LIBERTY TREE

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ObamaCare and Edwin Hale

By Harold Forney

The decision of "Justice" John Roberts *et al.* to uphold the ObamaCare mandate as a tax has left many issues pending, and one of the issues being raised is that the mandate unconstitutionally infringes on freedom of religion. The current religious uproar is addressed in an article published in the September 2012 *Imprimis,*[1] by Matthew J. Franck of Witherspoon Institute, entitled, "Individual, Community, and State: How to Think About Religious Freedom." In his article, Franck says:

> It is no wonder that the U.S. Catholic bishops formed an Ad Hoc Committee for Religious Liberty last year; and that they published a major statement on religious freedom in March; and that they organized a "Fortnight for Freedom" to pray for religious liberty in June and July. Recognizing the threat to themselves as well, particularly in the mandated coverage of abortifacient pharmaceuticals, a number of evangelical Protestant institutions have joined in the litigation against the HHS mandate, while Jewish, Mormon, and Muslim leaders have joined in formal protests. There are, at last count, 28 separate lawsuits pending in federal courts around the country, involving more than 80 separate plaintiffs.
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> Perhaps the most interesting case involves, not a religious school, hospital,

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BRUCE ELLEFSON, ALLIANCE DEFENDING FREEDOM

Hercules Industries leadership on their factory floor: Plaintiffs Jim Newland, Christy Ketterhagen, Bill Newland, Paul Newland (1st two rows, in order from L), and Andy Newland (last row, on R), and their Colorado S-Corporation have filed a complaint in federal court against officials of the Departments of Health and Human Services, Labor, and Treasury, for violating their religious freedom through the PPACA (Obamacare). They have been granted a preliminary injunction by the district court. The complaint, order, and all briefs can be viewed at http://www.adfmedia.org/News/PRDetail/7524.

1. *Imprimis* is a free monthly periodical of Hillsdale College, with over 1,900,000 readers. It is "dedicated to educating citizens and promoting civil and religious liberty by covering cultural, economic, political and educational issues of enduring significance." Content is drawn from speeches delivered at Hillsdale College-hosted events, both on- and off-campus. For article, see *www.hillsdale.edu/news/imprimis/archive/issue.asp?year=2012&month=09*

The NONDELEGATION Doctrine

A look into the near future?

After winning his race for the new third Congressional district in Missouri with a comfortable margin of eight percentage points, U.S. Representative Blame Lootemore calls a press conference in Washington, D.C., hours before the House of Representatives' January swearing-in ceremony.

Standing proudly behind the podium with his wife of 36 years and adult son Tryant, a beaming Lootemore thanks the press for coming, and proceeds: "I'm gratified that the majority of the district's voters saw fit to place their trust in me, and I thank them for standing by me and voting for me. I'm humbled that they agreed with the *Washington Missourian*, that I'm the 'best fit' for the people I represent.

"We had a great campaign, and today, I'm happy to announce that I'm delegating the power of my congressional seat to my son Tryant. You know, my wonderful wife

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 Telephone 410.857.4441 Post Office Box 91, Westminster, Md. 21158

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Jackie A., my daughter Bandit, and son Nick (who couldn't be here today), have watched with me as Tryant has grown in wisdom and political skill, and together, we have determined his taking office is a necessary step at this time. He will, of course, be sworn in today, and thereafter, he will carry out my duties, including sitting on the House Financial Services Committee, proposing legislation and voting on all bills. I have full confidence that he will perform those duties with the utmost care. I know that he is as dedicated to repealing and de-funding Obamacare as I am, and I ask you all to welcome my son to his new position and give him your support. Thank you."[1]

> And when the people have said, We will submit to rules, and be governed by laws made by such men,
> ... no body else can say other men shall make laws for them ...

Imagine the outcry that would result from Lootemore's devolving of his duties and power as an elected official to his son. Even the most dumbed-down voter of today comprehends that they voted for a *particular person* as their representative. After all, the campaign website states "*Blame Lootemore* for U.S. Congress," just as any other campaign, and the people chose between several balloted candidates, all separate and unique individuals, for the position.

Since Lootemore, and no other, was chosen to be the agent, or representative, of the people, he is the only person who can remotely be said, under the American system of governance, to have the consent of the governed, and it is not within his power or authority to redelegate his agency to another who does *not* have the consent of the governed. One can imagine an extreme example to evince this truth: suppose, rather than attempting to delegate his office to his son, he proclaimed he would delegate it to his opponent, who had just lost to him in the election. Clearly, this would completely overturn the consent of the majority who had voted *him* into office.[2]

Jurisdictions separated for the safety of liberty

Nearly every American has at least heard of the "checks and balances" the Founders sought to establish within the U.S. Constitution between the three branches of government — the legislative, the executive, and the judicial. The idea of consciously separating the powers delegated to the federal government can be traced in part to Montesquieu, who wrote in 1748, in *The Spirit of Laws:*

> The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.
>
> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Since "All legislative Powers granted shall be vested in a Congress of the United States, ..." Article 1, Section 1 of the Constitution, the jurisdiction to make and declare laws of the federal government, pursuant to the enumerated powers of the Constitution, belongs *only to the Congress*. Congress is unable to delegate this jurisdiction to either the President or the Supreme Court, or a member of the Cabinet, or any agency head — *or indeed, to anyone else at all* — since to do so would be a violation of the Constitution itself, and thus of the consent of the governed from which the Constitution derives its authority. Such an action would not only be tyrannical and oppressive, as Montesquieu held, but would also, being unconstitutional, be null and void — as null and void as the act of Blame Lootemore in turning over his office to a person who has no consent from the people of his district.

Making laws, not more legislators

This principle, called the nondelegation doctrine, perhaps finds its clearest expression in the words of John Locke.[3] The people, he said, choose their legislators and grant them the authority to make *laws*, not (other) *legislators*:

> The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from

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1. This story is pure fiction, and any resemblance to anything a representative has actually done, or might do in the future, is pure coincidence.
2. This matter of the consent of the governed is a tricky one, see "Consent of the Governed," and "A Limited Consent," in the July and August 2012 issues of the *Liberty Tree*. For our purposes in exploring jurisdiction and its limits, we will assume that the "consent of the governed" is expressed in the will of the majority, and that this forms the foundation for legitimate jurisdiction. As Jefferson remarked, in a letter to Major John Cartwright, June 5, 1824, "And where else will [Hume, "that great apostle of Toryism" and a proponent of the reign of the Stuarts] this degenerate son of science, this traitor to his fellow men, find the origin of just powers, if not in the majority of the society? Will it be in the minority? Or in an individual of that minority?"
3. John Locke, *Second Treatise on Government*, Chapter 11, Section 141. All emphases added.

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or charity, but Hercules Industries of Colorado, a private company that makes heating and air conditioning equipment. Its sole owners are the Newlands, a family of Catholics who object to providing the mandated coverage to their employees, against the dictates of their conscience as informed by their faith. **The argument of the Obama Justice Department in the case is astonishing. It is that no one can claim, on behalf of an incorporated business he owns, any right of religious freedom or conscience that can trump a requirement of the law. Period.** The members of the Newland family may have religious scruples, but the business they own cannot be conducted in accord with those scruples. Once individuals opt for incorporation of a *business, they lose the freedom of religion so far as the actions of that corporation are concerned. Luckily, a federal judge in Colorado has entered a preliminary injunction barring enforcement of the HHS mandate against Hercules Industries while litigation continues. But the all-out character of the administration's disregard for claims of conscience is a grave portent of things to come.*

Franck may have found the administration's position interesting, but anyone who understands "corporate staus" already knows that a corporation is an entity of the state and is deemed to have no Constitutional shield.

This position was established long ago in *Hale v. Henkel* (201 U.S. 43),[2] decided on March 12, 1906. Although this case was decided over 100 years ago, it may soon become instrumental — along with the *Newland* case referenced above — in true religious organizations coming to a clearer understanding that as an incorporated body, they are a state entity, and must therefore abide by the dictates of the "corporate creator" which falsely believes in the separation of church and state.

The *Hale* case began with a grand jury investigation into violations of the Sherman Anti-Trust Act of 1890 (26 Stat. 209) by American Tobacco Company and MacAndrews & Forbes Company. Edwin Hale, Secretary and Treasurer of MacAndrews & Forbes, was subpoenaed to testify before the grand jury and produce certain corporate documents. Hale appeared before the panel but refused to testify or produce the requested documents, claiming among other reasons, that such testimony and documents would tend to incriminate him. Continuing his refusal even after being advised of immunity from prosecution for anything revealed through his testimony — by operation of a special provision inserted in a 1903 appropriation act[3] — he was held in contempt. His challenge to his confinement on that contempt charge was the case before the Supreme Court.

After upholding Hale's contempt on the basis that the immunity provision removed any possibility of criminal prosecution of him, and so eliminated his right to refuse to answer the questions put to him, the court went on to discuss the lack of 4th and 5th Amendment protections for corporations. Justice Brown said:

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2. http://supreme.justia.com/cases/federal/us/201/43/case.html
3. See 32 Stat. 854, 904. For a discussion of immunity statutes and 5th Amendment protections, see the February, March and April 2010 issues of Liberty Tree. (www.libertyworksradionetwork.com/jml/index.php/news/newsletters/2010)

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> [T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. ... Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. ... It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. (*Hale*, at p. 74)

"True religious organizations" should heed this warning, and begin a mass exodus from corporate status. It is a change that is long overdue and necessary for the survival of any religious organization that takes its faith seriously. Although, as a Christian, I see this issue of incorporation as a very strong threat to the Church of Jesus Christ, the same threat exists for every other religion in the United States as well. For this reason, ObamaCare may well be a blessing in disguise, because it brings to a head a very important issue: WHOM DO WE SERVE? There are two serious errors that religious organizations fall into today. The first is that it is the custom that when a religious body is formed, one of the first "legal" actions it takes is to ***apply*** for corporate status. The assumption is that incorporating provides a shield of limited liability, but this is not an appropriate course of action for a religious organization. There are other ways of addressing limited liability. In my humble opinion, a religious organization should ***never, ever,*** incorporate. An incorporated religious organization can no longer claim that its creator is the God that it worships, because it has a different creator — the state. And, according to the Holy Bible, a Christian believer cannot serve two masters.

The second error is to ***apply*** for 501(c)(3) tax-exempt status. This too has become customary. Most religious organizations again assume that this is a proper method to avoid (not evade) paying taxes. But it comes with heavy strings attached, including complying with government mandates like ObamaCare, as well as restrictions on political advocacy. In essence, the entity applying for this status is declaring: "We agree that the government has the authority to tax our church and we pray to the government for relief from having to pay the tax." To proceed from that premise is to discard the shield of the first amendment to the United States Constitution. It was never assumed in American Law that the state or federal governments had the power to tax a "church." Such authority would be the power to control the church. This was the very issue over which the Puritans left England and came to the New World.

The appropriate position for the Church is that it is immune from any requirement to apply for anything. There is no precept in Scripture that the Church should plead for privileges from "Caesar." It has an inalienable right (mandate) to exist as one of God's created institutions on a par with the state. It's God-given right to exist cannot be taxed or controlled by the state.

There is a very simple axiom in law that says: "**Whenever an application is required, it is a voluntary act."** Such a paradox it is. When it comes to applying, you are asking for a privilege. It is a voluntary act on the part of the applicant. In the case of churches, it is this voluntary act of incorporation which brings the church within the scope of taxation — the income tax on "corporations."[4] It is that first voluntary act which creates the necessity for the next one, applying for "tax-exempt corporation" status. Thus, churches have brought this situation on themselves, and I pray that God will call the Church out of its error and give righteous men the strength to declare its freedom from a Baal state.

Harold Forney is a long-time patriot, father of seven, and elder of his church.

4. See 26 USC § 11.

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> the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, *no body else can say other men shall make laws for them*; *nor can the people be bound by any laws, but such as are enacted by those whom they have chosen*, and authorized to make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, *which being only to make laws, and not to make legislators*, the legislative can have no power to transfer their authority of making laws, and place it in other hands.

The nondelegation doctrine, then, is essential to maintain the liberty of the people, and yet, in the words of one constitutional scholar, "many conservatives, such as Justice Scalia, flee from the nondelegation doctrine as vampires flee garlic."[4] Even if judges refuse to declare "laws" made by federal agencies null and void, the fact remains that those agencies have no such *jurisdiction* over the people.

4. Gary Lawson, "Burying the Constitution under a TARP," www.bu.edu/law/faculty/scholarship/workingpapers/2009.html