Problems that result from granting freedom of religious exercise to US corporations

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Abstract

The U.S. Supreme Court's 2014 *Hobby Lobby* decision was widely heralded as a victory for proponents of religious freedom. In *Hobby Lobby*, a closely held corporation was permitted to claim the right of religious exercise and thereby avoid a government mandate that infringed upon the shareholders' religious beliefs. But the rationale underpinning that decision is problematic, because it invoked the entity theory of corporate personhood. That rationale contains pitfalls for any religious rights held by faith entities. Specifically, the tax-exempt status of faith-entities could be made more vulnerable by the endorsement of entity theory in the context of religious freedom issues.

Keywords Religious corporations, closely held corporations, tax-exempt entities, nonprofits, Hobby Lobby, aggregate theory, entity theory.

In the realm of law, a "person" may be either a human being or an artificial person, such as a corporation. This paper explores whether religious artificial persons (such as churches, temples, mosques, or even for-profit enterprises) should enjoy religious freedom rights separate from the individual members of those entities. I analyze the question from the perspective of United States jurisprudence, beginning with the *Hobby Lobby* decision, which recognized the ability of closely held corporations to hold religious freedom rights independently of their shareholders.[2] I then compare the decision to two primary corporate theories – aggregate theory and entity theory – and conclude that *Hobby Lobby*'s implicit application of the entity theory to corporate personhood in the context of religious freedom may be problematic. Although the cause of religious freedom prevailed in *Hobby Lobby*, the underlying rationale is troublesome. Specifically, an instinctive or automatic application of entity theory with regard to religious matters could jeopardize the tax-exempt status of a nonprofit entity. Moreover, entity theory misconstrues the reality of most collective religious observances.

1. An introduction to entity and aggregate theories

There are many varieties of artificial legal persons, such as corporations, partnerships, and estates. Much of business organizations law in the 20th century ques-

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[2] *Burwell v. Hobby Lobby Stores,* Inc., 573 U.S. 682, 134 S.Ct. 2751 (2014) (hereinafter *Hobby Lobby).*

tioned whether one of the prime structures for small businesses – the partnership – was merely a collection of partners or an independent actor in its own right. Aggregate theory presumes that although an entity shell can be recognized to some degree, the partnership, at its core, is simply an assemblage of natural persons (i.e., human beings) who have gathered together to pursue a shared aim. In contrast, entity theory, while acknowledging the interests of the various human constituents, understands the partnership itself as an entity and thus acknowledges the partnership's independent existence as an artificial person to a greater degree than aggregate theory.

Entity theory and aggregate theory might be viewed more as points on a continuum than as in direct opposition to each other.[3] Entity theory is biased toward the personhood of the partnership and views partnerships as organizations. Aggregate theory favors the constituents of the partnership; it considers partnerships as "constitutive communities which are constructed out of normatively thick collective affiliations in which individual members regard their own good as intimately connected to the good of the group."[4] The basic doctrinal issue in the early part of the 20th century was which theory, aggregate or entity, best captured the 'true' nature of a partnership.

This question had no easy solution, since it was embedded in the theoretical and rather abstract structure of artificial persons. An artificial legal person could be at once a subject (a unit bearing rights) and an object (alienable and malleable). With regard to corporate subjects, identifying any particular event as representative of 'corporate will' was an unclear matter, which was initially resolved by requiring shareholder unanimity, at least on fundamental issues. "Unanimous consent for fundamental changes was needed, in part, because the corporation formed a contractual triad between the parties which could not be altered but for the consent of all."[5] After all, if a mere majority could represent the will of the corporate entity – and bind the dissenting minority – "the 'corporate will' had to mean something other than the actual consent of the entity."[6] But soon, it came to mean just that. A rather uniquely American innovation, born out of the demands of commercial enterprise, claimed that a corporation could be an independent legal person. "American law, unlike its British progenitor, began to view the corporation as a construct which could be divorced from both its human constituent parts and the economic reality in which it existed."[7] Partnerships would follow the same evolution in fits and starts.

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3 James D. Nelson, *Conscience, Incorporated,* Michigan State Law Review 1565, 1583 (2013).

4 *Id.*

5 Brett W. King, "The Use of Supermajority Voting Rules in Corporate America: Majority Rule, Corporate Legitimacy, and Minority Shareholder Protection", 21 Del J. Corp. L. 895, 900 (1996).

6 *Id.*

7 Id. See also John Dewey, "The Historic Background of Corporate Legal Personality", 35 Yale L.J. 655,

In the United States, the 1914 Uniform Partnership Act (UPA), drafted by the National Conference of Commissioners on Uniform State Laws, gave a mixed answer to the question of aggregate or entity, suggesting that a partnership represented an independent legal person (an entity) but was also a collection of flesh-and-blood persons oriented toward a shared aim (an aggregate).[8] The UPA thus situated partnerships at a midpoint on the aggregate–entity continuum. It was an awkward compromise. Some speculated that the hybridization of aggregate and entity theories in the UPA could be traced to the untimely death of Dean Ames, a proponent of the entity theory and reporter for the drafting committee, about halfway through the project.[9] The same debate echoes in questions of religious freedoms when artificial legal persons are involved.

Application of the entity theory to worship-oriented organizations – churches, temples, mosques – as well as to religiously infused entities dominated by devout individuals (hereinafter, both types will be referenced collectively as "faith entities") – resulted in gains for proponents of religious freedom. An entity theory for faith entities seemingly amplifies religious liberty. It expands the number of potential persons (i.e., both natural persons and artificial persons) who can assert a religious right. The ability of an artificial legal person, whether nonprofit or for-profit, to claim religious rights for itself can achieve the extension of those rights to corporate actors and constituents in areas where persecution might otherwise go unchallenged. In this sense, applying entity theory to faith entities is a good thing. Conversely, the alternative theory, aggregate personhood, may cost the faithful some degree of religious freedom by depopulating the list of potential claimants who can assert religious rights.

However, entity theory, as the alternative to aggregate personhood, is not all good, nor does it necessarily rest on an accurate construction of religious practice. Entities can do certain things as persons (such as entering into contracts or committing wrongs), but they cannot do all the things that natural persons can. Entities cannot obtain a high-school diploma, for example. Most understandings of religious acts, from worship to prayer, would not support an entity's ability to practice religion. Nor do religious beliefs or matters of faith typically reside within a corporate actor. And when courts or legislators pretend otherwise, unintended consequences may result.

It should be acknowledged that some sorts of religious exercises *do* involve an entity and therefore fit to a greater degree with entity theory. Evangelization, mis-

667–678 (1926) (contrasting "fiction" and "concession" theories of corporate rights).

[8] See the Uniform Partnership Act § 6(1) (1914).

[9] See *id.*, Commissioners' Prefatory Note (narrating how Harvard Law School's Dean had been secured in 1903 as the drafting committee's reporter but that he had died in 1910, after which the "experts present recommended that the act be drawn on the aggregate or common law theory").

sionary work, and approving or rejecting official statements of dogma are carried out to a large degree by a faith entity acting as such. Thus, in these instances, an entity might be seen as the actor. To a lesser degree, the implementation and oversight of ceremonies or sacraments are more akin to conduct by an entity than are acts of worship or praise. However, these modest exceptions, in which a religious organization acts more like an entity than as an assemblage of individuals, reinforce the broader assertion that most religious exercises do not involve an entity-actor as such. When we permit the entity theory to be applied to the religious viewpoints of a corporation, the theory becomes "divorced from observable reality."[10] If worship and salvation form the nucleus of a religion, then the core of religious practice centers on the individual rather than the collective.

If an unacknowledged falsehood resides within the entity theory concerning the nature of most religious impulses, one might say that its application in this context is dishonest. Dishonesty has public-relations costs in terms of presenting an inaccurate picture of religion to nonbelievers. But it may have legal consequences as well. I propose one potential, undesirable consequence of an unthinking embrace of entity theory: it could give tax authorities a powerful tool by which to police worship that carries political overtones and thereby withdraw favorable exempt status with alarming frequency.

In the following discussion, I focus on the nature of mainstream Catholic and Protestant worship and how it is constructed within faith entities. Other religious traditions, including Islam, Judaism, and Buddhism as well as certain Christian traditions, may share some commonalities with mainstream Christian collective religious experiences, but they also differ in material respects. To that extent, my assertions should be read as giving way to various and disparate religious practices as required. Variations in religious tenets do not permit reflexive shoehorning of arguments. Religions differ and my arguments likely fit some religious practices more than others. It is not my intent to suggest otherwise nor to impose any sort of value judgment which favors some religions over others.

2. The *Hobby Lobby* case

One of the most important events in recent American religious-freedom jurisprudence is the Supreme Court's 2014 *Hobby Lobby* decision. This decision confronted – but did not analyze – the impact of entity and aggregate theories in the context of religious freedom.[11] Though widely celebrated for upholding religious liberties, the Supreme Court's ruling actually addressed religious freedom only obliquely while

[10] Matthew J. Allman, Note, "Swift Boat Captains of Industry for Truth: Citizens United and the Illogic of Natural Person Theory of Corporate Personhood", 38 Fla. St. U. L. Rev. 387, 388 (2011).

[11] *Hobby Lobby,* 573 U.S. 682, 134 S.Ct. 2751.

relying on an entity theory of corporate personhood. The narrow legal question before the Court was whether the U.S. Congress intended the word "person" in its Religious Freedom Restoration Act (RFRA) to include closely held corporations.[12]

Hobby Lobby has merited study for its impact on the free exercise of religion, but the Court merely decided, as a matter of statutory construction, that the word "person" in RFRA does refer to closely held corporations (artificial legal persons) as well as to individuals (natural persons). The Court did not consider whether corporations *ought* to enjoy religious rights. Prior law had already recognized nonprofit corporations as qualifying as persons under RFRA.[13] The Court reasoned that "no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations."[14] After all, for-profit corporations, though primarily oriented toward making money, often pursue altruistic objectives just as nonprofits (including churches) do. Some for-profit corporations, for example, make charitable donations to religious enterprises. Some may be dominated by officers and directors who are religiously minded. Some reject sinful business practices even if those practices are lawful and profitable.

Viewed with this gloss, *Hobby Lobby* is actually a relatively unimportant ruling; its holding is narrow and unlikely to impact future controversies under the common law doctrine of *stare decisis*. Justice Samuel Alito, writing for the majority of the Court, simply reasoned that it was inconsistent for the word "person" in a particular statutory context to encompass nonprofit corporations but not for-profit corporations. Both are artificial legal persons, both are convenient legal constructions, and neither is more like an actual flesh-and-blood person than the other. Both are legal fictions; neither is genuinely a person. Personhood for corporations generally, and for faith entities in particular, is and always has been simply a convenient construction, a product of commercial necessity.

In addition to the distinctions between for-profit faith entities and their nonprofit counterparts evinced above, the unique character of closely held or family-owned faith entities also deserves mention. Some sources of legal authority suggest that the mere number of shareholders is irrelevant to questions of personhood. One case proclaims, for example, "The fact that one person owns all of the stock does not make him and the corporation one and the same person."[15] The extension of religious rights to a corporation wholly owned by a single religious human being cannot necessarily be equated with the extension of religious rights to a publicly

[12] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993), codified at 42 U.S.C. §§ 2000bb through 2000bb-4 (2016).

[13] See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006) (entertaining a RFRA claim brought by a nonprofit entity).

[14] *Hobby Lobby,* 134 S.Ct. at 2769.

[15] *Barium Steel Corp. v. Wiley,* 108 A.2d 336, 341 (Pa. 1954) (applying corporate veil piercing doctrine).

traded institution, however. Searching for the religious locus in a corporation with millions of ever-shifting shareholders is unlike the assessment one might undertake for a single-shareholder corporation.

As noted above, close-knit shareholders of a family enterprise often pursue goals other than the maximization of profits. For example, Hobby Lobby committed its family owners to "honoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles."[16] The presumed primary goal for large corporations with numerous unrelated shareholders, by contrast, is profitability. Closely held corporations are more frequently endowed with aims other than mere profit.

A second important distinction between closely held and larger corporations is the liquidity of larger entities' shares of stock (representing an easy exit strategy), which smaller organizations often lack. Shareholders of smaller organizations have a greater tendency to be stuck with their status in the enterprise. The *Hobby Lobby* decision itself was strictly limited to closely held organizations, but it applied entity theory to reach its holding. In doing so, the decision implied that the religious preferences or sympathies of a corporation's shareholders could be equated with the preferences and sympathies of the entity itself.

It may have been thrilling for a few legally minded Americans to debate whether partnerships were entities or aggregates in the 1910s, but by the 1990s, the Revised Uniform Partnership Act had declared that partnerships were in fact entities (and therefore legal persons, not mere aggregates).[17] The debate on this question is now closed; partnerships are essentially entities vested with personhood. And there has never been any serious debate about corporations, which have quite consistently been viewed as artificial legal persons. It is convenient, for most purposes, to treat them as such. And convenience is an acceptable social end for atheists and religiously minded individuals alike.

Proponents of religious freedom cheered for David Green, the founder of Hobby Lobby's chain of stores,[18] as he successfully resisted the full force of the U.S. government. That government had tried to force him, his family, and his company to purchase health insurance for abortifacients which, Green believed as a matter of

[16] *Hobby Lobby,* 134 S.Ct. at 2766.

[17] See the Revised Uniform Partnership Act § 201(a) (1994) ("A partnership is an entity distinct from its partners").

[18] Hobby Lobby was consolidated with a parallel case involving a challenge to the government's contraceptive mandate by Norman and Elizabeth Hahn and their three sons, devout members of the Mennonite Church, and a corporation named Conestoga Wood Specialties. *Hobby Lobby,* 134 S.Ct. at 2764. The Hahns individually had been dismissed as plaintiffs by the Third Circuit Court of Appeals when "it concluded that the [contraceptive] 'mandate does not impose any requirements on the Hahns in their personal capacity." *Id.* at 2765 (quoting from the Third Circuit's opinion) (citation omitted).

his Christian faith, would cause the death of unborn natural persons. Green fought back and prevailed. His religious rights were vindicated by the Supreme Court's reasoning.

3. The lack of corporate capacity to practice religion

Somewhere between the cheers for David Green and the dull parsing of the word "person" in the RFRA statutory text lie other important questions. *Should* corporations be endowed with religious freedom? How can we expect corporations to exercise that freedom? Does granting religious rights to corporations necessarily advance religion? We should consider first what a corporation is and then examine particular sorts of rights.

A corporation is not a pagan creation nor an anti-religious construction, but neither is it a religious vessel, intrinsically or otherwise. It is an intangible legal structure in which natural persons gather toward common ends. It is an organization of human wants and capital aligned among several actors, namely management and owners. It is neither good nor evil, lazy nor disciplined. It represents simply an assemblage of the aims of the natural persons behind it, and nothing more.

Like a suspension bridge, the relationship between shareholders and directors is the tension that gives the corporation structure. In a for-profit corporation, shareholders invest capital and vote for members of the board; the board wields power over the enterprise while owing duties to its investors.[19] It is a construction of great utility and potential, engineering human nature and capital toward ends that could never be accomplished by a single natural person. Indeed, the corporation might be one of the most powerful forces on the planet, even more powerful than some sovereign nations. But its parameters and powers are limited to those that we choose to permit and recognize.[20] "Put roughly, 'person' signifies what law makes it signify."[21] And what it signifies has particular import when applied to fundamental rights.

Certain fundamental rights are enshrined in the Bill of Rights, the first ten amendments to the U.S. Constitution. The right of free speech is one of them.[22] Corporations, the courts have confirmed, enjoy the same free-speech rights as natural persons.[23]

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[19] Model Business Corporations Act 8.31(b)(1)(i) (2002) (allowing damage claims against directors who have caused damages to the corporation or its shareholders).

[20] See *Trustees of Dartmouth College,* 17 U.S. at 636 ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.").

[21] Dewey, *supra* note 7, at 655.

[22] U.S. Const. amend. I (1791).

[23] *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 784 (1978).

If a corporation publishes a newsletter, which is not simply a collection of the views of any of its individual officers or employees, that newsletter enjoys constitutional protections. In that sense, a corporation can 'speak.' Were the corporation not vested with free speech rights, certain corporate speech could be regulated or silenced by the government in ways inconsistent with the existence of the right.

Another important, fundamental right is the right to vote.[24] Additional established rights protect the privileges of adopting a child, enjoying intimacy, or marrying.[25] Yet no one would suggest that corporations should be entitled to vote, marry, or adopt children. These rights and privileges are inherently personal and only properly vested in natural persons. Thus, some rights can be exercised by an artificial person as an entity (and therefore require protection), but others cannot (and do not require protection).

What about religious exercises? It seems clear that a faith entity cannot worship – not even a church. A corporation cannot take communion, be baptized, be ordained, or receive absolution. A corporation cannot pray, fast, or observe religious dietary restrictions. It cannot be devoted to Christ; it cannot be saved (in the spiritual sense) or damned. These are inherently human activities, events, and sacraments. Fundamentally, a corporation cannot experience the Creator's love. It would therefore seem impossible for corporations, or even churches, to exercise or enjoy religious freedoms functionally as entities.

A rejoinder to this assertion should be considered.[26] "Neither can a corporation," an objector might say, "experience a deprivation of due process of law, yet the law recognizes and protects against the same."[27] Granted, a corporation is not actually a person. A for-profit corporation is really nothing more than an intersection of human interests held by management and equity stakeholders. Attaching the label of legal personhood for purposes of bestowing certain categories of rights, powers, and responsibilities on the entity is simply a convenient way of accomplish-

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[24] U.S. Const. amend. XV (1870). "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure'" *[Burdick v. Takushi,* 504 U.S. 428, 433 (1992), quoting *Ill. State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1979)].

[25] Jedd Medefind, "In Defense of the Christian Orphan Case Movement", 2 J. Christian Legal Thought 9, 14 (Spring 2012) (calling adoption "the most fundamental of needs"); but see *Browder v. Harmeyer,* 453 N.E.2d 301, 308–309 (Ind.App.1983) (holding that a grandparent with intermittent custody of her grandchild seeking to adopt had no constitutional liberty interest). See also *Loving v. Virginia,* 388 U.S. 1, 12 (1967) (viewing the right to marry as a fundamental right).

[26] See Rik Torfs, "The Internal Crisis of Religious Freedom", 4 Int'l J. of Religious Freedom, 17, 18 (2011). Torfs boldly asserts, "Reducing religious freedom to its individual aspects ... leads to dismantling all religious organisations, and denies the collective aspect of religion." It is one thing to consider religious exercise in the collective, however, and another to locate its existence and expression independent of the collective.

[27] *Covington & Lexington Turnpike Rd. Co. v. Sandford,* 164 U.S. 578, 592 (1896).

ing acceptable ends.[28] For example, a corporation is a legal person with regard to property ownership. It enjoys the efficiency of conveying an acre of dirt with the signature of a single corporate officer instead of requiring the approval of thousands of individual shareholders. A U.S. corporation is typically an independent taxpayer, collecting its receipts and deductions and presenting them on just one tax return rather than diffusing those reportable events among an evolving list of relatively disinterested owner-shareholders.[29] Furthermore, a corporation's ability to hire and fire employees ensures continuity when supervisors come and go. Moreover, endowing corporations with personhood enables governments to ask them to comply with the law and other social expectations, and to sanction them when they don't.[30]

The justifications for endowing a corporation with protection from due process deprivations or uncompensated eminent domain takings do not rest on a corporation's actual personhood, which is simply a convenient legal fiction for some purposes (such as taxation) but not for others (e.g., adoption).[31] It might be argued that corporations may exercise all but the more intensely personal freedoms, but this is an imprecise measure.[32] A more sensitive test of whether a corporation should enjoy a particular right considers whether the right resonates in an intersection of human interests found within the corporate format.[33] Particularly with for-profit faith entities, particular religious tenets cannot typically be located at the intersection of shareholder, officer, and director concerns.

4. The problem with entity personhood for religious matters

Tax-exempt status for churches rests on the religious aims and functions of the churches as entities. The unthinking application of entity-personhood theory to faith entities may thus raise unforeseen problems with regard to the recognition of

[28] See *Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518, 636 (1819) (Marshall, C.J.) (characterizing the corporate characteristic of individuality as one that "enable[s] a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand").

[29] 26 U.S.C. § 11(a) (2016).

[30] American Law Institute, *Principles of Corporate Governance* 60 (1994).

[31] See *Trustees of Dartmouth College,* 17 U.S. at 636 (calling a corporation "an artificial being, invisible, intangible, and existing only in contemplation of law"). "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." *Id.*

[32] But see *United States v. White,* 322 U.S. 694, 698–699 (1944) (denying corporations the privilege against self-incrimination because it is a "purely personal" right).

[33] Cf. Frank Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law", 80 Harv. L. Rev. 1165, 1223 (1967) (calling for a legal conclusion upon the occurrence of a "distinctly perceived, sharply crystallized, investment-backed expectation").

religious freedoms. Endowing churches with entity-personhood would empower taxing authorities and enhance their ability to shape what happens in churches. It would legitimize taxing authorities' oversight of the words spoken by the faithful.

In 2004, just days before the U.S. presidential election between George W. Bush and challenger John Kerry, a minister at a Pasadena, California church delivered a sermon titled "If Jesus Debated President Bush and Senator Kerry." The sermon precipitated a chain of events that ultimately endangered the church's tax-exempt status.[34] Similar situations have played out in settings across the United States.[35]

The U.S. Internal Revenue Service (IRS) monitors the political activity of religious organizations that enjoy tax-exempt status.[36] An example from an official IRS publication describes a factual scenario in which a church could lose its tax-exempt status:

> Minister D is the minister of Church M, a Section 501(c)(3) organization. During regular services of Church M shortly before the election, Minister D preached on a number of issues, including the importance of voting in the upcoming election, and concluded by stating, "It is important that you all do your duty in the election and vote for Candidate W." Because Minister D's remarks indicating support for Candidate W were made during an official church service, they constitute political campaign intervention by Church M.[37]

Implicit in this example is the construction of Church M pursuant to an aggressive application of entity theory. Note how the spoken words of one church member (the minister) are linked to the church as an entity. The IRS effortlessly yokes the pastor's words to the church, as opposed to construing them as simply representing the political opinions of one member of the aggregate. Minister D is actually speaking to an aggregate, not as (or on behalf of) an entity. But the IRS views the minister's words as corporate words. As such, the IRS is tacitly applying entity theory to the act of worship.

This mistaken IRS view of religious services could be traced to the same fault lines that underlie the *Hobby Lobby* decision: a misapplication of the entity theory to religious practices. The IRS's thinking in its Publication 1828 is based on the assumption that the political text within the sermon was essentially spoken by the

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[34] Keith S. Blair, "Praying for a Tax Break: Churches, Political Speech, and the Loss of 501(c)(3) Tax Exempt Status", 86 Denv. U. L. Rev. 405, 406 (2009).

[35] *Id.*

[36] Internal Revenue Service, U.S. Department of the Treasury, Pub. 1828, *Tax Guide for Churches and Religious Organizations* 8 (rev. 2015), available at https://www.irs.gov/pub/irs-pdf/p1828.pdf.

[37] *Id.*

church as a corporate entity.[38] As a result, the IRS considers it appropriate to threaten or even withdraw the church's tax-exempt status in such an instance.[39]

A more accurate understanding of worship in the aggregate might reach a different conclusion, namely that the minister's preaching is one voice inspiring the congregation. The congregation does not worship through the minister; it worships as a collection of individuals assembled in a sacred place. Viewed in this aggregate light, the minister's message ought not to stain the church's tax-exempt status, the loss of which could be catastrophic to the church's operations. Unless the political activity is clearly a corporate act (such as if the church's board of trustees has formally endorsed it), a pastor's exhortations to vote in a particular way ought not to be characterized as campaign interventions by the church as an entity.

The power to tax is the power to destroy – and the power to persecute.[40] The IRS's power to withdraw tax-exempt status from churches or other nonprofit faith entities is a potentially destructive scope of authority. Quite possibly, the direction of persecution against faith entities in future years will originate from this power to tax, as governments suspend tax exemptions because of the 'political' acts of churches. The IRS and other taxing authorities will be empowered in any concerted effort to withdraw tax exemptions from churches by the very doctrine at the center of the *Hobby Lobby* decision – entity personhood.

Honesty and accuracy about the way things really are is important, especially when it comes to witnessing about matters of faith. Religiously minded individuals should be accurate in depicting their own worship. A church, as a corporate entity, does not worship any more than it can adopt a child, adhere to a faith commitment, or vote for a political candidate. A church is organized with the aim of creating a platform for worship, but the exercise of religious faith itself occurs in and only in the aggregate.[41] The accuracy of this depiction becomes even more forceful when

[38] See also Kim Colby, "Practical Steps That Religious Institutions Should Consider in the Post-Obergefell World", 11 The Christian Lawyer 19, 24 (Dec. 2015) (noting that during oral arguments in the Obergefell case, Justice Alito asked the Solicitor General whether religious schools prohibiting same-sex conduct among students would lose their tax-exempt status, to which the reply was that that might well be an issue).

[39] Too much lobbying can jeopardize a nonprofit entity's tax-exempt status, as can any degree of participation in a political campaign. See 26 U.S.C. § 501(h) (lobbying); 501(c)(3) (political campaign intervention).

[40] *M'Culloch v. State,* 17 U.S. 316, 327 (1819) (Marshall, J.): "An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation."

[41] In the Christian tradition, Paul's letters speak about the importance of the church, and both 1 Corinthians and Romans speak of the unity of the body of Christ. Paul seems to espouse the equivalent of entity theory when he speaks of the oneness of the experience of the Eucharist: "We, who are many, are one bread, one body; for we all partake of the one bread" (1 Cor 10:17). He also says, "For as the body is one, and hath many members, and all the members of the body, being many, are one body; so

the organization involved is a for-profit faith entity such as Hobby Lobby, which engages in the retail sale of craft supplies as its main enterprise while only incidentally abiding by Christian precepts, such as closing on Sundays.

The place for individual faith is the individual, not in corporations. The place for religion within a church is with its aggregate worshippers. Churches and other faith entities "minister to their parishioners, run food banks, distribute food, offer job counseling and, generally, deliver services to the community at large."[42] However, churches themselves do not worship, practice religion, seek forgiveness, or enter into communion with God. These practices are reserved for natural persons, not artificial ones.

5. Conclusion

"All things are lawful; but not all things edify," Paul wrote (1 Cor 10:23). He meant, in one sense, that just because we *can* do something doesn't mean that we *should* do it. For him, the ends should not justify the means. Hobby Lobby owner David Green's victory over a bullying government – preserving his integrity against a Rome that gave no quarter to his faith – represents an inspirational outcome, a happy end. But the path by which that victory was attained was paved with a false assertion, namely the assertion that corporations can enjoy religious freedoms. This foundation can only degrade with use, and with that degradation may come enhanced persecution of faith entities by taxing authorities. Tactically speaking, the means by which *Hobby Lobby* was won may, in the long run, jeopardize religious liberties. This will not do. We should reclaim religious freedoms as non-corporate matters of conviction.

Religion's place is in the devout human heart, in the gatherings of worshippers in the aggregate, and in the worshippers themselves. It is not in a corporation, nor does it lie within any sort of artificial legal entity, a creature of law that even the law calls a fiction and a construction of convenience. Religion's place is not in a company, but in us. To pretend otherwise is dishonest, inaccurate, and potentially dangerous, as it may prove to exchange a short-term tactical victory for a strategic long-term defeat.

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also is Christ. For in one Spirit were we all baptized into one body" (1 Cor 12:12). In Romans he adds, "For even as we have many members in one body, and all the members have not the same office: so we, who are many, are one body in Christ, and severally members one of another" (Rom 12:4–5). Consider also the line from Peter Scholtes's 1960s hymn "They'll Know We Are Christians by Our Love," in which he wrote, "We are one in the Spirit, we are one in the Lord." Pauline texts could be read as lending support to the *Hobby Lobby* court's view of religious exercise through a united corporate entity, but I think Paul is speaking of the oneness of communion with the Holy Spirit, not a oneness of faith, for in 1 Corinthians 12 he continues, "Now there are diversities of gifts, but the same Spirit. And there are diversities of ministrations, and the same Lord. And there are diversities of workings, but the same God, who worketh things in all" (1 Cor 12:4–6).

[42] Blair, *supra* note 45, at 406.