The Volokh Conspiracy

Mostly law professors, blogging about whatever we want since 2002

'Hobby Lobby, corporate law, and the theory of the firm'

BY EUGENE VOLOKH May 20 at 4:43 pm

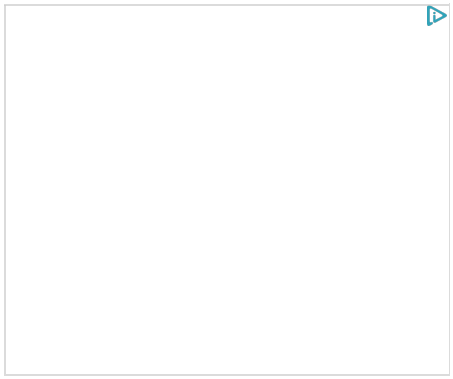
(Photo by Justin Sullivan/Getty Images)

An interesting new article in the Harvard Law Review Forum, by Profs. Alan Meese and Nate Oman; here's an excerpt:

> The Obama Administration contends that ... Hobby Lobby is not a RFRA person.... One set of amici — forty-four corporate and criminal law scholars — elaborated on this ... argument. These scholars contend that treating corporations as RFRA persons that exercise their shareholders' religion contradicts basic principles of corporate law and would undermine that law's goals. In particular, they claim that corporations are distinct legal entities, protected from intrusion by shareholders who enjoy limited liability behind the corporate veil. These essential attributes of corporateness, they say, preclude shareholders from exercising their religion under the aegis of the corporate form.
>
> This essay argues that these scholars are mistaken ...We make three basic claims. First, corporate law does not discourage for-profit corporations from advancing religion. Second, such businesses do not undermine the goals of corporate law, nor

> would it undermine such goals to grant these firms religious exemptions from otherwise neutral laws in appropriate cases. Third, given the plausible reasons for protecting religious exercise by for-profit corporations, there is no reason to reject the most natural reading of RFRA's text, namely that "person" includes private corporations of all kinds. This does not mean, of course, that every RFRA claim by a for-profit corporation should be successful.... RFRA, however, does not assign the task of weeding out such undesirable religious exemptions to the definition of "person." ....
>
> For-profit corporations embodying shareholders' religions are common, passing without corporate law objections.... A kosher supermarket owned by Orthodox Jews challenged Massachusetts' Sunday closing laws in 1960. For seventy years, the Ukrops Supermarket chain in Virginia closed on Sundays, declined to sell alcohol, and encouraged employees to worship weekly. A small grocery store in Minneapolis with a Muslim owner prepares halal meat and avoids taking out loans that require payment of interest prohibited by Islamic law... In each case (and presumably many others), shareholders have imposed their religious beliefs on the corporation. Tellingly, the scholars' brief does not cite a single case challenging such actions on corporate law grounds.
>
> The examples above are inconsistent with the claim that an impermeable barrier prevents shareholders from mixing commercial and religious objectives. The largely contractual nature of corporate law explains the existence of such businesses. Investors may alter default rules in various ways that contradict the essentialist version of the for-profit corporation invoked by the scholars' brief.... Hobby Lobby's five shareholders manage the corporation "in a manner consistent with Biblical principles" they unanimously share. Courts and commentators have often characterized such a closely held corporation as a "chartered partnership," "incorporated partnership," or "a corporation de jure and a partnership de facto." [Moreover,] corporate law now provides methods for contracting around the potential separation of ownership from control that characterizes large publicly held corporations. Far from excluding shareholders from control of an artificial entity, these tools grant shareholders the same prerogatives as owners of noncorporate enterprises like partnerships....
>
> Indeed, Delaware expressly empowers shareholders to employ these devices to "treat the corporation as if it were a partnership.... To be sure, shareholders of such "incorporated partnerships" would still retain limited liability... and the firms themselves would continue to enjoy entity status...However, any claim that these attributes preclude use of the corporate form to further shareholders' religion does not withstand analysis... Many synagogues, churches, and mosques are also incorporated. Like for-profit corporations, they are "artificial legal entities." Many also have members who, like shareholders, enjoy limited liability... [E]ven the Obama Administration admits that non-profit "religious corporation[s]" could be RFRA persons. ...
>
> Nothing in the rationale for limited liability, furthermore, provides a reason for limiting the ability of a firm's owner to use the corporation as a vehicle for religious activity. ... Metaphors aside, whether a particular shareholder's personal assets (if any) are available to satisfy the firm's creditors seems normatively irrelevant to shareholders' ability to infuse corporations with their religious values.... [L]imited liability is economically indistinguishable from other institutions that limit a

liability [and should not] deprive shareholders and corporations of rights under RFRA.



What about the corporation's status as an artificial entity? As others have explained, entity status is simply a legal fiction that facilitates transacting and the assertion of legal rights by an enterprise that aggregates the capital of multiple investors. Thus, entity status mimics any number of institutional mechanisms that reduce transaction costs and thus facilitate commercial activity. … [T]he state's creation of a useful institutional device does not forestall individuals from employing that device to exercise religion….

[T]he scholars' [amicus] brief raises the specter of corporations manufacturing fictitious religious identities to obtain regulatory exemptions. They write, "Companies suffering a competitive disadvantage will simply claim a 'Road to Damascus' conversion. A company will adopt a board resolution asserting a religious belief inconsistent with whatever regulation they find obnoxious …."

This concern has nothing to do with the corporate form. Natural persons can also make insincere religious claims. Sole proprietorships and partnerships may also desire regulatory exemptions. … The courts have consistently held that they lack the competence to evaluate the truth of theological claims or the accuracy of a particular litigant's interpretation of their faith. This task is entirely separate, however, from the question of whether a litigant's asserted religious beliefs are sincerely held. Courts applying RFRA have not infrequently evaluated such sincerity….

When thinking about religious freedom it is easy to slip into the assumption that only individual rights matter. Religious freedom, however, need not end with such rights. There are numerous instances in our law where protecting religious freedom involves limiting government control over corporate entities [such as churches]….

Consider the analogy of freedom of speech. The New York Times is a for-profit corporation that enjoys legal protections under the Free Speech Clause of the First Amendment, even when publishing paid advertisements. …The New York Times is not valuable because its pages involve the individual exercise of expressive rights. Rather, it is valuable because it contributes to public discussion. On this view, public discussion is not a byproduct of individual rights. Rather, individual rights are one among several mechanisms — including free speech rights for corporations — by which we foster public discussion.

Likewise, we can think of religious freedom as limiting government control over

> religious activity rather than as protecting only individual rights. On this view, what is important about religious activities by corporations is that they are religious. ... In a pluralistic society, people and communities need space in which to test differing modes of religious experience — including the religious experience of agnosticism and atheism. ...
>
> [Finally,] [o]ne might accept the importance of protecting religious activity but deny that for-profit corporations should receive such protections. We disagree. Many for-profit corporations are infused with religious values and religious missions. Some for-profit corporations are solely owned by churches. The owners of these corporations can feel called on to infuse their business activities with religious values. In other cases, businesses exist to fulfill explicit religious missions. Religious publishing houses devoted to propagating religious messages provide a good example. Finally, many believers deny that religion is sharply limited to the non-commercial realm. Islam, for example, prohibits "riba," the taking of interest, and a multi-billion dollar industry exists to provide Muslim investors with sharia-compliant investment instruments. ... Religion speaks to the totality of what constitutes a good and faithful life. In a liberal polity, we rightly wish the government to refrain from making spiritually ambitious claims, thus maintaining a space where others can work out such concerns without the heavy hand of the state....

Eugene Volokh teaches free speech law, religious freedom law, church-state relations law, a First Amendment Amicus Brief Clinic, and tort law, at UCLA School of Law, where he has also often taught copyright law, criminal law, and a seminar on firearms regulation policy. Before coming to UCLA, he clerked for Justice Sandra Day O'Connor on the U.S. Supreme Court and for Judge Alex Kozinski on the U.S. Court of Appeals for the Ninth Circuit. Volokh is the author of the textbooks The First Amendment and Related Statutes (4th ed. 2011), The Religion Clauses and Related Statutes (2005), and Academic Legal Writing (4th ed. 2010), as well as over 70 law review articles. Volokh is also an Academic Affiliate for the Mayer Brown LLP law firm.

44 Comments

Discussion Policy

Conversation Live

Newest First

All Comments

Joe-dallas
9:13 AM EDT (http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/20/hobby-lobby-corporate-law...

The dictionary act defines person for purposes of the federal statutes as individuals, corps, etc. unless the context indicates otherwise. Granted it is reasonably plausible that the context in RFRA would indicate otherwise and an argument can certainly be made that the RFRA statute should only apply to individuals.

However, given the fact the the statutory definition of "person" includes corporations is common knowledge among members of congress and common knowledge among congressional staff especially those individuals that write the statutes, it becomes hard to fathom that not a single senator or representative out of 535 objected to the term person and not a single congressional staff person objected to using the term person in the RFRA statute. (or am i giving too much credit to the intelligence to the average congressman)

The case should only be whether one statute overrides a provision of another statute. ie does RFRA provide an exemption from another statute (ACA). The court does not need to reach the !A issue.