Beyond Contraceptive Mandate Doctrinalism

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James D. Nelson, *Conscience, Incorporated*, **Mich. St. L. Rev.** (forthcoming), available at SSRN.

Perhaps the single hottest issue in American law and religion right now is the dispute over the so-called "contraceptive mandate." The Affordable Care Act requires employers to extend insurance coverage to include contraceptive care. It includes some exemptions for particular churches and other religious organizations, but the Obama administration has refused to extend that exemption too widely. A number of businesses or business owners have complained that this mandate violates "their" religious consciences and that, under the Religion Clauses of the First Amendment and/or the Religious Freedom Restoration Act, an exemption is required. Key questions raised by the controversy include whether corporations have religious rights at all, whether the mandate constitutes a substantial burden, and whether the mandate is generally applicable or not. Lower court rulings are all over the map. The Supreme Court will hear two of those cases next month.

Articles on the contraceptive mandate are a growth industry right now but, with all due respect, few of them have said anything all that deep. Much of the work on this issue is still at the shadow-amicus-brief stage of legal doctrinalism, in which the first articles addressing a legal issue read like standard legal briefs lining up on one side of the issue or the other. There is some value in that for the litigants, and for those scholars who are rehearsing for amicus participation. But those articles really are just rehearsals, efforts to fight tomorrow's battles with yesterday's tools.

James Nelson's draft article *Conscience, Incorporated* is a welcome exception. Many articles exhaust themselves on a threshold question: can corporations assert Free Exercise rights at all? Authors conclude that they obviously do or obviously don't. But most interesting legal work, whether doctrinal or theoretical, takes place at the "it depends" level. That's the ground that Nelson's fine article occupies.

As Nelson writes, "The problem is that courts do not have a workable theory to guide their analysis." The courts lack a fully coherent account of corporate identity itself, as it relates to constitutional rights and particularly matters like individual conscience. Speech, at least, is an activity in the world that directly implicates the recipients of that speech; whether the "person" pronouncing on matters of public concern is a soap-box speaker or a publicly traded newspaper, it matters to all citizens that that speech on matters of public concern take place. Consciences are harder to pin down. In Nelson's view, standard debates over the nature of corporate personhood, which rely on "abstract descriptions of the corporate form," all "fail to illuminate our inquiry into rights of corporate conscience." They "provide only a sort of window dressing for unstated normative premises."

Instead, Nelson argues, we must "develop a theory of corporate conscience that takes account of the nature of the relationships between individuals and organizations." He calls this "the social theory of conscience." If "conscience is about the construction of our identity and personhood," then "we must be attentive to the ways in which our various social associations contribute to that process." We might begin by distinguishing between organizations in which individuals "use their collective affiliation as a tool to achieve instrumental ends," and have little interest in or commitment to deeper identity formation, and "constitutive communities" in which "individuals view their affiliation with the collective as a core aspect of their own identity." It is the latter sorts of institutions, Nelson argues, those that

involve a "*shared* [interest] among the members of a group or institution," that have the strongest claim to some form of corporate conscience.

For Nelson, the general state of "environmental conditions in modern corporate life" is largely inconsistent with the social theory of conscience. Those conditions encourage all the constituents of a corporation to remain detached from their roles in an organization, weakening any claim to a collective or corporate conscience. But he acknowledges that other kinds of entities—with churches on one end, and parachurch organizations (such as religious schools or social service agencies) and some closely held companies in the middle—have a stronger claim to being constitutive communities sharing a commitment to particular conscience-driven values, and thus are in a stronger position to assert claims of conscience.

Nelson's goal is not to answer the question how to treat corporate Free Exercise claims once and for all, or how to resolve individual claims concerning the contraceptive mandate. "When all is said and done," he writes, "the legacy of the contraceptive mandate may be that it exposed the need to think more seriously about the broader phenomenon of institutional exemption."

As Nelson acknowledges, one might favor a presumptive rule in favor of corporate conscience claims (or against them) as the best means of implementing a social theory of conscience, given the institutional capacities of courts. Or one might conclude, drawing on ancient history or recent cases, that conscience, in a more or less personal sense, is not the only basis for a viable Free Exercise claim—that there are structural reasons to favor a protective stance toward religious claims by institutions, even if not all their stakeholders share the same value commitments. Even if we agree with the social and identity-forming focus, we might hold a different view of the relevant individuals and of how much other individuals' "detachment" matters. If the owner of Hobby Lobby, for example, sees the business as a fundamentally religious enterprise, and employees and customers have fair warning of that fact, does it matter if their own reasons for working or shopping there are more instrumental?

But I think Nelson (and Robert Vischer, in another excellent recent paper) asks the right questions, and asks them in a thoughtful and productive manner. Those questions matter. The idea that the courts will reject all corporate Free Exercise claims altogether is simply fanciful. But even a blanket acceptance of such claims will still raise questions of implementation—especially questions about the substantiality of the alleged religious burden. Our sense of how substantial those burdens are may vary in different cases. How we see those variations will depend in substantial part on the kinds of questions Nelson is asking. Despite its ultimate normative tilt, this is more than an amicus brief by another name; it's a worthy contribution to a discussion of the deeper questions raised by the contraceptive mandate litigation.

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