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Religion and For-Profit Corporations: A Real Issue Hidden by Flimsy Arguments

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I was recently talking with a well-regarded scholar about the argument advanced in *Hobby Lobby* by the Administration that for-profit corporations should not be able to claim protections for religious freedom. His response was that the argument was always a makeweight and didn't really raise serious questions one way or the other. Since my interlocutor is a smarter and more learned man than I, I have thought quite about his claim. Here is why I think he's wrong.

He's right that the arguments advanced in the *Hobby Lobby* debates about corporations were pretty shallow. There was the claim that a corporation – as opposed to an individual – cannot practice religion. This, of course, cannot be right as it would lead to the absurd position that churches (which are corporate persons) cannot exercise religion. One might respond that it is not the corporateness per se that is at issue but the exercise of religion by *for-profit* corporations. The problem here is that this would suggest that individuals that pursue profits also cannot be exercising religion. This is less absurd, but still pretty flimsy. One might imagine trying to say this with a straight face about businesses organized as sole proprietorships, but what of employees or other individuals pursuing economic gain, i.e. essentially all adults? Does their “for profit” status preclude them exercising religion? Certainly not. Then there is the claim that in exchange for the “subsidy” of limited liability, for-profit corporations give up the right to pursue religious ends. This claim flies in the face of state corporate law, which generally provides that a corporation may be formed for “any lawful purpose.” It's also worth noting that state exempt property statutes provide “limited liability” for individuals, performing precisely the same economic function – asset partitioning – as limited corporate liability. In return for the “subsidy” provided by homestead exemptions does anyone think that individuals give up the right to practice religion?

Despite the flimsiness of these arguments, however, I think that the debates about corporations in *Hobby Lobby* get at a deeper issue, one that at the very least justifies a blog post on the topic even after the case has been decided.

Far from being a makeweight, I think that the intuition that many folks have that corporations should not exercise religion actually has pretty deep roots in our law, albeit one's that I don't find terribly attractive. One could object to the exercise of religion by for-profit corporations for the same reason that one might generally be suspicious of for-profit corporations. Corporations are a mechanism for amassing resources and deploying power that is not subject to democratic control the way that the government is subject to democratic control. We should tightly regulate corporations because such concentrations of power are dangerous, and we should keep for-profit corporations from exercising religion precisely because this makes

religion too powerful by allowing it to harness the power represented by the amassed capital of a corporation.

This argument, I think, tends to overstate the power of corporations and romanticize democracy, but it certainly seems like a respectable position to take, one that runs from the Progressive Era through the New Deal and into the present. It is surely not surprising that most of those most vehemently opposed to the *Hobby Lobby* holding that the exercise of religion by for-profit corporations is protected are also those who are suspicious of corporations in general and on the whole enthusiastic about their regulation.

One of the implications of this argument, however, is that, contrary to Justice Ginsburg's dissent, churches aren't special. After all, churches are corporations. They too can amass wealth and resources that give them power. If religion coupled with for-profit corporations is dangerous because it has too much power, then religion coupled with religious corporations can be dangerous for the same reason. This is actually not a particularly radical position to take historically.

Indeed, historically it has a name: Protestantism.

In particular, one of the legal manifestations of Protestantism in English and American law has been to sharply limit the power of religious corporations. Beginning with Henry VIII, who aggressively used mortmain laws to confiscate church property and humble the power of religious corporations, Anglo-American law has tended to limit the ability of church corporations to own and use property. Under American law, so long as such corporations were limited to a single congregation, perhaps owning a church, a parsonage, and a glebe, they were fine. Any more than this and the law aggressively regulated these corporations in order to avoid concentrations of religious power. Not surprisingly, this legal tradition has been quite hostile toward religions that are clerical and hierarchical rather than congregational and lay-controlled. Hence, mortmain and other laws coming out of the Protestant tradition were deployed in the nineteenth century against Catholics and Mormons in cases such as *United States v. Late Corporation of the Church of Jesus Christ of Latter-day Saints*.

In the end, I don't think that the concern with for-profit corporations in *Hobby Lobby* was an intellectual will-o'-the-wisp, a mere makeweight argument of only passing interest. Rather, I think it taps into a pretty deep strand of suspicion about religious power and legal efforts to limit that power. It is also a tradition that, in my opinion, has some ugly aspects to it. If I am right about this, then we probably have not seen the last of efforts to regulate religious corporations, including not only for-profit corporations but churches as well.

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