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Posted by Alan Meese

The Religious Freedom Restoration Act applies only to "persons." Invoking this limitation, the Obama Administration claims that for-profit corporations such as Hobby Lobby are not RFRA persons, thus negating Hobby Lobby's challenge to the Administration's contraception mandate. In particular, the Administration claims that treating corporations as RFRA persons capable of exercising religion contravenes "fundamental tenets" of American corporate law.

In a [brief](#) amicus curiae, 44 professors of corporate and criminal law have elaborated on this argument. These scholars contend that treating corporations as RFRA persons that exercise their shareholders' religion violates basic principles of corporate law and would undermine that law's goals. The scholars' brief emphasizes that corporations are separate legal entities protected from intrusion by shareholders, who enjoy limited liability behind the corporate veil. These essential attributes of corporateness, these scholars say, categorically preclude shareholders' religion from "passing through" a boundary between shareholders and the firm and thus prevent shareholders from "impos[ing] their personal religious beliefs" on the firm. Allowing such imposition, the scholars say, would encourage intra-corporate struggles over religious identity, struggles that would sometimes result in litigation and discourage investment.

In a [recent essay](#), Nate Oman and I argue that the Obama Administration and the scholars who support it are mistaken on this point and that for-profit corporations are in fact RFRA persons. Corporations often adopt policies that reflect shareholders' religious beliefs. Examples include Jewish-owned restaurants or groceries that keep Kosher and remain closed on the Jewish sabbath, Christian-owned establishments that decline to sell alcohol and/or close on Sunday, and Muslim-owned firms that refuse to enter contracts that require the payment of interest. These practices do not offend corporate law, and the scholars cite no case to the contrary.

None of this is a surprise. Americans are the most religious people in the developed world. Moreover, the now-prevalent theory teaches that firms are nexuses of contracts among suppliers of various inputs. Modern corporate law reflects this contractual vision, allowing investors to alter default rules so as to facilitate the exercise of religion under the aegis of the corporate form. While the "standard" corporation entails separation of ownership from control of the sort found in large, publicly traded firms, the vast majority of corporations are closely held entities like Hobby Lobby, firms that courts and scholars have dubbed "chartered partnerships," "incorporated partnerships," or "corporations de jure and partnerships de facto."

Several facets of modern corporate law empower shareholders to impose their religious beliefs on such corporations. Shareholders can adopt provisions in the corporate charter or the firm's bylaws that limit what products firms may sell, days firms will operate, and how firms treat employees, customers, or the wider community. None of these provisions would contravene corporate law, which allows firms to pursue "any lawful businesses or purposes." Shareholders can also enter shareholder agreements that govern operation of the firm or require unanimous consent before the firm takes certain actions. Indeed, shareholders can eliminate the Board of Directors altogether and operate the firm as a de facto partnership. Delaware law, for instance, expressly provides that shareholders may "treat the corporation as if it were a partnership or [] arrange relations among the stockholders or between the stockholders and the corporation in a manner that would be appropriate only among partners." Shareholders may properly rely upon these devices (and perhaps others) to induce corporations to pursue religious objectives, even to the detriment of profits.

To be sure, shareholders of such "chartered partnerships" would retain limited liability (unless waived in the corporate charter) as well as entity status. But non-profit corporations, including churches, synagogues and mosques, and their members possess these very same attributes without forfeiting

their ability to exercise religion. States confer limited liability on shareholders of for-profit corporations to encourage investment, risk taking and the like. Moreover, entity status reduces transaction costs that would result from individual shareholder transacting. Nothing about the rationales for these institutional devices justifies limiting the ability of shareholders to induce firms to pursue religious objectives.

Perhaps, however, pursuit of religion by for-profit corporations is inconsistent with the goals of corporate law, thereby suggesting that Congress did not extend RFRA to such entities. For example, the law professors' brief suggests that allowing RFRA exemptions will lead to costly derivative suits over whether a corporation ought to adopt a particular religion and that firms will manufacture spurious religious claims to avoid onerous regulations.

We doubt it. Under current law a for-profit corporation may pursue a religious mission. It's unclear why the predicted corporate-governance litigation over religion hasn't already happened. It's telling that the critics have been unable to cite a single derivative action or corporate governance dispute related to religion. In theory, it is possible that firms might manufacture insincere religious claims. This, however, has nothing to do with the corporate form. Natural persons also have incentives to manufacture religious claims. In applying RFRA, courts properly inquire into the sincerity of religious beliefs, booting spurious claims.

Finally, one might object that it simply makes no sense to give free-exercise rights (even statutory ones) to corporations. After all, a corporation has no soul, and religion is something that only natural persons can practice. We disagree. First, churches and other religious entities are corporations and no one has ever claimed that this fact disables them from practicing religion or meriting protection. Furthermore, these claims are not confined to uniquely "religious" corporations. Many churches, for example, are organized as LLCs. As a legal matter, they have the same form as Chrysler. The validity of RFRA claims should not turn on a claimant's corporate status or lack thereof.

Perhaps the real problem is the for-profit character of firms like Hobby Lobby. Natural persons, however, also pursue profits. It would be very odd to say that a sole proprietorship or a partnership may claim the protections of RFRA but a corporation or an LLC may not. At a deeper level, it would be perverse to suggest that once a person is engaged in profit making activity they have given up their right to practice their religion. Such a principle would gut the idea of religious freedom.

Implicit in these arguments against RFRA personhood for corporations are two problematic assumptions. The first is that religion is fundamentally an individual and private affair, rather than a collective and public affair. This is a good description of a seventeenth-century Calvinist examining his or her soul for the signs of irresistible grace. This account does not work very well for many other approaches to religion. Jewish law, for example, denies that there is a distinction between the "private" and "religious" activity of the home and the "public" and "secular" activity of the marketplace. God's demand that Israel live according to his law applies equally in both realms. Likewise, Catholic theology has a rich tradition of understanding corporate religious experience within a host of subsidiary organizations, including for-profit firms.

None of this means that the RFRA claims of for-profit corporation should always succeed. Courts should scrutinize all RFRA claims for sincerity, substantial burden, and whether any substantial burden is narrowly tailored to further a compelling interest. There is, however, no good reason for categorically excluding for-profit corporations from RFRA's protection for religious freedom.

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