

DO FOR-PROFIT CORPORATIONS HAVE RIGHTS OF RELIGIOUS CONSCIENCE?

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INTRODUCTION.....	70
I. WHY FOR-PROFIT CORPORATIONS HAVE SOME CONSTITUTIONAL RIGHTS BUT NOT OTHERS.....	71
II. <i>CORPORATION OF PRESIDING BISHOP V. AMOS</i>	74
III. BUSINESS MODELS.....	76
IV. REVERSE VEIL-PIERCING.....	82
CONCLUSION.....	85

INTRODUCTION

Challenges by for-profit corporations to the Affordable Care Act’s requirement¹ that employers provide their employees with medical insurance packages that include coverage for contraceptives have raised questions under the Religious Freedom Restoration Act (RFRA)² and the Constitution. This Essay discusses a threshold question in the constitutional challenges: Do for-profit corporations have rights of religious conscience protected by the Free Exercise Clause?³ I do not offer a definitive answer but instead mostly enumerate considerations that counsel hesitation before concluding that they do. I originally thought that I could address the question posed in the title without dealing with the RFRA,⁴ but—as will appear

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¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

² Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2006))

³ U.S. CONST. amend. I. I do not address in this Essay the formerly much-mooted question of whether corporations “are” persons in some ontological sense, whether because aggregating individuals into the corporate form somehow transforms the latter into a “person” or because they are “real” in some other sense. I am too much of a legal realist to think that these questions hold any interest after John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926). I observe, though, that some of the emerging literature on the contraceptive mandate appears to be reviving interest in that question.

⁴ The Essay does deal, albeit indirectly, with one aspect of the question of whether for-profit corporations are “persons” covered by RFRA. The first response to the question of coverage under RFRA is to look to the Dictionary Act, 1 U.S.C. § 1 (2012) (“In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words ‘person’ and ‘whoever’ include corporations . . . as well as individuals.”). The “context” of RFRA is “rights of religious conscience,” and if for-profit corporations do not

below—perhaps the answer lies in the statutory accommodations legislatures choose to enact, which might, but only might, include RFRA.

I

WHY FOR-PROFIT CORPORATIONS HAVE SOME CONSTITUTIONAL RIGHTS BUT NOT OTHERS

Under established doctrine, for-profit corporations have some constitutional rights but not others.⁵ Most obviously, in a post-*Citizens United* world, we know that corporations have rights of free expression (even if they are not “media” corporations organized for purposes of disseminating information).⁶ Older cases held that corporations can claim the protection of the Double Jeopardy Clause.⁷ And, probably most important for present purposes, corporations cannot claim the privilege against self-incrimination.⁸

In general, text alone cannot tell us which constitutional rights corporations have. Consider the Eighth Amendment. It is easy enough to see how “excessive fines” might be imposed on corporations, but what about “cruel and unusual punishments”?⁹ We might refer to some sanction imposed on a corporation as the “death penalty,”¹⁰ but the usage there is clearly metaphorical. Or consider the Second Amendment, which guarantees to “the people” the right “to keep and bear Arms.”¹¹ *District of Columbia v. Heller* informs us that

have such rights under the Constitution, perhaps the context does indeed indicate otherwise. *But see infra* Conclusion (suggesting that the constitutional question reduces to the statutory one, implying that there is no constitutional “context” that might affect the interpretation of the word “person” in RFRA).

⁵ In what follows, I will typically use the term “corporations” to refer only to for-profit corporations unless I think it important to emphasize a specific point about for-profit corporations as against not-for-profit ones.

⁶ See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 342 (2010); Religious Freedom Restoration Act, 107 Stat. 1488.

⁷ See U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .”). For a review of these cases, see *United States v. Hospital Monteflores, Inc.*, 575 F.2d 332, 333–34 (1st Cir. 1978).

⁸ See, e.g., *Curcio v. United States*, 354 U.S. 118, 122 (1957) (“It is settled that a corporation is not protected by the constitutional privilege against self-incrimination.”).

⁹ U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

¹⁰ See Paul Mahoney, *The Public Utility Pyramids* 12–13 (Aug. 2011) (unpublished manuscript) (on file with author), available at <http://web.law.columbia.edu/sites/default/files/microsites/contract-economic-organization/files/Mahoney%20paper.pdf> (referring to section 11 of the Public Utility Holding Company Act of 1935 as a “death sentence” because it outlawed pyramid structures).

¹¹ U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”); see, e.g., Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887 (2011) (exploring the issue of Second

each word in that phrase has a separate meaning.¹² We can understand easily enough how a corporation can “keep” arms, but how it could “bear” a weapon is more puzzling. Further, “the people” to whom the Amendment refers appears to be the nation’s political community—roughly, those potentially entitled to vote according to standard accounts of political organization—but corporations are not members of the community in that sense. Yet, the Fourth Amendment also refers to “the people,”¹³ and established doctrine holds that corporations do have rights under the Fourth Amendment.¹⁴

Sorting the Amendments into the boxes “available to corporations” and “not available to corporations” appears to require some consideration of each Amendment’s purposes.¹⁵ Of course, identifying those purposes is itself complex. According to *Heller*, the Second Amendment’s core purpose is personal self-defense.¹⁶ Obviously, weapons can be used to protect a corporation’s *property*, but it is not obvious that they can be used to protect the corporation itself. Still, the Second Amendment has another purpose—creating an armed citizenry able to resist overreaching by a potentially tyrannical government.¹⁷ That purpose might be served by according corporations Second Amendment rights.¹⁸ The Free Speech Clause similarly has numerous purposes, though they probably operate in tandem to explain why corporations have free speech rights. The Clause ensures that a wide range of information and ideas can be made available to the public,¹⁹ and whether the information and

Amendment rights and the corporate form).

¹² See 554 U.S. 570, 576–98 (2008).

¹³ U.S. CONST. amend. IV (“The right of the people to be secure . . . shall not be violated . . .”).

¹⁴ See, e.g., Miller, *supra* note 11, at 910 & n.142 (asserting that corporations have rights against unreasonable searches and citing *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 325 (1978), which found that corporations are protected against warrantless inspections by workplace safety regulators).

¹⁵ Cf. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (“Whether or not a particular guarantee is ‘purely personal’ or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.”) I elide consideration of each Amendment’s history on the ground that, as far as I know, the history of affording corporations constitutional protections in ways not captured by existing doctrine is at least thin.

¹⁶ See *Heller*, 554 U.S. at 635.

¹⁷ See *id.* at 597–98.

¹⁸ Doing so, for example, might give them a constitutional right to purchase weapons for their employees.

¹⁹ Caroline Mala Corbin, *Corporate Religious Liberty* (Aug. 2013) (unpublished manuscript) (on file with author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327919, emphasizes the listener-oriented purpose of corporate free speech rights. Whether the listener-oriented purpose is the exclusive one with respect to corporate speech raises interesting questions about the best reading of the Court’s decisions, but those questions need not be addressed here

ideas come from a physically embodied person or a corporation is irrelevant to that purpose.²⁰ The Clause also protects an aspect of individual autonomy, as when embodied individuals decide that the most effective way of disseminating their ideas is through the use of the corporate form.

Considering the settled law, the interesting case is the Fifth Amendment. We should consider two prongs of the Fifth Amendment. First, the Amendment bans the use of products of physical torture against a defendant.²¹ Here, the concern is almost certainly with preserving bodily integrity against severe government intrusions. Because corporations do not have bodies, they cannot avail themselves of the Fifth Amendment, at least with respect to this prong. But the Fifth Amendment provides broader protection. A person has a privilege to refuse to answer potentially self-incriminating questions when they are put to him or her in a formal judicial proceeding with no threat of physical torture at hand.²² The standard argument for affording this protection is that, here, it bars the government from unfairly forcing defendants to choose among the “cruel trilemma” of self-incrimination, perjury, or contempt of court.²³ Exactly what is cruel about that choice is not entirely clear.²⁴ It probably has something to do with the undesirability of allowing the state to intervene in a person’s mental operations—of allowing the state to place severe pressure upon a person in ways that make that person’s mind the instrument of the person’s incarceration. Perhaps the thought with respect to corporations is that they do not have “minds” of the sort implicated in this account of the cruel trilemma.

Consider here a common observation about imposing criminal liability on corporations. According to Professor John Coffee, an English Lord Chancellor puzzled about how to punish a corporation

because the purposes of the speech provisions and the Free Exercise Clause of the First Amendment might be different. I note that I am inclined to think that corporate free speech rights are sometimes derived from the autonomy and other rights of the corporation’s shareholders.

²⁰ For present purposes, I need not consider whether the source of the ideas and information—whether physical person or corporation—might affect the determination of whether some specific regulation is constitutionally permissible.

²¹ See *Brown v. Mississippi*, 297 U.S. 278 (1936).

²² See U.S. CONST. amend. V (“No person shall be . . . compelled in any criminal case to be a witness against himself . . .”).

²³ *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964). The word “cruel” here indicates why this argument resonates somewhat with what one would probably say about the availability to corporations of the protection against cruel and unusual punishments.

²⁴ It almost certainly is not that the threat of being held in contempt of court carries with it the potential for physical coercion in the form of incarceration because incarceration is not in itself cruel. Cf. U.S. CONST. amend. V (permitting incarceration provided that those deprived of life or liberty have received due process of law).

convicted of a criminal offense: “Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?”²⁵ Corporations cannot claim the protection of the Fifth Amendment in this view because they do not have consciences that can be coerced. Perhaps the same might be said of rights of religious conscience.

II

CORPORATION OF PRESIDING BISHOP V. AMOS

*Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*²⁶ involved the following facts: Mayson worked as a building engineer—roughly speaking, a maintenance worker—at a not-for-profit gymnasium, open to the public, which was owned and run by the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints. The corporation set rules for the gym’s employees. According to those rules, employees had to have certificates showing they were members of the Church and complied with Church rules. Mayson was fired because the Church refused to give him such a certificate, a refusal based on its conclusion that he had violated some of the Church’s requirements. He sued the corporation for discriminating against him on the basis of religion in violation of Title VII of the 1964 Civil Rights Act. Title VII contains an exemption for “religious corporation[s],” allowing them to discriminate on the basis of religion “with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of [their] activities.” Mayson argued that operating the gym was not an “activity” of the church within the exemption and that, were the exemption to be construed to cover the work he had been doing, it would violate the First Amendment’s Nonestablishment Clause.

The Supreme Court unanimously rejected Mayson’s arguments.²⁷ For present purposes, the views expressed by four Justices are of most interest. Writing for himself and Justice Thurgood Marshall, Justice William Brennan said that it was decisive for him that the case involved “the activities of a *nonprofit* organization,” because “the particular character of nonprofit activity makes inappropriate a case-by-case determination whether its nature is religious or secular.”²⁸ Title VII’s exemption “burden[ed] the religious liberty of prospective and current employees,” and so was

²⁵ 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).

²⁶ 483 U.S. 327 (1987).

²⁷ *Id.* at 339–40.

²⁸ *Id.* at 340 (Brennan, J., concurring in the judgment) (emphasis in original).

“in serious tension with our commitment to individual freedom of conscience in matters of religious belief.”²⁹ But “religious organizations have an interest in autonomy in ordering their internal affairs,” and “[d]etermining that certain activities are in furtherance of an organization’s religious mission . . . is . . . a means by which a religious community defines itself.”³⁰ That “rationale suggests that . . . religious organizations should be able to discriminate on the basis of religion *only* with respect to religious activities”³¹ But, Justice Brennan concluded, determining which activities were religious on a case-by-case basis would result in “ongoing government entanglement in religious affairs,”³² and should be avoided if possible. That could be done by adopting a categorical rule allowing the exemption to be claimed for the corporation’s “*nonprofit* activities.”

The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation. In contrast to a for-profit corporation, a nonprofit organization must utilize its earnings to finance the continued provision of the goods or services it furnishes and may not distribute any surplus to the owners. This makes plausible a church’s contention that an entity is not operated simply in order to generate revenues for the church but that the activities themselves are infused with a religious purpose. Furthermore, unlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply to engage in commerce. Churches often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster.³³

In *Amos*, four Justices thought that a legislative decision to allow an exemption for for-profit activities of religious associations—churches—seemed to approach the limit of constitutionality under the Nonestablishment Clause.³⁴ If it would violate the Nonestablishment Clause for Congress to grant an exemption from Title VII to for-profit activities of *churches*, it seems quite unlikely that

²⁹ *Id.* at 340–41.

³⁰ *Id.* at 341–42.

³¹ *Id.* at 343 (emphasis in original).

³² *Id.* at 345.

³³ *Id.* at 344 (internal citations omitted). Justices Sandra Day O’Connor and Harry Blackmun agreed in substance with Justice Brennan’s analysis, with Justice O’Connor noting that the Court’s decision left “open” the question of the exemption’s constitutionality “as applied to for-profit activities of religious organizations.” *Id.* at 349 (O’Connor, J., concurring in the judgment).

³⁴ See *id.* at 343 (Brennan & Marshall, JJ., concurring in the judgment); *id.* at 346 (Blackmun, J., concurring in the judgment); *id.* at 349 (O’Connor, J., concurring in the judgment).

the Free Exercise Clause *requires* that exemptions be granted to for-profit nonreligious corporations.³⁵

That *Amos* involves a religious association organized as a corporation points to another consideration. Sometimes it is said that corporations must have constitutionally protected rights of religious conscience because, if they did not, churches organized as corporations would not have such rights. This would be an absurd result. In *Amos*, Justice Brennan cited the “church autonomy” cases and Professor Douglas Laycock’s classic article on “the right to church autonomy” as part of his argument distinguishing the not-for-profit and the for-profit activities of religious associations.³⁶ That points to the response to the concern that denying corporations rights of religious conscience would adversely affect churches. Churches, including those organized as corporations, have such rights *as churches*, not (necessarily) as corporations, a conclusion confirmed by *Hosanna-Tabor*.³⁷ The scope of the right of church autonomy recognized in *Hosanna-Tabor* is almost certainly different from, and probably less extensive than, the scope of the right of religious conscience available to everyone (including churches not organized as corporations) under the Free Exercise Clause. But, for present purposes, it is enough to observe that saying that corporations do not have rights of religious conscience does not imply that churches organized as corporations lack such rights.

III

BUSINESS MODELS

Suppose two friends are thinking about going into business—operating a gymnasium, selling meat products as a butcher, or running a bakery. They have a target income and return on investment that, for them, gives them enough of what they want. And what they want includes financial returns (“income”) that they will spend on other things they want and the psychological satisfaction

³⁵ Of course, *Amos* does not *hold* anything about the constitutionality of affording exemptions for the for-profit activities of religious associations, and even the four concurring Justices did not unequivocally commit themselves to the view that the exemption would not be available for some for-profit activities of religious associations (and, if available, would not violate the Nonestablishment Clause). *See* *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1131 (10th Cir. 2013) (“[B]oth concurrences were careful not to categorically exclude [for-profit] activity from Title VII’s exemption.”). Still, Justice Brennan’s arguments, qua arguments rather than binding precedent, identify an important dimension of the problem.

³⁶ 483 U.S. at 341–42 (citing Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981)).

³⁷ *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694, 704–05 (2012) (discussing the ministerial exception in terms of the rights of “a religious group” to control appointments without reference to the legal nature of that group).

(“psychic income”) that comes from running the business as they choose. They also know that the business will operate in a general regulatory environment: they know that ordinary contract law will not allow them to stiff their suppliers, for example, and that under ordinary tort law, they might be liable to patrons on whom barbells are dropped or who get ill from consuming contaminated meat or cookies. Further, they know they have other opportunities to gain financial and psychic income: more security and perhaps higher pay working as an insurance agent, for example, but less satisfaction in the work itself. They then decide what to do, and they will open the business if they calculate that the returns to them of doing so exceed the returns on their alternative opportunities.

Now, suppose that some of the returns come from operating the business in a way consistent with their religious beliefs. I call this a “religiously structured” business. Patrons at the gym will be encouraged to supplement their physical workouts with mental relaxation exercises supplied at the gym; the butchers will sell only kosher meat; the bakery’s cakes will come packaged in boxes labeled with Christian messages.

What are the implications of the fact that the businesses will be operating in a market with other gyms, butchers, and bakeries? There are two possibilities worth considering. First, and likely more common, the costs of operating a religiously structured business are higher than the costs of operating one not so structured because, for example, the cost of obtaining meat slaughtered according to the rules of *kashrut* is higher than the cost of obtaining non-kosher meat. Or, alternatively, the sales at a religiously structured business will be lower than those at one not so structured: a business closed on Saturday or Sunday for religious reasons will not gain the patronage of shoppers on those days.³⁸ The prices that the religiously structured business charge will be higher than those at their competitors,³⁹ which means the financial returns from the business will be lower than would be the case were the two friends to operate a non-religiously structured business of the same sort.⁴⁰ But the fact that the

³⁸ In addition, some consumers might avoid shopping at a religiously structured business precisely because of its religious commitments.

³⁹ In the case of the lost business opportunities from a Saturday or Sunday closing, the reason is that the religiously structured business will have to pay its suppliers the market rate, which will be determined by demand from all businesses, including those open seven days a week: the religiously structured businesses will have to pay the market rate based on what they get from customers on only six days a week whereas their competitors will be able to pay based on seven days of patronage.

⁴⁰ If the financial returns from operating a religiously structured business were higher than those from operating a non-religiously structured business, all the businesses in the sector—all the butchers and bakeries—would be religiously structured, in the sense that all would sell only kosher meat or package their goods with Christian-oriented

friends go into the business implies that the psychic returns they get from operating a religiously structured business offset the reduction in financial returns.⁴¹

The second possibility is that the friends have identified a market niche for their specialized product. There are enough consumers willing to pay higher prices for kosher meat or cookies in packages with Christian themes to make the financial returns in the religiously structured business roughly the same as the financial returns in other businesses. We would expect some “ordinary”—that is, nonreligious—entrepreneurs to occupy this market niche as well because they are interested only in financial returns and are indifferent about the business model that generates those returns.

Recall that all these businesses operate within a general regulatory environment, the costs of compliance with which are part of the friends’ initial decision about whether to go into business.⁴² It is bedrock law under the Free Exercise Clause that individuals are entitled to claim the protection of that Clause for their religiously motivated activities.⁴³ That they can claim such protection, of course, does not mean their claims must be vindicated. As Justice Brennan observed in *Amos*, vindicating the claims imposes costs.⁴⁴ In the classic exemption cases such as *Sherbert v. Verner*⁴⁵ or *Employment Division v. Smith*,⁴⁶ the costs are imposed on a widely distributed group—roughly speaking, taxpayers (in *Smith*, through the enforcement costs associated with suppressing the nonreligious use of psychoactive drugs). Sometimes, though, the costs are concentrated, as in *Amos* itself, on the class of employees of religious associations.

In the commercial context, the exemption’s cost falls on the religiously structured business’s competitors.⁴⁷ In what I have

messages.

⁴¹ This is the standard analysis of investment in socially responsible businesses: investors accept lower rates of financial return because they receive offsetting psychic compensation.

⁴² More precisely, the friends calculate the value of existing exemptions for the type of religiously structured business they plan to operate and the value of any exemptions from future legislation to which they might be entitled. Put that way, the calculation sounds nearly impossible to do, but in principle it is no different from calculations about foreseeable contingencies, such as the development of an innovative product that destroys the market for the friends’ product, that good business planning must take into account.

⁴³ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (“Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.”).

⁴⁴ See 483 U.S. 327, 344 (1987) (Brennan, J., concurring). This is probably the reason that, on the policy level, no one seriously argues that socially responsible businesses should be exempted from general regulatory requirements.

⁴⁵ 374 U.S. 398 (1963).

⁴⁶ 494 U.S. 872 (1990).

⁴⁷ Critics of the view that corporations are entitled to an exemption from the contraceptive mandate have focused primarily on the fact that such an exemption would

described as the more probable case, this may not be troubling. In those cases, an exemption from compliance with a regulatory requirement reduces the cost of operating the business, offsetting some or all of the reduced financial income from operating as a religiously structured business. All that means, though, is that the prices the religiously structured business charges will be, roughly, the same as the prices that their competitors charge. The religiously structured business gets no boost in the market from having the exemption available to it, although the two friends' overall income—financial and psychic—is higher than it would be absent the exemption. The “market niche” case is more bothersome for two reasons. First, of course, in that case the religiously structured business exempted from a regulatory requirement does have a competitive advantage over businesses that compete within that niche for purely commercial reasons.⁴⁸ Second, the existence of that competitive advantage provides an incentive to represent that one has religious objections to compliance with some regulatory requirement. And the law of mandatory exemptions appears to have been structured in a way that makes exemptions less available when they provide such incentives.⁴⁹

impose the cost of purchasing contraception on employees, thereby burdening their (sometimes religious but mostly nonreligious) interests in obtaining contraception. *See, e.g., Corbin, supra* note 19 (manuscript at 46) (noting that “recognizing corporate religious liberty will make religious liberty more available for the elite, and more scarce for everyone else”). They suggest that this is an example of a relatively concentrated burden from exemptions, one criterion the Court has used as a basis for holding that some exemptions are prohibited under the Nonestablishment Clause. *See, e.g., Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985) (“[T]he statute takes no account of the convenience or interests . . . of other employees . . .”).

⁴⁸ For some suggestive but not conclusive evidence that exemptions do cause such competitive advantages, see W. Wesley Hill, *Thou Shalt Opt Out: Reforming the Religious Conscience Exemption from Social Security and the Affordable Care Act Based on State Experience*, 43 U. MEM. L. REV. 659, 682 (2013) (“After being undercut by a rival Amish roofing firm by 38%, one non-Amish contractor voiced his concern regarding the religious sect’s exemptions from both Social Security and workers’ compensation: ‘If they are going to come into our community, they need to conduct their business the same way we do.’”) (footnote omitted). The evidence is only suggestive because the cost advantages might come in part from other sources such as higher productivity among Amish workers. I note that this same difficulty arises in the (assumed to be) more likely case if the cost reduction associated with the exemption is larger than the reduction in the financial returns arising from the adoption of the business model of a religiously structured business. For myself, this possibility provides a reason to be leery of holding that the Free Exercise Clause requires exemptions from general regulatory requirements, at least in the business context. Perhaps, though, this specific difficulty is rare enough that it should not be taken into account in structuring doctrine.

⁴⁹ *See, e.g., Douglas Laycock, Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 347 (1996) (“Claims for exemptions that align with self-interest are problematic because they create incentives to join the exempted faith, and in practice such claims have not been recognized.”). The full-fledged defense of an incentive-based element in the law of exemptions probably requires some argument that it is too difficult to determine the sincerity of claims on a case-by-case basis.

We are now in a position to consider the question of who is entitled to claim exemptions (if they are available as a matter of the law of mandatory exemptions). As noted, individuals—the two friends—can claim such exemptions. The reason appears to be that we regard the psychic benefits (or the reduction in psychic harms) to individuals of mandatory accommodations as worth the costs to others, whether those costs be distributed widely as they are in the core cases of exemptions or be concentrated as they sometimes are. And, apparently, we are not concerned about the possibility of above-average financial returns in the market-niche case or the case where the financial benefits of an exemption exceed the reduction in financial returns associated with the religiously structured business model.⁵⁰

Next, suppose the friends include in their deliberation about whether to go into business some consideration of the legal form their business will take. They know that they will be able to claim exemptions if they operate as a partnership. What about operating as a corporation?⁵¹ Their lawyer will tell them that some financial benefits flow from adopting the corporate form. For present purposes I will confine myself to two. Organizing the business as a corporation means limited liability for the shareholders: the friends' personal assets will not be at risk for liability from tainted meat or cookies. And, probably because of limited liability, the corporate form likely makes it easier for the business to expand beyond one or two local gyms, butcher shops, or bakeries.⁵²

The limited liability associated with the corporate form increases the financial returns available from adopting the business model of the religiously structured business. Operating in the corporate form will therefore exacerbate the problem of concentrated costs by giving an even larger competitive advantage to the religiously structured corporation. The availability of mandatory exemptions from general regulatory requirements means that the prices the religiously structured business charges need not be increased as much—or perhaps even at all—because of the smaller customer base.

In *Amos*, Justice Brennan pointed to a reason for allowing

⁵⁰ That is, we do not worry about the possibility that the two friends will use the financial benefits of the exemption to build McMansions or take wildly expensive vacations.

⁵¹ The analysis that follows, though written using the term “corporation,” is applicable to all business forms that have limited liability, such as limited-liability partnerships.

⁵² I note the possibility that the friends think it important to witness their religious commitments by operating a business in the corporate form rather than as an individual proprietorship or partnership. Though I think the possibility rather slim, it might occur because the witnessing might be “better” or more effective the larger the business is, and the corporate form makes it more likely that the business will become large.

nonprofit corporations to claim exemptions: when such exemptions are available, the law of nonprofit corporations requires that the financial returns I have just described be used not to enhance shareholders' financial well-being but to advance the corporations' not-for-profit objectives.⁵³ The judgment, that is, is that even in the presence of concentrated costs (again, in *Amos*, to employees; in the cases considered here, to competitors), the overall social benefits of exemptions—that is, the promotion of religious associations' religious mission, or nonprofit schools' educational mission—justify the imposition of the concentrated costs.

Finally, what of for-profit corporations? I have sketched the path of the friends' deliberation about going into a business in a specific form. Organized as a religiously structured partnership, the business will probably have smaller financial returns but larger psychic ones than it would were they to adopt some plan other than developing a religiously structured business. But perhaps the financial returns will be roughly the same (and the psychic income again larger) because they will be able to claim some exemptions from regulatory requirements imposed on their competitors. Though that is probably likely to do no more than put them on a level financial playing field with their competitors by allowing them to charge the same prices, under some circumstances the ability to claim exemptions might actually give them a competitive advantage.⁵⁴ But, as noted, society appears to be willing to allow that advantage because of the psychic benefits of making exemptions available.

Adding limited liability through the corporate form increases the financial returns compared to those available from the partnership form while preserving the psychic returns. Exemptions from regulatory requirements increase the financial returns even more and seem more likely to give the religiously structured business a competitive advantage over non-religiously structured businesses.⁵⁵ For nonprofit corporations, the investment of the returns flowing from that competitive advantage in the non-profit's purposes might

⁵³ See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring).

⁵⁴ It is probably worth noting that all these calculations are ex ante and therefore involve some probabilistic consideration of whether an exemption, if claimed, would actually be available under the law of mandatory exemptions.

⁵⁵ With respect to the contraceptive mandate, it is sometimes said that insurance excluding contraception is more expensive than insurance including it because including contraception in the insurance package means that some employees will avoid pregnancy, and the costs associated with the avoided pregnancies exceed the cost of providing access to contraception. Douglas Laycock suggests otherwise on the ground that prior to the adoption of the Affordable Care Act, "many insurers and employers refused to cover contraception voluntarily." Douglas Laycock, *Religious Liberties and the Culture Wars*, 2014 U. ILL. L. REV. (forthcoming 2014) (manuscript at 20), available at <http://ssrn.com/abstract=2304427>.

be sufficient to justify the exemptions when they are available and therefore might be sufficient to justify eligibility for exemptions. With for-profit corporations, the case for eligibility for exemptions seems to require acceptance of the possibility that shareholders will use the returns flowing from the competitive advantage conferred by exemptions for purely personal gain—a nicer house than the one owned by investors in the for-profit gymnasium across the street, a longer vacation than the one taken by the investors in the bakery down the block. To adapt an example from Caroline Mala Corbin, it is not obvious why the Free Exercise Clause should be construed to allow for-profit sellers of HVAC (heating, ventilation, and air conditioning) equipment to gain market share over their competitors.⁵⁶

IV

REVERSE VEIL-PIERCING

Professor Stephen Bainbridge has described the corporate-law doctrine of reverse veil-piercing.⁵⁷ Direct veil-piercing is familiar: corporate acts injure a person, but the corporation has been deliberately set up so that it has few assets while its shareholders are quite well off. Under some circumstances, the injured person can pierce the corporate veil and get recovery from the shareholders' assets. Reverse veil-piercing occurs when the corporation is the beneficiary of something but cannot take advantage of the benefit, whereas the shareholders can. Professor Bainbridge illustrates reverse veil-piercing with a case in which a husband and wife operated a farm, which was incorporated with the wife as the sole shareholder. The couple lived in a house, itself owned by the corporation, on the farm. When a creditor obtained a judgment against the corporation, the wife intervened in her own name, seeking the benefit of the state's homestead exemption (an exemption that the corporation, "needing no dwelling," could not

⁵⁶ Steven D. Smith & Caroline Mala Corbin, Debate, *The Contraception Mandate and Religious Freedom*, 161 U. PA. L. REV. ONLINE 261, 278 (2013), <http://www.pennlawreview.com/online/Steven-D-Smith-Caroline-Mala-Corbin-161-U-Pa-L-Rev-261.pdf> (citing *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012)). Businesses derive the competitive advantage from the cost savings from avoiding the requirement, imposed on competitors, of purchasing (for employees) an insurance package including contraception. In *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114, 1141 (10th Cir. 2013), Judge Tymkovich took the cost of complying with the contraceptive mandate—either \$475 million or \$26 million annually, depending on how the financial cost is measured—as the measure of the burden on the religious conscience of Hobby Lobby or its owners. These figures suggest the competitive advantage Hobby Lobby would gain from the exemption over other stores selling arts and crafts supplies, although they are not identical to the cost of purchasing insurance for employees.

⁵⁷ Stephen M. Bainbridge, *Using Reverse Veil-Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2D 235, 236 (2013).

claim). The court allowed the wife to claim the homestead exemption.⁵⁸

According to Professor Bainbridge, reverse veil-piercing is available when three conditions are met: there exists “a close identity” between the corporation and the shareholders, which basically limits the doctrine to closely held corporations; piercing the veil will injure third parties (presumably, as Professor Bainbridge intimates, to some substantial degree because reverse veil-piercing by definition injures someone—the creditor in the farm case, for example); and there are “strong policy reasons” to pierce the veil to benefit the shareholders.⁵⁹ Neither direct nor reverse veil-piercing occur often because each is in tension with the basic idea of limited liability, whose benefits, one might think, ought to come with some risks as well: shareholders obtain limited liability but at the cost of relinquishing some benefits that might accrue had they chosen to operate as partnerships. Perhaps more notable, the second and third elements of the doctrine Professor Bainbridge describes have the same structure as components of the RFRA test for determining whether a person is entitled to an exemption from federal law.⁶⁰ That is, reverse veil-piercing seems to imply that the question of whether a corporation can *claim* an exemption reduces to the question of whether it can *successfully* claim one.

Whatever we think of the idea of reverse veil-piercing, going behind the corporate form sometimes has some attractions. In particular, I think our intuitions are that publicly held corporations are different from privately held ones, and that privately held corporations with a relatively small number of shareholders are different from those with a large number.

Consider first the publicly held corporation whose board of directors asserts that they—and therefore the corporation—hold some specific religious view. The board speaks for the corporation, of course, and yet we might be uneasy because of the thought that the corporation’s shareholders are simple profit-maximizers who think that the corporation has located a market niche from which the returns on their investment are attractive. And, as I have suggested, the pure market-niche model for a religiously structured corporation is probably the weakest one for corporate claims of religious conscience.

Privately held corporations are a bit different. Some will be

⁵⁸ *Id.* at 243–44 (quoting *Cargill, Inc. v. Hedge*, 375 N.W.2d 477, 478 (Minn. 1985)).

⁵⁹ *Id.* at 244.

⁶⁰ *See* 42 U.S.C. § 2000bb-1(b) (2006) (stating that the government can burden a person’s exercise of religion if the burden is “in furtherance of a compelling governmental interest” and the method used “is the least restrictive means.”).

owned by a small group of friends or family members, and reverse veil-piercing might seem sensible. To use a term from tax law that might be particularly appropriate, the shareholders' views—which are likely to be readily ascertainable beyond looking to resolutions of the board of directors—might seem to pass through to the corporation itself.⁶¹ The smaller the ownership group, the more it has the feel of a partnership—but, of course, without the unlimited liability associated with partnerships and so with the competitive advantage (if the corporation can claim religious exemptions) associated with limited liability.⁶²

At this point, though, questions of administrability arise.⁶³ If courts are to hold that some but not all corporations can claim rights of religious conscience, should they do so according to a rule or an all-things-considered standard? Standards are difficult to administer in a transparently fair way: it is going to be relevant that a corporation is a not-for-profit or a for-profit one, that a for-profit corporation is organized as a Subchapter S corporation or not, that its shares are held by a small number of members of a single family or by a larger number of members of an extended family or by unrelated investors, that it employs a small or a large number of people, that its revenues are small or large, and, given the nature of standards, much more. We could, of course, treat each of these considerations as the foundation of a rule. So, for example, a for-profit corporation organized under Subchapter S might be entitled to claim exemptions while those not so organized could not. Of the candidates for administrable and minimally defensible rules, the distinction between for-profit and not-for-profit corporations leaps out.⁶⁴ As with all rules,

⁶¹ Mere organization as a Subchapter S corporation, where the profits pass through the corporation directly to the shareholders, probably should not be sufficient to give a for-profit corporation an entitlement to claim religious exemptions. But organization in that form might be one indication that allowing the corporation to make such claims has some appeal.

⁶² As of 2006, the corporation that ranked at one hundred on a list of privately held corporations (Charmer Sunbelt Group) had revenues of \$2.9 billion and 6100 employees. *The Largest Private Companies*, FORBES (June 9, 2011, 6:00 PM), http://www.forbes.com/lists/2006/21/biz_06privates_The-Largest-Private-Companies_Rank_4.html.

⁶³ Although not discussing the issue in these terms, Robert K. Vischer, *Do For-Profit Businesses Have Free Exercise Rights?*, J. CONTEMP. LEGAL ISSUES (forthcoming 2013) (manuscript at 25–38) (on file with author), identifies many of the considerations bearing on the question of administrability.

⁶⁴ Indeed, it is probably the only candidate (barely) reconcilable with RFRA's language: it is hard to imagine a court holding that a Subchapter S corporation is a "person" under RFRA but that a corporation organized in other ways for tax purposes is not a "person." This would be so for all the other candidates. The for-profit/not-for-profit distinction does not conform well to the word "person" either, but it is the best of a bad lot. More precisely: the possibility that a broad definition of "person" in RFRA would produce a significant number of exemptions that would violate the Nonestablishment Clause argues for a limiting interpretation that distorts the statute's language to some

the distinction will be overinclusive (all things considered, some for-profit corporations “ought” to be able to claim exemptions) and underinclusive (all things considered, some not-for-profit corporations “ought not” be able to do so).

CONCLUSION

Amos brings out something that recent scholarly discussions of mandatory accommodations have tended to overlook: there is a tension between the nonestablishment principle and mandatory exemptions.⁶⁵ The Court’s doctrine points to the solution. *Amos* was the beginning and *Employment Division v. Smith* a way station, but *Locke v. Davey* provided the articulation. We can resolve the tension by recognizing that the Constitution’s religion clauses allow legislative “play in the joints.”⁶⁶ That is, the legislature should be the primary venue for structuring religious exemptions from general regulations, and legislatures have a fair amount of discretion in choosing between exempting some or all of those who hold some or any religious beliefs from those regulations. On this view, for-profit corporations could be given exemptions from general regulations without violating the Nonestablishment Clause, but such exemptions could be withheld from them (yet provided to nonprofit corporations) without violating either the Free Exercise Clause or principles of equality as they apply in this setting.⁶⁷

The constitutional question posed in this Essay’s title might then reduce to the avoided statutory one about the scope of the Religious Freedom Restoration Act. Yet, perhaps we ought to structure the “play in the joints” doctrine to require that legislatures focus with some precision on the tension between the Nonestablishment and Free Exercise Clauses when they enact permissible accommodations. If so, RFRA’s breadth raises nonestablishment questions, as Justice John Paul Stevens thought,⁶⁸ and provides a “context” for construing

degree without rendering the RFRA definition of “person” incompatible with the Dictionary Act’s definition. *Cf.* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 194 (2009) (interpreting the words “political subdivision . . . includ[ing] any other subdivision of a State which conducts registration for voting” to apply to a utility district that did not conduct voting registration).

⁶⁵ See Gregory P. Magarian, *The New Religious Institutionalism Meets the Old Establishment Clause* (Sept. 12, 2013) (unpublished manuscript) (on file with author) (“The two core religious principles set forth in the First Amendment—that government shall neither prohibit the free exercise of religion nor establish religion—coexist in tension with one another.”).

⁶⁶ *Locke v. Davey*, 540 U.S. 712, 718 (2004) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970)).

⁶⁷ This holds true for distinctions between publicly held corporations and non-public ones, and between large and small non-public corporations.

⁶⁸ *City of Boerne v. Flores*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring) (“In my opinion, the [RFRA] is a ‘law respecting an establishment of religion’ that violates the

the term “person” to exclude for-profit corporations.