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## From the Fuggers to Justice Ginsburg

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### From the Fuggers to Justice Ginsburg

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One of the things that the law has always done is order the relationship between religion and the market. For example, the prohibition on usury, which for a long time was one of the central issues in commercial law, has religious roots. In the Bible, charging interest on debt is condemned. In the ancient world, debt was less a way of raising capital for new ventures than a response to misfortune. The money lender was less a financier than a predator who extended credit to the unfortunate to tide them over and extracted high interest, often as a way of enslaving the debtor or his children. Hence the prohibition.

By the high Middle Ages, however, bankers such as the Fuggers were seeking to extend credit to merchants to finance commercial ventures. They developed what became known as the German Contract. The banker would form a partnership with the merchant in which the banker would contribute capital and share in the profits of the venture. Such investments did not run afoul of the prohibition on usury because, to use modern terminology, they took the form of equity rather than debt. The banker would then purchase from the merchant an insurance contract on the venture, in which the merchant agreed to accept the risk of the venture's failure, promising – in return for a nominal fee – to pay the banker the expected profits in the event of failure. Insurance, not being a loan, did not come within the prohibition on usury. Taken together, of course, the partnership agreement and the insurance contract were the economic equivalent of a loan for interest. The papacy's willingness to bless the German Contract is what launched the beginnings of modern finance.

Notice that in this legal world, commerce is supposed to be infused with religious values and the law is supposed to structure markets so that they reflect these godly concerns. Usury is a sin, one that cannot be allowed to stain honest commerce. The debate over the German Contract was a theological debate, one about whether or not the law could bless an arrangement that seemed to skirt the edges of what revelation defined as legitimate commercial activity.

The law continues to structure the relationship between commerce and religion. Consider Justice Ginsburg's dissent in the *Hobby Lobby* case. Rejecting the idea that for-profit corporations could exercise religion, Justice Ginsburg's argument was embarrassed by the facts that churches – which are organized as corporations – routinely claim to practice religion and obtain religious protection. She distinguished churches from for-profit corporations by writing, "Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations."

As an empirical matter, of course, this statement is false, as the *Hobby Lobby* case itself illustrates. There are many for-profit corporations that seek to infuse their commercial activities with religious values and some

such corporations are formed for explicitly religious purposes, as for example when for-profit religious publishing houses are organized to advance a particular set of theological positions.

We can, however, understand Ginsburg's dissent as making a normative claim rather than an empirical claim. Viewed most charitably, her dissent suggests that the market should be understood as an explicitly areligious space, one in which religious considerations are out of place and where they ought to be ignored. One might justify such a position in a number of ways. For example, perhaps religion should be seen as purely private, while the market is in some sense public. Perhaps we view religion as particularly dangerous, and therefore ought to limit its ability to wield the power that can accrue to successful corporations. One might point out that the market is a particularly good mechanism for fostering cooperation between those with sharply differing religious and moral beliefs. Perhaps religion ought to be excluded from the marketplace lest it threaten the ability of commerce to mediate moral pluralism.

It's hard to discern which if any of these arguments motivates Ginsburg's position, and one suspects that like many judicial statements it wasn't all that carefully thought out. What is striking to me is that while the position gestured towards in the Ginsburg dissent is essentially the polar opposite of the stance taken by participants in the usury debates, it shares with the medieval casuists the conviction that the law ought to regulate commerce so as to insure that it takes the proper stance towards religion.

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