

BACKGROUND

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The Good of Corporations

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Abstract

Americans rightly cherish freedom of association as the necessary condition of a civil society that is not absorbed by the state. Legal protections for corporations recognize that associations are a natural part of human life. The good of individuals is dependent upon “the ties that bind us,” and legal protections for corporations are deeply embedded in Anglo–American jurisprudence partly for that reason. Today, many are skeptical that corporations should be afforded legal rights, because they see examples of irresponsible behavior vindicated in courts in situations where the corporate form appears to be a sham. Yet these real examples of bad behavior ought not to be used to justify encroachment upon corporate rights writ large, and the importance of “little platoons” to American life cannot be overstated.

The recent decision of the Supreme Court of the United States in the Hobby Lobby case raises important questions concerning the rights of corporations.¹ That case purportedly interpreted only one federal statute, the Religious Freedom Restoration Act of 1993 (RFRA), and held that “closely held for-profit” corporations are considered “persons” under that Act, capable of exercising religion. Yet the status of corporate persons in American law goes beyond RFRA, as the rights of corporations include rights under the Constitution as well as rights in contract, tort, and employment law.²

What exactly are “corporations?” Are the rights and duties of the corporation in any way comparable to those of the individual citizen?

These questions involve deep legal issues, such as the standing of corporations to sue in court under Article III of the Constitution,

KEY POINTS

- The concept of corporate personality reminds us that associations are not just arbitrary groupings of people that the state can shape and destroy at will. They are the gift of freedom and responsibility.
- We attribute personality to them in law because they already have personality in fact. They inherit some of the rights and duties of their members and shape those rights and duties according to the aspirations that they embody.
- It is not possible to deal with corporations as though their rights and freedoms were not bound up with the rights and freedoms of the individual.
- If the American Constitution is to fulfil its promise of creating a society of free individuals, it must protect the freedom of corporations too. Associations are often means to some end, but they are also ends in themselves with a claim to recognition and protection that sets limits to legislators’ power.

This paper, in its entirety, can be found at <http://report.heritage.org/bg2964>

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and deep political issues concerning the right of the federal government to curtail the activity of associations that enter into conflict with the responsibilities seemingly conferred on Congress by the Constitution. They also, however, connect with deep moral issues concerning the place of free association and the experience of membership in the life of the individual.

Americans rightly cherish freedom of association as the necessary condition of a civil society that is not absorbed by the state. They are aware of the long history of volunteering that has conferred on their country stability in peacetime and security in times of conflict. But they are also aware that there are criminal associations, conspiracies, mafias, and subversive groups, and they have become ever more suspicious of corporations—and especially the large corporations—some of which are more like screens behind which their directors escape from liability than real “persons” in law.

It is useful, therefore, to reflect both on what is meant by corporate personality and on the very real social goods that are protected by it. Is the idea of corporate personality coextensive with that of the “corporation” in American law? Why provide legal protection to corporations at all?

The Idea of Corporate Personality

In U.S. law, the corporate form was originally conceived on the English model as an artificial entity created by a grant of patent. Corporations were not free associations of citizens but bundles of rights defined by the state. During the course of the 19th century, however, it became increasingly recognized that corporations could be created by the citizens themselves. People could associate for some purpose, and this association would be treated by courts as an independent legal entity with attendant rights and duties, whether or not the individuals ever approached the state for official sanction.

The changes in American and British law were haphazard and were not dealt with by the courts either on the basis of any settled philosophy of

corporate personality or on the basis of the relation between the personality of the corporation and the personalities of the individuals who compose it.³ What is evident, however, is that this was a spontaneous development that both respected the real intentions of the individuals involved and provided security to spontaneous forms of social life.

Corporate personality informs and precedes any legal definition and any assignment of rights and duties at law. In turn, the legal rights and duties foster the growth of private associations and affect individual rights and duties.

Nineteenth century Anglo-American commentary is ambiguous on this subject.⁴ Some jurists opt for the “legal fiction” theory, others for the idea that corporations are reducible in some way to their members. The view that corporations are “constructions” and not part of the fabric of reality—mere legal instruments that enable us to simplify relations between people that could be expressed more truly, though more clumsily, in terms of the contracts that bind them—is natural to individualists, who see institutions as provisional and fungible, no more lasting than the agreements that bring them into being, and to be explained and justified in terms of our individual needs and purposes, but this view fits ill with the history of our civilization.

It is important to insist at this point that the legal idea of incorporation is not the heart of corporate personality, but only the shell that protects it. Corporate personality as such informs and precedes any legal definition and any assignment of rights and duties at law. In turn, the legal rights and duties foster the growth of private associations and impact individual rights and duties.

1. *Burwell v. Hobby Lobby Stores, Inc.*, Nos. 13-354 & 13-365 (U.S. June 30, 2014), available at http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf.

2. For some of the issues here, see Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 96-163 (2014).

3. For some of the philosophical issues here, see Roger Scruton & John Finnis, *Corporate Persons*, 63 PROC. OF THE ARISTOTELIAN SOC'Y 239-74 (1989), available at <http://www.sci.brooklyn.cuny.edu/~schopra/Persons/ScrutonFinnis.pdf>.

4. Blackstone's views on the subject are typical, as he notes that corporations are persons, albeit not natural persons. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-69).

The idea of corporate personality is indeed far older than the modern corporate form, and its foundations lie deep in our nature as political animals. Medieval society was not composed of individuals. It was composed of bishoprics, abbeys, orders of knighthood, universities, schools, guilds, courts, and parliaments. When the modern concept of the individual began to fight its way to the fore in the Renaissance and the Reformation, it was not in order to stand alone amid a ruined and atomized world, but in order to make new institutions, comparable in so many ways to those that the Reformation destroyed. Society was composed as before of schools, universities, churches, clubs, and orders, and there arose in 17th century Holland and Britain those extraordinary institutions—limited liability, insurance underwriting, the joint-stock company, and the stock exchange—that separated commercial corporations from the individuals who composed them and endowed them with a life of their own.

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We are associative creatures, and when we associate, we create communities, clubs, and “little platoons” and imbue these collective entities with our own moral character. Even in business, this is true, and firms that fail to arouse a sense of membership or to give cause, however slight, for pride will suffer from a rapid turnover of their workforce. The Hobby Lobby case spotlights this fact, since it reminds us of the very many firms in America—especially those family firms that are integral to the life of the communities where they are situated—that are not merely associations for the pursuit of profit, but real moral persons in the life of their members. The corollary is that limiting legal protections for associations will harm both individuals and society as a whole.

Our vision of corporate persons has been soured by recent events, most notably by the worldwide banking crisis of 2008. To many people, it seemed then that the corporation is no more than a mask behind which individuals can escape from their liabilities, paying themselves outrageous bonuses for performance at the very moment when others are being bankrupted by their irresponsible actions.

In response to this situation, some people were tempted by a version of the Islamic view⁵ that there is no such thing as a corporation with rights and duties of its own, that “limited liability” is simply a way to avoid obligations and that, in any case, speculations that involve loans at interest and insurance against failure are attempts to forestall the will of God and therefore forbidden to all who would faithfully serve Him. On this view, the corporate legal form, a particular piece of Western institution-building, is fatally marked by the hubris and blasphemy that are the dangers of institution-building in all its forms.

Tempting though that radical approach might be, it would involve rejecting a long tradition of creative jurisprudence on which Western economies have depended since the 17th century. The banking catastrophes of recent times have not been caused by defects in the law of corporations. They have been largely the result of a breakdown in loyalty and accountability, of which the banks have been as much the victims as the cause. They show us that the corporate form is designed to express and protect something else, which is the collective agency of a group of people. Just as a wayward husband harms “the marriage” as much as his wife, the corporate director who votes himself a bonus while the employees take the full cost of the firm’s collapse is cheating the firm as much as he is cheating his fellow members of it.

One reason for suspicion of the corporate form in our times is that the larger the entity, the easier it is for the individual to avoid taking responsibility for his role within it, and the easier it is to use the shell of legal identity to hide a diseased or absent experience of membership. In these situations, the justification for the legal protection is attenuated precisely because the real, organic corporate entity is missing or imperfect.

5. On the effect in Islamic law of the absence of a concept of the corporation, see MALISE RUTHVEN, *ISLAM IN THE WORLD* (2d ed. 2002). On the *waqf* as a charitable trust, see JONATHAN BENTHALL & JEROME BELLION-JOURDAN, *THE CHARITABLE CRESCENT: THE POLITICS OF AID IN THE MUSLIM WORLD* (2010).

But rather than focus on the atypical, diseased member of the class, we should consider the fate of healthy, smaller corporations in which the legal shell is built around a real personality. When Alexis de Tocqueville praised the associative genius of the American people, seeing in it a counterbalance to “the tyranny of the majority,” it was because he had noticed that the values, duties, and responsibilities of Americans are shaped by the institutions that they create and the clubs that they join.⁶ Edmund Burke had something similar in mind when he traced the English form of civil order to the “little platoons” that shaped the social values of the individual citizen,⁷ and Georg Wilhelm Friedrich Hegel gave a comparable role to the corporations as the heart of civil society.⁸

Associations and the Moral Life of the Community

Philosophically speaking, there is a question about the personality of associations that is not reducible to the question of their legal personality. English law has long recognized the existence of the “unincorporated association,” and the equitable concept of the trust emerged partly in order to deal with the rights and duties that pertain to such things. In the United States, there is a similar concept in partnership law.

Yet to assess why the corporate form is important and what is at stake, we must explore the real meaning of associations in the moral life of the community, whether or not the law has conferred an explicit identity on them.

There is a certain amount of philosophical literature on this topic,⁹ although it is fair to say that it has not properly entered the discussions of philosophers in the Anglo-American tradition in which, with a few exceptions, the “methodological individualism” of Karl Popper prevails. According to Popper, we should treat all social entities in terms of the individuals who compose them and attempt to explain the larger changes in the social order in terms of the acts, desires, and needs of individuals. To attribute

will, knowledge, rights, and duties to a collective is to violate the methodological assumption on which scientific sociology depends.¹⁰

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However, there is one work of considerable importance that breaks radically with the Anglo-American tradition: Michael Novak’s *Toward a Theology of the Corporation*. This book has been unaccountably neglected in recent discussions, despite being of direct relevance to an understanding of the corporation’s place in the religious view of human communities.¹¹ I therefore return to it below after summarizing my own perspective.

It is helpful to distinguish three kinds of natural associations or groupings.

- There are associations that exist for a specific purpose: in particular, businesses that aim to trade in a marketable product;
- There are associations that exist purely for the benefit of membership, such as clubs and discussion groups; and
- There are associations that, while endowed with specific purposes, are something more than mere means to a given end, possessing an ethos and a personality that are appreciated for their own sake.

Traditional army regiments are examples of this third kind of association; so are the English “public”

6. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 489 (Harvey Mansfield & Delba Winthrop, trans. 2000).

7. EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 69 (1790).

8. See, e.g., T. M. KNOX, *TRANS.*, *HEGEL’S PHILOSOPHY OF RIGHT* §308-11 (1942).

9. I have summarized some of the arguments in Scruton & Finnis, *Corporate Persons*, *supra* note 3.

10. SIR KARL POPPER, *THE POVERTY OF HISTORICISM* (1945). See also Joseph Heath, *Methodological Individualism*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Nov. 16, 2010), <http://plato.stanford.edu/entries/methodological-individualism/>.

11. MICHAEL NOVAK, *TOWARD A THEOLOGY OF THE CORPORATION* (1981).

(i.e., private) schools. Churches too belong to this category, and it is through the study of churches that discussion of the corporate person entered the philosophy of law in England and Scotland during the 19th century.¹²

The real goal of human life in all its forms is the association that is an end in itself, and however much our associations come into being as means, they will gravitate of their own accord in that direction, so as to acquire some of the purposeless and self-sustaining character of love and friendship.

In the case of an association for a specific purpose, there is often a contractual relation between the members, but very few associations are of a purely contractual character. The normal business offers more and demands more than the contract specifies, and this fact has gradually made its way into employment law, with provisions for unfair dismissal, conduct in the workplace, and pension and welfare contributions built into the relationship between the parties, whether or not specified in a contract. Like marital law and family law, employment law reflects the view that obligations accumulate through association; that these obligations are non-contractual; and that people do not merely agree to join the firm, but also rapidly come to depend on it.

It is partly for this reason that associations acquire a personality. People invest in them beyond what they have contracted to invest. They are places of friendship. Their members put themselves out for each other, staying late at work so that someone can go home early to look after a sick child or comforting each other in times of trial. There are office parties and special days in the workplace, and many firms start the day with a prayer or set aside hours for meditation.

The point can be put in another way: However purposeful our associations, they are quickly overlaid with embellishments that lie outside their primary purpose. The real goal of human life in all its

forms is the association that is an end in itself, and however much our associations come into being as means, they will gravitate of their own accord in that direction, so as to acquire some of the purposeless and self-sustaining character of love and friendship. It is in this way that a business becomes a “we,” a genuine first-person plural that can be loved and hated, resented and admired, independently of its legal reality as a bearer of rights and duties in law.

That is, of course, even more obviously true of the other kinds of association to which I referred. Through clubs and societies, people grow as social beings, practicing and overcoming their spontaneous competitiveness and enjoying the mutual recognition that fortifies their personal autonomy. It is through associations of this kind that people most easily acquire their values: Joining is also “homecoming.”

Gaining a Moral Personality

Empiricists and individualists insist that an association, however constituted, is never more than the individuals who compose it, arguing that while associations cannot exist without their members, the members can exist without the associations, so that the individuals are more basic, the true components of society, the things that are “ontologically prior.”

This view, however, depends on an impoverished theory of personality. It is true that associations acquire personality because of the individuals who compose them, but it is also true that individuals acquire personality because of the associations to which they belong. The question of which comes first—the individual or the association—is unanswerable once we recognize that personality is in all its forms a social product, a result of the I–Thou relationship that joins people in mutual recognition.¹³

Personality, in its fullest sense, involves a robust understanding of rights and duties. It is something more than biological consciousness: It comes through culture, mutual sympathy, and the awareness that I am both self and other, just as you are.

Personality is gradually wrested from the world through the associations we make and that make us answerable to others. To gain a moral personality and the rights and duties that go with it is automatically to acquire what Francis Herbert Bradley was

12. The discussion is usefully summarized in JOHN NEVILLE FIGGIS, *CHURCHES IN THE MODERN STATE* (2d ed. 1914).

13. On this point, see ROGER SCRUTON, *THE FACE OF GOD* (2012).

to call a “station” in the social world.¹⁴ The various forms of fellowship—from the “immediate” union of the family, through the mediated associations in clubs and common enterprises, to the fully “realized” forms of association in civil society and the state—are the instruments of our own self-development, and without them, we could not “become what we are.”¹⁵

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That is the meaning of the Boy Scouts, for example, as it is of teams and clubs that grow through the school and the church. The individual owes something to family and community, and it is through recognizing this that he or she acquires the conception of an objective obligation: an obligation that arises independently of any consent to it and therefore lies in the nature of things. Hence the importance of the second and third kinds of association mentioned above, which stand in non-contractual relations to their members and whose meaning cannot be captured in terms of an agreement.

Recent discussions that take the firm as their principal example fail to engage with that Hegelian argument and indeed beg the most important question in taking the freely contracting individual as their starting point. Individuals come into existence, the Hegelians argue, already marked by the ties of membership, which compel them to recognize and to honor the personality of institutions. Without those ties, they would not possess the autonomy that is necessary for any contractual undertaking.¹⁶

This can be illustrated by looking at the American experience. One’s self-identity in America is bound up with the rights granted in the Bill of Rights. Our lived experience of individuality has been informed and changed by the legal culture. It is against this background of embedded personality that we find stable footing to enter into contractual arrangements with each other, because no paper contract can contain all the rights and duties between two parties.

To put the point another way, we cannot isolate the individual in thought from his non-contractual obligations and from the groups that engender these obligations and still suppose him to be the fully autonomous rational agent envisaged by the liberal imagination. Agency is merely irrational until tempered and guided by a sense of value, which is developed only in communion with others. It is this sense of value that justifies the ends of conduct and therefore justifies the means, for means without ends are meaningless.

The Idea of Value

But whence comes the idea of value? Surely, it comes through the sense of being “called to account,” which is the gift of association. The non-contractual obligation inducts us into the moral life by bringing us face to face with others.

Hence, associations inevitably acquire some of the personality that they also help to bestow upon their members. They have a specific character and recognizable norms and ideals; they can be objects of interpersonal attitudes such as love and hatred, praise and blame; you can be ashamed of them or grateful to them; you can trust them or distrust them; and so on. You can even give your lives to them, as many have done even to the smallest of them.

When we see associations in this way, we are not indulging in fictions. We are acknowledging social realities, and the emergence of instruments such as equitable ownership and corporate personality is simply the legal recognition of these realities.

This is not to deny the uniqueness of the human individual, for obviously, an association is a “we,” not an “I.” It cannot be the object of attitudes like sexual desire that are directed to the embodied individual,

14. F. H. Bradley, *My Station and Its Duties*, in *ETHICAL STUDIES* (2d ed. 1927).

15. FRIEDRICH NIETZSCHE, *ECCO HOMO: HOW ONE BECOMES WHAT ONE IS*.

16. This point is made at greater length in Scruton, *Corporate Persons*, *supra* note 3.

and corporations as such do not normally aspire beyond this world as individuals do. American law recognizes this by withholding certain constitutional rights from corporations, such as the Fifth Amendment right against self-incrimination. Be that as it may, however, a philosophy or legal system that fails to recognize the real personality of associations simply fails to recognize what we truly are.

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Michael Novak's plea for a theology of the corporation arises from this sense that the law does not create the personality of corporations but merely acknowledges it. Novak believes that corporate personality is conferred in some way by the workings of the Holy Spirit, for corporations have the marks of divine grace: The best of them are creative, free, with virtuous character and insight (their primary capital), take risks on behalf of others and themselves, and stand in accountable relation to their members.

All of the features to which Novak refers are a matter of degree, and all must be tempered if they are to be an acceptable part of the democratic order. The legal instruments evolved not merely to protect corporations and their assets, but also to restrain them, and as corporations become bigger and more anonymous, so do their personal attributes decline. In these cases, they cease to be creative, lose all insight and innovation, take fewer and fewer risks, reach out for subsidies and handouts, and wither to the masks that are rightly criticized in the popular culture.

Again, however, when considering the place of corporations in the modern body politic, we should not focus on the monsters that are "too big to fail," but on the "little platoons" of Burke and Tocqueville—the associations that depend on their personality and make a gift of it to their members. A family firm like Hobby Lobby lies at the edge of this kind of association. It would not exist were it not for the profit motive, but it also offers a kind of membership to its

workforce and tries to live up to values other than those that can be measured in economic terms. It is, in a real sense, greater than the sum of its parts and should be treated as such.

The Assault on Free Association

The points at issue here become clearer if we acknowledge that since the Enlightenment, there has been a continuous assault on free association by the state. There are two fundamental reasons for this.

On the one hand, the state is a jealous god, eager to ensure that no rival obedience can threaten its monopoly of force. One good reason that governments might occasionally crowd out certain small associations, such as street gangs or violent militias, is that if it does not, such organizations might fill any power vacuum, as happens in so-called failed states.

On the other hand, factions can use the state in order to suppress opinions and activities that offend some moral, religious, or doctrinal scruple, whether or not those opinions and activities are criminal in any natural understanding of the term. This sort of "capture" encourages government to crowd out organic associations not for good motives, but for bad motives.

In our time, the state has never been more threatening than when it has set out to destroy free associations, for then it makes itself the enemy of civil society and is on the path toward totalitarian control. The destruction of the little platoons is indeed usually the first policy of any revolutionary government.

Thus, on August 18, 1792, the French Revolutionaries decreed that "a state that is truly free ought not to suffer within its bosom any corporation, not even such as, being dedicated to public instruction, have merited well of the *patrie*."¹⁷ That was the prelude to the closing of private schools and the confiscation of the assets of small clubs and societies that had grown around the Church, whether for the relief of poverty or for the sake of companionship and worship. The effect was a "depersonalization" of society as associations lost their personal identities and were reduced to mere concentrations of power, which were in turn seized by the state.

The process of depersonalization was later resuscitated by Vladimir Lenin through the device of the Potemkin institution. All associations were to be

17. F. W. Maitland, *Moral Personality and Legal Personality*, in COLLECTED PAPERS 312 (H. A. L. Fisher ed., 1911).

infiltrated by the Communist Party and made subservient to it. They could retain no autonomy, and any attempt to do so was visited with the harshest punishment.

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Particularly important, of course, were the churches, since they offered membership as a complete way of life. The Russian Orthodox Church was forced to become the servant of the Party: Those churches which were not infiltrated were suppressed, and all corporate action by religious bodies other than the act of worship was forbidden.¹⁸

Other institutions that had acquired moral personality—universities, schools, clubs, and societies—were either destroyed or turned into Potemkin replicas. Private charities were expropriated and then suppressed. One of the most striking features of the Communist order as I encountered it during the late 1970s in Eastern Europe was the fact that charities were illegal. (I was involved in running two of them, and so began my life as a criminal.)

János Kádár, during his first year as Minister of Justice after the Communist takeover of Hungary in 1948, personally saw to the destruction of 5,000 associations—not only small businesses, but chess clubs, brass bands, discussion circles, reading clubs, women’s institutes, churches, scouts, and schools. All association was absorbed into and controlled by the state. Thus was Friedrich Engels’s prophecy fulfilled: “The government of men” was replaced by “the administration of things”¹⁹ as all persons, both corporate and natural, were reduced to things,

mere instruments in the Party’s machinery for total control.

The result was a society entirely instrumentalized, in which all cooperation was made to depend on the one overriding purpose of “building socialism.” Subjects of the Communist state were like soldiers in an army, recruited for an end that was to be the final source of the bond between them. They were to act together under a single system of command but without attachments, without love for the past, without an inherited identity or culture, without any object of affection that would compete with the overriding purpose. In other words, in the attack on corporations, authentic individuality died.

All associations (if they could be called that) were kept together by the top-down commands of the Party, and those commands were justified in terms of the official goal—in which, as it happened, nobody believed. The work of the secret police was to control and, if possible, prevent free association so that society would be entirely atomized by suspicion and fear. Each person would be allowed to secure what he or she could secure in his own private sphere behind the back of the great machine that gave the orders, but all association was to occur under the guidance of the Party. The Communist citizen was to be the perfect *homo economicus*, motivated by rational self-interest to advance a purpose in which he did not believe. Alternative identities and motivations were not tolerated.

Growing Hostility Between the State and America’s “Little Platoons”

Now that the truth is out, no sane, truly freedom-loving person wants to go down that path. Nevertheless, we should recognize the increasing hostility between the state and the little platoons here in America too. It issues from the same cause, which is the desire to flatten society and control people in the interests of a dominant ideology regardless of their spontaneous associative habits.

For example, legal fiat has almost abolished all-male clubs in this country.²⁰ Even if men want to

18. See TIMOTHY WARE, *THE ORTHODOX CHURCH* (1993).

19. FRIEDRICH ENGELS, *SOCIALISM, UTOPIAN AND SCIENTIFIC* (1901).

20. To be sure, the First Amendment protects certain exclusionary activity from state regulation, even against so-called anti-discrimination laws. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding that the First Amendment right to expressive association allows a group to exclude unwanted members, such as homosexuals, whose presence “affects in a significant way the group’s ability to advocate public or private viewpoints”). But the picture is complicated, and legislative efforts have undoubtedly contributed to a culture that now disfavors such groupings.

associate with other men because they like that kind of thing and thereby create webs of support and mutual obligation, they now can do so only in ways authorized by the state as special exemptions to a regime of non-discrimination.

The reason for this legislative move is ideological, part of the feminist campaign to reorganize society in accordance with a radical and comprehensive agenda. Non-discrimination laws have similarly exerted the state's control of all employment so that race, religion, family, and even (increasingly) sexual orientation must all be discounted by the employer—and again for reasons that seem impeccably right to the liberal conscience.

In other words, there is a growing top-down regulation of associations, which is tantamount to a state-sponsored suspicion of them. Associations now need elaborate permissions if they are to exist, and their moral personality is under close scrutiny from the guardians of public morality—a morality that tends to be secular, egalitarian, liberationist, and to a great extent anti-Christian in its emphasis. The breakdown in legal protection for corporate persons is actually harming private association and harming individual welfare and autonomy. This is precisely the goal of those who stir up populist anger against private associations by citing examples of truly lamentable abuse of the system.

Top-down moral control does not always win out in the courts, as we have seen in the Hobby Lobby case and as we saw equally in the yet more interesting 2010 case of the Boy Scouts and their building in Philadelphia. The Boy Scouts had constructed a building at their own expense on property owned by the City of Philadelphia. Upon its completion in 1929, the building became the property of the city, remaining for the exclusive use of the Boy Scouts. For almost 80 years, the Boy Scouts paid no rent to the city but maintained and improved the building—until the city proposed to expel them, since the refusal of the Scouts to recruit homosexual scoutmasters violated the city's non-discrimination laws.

In the end, the Scouts won the right to their building, but it was a close-run thing.²¹ Gradually, however, it is becoming clear that the morality of the liberal establishment is being built into federal legislation as a matter of course and sometimes read into the Constitution by an activist Supreme Court.

As was the case with the French Revolution, the first targets of suspicion are the little platoons: the associations that grow from ordinary people, uniting around a shared purpose or for no other purpose than that of being together. Such an association reflects and shapes the value-forming aspect of the human condition and hence is naturally seen as a provocation by those who wish to control the habits of their fellow citizens.

The increasing hostility between the state and the little platoons here in America issues from the desire to flatten society and control people in the interests of a dominant ideology regardless of their spontaneous associative habits.

This is especially so today, when the values of the little platoons frequently fail to reflect the distant and more coldhearted visions of a “better society” as these take shape in the imagination of the liberal legislator. Hearing rumors of the goings-on at rodeos and foxhunts, at all-male camping trips and revivalist meetings, at gun clubs and pigeon shoots, such a legislator may feel a strong urge to put a stop to such things. In a civilized and rational country, he might say, these pastimes should be strictly controlled, and without seeing that his secular and supposedly “inclusive” morality might be as distasteful to rural America as rural America is to him, he spontaneously builds his prejudices into legislative proposals.

Of course, it could also go the other way. A conservative legislator might want to put an end to casinos and betting shops and might have qualms too about plans to build a mosque in his neighborhood or to open a school of meditation. To him, these private associations might be a threat to all that makes his life worthwhile. It has therefore been the constant preoccupation of classical liberals like John Stuart Mill to find some criterion that will distinguish the legitimate from the illegitimate use of the state's coercive power in controlling and forbidding free association.

21. See *Cradle of Liberty Council v. City of Philadelphia*, 851 F.Supp.2d 936 (E.D. Pa. 2012).

Obamacare's Challenge to Free Association

Perhaps this explains some of the motivations behind the health care law. Forcing businesses to provide contraception, sterilizations, and abortion-inducing drugs can easily be presented as part of the "health care" agenda. Yet this mandate runs roughshod over many good private associations. The Little Sisters of the Poor, for example, a group of Catholic nuns, argues that being forced to provide health insurance coverage for such services violates their rights under RFRA. While the lawsuit refers to the "substantial burden" placed on the religious exercise of the Little Sisters, one can also see real associational damage to them.

It is here, I think, that the concept of corporate personality comes into its own, for it reminds us that associations are not just arbitrary groupings of people that the state can shape and destroy at will. They are the gift of freedom and responsibility. They are "the ties that bind us," and we attribute personality to them in law because they already have personality

in fact. They inherit some of the rights and duties of their members and also shape those rights and duties according to the aspirations that they embody.

If our legislators were properly clear about this, then they would recognize that it is not possible to deal with corporations as though they were of merely instrumental significance and as though their rights and freedoms were not bound up with the rights and freedoms of the individual.

In the end, if the American Constitution is to fulfil its promise of creating a society of free individuals, it must protect the personality of corporations too. It must realize that while associations are often means to some end, they are also, as persons, ends in themselves with a claim to recognition and protection that sets limits to the legislators' power. To do any less is to threaten not just corporate rights, but the lives of individuals as well.

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