hobby Lobby* was incorporated under that corporate form. S corporations are a distinct corporate form that must have 100 or fewer shareholders.¹³⁵ S corporations do not pay traditional corporate taxes; rather, gains and losses flow through to the shareholders, who report the gains and losses in their individual tax returns and pay taxes at their personal tax rates.¹³⁶ Crucially, there is no requirement that an S corporation have 50% or more of its stock held and controlled by five or fewer shareholders, as is the case with closely held corporations as defined by the IRS. This fact alone indicates that the Supreme Court does not wish to confine its definition of closely held corporations to the IRS definition, as it extended the opt-out from the birth control mandate to S corporations, which do not have to satisfy the IRS requirements for closely held corporations.

It is also noteworthy (and puzzling) that the Court was willing to limit the types of corporations that can exercise

¹³¹ *Entities*, IRS, <http://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business-Self-Employed-Other-Business/Entities/Entities-5> [<http://perma.cc/5FPP-X5ML>] (last visited Apr. 20, 2016).

¹³² *Id.*

¹³³ Stephanie Armour & Rachel Feintzeig, *Hobby Lobby Ruling Raises Question: What Does ‘Closely Held’ Mean?*, WALL ST. J. (June 30, 2014, 2:56 PM), <http://online.wsj.com/articles/hobby-lobby-ruling-begs-question-what-does-closely-held-mean-1404154577> [<http://perma.cc/8F6F-CK27>].

¹³⁴ Drew Desilver, *What Is a ‘Closely Held Corporation,’ Anyway, and How Many Are There?*, PEW RESEARCH CTR. (July 7, 2014), <http://www.pewresearch.org/fact-tank/2014/07/07/what-is-a-closely-held-corporation-anyway-and-how-many-are-there/> [<http://perma.cc/7UDU-TA52>].

¹³⁵ *S Corporations*, IRS, <https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/S-Corporations> [<http://perma.cc/M4YY-SY44>] (last visited Apr. 20, 2016).

¹³⁶ *Id.*

religion in *Hobby Lobby*, but was unwilling to limit which corporations could exercise political speech in *Citizens United*—all without explaining why. Applying the *Hobby Lobby* majority's own reasoning, if finding unanimous agreement between all shareholders regarding a public corporation's religion would be impossible,¹³⁷ the same could easily be said for political beliefs. Finally, the majority neglected to enunciate a test or standard for when a corporation may be a person, keeping with the Court's motif of results-oriented decisionmaking in corporate personhood cases.

B. *Disagreement Between Circuit Courts over Corporate Tag Jurisdiction*

Around the very same time that *Hobby Lobby* was being decided, the Ninth Circuit heard a case with interesting implications for corporate personal jurisdiction. In *Martinez v. Aero Caribbean*, the Ninth Circuit held that there cannot be tag jurisdiction over corporations.¹³⁸ The case arose from a plane crash off the coast of Cuba in 2010, where all 68 passengers on board perished.¹³⁹ The plane was designed by Avions de Transport Regional (ATR),¹⁴⁰ a company organized under French law with its headquarters and principal place of business in France.¹⁴¹ The Cervantes family, survivors of one of the deceased victims of the crash, brought suit in the Northern District of California against ATR for products liability, negligence, breach of warranty, and wrongful death.¹⁴² The Cervantes family personally served ATR at its headquarters in France.¹⁴³ ATR immediately moved to dismiss the claims for lack of personal jurisdiction in California.¹⁴⁴ The district court did not immediately grant its motion¹⁴⁵ but instead granted the Cervantes family a two-month window to conduct limited jurisdictional discovery.¹⁴⁶ During that two-month period,

¹³⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 (2014).

¹³⁸ *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1064, 1068 (9th Cir. 2014) (“On the assumption that tag jurisdiction exists only over natural persons who are physically present in a forum state, *International Shoe* indicates that a corporation may be subject to personal jurisdiction only when its contacts with the forum support either specific or general jurisdiction. In the almost seventy years since *International Shoe*, the Supreme Court has never suggested anything else.”).

¹³⁹ *Id.* at 1064.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1065.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

plaintiffs served “ATR’s vice president of marketing [personally] while he was in California” for a conference.¹⁴⁷

In a supplemental memorandum opposing the motion to dismiss, plaintiffs argued, *inter alia*, that by serving ATR’s vice-president of marketing personally in California, they had acquired general personal jurisdiction over ATR in California pursuant to *Burnham*.¹⁴⁸ After the district court rejected the tag jurisdiction argument and granted ATR’s motion to dismiss,¹⁴⁹ the Ninth Circuit affirmed the district court’s dismissal.¹⁵⁰ The court reasoned, “An officer of a corporation is not the corporation, even when the officer acts on the corporation’s behalf. While a corporation may in some abstract sense be ‘present’ wherever its officers do business, such presence is not physical in the way contemplated by *Burnham*.”¹⁵¹

The court’s distinction between the physical presence of the officer and the physical presence of the corporation itself is crucial because the notion is premised entirely on the American jurisprudential conceptualization of corporations: that the corporation is an invisible entity separate and apart from its owners, present only in its state of incorporation and its principal place of business.¹⁵² Under the early conception of corporations, this view made sense. Concededly, even today it still makes sense when applied to large, publicly traded corporations.¹⁵³ In light of *Hobby Lobby*, however, there is suddenly a soft spot in the Ninth Circuit’s reasoning. The one-size-fits-all approach for corporate personal jurisdiction jurisprudence can hardly be called workable, as the Supreme Court has departed from allocating blanket rights to *all* corporations and has instead identified different types of corporate persons capable of possessing different rights.¹⁵⁴

Only one court in American history has come to a different conclusion than the Ninth Circuit in *Aero Caribbean*. In 2001, the First Circuit in *Northern Light Technology, Inc. v. Northern Lights Club* stated in a footnote, “We believe that the service of process effected upon [defendant] also conferred personal jurisdiction over the other [corporate] defendants.”¹⁵⁵ The decision has never been adhered to, especially because the case was

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (citing *Burnham v. Superior Court of Cal., Cty. of Marin*, 495 U.S. 604, 611 (1990)).

¹⁴⁹ *Martinez v. Aero Caribbean*, 2012 WL 1380247, at *4 (N.D. CA 2012).

¹⁵⁰ *Martinez v. Aero Caribbean*, 764 F.3d at 1065.

¹⁵¹ *Id.* at 1068 (citations omitted).

¹⁵² See *supra* note 110 and accompanying text.

¹⁵³ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 (2014).

¹⁵⁴ See *supra* Section III.A.

¹⁵⁵ *N. Light Tech., Inc. v. N. Lights Club*, 236 F.3d 57, 63 n.10 (1st Cir. 2000).

decided on other grounds.¹⁵⁶ Nevertheless, this disagreement between circuit courts may be ripe for exploitation in the wake of *Hobby Lobby* and its creation of the “new” corporate person.

IV. KEEPING IT IN THE FAMILY: CONFERRING TAG JURISDICTION OVER *HOBBY LOBBY'S* CLOSELY HELD CORPORATION

The Supreme Court’s decision in *Hobby Lobby* effectively created a new corporate entity, the likes of which the Court had never before contemplated in its corporate personhood cases or its personal jurisdiction cases—the religious closely held corporation. This is certainly not to say that closely held corporations themselves are new creations of the Court—they have essentially existed since before the Founding. In terms of corporate personhood jurisprudence, though, the Court had never before discriminated between closely held corporations and all other types of corporations when recognizing new corporate rights. To better align the rights of such lifelike, closely held corporations with the legal responsibilities of real persons, courts should confer tag jurisdiction over closely held corporations.

In terms of personhood rights possessed by corporations, closely held corporations are the closest to being natural persons out of all types of corporations. In the wake of *Hobby Lobby*, closely held corporations retain all rights previously granted to the “classic” corporate person, as well as the right to seek exemption from a federal law of general applicability on grounds of religious objection under RFRA.¹⁵⁷ Closely held corporations can exercise religious beliefs, political beliefs, and due to the Court’s failure to enunciate a standard for when, why, and how a corporation may assume the rights of the individual, seemingly countless other untold rights. The Court must enunciate how it defines closely held corporations to provide clarity to corporate entities and their directors, owners, and counsel.

A. *Closely Held Corporations Should Be Amenable to Tag Jurisdiction*

Closely held corporations may now exercise their owners’ religious beliefs. But the corporation itself is not a sentient being. It cannot think for itself, it cannot choose which religion to adhere to, it cannot actively practice its religion, and it cannot make

¹⁵⁶ *Id.* at 63, 66.

¹⁵⁷ *Hobby Lobby*, 134 S. Ct. at 2768-69.

religious decisions, or any decisions, on its own. The corporation is only “religious” because its owners and directors, acting as corporate agents, superimpose their own religious beliefs onto the corporation. In essence, *Hobby Lobby* has eviscerated the divide between closely held corporations as intangible entities and their owners.

This new legal right for closely held corporations and their owners tears down the legal wall that once separated the personalities of corporations and corporate owners and directors. Now, the closely held corporation walks with its directors. The beliefs of corporate directors of closely held corporations can be so intricately and intimately intertwined with the corporate personality that the two entities—traditionally separate and distinct in classic corporate theory—are now one. The fear of numerous, diffuse shareholders vying for different religious and political beliefs within the corporation’s governance is rendered irrelevant. By being owned by such a small cluster of individuals, typically family members, the closely held corporation suddenly becomes eerily “natural” in terms of personhood.

In this respect, the post-*Hobby Lobby* closely held corporation is more analogous to a partnership than a traditional corporation. And, crucially, tag jurisdiction over a partner of a partnership confers personal jurisdiction over the entire partnership. For example, in *First American Corp. v. Price Waterhouse LLP*,¹⁵⁸ the Second Circuit allowed for personal jurisdiction over an entire partnership after one of its partners was personally served in the forum state.¹⁵⁹ The court, led by Judge Jacobs, reasoned that no analysis of the partnership’s business contacts with New York was necessary. Because there is no distinction between the partners and the partnership as an entity, tagging one of the partners was sufficient to establish personal jurisdiction over the entire entity.¹⁶⁰

The Second Circuit’s decision turned on the same distinction that previous corporate personhood cases had turned on: the separate existence of the corporation from its directors, officers, and shareholders.¹⁶¹ In *First American*, though, because partnership law does not create a separate existence between partners and the partnership, the court was willing to confer personal jurisdiction over the partnership after one of the partners was tagged in New York.¹⁶² Now, there is no separate

¹⁵⁸ *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 18 (2d Cir. 1998).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 20.

¹⁶¹ *Id.* at 19.

¹⁶² *Id.* at 18.

existence between the closely held corporation and its small core of owners and directors. The religious, closely held corporation is not much more than a shell that exhibits the religious beliefs of its owners while allowing them to enjoy the benefit of limited liability. Moreover, S corporations, which are included in the Court's definition of closely held, are treated extremely similarly to partnerships for tax purposes. They are considered "pass through" entities that do not pay corporate taxes but instead all incomes, losses, credits, and deductions pass through to the shareholders and are then reflected in their individual tax returns. Also, as with partnerships, the closely held corporation is comprised of a small group of individuals, all heavily invested in the corporation in terms of capital and property and who expect to share in the corporation's profits and losses. The only difference is that closely held corporations, under the IRS definition, have a ceiling on how many people can comprise the majority ownership, while partnerships only have a floor (two or more people). Therefore, because the separation between the closely held corporate entity and its owners has dissolved, and because many of the corporations included in the Court's definition of closely held (including Hobby Lobby) are treated almost identically as partnerships, courts should treat religious, closely held corporations more like partnerships for purposes of personal jurisdiction. Namely, the owners and directors of a closely held corporation (as contemplated in the proposed definition above¹⁶³) should be "tag targets," and successful personal service on them should confer general personal jurisdiction in the forum state where they are served, just as it would for partnerships and natural persons.

This rule certainly has several pros and cons. One possible drawback is that it presents closely held corporations with difficult choices. For example, closely held corporations may have to turn away interested investors, and therefore capital injections, if such investments would dilute the single shareholder's ownership to less than 50%, all to meet the IRS definition's requirements. But an actual benefit may be lurking behind this choice; that is, such a decision would serve as a sorting mechanism. Those closely held corporations that are truly serious about imposing a religious (or other) belief onto the corporation will ensure that they meet the criteria for being considered closely held. Those who would prefer to avoid tag jurisdiction will accept investors even if their ownership share would drop below 50%. This will have the effect of keeping closely held corporations truly closely held.

¹⁶³ *Infra* Section IV.B.

Moreover, closely held corporate defendants would not be entirely powerless once served personally in a given forum. If litigating in a forum is truly burdensome, a defendant still has the tools of transfer or forum non conveniens in their belt to move the litigation to a more conducive forum.¹⁶⁴ Under either doctrine, convenience and justice are the guiding concerns.¹⁶⁵ *Piper Aircraft Co. v. Reyno* sets forth factors for determining when a forum is convenient, including ease of access to evidence, “availability of compulsory process for . . . unwilling” witnesses, cost of attendance to willing witnesses, viewing the premises, and “other practical problems.”¹⁶⁶ There are also public considerations in forum non conveniens cases, including court congestion, the chosen forum’s interest in overseeing the litigation, choice of law issues, and the burden of jury duty in a given forum.¹⁶⁷ If a closely held corporation was brought before a tribunal by being tagged, it could move for transfer or dismissal by presenting arguments attesting to the factors laid out above. Also, the owners of a closely held corporation still retain the hallmark benefit of the corporate form—limited liability—meaning that even when jurisdiction is established over a corporation via tagging, the individual shareholders are not personally liable. *Hobby Lobby* did not make any attempt to alter that aspect of corporate formation. By arming the owners of these corporations with these procedural safeguards, the conferral of tag jurisdiction over closely held corporations is fair and acknowledges the realities of the contemporary nature of the closely held corporation.

B. *Defining the Post-Hobby Lobby Closely Held Corporate Person*

One troubling aspect of the Court’s decision in *Hobby Lobby* is that the majority failed to define what exactly qualifies as a closely held corporation. It did describe, however, three considerations in its decision to limit the availability of the religious exemption. First, the Court acknowledged that large corporations would likely not be entitled to the RFRA exemption, as it would be virtually impossible for shareholders to arrive at an agreed-upon religion.¹⁶⁸ Secondly, the majority justified granting

¹⁶⁴ Edward M. Mullins & Christopher Kokoruda, Forum Non Conveniens—*The Defendant’s Toolbox*, AM. B. ASS’N, http://apps.americanbar.org/intlaw/fall09/materials/Mullins_Ed_251_EM10301029251_CLEMaterials_sysID_1734_707_0.pdf [<http://perma.cc/N53P-EP9Y>] (last visited Apr. 24, 2016).

¹⁶⁵ See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249, 254 (1981).

¹⁶⁶ *Id.* at 241 n.6 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

¹⁶⁷ See *id.*

¹⁶⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 (2014).

the exemption to the plaintiff corporations because all were “owned and controlled by members of a single family.”¹⁶⁹ Finally, the Court seemingly wished to include S corporations in its definition of closely held, as Hobby Lobby is an S corporation.¹⁷⁰

Taking the Court’s reasoning into consideration, closely held corporations entitled to the RFRA exemption should be defined as corporations at least 50% owned by a single shareholder, with no more than 100 total shareholders. This definition serves all of the Court’s explicit and implicit considerations and concerns and would not disturb *Hobby Lobby’s* ultimate outcome. First, a strict adoption of the IRS definition would potentially undercut the Court’s desire to extend the exemption to corporations owned and controlled by single families. The IRS definition merely requires that 50% of the corporation be owned by five or fewer shareholders.¹⁷¹ (It is important to note that members of the same family may elect to be counted collectively as a single shareholder.¹⁷²) By requiring that 50% of the company be owned by one shareholder (i.e., one family), the more believable and bona fide the corporation’s religion becomes. Also, this would potentially limit the number of massive closely held corporate giants that fit the definition, as several of those companies are 50% owned by more than one shareholder. Finally, S corporations would still be eligible for the exemption, as long as 50% of the company is owned by a single shareholder.

Proceeding under this definition, Courts should confer tag jurisdiction over closely held corporations. American courts have always operated under a conceptualization of the corporation exactly as it exists in textbooks—an invisible, separate personality from its directors and shareholders. This conceptualization of corporations made sense for a long time.¹⁷³ Even as corporations were given several of the same rights enjoyed by natural persons under the Bill of Rights over the course of the nineteenth and twentieth centuries, none of those decisions mirrored the degree to which the *Hobby Lobby* decision redefined the corporate person. *Hobby Lobby’s* bifurcation of the corporate person leaves open the question of what other rights closely held corporations may claim in the future. Whether the decision was good or bad, now that the Supreme Court has created a new corporate person in the closely held corporation, the Court has the opportunity to

¹⁶⁹ *Id.*

¹⁷⁰ Desilver, *supra* note 134.

¹⁷¹ *Entities*, *supra* note 131.

¹⁷² NIXON PEABODY LLP, SUBCHAPTER S—MAJOR OBSTACLES REMOVED 1 (2004), http://www.nixonpeabody.com/files/RFIA_10182004.pdf [<http://perma.cc/9PF9-8SS7>].

¹⁷³ *See supra* Part I.

craft legal doctrine that aligns closely held corporate rights and responsibilities in a more sensible fashion than the Court ever has with the “classic” corporate person.

CONCLUSION

In rendering its decision in *Burwell v. Hobby Lobby Stores, Inc.*, deeming closely held corporations “persons” under RFRA, the Supreme Court broke from its “one-size-fits-all” approach to corporate personhood jurisprudence for the first time in the Court’s history. The result is a doctrine steeped in uncertainty. The Court should use this decision as a starting point to embark on a crusade of aligning corporate rights and corporate responsibilities.

Courts should begin this new era of corporate jurisprudence by conferring tag jurisdiction over closely held corporations when an owner or director of the corporation is personally served in a given forum. To do so would be sensible from a practical standpoint, as the anatomical composition of the closely held corporation is fundamentally different from the “classic” corporation, as conceptualized by the Court in its over 150 years of corporate-person jurisprudence. Instead, the religious closely held corporation, as contemplated by the Court in *Hobby Lobby*, more closely resembles other business entities already subject to tag jurisdiction, such as partnerships.

The “new” corporate person (i.e., the post-*Hobby Lobby* closely held corporation) is as close to a natural person than any corporation has ever been. It can exercise religious, political, and seemingly several unrecognized rights. But since corporations are not sentient beings, the closely held corporation would never be able to choose a religious or political guiding principle on its own. Indeed, it is the owners and directors of closely held corporations, often the same people from one family, who impart their own religious or political ideologies onto the corporation. This commingling of traditional corporate functionality and personal religious beliefs deconstructs the wall that previously existed between the fictional corporate personality and the personality of its directors and shareholders. The result is a merger between the personalities of the owners of closely held corporations and the corporations themselves. Now, wherever an owner or director of a closely held corporation walks, so walks the corporation.

In this respect, courts should view closely held corporations as being more anatomically analogous to partnerships than classic corporations. The owners of closely held corporations, like partnerships, are few in number and can custom tailor the entity to their personal beliefs and goals. Also, many of the

corporations included in the Supreme Court's vague definition of closely held (including Hobby Lobby) are treated almost identically to partnerships, as opposed to classic corporations, for tax purposes. One key distinction, though, is that partnerships, but not corporations, can be subject to tag jurisdiction. This distinction no longer makes sense, as the previous justification for the rule—that corporations and their owners are separate and distinct from one another—has been eroded as corporations have been allowed to incrementally become more person-like over time. As corporate personalities merge ever more intimately with the personalities of their owners, the need to align the legal responsibilities of corporations with those of their owners becomes more urgent. To that end, courts should confer tag jurisdiction over closely held corporations when one of their owners or directors is personally served in a given forum. While this would by no means serve as a cure-all for the gulf between corporate rights and responsibilities, it would mark an important first-step towards eliminating many of the inequitable anomalies that plague American corporate personhood.

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